public guardian

Serious Incident Response Scheme for Commonwealth funded residential aged care – Finer details consultation paper

Submission to the Department of Health

October 2019

About the Office of the Public Guardian

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

The OPG provides individual advocacy to children and young people through the following two functions:

- the child community visiting and advocacy function, which monitors and advocates for the rights of children and young people in the child protection system including out-of-home care (foster and kinship care), or at a visitable site (residential facilities, youth detention centres, authorised mental health services, and disability funded facilities), and
- the child legal advocacy function, which offers person-centred and legal advocacy for children and young people in the child protection system, and elevates the voice and participation of children and young people in decisions that affect them.

The OPG provides an entirely independent voice for children and young people to raise concerns and express their views and wishes. The OPG's child community visiting and advocacy function independently monitors and advocates for children and young people staying at visitable locations and facilitates the identification, escalation and resolution of issues by and on behalf of children and young people. The OPG's child legal advocacy function elevates the voice and participation of children and young people in the child protection system in decisions that affect them. When performing these functions, the OPG is required to seek and take-into-account the views and wishes of the child to the greatest practicable extent.

The OPG also promotes and protects the rights and interests of adults with impaired decision-making capacity for a matter through its guardianship, investigations and adult community visiting and advocacy functions:

- The guardianship function undertakes both supported and substituted decision-making in relation to legal, personal and health care matters, supporting adults to participate in decisions about their life and acknowledging their right to live as a valued member of society.
- The investigations function investigates complaints and allegations that an adult with impaired decision-making capacity is being neglected, exploited or abused or has inappropriate or inadequate decision-making arrangements in place.
- The adult community visiting and advocacy function independently monitors visitable sites (authorised mental health services, community care units, government forensic facilities, disability services and locations where people are receiving National Disability Insurance Scheme (NDIS) supports, and level 3 accredited residential services), to inquire into the appropriateness of the site and facilitate the identification, escalation and resolution of complaints by or on behalf of adults with impaired decision-making capacity staying at those sites.

When providing services and performing functions in relation to people with impaired decision-making capacity, the OPG will support the person to participate and make decisions where possible, and consult with the person and take into account their views and wishes to the greatest practicable extent.

The *Public Guardian Act 2014* and *Guardianship and Administration Act 2000* provide for 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 advance health directive or an enduring power of attorney.

Submission to the inquiry

Position of the Public Guardian

The OPG welcomes the opportunity to provide a submission to the Department of Health's consultation on the *Serious Incident Response Scheme (SIRS) for Commonwealth funded residential aged care - Finer details of operation consultation paper* (the consultation paper). The views contained in this submission are that of the OPG and do not purport to represent the views of the Queensland Government.

This submission addresses the issues and questions raised in the consultation paper where they relate to the experiences of the OPG and the people that we serve. It also raises additional issues for the Department of Health's consideration which OPG considers significant in establishing an appropriate and effective SIRS.

The OPG would be pleased to lend any additional support as the inquiry progresses. Should clarification be required regarding any of the issues raised, the OPG would be happy to make representatives available for further discussions.

Summary of recommendations

The Public Guardian recommends:

- That the SIRS be revised to take a 'rights-based' approach to reporting serious incidents with the overarching framework, definitions and responses to serious incidents driven by recognition of, and upholding of the Charter of Aged Care Rights.
- That the SIRS expressly state that its intent, scope and design is to support recognition of the rights of *every* resident at the aged care facility (not only older persons), and that responses to serious incidents:
    - are developed in keeping with the individual person's will and preferences, and
    - give full recognition to the individual's context and concerns, whether the person is over, or under the aged of 65 years, and with or without a disability, and
    - recognise the person's right to decision-making support to make decisions and exercise their rights, will and preferences when a serious incident occurs
- The definition of 'financial' abuse should be broadened to include 'property or possessions'.
- The definition of 'serious incident' be expanded to include a pattern of potentially trivial or negligible acts or omissions.
- The determination of what is 'serious' (or alternatively 'significant') be based upon the perspective of the consumer and what they consider to be 'serious' or 'significant', taking into consideration the impact of the action or behaviour upon them.
- Aged care service providers be obligated to report allegations of physical, sexual, or financial abuse against consumers that are committed by third parties.

- A reporting framework to be supported by an investigative function within the Aged Care Quality and Safety Commission.
- The definition of 'serious incident' include any unexplained or avoidable deaths in a residential care facility.
- The definition of 'serious incident' distinguish between 'seriously inappropriate or improper behaviour that breaches professional standards or codes of conduct' and behaviour that amounts to 'inhumane or cruel treatment'.
- Any serious incident reporting to take a trauma informed approach, recognising the impact and effect of negative conduct upon the person who is the victim of inappropriate behaviour.
- The definition of 'neglect' be expanded to include acts or omissions that lead to an 'avoidable decline in a consumer's health and wellbeing'.
- The term 'inappropriate physical or chemical restraint' be re-worded to reflect the reportable incident language used by the NDIS Quality and Safeguards Commission of "unauthorised use of a restrictive practice".
- 'Unauthorised use of restrictive practices' should be clearly tied to 'consent' to the use of such practices, and authorisation being provided by the consumer, or their appointed decision-maker in accordance with state or territory law.
- Restrictive practices definitions should align with definitions under the NDIS Quality and Safeguarding Framework and the *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018*.
- Development of the SIRS should be accompanied by the establishment of a rights-based approach to an appropriate and effective regulation of the use of restrictive practices in line with the NDIS and Queensland's disability sector models.
- The SIRS should provide for 'unauthorised' use of restrictive practices, to ensure that consent is appropriately obtained, and the use of such practices are authorised by the consumer, or their representative in accordance with state or territory law and reported as serious incidents where such processes are not followed.
- That the SIRS provide for reporting of serious incidents between aged care consumers, but take caution in the design and refinement of definitions to ensure that the SIRS protects against the criminalisation of consumers, particularly consumers with intellectual, cognitive or psychosocial disabilities.
- Failure to comply with the SIRS should be accompanied by penalties attached to registration, so that serious non-compliance could result in de-registration of a service provider.
- The SIRS should not include thresholds under its definitions.
- Reporting on incidents between consumers should include information on the impact the incident has had on the alleged offender, whether the alleged offender's family/decision maker has been notified of the incident, and particulars of the behaviour support plan put in place.

