BE IT RESOLVED, That the American Bar Association supports the enactment of Federal and State legislation providing a coordinated and comprehensive system of care and support for Americans of all ages with long-term care needs. Any system of long-term care should be consistent with, but not limited to, the following principles:

1. Provide equitable access to care without undue financial hardship, such as impoverishing spouses or dependents;

2. Provide procedural fairness;

3. Provide for appropriate beneficiary choice with respect to the nature and setting for delivery of care, including institutional and home care, subject to costs and other constraints;

4. Assure appropriate quality consistent with the principles recommended by the Institute of Medicine for nursing home care and by the American Bar Association in its 1987 resolution with respect to home care quality;

5. Ensure responsible financing through appropriate means, which could involve a mixture of public funding and individual cost sharing.
Long term care is a problem for people of all ages, because it is a family problem. Sooner or later, almost every family has to face it. And, for all but the very rich, paying for the long term care of a parent or other family member means major family sacrifices. The average cost of a year in a nursing home is now around $25,000. In some states, nursing homes are running $35,000 a year, or more. The cost of long term care provided in the home can be an equally catastrophic for most families and retired people.

Medicare, the basic health insurance program for older and disabled Americans, does not cover long term care. Private long-term care insurance plans are expensive, and riddled with limitations and coverage restrictions. A recent study by the Brookings Institution, entitled "Caring for the Disabled Elderly," makes it clear that under the best of circumstances, private insurance is not likely to provide an affordable solution for most families. To date, fewer than 500,000 of America's 250 million citizens have bought these policies. So millions of ordinary middle class American families are faced with major financial crises to pay for long term care for their beloved ones.

Long term care has simply become an unavoidable issue for legislators and policymakers. Accordingly, the time has come when the ABA needs to be able to speak to this important matter. A July 1987 poll undertaken by the American Association of Retired Persons and the Villers Foundation indicated that 61% of American families have already experienced a long-term care situation among family or close friends. An overwhelming 84% of American voters favor federal action on Long term care, and 76% are willing to pay higher taxes for a federal program of long term care.

The Congressional response to this family issue has been significant. In recent months, several bills have been introduced in both the House and Senate, and other proposals have been urged by outside groups. The following list represents pending bills filed prior to November, 1988, those bills died with the expiration of the 100th Congress but are likely to be reintroduced along with others in the new 101st Congress:

Sen. Mitchell - The Long-Term Care Assistance Act of 1988 (S. 2305)
Sen. Melcher - The Helping Expand Access to Long-Term Health Care Act (S. 2671)
Sen. Kennedy - The Lifecare Long-Term Care Protection Act (S. 2681)
Rep. Rinaldo - an amendment to the Internal Revenue Code (H.R. 3501)

Rep. Kennelly - The Partnership for Long-Term Care Bill (H.R. 4631)

Rep. Waxman - The Elder-Care Long-Term Care Assistance Act of 1988 (H.R. 5320)


Rep. Stark - The Chronic Care Long-Term Care Coverage Act of 1988 (H.R. 5393)

While some of these proposals have attracted bi-partisan sponsorship, there are differences between those who favor a comprehensive solution and those who favor some minor improvements in Medicaid and incentives to purchase private insurance. Another difference is the reliance to varying degrees on social insurance principles.

The recommendation does not endorse any particular bill. It simply adopts a set of general principles that will permit the ABA to play a constructive role in the legislative consideration of long term health care.

The Key Policy Issues
A handful of issues dominate the political and policy agenda in long term care. These are:

- **Equity and Fairness** -- no one should have to impoverish themselves in order to qualify for help;

- **Choice** -- individuals who need long term care should be free to choose where they receive care; most prefer staying at home and, while there is strong emotional (even moral) opposition to being "forced" into an institutional setting, nursing homes must also be an option;

- **Family Support** -- families (mostly women) provide the bulk of care now; assistance is necessary to keep families involved and to avoid financial hardship;

- **Self-financing** -- any solution must not contribute to the deficit;

- **Intergenerational** -- long term care strikes at any age and the absence of protection is as destructive for a family with a disabled child as it is for those with elderly parents who need constant supervision;
Quality Assurance -- an appropriate level of quality of care must be defined, monitored and enforced with significant consumer participation at all levels.

