



Law Council  
OF AUSTRALIA

# Australian Law Reform Commission Elder Abuse Discussion Paper

Australian Law Reform Commission

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*Telephone* +61 2 6246 3788 • *Fax* +61 2 6248 0639  
*Email* [mail@lawcouncil.asn.au](mailto:mail@lawcouncil.asn.au)  
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra  
19 Torrens St Braddon ACT 2612  
Law Council of Australia Limited ABN 85 005 260 622  
[www.lawcouncil.asn.au](http://www.lawcouncil.asn.au)

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# About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council of Australia is grateful for the assistance of its Elder Abuse Working Group, the Superannuation Committee of the Legal Practice Section, the Law Society of Western Australia, the Queensland Law Society, the Law Institute of Victoria and the Law Society of New South Wales in the preparation of this submission.

# Executive Summary

1. The Law Council of Australia welcomes the opportunity to provide the following comments and recommendations in response to the Australian Law Reform Commission (ALRC) Elder Abuse Discussion Paper (**the Discussion Paper**).<sup>1</sup>
2. This submission provides the Law Council's views in response to certain Discussion Paper proposals and questions where the Law Council, its Constituent Bodies and Advisory Committees have a particular interest, experience or knowledge of the subject matter.
3. Key comments and recommendations of this submission include:

## National Plan

- A National Plan should be developed and a national prevalence study should be commissioned;
- A rights-based approach should inform any measures to combat elder abuse;

## Power of Investigation

- State and territory public advocates and guardians should be given the power to:
  - Investigate elder abuse, subject to appropriate safeguards and limitations on investigative powers; and
  - Conduct random audits of attorney's management of principals' financial affairs, subject to a threshold test of 'reasonable grounds for suspicion' of misconduct;

## Enduring Powers of Attorney and Enduring Guardianship

- A national, low cost register of enduring documents and court and tribunal orders for the appointment of guardians and financial administrators should be established. In relation to the register, the Law Council recommends that:
  - Registering of a subsequent enduring document should not *automatically* revoke an earlier document of the same type;
  - There should be the ability to process urgent registrations where required; and
  - Appropriate transitional arrangements should be put in place;
- A prescribed witness of an enduring document should be required to explain the power of attorney to the principal. The list of prescribed witnesses who can witness an enduring document should also be expanded;
- State and territory tribunals should have the power to award compensation where a loss was caused by an enduring attorney/guardian or court appointed guardian/financial manager's misconduct;
- The current terminology of 'enduring power of attorney', 'enduring guardian' and 'substitute decision maker' should not be replaced with a generic term of 'representatives';

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<sup>1</sup> Australian Law Reform Commission, *Elder Abuse Discussion Paper (DP 83)*, December 2016.

## **Guardianship and Financial Administration Orders**

- Guardians and financial administrators should be educated about the scope of their roles, responsibilities and obligations. Such training and education should be required on a case-by-case basis;

## **Banks and Superannuation**

- Mandatory elder abuse training for staff at financial institutions and reporting of irregularities in accounts should be instituted;
- The *Code of Banking Practice* should increase the witnessing requirements for bank Authorities to Operate;
- The *Superannuation Industry (Supervision) Act 1993 (Cth)* should not be amended to require that all new self-managed superannuation funds have a corporate trustee;

## **Family Agreements**

- State and territory tribunals should have jurisdiction to resolve family disputes involving residential property under an 'assets for care' arrangement. Consideration should be given to requiring supported elder mediation as part of the tribunal process;
- Section 8 of the *Family Violence Protection Act 2008 (Vic)* should be considered as an appropriate definition for 'family' in the context of 'assets for care' matters;

## **Wills**

- The Law Council, together with state and territory law societies, should review guidelines for practitioners in relation to the preparation and execution of wills and other advance planning documents;
- Witnessing requirement for binding death benefit nominations should be the same as those for wills;

## **Social Security**

- The Department of Human Services should develop an elder abuse strategy;
- Centrelink should:
  - Require that staff speak directly with persons of Age Pension age who are entering into arrangements with others that concern social security payments;
  - Ensure its communications make clear the roles and responsibilities of all participants to arrangements with persons of Age Pension age that concern social security payments;
  - Institute elder abuse training for staff;

## **Aged Care**

- A reportable incidents scheme, overseen by the Aged Care Complaints Commissioner, should be established;
- The term 'reportable assault' in the *Aged Care Act 1997 (Cth)* should be replaced with 'reportable incident'. With respect to residential care, the definition of 'reportable incident' should be expanded;

- The exemption to reporting provided by s 53 of the *Accountability Principles 2014* (Cth), regarding alleged or suspected assaults committed by a care recipient with a pre-diagnosed cognitive impairment on another care recipient, should be removed;
  - There should be a national employment screening process for Australian Government funded aged care. A national database should be established to record the outcome and status of employment clearances, subject to appropriate privacy protections;
  - Where a person is the subject of an adverse finding in respect of a reportable incident, they should automatically be excluded from working in aged care;
  - An employment clearance should remain valid for up to three years, subject to any adverse findings or convictions that occur during this time;
  - The ALRC should consider whether relevant dishonesty offences and illegal substance abuse should preclude employment in the aged care sector, with relief for spent convictions. Offences which preclude a person from employment in aged care should not be conviction-dependent;
  - The *Aged Care Act 1997*(Cth) should regulate the use of restrictive practices in aged care;
  - Aged care legislation should provide that agreements entered into between an approved provider and a care recipient cannot require the care recipient has an appointed decision maker for lifestyle, personal or financial matters;
  - The Department of Health (Cth) should develop national guidelines for the community visitors scheme;
  - The *Aged Care Act 1997*(Cth) should provide for an 'official visitors' scheme for residential aged care;
  - The *Aged Care Act 1997*(Cth) should empower official visitors to enter and inspect a residential aged care service, confer with residents and staff and make complaints or reports about suspected elder abuse to the appropriate person or organisation.
4. The Law Council congratulates the ALRC on its extensive work and consultative approach throughout its Elder Abuse Inquiry (**the Inquiry**). The Law Council would be pleased to provide further clarification on the issues raised in this submission, should it assist the ALRC.



# National Plan

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

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

5. The Law Council supports the development of a National Plan as well as the commissioning of a national prevalence study of elder abuse.<sup>2</sup> Both will assist in providing the sound evidence base required to address elder abuse.<sup>3</sup> A national body, such as that recommended by the ALRC,<sup>4</sup> could collect and analyse the data and these findings could inform national harmonisation of laws across the states and territories.
6. The Law Council recognises the difficulty in developing national laws, given that many laws relating to elder abuse and ancillary matters are within the jurisdiction of the states and territories, such as powers of attorney and guardianship legislation. However, national implementation of the ALRC's recommendations that promote greater harmony could significantly relieve the complexities that exist within discrete state and territory schemes.<sup>5</sup>
7. The Law Council recommends that any National Plan to address elder abuse:
  - include a strong education component with a view to combating any negative 'ageist' attitudes – that is, stereotyping of and discriminating against individuals or groups based on their age – towards older people;
  - should be subject to independent scrutiny and informed by relevant human rights standards applicable to older persons. There are a number of international instruments that bear upon the rights of older persons, such as the *Vienna International Plan of Action and Ageing* (1982),<sup>6</sup> the *United Nations Principles for Older Persons* (1991)<sup>7</sup> and the *Madrid International Plan of Action on Ageing* (2002).<sup>8</sup> Whilst not legally binding, these instruments effectively highlight the need for independence, participation, care, self-fulfilment and dignity of the elderly in addition to providing policy pathways for legislators. Moreover, the *Universal Declaration of Human Rights*,<sup>9</sup> the *International Covenant on Civil and Political*

<sup>2</sup> Law Council of Australia, *Submission on the ALRC Elder Abuse Issues Paper* (17 August 2016), 7.

<sup>3</sup> Australian Law Reform Commission, *Elder Abuse Discussion Paper (DP83)* (December 2016), 54.

<sup>4</sup> *Ibid.*

<sup>5</sup> Law Council of Australia, *Submission on the ALRC Elder Abuse Issues Paper* (17 August 2016) 13, 24.

<sup>6</sup> *The Vienna International Plan of Action on Ageing*, December 1982. The Plan of Action was endorsed by the United Nations General Assembly in Resolution 37/51, December 1982.

<sup>7</sup> *The United Nations Principles for Older Persons*, United Nations General Assembly Resolution 46/91, December 1991. The *Vienna International Plan of Action on Ageing* was endorsed by the United Nations General Assembly and the *United Nations Principles for Older Persons* is itself a General Assembly Resolution; both are thus reflective of international consensus on these issues.

<sup>8</sup> *The Madrid International Plan of Action on Ageing (MIPAA)*, (adopted at the Second World Assembly on Ageing, April 2002). The Australian Government has stated that '[g]iven Australia's strong existing foundations across the areas for action identified in the MIPAA and commitment to its international obligations, Australia has used the MIPAA to inform ongoing action rather than implement the MIPAA separately' – see Permanent Mission of Australia to the United Nations, *OHCHR Questionnaire to assess the human rights implications of the implementation of the Madrid International Plan of Action on Ageing*, File no 15/9336#10, available at <http://www.ohchr.org/Documents/Issues/OlderPersons/MIPAA/Australia.pdf>

<sup>9</sup> *Universal Declaration of Human Rights*, GA Res 217A (III) UN GOAR, 3<sup>rd</sup> see, 183<sup>rd</sup> plen meg, UN Doc A/810 (10 December 1948).