- Reporting should detail the training and education staff have been provided with on the behaviours of each consumer to prevent the escalation of any incidents to a level that could be deemed to be "serious".
- Details of the positive behaviour support plan developed in response to harm caused to a consumer by another consumer should be provided by the aged care provider at each stage of the reporting process, namely, initial, intermediary and final.
- Initial, intermediary and final reporting by the aged care service provider should include details of past and ongoing training provided to staff to manage challenging behaviours at the aged care residence.
- Aged care service providers who contact police in response to an incident must, as part of the initial report to the Aged Care Quality and Safety Commission, provide justification as to why they deemed it necessary to involve law enforcement.
- Investigation of an incident should only be deemed to be finalised by the Aged Care Quality and Safety Commission if both consumers, or their representatives, have been consulted and has advised that they are satisfied with the outcome.
- The Aged Care Quality and Safety Commission must be appropriately empowered and resourced to undertake effective oversight, investigation and enforcement functions including:
    - Establishing, funding and operating a fully funded community visitor program for the aged care sector, with legislated powers to monitor, inquire, complain and advocate on behalf of consumers in residential aged care, and
    - Empowered with investigative and prosecutorial powers, with increased independent oversight mechanisms to regularly audit aged care service.
- Any legislative proposals to support the SIRS and related aged care reforms be preceded by considered and wide public consultation that engages meaningfully with older adults and young people in the aged care sector, persons with disability living in aged care facilities, as well as state and territory governments and key statutory bodies such as Public Advocates, Public Guardians and Administrators.
- A focused public review regarding regulation of restrictive practices in aged care, and the development of solutions that learn from, and align with the regulation of restrictive practices in the disability sector.

Overarching issues

Rights-based approach

The OPG strongly supports the statement on the Department of Health's website regarding the need for strengthening protection for older Australians under a SIRS that, *"Australians have a right to live free from abuse and neglect as a matter of human rights, current law, and a reasonable community expectation. Older Australians also have specific rights and expectations when receiving*

Commonwealth funded aged care services".[1] This principle recognises that an effective SIRS is one that is centred upon the protection and promotion of human rights. Therefore, to be both appropriate and effective, the SIRS must be clearly driven by a human rights-based approach to managing serious incidents as they arise in aged care settings, centred upon choice and control by the consumer.

The creation of this new scheme provides a unique opportunity to embed the protection of human rights as the underpinning philosophy in defining what a serious incident is, and the driver in identifying what a serious incident is and how it should be responded to. While the consultation paper acknowledges the existence of the Charter of Aged Care Rights (the Charter), the SIRS is missing an express link at each stage to the Charter as the 'measuring stick' by which to determine what standards are to be adhered to; how to identify a serious incident; how responses are to be handled; and what are the expected outcomes of such a scheme.

Charter rights should drive the definitions and responses to every serious incident under the scheme, and should be centred upon the consumer's perception and experience, and will and preference. A rights-based approach *"positions the older person as the rights holder whose rights to autonomy and independence are recognised and enacted. This approach requires service providers to support the older person to exercise their right to self-determination"*.[2] The SIRS as currently proposed, should be re-framed within a rights-based approach, so that the response to serious incidents is motivated by the recognition and enforcement of Charter rights, rather than being focused upon primarily managing risk to the service provider.

The proposed SIRS and other aged care reforms lack clear and coherent connection with an overarching rights-based regulatory framework. While the consultation paper places the development of the SIRS within a regulatory context that refers to the Charter; the Aged Care Quality Standards; and the Aged Care Quality and Safety Commission (the Commission) , there is no key theme that either drives or links together these reforms, and the reforms appears disconnected in philosophy and purpose. From this perspective, there is much that the aged care sector could learn from the disability sector under the NDIS, and reforms in child protection. For example, the theme of 'choice and control' is the overarching principle that links the operation and regulation of the NDIS, and is clearly founded in the recognition of rights of independence and autonomy under the United Nations *Convention on the Rights of Persons with Disabilities*[3] (CRPD). It is interesting to note how the NDIS Quality and Safeguarding Framework has a clear human rights purpose where it seeks to provide *"a nationally consistent approach to help empower and support NDIS participants to exercise choice and control, while ensuring appropriate safeguards are in place and establishes expectations for providers and their staff to deliver high quality support"*[4]. In the child protection sector there is a corresponding strong emphasis upon the recognition of, and upholding of the 'rights and views' of children as expressed under the *Convention on the Rights of the Child* (CRC). The absence of such an express overarching framework, and underpinning rights-based philosophy within the aged care sector reforms (of which the SIRS is one element) risks that the Charter will ultimately amount to an

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[1] https://agedcare.health.gov.au/quality/strengthening-protections-for-older-australians-serious-incident-response-scheme-sirs

[2] https://caxton.org.au/a-rights-based-approach-necessary-in-the-response-to-elder-abuse/

[3] Convention on the Rights of Persons with Disabilities, opened for signature 13 December 2006, GA Res 61/106, UN Doc A/Res/61/106 (entered into force 3 May 2008) ('CRPD'). The CRPD was signed by Australia 30 March 2007.

[4] https://www.dss.gov.au/disability-and-carers/programs-services/for-people-with-disability/ndis-quality-and-safeguarding-framework

impotent 'add-on' where the rights it contains are unenforceable, and only lip service is given to them by the aged care sector.

One of the challenges of moving towards a rights-based approach is that the model currently underpinning the aged care system in Australia is strongly informed by a paternalistic medical model of care, rather than a social model aimed at addressing human rights barriers that older persons face within society. One might perceive this is reinforced by the fact that the aged care system is regulated by the Department of Health, rather than the Department of Social Services. Other systems are far more mature and advanced when it comes to promoting the voice of persons who interact with their systems, and receive care, support or other services. Such systems are increasingly shifting towards, or have fully adopted social models to address barriers to participation within society, having moved away from medical models of 'care'. While there is still room for improvement, the disability, and child protection systems have all established processes for addressing the views and wishes of the individual concerned. If you compare the child protection system with the aged care sector, you can see very clearly the significant deficits in relation to aged care. For example, in Queensland, each child has an individual case plan in which the child MUST be consulted. The views and wishes of the child are always considered paramount and attempts are made to follow what the child wants as far as is practicable. This obligation does not exist in the aged care sector. Instead, older persons (including younger persons living in such facilities) are required to fit into a system that is neither designed for their needs, nor tailored around them. It is in effect, a form of institutionalisation. There is a "fit in the system or otherwise there is nothing'' approach rather than exploring what the individual older person requires, or wants, or creating opportunities to meet the individual's needs. Like the child protection system, the NDIS seeks to explore the individual's own choice and needs in order to create a unique plan with tailored services to meet those individual wants and needs. Conversely, the aged care sector (particularly in residential care) has a highly restricted individual focus, and far less consultation with the person about his/her wants and needs.