The Legislative Options

Legislation on long term care ranges along several policy continua. These include: comprehensiveness of benefits, the amount and duration of nursing home protection, the degree of protection for non-elderly, and sources of financing.

Comprehensiveness. At the "most comprehensive" end are two bills -- Rep. Stark's (H.R.5393) and Rep. Waxman's (H.R. 5320). Both provide comprehensive social insurance protection for the full-range of services, with some cost-sharing and a modest role for private insurance. At the other end of the continuum is a bill by Rep. Rinaldo (H.R. 3501) that provides limited tax incentives for the purchase of long term care insurance.

Rep. Pepper's home care bill (H.R. 3436), as well as Sen. Melcher's (S.2671), fall near the middle of the comprehensiveness continuum because they provide substantial social insurance coverage for home care, but leave nursing home protection to private insurance and the current Medicaid program.

Duration of Nursing Home Protection. The bills covering nursing home care differ substantially according to whether their coverage is "front end" or "back-end."

FRONT END COVERAGE. One intermediate model, Sen. Kennedy's S. 2681, provides front-end social insurance coverage for nursing home care, leaving long stays to private or other sources. The logic: most people exit a nursing home within six months and the need for protection against longer stays is only to preserve assets, which is arguably a role more suited to private insurance. Sen. Kennedy's bill would provide for the first six months of nursing home care, with an optional government plan (like Medicare Part B) or private insurance plans to cover longer nursing home stays.

BACK END COVERAGE. Another approach is to cover only long "catastrophic" stays in a nursing home, leaving the shorter, less expensive stays to private financing. Sen. Mitchell's bill (S. 2671) provides social insurance coverage for nursing home care after the first two years. This is designed to protect families only against the most catastrophic nursing home expenditures, while at the same time limiting the liability of private insurers, thereby creating the possibility of lower insurance premiums to cover the two-year exclusionary period.

Degree of Non-Elderly Protection. Many of the proposals provide home care and nursing home coverage only for the elderly or Medicare beneficiaries, including non-aged if they qualify for Medicare (e.g., Mitchell's S. 2305 and Waxman's H.R. 5320). Others proposals have been suggested that would cover all age groups, but none have
been introduced in Congress as of November 1, 1988. One bill (Sen. Kennedy's S. 2681) would cover only the elderly for nursing home care, but include disabled children for home care. Congressman Pepper's home care bill (H.R. 3436) would cover disabled children in addition to all other Medicare beneficiaries. In contrast, Sen. Melcher's home care bill (S. 2671), though similar in benefits to Congressman Pepper's, would not cover children.

Quality Assurance. The above described bills vary from no mention of quality assurance to the inclusion of major provisions on the subject, such as in Congressman Pepper's bill (H.R. 3436). At a minimum, any legislation introduced will need to be consistent with the quality assurance standards, survey procedures, and enforcement requirements mandated in the Omnibus Budget Reconciliation Act ("OBRA") of 1987 (P.L. 100-203) for nursing homes and home care agencies.

The nursing home provision in OBRA derive in concept and content from the seminal study conducted by the prestigious National Academy of Science's Institute of Medicine, entitled, Improving the Quality of Care in Nursing Homes (1986). This 400 page report calls for strong federal quality assurance regulation and details some 47 far-reaching recommendations relating to improved standards, monitoring, and enforcement. The report is recognized by the industry, consumer advocates, and policymakers as the benchmark for future nursing home regulation.