*Rights*<sup>10</sup> and the *International Covenant on Economic, Social and Cultural Rights*<sup>11</sup> offer some protections for older people in the areas of social security, an adequate standard of living and physical and mental health; and

- should be developed in consultation with relevant stakeholders, including Indigenous communities.
8. The Law Council also supports consideration of health-justice partnerships in the context of elder abuse. As noted in the Discussion Paper, 'doctors, nurses, pharmacists and other health professionals are often in an ideal position to identify elder abuse, since most elderly people trust them.'<sup>12</sup> Health-justice partnerships can serve a dual role in that they allow for the provision of legal advice to older persons experiencing elder abuse as well as educating service providers in relation to elder abuse. It is suggested that such partnerships could play an important role in combating elder abuse.
9. Any prevalence study should include particular examination of elder abuse:
- against Aboriginal and Torres Strait Islander people;
  - against women as compared to men as well as the risk factors associated with elder abuse in this context. Statistics in Queensland, for example, have shown that women are twice as likely to be victims of elder abuse than men;<sup>13</sup> and
  - in regional and remote communities.

## Powers of Investigation

### Powers of the Public Advocate/Guardian

**Proposal 3-1** State and territory public advocates or public guardians should be given the power to investigate elder abuse where they have a reasonable cause to suspect that an older person:

- (a) has care and support needs;
- (b) is, or is at risk of, being abused or neglected; and
- (c) is unable to protect themselves from the abuse or neglect, or the risk of it because of care and support needs.

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

10. The Law Council noted in its Issues Paper submission that

*[without] proper investigation it is often impossible to identify or respond to individual allegations of abuse. Unless a particular organisation is tasked with the*

<sup>10</sup> *International Covenant on Civil and Political Rights* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>11</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

<sup>12</sup> Australian Law Reform Commission, *Elder Abuse Discussion Paper (DP 83)* (December 2016), 251.

<sup>13</sup> Elder Abuse Prevention Unit Queensland, *Highlight Report 2015/16 Financial Year* (August 2016) [http://www.eapu.com.au/uploads/annual\\_reports/highlight\\_reports/Highlight%20Report%20August%2016.pdf](http://www.eapu.com.au/uploads/annual_reports/highlight_reports/Highlight%20Report%20August%2016.pdf)

*investigation process, there will be no accountability for conducting this work and victims of abuse will continue to fall between the cracks.*<sup>14</sup>

It was also noted that currently there is no organisation that has responsibility for investigating allegations of elder abuse.<sup>15</sup>

11. The Law Council supports giving the state and territory public advocates or public guardians a broad remit to investigate instances of elder abuse as set out in Proposal 3-1.<sup>16</sup>
12. Some jurisdictions, such as Scotland, recognise the importance of maintaining a balance between the rights of a vulnerable person and the community's responsibility to protect those most vulnerable.<sup>17</sup> Section 35 of Scotland's *Adult Protection and Support (Scotland) Act 2007*, for example, recognises the 'ability of individuals to object to the placing of protective orders over them'.<sup>18</sup> A similar approach could be followed in Australian jurisdictions.
13. This Proposal should be further developed in consultation with public advocates, guardians and tribunal representatives as well as the legal profession. If the state and territory tribunals' remit is to be limited to 'older persons' then an appropriate definition of 'older person' must be worked through and adopted.
14. The Law Council supports conferring investigative powers on the public advocate/guardian to investigate elder abuse and assist older persons who are, or may be, experiencing abuse to access services. This function, which should be carried out in accordance with the guiding principles set out in Proposal 3-2, has the following benefits:
  - These agencies have extensive experience and expertise in working with older persons and persons with disabilities and are well-placed to understand the needs specific to these groups of persons.
  - As highlighted by the ALRC, victims of abuse or witnesses to abuse or suspected abuse may feel more comfortable reporting it to the public advocate/guardian than to police, for fears that the perpetrator will be prosecuted. Preservation of the familial relationship is often the older person's main concern.<sup>19</sup>
  - This function promotes and supports older people to participate equally in their community and access services and advice.
15. The power of the public advocate/guardian to investigate on its own motion is critical to responding early where abuse is occurring or suspected, as abuse is often reported after it has been occurring for a long period of time.
16. The Law Council supports the ALRC's view that significant additional resourcing of the public advocate/guardian in each state and territory will be critical to adequately responding to elder abuse.<sup>20</sup>

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<sup>14</sup> Law Council of Australia, *Submission on the ALRC Elder Abuse Issues Paper* (17 August 2016), 6.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, 31.

<sup>17</sup> *Adult Support and Protection Act (Scotland) Act 2007* (UK).

<sup>18</sup> *Ibid.*

<sup>19</sup> Australian Law Reform Commission, *Elder Abuse Discussion Paper (DP83)* (December 2016), 62.

<sup>20</sup> *Ibid.*, 74.

**Proposal 3-2** Public advocates or public guardians should be guided by the following principles:

- (a) older people experiencing abuse or neglect have the right to refuse support, assistance or protection;
- (b) the need to protect someone from abuse or neglect must be balanced with respect for the person's right to make their own decisions about their care; and
- (c) the will, preferences and rights of the older person must be respected.

17. The Law Council also supports Proposal 3-2. The *Principles for Older Persons*, adopted by the United Nations General Assembly, affirm the right of older persons to make decisions about their care and quality of their lives.<sup>21</sup> The guiding principles for public guardians and public advocates set out in Proposal 3-2 appropriately balance the need to protect older persons from abuse and neglect with the right of older persons to autonomy and dignity. However, these guiding principles could be strengthened by specifically allowing an older person to stop an investigation from commencing or continuing.

**Proposal 3-3** Public advocates or public guardians should have the power to require that a person, other than the older person:

- (a) furnish information;
- (b) produce documents; or
- (c) participate in an interview relating to an investigation of the abuse or neglect of an older person.

18. The Law Council accepts that the public advocate/guardian will require powers to gather evidence and information in order to effectively investigate suspected cases of elder abuse.<sup>22</sup> However, the Law Council supports increased education in relation to services and supports for older persons rather than only an expansion of investigative powers. The Law Council also supports the limitations to investigative powers of the public advocate/guardian recommended by the ALRC, such as retention by police of powers of search and entry and limiting required investigation to persons other than the older person in order to 'preserve the supportive and consent-based nature of the investigative function of the public advocate'.<sup>23</sup>

19. Further limitations to the investigative regime should be considered, including the right to protection against self-incrimination, which, broadly speaking, 'entitles a person to refuse to answer any question, or produce any document, if the answer or production would tend to incriminate that person'.<sup>24</sup> Generally, this privilege is only abrogated in the context of coercive questioning regimes and strict limits apply to the use of any evidence gathered. The Law Council welcomes a more robust investigative regime, but submits that fundamental rights built on established criminal law protections need to be maintained.

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<sup>21</sup> *The United Nations Principles for Older Persons*, United Nations General Assembly Resolution 46/91, December 1991.

<sup>22</sup> *Ibid.*, 72.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 335, cited by the Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2005), 32.

20. Where the public advocate/guardian, in exercising its investigative function, identifies elder abuse, the appropriate penalties should be the subject of further consideration by the ALRC, guided by the principle that the rights of the older person to choose non-intervention should be paramount.

**Proposal 3-4** In responding to the suspected abuse or neglect of an older person, public advocates or public guardians may:

- (a) refer 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.

21. The Law Council supports Proposal 3-4, in recognition of the critical role public advocates/guardians play in assisting older persons with access essential services, such as, health care, social, legal, accommodation or other services. The Law Council emphasises that the older person's right to refuse assistance or take any action should be the paramount consideration in responding to instances of elder abuse.

**Proposal 3-5** Any person who reports elder abuse to the public advocate or public guardian in good faith and based on a reasonable suspicion should not, as a consequence of their report, be:

- (a) liable, civilly, criminally or under an administrative process;
- (b) found to have departed from standards of professional conduct;
- (c) dismissed or threatened in the course of their employment; or
- (d) discriminated against with respect to employment or membership in a profession or trade union.

22. The Law Council supports the protections in Proposal 3-5. It is recognised that stakeholders such as health professionals, financial institutions and employees in the aged care sector may not report elder abuse for a number of reasons. These include fear of contravening state, territory or Commonwealth privacy laws, fear of dismissal or adverse treatment by employers, fear of breaching their clients' trust and lack of education around what constituted elder abuse.

# Enduring Powers of Attorney and Enduring Guardianship

## National online register of enduring documents, and court and tribunal orders

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

23. For the reasons outlined in the Discussion Paper, a majority of the Law Council's Constituent Bodies who provided input to this submission support in principle the creation of a register of enduring document, and court and tribunal orders for the appointment of guardians and financial administrators. However, accessibility of the register must be balanced with right to privacy considerations.
24. Further, noting that enduring documents would not be valid until registration, any cost associated with registering documents should not be such that people are unwilling, or indeed unable, to enter into formal arrangements.
25. The Law Council notes that a minority of its Constituent Bodies who provided input to this submission, such as the Law Society of New South Wales (**LSNSW**), do not support a registration system for the purposes of protecting against elder abuse. The LSNSW is not persuaded that a register would, in itself, operate in any practical or effective way to prevent, or affect, the incidence of elder abuse. In the LSNSW's view, the critical issue is ensuring that an attorney acts in accordance with his or her fiduciary and statutory duties and registration will not cure this problem.
26. The Law Council agrees with the ALRC's recommendation in the Discussion Paper<sup>25</sup> that enduring documents should be kept in a separate register from medical records.

## Making and revocation of an enduring document

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

27. In relation to Proposal 5-2, the Law Council notes that if validity depends on registration, the principal and attorney may be hampered in the attorney promptly acting in some circumstances. The requirement for compulsory registration may produce greater opportunity for abuse, where the revocation is (deliberately) not registered so that the (intended) revoked power of attorney continues to be available for use by the abuser. Further, irrespective of any dilatory tactics, there may be practical difficulties in ensuring timely registration of documents in rural and remote areas of Australia. The Law Society of Western Australia has noted that for some people in rural areas, having documents prepared and properly witnessed can be challenging and time consuming. Any system of registration (if such a system is to be adopted) should have the capacity to process urgent registrations if required.

