



Elder Abuse

Submission to the Australian Law Reform Commission on
Elder Abuse Discussion Paper 83

March 2017

About the Office of the Public Guardian (Queensland)

The Office of the Public Guardian (OPG) is an independent statutory office which promotes and protects the rights and interests of adults with impaired decision-making capacity, and children and young people in out-of-home care or staying at a visitable site.

The OPG provides an important protective role in Queensland by administering a community visitor program, which provides statewide visiting services to:

- adults with impaired decision-making capacity residing in government funded facilities and some private hostels, and
- children and young people in out-of-home care (foster care, kinship care, residential care) or at a visitable site (residential facilities, detention centres, corrective services facilities, authorised mental health services).

The OPG works to protect the rights and interests of adults who have impaired capacity to make their own decisions, recognising that everyone should be treated equally, regardless of their state of mind or health. The OPG has a direct role in implementing obligations and ensuring rights as prescribed by the United Nations *Convention on the Rights of Persons with Disabilities* are upheld.

The OPG's legislative obligations with respect to adults with impaired capacity are to:

- make personal and health decisions if the Public Guardian is their guardian or attorney
- investigate allegations of abuse, neglect or exploitation
- advocate and mediate for adults with impaired capacity, and
- educate the public on the guardianship and attorney systems.

When appointed by the Queensland Civil and Administrative Tribunal as guardian, the Public Guardian routinely makes complex and delicate decisions on health care and accommodation, and guides adults through legal proceedings in the criminal, child protection and family law jurisdictions.

The *Public Guardian Act 2014* and *Guardianship and Administration Act 2000* set out the OPG's legislative functions, obligations and powers. The *Powers of Attorney Act 1998* regulates the authority for adults to appoint substitute decision makers under an Advanced Health Directive or an Enduring Power of Attorney.

The OPG also provides individual advocacy for children and young people through its child visiting program, complemented by its child advocacy program. This program gives children and young people engaged with the child protection system an independent voice, ensuring their views are taken into consideration when decisions are made that affect them, thereby implementing a key element of the United Nations *Convention on the Rights of the Child*.

The community visitors and child advocates provide an oversight mechanism to ensure that the Charter of Rights for a child in care under the *Child Protection Act 1999* are upheld. This includes upholding the rights of children and young people to be provided with a safe and stable living environment, and to be placed in care that best meets their needs and is culturally appropriate.

Submission

Position of the Public Guardian

The Office of the Public Guardian (OPG) welcomes the opportunity to provide a submission on the Australian Law Reform Commission (ALRC) Discussion Paper No 83, on Elder Abuse (discussion paper). The views contained in this submission are that of the Office of the Public Guardian and do not purport to represent the views of the Queensland Government. This submission should be read in parallel with the submission made by the OPG to the ALRC's Elder Abuse Issues Paper No 47. A copy of the OPG's initial submission can be found on the OPG's website at <http://www.publicguardian.qld.gov.au/about-us/publications/submissions>.

The OPG would be pleased to lend any additional support as the ALRC explores ideas and opportunities to develop strategies and ideas for addressing elder abuse nationally. Should clarification be required regarding any of the issues raised, the OPG would be happy to make representatives available for further discussions.

This submission addresses the ALRC's proposals and questions in order that relate to the OPG's functions and roles. These are set out below to align with the chapter headings in the discussion paper.

ALRC Proposals and questions

2. National plan

The OPG supports the ALRC's proposal to develop a national plan as part of a long term strategy to address elder abuse (Proposal 2-1). The OPG supports the proposal to adopt a collaborative national approach and strongly supports raising the awareness, and facilitating the education and training of the general public on issues relating to elder abuse. Similar to national campaigns to address domestic violence, the OPG recommends that awareness campaigns should focus upon helping the community recognise, identify and respond to elder abuse when they see it.

A key element of this strategy would be educating the community to see elder abuse as criminal behaviour that should be referred to the police and prosecuted, and where possible avoided through the use of early intervention strategies. It is critical that the national plan propose strategies to address the criminal aspect of abuse, and what this form of abuse looks like within the context of an older population. Elder abuse should be recognised at law as a criminal behaviour and there should be commensurate offences where there is: violence (similar to domestic violence laws); failure to provide care and support leading to neglect; fraud; financial exploitation; and unauthorised use of restrictive practices, or use of aversive practices. However the manner in which this is implemented must be sensitive to the fact that criminal sanction against perpetrators who are related, or ordinarily 'carers' for elderly people, may also result in a loss of contact with family and in particular grandchildren, and that fear of this may also serve to hinder disclosure. Further, not all 'abuse' will meet a criminal offence threshold. Therefore a National Plan should prioritise strategies to enable

early intervention and other protective actions, to prevent abuse so that older persons, carers and other support persons have access to appropriate services and support where the older person is at risk of abuse or neglect.