The worldwide movement towards greater recognition of human rights within the disability and child protection sectors (particularly in relation to supported decision making in the disability sector), has not had the same impact on the aged care sector in the way that it has radically changed the disability and guardianship sectors, and increasingly, the mental health sector. Supported decision-making is about doing everything necessary to support an individual with communication, or intellectual, cognitive or psychosocial disabilities to make their views and wishes known and counted, and to retain the right to make their own decisions, either with or without support. The aged care sector urgently needs to benefit from the learnings of the disability sector, and the supports, interventions and projects that are being undertaken to explore opportunities for realising the right to supported decision-making in this sector. These (and other reasons) are some of the driving factors behind the current development of, and the imperative for, a United Nations Convention for the Rights of Older Persons, given the glaring deficiencies across the globe in recognising the voice and rights of older persons, and the need for greater safeguards and the development of normative standards for the protection of their rights.

These overarching problems within the aged care sector are now clearly evidenced in the approach to the development of a SIRS. It is strongly recommended that the SIRS be revised to take a 'rights-based' approach to reporting serious incidents with the overarching framework, definitions and

responses to serious incidents driven by recognition of, and upholding of the Charter of Aged Care Rights.

Recommendation:

- That the SIRS be revised to take a 'rights-based' approach to reporting serious incidents with the overarching framework, definitions and responses to serious incidents driven by recognition of, and upholding of the Charter of Aged Care Rights.

Young people in aged care

The consultation paper is expressly rooted in the Australian Law Reform Commission (ALRC) report on *Elder Abuse – A National Legal Response* [5]and the recommendations made under the report to broaden the types of incidents to be reported in residential care (recommendation 4-3[6]), and changing the emphasis to ensuring service providers both investigate and respond to allegations of assault (recommendation 4-2[7]). The primary driver of the ALRC report was to address elder abuse, namely abuse of older persons aged 65 years and above. In this context, it is notable that the consultation paper appears to address only matters arising for persons aged 65 years and over, and fails to expressly acknowledge the needs of younger persons in aged care.

Further, given the high proportion of persons with disabilities under the age of 65 years who live in aged care[8], there is an even greater imperative for any SIRS model to adopt a rights-based approach equivalent to that of the disability sector, particularly as expressed through 'choice and control' recognised and upheld under the NDIS Quality and Safeguarding Framework. Failure to acknowledge the specific issues that arise for younger persons living in aged care facilities means that the SIRS as currently proposed may not be appropriate to address serious incidents for their individual context, nor acknowledge potential histories of trauma, discrimination or disadvantage associated with their disability.

It is therefore important that the SIRS expressly state that its intent, scope and design is to support recognition of the rights of *every* resident at the aged care facility (not only older persons), and that responses to serious incidents:

- are developed in keeping with the individual person's will and preferences, and
- give full recognition to the individual's context and concerns, whether the person is over, or under the aged of 65 years, and with or without a disability, and
- recognise the person's right to decision-making support to make decisions and exercise their rights, will and preferences when a serious incident occurs

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[5] Australian Law Reform Commission, *Elder Abuse—A National Legal Response (ALRC Report 131),* May 2017

[6] *Ibid, p.20*

[7] *Ibid*

[8] The Department of Health reported as at 30 September 2019, there were 5,905 people aged under 65 years of age living in residential aged care facilities across Australia <https://www.dss.gov.au/disability-and-carers/programmes-services/for-people-with-disability/younger-people-with-disability-in-residential-aged-care-initiative>; see also the ABC report in July 2019 that in the most recent financial year, 2,578 people under 65 were admitted into aged care <https://www.abc.net.au/news/2019-07-17/young-people-in-nursing-homes-ndis-funding/11271818>.

Recommendation:

- That the SIRS expressly state that its intent, scope and design is to support recognition of the rights of *every* resident at the aged care facility (not only older persons), and that responses to serious incidents:
    - are developed in keeping with the individual person's will and preferences, and
    - give full recognition to the individual's context and concerns, whether the person is over, or under the aged of 65 years, and with or without a disability, and
    - recognise the person's right to decision-making support to make decisions and exercise their rights, will and preferences when a serious incident occurs.

Consultation paper issues and responses

Definition of a serious incident

The consultation paper has proposed the following definition of a serious incident:

- *When by a staff member against a consumer:*
    - *Physical, sexual, or financial abuse*
    - *Seriously inappropriate, improper, inhuman or cruel treatment*
    - *Inappropriate physical and chemical restraint*
    - *Neglect*
- *When by a consumer against another consumer:*
    - *Sexual abuse*
    - *Physical abuse causing serious injury*
    - *An incident that is part of a pattern of abuse*
- *A serious incident also includes a death or serious injury that is unexplained, and/or where the perpetrator isn't known*
- *An act or omission that, in all circumstances, causes harm that is trivial or negligible should not be considered a 'serious incident'.*

Scope of the SIRS definitions and components

While the general areas to be included in the definition appear appropriate, there are significant problems with the definition, given that it is not driven by a right-based approach. This is highlighted by the approach proposed to 'seriously inappropriate, improper, inhumane or cruel treatment' and the comment in the consultation paper that any response is to be focused upon the "alleged conduct rather than the actual effect of the conduct" (p 13 consultation paper). A rights-based approach would focus upon the individual person, and the impact upon *the person's* rights, autonomy and independence.

Further, under the current proposal the definitions of what is a serious incident are extremely narrow, and do not recognise serious incidents that significantly infringe upon Charter rights that should be recognised, protected and upheld by the service provider.

It is noted that currently the proposed definition of 'financial abuse' is limited only to the 'finances' of a person in aged care. However, the OPG is concerned that this definition is too narrow, and should also include 'property or possessions', given that a consumer may have possessions of value

that could equally be subject to abuse, fraud or theft. This would appropriately raise the threshold on the standard of vigilance required of service providers regarding the financial and property rights of consumers, and provide increased protections against financial abuse. If the definition remains limited to finances only, a service provider is only likely to be alerted to potential financial abuse when there are insufficient funds available in the person's account to pay any matters due to the service provider for the person's care.

There are also concerns that acts or omissions that cause harm deemed to be 'trivial' or 'negligible' would not be considered a serious incident. This fails to recognise that multiple 'trivial' incidents, or a pattern of minor acts/omissions can also amount to a serious incident. The definition should be amended to expand the scope to include a pattern of potentially trivial or negligible acts or omissions.

