

Inquiry into Elder Abuse: Discussion Paper

Legal Aid NSW submission
to the Australian Law Reform
Commission

March 2017

Table of Contents

Introduction	4
National plan	4
Powers of investigation	5
<i>Proposal 3-1: power to investigate</i>	5
<i>Proposal 3-2: principles for intervention</i>	6
<i>Proposal 3-3: powers to require information</i>	6
<i>Proposal 3-4: outcomes of an investigation</i>	6
<i>Proposal 3-5: third party disclosures</i>	6
Criminal justice responses	6
Enduring powers of attorney and enduring guardianship	6
<i>Proposal 5-1: a national register</i>	7
<i>Proposal 5-2: mandatory registration, 5-3 transitional arrangements</i>	7
<i>Question 5-1: who may access a national register</i>	8
<i>Question 5-2: random checks on attorneys</i>	8
<i>Proposal 5-4: enhanced witnessing of enduring documents</i>	8
<i>Proposal 5-5: compensation for loss</i>	8
<i>Proposal 5-6: transactions where there is a conflict</i>	9
<i>Proposal 5-7: persons ineligible to be an attorney</i>	9
<i>Proposal 5-8: prohibited decisions</i>	9
<i>Proposal 5-9: record keeping</i>	9
<i>Proposal 5-10: nationally consistent laws</i>	9
<i>Proposal 5-11: renaming enduring instruments ‘Representative Agreements’</i>	9
<i>Proposal 5-12: a model Representatives Agreement</i>	9
<i>Proposal 5-13: representatives should be required to represent the will, preferences and rights of the principal</i>	10
Guardianship and financial administration orders	10
<i>Proposal 6-1: Informing guardians of their responsibilities</i>	10
<i>Proposal 6-2: Guardians and financial administrators should be required to sign an undertaking</i>	11
Banks and superannuation	11
<i>Proposal 7-1: reasonable steps to prevent financial abuse</i>	11
<i>Proposal 7-2: witnessing of authority to operate bank accounts</i>	12
Family agreements	12
<i>Proposal 8-2: jurisdiction to resolve ‘assets for care’ disputes</i>	12
<i>Question 8-1: the definition of family</i>	13
Social Security	13
<i>Proposals 10-1 – 10-4</i>	13

Aged care	14
<i>Proposal 11-4 – 11-5</i>	14
<i>Question 11-1: automatic exclusion from working in aged care</i>	14
<i>Question 11-2: how long should an employment clearance remain valid?</i>	15
<i>Question 11-3: other offences that should bar employment</i>	15
<i>Proposal 11-7: regulation of restrictive practices</i>	15
Other issues.....	15

About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners.

Legal Aid NSW regularly provides services to older people, including those who have experienced or are experiencing elder abuse.

The Legal Aid NSW Civil Law Older Person's Legal Service (**OPS**) provides legal information, advice, assistance, community legal education and representation to older people about their legal rights. Other parts of the Legal Aid NSW Civil Law Division also advise and represent older people who have been victims of elder financial abuse. The OPS supports the whole of Legal Aid NSW to provide effective legal services to older people.

The Legal Aid NSW Veteran's Advocacy Service is a statewide specialist that provides free legal advice, assistance and representation to veterans and their dependents about rights and entitlements under the *Veterans' Entitlements Act 1986*.

The Legal Aid NSW Domestic Violence Unit provides legal information, advice, assistance and representation and social

work support to women who have experienced or are experiencing domestic and family violence, including older women.

In the 2015-2016 financial year, approximately 2.2 per cent of Legal Aid NSW's clients were aged 60 or over.

Legal Aid NSW also funds services provided by non-government organisations to older people who are experiencing or have experienced elder abuse. For example, Legal Aid NSW funds the Seniors Rights Service, a community legal centre that protects the rights of older people. This includes an advice and advocacy service in relation to aged care services.