It is also recommended that the proposed national plan clearly address issues faced by those subsets of the Australian population who are at the margins of mainstream society and face heightened risk of elder abuse, and have significant barriers to addressing these issues. For example, while the discussion paper refers to an older person as generally being 65 years or above, it is not clear whether special consideration is to be given within the plan to recognising Aboriginal and Torres Strait Islander community elders from 50-55 years of age. Given the lack of data and underreporting of elder abuse within indigenous communities, it is critical that specific consideration be given to the unique circumstances faced by older persons as they are understood within these communities, and strategies developed in close consultation with these communities in urban, regional and remote locations. In addition to this, the plan should include specific strategies to address barriers and safeguards for older persons from culturally and linguistically diverse backgrounds; those with physical disabilities; complex health problems; and those adults with impaired decision-making abilities due to intellectual or cognitive disabilities, acquired brain injury, dementia or mental illness.

The collection and analysis of data and evidence regarding elder abuse is essential to improving our understanding of the drivers behind elder abuse, trigger points for identifying elder abuse, and protective measures that older persons can put in place to protect themselves. The OPG collects data related to investigations of allegations of elder abuse; however, this is limited to allegations made to the OPG of abuse, neglect or exploitation; or inappropriate or inadequate decision-making for adults with impaired capacity in Queensland. The OPG supports in principle the ALRC's proposal to commission a national prevalence study (Proposal 2-2) to identify amongst other things: rates and types of abuse; who commits the abuse; and who suffers from it.

A properly funded and well scoped prevalence and incidence study can assist in filling gaps in knowledge and provide evidence to direct the development of policy and programs. However, given the wide scope of elder abuse within Australia, it is anticipated that an effective study will be both costly and resource intensive. It is therefore recommended that the study focus on known areas of underreporting, and upon existing gaps in knowledge and official data sets. It is also recommended that the prevalence study include an examination of the culture, context and circumstances giving rise to elder abuse, with the aim of identifying and addressing systemic issues and barriers and to inform future service delivery reform.

In light of the critical information that such a prevalence study would provide in understanding elder abuse, it is recommended that this study precede the formal exploration and development of the strategies proposed within the discussion paper, and that the strategies proposed be re-examined in light of the findings of the study.

Recommendations for a National Plan and prevalence study:

- The OPG supports Proposal 2-1 for the development of a national plan.
- The OPG recommends that a national plan:
 - address the criminal aspect of abuse within the context of an older population
 - provide specific strategies for Aboriginal and Torres Strait Islander communities, and vulnerable older adults with specific needs outside of the mainstream
- The OPG supports Proposal 2-2 and recommends a prevalence study examine the culture, context and circumstances giving rise to elder abuse, to identify and address systemic issues and barriers.

3. Powers of Investigation

The discussion paper has identified an ‘investigation gap’ with respect to elder abuse. The ALRC has proposed that public advocates or public guardians be given the power to investigate elder abuse where there is reasonable cause to suspect that an older person: has care and support needs; is, or is at risk of being abused or neglected; and is unable to protect themselves from the abuse or neglect, or the risk of it, because of care and support needs (Proposal 3-1). The OPG is supportive in principle of the proposal to expand the powers of public advocates or guardians to incorporate this investigative function. However, this would require significant legislative and resource changes in each state and territory. There is also a risk that the expansion of the current investigative role of the OPG could lead to an increase in interim guardianship appointments to the OPG.

While the OPG accepts that there may be an ‘investigations gap,’ the OPG recommends that further consideration be given to whether there are existing agencies with appropriate skills and resourcing already equipped for investigating abuse of older persons. As the discussion paper notes, the Queensland Public Guardian already has an investigative power in relation to elder abuse. However, as explained above, this is limited to: persons with impaired capacity; allegations of neglect, exploitation or abuse; or allegations of inappropriate or inadequate decision-making on behalf of the adult (s 19 *Public Guardian Act 2014*). Where a criminal offence is suspected to have occurred, the OPG will refer the matter to the police.

The OPG would caution against the expansion of this role before a prevalence and incidence study is conducted. There also needs to be a greater understanding of the factors underpinning such abuse, including the culture, context and issues leading to elder abuse and its prevention is required before substantial investment is made to change the role and function of public advocates and guardians around the country. While the OPG is already well equipped to investigate elder abuse in Queensland, it is also worth considering whether the broad investigations gap identified by the ALRC may be in part, linked to a gap in the criminal law that should be addressed through criminal law reform, with specific functions identified and given to specialist police units to investigate and prosecute elder abuse as a criminal offence. However, this should be linked to the evidence obtained through a prevalence and incidence study.