Clarification is also required as to what would satisfy the criteria of being a "serious" incident. The OPG recommends that the determination of what is 'serious' (or alternatively 'significant') be based upon the perspective of the consumer, and the impact of the action or behaviour upon them. For example, a staff member may use offensive or vulgar language towards a consumer, and while this may seem innocuous to the staff member, the effect on the consumer could be significant depending upon their background, culture, disability or medical condition.

Recommendations:

- The definition of 'financial' abuse should be broadened to include 'property or possessions'.
- The definition of 'serious incident' be expanded to include a pattern of potentially trivial or negligible acts or omissions.
- The determination of what is 'serious' (or alternatively 'significant') be based upon the perspective of the consumer and what they consider to be 'serious' or 'significant', taking into consideration the impact of the action or behaviour upon them.

Should acts by family and/or visitors be covered by a SIRS?

There are significant concerns that the restriction of the SIRS to only certain matters arising from actions undertaken by staff members or other consumers, is grossly inadequate. This restriction fails to recognise the vital role that service providers should play in protecting older persons, as well as persons with disabilities from abuse. Acts of physical, sexual or financial abuse are violations of a consumer's fundamental rights, no matter who the perpetrator is. Given the unique setting of residential care where such persons are often isolated from the outside world, or limited in their ability to access legal or advocacy support, service providers should be obligated to ensure that their residents are treated with dignity and respect and equitably, with all such allegations, or suspected breaches of rights reported, escalated and addressed.

The OPG has a unique investigations function in Queensland, where it is able to investigate complaints or allegations of abuse, neglect or exploitation linked to adults who have impaired capacity, and their decision-making needs. OPG's Investigations team often receives referrals from residential aged care facilities when fees are in arrears, meaning in most cases that the adult's funds are not being used for their own care but are being used fraudulently by third parties, usually family members. However, these issues are often not referred to the OPG until there are significant problems, and the arrears are so high that the consumer is at risk of being removed from the facility

given their inability to pay. The OPG works closely with aged care facilities to develop strategies that encourage aged care facilities to identify elder abuse early on, and allow protective action to be taken to preserve the adult's assets before they disappear. Invariably the only people who can see such abuse occurring are those within the residential aged care service.

Further, an aged care service provider will be privy to seeing how third parties interact with, coerce or place duress on their residents. Given the lack of independent oversight mechanisms in aged care, such as a professionalised community visitor scheme (as demonstrated in Queensland under the NDIS Quality and Safeguarding Framework) aged care service providers should be obligated to report allegations of physical, sexual, or financial abuse committed by third parties. This reporting framework must be supported by an investigative function within the Commission that is fully empowered and resourced to investigate and prosecute where allegations are substantiated.

Recommendations:

- Aged care service providers be obligated to report allegations of physical, sexual, or financial abuse against consumers that are committed by third parties.
- A reporting framework to be supported by an investigative function within the Aged Care Quality and Safety Commission.

Should a SIRS include an unexplained death, noting the role of the Coroners?

The consultation paper has proposed that a serious incident also include "a death or serious injury that is unexplained, and/or where the perpetrator isn't known", on the basis that such incidents may point to patterns of neglect, physical or sexual assault. The OPG looks forward to seeing how such a scheme will link with, and inform state and territory based Coroner's reportable death schemes, given the important protection that Coronial schemes provide in helping to prevent deaths from similar causes happening again in the future.

The OPG supports the inclusion of such matters in a definition of a serious incident. However, it is recommended that this also be expanded to address matters such as avoidable deaths. Avoidable deaths would include deaths that are attributable to negligence, or inadequate personal care on the part of the service provider. Avoidable deaths, similar to unexplained deaths or injury, may point to patterns or gaps in system oversight and care that require further investigation in order for a service provider to develop appropriate care responses to avoid a repeat incident. An effective SIRS should be taken as an opportunity to drive change in the industry to avoid future deaths and serious injuries and address systemic issues prevalent throughout the aged care industry, or culture of the service provider.

Recommendation:

- The definition of 'serious incident' include any unexplained or avoidable deaths in a residential care facility.

Is the definition of seriously inappropriate, improper, inhumane or cruel treatment appropriate?

The following definition has been proposed under the SIRS for "seriously inappropriate, improper, inhumane or cruel treatment":

"unreasonable behaviours against a consumer that constitutes a serious breach of the duty of care, and/or any relevant code of conduct or professional standard that applies (ied) to the staff member."

As noted above, there are significant concerns that the focus of this definition is upon *"the alleged conduct rather than the actual effect of the conduct"* (p 13, Consultation report).

From a rights-based approach, the definition should recognise that such behaviour significantly infringes a person's human and legal rights, and that the effect of such conduct upon the individual generally involves abuse or humiliation, that can cause mental suffering, debase a person, intimidate, cause fear, anguish or a sense of inferiority. A rights-based approach should take a trauma informed approach to such abuse, recognise the inherent power imbalance between a consumer and an aged care provider, and recognise the effect of the conduct as it impacts the individual person as the victim of such behaviour. Adopting a rights-based approach would strengthen the ability of Charter rights to be upheld, respected and taken seriously when addressing such serious (and potentially criminal) behaviour.

Given these concerns, the current definition is inadequate. Firstly, it is recommended that the definition distinguish between 'seriously inappropriate or improper behaviour that breaches professional standards or codes of conduct' and behaviour that amounts to 'inhumane or cruel treatment'. From a rights-based perspective it is an absolute human right that a person has the right to not be subjected to inhumane or cruel treatment (article 5, Universal Declaration of Human Rights). Further, instances of inhumane or cruel treatment may amount to crimes under Commonwealth, or state laws.[9] Therefore any definition needs to require reporting of unlawful, as well as inappropriate behaviour. Secondly, it is recommended that any serious incident reporting of such behaviour takes a trauma informed approach, by recognising the impact and effect of the conduct upon the person who is the victim of such inappropriate behaviour.

Recommendations:

- The definition of 'serious incident' should distinguish between 'seriously inappropriate or improper behaviour that breaches professional standards or codes of conduct' and behaviour that amounts to 'inhumane or cruel treatment'.
- Any serious incident reporting to take a trauma informed approach, recognising the impact and effect of the conduct upon the person who is the victim of such inappropriate behaviour.

Are there any additions or refinements required to the definitions of incidents by staff against consumers? If so, which definitions, and what additions/refinements should be made?