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<sup>25</sup> Australian Law Reform Commission, *Elder Abuse Discussion Paper (DP 83)*, (December 2016), 97.

28. Further, the Law Council does not agree with the proposal that the making and registering of a subsequent enduring document should *automatically* revoke the previous document of the same type. There may be occasions where there will need to be more than one power of attorney to be used in different circumstances; automatic revocation would preclude this.

### Transitional arrangements

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

29. Subject to the comments above in relation to the creation of a national register, the Law Council supports Proposal 5-3. If a register is created, the Law Council agrees that appropriate transitional arrangements are needed for currently prepared powers of attorney. Transitional arrangements such as those that operated in the United Kingdom should be considered for application in the Australian context. In the United Kingdom, during the transition process of registration, the laws did not operate retrospectively and negate validity of unregistered documents.<sup>26</sup>
30. The Law Council agrees that awareness raising and education around the need for existing documents to be registered will be required during any transition period. An education program should be undertaken irrespective of the establishment of a national register to improve community understanding surrounding powers of attorney.

### Who should be able to search the register?

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

31. Given that powers of attorney are used in legal and financial transactions, all persons involved in those transactions will need to be able to search the register. This includes vendors and purchasers of real estate and businesses.
32. In a joint submission to the Victorian Law Reform Commission (VLRC) Guardianship Inquiry, Justice Connect and Seniors Rights Victoria recommended a number of safeguards be implemented to any national register to ensure that third party access is limited to only the information necessary to establish the extent and validity of the power.<sup>27</sup>
33. The tiered approach outlined in this submission was adopted by the VLRC in its Final Report,<sup>28</sup> but a registration system has not yet been enacted in Victoria. The Law Council recommends an approach that mirrors the VLRC's recommendation be considered for possible national implementation.

<sup>26</sup> See, e.g. Office of the Public Guardian (UK), *Lasting and enduring power of attorney forms*, (12 December 2016), available at <https://www.gov.uk/government/publications/register-a-lasting-power-of-attorney>.

<sup>27</sup> Seniors Rights Victoria, Submission No 71 to Victorian Law Reform Commission, *Guardianship Consultation Paper*, (3 June 2011) 14.

<sup>28</sup> Victorian Law Reform Commission, *Guardianship: Final Report*, Report No 24 (2012), 358.

34. Registered legal practitioners should be categorised as 'preferred users' because of the range of matters that will require a search of the register.<sup>29</sup> Preferred users could include: financial institutions, medical/healthcare providers, supported residential services and approved aged care providers.

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

35. The Law Council's supports random audits in principle where they are based on the existence of reasonable grounds for suspicion. The Law Council supports this function being conferred on the public advocate/guardian, as it may serve as a deterrent against financial abuse. Such audits should be applied on a case-by-case basis and sufficiently rigorous to satisfy the public advocate and/or guardian that no misconduct has occurred without being overly burdensome or intrusive on the appointed decision-maker. Natural justice would require reasonable notice to be provided to the appointed decision maker to provide time to prepare for, and respond to, an audit. Where a random audit reveals a discrepancy in the accounts, the attorney should be given the opportunity to explain the discrepancy. Where the explanation reveals the act or omission was an honest or reasonable oversight by the attorney, the attorney should be given time to rectify any potential breach of their duties caused by the act or omission.

## Witnesses

**Proposal 5-4** Enduring documents should be witnessed by two independent witnesses, one of whom must be either a:

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

Each witness should certify that:

- (a) the principal appeared to freely and voluntarily sign in their presence;
- (b) the principal appeared to understand the nature of the document; and
- (c) the enduring attorney or enduring guardian appeared to freely and voluntarily sign in their presence.

36. In relation to Proposal 5-4, the most important part of the witnessing process is ensuring that the principal understands the nature of the instrument. The Law Council is concerned that the suggested witnessing requirements do not require the power of attorney to be explained to the principal. This is critical to ensure that the possibility of abuse is raised with the principal and the principal is asked to contemplate that possibility. In that context the principal can decide against making a power of attorney, appointing different attorneys, restricting the allocated powers, imposing different conditions or limitations, designating a stricter regime for operation, and the like. This process will better address the prospect of misuse of the attorney's authority.

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<sup>29</sup> Law Institute of Victoria, Submission No 77 to Victorian Law Reform Commission, *Guardianship Consultation Paper*, (8 June 2011), 11.



37. The Law Council considers that a balance must be struck between ensuring that the enhanced witnessing requirements reduce the likelihood of such a document being signed under some form of duress, and the need to encourage members of the community to put documents of this type in place. In the Law Council's view, the proposed list of authorised witnesses is too restrictive and may have the effect of discouraging people from making an enduring power of attorney, or result in powers of attorney that are invalid on the basis that the witnessing requirements are not met. Further, there may also be difficulties for people in regional or remote areas in relation to finding appropriate witnesses. The Law Council suggests that an enduring power of attorney should be able to be witnessed by two independent persons, at least one of whom is on the list of authorised witnesses in the *Statutory Declarations Regulations 1993* (Cth). This will mean that the document is required to be witnessed by an independent person of a certain standing and responsibility within the community, while not placing a barrier in the path of an individual wishing to put one of these documents in place. In this context, it is suggested that the ALRC should also give consideration to including pharmacists, as professionals whom older persons might see on a regular basis in any event, on the list of prescribed witnesses.

38. The prescribed witness should be required to explain to the principal the:

- nature of a power of attorney;<sup>30</sup>
- different features of the various types of powers of attorney, with particular attention to the distinguishing feature of an enduring power of attorney;
- attributes most desired in an attorney;<sup>31</sup>
- fiduciary obligations that an attorney owes the principal;
- different ways that multiple attorneys may be appointed (being joint, several and consecutive) and the pros and cons with each approach;<sup>32</sup>
- limit on an attorney's authority imposed by law;
- additional powers that may be conferred on an attorney, and the pros and cons of those powers in the principal's circumstances;
- conditions and limitations that may be imposed on the attorney's authority, and the pros and cons thereof; and

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<sup>30</sup> In *Despot v Registrar-General of NSW* [2013] NSWCA 313 the Court of Appeal stated: 'A power of attorney is a formal instrument by which authority or power to represent the donor [now called the principal] is conferred on the donee [the attorney]' at [48].

<sup>31</sup> In *Szozda v Szozda* [2010] NSWSC 804 the Court made the following comments about the attributes of the person who the principal should appoint as an attorney: 'Is that person someone who is trustworthy and sufficiently responsible and wise to deal prudently with my affairs and to judge when to seek assistance and advice? The decision is one in which considerations of surrender of personal independence and considerations of trust and confidence play an overwhelmingly predominant role: am I satisfied that I want someone else to be in a position to dictate what happens at all levels of my affairs and in relation to each and every item of my property and that the particular person concerned will act justly and wisely in making decisions?' Other desirable attributes in an attorney may include: financial competence; decisiveness; and impartiality. Other important factors that the witness may suggest the principal consider are: the age of the attorney; the location of the attorney; and the likelihood that the attorney will be able and willing to devote the necessary time and attention to the required tasks.

<sup>32</sup> The Law Council considers that this aspect is especially important. There have been instances of joint attorneys not agreeing, with the result that the principal has been left without an alternative decision-maker. There have been instances of banks failing to understand the difference between joint and several. In one instance, one of two joint attorneys was allowed to withdraw all funds from the mother's (donor's) bank account. (He then transferred the funds to the mother's other account and began systematically paying his own bills using an online facility).

- prescribed and other options concerning the operation of the power of attorney.
39. The Law Council considers that the proposed attestation of the person witnessing the enduring documents places too much of a burden on the witness to form a view on whether:
- the principal 'appeared' to freely and voluntarily sign the document and to understand the nature of the document; and
  - the enduring attorney 'appeared' to freely and voluntarily sign the document,
- which they may not be in a position to positively attest. This is especially the case where the authorised witness is not trained to be able to reasonably form a view on whether the person understood the nature of the document (arguably this would require legal training). The possibility of legal action against the authorised witness in the event that it is later found that the person did not fully understand the document may also discourage authorised witnesses from agreeing to witness enduring documents.
40. Instead, the Law Council suggests that a more workable attestation would be that the witness is not aware of anything that causes them to believe that:
- the principal did not freely and voluntarily sign the document;
  - the principal did not understand the nature of the document; or
  - the enduring attorney did not freely and voluntarily sign the document.

## Compensation

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

41. The Law Council agrees with Proposal 5-5. It supports tribunals, such as the New South Wales Civil and Administrative Tribunal and similar tribunals, having sufficient power to hold attorneys and other such representatives to account for their actions.<sup>33</sup> The *Power of Attorney Act 2014* (Vic) may provide a useful model for tribunals to order compensation where an attorney has breached its fiduciary duty. Further, appropriate defences ought to be available to attorneys and other representatives, such as a defence of acting honestly and reasonably.

<sup>33</sup> Law Council of Australia, *Submission on the ALRC Elder Abuse Issues Paper* (17 August 2016), 23.

## Laws governing powers of attorney

**Proposal 5-6** Laws governing enduring powers of attorney should provide that an attorney must not enter into a transaction where there is, or may be, a conflict between the attorney's duty to the principal and the interests of the attorney (or a relative, business associate or close friend of the attorney), unless:

- (a) the principal foresaw the particular type of conflict and gave express authorisation in the enduring power of attorney document; or
- (b) a tribunal has authorised the transaction before it is entered into.

**Proposal 5-7** A person should be ineligible to be an enduring attorney if the person:

- (a) is an undischarged bankrupt;
- (b) is prohibited from acting as a director under the *Corporations Act 2001* (Cth);
- (c) has been convicted of an offence involving fraud or dishonesty; or
- (d) is, or has been, a care worker, a health provider or an accommodation provider for the principal.