The OPG does however, support a nationally consistent approach. Therefore, it supports that any proposal for extending investigations powers for public advocates or public guardians should be limited to adults with impaired decision-making capacity. This would more closely align with the current legislative frameworks and roles of these bodies across the states and territories, and would not be as radical a change in the role and function of these bodies as is currently proposed by the ALRC. In addition, (and as noted above) the OPG also has a critical investigative role in relation to inadequate or inappropriate decision-making that enables the OPG to investigate abuse of powers by attorneys or guardians. It is recommended that the proposed definition of 'support needs' be broad enough to encompass this role.

The OPG supports in principle the proposal that an investigative function should be able to be exercised on receipt of a complaint or referral, or on their own motion (Proposal 3-1). Such a proactive power should be discretionary, and not mandatory. One of the challenges for the investigative function of the OPG is that it is primarily re-active (rather than proactive), and allegations of abuse must be reported before an investigation can commence. However, while this proposal is supported in principle, the OPG recognises that such an expansion to encompass a proactive role would require funding to enable the OPG to investigate more matters than it is currently resourced for.

In addition to these matters, the OPG is concerned with the proposed definition for the investigative function. The power of investigation is linked to 'care and support' needs of an adult that are (allegedly) not being met; or risk of abuse or neglect, and being unable to protect themselves because of their care or support needs. 'Care and support needs' have been defined by the ALRC as arising from, or relating to: 'physical or mental impairment or illness; or physical restraint' (3.32 discussion paper). First, this is a very broad remit for investigating potential elder abuse as noted above in relation to all older adults with physical or mental impairments, or use of physical restraint. Second, the use of the term 'physical restraint' is unhelpful, as there is no legitimate connection between failure to meet 'care and support needs' and 'physical restraint'. Further, by specifically referring to physical restraint, it fails to recognise other forms of restraint such as aversive, or unauthorised use of restrictive practices. As previously raised by the OPG, aversive practices can be used as a form of punishment, including for example, unauthorised detention. This may, or may not involve 'physical restraint'. Further the OPG is aware of allegations that 'chemical restraint' is sometimes used by carers and in the aged care sector, particularly when staffing resources may be low. 'Care and support needs' may therefore sometimes be, but are not naturally or necessarily linked with 'physical restraint' and this element should therefore be removed from any proposed definition. However, the need to recognise the problematic use of a wide range of restrictive practices must still be addressed elsewhere.

The OPG supports Proposal 3-2 in principle, that older persons experiencing abuse or neglect have the right to refuse support, assistance or protection. While the OPG supports a rights based approach, principles governing recognition of this right should give due consideration to the significant power imbalance, the element of psychological and emotional control by 'trusted' persons, and that these older persons are victims of abuse. Further, they should take into consideration that some adults with intellectual or cognitive impairments may not have the capacity to refuse assistance or protection.

The OPG also recommends that measures to address elder abuse should address the perpetrator's behaviour, with corresponding support provided to protect and uphold the human and legal rights of the older person. Recognition of the criminal element of abuse, and the complexity of corresponding disempowerment, psychological control and (in many instances) inability of a person who is the victim of abuse to stand up for themselves against family members and those who have been in a position of trust, should be critical considerations in the development of safeguard measures. Safeguards should ensure that it is the older person's will and preferences that are reflected, and where support is refused, it is the older person's 'voice' and will that is heard and not the abuser speaking through them. Further, as elder abuse primarily occurs within a familial or relational context, rights based approaches should recognise the inherent challenges in addressing elder abuse that occurs within the context of strong relational and emotional bonds. An older parent will often continue to sacrifice their own needs and desires for that of the abusive adult child.

However, as noted above not all abuse will satisfy the requirements of a criminal offence. Further, any response needs to balance the risk that criminal sanctions against perpetrators may also result in a loss of contact with family, and in particular grandchildren, potentially hindering disclosure or successful prosecution. Therefore, substantial investment should be made in early intervention strategies to identify risk of elder abuse, and take preventative measures to provide early intervention services and supports to older persons, carers and support persons as early as possible. Early intervention strategies should be informed by evidence obtained the prevalence and incidence study.

However, the provision of services alone is an insufficient response. While the OPG supports potential responses to suspected abuse or neglect by referring the person or perpetrator to appropriate accommodation or services (Proposal 3-4), this should be in addition to an obligation to refer matters to the police for criminal investigation where a criminal offence is suspected to have been committed. Referrals should be made of suspected abuse to specialist elder abuse policing units equipped to investigate, collate evidence, and prosecute elder abuse. Prosecution of such offences would send a strong public message that abuse of older members of the community is not tolerated. In addition to this, potential responses should include connecting older persons with specialist advocacy support, and as a last resort and where necessary, applications for guardianship or administration where an older person is in need of a decision-maker for certain matters on their behalf.