It is noted that the definition of 'neglect', while not currently addressed in existing compulsory reporting requirements, has been proposed to be included within the SIRS. The proposed definition of neglect is *"intentional or reckless failure in the duty of care for an aged care consumer that may also be a gross breach of professional standards".* The OPG supports this inclusion; however, recommends that the definition be expanded to include acts or omissions that lead to an 'avoidable decline in a consumer's health and wellbeing'. From a rights-based approach the important factor is

[9] For example, torture is a crime in Australia under the *Commonwealth Criminal Code Act 1995* (Division 274), and in Queensland (for example) some instances of torture and cruel, or inhuman treatment may also be crimes under the Queensland Criminal Code.

not so much the intentionality or nature of the action or inaction taken, but the impact of neglect upon the consumer. The impact on the consumer remains the same, regardless of whether the behaviour of staff is intentional or reckless. Further, the risk is that the investigation of the serious incident will focus less on the impact on the person and the neglect they have experienced, and more upon determining the intentionality of the act; or the level of recklessness displayed in fulfilling a duty of care. Such incidences should be reported through the SIRS to protect the rights of the consumer, prevent recurrence and drive cultural change in the way the residential aged care service operates.

Recommendation:

- The definition of 'neglect' be expanded to include acts or omissions that lead to an 'avoidable decline in a consumer's health and wellbeing'.

Reporting the use of physical and chemical restraint

The consultation proposes that the use of 'inappropriate physical or chemical restraint' be a reportable serious incident.

It is strongly recommended that this be re-worded to reflect the reportable incident language used by the NDIS Quality and Safeguards Commission of 'unauthorised use of a restrictive practice'. The term 'inappropriate' has no clear meaning, and could be interpreted broadly and in a variety of ways. From a rights-based perspective, the language should be clearly tied to protection of a person's rights, and ensuring that their legal and human rights are respected and upheld. 'Unauthorised' use of restrictive practices should be clearly tied to 'consent' to the use of such practices, and authorisation being provided by the consumer, or (where authorised under a legal instrument such as an enduring power of attorney, or court order) by their appointed decision-maker in accordance with state or territory law.

Restrictive practices definitions should also align with definitions under the NDIS Quality and Safeguarding Framework and the *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018.*

The need for an appropriate regulatory model to align with a SIRS

There are significant concerns regarding the recent efforts to regulate the use of restrictive practices in aged care under the *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* (the Principles). The Principles were made on 2 April 2019 and commenced on 1 July 2019 and form part of the *Quality of Care Principles 2014* under the *Aged Care Act 1997* (Cth). However, following an inquiry by the Parliamentary Joint Committee on Human Rights and the identification of significant human rights issues and concerns with the Principles, they have been subjected to a Motion to Disallow in the Senate. Therefore, it is strongly recommended that the development of SIRS be accompanied by the establishment of an appropriate and effective rights-based approach to the use of restrictive practices in line with the NDIS and Queensland's disability sector regulatory models. Given that the Principles are likely to be disallowed in the Senate, this is a timely opportunity to properly address this significant human rights issue, and bring the regulation of the use of restrictive practices and reporting of their unauthorised use under a SIRS into line with existing best practice.

While the Commonwealth should be applauded for recognising the need to regulate, the Principles fall significantly short of industry practice and standards in other sectors, in particular the national standards under the NDIS. Appropriate and effective regulation of restrictive practices (such as physical and chemical restraint) in aged care facilities should adopt a model equivalent to, and no less than, that articulated under the NDIS Quality and Safeguarding Framework. It is highly inappropriate and unjust that there are lesser standards to protect the human rights of older and disabled persons in aged care (as compared with other Australians in other residential settings) solely on the basis that they live in residential aged care.

The NDIS model is enhanced by authorisation practices in Queensland, grounded in Queensland's long established best practice statutory regime governing restrictive practices. This regime has proven strength in safeguarding an adult's rights and interests through comprehensive regulation of the assessment, approval, monitoring and review of the use of restrictive practices by disability service providers, and the requirement for a positive behaviour support plan designed to reduce and eliminate the use of restrictive practices.

The new Principles drastically regress protections of the human rights of all persons living in an aged care facility. Restricting the liberty of a person is such a significant infringement of a person's human rights it requires strict guidelines and regulation to justify being overridden, with justifications to be required in each individual instance. The new Principles give no consideration to a person's right to decision-making support, or choice and control. Most notably, the right of equal recognition before the law under article 16 of the *International Covenant on Civil and Political Rights*[10] and article 12 of the CRPD (enshrining the right to autonomy, dignity, choice and control) is completely bypassed and ignored. The passing of such laws without consultation, and based on a ministerial instrument rather than an Act of Parliament, only reinforces how important it is that a United Nations Convention on the Rights of Older Persons is developed, and for Australia to become a signatory.

The new Principles seek to introduce regulations governing the use of physical restraint and chemical restraint where a consumer in an aged care facility is unable to provide informed consent to their use. There is no requirement under the new Principles to consider or address how the service provider will reduce or eliminate the use of restrictive practices, nor any requirement to develop positive behaviour support plans which are now industry standards within the national disability sector. The authorisation and use of such practices lack any independent oversight, and in effect, appear to merely be a further requirement for service providers to 'tick off', without any clear obligation to seek the person's consent, keep the person informed, or consider the person's rights, will or preferences. Furthermore, there are serious questions as to whether the introduction of the Principles have also engaged the rights under the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.[11]

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[10] International Covenant on Civil and Political Rights, GA Res 2200A (XXI) opened for signature 16 December 1966, 993 UNTS 3 (entered into force 23 March 1976) ('ICCPR').

[11] See questions on notice to the Department of Health regarding the Principles, raised by the Parliamentary Joint Committee on Human Rights dated 28 August 2019. https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/QualityCareAmendment> See also the letter in response by the Public Advocate (Victoria) dated 17 September 2019 citing the Committee overseeing the Convention's General Comment No 2 Implementation of Article 2 by state parties. https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/QualityCareAmendment/Additional_Documents.

Need for regulation of restrictive practices focused upon age, and disability specific issues

The primary purpose for the use of restrictive practices should be to protect the person, or others, from harm, and should only be used as an *absolute last resort* and be the least restrictive option available, with requirements to demonstrate and articulate what other options have been tried and used. Any use of restrictive practices should be accompanied by a plan for reduction and elimination of its use altogether, with regular revision of its use, and authorisation for the shortest time possible. Provision of a legislative scheme should provide: stronger safeguards consistent with that proposed under the NDIS; transparency in the use and prevalence of restrictive practices; a mechanism for independent oversight for people in aged care facilities including the use of restrictive practices; and ensure clarity regarding the legal and appropriate use of restrictive practices in the aged care system. The regime should include strict penalties for abuse and misuse of restrictive practices, and obligate aged care facilities to develop and use positive behaviour support plans in line with the aim of reducing and eliminating the use of restrictive practices in services for the relevant person.

