

Recommendations

3. A National Plan to Combat Elder Abuse

Recommendation 3–1 The Australian Government, in cooperation with state and territory governments, should develop a National Plan to combat elder abuse. The Plan should:

- (a) establish a national policy framework;
- (b) outline strategies and actions by government and the community;
- (c) set priorities for the implementation of agreed actions; and
- (d) provide for further research and evaluation.

Recommendation 3–2 The National Plan to combat elder abuse should be led by a steering committee under the imprimatur of the Law, Crime and Community Safety Council of the Council of Australian Governments.

Recommendation 3–3 The National Plan to combat elder abuse should identify goals, including:

- (a) promoting the autonomy and agency of older people;
- (b) addressing ageism and promoting community understanding of elder abuse;
- (c) achieving national consistency;
- (d) safeguarding at-risk adults and improving responses; and
- (e) building the evidence base.

Recommendation 3–4 The National Plan should take into account the different experiences and needs of older persons with respect to:

- (a) gender;
- (b) sexual orientation;
- (c) disability; and
- (d) cultural and linguistic diversity.

The Plan should also take into account the experiences and needs of:

- (a) older Aboriginal and Torres Strait Islander people; and
- (b) older people living in rural and remote communities.

Recommendation 3–5 There should be a national prevalence study of elder abuse to build the evidence base to inform policy responses.

4. Aged Care

Recommendation 4–1 Aged care legislation should provide for a new serious incident response scheme for aged care. The scheme should require approved providers to notify to an independent oversight body:

- (a) an allegation or a suspicion on reasonable grounds of a serious incident; and
- (b) the outcome of an investigation into a serious incident, including findings and action taken.

This scheme should replace the current responsibilities in relation to reportable assaults in s 63-1AA of the *Aged Care Act 1997* (Cth).

Recommendation 4–2 The independent oversight body should monitor and oversee the approved provider’s investigation of, and response to, serious incidents, and be empowered to conduct investigations of such incidents.

Recommendation 4–3 In residential care, a ‘serious incident’ should mean, when committed against a care recipient:

- (a) physical, sexual or financial abuse;
- (b) seriously inappropriate, improper, inhumane or cruel treatment;
- (c) unexplained serious injury;
- (d) neglect;

unless committed by another care recipient, in which case it should mean:

- (e) sexual abuse;
- (f) physical abuse causing serious injury; or
- (g) an incident that is part of a pattern of abuse.

Recommendation 4–4 In home care or flexible care, ‘serious incident’ should mean physical, sexual or financial abuse committed by a staff member against a care recipient.

Recommendation 4–5 An act or omission that, in all the circumstances, causes harm that is trivial or negligible should not be considered a ‘serious incident’.

Recommendation 4–6 The serious incident response scheme should:

- (a) define ‘staff member’ consistently with the definition in s 63-1AA(9) of the *Aged Care Act 1997* (Cth);
- (b) require the approved provider to take reasonable measures to require staff members to report serious incidents;
- (c) require the approved provider to ensure staff members are not victimised;
- (d) protect informants’ identities;

- (e) not exempt serious incidents committed by a care recipient with a pre-diagnosed cognitive impairment against another care recipient; and
- (f) authorise disclosure of personal information to police.

Recommendation 4–7 The Department of Health (Cth) should commission an independent evaluation of research on optimal staffing models and levels in aged care. The results of this evaluation should be made public and used to assess the adequacy of staffing in residential aged care against legislative standards.

Recommendation 4–8 Unregistered aged care workers who provide direct care should be subject to the planned National Code of Conduct for Health Care Workers.

Recommendation 4–9 There should be a national employment screening process for Commonwealth-regulated aged care. The screening process should determine whether a clearance should be granted to a person to work in aged care, based on an assessment of:

- (a) a person’s criminal history;
- (b) relevant incidents under the recommended serious incident response scheme; and
- (c) relevant disciplinary proceedings or complaints.

Recommendation 4–10 Aged care legislation should regulate the use of restrictive practices in residential aged care. Any restrictive practice should be the least restrictive and used only:

- (a) as a last resort, after alternative strategies have been considered, to prevent serious physical harm;
- (b) to the extent necessary and proportionate to the risk of harm;
- (c) with the approval of a person authorised by statute to make this decision;
- (d) as prescribed by a person’s behaviour support plan; and
- (e) when subject to regular review.