**Proposal 5-8** Legislation governing enduring documents should explicitly list transactions that cannot be completed by an enduring attorney or enduring guardian including:

- (a) making or revoking the principal's will;
- (b) making or revoking an enduring document on behalf of the principal;
- (c) voting in elections on behalf of the principal;
- (d) consenting to adoption of a child by the principal;
- (e) consenting to marriage or divorce of the principal; or
- (f) consenting to the principal entering into a sexual relationship.

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

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

42. The Law Council supports Proposals 5-6, 5-7, 5-8, 5-9 and 5-10.

43. In relation to Proposal 5-8, which concerns legislatively mandating transactions that cannot be completed by an enduring guardian,<sup>34</sup> information should be attached to enduring documents concerning the powers and responsibilities of attorneys and guardians. Further, the list of transactions in Proposal 5-8 should be non-exhaustive.

44. In relation to Proposal 5-10, nationally consistent laws would streamline education, best practice, and implementation of a national register of substitute decision makers. The Law Institute of Victoria has recommended all states and territories adopt legislation mirrored off the *Powers of Attorney Act 2014* (Vic), the *Medical Treatment Planning and Decisions Act 2016* (Vic) and the *Guardianship and Administration Act 1986* (Vic).

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<sup>34</sup> Australian Law Reform Commission, *Elder Abuse Discussion Paper (DP 83)*, (December 2016) 105.

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

45. The Law Council does not support Proposal 5-11. Changing the name of a longstanding legal position, like an attorney, is likely to cause confusion in the community. Moreover, it is unlikely to assist in the reduction of elder abuse. Devoting resources to the education of the community about the roles of the attorney and enduring guardian may be more effective.

### Model Representatives Agreement

**Proposal 5-12** A model Representatives Agreement should be developed to facilitate the making of these arrangements.

46. The Law Council supports a national model for a power of attorney. It does not support, however, renaming that instrument a 'Representatives Agreement' for the reasons outlined above in relation to Proposal 5-11.

### Representation requirements

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

47. Proposal 5-13 is supported in principle. However, there may be practical issues that will require further consideration. These issues include:

- Any proposal to apply a formal legal framework to informal family arrangements should not necessarily replace informal arrangements, unless doing so is appropriate;
- Supported decision-maker models should enhance the decision making capabilities of people with a disability and not expose people to potential abuse;
- How a person would be supported in practice;
- There must be adequate supports and funding allocation for any implementation of a supported decision-making model;
- A legal framework for the appointment of a supported person and the scope of the powers of such an appointment need to be determined; and
- The precise model of decision making to be employed for people whose will and preferences cannot be determined because of cognitive impairment or serious mental illness, particularly in relation to decision making about financial management.

# Guardianship and Financial Administration Orders

## Education and training

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

48. The Law Council supports Proposal 6-1 as one of a suite of measures to ensure that guardians and financial administrators are adequately educated to act in accordance with the obligations and responsibilities of their appointments.
49. As noted in the Discussion Paper, there is a plethora of state and territory laws relating to guardianship and financial administration orders.<sup>35</sup> The Law Council supports the harmonisation of guardianship and financial administration laws in each state and territory to establish consistency between those laws. Uniformity of those laws would:
- reduce complexity and the overlap in their application;
  - simplify education of guardians and financial administrators; and
  - improve public understanding of the relevant law.
50. In addition to harmonisation, the Law Council recommends a review of the legislation should be undertaken to specify the obligation on the decision-maker and to adopt consistency of terminology and plain language.
51. In Victoria, an applicant for an administration order receives a fact sheet from the VCAT. As noted by the ALRC, generally, the Tribunal member makes inquiries to satisfy itself, among other things, that the applicant is the appropriate person to be appointed to the role.<sup>36</sup> Information for administrators and guardians is also available on VCAT's website.<sup>37</sup> Additionally, VCAT provides regular information sessions for administrators and guardians to provide an opportunity to ask questions about their roles and responsibilities.
52. The Law Council supports the ALRC's view that education could be incorporated into tribunal processes without the need for external training. This could be achieved through a tiered approach. Specifically, the Law Council recommends:
- Sign-off by newly-appointed administrators - acknowledging they understand the responsibilities attaching to the order;
  - The availability of online resources (supported by significant financial resourcing); and

<sup>35</sup> Australian Law Reform Commission, *Elder Abuse Discussion Paper (DP 83)* (December 2016), 116-117.

<sup>36</sup> *Ibid.*, 123.

<sup>37</sup> See Victorian Civil and Administrative Tribunal, *Guardianship and Administration*, available at <https://www.vcat.vic.gov.au/case-types/guardianship-and-administration>.

- Training for guardians and administrators ordered at the Tribunal's discretion.<sup>38</sup>

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

**Question 6-1** Should information for newly-appointed guardians and financial administrators be provided in the form of:

- (a) compulsory training;
- (b) training ordered at the discretion of the tribunal;
- (c) information given by the tribunal to satisfy itself that the person has the competency required for the appointment; or
- (d) other ways?

53. Education and awareness raising, however, should not be in the form of uniform compulsory training for all persons who are appointed guardians and financial administrators. Rather, the relevant tribunal should only require guardians and financial administrators to undergo training or education as a condition of their appointment where it is necessary to enable the applicant to meet specified eligibility criteria for appointment. Eligibility for applicants to be appointed guardians and financial administrators should be restricted to persons who possess certain attributes, experience, or training. Those criteria should be focused on ensuring that applicants for appointment understand their responsibilities and have the capacity to fulfil them.
54. This approach would enable any training or education to be tailored to suit the circumstances of the particular individual, including their pre-existing education, occupation, location and the terms of appointment. It would both optimise the effectiveness of any training or education and maintain its cost at a level sufficient to achieve the desired result.
55. The relevant tribunals should also be funded to provide information through both web-based and telephone services; that information should include the key obligations and responsibilities of various types of appointment. However, this initiative should not be seen as a substitute for training or education as a condition of appointment to enable particular applicants to meet the requisite eligibility criteria.

## Undertaking

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

56. The Law Council supports the ARLC's proposal that tribunal-appointed guardians and administrators be required to sign a statement of acceptance at the time of appointment to solemnise the appointment, and reinforce the obligations of the guardian or administrator.<sup>39</sup> Such a statement could be relied upon in subsequent

<sup>38</sup> This is consistent with the recommendation made by the Victorian Law Reform Commission; see Victorian Law Reform Commission, *Guardianship: Final Report*, Report No 24 (2012), 408.

<sup>39</sup> Australian Law Reform Commission, *Elder Abuse Discussion Paper (DP 83)* (December 2016), 123.

proceedings where a guardian or administrator fails to fulfil their obligations.<sup>40</sup> The terms of such an undertaking, including its scope, and whether it contains a commitment to repay money lost to the estate, would require further consideration.

57. The Law Council would not support a breach of the undertaking being sanctioned independently of the conduct which gave rise to the breach; the undertaking should not have the effect of an undertaking to a court. The undertaking could still be relied upon in subsequent proceedings where a guardian or administrator has allegedly failed to fulfil his or her obligations.
58. The Law Society of Western Australia, however, does not support this proposal. In the view of the Law Society of Western Australia, doing so would add another level of administration that will not add to the responsibility of the person appointed.

## Surety bonds

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

59. The Law Council considers that it is premature to take a final position as to the appropriateness of surety bonds. Factors which will require further consideration include the commercial availability of bonds and their terms, including, in particular, the circumstances in which a bond can be called upon.
60. In the experience of members of the Law Institute of Victoria, surety bonds were historically used in deceased estate matters when ordered by the Registrar of Probates. The Registrar would ask for an applicant to apply for a Surety guarantee from a bank to guarantee the value of the estate, where, for instance:
- a deceased person died intestate (without a will), *and* there was an application for Letters of Administration *and* there were minor beneficiaries, or
  - the executor was interstate and the application was for Letters of Administration *or* Letters of Administration with the Will annexed.
61. In the past, there were a number of institutions who offered this service. A person could apply to the institution and seek a guarantee based on the value of the estate. The institution typically charged a standard fee or a commission based on the value of the estate.
62. This is common practice in the United Kingdom, where death duties are in existence. However, in Australia, in the absence of death duties, it has become increasingly difficult to obtain this service as institutions are reluctant to grant a guarantee over an estate upon which they have no control. Further, the assets belong to the estate and not the applicant.
63. Accordingly, in Victoria, the Registrar has altered the system to accommodate the lack of institutions who offer Surety guarantees. An applicant can either seek a guarantee from a person (who is not related to the applicant, the deceased, or a beneficiary) who will act as guarantor for the whole of the value of the estate. The other option is that

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<sup>40</sup> Ibid.

the Registrar will appoint two people to the role of Administrator (of an estate) as opposed to a single applicant.

64. In principle, surety guarantees may be beneficial because the responsibility rests with a guarantor and it is in their interest to see that a task is fulfilled adequately. In practice, surety guarantees are difficult to obtain.
65. Where such a bond has been provided, it would be appropriate that where a tribunal makes a finding that a private manager has not complied with his or her duties and the tribunal makes a compensation order, the loss be recouped by way of the surety bond agreement to the extent possible. However, the Law Council notes that the Law Institute of Victoria is of the view that compensation should be paid by the perpetrator in the first instance; otherwise, if the fund can easily be recouped by the insurance company, an administrator may be more inclined to engage in financial abuse.
66. As noted by the ALRC, the New South Wales Trustee and Guardian scheme which requires bonds be given by private financial managers is in its infancy<sup>41</sup> and it would be appropriate to assess the operation of that scheme over a longer period before forming a view as to its efficacy. However, the relatively modest cost associated with the bonds and the obvious benefit to the person whose affairs are being administered makes at least the discretionary use of the requirement of a bond a useful tool for tribunals, provided it is applied according to published guidelines which ensure predictability and fairness.
67. Any concern that the provision of such bonds might lead to an increase in the misuse of funds by financial administrators can be better assessed once the New South Wales scheme has been in operation for a longer period. However, the reputational risk and the potential for criminal consequences would appear to be a sufficient deterrent to a financial administrator who might otherwise see the availability of the bond as an encouragement for misuse of the funds under administration.
68. Any risk that the requirement for a bond might operate as a deterrent to potential financial administrators to accept the appointment would appear small, given the modest cost associated with the bonds. The existence of such a small risk needs to be compared with the substantial benefit that would flow to persons whose estate has been diminished by misuse and who have no prospect of reimbursement from the errant financial administrator.

