

Advocare Incorporated
Response to the
Australian Law Reform Commission's
Elder Abuse Discussion Paper 83



Advocare Incorporated

Advocare is an independent, community based, not for profit organisation that supports and protects the rights of older people and people with disabilities in Western Australia through advocacy, information and education. A key client group is older people who are victims, or potential victims, of abuse from family and friends.

Advocare is the lead agency in Western Australia lobbying against elder abuse. In collaboration with government agencies – including Legal Aid (WA), the Office of the Public Advocate and the Public Trustee – Advocare has developed an Elder Abuse Protocol to assist organisations working with older people to respond to elder abuse.

Advocare also collates the National Elder Abuse Annual Report on behalf of elder abuse agencies from around Australia*#. In the 2015/2016 report, participating agencies reported that 6,903 clients were assisted, 1,064 who identified as having additional needs (culturally and linguistically diverse, rural and remote, people with a disability, Aboriginal and Torres Strait Islander people, care leavers, and LGBTI).

The perpetrators of elder abuse are most likely to be adult children (60%) with the most prevalent forms of abuse being financial (38%) and psychological (36%).

Financial abuse includes non-repayments of home loans; forced changes to legal documents; misappropriation of money; denying access to personal funds; forging signatures; misuse of a bank card; and, misuse of an Enduring Power of Attorney.

Psychological abuse included verbal intimidation, humiliation, harassment, shouting; threats of various forms; withholding affection; removal of decision making power, and, an enduring guardian acting inappropriately.

In addition to individual advocacy, support and information, the agencies also delivered 1,579 education and information sessions to 39,252 attendees.

Greg Mahney, CEO
Advocare Incorporated
www.advocare.org.au
rights@advocare.org.au
(08) 9479 7566

** Participating agencies: ACT Office for Women, ACT Disability, Aged and Carer Advocacy Service, NSW Elder Abuse Helpline and Resource Unit, CatholicCare NT – Aged Care Advocacy, Darwin Community Legal Service- Aged and Disability, Elder Abuse Prevention Unit (Queensland), Caxton Legal Centre Inc, Aged Rights Advocacy Service Adelaide, Advocacy Tasmania, Council on the Ageing (Tasmania), Eastern Communities Legal Centre, Seniors Rights Victoria, Elder Rights Advocacy, Justice Connect: Seniors Law, the Older People's Rights Service (WA) and Advocare Incorporated.*

Note that the National Elder Abuse Annual Report does not include statistics relating to people being abused by a person other than a family member or close friend.

Proposal 2-1

A National Plan to address elder abuse should be developed.

Yes.

Proposal 2-2

A national prevalence study of elder abuse should be commissioned.

Yes.

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.

The issue of capacity is paramount. At all times, an individual who has capacity should have the right to choose.

Vesting the public advocate or public guardian with these powers is a significant departure from their current roles. It would take them from an agency that deals almost exclusively with clients with reduced decision-making ability to an agency that needs to be able to deal with almost any older person with any type of complaint. Advocare does not recommend this course of action.

If it were to proceed, the public advocate would need to be supported through appropriate training and, we stress, considerably increased resources to carry out these powers in an effective manner.

Such a change would require considerable thought and nuanced implementation.

For the purpose of answering the remaining questions on this topic, from this point forward Advocare will answer as if it agrees to the proposal.

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.

Yes.

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.

Advocare agrees that such powers should be invested with a body, however we caution that older vulnerable people are at a very real risk of retribution from perpetrators. Risk assessments will become 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.

Referrals to well-resourced elder abuse agencies will often provide the necessary support.

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.

Yes, and such protections should be extended to elder abuse agencies. This could be particularly useful in getting care workers in aged care to report bad practice in homes and care services.

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.

Advocare agrees that the introduction of a national online register would be a significant step forward, and it is vital that it be properly resourced. As mentioned in our original submission, we believe that this is just one step to find solutions for very complicated problems. Issues would remain with things like version control, auditing and people who have difficulty accessing the registration process, particularly through frailty, people with language difficulties, or because their abusers are restricting their access.

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.