Recommendation 4–11 The Australian Government should consider further safeguards in relation to the use of restrictive practices in residential aged care, including:

- (a) establishing an independent Senior Practitioner for aged care, to provide expert leadership on and oversight of the use of restrictive practices;
- (b) requiring aged care providers to record and report the use of restrictive practices in residential aged care; and
- (c) consistently regulating the use of restrictive practices in aged care and the National Disability Insurance Scheme.

Recommendation 4–12 The Australian Government should further consider Recommendation 6–2 of ALRC Report No 124 *Equality, Capacity and Disability in Commonwealth Laws*, that aged care laws and legal frameworks should be amended consistently with the National Decision-Making Principles set out in that Report.

Recommendation 4–13 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.

Recommendation 4–14 The Department of Health (Cth) should develop national guidelines for the community visitors scheme. The guidelines should include policies and procedures for visitors to follow if they have concerns about abuse or neglect of care recipients.

5. Enduring Appointments

Recommendation 5–1 Safeguards against the misuse of an enduring document in state and territory legislation should:

- (a) recognise the ability of the principal to create enduring documents that give full powers, powers that are limited or restricted, and powers that are subject to conditions or circumstances;
- (b) require the appointed decision maker to support and represent the will, preferences and rights of the principal;
- (c) enhance witnessing requirements;
- (d) restrict conflict transactions;
- (e) restrict who may be an attorney;
- (f) set out in simple terms the types of decisions that are outside the power of a person acting under an enduring document; and
- (g) mandate basic requirements for record keeping.

Recommendation 5–2 State and territory civil and administrative tribunals should have:

- (a) jurisdiction in relation to any cause of action, or claim for equitable relief, that is available against a substitute decision maker in the Supreme Court for abuse, or misuse of power, or failure to perform their duties; and
- (b) the power to order any remedy available to the Supreme Court.

Recommendation 5–3 A national online register of enduring documents, and court and tribunal appointments of guardians and financial administrators, should be established after:

- (a) agreement on nationally consistent laws governing:
 - (i) enduring powers of attorney (including financial, medical and personal);

- (ii) enduring guardianship; and
 - (iii) other personally appointed substitute decision makers; and
- (b) the development of a national model enduring document.

6. Family Agreements

Recommendation 6–1 State and territory tribunals should have jurisdiction to resolve family disputes involving residential property under an ‘assets for care’ arrangement.

Recommendation 6–2 The *Social Security Act 1991* (Cth) should be amended to require that a ‘granny flat interest’ is expressed in writing for the purposes of calculating entitlement to the Age Pension.

7. Superannuation

Recommendation 7–1 The structure and drafting of the provisions relating to death benefit nominations in ss 58 and 59 of the *Superannuation Industry (Supervision) Act 1993* (Cth) and reg 6.17A of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) should be reviewed. The review should consider:

- (a) witnessing requirements for making, amending and revoking nominations;
- (b) the authority of a person who holds an enduring power of attorney in relation to the making, alteration and revocation of a nomination;
- (c) whether a procedure for the approval of a nomination on behalf of a member should be introduced; and
- (d) the extent to which other aspects of wills law may be relevant.

Recommendation 7–2 The *Superannuation Industry (Supervision) Act 1993* (Cth) should be amended to include ‘replaceable rules’ for self-managed superannuation funds which provide a mechanism for an enduring attorney to become a trustee/director where this was provided for in the enduring document and notwithstanding the terms of the trust deed and constitution of the corporate trustee or the actions of the other trustees/directors.

Recommendation 7–3 The relevant operating standards for self-managed superannuation funds in cl 4.09 of the *Superannuation Industry (Supervision) Regulations 1994* (Cth), should be amended to add an additional standard that would require the trustee to consider the suitability of the investment plan where an individual trustee or director of the corporate trustee becomes ‘under a legal disability’.

Recommendation 7–4 Section 104A of the *Superannuation Industry (Supervision) Act 1993* (Cth) and the accompanying Australian Taxation Office Trustee Declaration form should be amended to require an individual to notify the Australian Taxation Office when they become a trustee (or director of a company which acts as trustee) of a self-managed superannuation fund as a consequence of being an attorney under an enduring document.