Legal Aid NSW also funds 28 Women's Domestic Violence Court Advocacy Services (**WDVCASs**), which provide information, advocacy and referral services to women seeking legal protection from domestic and family violence through an Apprehended Domestic Violence Order. Approximately 7 per cent of WDVCAS clients are women aged 60 or over.

Legal Aid NSW welcomes the opportunity to respond to the ALRC Discussion Paper on Elder Abuse. Should you have any questions about the submission, please contact Robyn Gilbert, Law Reform Solicitor, Strategic Planning and Policy on ph: (02) 9213 5207 or e: robyn.gilbert@legalaid.nsw.gov.au

Introduction

Legal Aid NSW welcomes the opportunity to respond to the Australian Law Reform Commission's Discussion Paper on Elder Abuse. We broadly agree with the proposals made regarding:

- a national plan to address elder abuse
- powers to investigate elder abuse
- introducing obligations in the *Code of Banking Practice* requiring financial institutions to protect older customers
- providing a better forum to resolve disputes over family agreements
- requiring Centrelink to take steps to protect older clients, and
- establishing a reportable incidents scheme for aged care providers.

While we share the ALRC's concerns about the abuse of powers of attorney, we consider that some of the proposals made will impose cost and inconvenience on both older people and their attorneys while not having a significant impact on the incidence of elder abuse.

National plan

Legal Aid NSW supports a national plan to address elder abuse. A national plan would help maintain the momentum for reform and encourage a strategic, consistent response to elder abuse across Australian jurisdictions. Such a plan should be properly resourced to ensure meaningful outcomes for older people. It should include access to justice measures, as providing older people with legal information, advice and representation is a critical component of any strategy to prevent and respond to elder abuse.

As noted in our submission to the ALRC Issues Paper, there is a large level of unmet legal need amongst older people,¹ and this is likely to increase in the future given the ageing population.² Publicly funded legal assistance for older people should therefore be incorporated into any national plan to address elder abuse. If increased resources were available, legal assistance providers such as Legal Aid NSW would be able to expand services and better meet the legal needs of older people, including older people experiencing or at risk of elder abuse.

¹ See NSW Law and Justice Foundation, *The Legal Needs of Older People* (2004).

² See for instance Treasury, *2015 Intergenerational Report Australia in 2055* (2015).

Powers of investigation

Proposal 3-1: power to investigate

Legal Aid NSW agrees, in principle, that state and territory public advocates / guardians should have a consent-based power to investigate the abuse and neglect of older people. However we have some concerns about the specifics of the proposal.

Firstly, the power to investigate is subject to three conditions. Determining whether those conditions are satisfied would require the exercise of judgement regarding complex matters, that is, whether there is reasonable cause to suspect that the person

1. has care and support needs, arising from impaired decision-making ability, a physical disability, or due to physical restraint³
2. is at risk of abuse or neglect, and
3. is unable to protect themselves because of their care and support needs (emphasis added).

These three complex preconditions could leave investigators hesitant to use the power. It might be difficult to establish reasonable cause to suspect all of these matters before an investigation commences. For example, it may be unclear, without specialist medical advice, if the person is in fact unable to protect themselves, or if they have chosen not to take steps to protect themselves.

The Discussion Paper indicates that this formula is preferred to a broad power to investigate abuse or neglect where there is reasonable suspicion that an older person is at risk of abuse and neglect, because 'it may impede an older person's right to refuse intervention'.

Another way to resolve this problem might be to give investigators a broad power to investigate where there is a reasonable suspicion that an older person is at risk of abuse and neglect, and also to provide that any investigation must only proceed with the consent of the older person. If the investigating agency has concerns about the person's capacity to consent (or withhold consent) to an investigation, the usual avenues regarding the appointment of a guardian are available. It might also be necessary to provide that if the investigating agency has reasonable grounds to suspect that the person is withholding consent as a result of coercion or intimidation, an investigation could occur without consent.

Second, the power is to investigate "elder abuse", which requires a definition. Legal Aid NSW acknowledges the difficulty of fixing an age limit for the definition of elder abuse, and also acknowledges that the ALRC's terms of reference do not encompass an inquiry into a power to investigate abuse of vulnerable adults more generally.