The OPG supports Proposal 3-3 that the investigative body have the power to require the person suspected of abuse, furnish information, produce documents, or participate in interviews relating to the alleged abuse, or neglect of the older person. This is in line with powers that the OPG already has in Queensland (Chapter 3, Parts 3 and 4 *Public Guardian Act 2014*). The OPG also supports Proposal 3-5 that any person who reports elder abuse to the public advocate or guardian in good faith, and based on reasonable suspicion should not be liable, civilly, criminally or under an administrative process. The OPG already has an equivalent provision (s 24 *Public Guardian Act 2014*) to protect a person from such liability.

Recommendations for powers of investigation:

- The OPG recommends further exploration is given to whether the investigations gap is connected to a gap in the criminal law, and requires: law reform, and funding of specialist police units trained in evidence gathering, investigation and prosecution
- The OPG supports Proposal 3-1 provided that:
 - it is limited to adults with impaired decision-making capacity
 - ‘support’ under the definition includes the ability to investigate inadequate or inappropriate decision-making, in line with the OPG’s current legislative role
 - a proactive investigative power is discretionary
 - the definition removes reference to ‘physical restraint’
- The OPG supports Proposal 3-2 in principle; however, due consideration should be given to balancing the person’s rights, with understanding of the context and psychological impact of elder abuse to ensure that the refusal truly reflects the will and preferences of the older person.
- The OPG recommends primarily focusing safeguards upon the abuser and their behaviour, while directing support towards the recognition of the older person’s human and legal rights
- The OPG supports Proposal 3-3
- The OPG supports Proposal 3-4, in addition to ensuring suspected criminal offences are referred to the police.

4. Criminal justice responses

The ALRC paper did not propose additional offences to respond to elder abuse on the basis that existing laws already covered circumstances like fraud, theft and neglect which can arise in elder abuse.

However, the OPG recommends a strengthening of criminal justice responses, and providing for new offences that support effective criminal justice pathways for victims of elder abuse. Protective models should consider the investigative and prosecution powers more recently adopted in Queensland to address issues of domestic violence. In Queensland, elder abuse is considered a form of domestic and family violence¹ to which elderly people are recognised as being particularly vulnerable.²

Further exploration is warranted as to how domestic violence orders might be better utilised in situations of elder abuse, and moving the focus of elder abuse from being a ‘family matter’ to that of a ‘criminal matter’. The threat of criminal charges can on occasion act as a mechanism to effect behavioural change. In order to achieve this, greater exploration should be given by the ALRC to understand the motivations, culture, risk and protective factors to develop a more holistic and just response to the criminal behaviour underpinning elder abuse. One consideration could be to explore

¹ Section 4(d) *Domestic and Family Violence Protection Act 2012* (Qld)

² Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland*, 28 February 2015, available at <https://www.qld.gov.au/community/getting-support-health-social-issue/dfv-read-report-recommendation/index.html>

strengthening of the current neglect offences to criminalise duty of care breaches involving failure to adequately care for older persons.

However, offences alone will not suffice. The gathering of evidence, witness cooperation, police practice and court processes are all factors that need to be taken into consideration in addressing barriers preventing access to justice for victims of abuse. Criminal justice responses also need to consider the increased vulnerability of the older person where there may be diminished, fluctuating, or impaired capacity. These evidentiary and process issues should be examined in light of the heightened vulnerability of older persons to ensure that they are accessible, and facilitate the protection of victims and their rights, and provide increased accountability of perpetrators.

Recommendations for criminal justice responses:

- The OPG recommends strengthening criminal justice responses to elder abuse; and providing new offences to support effective criminal justice pathways for victims of elder abuse.
- Elder abuse should be seen as a ‘criminal’, and not a ‘family’ matter.

5. Enduring powers of attorney and enduring guardianship

The ALRC has proposed that a national online register of enduring documents, and court and tribunal orders for the appointment of guardians and administrators should be established (Proposal 5-1 to 5-3). The OPG holds concerns about this proposal. The OPG appreciates that a register can provide third parties with a clear means of identifying whether a person has a valid power of attorney or similar agreement. For example, a register may be a useful tool for banks and hospitals. However, there is no evidence to substantiate the proposition that a register would provide an effective or appropriate safeguard, or protect against elder abuse. Further, implementing a register that could protect against elder abuse would be prohibitively expensive. It appears unrealistic to expect a register to be of any use in preventing or addressing elder abuse without also empowering the administrator of the register with the mandatory function and responsibility to ensure the validity and authenticity of documents submitted to the register (and that they are not fraudulent).

While costs could be partially recouped through the imposition of fees, the administrative and bureaucratic nature of a register, and registration fees could act as significant deterrents to people making enduring documents. If a register is to be implemented, it may be appropriate for the fees to be met, at least partly, by regular users or viewers of the register such as banks and hospitals. However, any proposal for a register would have to take into consideration how this would impact upon the current flexibility and ease in making an enduring document, and the current widespread use of such documents within the community. It would also need to take into consideration the impact upon tribunals, public guardianship and administration systems that would likely have to bear the burden of any increase in guardianship or administration appointments where there is less take up of making enduring documents. This may occur where enduring documents are no longer

administratively easy and flexible to make, or economical, and require navigation of registration regime.