In developing a legislative regime, consideration should be given to whether there should be either a nationally consistent legislative scheme or a single piece of Commonwealth legislation that governs the use of restrictive practices for both children and adults across the various service sectors, including aged care, disability and health. A national approach could ensure consistent, independent regulation of the use of all restrictive practices upon persons of all ages, regardless of whether the practices are used in aged care, health, residential or disability facilities, or in the home.

However, the legislative regime governing aged care facilities should be designed to take into account not only disability-related behaviours of harm, but also issues specific to older persons. Evidence suggests that there is an increasing number of people with dementia who are being subjected to the use of restrictive practices in aged care settings. Often adults with dementia may find themselves at risk of harm as a result of ad hoc, poorly applied, or misused restrictive practices. Dementia wards generally house a broad range of people with varying degrees of dementia, some of whom may be relatively high functioning. The OPG has observed that there is a tendency towards classifying dementia wards as ‘high care’ with the motivation behind this classification is unknown directly by the OPG. Regardless of intent, the result is that such a classification can result in receipt of greater funding from the Commonwealth. Dementia is different from other cognitive conditions which can be treated with therapeutic interventions. Unlike other cognitive conditions, dementia is a terminal illness that cannot always be addressed by traditional modalities of positive behaviour support, or through the use of anti- psychotic medications as a form of treatment or chemical restraint. A significant risk in using restrictive practices on adults with dementia is that they can: negatively impact the adult; lead to an escalation in harmful behaviours; or cause harm to the person. As a degenerative illness, dementia should be treated within a palliative care model on the understanding that the person is unlikely to improve as the illness progresses. Currently, there is no equivalent to a specialised positive behaviour support concept to reduce and eliminate the use of any restrictive practices within aged care facilities that is designed for persons with dementia, and their use in these settings can amount to a breach of the person’s human rights. An appropriate model of care designed for dementia patients should be developed for managing challenging behaviour, and should be based upon providing the adult with dignity and respect and equitably, encouraging and supporting them to live life as much as their health permits at any given time.

Given the significant legal, human rights, and uncertainty surrounding the current regulatory regime, it is strongly recommended that the SIRS provide for 'unauthorised' use of restrictive practices, to ensure that consent is appropriately obtained, and the use of such practices are authorised by the consumer, or their representative in accordance with state or territory law.

Recommendations:

- The term 'inappropriate physical or chemical restraint' be re-worded to reflect the reportable incident language used by the NDIS Quality and Safeguards Commission of "unauthorised use of a restrictive practice".
- 'Unauthorised use of restrictive practices' should be clearly tied to 'consent' to the use of such practices, and authorisation being provided by the consumer, or their appointed decision-maker in accordance with state or territory law.
- Restrictive practices definitions should align with definitions under the NDIS Quality and Safeguarding Framework and the *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018*.
- Development of the SIRS should be accompanied by the establishment of a rights-based approach to an appropriate and effective regulation of the use of restrictive practices in line with the NDIS and Queensland's disability sector models.
- The SIRS provide for 'unauthorised' use of restrictive practices, to ensure that consent is appropriately obtained, and the use of such practices are authorised by the consumer, or their representative in accordance with state or territory law and reported as serious incidents where such processes are not followed.

Are there any additions or refinements required to the definitions of incidents between aged care consumers? If so, what?

It is recognised that the reporting of incidents between aged care consumers can be a significant means of ensuring that all persons living in aged care services feel safe and secure in their own homes. It also provides a tool to allow abuse to be appropriately addressed and resolved. However, in proposing such a definition, it should always be the purpose to gain greater understanding of causes resulting in consumer to consumer assaults, so as to develop better strategies to prevent harm to others. Such knowledge could inform aged care facilities engagement in harm minimisation approaches to de-escalate underlying tensions and frustrations, and address the behavioural concerns of certain consumers, while ensuring that other consumers live in a place where they feel safe and 'at home'. For further reference, the OPG recommends the Department of Health consider the findings and recommendations in relation to the reporting of assaults in disability service settings in the Victorian Parliament's *Inquiry into abuse in disability services: Final Report*[12] and the Victorian Ombudsman's *Reporting and Investigation of allegations of abuse in the disability sector: Phase 2 – incident reporting*[13].

[12] https://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/58th/Abuse_in_disability_services/FCDC_58-02_Abuse_in_disability_services_-_Final_report.pdf

[13] https://www.ombudsman.vic.gov.au/getattachment/45e28c63-24b0-4efd-b313-85f4f6e44d3f

It is essential that the SIRS not be used as a mechanism to criminalise, remove or discriminate against consumers who exhibit challenging behaviours due to disability, previous trauma and/or medical conditions, such as consumers suffering from dementia. The SIRS should ensure that the response to abuse or serious incidents between consumers aims to ensure that all consumers receive individualised and trauma-informed care to protect their Charter rights, and fundamental human rights. The OPG has anecdotal evidence of occasions when consumers (subject to allegations of abuse) who, following a hospital admission have been refused entry back into the home, without ever addressing the issues, or developing appropriate responses to address behavioural concerns. Where serious incidents arise between consumers, the SIRS should be utilised as a tool to ensure that behaviour support plans are developed to address such behaviours, not as an opportunity to penalise consumers. Staff also need to be trained and educated on behaviours of each consumer to prevent the escalation of any incidents to a level that could be deemed to be "serious".

Further, failure of an aged care service provider to ensure that behaviour support plans are in place and followed should be tied to the service provider's registration. This would allow for providers with a history of not developing and applying behaviour support plans to be penalised and risk de-registration.

Recommendations:

- That the SIRS provide for reporting of serious incidents between aged care consumers, but take caution in the design and refinement of definitions to ensure that SIRS protects against the criminalisation of consumers, particularly consumers with intellectual, cognitive or psychosocial disabilities.
- Failure to comply with the SIRS should be accompanied by penalties attached to registration, so that serious non-compliance could result in de-registration of a service provider.

Are there any definitions that require specific thresholds? If so, which ones and what should the threshold be? (For example, financial abuse would only be considered a serious incident when it was in relation to a certain dollar value or above).