³ The second half of this condition is in [3.27] but not Proposal 3-1.

Proposal 3-2: principles for intervention

Legal Aid NSW supports these principles for intervention.

Proposal 3-3: powers to require information

Legal Aid NSW supports the proposal to require a person to provide information, produce documents, or participate in an interview relating to the investigation of the abuse or neglect of an older person. The power should be subject to the privilege against self-incrimination, as it is in the *Guardianship and Administration Act 1986* (Vic), the *Public Guardian Act 2014* (Qld), and the *Guardianship of Adults Act* (NT).

Proposal 3-4: outcomes of an investigation

It is not clear whether this list of outcomes is intended to encompass all of the options that are to be available to the advocate or guardian. Reporting to the police is not a listed option. Legal Aid NSW considers that, if the advocate or guardian becomes aware of or suspects criminal activity, particularly ongoing criminal activity, it would be appropriate for the advocate or guardian to make a report to the police.

Proposal 3-5: third party disclosures

Legal Aid NSW agrees that a person who reports elder abuse to the public advocate or public in good faith and based on reasonable suspicion should be protected from any adverse consequences or liability for the disclosure.

Criminal justice responses

Legal Aid NSW agrees that specific offences for the abuse of older persons are unnecessary and would not contribute to the goal of reducing elder abuse. We note that the ALRC considered whether there should be a criminal offence of misusing a power of attorney and concluded that this behaviour is already covered by existing criminal offences. We also note that in New South Wales, it is an offence to act under a terminated power of attorney if the attorney knows of the termination.⁴

Enduring powers of attorney and enduring guardianship

Generally, Legal Aid NSW has concerns about creating further regulatory requirements for the creation or revocation of enduring powers of attorney and enduring guardianship. Adding to the cost and difficulty of making these documents is likely to deter older people from making them, which will be to their disadvantage if they lose capacity. If older people were deterred from making enduring instruments, there would be increased applications

⁴ *Powers of Attorney Act 2003* section 49.

for guardianship and financial management orders in NCAT, placing burdens on both NCAT and the family of the older person.

Proposal 5-1: a national register

Legal Aid NSW is not persuaded that the benefits of a national register exceed the costs. Currently, enduring powers of attorney can be registered at existing land title registers if the attorney is required to deal in real property. Mandatory registration of all enduring documents would add to the cost and complexity of the management of small estates that do not include real property.

Legal Aid NSW does not support a requirement to register court and tribunal orders. Currently it is possible to find out if a person is subject to an order by contacting the Guardianship Division of the NCAT. Orders are regularly amended so a register of orders could quickly become out of date.

Proposal 5-2: mandatory registration, 5-3 transitional arrangements

Legal Aid NSW is not persuaded that a requirement for the registration of enduring documents, and their revocation, would reduce the incidence of elder abuse. As the NSW Legislative Council report noted, a register would 'enable solicitors, banks and others to check the authenticity of an instrument or to track one down'.⁵ A register may have benefits for third parties, as it can give them confidence that they are relying on a current, accurate and authentic enduring power. However we are not aware that the use of forged or revoked documents is a significant contributor to elder abuse.

Ryan, Arnold and Bonython have noted that if the register includes a monitoring function, it may have a role in the prevention of abuse, but:

The question of whether such monitoring leads to a decrease in financial abuse is an empirical one. Some commentators are sceptical that the mere fact of registration has a restraining effect on abuse. Nevertheless, others are more optimistic and presumably much depends on the design and consequences of registration.⁶

Legal Aid NSW notes that a 2009 review of the *Powers of Attorney Act 2003* (NSW) found that the costs outweighed the benefits. We agree with the Law Society of NSW that there is no evidence that a register will reduce the incidence of elder abuse.

⁵ Legislative Council General Purpose Standing Committee No. 2, Parliament of New South Wales *Elder Abuse in New South Wales* (2016) 101.