## Process

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

69. The Law Council agrees that a best practice model should require the tribunal, where possible, to speak with the person who is the subject of an application for the appointment of a guardian or financial administrator. This should occur regardless of that person's attendance at the hearing before the tribunal and before the appointment of a guardian or financial administrator takes place.

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<sup>41</sup> Ibid., 125.



## Banks and superannuation

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

70. For the reasons outlined in the Discussion Paper, the Law Council supports Proposal 7-1 and considers that specific measures and safeguards aimed at protecting older people from financial abuse through misuse of online banking facilities would be beneficial. The Law Council supports mandatory training for staff at financial institutions and supports reporting of irregularities in accounts being reported to the relevant authorities. Training for bank staff should include:

- the nature of an enduring power of attorney, including the difference between *joint* and *joint and several*;
- ensuring that, where an enduring power of attorney commences upon loss of capacity, the person dealing with the attorney is satisfied that there has been a loss of capacity with respect to the particular transaction at hand (a principal may have capacity for some decisions and not others);
- the difference between an enduring power of attorney for personal matters (which does not confer authority to conduct financial affairs) and an enduring power of attorney for financial matters; and
- awareness of the types of limitations on the exercise of power under an instrument and the effect of those limitations.

In the Law Council's view, the 'relevant authority' ought to be a national regulator on the care and protection of the elderly.<sup>42</sup> A mechanism to monitor and report on compliance with an agreed best practice approach may also serve to protect older people from financial abuse.

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

71. In the Law Council's submission in relation to the ALRC's Elder Abuse Issues Paper, it was noted that a bank Authority to Operate (ATO) is easy to obtain and is not generally required to be witnessed.<sup>43</sup> As a consequence, an ATO may be misused to the detriment of an older person or indeed banking customers generally. The Law Council thus supports Proposal 7-2 requiring increased witnessing requirements for arrangements allowing third parties to access bank accounts. It is noted, however, that abuse of ATOs or other internal bank documents fall outside the jurisdiction of state

<sup>42</sup> Law Council of Australia, *Submission on the ALRC Elder Abuse Issues Paper* (17 August 2016), 17.

<sup>43</sup> *Ibid.*, 16-17.

and territory tribunals; in Victoria, for example, such conduct would fall outside the jurisdiction of VCAT and remedies would not be available under the *Power of Attorney Act 2014* (Vic). Another approach would be to require banks to rely on instruments such as enduring powers of attorney, powers of attorney, or administration orders.

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

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

72. The Law Council does not think that the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) should be amended to require that all new self-managed superannuation funds have a corporate trustee.

73. While the Law Council considers that there are strong reasons in favour of such a structure (as outlined in paragraph 7.58 of the Discussion Paper), it does not believe that requiring this to be adopted would of itself reduce the risk of elder abuse occurring. While the ALRC states at paragraph 7.52 in respect of the individual trustee structure that 'there is also a greater risk of fraud', the Law Council considers that a perpetrator of financial abuse would be equally able to perpetrate this under either structure.

74. As to the question of the arrangements that should be put in place in the event that a trustee loses capacity, the Law Council considers that the law already makes adequate provision for such arrangements. A legal personal representative (the holder of an enduring power of attorney, or the trustee of the estate of a person under a legal disability)<sup>44</sup> may be appointed as a trustee or trustee director in place of a member during any period when the member is under a legal disability or the legal personal representative holds an enduring power of attorney.<sup>45</sup> Alternatively, the member might have their interests cashed, rolled over or transferred to a superannuation fund other than a self-managed superannuation fund, or the fund might be wound up, or an Registrable Superannuation Entity (**RSE**)-licensed trustee might be appointed such that the fund became a small Australian Prudential Regulatory Authority (**APRA**) Fund.

75. The best option in any particular case will depend on the circumstances at the time. The Law Council considers that 'hard wiring' a particular course of action may be counterproductive and give rise to inappropriate results. For example, a member may have a legal personal representative but there may be reasons why having that person appointed as a trustee or trustee director in place of the member would be inappropriate in the particular circumstances. Equally, the compulsory transfer of a

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<sup>44</sup> Definition of 'legal personal representative' in section 10(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth).

<sup>45</sup> The Committee notes that paragraph 7.50 of the Discussion Paper suggests that an attorney can become the trustee or director of a corporate trustee only where a person has lost legal capacity, but this is not the case. The holder of an enduring power of attorney can be appointed to a trustee or trustee director role at any time. This is a valuable opportunity for older persons who have not lost legal capacity but have lost the energy or motivation to continue to actively manage their fund.

member's interests might give rise to adverse tax results or might unduly disadvantage the remaining member/s of the self-managed superannuation fund.

76. The Law Council notes the Discussion Paper states that,

*If the attorney does not take over the management of the SMSF [Self Managed Superannuation Fund], the fund is likely to become non-compliant, unless the principal's interest in the fund can be paid out, the fund is able to be wound up, or the management transferred to an APRA licensed trustee.*<sup>46</sup>

77. In fact, the most likely outcome would be that the fund would cease to be a self-managed superannuation fund, as it would have ceased to satisfy the trusteeship requirements under section 17A of the SIS Act.
78. The Law Council does not support imposing additional compliance obligations on trustees and directors when they are not a member of the fund. The SIS Act and *Superannuation Industry (Supervision) Regulations 1994* (Cth) (**SIS Regs**) already impose significant compliance obligations on the trustees and trustee directors of self-managed superannuation funds.
79. In particular, the compulsory covenants contained in sections 52B and 52C of the SIS Act impose covenants to, among other things, act honestly in all matters concerning the fund, exercise the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with the property of another for whom they felt morally bound to provide, and act in the best interest of the beneficiaries.
80. A legal personal representative who is appointed as a trustee or trustee director is appointed in their own right and assumes all of the obligations and responsibilities of the role in their personal capacity. To impose additional compliance obligations in respect of what is already a highly regulated and onerous role may simply make it difficult for older persons to find an individual willing to take on the role (noting that this must be unpaid).<sup>47</sup>
81. The Law Council does not support giving the Superannuation Complaints Tribunal (**SCT**) jurisdiction to resolve disputes involving self-managed superannuation funds. It is an essential aspect of the operation and supervision of self-managed superannuation funds that they are 'self-managed'. This means that (save in limited circumstances as noted), all of the members are required to be involved in the management and administration of their fund. The SCT is established to provide a low cost and efficient means by which complaints can be heard in relation to superannuation matters outside of the self-managed sector. Participants in the superannuation industry are in the main participating because of the compulsion of the superannuation guarantee system, and there is an imbalance of power and information as between the member and the trustee of their fund.
82. In the Law Council's view it would not be appropriate to involve the SCT in disputes that are ultimately disputes between family members or associates and are private in nature. Further, the threat of a complaint to the SCT might be used by a party to such a dispute in order to exert leverage over the other party or parties.
83. There are remedies available to members of self-managed superannuation funds in the event of a dispute, including seeking the advice and guidance of the Court, seeking

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<sup>46</sup> Australian Law Reform Commission, *Elder Abuse Discussion Paper (DP 83)* (December 2016), [7.52].

<sup>47</sup> *Superannuation Industry (Supervision) Act 1993* (Cth), ss 17A(1)(f) and (2)(c).

injunctions under section 315 of the SIS Act and applying to the Court for relief in respect of a breach of trust. Members of self-managed superannuation funds are also able to agree to use the services of mediators, conciliators or arbitrators to assist them in resolving disputes.

84. The current funding for the SCT is not sufficient to enable it to deal with its current workload in a timely manner and any expansion of its jurisdiction would of course necessitate the provision of additional funding.

85. The Law Council also notes that the future of the SCT is under consideration by Government and draws attention to the matters raised regarding its future in the Expert Panel's Interim Report entitled *Review of the financial system external dispute resolution and complaints framework* dated 6 December 2016.

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

86. Preparation of self-managed superannuation trust deeds is legal work and as such can only be done by registered legal practitioners. The Law Council does not recommend any change to this position, and notes that better enforcement of existing laws in each jurisdiction might assist.

87. The question of who may provide advice on the establishment of self-managed superannuation funds is not completely free from restrictions and the position is somewhat nuanced.<sup>48</sup>

## Family Agreements

### Assets for care arrangements

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

88. The Law Council supports Proposal 8-1. The jurisdiction of each state and territory tribunal should be defined in a way that ensures parties to assets for care arrangements have a forum to resolve their dispute and that there are appropriate remedies available, including, non-monetary, monetary and real property. Further, the Law Council supports the proposition that general principles of property law should apply in all cases.<sup>49</sup> Where a former property or principal place of residence of the older person in an assets for care arrangement has been disposed of to a third party bona fide purchaser for value without notice, property law principles will ensure an innocent third party purchaser is not unfairly disadvantaged where assets for care arrangements fail. Nonetheless, the victim should still be able to claim compensation from the perpetrator.

<sup>48</sup> See, e.g. Australian Securities and Investments Commission, *AFS licencing requirements for accountants who provide SMSF services* (December 2016), available at <http://asic.gov.au/for-finance-professionals/afs-licensees/applying-for-and-managing-an-afs-licence/limited-financial-services/afs-licensing-requirements-for-accountants-who-provide-smsf-services/>.