The home care quality provisions in OBRA 1987 derive originally from hearings and a bill initiated in 1986 by Congressman Edward Roybal, Chair of the House Select Committee on Aging. Congressman Roybal based his hearings and bill on a study presented to him by the American Bar Association's Commission on Legal Problems of the Elderly, entitled The "Black Box" of Home Care Quality. (1986) In August 1987, the ABA adopted a policy recommendation for quality assurance in home care based on the recommendations of the "Black Box" report. A copy of that recommendation is attached as Appendix A herein.

The instant recommendation adopts both the Institute of Medicine's nursing home report and the previously adopted ABA recommendation on home care as guiding principles for quality assurance regulation in long-term care.

Degree of Public Financing. All bills require some degree of public financing, whether that be in the form of foregone revenues (e.g., tax incentives) or direct taxes (payroll, estate/gift, income). Obviously, the more comprehensive the coverage, the more public financing is required.

The public financing sources are divided into two categories: 1) those covering today's elderly who are unable to contribute over their working life to a social insurance program (these utilize
estate taxes, premiums and co-payments), and 2) those covering future elderly who can contribute over a lifetime (these utilize payroll taxes, for example, by uncapping the Medicare (HI) portion of the payroll tax or modest increases in employee and employer payroll taxes, or by imposing an income tax surcharge). The resolution recommends an appropriate mix of these categories incorporating both beneficiary cost sharing and public financing. The financing objectives should be achieved in ways that do not add to the federal deficit.

Need for Action
A comprehensive solution to the long term care problem should be a priority policy issue for several important reasons:

- Long term care is a key part of the larger health care access issue; Americans of all ages are highly vulnerable to long term care costs and there is virtually no protection, aside from welfare.

- Long term care affects nearly every American family at some point; it is one of the most important family issues today, with implications for children, women and elderly parents.

- The American Bar Association, speaking for the nation's legal profession, has a special responsibility to promote equity, fairness, personal autonomy, and responsibility in this important area of public policy. The Association's Goal III, Objective 3, sets forth the responsibility to "Provide leadership in development of sound law-related public policy." Leadership by the ABA in the formation of national long-term care policy is especially appropriate because of the natural role the ABA membership plays in counseling families and the elderly, and because of its expertise in addressing the legal implications of public policy.

The recommendation submitted herein fulfills this responsibility by expressly supporting the enactment of legislation providing for a coordinated and comprehensive system of long-term care for Americans of all ages, consistent with principles of equitable access, procedural fairness, beneficiary choice, appropriate quality, and responsible financing.
GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

No. ________ (Leave Blank)

Submitting Entity: Commission on Legal Problems of the Elderly

Submitted By: John H. Pickering, Chairperson

1. Summary of Recommendation(s).

Supports the development of long-term care services for Americans of all ages, consistent with principles of equity, fairness, consumer choice, quality of care, and responsible financing.

2. Approval by Submitting Entity.

October 1988 Commission meeting and the Senior Lawyers Section, October, 1988.

3. Previous submission to the House or relevant Association position.

Quality assurance in home care services is addressed in ABA policy adopted August, 1987.

4. Need for Action at This Meeting.

Long-term care has become an unavoidable issue for the nation. Since the passage of the Medicare Catastrophic Act, the Congress, as well as state legislatures, have begun to face the issue with a varied range of proposals that will come before the 101st Congress. ABA action at this time maintains and enhances its leadership responsibility in developing sound law-related public policy through the articulation of basic principles essential to sound long-term care legislation.

5. Status of Legislation. (If applicable.)

N/A. Several pending federal bills, described in the report, expired at the conclusion of the 100th Congress.
6. **Financial Information.** (Estimate of funds required, if any.)

None are needed.

7. **Disclosure of Interest.** (If applicable.)

N/A

8. **Referrals.**

Administrative Law, Family Law, General Practice, Individual Rights and Responsibilities, Real Property, Probate and Trust law, Science and Technology, Senior Lawyers Division, Young Lawyers Division, and Taxation.

9. **Contact Person.** (Prior to meeting.)


10. **Contact Person.** (Who will present the report to the House.)

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