⁶ Trevor Ryan, Bruce Baer Arnold and Wendy Bonython, 'Protecting the rights of those with dementia through mandatory registration of enduring powers: a comparative analysis' (2015) 36 *Adelaide Law Review* 335, 363.

Question 5-1: who may access a national register

To be useful, a national register should be open to anyone to search, just as anyone can search the current register of Land Property Information. However this would have a significant impact on the privacy of both the principal and the attorney. Presently, principals and attorneys do not have to share this information with the public unless the power extends to dealing with real property.

Question 5-2: random checks on attorneys

Legal Aid NSW does not support the proposal to give public advocates and guardians the power to conduct random checks of attorneys' management of principals' affairs. Undertaking such checks would be costly and it is not clear that it would reduce elder abuse by attorneys. It may discourage private individuals from acting as attorneys. It would also infringe upon the privacy of the principal. We would prefer that such checks only be carried out under the investigation powers proposed in Proposal 3.1.

Proposal 5-4: enhanced witnessing of enduring documents

Legal Aid NSW does not support the proposed requirement for enduring documents to be witnessed by two independent witnesses with certain qualifications.

In New South Wales, enduring powers of attorney must be witnessed by a solicitor or barrister, a registrar of a NSW Local Court, a licensed conveyancer who has completed an approved course under the Powers of Attorney Act, or an employee of NSW Trustee & Guardian or a Private Trustee company who has completed an approved course under the Powers of Attorney Act. The witness must confirm that the witness explained the effect of the power of attorney and was satisfied that the principal understood that effect.

Legal Aid NSW considers that the New South Wales approach sufficiently protects the donor. That is, one qualified witness is sufficient to explain the effect of the instrument and be satisfied that the principal understands it. The proposed requirement for two witnesses would create significant inconvenience for principals and discourage the making of these important documents.

Proposal 5-5: compensation for loss

Legal Aid NSW supports the proposal to allow states and tribunals to order compensation for loss caused by the failure of an attorney, guardian or financial administrator to comply with their obligations. An action in equity in the Supreme Court is not a realistic option for most people, and extending the jurisdiction of the NCAT could provide a more accessible form of redress.

Proposal 5-6: transactions where there is a conflict

Legal Aid NSW agrees that laws should prohibit attorneys from entering into transactions where there is a conflict of interest. The proposal appears to codify current obligations on attorneys.

Proposal 5-7: persons ineligible to be an attorney

Legal Aid NSW supports this proposal. However it is unclear how it is proposed to enforce this prohibition. It might be useful for the prescribed form or the associated fact sheet to indicate that certain people are ineligible to be enduring attorneys. However should a principal appoint an ineligible person as their attorney, the transactions made should still be valid (unless otherwise tainted).

Proposal 5-8: prohibited decisions

Legal Aid NSW is not aware of concerns about enduring attorneys or enduring guardians purporting to make or revoke a will, vote, adopt, and so on, on behalf of a principal. However it may be useful to list the prohibited decisions in legislation. To be effective, the list of prohibited actions should also be provided to the attorney upon the making of the instrument.

Proposal 5-9: record keeping

Legal Aid NSW supports the proposal to require enduring attorneys and guardians to keep records and keep their own property separate from that of the principal.

Proposal 5-10: nationally consistent laws

Legal Aid NSW considers that nationally consistent laws regarding enduring powers of attorney and enduring guardianship would assist with enforcement and transferability across borders.

Proposal 5-11: renaming enduring instruments 'Representative Agreements'

Legal Aid NSW does not have a strong view regarding the terms that should be used for the attorney or the enduring instrument. However, we acknowledge that the term 'representative agreement' may be more readily be understood by lay people in the community.

Proposal 5-12: a model Representatives Agreement

Legal Aid NSW does not have a strong view as to whether a model Representatives Agreement should be developed. However, we acknowledge that a model agreement could help bring more clarity and accessibility to this area.