<sup>49</sup> Australian Law Reform Commission, *Elder Abuse Discussion Paper (DP83)* (December 2016), 153.

89. The Law Council also suggests that consideration be given to supported Elder Mediation as part of the tribunal process. Elder mediation is a preventative process because its focus on self-determination may interrupt the passivity and dependency that are often the pre-conditions of abuse, neglect and self-neglect.<sup>50</sup> Dispute resolution for older people is a service that is complementary to other forms of intervention such as advocacy, legal, medical, psychiatric, and social work assistance. Elder mediation should be a discrete process that distinctively focusses on promoting the autonomy, independence and control of the parties in the situation of making decisions that affect their lives. Without effective management, dysfunctional family dynamics can escalate and lead to abuse. Elder mediation is an alternative dispute mechanism for resolving such conflicts without recourse to formal legal proceedings.<sup>51</sup>
90. Elder mediation can make a valuable contribution and be a useful intervention at the early stages of family conflict between elders and their family and/or carers. Elder mediation can help parties name the dispute or confront the conflict and therefore improve future family communication. In this way, elder mediation has the potential to prevent elder abuse which is all too commonly associated with dysfunctional communication within the family unit. Elder mediation is confidential, voluntary and non-coercive, and this should be made clear at the outset to all potential participants.
91. Elder mediation represents an acceptance of the right of the older person to play a role in making decisions about themselves.<sup>52</sup> In the domestic violence context, the literature describes divergent perspectives as to whether an alleged or documented perpetrator of abuse should be included in the mediation.<sup>53</sup> It is argued that in an adult context, by including the 'at risk' person and placing them in the middle of the decision making process, it gives the person greater ownership of the decisions made. This approach offers people a way to take control of their own situations, to resolve issues within their family unit and to do this in a safe and controlled environment.<sup>54</sup>

## Definition of 'family'

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

92. 'Family' should be defined broadly to cover family-like relationships. Trust is often the defining characteristic of an elder abuse relationship, and this trust can exist in a number of relationships outside traditional definitions of 'family'. The definition contained in section 8 of the *Family Violence Protection Act 2008* (Vic), is particularly instructive. That section defines 'family' as:

- (1) [ ...]
- (a) a person who is, or has been, the relevant person's spouse or domestic partner; or
  - (b) a person who has, or has had, an intimate personal relationship with the relevant person; or

<sup>50</sup> Ammerman R & Herson M, *Case studies in family violence* (1991, New York: Plenum Press) as cited by Yvonne Craig MA 'Elder Mediation' (1994), 6 *Journal of Elder Abuse & Neglect*, 86-87.

<sup>51</sup> Report A/HRC/33/44, *Report of the Independent Expert on the enjoyment of all human rights by older persons*, United Nations General Assembly, Human Rights Council, Thirty Third Session, 8 July 2016, 9.

<sup>52</sup> Barry, L. *Elder Mediation: What's in a Name?* Conflict Resolution Quarterly, Vol.32., No. 4, Summer 2015, 441.

<sup>53</sup> Knowlton D & Mulhauser T, (1994) *Mediation in the presence of domestic violence: is it the light at the end of the tunnel or is a train on the track*, North Dakota Law Review, Vol. 70, 255-268.

<sup>54</sup> *Ibid.*, 71.

- (c) a person who is, or has been, a relative of the relevant person; or
- (d) a child who normally or regularly resides with the relevant person or has previously resided with the relevant person on a normal or regular basis; or
- (e) a child of a person who has, or has had, an intimate personal relationship with the relevant person.

(2) For the purposes of subsections (1)(b) and (1)(e), a relationship may be an intimate personal relationship whether or not it is sexual in nature.

(3) For the purposes of this Act, a "family member" of a person (the "relevant person") also includes any other person whom the relevant person regards or regarded as being like a family member if it is or was reasonable to regard the other person as being like a family member having regard to the circumstances of the relationship, including the following—

- (a) the nature of the social and emotional ties between the relevant person and the other person;
- (b) whether the relevant person and the other person live together or relate together in a home environment;
- (c) the reputation of the relationship as being like family in the relevant person's and the other person's community;
- (d) the cultural recognition of the relationship as being like family in the relevant person's or other person's community;
- (e) the duration of the relationship between the relevant person and the other person and the frequency of contact;
- (f) any financial dependence or interdependence between the relevant person or other person;
- (g) any other form of dependence or interdependence between the relevant person and the other person;
- (h) the provision of any responsibility or care, whether paid or unpaid, between the relevant person and the other person;
- (i) the provision of sustenance or support between the relevant person and the other person.

(4) For the purposes of subsection (3), in deciding whether a person is a family member of a relevant person the relationship between the persons must be considered in its entirety.<sup>55</sup>

93. Noting that assets for care arrangements can also occur outside the familial context, the Law Council recommends the ALRC consider whether primary carers should be included along with family so that state and territory tribunals have the power to resolve all assets for care disputes.

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<sup>55</sup> *Family Violence Protection Act 2008* (Vic) s 8.

# Wills

## Guidelines for legal practitioners

**Proposal 9-1** 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;
- (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.

94. The Law Council supports Proposal 9-1.

95. Some of these matters are covered by the Law Institute of Victoria Capacity Guidelines,<sup>56</sup> the NSW Capacity Toolkit,<sup>57</sup> and the Queensland Handbook for Practitioners of Legal Capacity,<sup>58</sup> including the importance of taking detailed file notes and of taking instructions from the client alone to ensure the decisions that are made are voluntary and free from undue influence. The existing guidelines could be used as a model for other states and territories.

96. Consistency in succession legislation and advance care planning frameworks would assist in developing national guidelines.

97. The Law Council considers that the suggestion of New South Wales Trustee & Guardian to widen the forfeiture rule, as set out in the Discussion Paper,<sup>59</sup> deserves further attention.

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<sup>56</sup> Law Institute of Victoria, *Capacity Guidelines and Toolkit: Concise Edition* (October 2016) Law Institute of Victoria <[https://www.liv.asn.au/PDF/For-Lawyers/Submissions-and-LIV-Projects/2054\\_LPP\\_CapacityGuidelines\\_FINAL\\_WEB](https://www.liv.asn.au/PDF/For-Lawyers/Submissions-and-LIV-Projects/2054_LPP_CapacityGuidelines_FINAL_WEB)>.

<sup>57</sup> New South Wales Government Attorney General's Department, *Capacity Toolkit* (June 2009) New South Wales Department of Justice toolkit, available at [http://www.justice.nsw.gov.au/diversityservices/Documents/capacity\\_toolkit0609.pdf](http://www.justice.nsw.gov.au/diversityservices/Documents/capacity_toolkit0609.pdf).

<sup>58</sup> Queensland Law Society, *Queensland Handbook for Practitioners on Legal Capacity* (ND) Queensland Law Society <[https://www.qls.com.au/Knowledge\\_centre/Ethics/Resources/Client\\_instructions\\_and\\_capacity/Queensland\\_Handbook\\_for\\_Practitioners\\_on\\_Legal\\_Capacity](https://www.qls.com.au/Knowledge_centre/Ethics/Resources/Client_instructions_and_capacity/Queensland_Handbook_for_Practitioners_on_Legal_Capacity)>.

<sup>59</sup> Australian Law Reform Commission, *Elder Abuse Discussion Paper (DP 83)*, December 2016, 165.

## Witnessing requirements for binding death benefit nominations

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

98. The current signing requirements under regulation 6.17A(6) of the SIS Regs are similar to those for the signing of wills found in the succession legislation of each jurisdiction. However, the witnessing requirements for wills are slightly different in each jurisdiction. The Law Council submits the witnessing requirements for binding death benefit nominations should be the same as for wills because they both confer a benefit to a third party upon a person's death. However, unlike wills, *lapsing* binding death benefit nominations expire after three years. In light of this, increased witnessing requirements may be impractical.
99. The Law Council recommends witnessing requirements for wills apply to *non-lapsing* binding death benefit nominations, so the appointer can be certain that once the nomination is made and duly witnessed, it will be binding at the date of their death.
100. The Law Council would not support providing a certificate of independent legal advice, given that the provision of a certificate for superannuation nominations would mean that every time a person made a nomination (some retail funds require a nomination every three years) with respect to his or her superannuation it would be necessary to see a lawyer.

## Enduring power of attorney and binding death benefit nominations

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

101. In relation to Proposal 9-3, the Law Council maintains its position that there should be clarity about whether the scope of the attorney's authority extends to making a binding death benefit nomination (**BDBN**) on behalf of the principal. The Law Council considers that the proposal needs to be more fully considered, and provides the following input into the proposal.
102. The Law Council agrees that a BDBN is a will-like document – though not a testamentary disposition, and considers that it would be desirable if the SIS Act and SIS Regs were amended to make clear that a person appointed under an enduring power of attorney cannot make (or confirm, amend or revoke) a BDBN (or non-lapsing nominations or non-binding nomination) on behalf of a member unless this is expressly authorised in the document by specific reference to the making of BDBNs (or other nominations).
103. At present this is an area of significant confusion for superannuation funds, with some funds allowing the holder of an enduring power of attorney to make, amend or revoke a BDBN, and other funds not allowing this. The issue has not been tested before the Courts. Conflict issues also commonly arise, where the holder of the enduring power of attorney is an individual who would benefit from the making, amendment or



revocation of a BDBN. Such issues can be addressed by the inclusion of specific authorising provisions in the relevant power of attorney, but there may then be further complexity with the correct drafting of such documents. In any event, the authorisation should be express, and should include the ability to nominate the attorney themselves and to amend the BDBN (or other nomination) in their own favour if this is desired by the member.