The OPG would be significantly concerned if thresholds were introduced to the SIRS, particularly in relation to financial abuse. From a rights-based perspective, every person's rights count, no matter who they are, or how wealthy they are. To create a monetary threshold would be inherently inequitable, and tantamount to saying that poor people are a cohort who are unable to access or exercise their rights to financial independence, property or possessions. From a rights-based approach, determination of whether there is theft, inappropriate, or fraudulent use of a person's finances, is a matter for the person who is the aged care consumer to determine whether the amount, or nature of the financial abuse is significant to them. For example, a theft of $20 could be insignificant to one consumer but significant to another. Further, from a rights-based approach, a person who requires decision-making support to determine such a matter should be provided with that support to raise allegations of abuse. Such rights should also be recognised within SIRS as a fundamental right to ensuring that serious incidents are raised, investigated and appropriately and effectively responded to.

Therefore, the OPG strongly urges against the introduction of thresholds into the definitions, given that it could lead to certain cohorts of persons being unable to access or exercise their rights. Such

an approach would be inconsistent with a consumer's right under the Charter to be treated with dignity and respect and equitably.

Recommendation:

- The SIRS should not include thresholds under its definitions.

Timeframes and information to be provided for reporting

Does the proposed level of information/details required adequately cover incidents between consumers?

As discussed above under the issue of *"additions or refinements required to the definitions of incidents between aged care consumers"*, the SIRS must not be used to criminalise, remove or discriminate against consumers who exhibit challenging behaviours due to disability, previous trauma and/or medical conditions, such as consumers suffering from dementia. Reporting under the SIRS should instead be utilised as a mechanism to ensure that positive behaviour support plans are developed to address behaviours of concern as well as a tool to ensure staff are adequately trained to manage challenging behaviours. Accordingly, reporting on incidents between consumers should also include information on the impact the incident has had on the alleged offender, whether the alleged offender's family/decision maker has been notified of the incident and particulars of the behaviour support plan put in place. Further to this, reporting should detail the training and education staff have been provided with on behaviours of each consumer to prevent the escalation of any incidents to a level that could be deemed to be "serious".

If the incident is between consumers, what additional information should be reported at each stage (e.g. details of any cognitive impairment that had been assessed by an appropriate health professional)?

In line with the OPG's recommendation above on the level of information to be reported in response to harm caused to a consumer by another consumer, details of a positive behaviour support plan must be provided by the aged care provider at each stage of the reporting process, namely, initial, intermediary and final. Providers should also be required to provide information at each reporting stage on the impact the incident has had on both consumers, not just the victim.

The consultation paper requires the initial incident notification to include information on whether the incident has been reported to police and what action police have taken (if any). The OPG supports this information being provided, however, we believe it is also necessary for providers to provide justification as to why they deemed it necessary to involve law enforcement for an incident between consumers. This would allow the Commission to monitor any frequent police call-outs and ensure providers are not exposing consumers to police unnecessarily. This reporting element may also provide deterrence to service providers who may default to a police presence in response to consumers with a cognitive impairment demonstrating behaviours of concern that would not be classed as criminal.

Further, the OPG impresses that the investigation of an incident only be deemed to be finalised by the Commission if the consumer, or their representative, has been consulted and has advised that they are satisfied with the outcome. The intention of a reporting mechanism should ensure that incidents aren't only reported on, but are appropriately resolved to a level of satisfaction in the eyes of the individual consumer who should be the focus of the process. It is also important that the same

rights based imperative apply to the consumer who is the alleged offender, or their representative, to ensure they are satisfied with any behaviour support plan put in place as a result of the incident.

Recommendations:

- Reporting on incidents between consumers should include information on the impact the incident has had on the alleged offender, whether the alleged offender's family/decision maker has been notified of the incident, and particulars of the behaviour support plan put in place.
- Reporting should detail the training and education staff have been provided with on behaviours of each consumer to prevent the escalation of any incidents to a level that could be deemed to be "serious".
- Details of the positive behaviour support plan developed in response to harm caused to a consumer by another consumer should be provided by the aged care provider at each stage of the reporting process, namely, initial, intermediary and final.
- Initial, intermediary and final reporting by the aged care service provider should include details of past and ongoing training provided to staff to manage challenging behaviours at the aged care residence.
- Aged care service providers who contact police in response to an incident should, as part of the initial report to the Aged Care Quality and Safety Commission, provide justification as to why they deemed it necessary to involve law enforcement.
- Investigation of an incident should only be deemed to be finalised by the Aged Care Quality and Safety Commission if both consumers, or their representatives, have been consulted and have advised that they are satisfied with the outcome.

Powers of the Commission in relation to reportable incidents

Are the proposed powers for the Commission adequate, for example in relation to investigation and the ability to respond to reports?

The current powers of the Commission fall short of what is required to effectively regulate and safeguard the rights of consumers living in aged care residential facilities. This is particularly concerning in the context of the unregulated use of restrictive practices in the aged care sector.

As noted above, the unlawful application, or inappropriate use of restrictive practices are significant infringements of a person's human rights. The solutions proposed under the new Principles are evidence of how the aged care system falls short of the high standards regarding the use of restrictive practices that are applied in other sectors. In order to adhere to the human rights of consumers the Commission will need strong investigative and disciplinary powers to give the SIRS any weight in the residential aged care environment.

The OPG has identified three tiers that will be integral to provide strength to the Commission and a safeguarding of overall Charter rights of a person in aged care:

1. Community Visitors with legislated powers to monitor, inquire, complain and advocate;
2. An investigative body empowered with disciplinary measures;

3. Proper Regulation of restraint (discussed above).

Community visitor oversight of aged care

A fully funded federal community visitor program with legislated authority within a body such as the Commission would be invaluable in ensuring that the human rights of consumers underpin the SIRS. A Commonwealth community visitor scheme, modelled on the current community visitor and advocacy function of the OPG, would allow for instances of abuse, neglect and exploitation of persons in aged care to be readily identified and addressed. Such a scheme would need to be properly resourced, with legislated powers afforded to the community visitors to perform their function in upholding the human rights of consumers in aged care.

A significant number of OPG clients under guardianship (including young people with intellectual disabilities) reside in aged care facilities. OPG guardianship officers have observed that the use of unregulated restrictive practices has been prevalent in aged care facilities. However, without adequate oversight such as through independent community visitors, these adults remain vulnerable to abuse through the unregulated use or misuse of restrictive practices. Further, the current aged care visiting program overseen by the Commonwealth is voluntary, and in the experience of the OPG has inconsistent quality of oversight and service across services. Anecdotal evidence suggests that the community visitors in aged care facilities generally take on a 'friendship' role to the consumer. While building a strong relationship of trust with consumers is important, without advocacy, monitoring and oversight, issues of abuse and neglect can remain unaddressed. In the OPG's experience, it is only if these functions are legislated, that safeguards can be considered to be in place and a genuine shift can be observed.