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

Legal Aid NSW supports a move away from the outdated ‘best interests’ model of substituted decision making. The New South Wales Law Reform Commission is currently inquiring into the *Guardianship Act*. As part of this inquiry, the Commission is considering whether the ‘best interests’ model should be replaced with a model more in keeping with Australia’s international obligations under the United Nations Convention on the Rights of Persons with Disabilities. This Convention calls upon parties to “ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person”.⁷

In our submission to that Inquiry, we said that:

“... we have some concerns with an approach which requires a substitute decision-maker to give effect to a person’s will and preferences. While a person’s will and preferences should be of central importance to substituted decision-making, there is some tension between this principle and the reality that guardians and financial managers are acting on behalf of people who have been found not to have the capacity to make or communicate their decisions. The person may be unable to understand the available options, to assess the merits of the options, or to remember having already made a choice. On balance, Legal Aid NSW therefore prefers the substituted judgment approach, which calls for the decision maker to make the decision that the person would make in the circumstances, if they had decision-making capacity.

We consider that this approach should also apply to decision making pursuant to enduring instruments—that is, attorneys, or representatives, should make the decision that the person would make in the circumstances, if they had decision-making capacity. This would require the attorney to consider both the wishes expressed by the person when they had capacity, and also the preferences expressed by the person after losing capacity.

Guardianship and financial administration orders

Proposal 6-1: Informing guardians of their responsibilities

Legal Aid NSW supports the proposal that non-professional guardians and administrators should be informed of the scope of their responsibilities. We note the concerns raised in the Discussion Paper concerning the impracticality of mandatory training, and agree that a tribunal should be able to order training if it considers a person to be in need.

⁷ United Nations Convention on the Rights of Persons with Disabilities article 12.

Proposal 6-2: Guardians and financial administrators should be required to sign an undertaking

Legal Aid NSW supports this proposal.

Banks and superannuation

Proposal 7-1: reasonable steps to prevent financial abuse

Legal Aid NSW supports including an obligation to protect older customers in the *Code of Banking Practice*. However a requirement to take 'reasonable steps' may not be the most appropriate way to frame the obligation. We suggest that code members be obliged to take all steps that are 'reasonably practicable' to prevent the financial abuse of customers. The 'reasonably practicable' requirement is from work safety legislation.⁸ We consider that the position of employers, who control the working environment of their employees and who are in a position of trust, is analogous to the position of banks, who are entrusted with the money of their customers and have a duty to keep it safe.

In our previous submission to this Inquiry, we proposed that certain measures should be taken by banks to prevent financial abuse.⁹ Failure to take these measures should be considered a failure to take reasonably practicable steps to prevent abuse:

- Banks should be alert to any transactions on an older person's account that involve large amounts of money being withdrawn or transferred, and should contact the older person by phone to confirm that they have authorised these transactions.
- Banks should contact older people to confirm any written authorities they purport to have given to another person to transact on their accounts.
- In situations where an older person comes in with a relative or friend apparently for the purpose of transferring funds to that person, bank staff should ensure that they speak to the older person alone. If the older person does not speak English, the staff should not rely on the relative or friend to translate for them.
- Banks should train their staff to recognise possible instances of elder financial abuse and to take appropriate steps to alert the older person.¹⁰

Other reasonably practicable measures that banks should take include:

⁸ Work Health and Safety Act 2011 section 19.

⁹ Legal Aid NSW *Submission to ALRC Inquiry into Elder Abuse Issues Paper 47* June 2016, 14.

¹⁰ See further Legal Aid NSW submission to the ALRC Inquiry into Elder Abuse Issues Paper 47 June 2016.