104. Implementation of this proposal would require a consideration of the broader consequences. Acknowledging the will-like nature of BDBNs, consideration might be undertaken in each jurisdiction of the desirability of amending the relevant succession legislation to allow for the court to make a BDBN for an individual who was lacking capacity. Such provision would be akin to the provisions in each jurisdiction allowing the court to authorise a will to be made in specific terms approved by the court or revoked on behalf of a person who does not have testamentary capacity. Alternatively, perhaps the Federal Court could be given relevant jurisdiction under superannuation legislation.
105. In the absence of such provisions, individuals who lose capacity will be at risk of having no BDBN in place (given that generally a BDBN in a fund, other than a self-managed superannuation fund, will lapse after 3 years unless a mechanism is adopted for non-lapsing nominations or reversionary pension rules apply).
106. Perhaps more importantly, individuals will be at risk of having a BDBN that has become inappropriate continue in effect until lapsing. There is an example given in the Discussion Paper<sup>60</sup> of where a marriage breaks down but a nomination in favour of a spouse continues in effect. It is possible of course for a legal marriage to continue even after the making of final orders or agreements in respect of the property of the marriage, and nothing in the making of such orders or agreements would operate to terminate a BDBN.
107. Clearly, it would be desirable that the Court should have the ability to consider these circumstances and whether it should intervene to revoke, amend or re-make a BDBN to avoid an outcome that would not have aligned with the member's intentions had they had capacity. The Law Council also queries whether it might be legislated in the SIS Regs that a BDBN is revoked in the same circumstances that a will would be revoked in the relevant jurisdiction. For example, in Victoria, section 12 of the *Wills Act 1997* (Vic) provides that with certain exceptions a will is revoked by the marriage of the testator.
108. Some of these issues arising in connection with BDBNs and the difficulty with the application of relevant provisions under superannuation legislation were addressed by Justice Blue in *Retail Employees Superannuation Pty Ltd v Pain*.<sup>61</sup> The Law Council recommends that any reforms of the superannuation legislation also have regard to Justice Blue's remarks and the issues considered in this case.
109. Transitional issues will need to be considered in relation to any change to the regime.
110. An attorney plays an important role with self-managed superannuation funds. For instance, if the member loses mental capacity, the attorney may become a trustee of the fund or a director of the corporate trustee of the fund. It is important that the attorney does so, and promptly, as otherwise the fund can cease being a complying fund (with adverse tax consequences for the fund). Nevertheless, this action allows the attorney to perpetrate elder abuse on the member during the member's lifetime.

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<sup>60</sup> Australian Law Reform Commission, *Elder Abuse Discussion Paper (DP 83)*, December 2016, [9.52].

<sup>61</sup> *Retail Employees Superannuation Pty Ltd v Pain* [2016] SASC 121, at [516] to [572].

111. An attorney will often claim Total and Permanent Disability insurance for a mentally incapacitated member. The attorney then receives that payment on behalf of the member. This action is generally in the member's best interests, but the payment is made during the member's lifetime and may allow an attorney (and any other person) to perpetrate elder abuse on the member by recourse to those funds.
112. If there is no BDBN, there is often considerable delay in obtaining a member's death benefit. In that event, the fund engages in a claim-staking process. Reviews against the fund's decision are available to the SCT. That involves further significant periods of time and can often delay the administration of a member's estate or the finalisation of his or her affairs.
113. On the whole the Law Council suggests that:
- this issue not be addressed differently to other issues of elder abuse involving the use of a power of attorney; and
  - greater emphasis should be placed on the benefits of better education and awareness strategies around avoiding and preventing elder abuse.
114. The Law Council recommends that there should be a cost effective way for an attorney to make an application to a tribunal to authorise a change in the principal's affairs in certain circumstances.
115. In the Law Council's view, the current position should continue until the ALRC's proposal is more fully considered.

## Social Security

### Elder Abuse Strategy

**Proposal 10-1** The Department of Human Services (Cth) should develop an elder abuse strategy to prevent, identify and respond to the abuse of older persons in contact with Centrelink.

116. The Law Council supports Proposal 10-1 that the Commonwealth Department of Human Services (**DHS**) should develop a strategy to prevent, identify and respond to elder abuse of persons in contact with Centrelink. Such a strategy could include standardised forms for special disability trusts and assets for care arrangements.
117. The strategy must include training for Centrelink staff on sensitivity in identifying and responding to elder abuse, including training on capacity and respecting the autonomy and dignity of older persons to make as many decisions as possible.
118. The strategy should also incorporate ways to identify and address abuse by persons in receipt of the carer's pension or allowance who is not meeting the requisite care requirements.

## Communication with Aged Pensioners

**Proposal 10-2** Centrelink policies and practices should require that Centrelink staff speak directly with persons of Age Pension age who are entering into arrangements with others that concern social security payments.

119. The Law Council also supports Proposal 10-2 that Centrelink should require staff to speak directly with persons of Age Pension age entering into arrangements with others that concern social security payments. Centrelink should require the older person to attend a Centrelink office upon conferring an authority on a third party to confirm these arrangements in person. To ensure the decision is free from undue influence or duress, Centrelink staff should speak to the older person alone at some point. This will assist to ensure arrangements made by older persons with respect to their social security payments are voluntary and informed decisions.
120. Where a nominated person proposes to authorise a third party to liaise with Centrelink on behalf of an older person with respect to their social security payments, Centrelink should contact the older person to ensure they are aware of such arrangements.

## Centrelink Communications

**Proposal 10-3** Centrelink communications should make clear the roles and responsibilities of all participants to arrangements with persons of Age Pension age that concern social security payments.

121. The Law Council supports Proposal 10-3. Centrelink communications should make clear the roles and responsibilities of all participants to arrangements with older persons with respect to their social security payments. Centrelink staff should be trained to communicate the roles and responsibilities of care givers and recipients.
122. One issue with Centrelink is the appointment of a person to act for the aged pensioner, which is done in an informal way and without any inquiry as to whether the aged pensioner has already appointed an attorney by means or an enduring power of attorney or whether an administrator has been appointed. It is recommended that the appointee should be the administrator or attorney for the aged pensioner under an enduring power of attorney.

## Training

**Proposal 10-4** Centrelink staff should be trained further to identify and respond to elder abuse.

123. Consistent with the position expressed in its Issues Paper submission<sup>62</sup> and as outlined above under Proposal 10-1 (above), the Law Council supports Proposal 10-4 to better equip Centrelink staff to identify and respond to instances of elder abuse.

## Aged care

### Reportable Incidents Scheme

**Proposal 11-1** Aged care legislation should establish a reportable incidents scheme. The scheme should require approved providers to notify reportable incidents to the Aged Care Complaints Commissioner, who will oversee the approved provider's investigation of and response to those incidents.

124. The Law Council supports Proposal 11-1 relating to the establishment of a reportable incidents scheme to increase accountability and transparency of approved providers in reporting, investigating and adequately responding to incidents. The Law Council strongly supports the ALRC's view that the proposed reportable incidents scheme would need to be significantly resourced to be effective.<sup>63</sup>

**Proposal 11-2** The term 'reportable assault' in the *Aged Care Act 1997* (Cth) should be replaced with 'reportable incident'. With respect to residential care, 'reportable incident' should mean:

- (a) a sexual offence, sexual misconduct, assault, fraud/financial abuse, ill-treatment or neglect committed by a staff member on or toward a care recipient;
- (b) a sexual offence, an incident causing serious injury, an incident involving the use of a weapon, or an incident that is part of a pattern of abuse when committed by a care recipient toward another care recipient; or
- (c) an incident resulting in an unexplained serious injury to a care recipient.

125. The Law Council supports expanding the scope of the type of incidents to be reported under the *Aged Care Act 1997* (Cth) by replacing the term 'reportable assault' with 'reportable incident'.

126. The Law Council shares the ALRC's concerns regarding current processes around reportable assaults, namely, that no investigation is required by an approved provider – reporting the incident and maintaining records is sufficient to meet their legislative obligations.<sup>64</sup>

<sup>62</sup> Law Council of Australia, *Submission on the ALRC Elder Abuse Issues Paper* (17 August 2016), 7.

<sup>63</sup> Australian Law Reform Commission, *Elder Abuse Discussion Paper (DP83)* (December 2016), 205.

<sup>64</sup> *Ibid.*, 203.

127. While the reporting requirements will be broader under the proposed scheme, adding the following types of abuse to the respective categories in Proposal 11-2 could clarify approved providers' obligations with respect to reportable incidents:

- 'Psychological/emotional abuse (including by words or other conduct) theft, seclusion or restraint (including chemical restraint) when used to control or prevent challenging behaviours /or in a way that unduly restricts a person's right to live and move freely';<sup>65</sup>
- 'Serious injury' includes 'serious psychological/emotional injury and physical injury'; and
- Including 'unexplained serious physical or psychological/emotional injury to the care recipient'.

128. The Discussion Paper notes the Commissioner will not have any enforcement powers with respect to oversight and monitoring, but will be able to make recommendations and publicly report on any of its operations.<sup>66</sup>

129. The Law Council recommends Part 7 of the *Accountability Principles 2014* (**the Accountability Principles**)<sup>67</sup> which contains an exemption to reporting 'reportable assaults' be repealed. All reportable incidents should be reported to the Commissioner, which would create greater clarity for approved providers around reporting obligations and assist in recording, and responding to, patterns of behaviour.

**Proposal 11-3** The exemption to reporting provided by s 53 of the *Accountability Principles 2014* (Cth), regarding alleged or suspected assaults committed by a care recipient with a pre-diagnosed cognitive impairment on another care recipient, should be removed.