While the OPG is aware that Tasmania has implemented a registration scheme for enduring documents, there is no publicly available evaluation to demonstrate whether the register has contributed to preventing, or identifying abuse. It is highly likely that the creation of a register will not protect legal rights or prevent abuse of older persons. As noted in OPG's original submission to the ALRC, the majority of cases of elder abuse observed by the OPG appear to result from social factors and community failure to identify and report abuse, rather than recognition of a decision-making instrument. In each of the examples cited in the OPG's submission that involved an enduring power of attorney, a register would have provided little, if any, additional protections to the person abused or have prevented the abuse from occurring in the first place.

If a register is to be implemented, the ALRC has queried who should be permitted to search the national online register without restriction (Question 5-1). The OPG is of the opinion that a basic form of a register for the purpose of identifying whether a person has an appointed attorney, guardian or administrator should be accessible to the public. This is in keeping with Tasmania's current register. There are significant risks attached to the principal and their representative being the persons with sole access to the registration, as this could only solidify a relationship of abuse and not enable other interested parties to view the principal's appointments where they are concerned that the person is at risk of abuse. It is recommended that mechanisms ensuring access to the register should provide easy facilitation to identifying whether a person has an attorney, guardian or administrator, and clear pathways to challenge the veracity of decisions being made by the third party under the enduring document or appointment.

The ALRC has also queried whether public advocates and/or guardians should have the power to conduct random checks of enduring attorneys' management of a principal's financial affairs (Question 5-2). While the OPG believes that random checks could help identify, prevent and provide redress for financial elder abuse, this would require significant funding and resources to achieve as such a process would be expensive and resource intensive; and would be a substantial expansion of the existing roles of such agencies.

The ALRC has also proposed changes to the witnessing of enduring documents, including that they should be witnessed by two 'independent witnesses', one of whom should be either a legal or medical practitioner; justice of the peace; Local/Magistrates Court registrar; or police officer of a senior rank (Proposal 5-4). It is not entirely clear how the requirement for a more stringent standard for executing an enduring document than that required to execute a valid will, will assist in preventing elder abuse. If the primary motivation of the abuser is the criminal intent of fraud, then a person who is willing to forge one signature, will most likely be willing to forge two. Further, placing the fraudulent document on a 'register' would provide an element of validity to the fraudulent document. However, the OPG agrees that there are benefits to prescribing that an 'independent witness' should explicitly exclude relations of the principal or attorney, paid carers, health providers of the principal, and beneficiaries under the principal's will.

The OPG also notes that the majority of the proposals outlined in 5-6 to 5-9 regarding conflict transactions; eligibility of attorneys; limits to attorney powers; and record keeping are already law in Queensland. The OPG supports a nationally consistent approach regarding these matters within Australia (Proposal 5-10), including Proposal 5-7 that a person should be ineligible to be an enduring attorney, when disqualified as a director, or have convictions for fraud or dishonesty.

The OPG does not support Proposal 5-11 to change the names of enduring documents to 'representative agreements'. The general community has a relatively high level of understanding and recognition of the term 'power of attorney', regardless of the level of understanding of the nature of the obligations and fiduciary duties that attach to the position. To change the name would only confuse a term that is widely used and understood within the Australian community.

Representation agreements in places such as Canada already have a meaning and purpose that is different from, but complementary to, enduring powers of attorney. Powers of attorney require the adult (principal) to have capacity at the time of making the appointment of their attorney/s. This means that adults who may not satisfy the threshold of 'capacity' under the law, can be left without mechanisms by which to appoint decision-makers of their own, and often the only legal recourse for obtaining a formal decision maker is to have a decision maker appointed by a tribunal or court on their behalf.

Representation agreements are an innovative mechanism to address this gap in the law, and enable people with impaired decision-making abilities to choose, and work with, decision-makers of their own choice and appointment. In certain Canadian provinces such as British Columbia, they can be used for assisted decision-making purposes, thereby avoiding the more restrictive mechanism of guardianship. The intention of these agreements is to enable a person who otherwise would not satisfy capacity requirements at law to make an agreement that gives legal authority to the supporters who help them with decision-making. These agreements are used because the person does not have the capacity to meet the standard legal test of understanding the nature and effect of the authority they are giving someone else to act on their behalf.

Anecdotally, the OPG has on occasion seen families attempt to make and use enduring documents where an adult has an intellectual disability. It is worth noting that capacity thresholds for appointing a person as an attorney under enduring documents is generally quite high, and is not always able to be met by the adult with impaired capacity, depending upon their level of understanding, and the complexity of the assets and decision-making required. Therefore while the OPG does not support the change to name enduring documents as 'representative' documents, the OPG does recommend exploring proposals to develop a model Representative Agreements for persons with impaired capacity. The OPG also supports the ALRC proposal to develop model enduring powers of attorney (Proposal 5-12). A representative agreement in keeping with the Canadian model outlined above would enable adults with impaired capacity to enter agreements of support, have greater control and say in their decision-making, and could provide a legal mechanism for recognition of decisions made by them.

