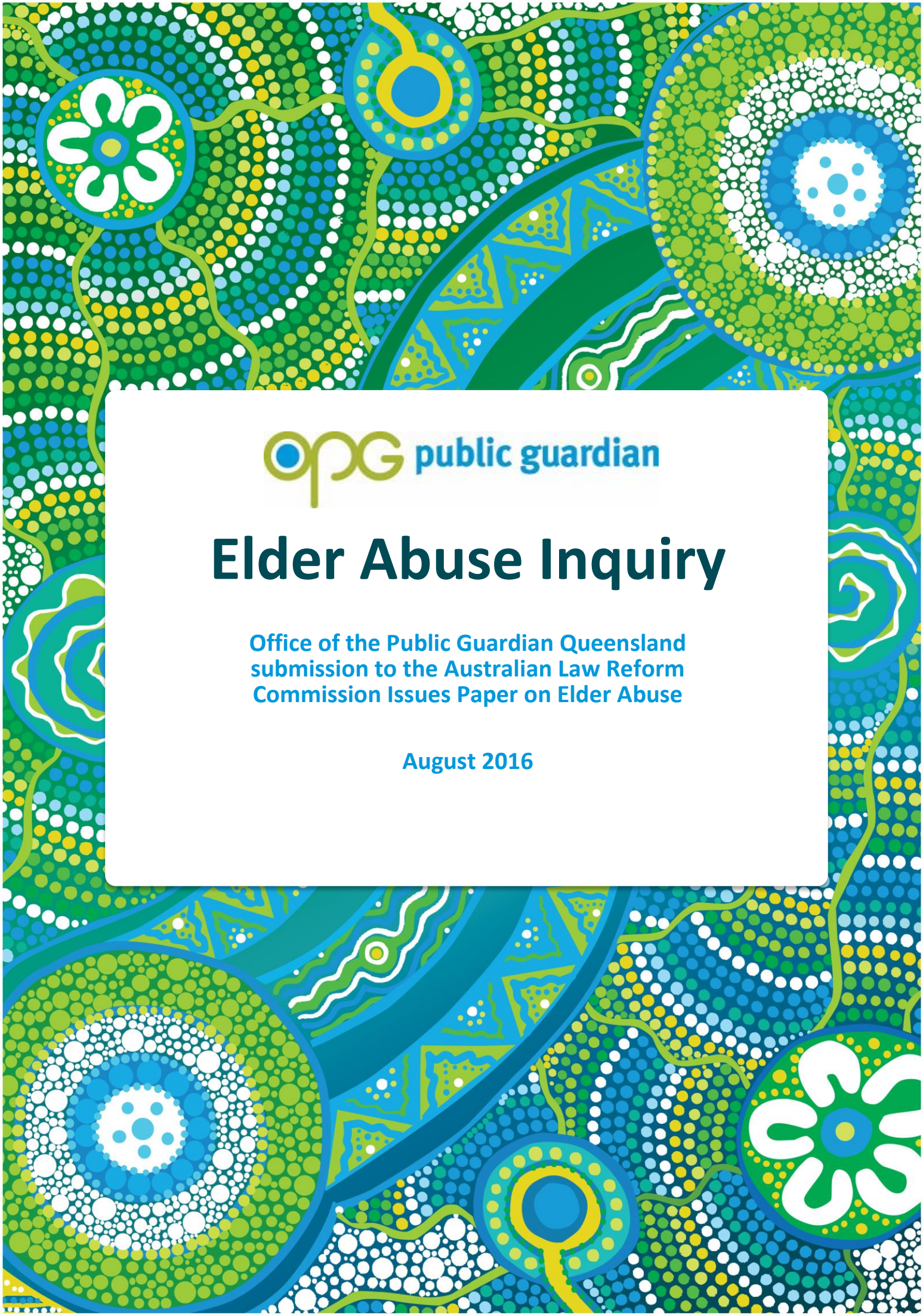

public guardian

Elder Abuse Inquiry

Office of the Public Guardian Queensland submission to the Australian Law Reform Commission Issues Paper on Elder Abuse

August 2016

About the Office of the Public Guardian, Queensland

The Office of the Public Guardian (OPG) is an independent statutory office established to protect the rights and wellbeing of adults with impaired decision-making capacity, and children and young people in out-of-home care (foster care, kinship care, residential care) and visitable sites.