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- obtaining written notice from a guarantor as to whether they have obtained independent legal and/or financial advice, or have waived their right to obtain that advice
 - disclosing to customers that acting as a guarantor can affect their Centrelink income.¹¹

The *Code* should also include obligations regarding actions to be taken if financial abuse is identified, including requirements to:

- provide specific financial hardship training to staff
- identify and refer customers to the financial hardship department of the bank as well as to an independent financial counsellor
- place posters and brochures about financial hardship in branches
- include information about financial hardship relief in statements of accounts and bills, and
- immediately assess a hardship application where there is a claim of family violence or elder abuse.¹²

Proposal 7-2: witnessing of authority to operate bank accounts

Legal Aid NSW supports, in principle, more stringent requirements for Authority to Operate arrangements. However we are not persuaded that two witnesses, one of whom should be a member of a prescribed prescription, and a declaration by the customer, is the correct level of protection. It could create excessive barriers for older people needing assistance with their banking, but not wishing to create a power of attorney. Legal Aid NSW recommends further consultation to ensure that the benefits of this proposal exceed the costs.

Family agreements

Proposal 8-2: jurisdiction to resolve ‘assets for care’ disputes

Legal Aid NSW supports this proposal. However the jurisdiction of state and territory tribunals should not be limited to ‘assets for care’ arrangements, but should extend to disputes where residential property or other assets have been transferred on the basis that the transferor will be able to live in property owned by the transferee. Some family agreements do not encompass a care component, but the older person transfers assets

¹¹ See further Legal Aid NSW submission to the Australian Bankers’ Association *Code Compliance Monitoring Committee Independent Review*.

¹² See further Legal Aid NSW submission to the Australian Bankers’ Association *Code Compliance Monitoring Committee Independent Review*.

in exchange for the promise of a home for life. If the agreement is not honoured, they find themselves homeless and without assets.

Question 8-1: the definition of family

Family should be defined broadly. It should include, for instance, include any relative of the older person, such as nieces, nephews and grandchildren, as well as relatives by marriage or de facto relationships, such as sons and daughters-in-law.

Social Security

Proposals 10-1 – 10-4

Legal Aid NSW supports these proposals. We particularly endorse the direct contact principle in Proposal 10-2 as we consider that speaking directly with older people is a valuable tool in preventing elder abuse.

We note that the ALRC has proposed that the Department of Human Services should develop an elder abuse strategy. We support this proposal and note that the strategy should address the following matters (as suggested in our submission to the Issues Paper):

- If Centrelink becomes aware that an aged pensioner has transferred an interest in their home for little or no value, this could be a red flag for possible elder financial abuse. In these circumstances, Centrelink should not immediately suspend or cancel payments on the assumption it is a deprived asset. Instead, a Centrelink social worker could follow up with the aged pensioner to clarify what has happened and make a preliminary assessment of the person's capacity and whether the transfer was made knowingly.
- If Centrelink makes a decision to cease or reduce an older person's pension on the basis of the gifting rules, Centrelink should let the person know that she or he can get advice from Legal Aid NSW or a community legal centre.
- Where a gift is determined to be a loan, Centrelink should not require litigation to be commenced to recover the loan if litigation is not affordable or would be futile because the creditor does not have assets that would be able to satisfy any order.
- The assurance of support scheme should be changed so that if an older person is brought to Australia and their relationship with their adult children breaks down, they can receive income support without placing them at further risk of abuse.

Aged care

Proposals 11-1 – 11-3, a reportable incidents scheme

Legal Aid NSW supports the introduction of a reportable incidents scheme, and supports these proposals in principle. However clarity is needed regarding the proposed powers and functions of the Aged Care Commissioner—in particular, whether the ACC is empowered to conduct its own investigations into incidents, and make findings against approved providers and/or their employees. If the ACC were to have such powers, consideration would need to be given as to requirements of procedural fairness and a mechanism for review of the Commissioner’s decisions.

Proposal 11-4 – 11-5

Legal Aid NSW supports these proposals. We note that the Discussion Paper proposed an approach similar to the Working with Children Check.¹³ We consider that model to be preferable to the scheme in the *Disability Inclusion Act 2014* (NSW), which prohibits services from employing people who have been convicted of certain offences. There is no discretion and no procedure for review under the NSW disability employment screening scheme. These restrictions can lead to the unfair and perhaps unintended outcome of prohibiting people who do not pose a risk from working directly with people with disabilities. For example, the *Disability Inclusion Act 2014* would prohibit a person with a historical conviction of carnal knowledge in circumstances of a consensual relationship between young people, from working directly with people with disabilities, without any avenue for review. The Working with Children model prohibits people with certain convictions from employment with children, but there is also a process of risk assessment and review (in NSW, by the NSW Civil and Administrative Tribunal).