Developing model representative agreements *in addition to* developing model enduring powers of attorneys (Proposal 5-12), would assist in moving Australian jurisdictions towards greater recognition

of supported or assisted decision-making in keeping with our international obligations under the United Nations *Convention on the Rights of Persons with Disabilities* to require representatives (whether as attorney, representative, guardian or administrator) to support and represent the will, preferences and rights of the principal (Proposal 5-13).

Recommendations for enduring powers of attorney, and enduring guardianship:

- The OPG has concerns about the establishment of a national register (Proposal 5-1 to 5-3)
- To be an effective mechanism for addressing elder abuse, any national register should require the administrator of the register to check the validity and authenticity of all documents submitted
- A national online register should be able to be searched by any member of the public (Question 5-1)
- Random checks of an enduring attorney's management of a principal's financial affairs by a Public Advocate or Guardian could help identify financial abuse; however, this would be resource intensive and require significant funding (Question 5-2)
- The OPG seeks further evidence that changes to witnessing requirements would prevent elder abuse (Proposal 5-4), and supports that an 'independent witness' should explicitly exclude relations of the principal or attorney, paid carers, health providers of the principal, and beneficiaries under the principal's will
- The OPG supports Proposals 5-6 to 5-9, regarding conflict transactions; eligibility of attorneys; limits to attorney powers; and record keeping noting that the majority of the proposals are already law in Queensland
- The OPG supports Proposal 5-10 for a nationally consistent legislative approach to proposals 5-6 to 5-9
- The OPG does not support Proposal 5-11 to change the names of enduring documents to 'representative agreements'
- The OPG strongly recommends that the ALRC explores the development of model representative agreements for adults with impaired capacity
- The OPG supports Proposal 5-12 to develop model enduring powers of attorney
- The OPG supports Proposal 5-13 that representatives (attorneys, guardians and administrators) should be required to support and represent the will, preferences and rights of the principal.

6. Guardianship and financial administration orders

The OPG strongly supports the proposal that guardians and administrators should be informed of the scope of their roles, responsibilities and obligations (Proposal 6-1), and that this proposal should also include attorneys. The OPG has a statutory function to educate and advise people about, and conduct research into the operation of Queensland guardianship and powers of attorney legislation (s 12 (j) *Public Guardian Act 2014*). This key role includes educating the community regarding the making of enduring documents such as powers of attorney and advance health directives, and the

role and functions performed by guardians. The OPG provides advice both through face to face training sessions, or over the phone to members of the public about a range of issues in these areas, including the nature and effect of substitute decision making documents, and the practical application of decision making under Queensland's guardianship legislation.

The ALRC has queried whether information for newly-appointed guardians and financial administrators should be provided in the form of: compulsory training; training ordered at the discretion of the tribunal; information given by the tribunal to satisfy itself that the person has the competency required for the appointment; or whether there are other ways (Question 6-1). While the OPG supports the proposal for training and education, such training should be voluntary and not mandatory.

Appointments made by the Queensland Civil and Administrative Tribunal under the *Guardianship and Administration Act 2000* already obligate the Tribunal to consider the appropriateness of a person's appointment as a guardian or administrator (s15), including their competence to perform the functions and exercise powers under an appointment order. The OPG supports the proposal that there should be guidance and information provided to prospective private guardians, administrators, and attorneys at the time of appointment. While this would require investment in the development of resources that are: comprehensive and easy to understand; available online as well as in print; and in other languages, this should be accompanied by access to support and advice services. However, as with many of the proposals within the discussion paper, this would require adequate funding for the development of such resources.

While the OPG also supports in principle that newly appointed guardians, administrators and attorneys should be required to sign an undertaking to comply with their responsibilities and obligations (Proposal 6-2), this must be accompanied by a corresponding understanding of the person informed by appropriate information and advice, with access to support to understand the role, if this proposal is to be of any intended benefit. There is also no apparent value in requiring professional guardians and administrators of last resort to sign undertakings for each individual appointment.

Recommendations for guardianship and financial administration orders:

- The OPG supports Proposal 6-1
- The OPG supports Proposal 6-2 that newly appointed guardians and administrators sign undertakings to comply with their responsibilities and obligations on the condition that this is for private appointments, and is accompanied by an informed understanding of the role, and access to support in performance of the role.

7. Banks and Superannuation

OPG supports the proposal that the *Code of Banking Practice* should provide that banks will take reasonable steps to prevent the financial abuse of older customers (Proposal 7-1).

