

Proposals and Questions

2. 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.

3. Powers of Investigation

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.

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.

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.

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.

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.

5. Enduring Powers of Attorney and Enduring Guardianship

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.

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.

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.

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

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

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.

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.

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.

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’.

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

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

6. Guardianship and Financial Administration Orders

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?

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

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

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?

7. 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.

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.

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?

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?

8. Family Agreements

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

Question 8–1 How should ‘family’ be defined for the purposes ‘assets for care’ matters?

9. Wills

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.

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.

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.

10. Social Security

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.

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.

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.

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

11. Aged care

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.

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.

With respect to home care or flexible care, 'reportable incident' should mean a sexual offence, sexual misconduct, assault, fraud/financial abuse, ill-treatment or neglect committed by a staff member on or toward a care recipient.

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.

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.

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

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?

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

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

Proposal 11-6 Unregistered aged care workers who provide direct care should be subject to the planned National Code of Conduct for Health Care Workers.

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.

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.

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.

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.

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.