8. Wills

Recommendation 8–1 The Law Council of Australia, together with state and territory law societies, should develop national best practice guidelines for legal practitioners in relation to the preparation and execution of wills and other advance planning documents to ensure they provide thorough coverage of matters such as:

- (a) elder abuse in probate matters;
- (b) common risk factors associated with undue influence;
- (c) the importance of taking detailed instructions from the person alone;
- (d) the need to keep detailed file notes and make inquiries regarding previous wills and advance planning documents; and
- (e) the importance of ensuring that the person has ‘testamentary capacity’—understanding the nature of the document and knowing and approving of its contents, particularly in circumstances where an unrelated person benefits.

9. Banking

Recommendation 9–1 The *Code of Banking Practice* should provide that banks will take reasonable steps to prevent the financial abuse of vulnerable customers, in accordance with the industry guideline, *Protecting Vulnerable Customers from Potential Financial Abuse*.

The guideline should set out examples of such reasonable steps, including in relation to:

- (a) training staff to detect and appropriately respond to abuse;
- (b) using software and other means to identify suspicious transactions;
- (c) reporting abuse to the relevant authorities, when appropriate;
- (d) guaranteeing mortgages and other loans; and
- (e) measures to check that ‘Authority to Operate’ forms are not obtained fraudulently and that customers understand the risks of these arrangements.

10. Guardianship and Financial Administration

Recommendation 10–1 Newly-appointed private guardians and private financial administrators should be required to sign an undertaking with respect to their responsibilities and obligations.

Recommendation 10–2 The Australian Guardianship and Administration Council should develop best practice guidelines on how state and territory tribunals can support a person who is the subject of an application for guardianship or financial administration to participate in the determination process as far as possible.

12. Social Security

Recommendation 12–1 The Department of Human Services (Cth) should develop an elder abuse strategy.

Recommendation 12–2 Payments to nominees should be held separately from the nominee’s own funds in a dedicated account nominated and maintained by the nominee.

Recommendation 12–3 Centrelink staff should speak directly with persons of Age Pension age who are entering into arrangements with others that concern social security payments.

14. Safeguarding Adults at Risk

Recommendation 14–1 Adult safeguarding laws should be enacted in each state and territory. These laws should give adult safeguarding agencies the role of safeguarding and supporting ‘at-risk adults’.

Recommendation 14–2 Adult safeguarding agencies should have a statutory duty to make inquiries where they have reasonable grounds to suspect that a person is an ‘at-risk adult’. The first step of an inquiry should be to contact the at-risk adult.

Recommendation 14–3 Adult safeguarding laws should define ‘at-risk adults’ to mean people aged 18 years and over who:

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

Recommendation 14–4 Adult safeguarding laws should provide that the consent of an at-risk adult must be secured before safeguarding agencies investigate, or take any other action, in relation to the abuse or neglect of the adult. However, consent should not be required:

- (a) in serious cases of physical abuse, sexual abuse, or neglect; or
- (b) if the safeguarding agency cannot contact the adult, despite extensive efforts to do so; or
- (c) if the adult lacks the legal capacity to give consent, in the circumstances.

Recommendation 14–5 Adult safeguarding laws should provide that, where a safeguarding agency has reasonable grounds to conclude that a person is an at-risk adult, the agency may take the following actions, with the adult’s consent:

- (a) coordinate legal, medical and other services for the adult;
- (b) meet with relevant government agencies and other bodies and professionals to prepare a plan to stop the abuse and support the adult;

- (c) report the abuse to the police;
- (d) apply for a court order in relation to the person thought to be committing the abuse (for example, a violence intervention order); or
- (e) decide to take no further action.

Recommendation 14–6 Adult safeguarding laws should provide adult safeguarding agencies with necessary coercive information-gathering powers, such as the power to require a person to answer questions and produce documents. Agencies should only be able to exercise such powers where they have reasonable grounds to suspect that there is ‘serious abuse’ of an at-risk adult, and only to the extent that it is necessary to safeguard and support the at-risk adult.

Recommendation 14–7 Adult safeguarding laws should provide that any person who, in good faith, reports abuse to an adult safeguarding agency 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.

Recommendation 14–8 Adult safeguarding agencies should work with relevant professional bodies to develop protocols for when prescribed professionals, such as medical practitioners, should refer the abuse of at-risk adults to adult safeguarding agencies.