The ALRC has also proposed that the *Code of Banking Practice* should increase witnessing requirements for arrangements that allow people to authorise third parties to access their bank accounts (Proposal 7-2). While the OPG acknowledges the proposed intent and supports the proposal in principle, the OPG is not satisfied that this proposal will be an effective means of preventing or addressing criminal behaviour that underpins fraud. First, increased witnessing requirements are unlikely to positively impact the behaviour of the dishonest third party (family member or friend) who is assisting the older person. Second, this proposal does not adequately take into consideration the increased use of internet banking, and the mechanisms that should be in place to protect the interests of the older person who provides their family member, or attorney with access to their online accounts.

Recommendations for banks and superannuation:

- The OPG supports Proposal 7-1
- The OPG supports in principle Proposal 7-2, but is not satisfied that the proposal will be an effective means in preventing the criminal behaviour underpinning financial fraud.

8. Family Agreements

The OPG supports in principle the proposal that state and territory tribunals should have jurisdiction to resolve family disputes involving residential property under an ‘assets for care’ arrangement (Proposal 8-1).

The OPG has investigated a number of allegations of abuse in relation to the use of family agreements. While the OPG supports this proposal, there should also requirements for greater obligations to be placed upon the legal profession when family agreements are being made. Solicitors should not be able to act for all family members when a family agreement is made that is not nullified by the older person giving consent,³ and should be responsible for ensuring that older family members have separate, and independent legal advice. There should also be greater educative resources available for persons transferring title to their property, to ensure that such family arrangements are formalised, and the rights and interests of all parties are clearly protected. Deeds of family arrangements should be required in order to protect vulnerable parties as proof of such arrangements, and in order to protect and provide enforceable rights to the older member of the family who is transferring their property.

³ Australian Solicitors Conduct Rules, r 11, Conflict of duties concerning current clients

The ALRC has queried how ‘family’ should be defined for these purposes (Question 8-1). The OPG recommends that any definition of ‘family’ should be broad enough to cover the broad spectrum of contemporary Australian relationships, as well as the broad family structures reflected in cultural communities. For example, this should include recognition of same-sex relationships; and other relationships where a person enters into arrangements with their deceased partner’s child, or niece or nephew, as well as ‘kin-ship’ relationships within Aboriginal and Torres Strait Islander communities.

Recommendations for Family Agreements:

- The OPG supports in principle Proposal 8-1
- Solicitors should have a professional obligation to not act for all family members in the making of a family agreement, and ensure older members have access to separate, and independent legal advice
- The OPG recommends the definition of ‘family’ should be broad to address contemporary relationship and recognise cultural definitions of family, such as kin-ship structures within Aboriginal and Torres Strait Islander communities.

10. Social Security

The OPG strongly supports the Department of Human Services (Cth) developing an elder abuse strategy to prevent, identify and respond to the abuse of older persons in contact with Centrelink (Proposal 10-1), and education and training to prevent, identify and respond to abuse, or suspected abuse of older persons who are in contact with Centrelink (Proposals 10-2 to 10-4). This should be supported by appropriate information sharing between key law enforcement agencies, service providers and Centrelink, as well as state agencies such as public advocates, guardians or administrators to ensure strengthened protection and responses to elder abuse.

Recommendations for Social Security:

- The OPG supports Proposals 10-1 to 10-4
- The proposals should be supported by clear information sharing powers between key law enforcement agencies, State and Commonwealth agencies, and service providers.

11. Aged Care

While the OPG supports the proposal for Aged Care legislation (Cth) to establish a reportable incidents scheme (Proposal 11-1), it is not clear how such a requirement would be enforced.

It is well known that older adults with impaired capacity living in aged care facilities are vulnerable to abuse, particularly where they are experiencing a decline in cognitive abilities or dementia, and are heavily dependent upon personal, day-to-day support. From the experience of OPG clients, abuse is usually manifested through less serious issues of neglect, suboptimal service delivery, use of aversive

or restrictive practices. It is therefore recommended that such a scheme incorporate mandatory reporting of suspected criminal offences to police for further investigations, and provide mechanisms for notification to also be made to guardians, attorneys or carers representing the adult. Such a scheme would require considerable training and education of staff, and should also include mechanisms for internal review of service delivery, and disciplinary procedures for inappropriate staff conduct where criminal thresholds are not met.

The OPG also supports the expansion of the types of violence that should be reportable under the *Aged Care Act 1997* (Cth) (Proposal 11-2). However, with respect to part (b) of the proposed definition, the OPG recommends that violence or exploitation that is part of a 'pattern of abuse when committed by a care recipient toward another care recipient' should focus on the perpetrator's pattern of behaviour, whether or not the abuse is directed against the same co-resident each time.

The OPG supports that the exemption to reporting provided by s53 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 be removed (Proposal 11-3).