The OPG adult community visitor program has statutory responsibility under the *Public Guardian Act 2014* to visit adults with impaired capacity who are living or receiving services at government funded facilities such as authorised mental health services, disability facilities, and level 3 accredited residential services[14]. Community visitors can make inquiries and *lodge* complaints for, or on behalf of, residents of the sites listed above. They also have broad legislative powers to do all things necessary to perform these functions[15]. Community visitors play an important role in identifying abuse which may otherwise remain undetected or unreported in these settings, and are a vital means of supporting adults to navigate complaints mechanisms. As a paid visitor scheme, it also has the advantage of ensuring staff are professionals with access to training and support who are equipped to provide rigorous assessment of rights protection and advocate for resolution of issues. It also means that structured duties in undertaking these functions can be managed within the terms of a contract.

The OPG also supports the Australian Law Reform Commission's recommendation 4-14 under their report *Elder Abuse – A National Legal Response (ALRC Report 131)* regarding the need for the Commonwealth to develop national guidelines for its aged care community visitors' scheme, including policies and procedures for visitors to follow if they have concerns about abuse or neglect of care recipients. Guidelines should include mechanisms to identify and address concerns of abuse or neglect, including referring older persons to appropriate advocacy and support services. Such mechanisms should empower older persons to overcome systemic barriers and support them to participate in their own rights protection.

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[14] Section 41, *Public Guardian Act 2014*
[15] Section 44, *ibid*

An empowered investigative body

An effective SIRS requires support from an appropriately empowered and independent Commission. Such a scheme would require appropriate governance, ensuring that the community visitor program is effectively managed by the Commission body, and empowered with complementary investigative and prosecutorial powers. This would be consistent with the findings of the Senate Community Affairs References Committee's findings in the report, *Violence, abuse and neglect against people with disability in institutional and residential settings* that "a nationally consistent approach to disability oversight mechanisms, is best overseen by a national disability body" (at 10.39, Recommendation 9).

Therefore, it is recommended that an effective community visitor program be established under the Commission. The program would need to be tightly focused in scope, purpose, powers and functions, but legislatively established within the Commission and empowered with 'teeth' to investigate and prosecute serious breaches of rights and service delivery standards reported upon and identified by community visitors in performance of their role.

We recommend that the Commission be empowered with greater independent oversight to regularly audit, as well as visit aged care services (both announced and unannounced) to speak with consumers to determine what is going on at the 'coal-face'. The safeguarding mechanisms must also be accompanied by powers to enter, inquire, investigate, prosecute and penalise, where appropriate. Having eyes and ears on the ground provides the opportunity to identify any issues of concern, such as the adequacy of staff-to-consumer ratios. A clear example of this is the emergency evacuation of residents from Earle Haven Retirement Village in Queensland in July 2019 which was linked to an inadequate ratio of staff to consumers. An independent oversight mechanism empowered to visit the facility to speak to consumers, staff and visitors may have been able to identify the warning signs and alerted an appropriate oversight body before the situation escalated to crisis point.

This is further to the issue discussed above whereby consumers exhibiting challenging behaviours have been admitted to hospital and later denied return to their residential 'home' which highlights specifically the need for greater oversight of the acceptance (or rejection) of vulnerable persons into residential aged care facilities. Mechanisms are needed to ensure that aged care services funded to provide services for persons with dementia or challenging behaviour are not routinely selecting only those persons who have 'easy' or more compliant behaviours. It can be extremely challenging to find an appropriate service for a person who has dementia with challenging behaviours that include aggression (either verbal or physical), or high needs such as faecal incontinence, or other challenging health conditions. Public Guardians, Public Advocates, and Public Trustees should be routinely consulted regarding their concerns about specific aged care services and residential aged care facilities. These statutory authorities (as they occur in respective Australian jurisdictions) are appointed to make decisions 'as the individual' and therefore frequently experience the same barriers, frustrations and positive experiences that individual older people experience, but on a much larger and broader scale than any one individual alone. Therefore, these authorities are uniquely placed to make comparisons between specific aged care services and can advise whether certain actions of an aged care service are a one off (e.g. an accident) or indicative of a more pervasive issue.

A future model for aged care

Any solutions cannot be realised through any rushed legislative proposals. There must be considered and wide public consultation that engages meaningfully with those working in the aged care sector, older adults and young people living in aged care, persons with disability living in aged care facilities,

as well as state and territory governments and key statutory bodies such as Public Advocates, Public Guardians and Administrators.

The OPG also urges government to undertake a focused review of the laws surrounding restrictive practices. A broad suite of solutions needs to be developed to address the use of restrictive practices in aged care, including:

- A regime that mirrors the requirements that the Queensland legislation places in relation to the 'authorisation' of restrictive practices;
- The three tiers of enforcement (as detailed above);
- Providing solutions to address the adverse consequences of physical restraints experienced by aged persons in nursing homes;
- Establishing and enshrining in law industry wide standards and guidelines regulating the use of restrictive practices, drawing on the standards established in the disability sector under the NDIS;
- Implementing dementia friendly environments;
- Increasing awareness of the risk of restraints while driving best practice to ensure the reduction and where possible elimination in their use, and
- Introducing reporting, monitoring and authorisation processes regarding the use of such practices that is overseen by a qualified and independent body.

Recommendations:

- The Aged Care Quality and Safety Commission be appropriately empowered and resourced to undertake effective oversight, investigation and enforcement functions including:
    - Establishing, funding and operating a fully funded community visitor program for the aged care sector, with legislated powers to monitor, inquire, complain and advocate on behalf of consumers in residential aged care, and
    - Empowered with investigative and prosecutorial powers, with increased independent oversight mechanisms to regularly audit aged care service.
- Any legislative proposals to support the SIRS and related aged care reforms be preceded by considered and wide public consultation that engages meaningfully with older adults and young people in the aged care sector, persons with disability living in aged care facilities, as well as state and territory governments and key statutory bodies such as Public Advocates, Public Guardians and Administrators.
- A focused public review regarding regulation of restrictive practices in aged care, and the development of solutions that learn from, and align with the regulation of restrictive practices in the disability sector.