No. The registration body should be responsible for confirming the validity of the enduring document. There should be scope for allowing a previously registered enduring document to be resurrected if it is found that the most recent registered enduring document was invalid (ie by reason of donor's incapacity as at execution).

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.

Yes. Unfortunately the prescribed period may be for the rest of the donee's life. Older frail people may not see the benefit of following government red tape when they have already made their EPA or EPG.

Question 5–1

Who should be permitted to search the national online register without restriction?

Lawyers, law enforcement, financial institutions, health professionals, elder abuse advocates. It will be essential to maintain audit trails of who has access to the register and when. It may be prudent to also require people to record their reasons for accessing a particular record.

Question 5–2

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

Yes.

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.

Yes.

Yes, Advocare agrees with the three certifying principles.

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.

Yes.

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.

Yes.

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.

At first glance the intent behind this proposal appears sound, however by attaching such limitations, it may have the unintended consequence of deterring an older person from appointing an attorney. As an example, an older person may have an only child whom they trust, but the child may have been convicted of an offence many years previously.

If an individual has capacity, it should be their choice as to whom they appoint as their enduring attorney.

There may be merit in attaching a disclosure requirement for people who meet any of the aforementioned conditions.

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.

Yes to (a)-(f). Advocare would also add (g) swearing statutory declarations in name of the principal.

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.

To a certain degree Advocare agrees, however if the record keeping process is too onerous – such as that required for Private Administrators – it will work against the person requiring the enduring documents by dissuading people from becoming an attorney. We agree that property should be kept separate.

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.

Yes.

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’.

Yes.

Proposal 5–12

A model Representatives Agreement should be developed to facilitate the making of these arrangements.

Yes.

Proposal 5–13

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

Yes.

Proposal 6–1

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

Yes.

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?

Advocare recommends that information should be able to be accessed on a website, available in a multilingual, accessible hard copy guide and free training should be provided on request.

Proposal 6–2

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

Yes.

Question 6–2

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

None.

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?

Well-resourced elder abuse advocacy agencies could assist in maximising the participation of older people in these processes.

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.

Yes.

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.

Yes, as long as it does not give the bank a way to blame others – the bank still needs to have a duty of care. Those able to witness should be provided with adequate training in recognising financial elder 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?

No.

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?

As long the person has capacity, it is their choice.

Proposal 8–1

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

Yes.

Question 8–1

How should ‘family’ be defined for the purposes ‘assets for care’ matters?

It should be left to the individual to define their family unit and familial relationships.

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.

Yes.

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.

Yes.

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.

Yes.

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.

Yes.

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.

Yes.

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.

Yes.

Proposal 10-4

Centrelink staff should be trained further to identify and respond to elder abuse.

Yes.

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.

Yes.

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.

There should be separate definitions for "assault" and "incident" so that the impact of an assault is not lessened.

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.

Yes.

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.

Yes.

Proposal 11-5

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

Yes.

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?

Fraud, assault, sexual offences, stealing, serious drug offences, murder/manslaughter.

Question 11-2

How long should an employment clearance remain valid?

12 months.

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.

Yes.

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.

This is an area ripe for additional training for residential aged care staff.

As a human rights organisation, Advocare believes in the rights of an older person to participate in the decision making process in regard to restrictive practices, where at all practicable.

There should be regular reviews of any measures being used.

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.

Yes.

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.

Yes.

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.

Yes.

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.

Yes.

Concluding Remarks

Advocare Incorporated sincerely thanks the ALRC for taking the time to visit Western Australia to engage with stakeholders as part of its consultation process.

We have also welcomed the opportunity to submit our response to Discussion Paper 83. The paper has focused a much-needed spotlight on elder abuse issues in Australia, and provides many practical proposals to redress concerns and promote the safety of older people.

Advocare notes with concern, however, that the discussion paper does not recognise that HACC in Western Australia provides the funding for the elder abuse advocacy service. In the coming year, HACC will be subsumed under the new NACAP program, which will not have elder abuse as a component. We are therefore concerned that there needs to be ongoing financial support for elder abuse advocacy services once the NACAP tender process is completed in June 2017.

Advocare looks forward with great anticipation to the responses and outcomes from the discussion paper and would be pleased to be involved in any future consultations