The OPG supports the proposal for the enhanced screening of workers (Proposal 11-4). Screening should be in line with working with children checks, and the enhanced screening as proposed under the National Disability Insurance Scheme (NDIS). This could also include closer scrutiny of a person's criminal charges, not just recorded convictions, as well as reportable incidents from the person's prior employment in either the children's or disability services sector. To this end, there is benefit in working closely across the aged care, disability and children's services sectors to see whether there is any merit in pursuing a national screening of workers that encompasses all these sectors and reduces administrative duplication of this work between the state, territory and commonwealth jurisdictions.

The OPG supports Proposal 11-6 that unregistered aged care workers who provide direct care be subject to the planned National Code of Conduct for Health Care Workers. However, training and education of any planned code of conduct should take into consideration that many staff in the aged care sector have limited formal education, with a high proportion of workers having culturally and linguistically diverse backgrounds. Requiring these workers to acquire this level of knowledge will require significant investment in education and training from the aged care sector. If such a proposal were to be adopted it should be accompanied by a clear and accessible education and communication campaign for workers to ensure they understand the Code of Conduct and their obligations and duties under it.

The OPG strongly supports the regulation of the use of restrictive practices in aged care (Proposal 11-7). Regulation of the use of restrictive practices should clearly prohibit the use of aversive practices (with strong penalties applying for their use), and be directed towards the reduction, and where possible, elimination of the use of such practices.

There is a need for reform in the area of restrictive practices, and to adopt a national legislative approach to reform of restrictive practices in a range of settings and across ages, from children and minors to the elderly. The introduction of the NDIS offers a significant and timely opportunity to bring greater national consistency, as well as internal consistency, to the use of restrictive practices across Australia. In light of the ALRC proposal for a senior clinician to approve the use of such

practices, consideration should be given to aligning with the proposals under the NDIS *Quality and Safeguarding Framework* and the Senior Practitioners role to be established under this framework. This would be a cost effective approach that would assist in working towards greater consistency nationally, as well as across the service sectors.

The proposed legislation should clearly define and limit the use of restrictive practices, to regulate the use of restraint (physical, chemical, mechanical and environmental), seclusion and other actions which prevent an individual from exercising their rights. While the primary purpose of the use of restrictive practices should be to protect the person or others from harm, they should only ever be used as a last resort, and be the least restrictive option available, with a plan for elimination of their use altogether.

Such a regime should include strict penalties for abuse of restrictive practices, and obligate service providers to develop and use positive behaviour support plans. Compliance with legislative obligations should not be negotiable for any person seeking to use restrictive practices on an older person. All persons and organisations seeking to provide services or supports to older persons with challenging behaviour should be obligated to comply with legislation governing restrictive practices, and be subject to criminal penalties for their misuse or use outside of the regulated scheme.

The proposed framework should also include:

- Establishment of best-practice agency to guide plan development; workforce development and the application for restrictive practices for older people, and
- Establishment of a visitor program to provide independent on-site scrutiny of the use of restrictive practices (Proposal 11-9 to 11-10).

The OPG supports that the proposed 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 11-8).

The OPG also supports the proposals to both provide for an official visitor scheme for residential aged care (Proposal 11-10) and develop national guidelines for the community visitors scheme (Proposal 11-9).

These visiting mechanisms would provide significant benefits for highly vulnerable persons who are residents at aged care facilities in identifying and addressing concerns about abuse or neglect, and as means of referral of older persons to appropriate advocacy and support services. OPG community visitors play an important role in identifying abuse which may otherwise remain undetected or unreported in residential settings. They are also an important means of supporting a person to navigate complaints mechanisms.

While it is not clear from the proposal whether the 'official visitors' scheme is to be a volunteer or paid model. It is noted that the OPG operates a paid visitor scheme which has the advantage of ensuring a more rigorous assessment of rights protection and therefore opportunities for advocacy.

Recommendations for Aged Care:

- The OPG supports Proposal 11-1; however, clarity is required as to how this would be enforced
- A reportable incidents scheme should include:
 - mandatory reporting of suspected criminal offences to police
 - be supported by training and education of staff
 - include mechanisms for internal review of allegations where criminal thresholds are not met to improve practice and service delivery and provide disciplinary mechanisms for inappropriate staff conduct
- The OPG supports Proposal 11-2, noting that patterns of violence or exploitation should focus on the perpetrator's pattern of behaviour
- The OPG supports Proposal 11-3
- The OPG supports Proposal 11-4 and recommends:
 - alignment of worker screening for vulnerable persons across the aged care, disability and children's services sectors
 - worker screening should include scrutiny of criminal charges as well as convictions, and reportable incidents from prior employment in the children's, aged care, or disability sector.
- The OPG supports Proposal 11-6 provided it is accompanied by plain English and accessible training and education for workers in the aged care industry
- The OPG supports Proposal 11-7, and recommends that this align with legislative and practice reforms under the *NDIS Quality and Safeguarding Framework*.
- The OPG supports Proposals 11-8 to 11-10.