Question 11-1: automatic exclusion from working in aged care

Legal Aid NSW would be comfortable maintaining the current automatic exclusions from working in aged care: convictions for murder, sexual assault, or assault where the sentence included a term of imprisonment. Other adverse findings should trigger a risk assessment. This would mirror the Working with Children scheme in New South Wales which provides that convictions for child sex offences result in automatic disqualification. Other adverse findings result in a risk assessment, where matters such as the seriousness of the conduct, the time since it occurred and the likelihood of it being repeated, are taken into account.¹⁴ Legal Aid NSW considers that this is a suitable model for the aged care employment screening process.

¹³ Discussion Paper [11.165].

¹⁴ Office of the Children’s Guardian *Risk assessment* <https://www.kidsguardian.nsw.gov.au/child-safe-organisations/working-with-children-check/about-the-check/what-gets-checked-/risk-assessment>

Question 11-2: how long should an employment clearance remain valid?

The Working with Children Check clearance is valid for five years. We think this is a suitable period.

Question 11-3: other offences that should bar employment

See Question 11-1, other offences should be considered as part of a risk assessment.

Proposal 11-7: regulation of restrictive practices

Legal Aid NSW agrees that restrictive practices should only be used when necessary, and to the extent necessary, to prevent physical harm, with the approval of an independent decision maker, and as prescribed in a person's behaviour management plan.

Other issues

Legal Aid NSW agrees that multi-disciplinary approaches, particularly health-justice partnerships (HJPs), are an effective response to elder abuse. HJPs are a growing movement in Australia, with the number and diversity of partnerships increasing rapidly. Legal Aid NSW acknowledges the significance of the establishment of Health Justice Australia in 2016. Health Justice Australia aims to be an advocate and centre of excellence for all partnerships which aim to improve health outcomes and access to justice.

Legal Aid NSW notes that HJPs do not necessarily rely on pro bono legal services, as suggested in the Discussion Paper, but may also use solicitors employed in the legal assistance sector. Legal Aid NSW currently has solicitors delivering regular clinics in health settings at:

- Budyari Aboriginal Health Centre (Miller) – in partnership with South West Sydney Legal Centre
- HealthOne (Sutherland)
- Bungee Bidgel Aboriginal Health Clinic (Hornsby)
- Blacktown Hospital and Blacktown Drug Health Service
- Sydney Children's Hospital (Randwick)
- William Booth House (drug and alcohol recovery centre, Surry Hills)
- Browne St Community Mental Health Centre (Campbelltown)
- High St Youth Health Centre (Harris Park)
- Headspace (Bathurst) – in partnership with Elizabeth Evatt Community Legal Centre

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- Mental Health Unit (Central Coast Local Health District) – in partnership with Central Coast Community Legal Centre
 - Aboriginal Medical Services (Mt Druitt, Collarenebri, Forster, Kempsey, Bourke, Brewarrina, Condoblin, Murrin Bridge, Lake Cargelligo, and Coraki)

Legal Aid NSW also delivers regular clinics at housing estates including Redlink (Redfern) and Greenway (North Sydney) in collaboration with FACS-Housing and healthcare providers.

Part of Legal Aid NSW's HJP work involves training health staff to identify legal issues and supporting them to screen patients for legal issues by providing them with the "Law Check-Up" tool.

Legal Aid NSW is currently scoping a partnership project with the Aged Care Assessment Team to improve identification of legal issues, including elder abuse, and referral to legal assistance.

HJPs are an innovative and effective means of identifying addressing elder abuse, which should be supported by governments.