130. The Law Council supports Proposal 11-3. The ALRC has recommended a higher threshold for resident-on-resident incidents where one party to the incident has a cognitive impairment, acknowledging the policy rationale behind the exemption, while recognising that serious incidents should be reported to foster understanding and better responses.<sup>68</sup>

131. The reporting exemption in section 53 of the *Accountability Principles* should be removed to ensure that all care recipients are safe, and to provide greater transparency and accountability in how approved providers are responding to resident-on-resident incidents and whether such responses are appropriate and effective.

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<sup>65</sup> See response to question 11.7 (below) for circumstances in which restrictive practices in aged care may be justifiable.

<sup>66</sup> *Ibid.*, 210.

<sup>67</sup> Made under s 96-1 of the *Aged Care Act 1997* (Cth).

<sup>68</sup> Australian Law Reform Commission, *Elder Abuse Discussion Paper* (December 2016), 216.

**Proposal 11-4** There should be a national employment screening process for Australian Government funded aged care. The screening process should determine whether a clearance should be granted to work in aged care, based on an assessment of:

- (a) a person's national criminal history;
- (b) relevant reportable incidents under the proposed reportable incidents scheme; and
- (c) relevant disciplinary proceedings or complaints

132. The Law Council supports this proposal - please see the response in relation to Question 11-1 below.

**Proposal 11-5** A national database should be established to record the outcome and status of employment clearances.

133. The Law Council supports this proposal, but notes that such a database must be subject to appropriate privacy protections, such as those contained in the *Aged Care Act 1997 (Cth)*.<sup>69</sup>

**Question 11-1** Where a person is the subject of an adverse finding in respect of a reportable incident, what sort of incident should automatically exclude the person from working in aged care?

134. In answer to Question 11-1, the Law Council's view is that where a person is the subject of an adverse finding in respect of a reportable incident, they should automatically be excluded from working in aged care.

**Question 11-2** How long should an employment clearance remain valid?

135. An employment clearance should remain valid for up to three years, subject to any adverse findings or convictions that occur during this time.

**Question 11-3** Are there further offences which should preclude a person from employment in aged care?

136. Any criminal convictions or adverse findings involving serious physical or sexual abuse should preclude a person from working in aged care, subject to relevant spent convictions legislation. Section 10A.1 (6) of the *Aged Care Act 1997 (Cth)* provides that some spent convictions do not require disclosure or are not to be taken into account when determining whether someone is suitable for employment in aged care.<sup>70</sup>

137. Further, offences which preclude a person from employment in aged care should not be conviction-dependent. Any adverse finding in relation to a reportable incident

<sup>69</sup> See especially *Aged Care Act 1997 (Cth)* s 62-1.

<sup>70</sup> See also: *Crimes Act 1914 (Cth)*.

should be disclosed. The aged care provider can then take this into account when determining whether someone is suitable for employment in aged care.<sup>71</sup>

138. The Law Council recommends that the ALRC consider whether relevant dishonesty offences and illegal substance abuse should also preclude employment in the aged care sector, with relief for spent convictions. However, the scope of spent conviction schemes varies across each Australian jurisdiction,<sup>72</sup> except Victoria, which remains the only state that does not have a spent convictions scheme.<sup>73</sup> The introduction of a nationally consistent scheme to promote nationally coordinated systems, such as Working with Children Checks,<sup>74</sup> which could be referenced in the development of an employment clearances process for persons seeking employment in aged care.

139. While people should not be 'unduly burdened by the stigma of old, less serious criminal convictions',<sup>75</sup> offences which preclude a person from employment in aged care should not be conviction-dependent.<sup>76</sup> Any adverse finding in relation to a reportable incident should be disclosed – the approved provider can then take this into account when determining whether the applicant is suitable for employment in aged care.

140. The Australian Human Rights Commission has developed guiding principles for employers to consider in assessing suitability of applicants with criminal records.<sup>77</sup> These guidelines could be useful to aged care providers in determining whether a disclosed criminal offence should preclude a person from working in aged care.

## Restrictive Practices

**Proposal 11-7** The *Aged Care Act 1997* (Cth) should regulate the use of restrictive practices in residential aged care. The Act should provide that restrictive practices only be used:

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

<sup>71</sup> See, e.g., *Nursing and Midwifery Board of Australia v Welling (now known as Fields)* (Review and Regulation) [2016] VCAT 1156 (13 July 2016) whereby a CEO of an approved provider found guilty of professional misconduct by VCAT, was re-employed at the facility in an administrative capacity.

<sup>72</sup> Law Institute of Victoria, *Introduction of Spent Conviction Legislation in Victoria*, 22 April 2015 <<https://www.liv.asn.au/getattachment/787194f0-0474-4f35-bdfd-259d67f7319e/LIV-Submission-Introduction-of-Spent-Conviction-Le.aspx>>; see also, Law Institute of Victoria, Submission to Victorian Department of Justice, *Discussion Paper*, 5 October 2004 <<https://www.liv.asn.au/For-Lawyers/Sections-Groups-Associations/Practice-Sections/Criminal-Law/Submissions/Uniform-Spent-Conviction-Scheme-Consultation-on-.aspx?rep=1&glist=0&sdiag=0&h2=1&h1=0>>.

<sup>73</sup> The Law Institute of Victoria has previously advocated for a scheme to be enacted in Victoria, see Law Institute of Victoria, *Introduction of Spent Conviction Legislation in Victoria*, (22 April 2015).

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> See, e.g., *Nursing and Midwifery Board of Australia v Welling (now known as Fields)* (Review and Regulation) [2016] VCAT 1156 (13 July 2016) whereby a CEO of an approved provider found guilty of professional misconduct by VCAT, was re-employed at the facility in an administrative capacity.

<sup>77</sup> Australian Human Rights Commission, *On the Record Guidelines* (2012) [Australian Human Rights Commission](http://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/human-rights-record) <<http://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/human-rights-record>>.

141. In relation to Proposal 11-7, the Law Council's view is that the *Aged Care Act 1997*(Cth) should regulate the use of restrictive practices in aged care.
142. Where a person in aged care has a cognitive impairment, the aged care facility must take all reasonable steps to locate the persons' medical treatment decision maker (and equivalent in other states and territories) to obtain consent to that person's treatment, including the administration of prescription pharmaceuticals. Where a medical treatment decision maker (or equivalent) cannot be located, consent should be sought from the public advocate/guardian.
143. The *Aged Care Act 1997*(Cth) should require that a person's medical treatment decision maker (or equivalent) be notified every time restrictive practices are used, including a written record of why restraint was applied and the form of restraint.
144. In relation to Proposal 11-7 (a) above, the word 'physical' should be preceded by 'serious', creating a higher threshold where restrictive practices are sought to be used.
145. In relation to Proposal 11-7(d), the Law Council submits that restrictive practices should not form part of a person's behaviour management plan. Restrictive practices should be used as a last resort where a person's behaviour poses an imminent risk of serious harm to the person, a visitor, an employee of the aged care facility or another care recipient. The restraint mechanism employed should be proportionate to the risk and should only be applied to the extent necessary to prevent the harm.
146. The Law Council previously recommended that the principles and core strategies of the National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Services Sector should form the basis of implementing a national approach to the regulation of restrictive practices in the aged care sector.<sup>78</sup> This position is maintained. Further, consideration must be given to the interaction between the Commonwealth and state and territory based regimes in this area.

## Agreements

**Proposal 11-8** Aged care legislation should provide that agreements entered into between an approved provider and a care recipient cannot require that the care recipient has appointed a decision maker for lifestyle, personal or financial matters.

147. In relation to Proposal 11-8, the Law Council submits that aged care legislation should provide that agreements entered into between an approved provider and a care recipient cannot require the care recipient has an appointed decision maker for lifestyle, personal or financial matters.
148. There should be more robust approvals process around entry to aged care, such as determining the wishes and preferences of older person and considering these wishes and preferences, irrespective of the person's capacity. If the older person does not consent to entry into care, the approved provider must determine their functional and mental capacity through formal assessments and use the least restrictive means.
149. In this situation, if the formal assessment produces evidence of lack of capacity, the facility is entitled to rely on the person's representative, without requiring a formally appointed substitute decision maker.<sup>79</sup> The Law Council emphasises that increased

<sup>78</sup> Law Council of Australia, *Submission on the ALRC Elder Abuse Issues Paper* (17 August 2016), 12.

<sup>79</sup> See *Aged Care Act 1997*(Cth) s 96.5.



education for aged care providers around autonomy, capacity and substitute decision making is required.

### Guidelines and Official Visitors

**Proposal 11-9** The Department of Health (Cth) should develop national guidelines for the community visitors scheme that:

- (a) provide policies and procedures for community visitors to follow if they have concerns about abuse or neglect of care recipients;
- (b) provide policies and procedures for community visitors to refer care recipients to advocacy services or complaints mechanisms where this may assist them; and
- (c) require training of community visitors in these policies and procedures.

150. The Law Council supports the Department of Health developing national guidelines for the community visitors scheme.

**Proposal 11-10** The *Aged Care Act 1997*(Cth) should provide for an 'official visitors' scheme for residential aged care. Official visitors' functions should be to inquire into and report on:

- (a) whether the rights of care recipients are being upheld;
- (b) the adequacy of information provided to care recipients about their rights, including the availability of advocacy services and complaints mechanisms; and
- (c) concerns relating to abuse and neglect of care recipients.

151. The *Aged Care Act 1997*(Cth) should provide for an 'official visitors' scheme for residential aged care as outlined in Proposal 11-10.

**Proposal 11-11** Official visitors should be empowered to:

- (a) enter and inspect a residential aged care service;
- (b) confer alone with residents and staff of a residential aged care service; and
- (c) make complaints or reports about suspected abuse or neglect of care recipients to appropriate persons or entities.

152. The *Aged Care Act 1997*(Cth) should empower official visitors to perform the functions in Proposal 11-11, but the Act should clarify that official visitors cannot compel a care recipient to take part in an interview against their will. Official visitors should be subject to protections and immunities where complaints about suspected abuse are made in good faith.