The OPG provides an important protective role in Queensland by administering a community visitor program, which provides state-wide 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 or staying at a visitable site, including residential facilities, detention centres, corrective services facilities, and 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 supports children and young people in care through the 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.

Office of the Public Guardian

Background

"Where, after all, do universal human rights begin? In small places, close to home - so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighbourhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world." Eleanor Roosevelt

The Office of the Public Guardian (OPG) welcomes the opportunity to provide a submission on the Australian Law Reform Commission (ALRC) Issues Paper No 47, on Elder Abuse (issues paper).

In many ways the quote of Eleanor Roosevelt epitomises how, and where, meaningful strategies to prevent and address elder abuse should begin. Law reform, and strengthening the ability to investigate and prosecute elder abuse, should be seen as one factor within a community based approach to addressing elder abuse. The effectiveness of any law reform is dependent upon holistic strategies to empower community action 'close to home', to both uphold the right of ordinary citizens to be free from elder abuse, as well as educating and assisting front line community services to identify and report elder abuse.

One of the significant challenges in identifying elder abuse is that abuse and mistreatment are often unrecognised by people in the community, and can be hard to detect. Further, people subject to abuse are less likely to speak out due to feelings of shame, fear of retaliation, or because close family members are involved.

The OPG is empowered under the *Public Guardian Act 2014* to protect the rights and interests of adults with impaired capacity. While the OPG has a pivotal role in protecting the rights and interests of adults at risk of elder abuse, it is limited to investigating elder abuse only where it concerns adults who have impaired capacity.

Key protective mechanisms include: administering a community visitor program for adults with impaired capacity who reside at certain residential facilities;[1] and protecting an adult's right to make their own decisions through investigating complaints regarding inappropriate or inadequate decision making, or allegations of neglect, exploitation or abuse.[2] Investigations can encompass allegations of physical, sexual, psychological and financial abuse (including abuse of a power of attorney), and neglect and exploitation.

Community visitors make regular visits to forensic disability services, authorised mental health services and other places prescribed by the Public Guardian Regulation 2014, where adults with impaired capacity live. Complaints or allegations of abuse may be raised with the OPG by any member of the public, or brought to light through the work of OPG's community visitors. As such, community visitors play an important role in identifying abuse which may otherwise remain undetected or unreported in residential settings.

Investigations involve consideration as to whether current decision-making arrangements provide an adult with impaired capacity with appropriate assistance, or protection of their rights. While the OPG's primary focus is the protection of the adult, OPG may also assist in bringing an alleged perpetrator of abuse to justice by referring matters to the appropriate authority. The OPG's role in detection and prevention of elder abuse through the OPG community visitor and investigations roles is discussed in detail in section G below.

The OPG would be pleased to lend support to the ALRC as their inquiry progresses. Should the ALRC require clarification regarding any of the issues raised, the OPG would be happy to make representatives available for further discussion.

[1] This is in addition to the role of the OPG to protect the rights and wellbeing of children and young people in out-of-home care (foster care, kinship care, residential care), authorised mental health services, residential services, and youth detention. OPG supports children and young people through two specific programs: the community visitor program and the child advocate program.

[2] Section 19 *Public Guardian Act 2014* (Qld)

ALRC inquiry questions

A. What is elder abuse?

Given that the OPG's role is limited to oversight and investigation of adults with impaired capacity, our responses to the inquiry's questions are directed towards specific vulnerabilities that adults with impaired capacity face.

There is significant evidence that persons with intellectual, mental or cognitive disabilities, are more vulnerable to abuse than the rest of the general population. In older populations this vulnerability is seen through declining cognitive abilities and the onset of dementia. These adults are often exposed to specific and additional risk factors different from the rest of the population. These risks are heightened where a person is residing in residential or institutional settings, or heavily dependent upon day to day support from formal or informal care givers. A critical element of vulnerability is where the person is highly dependent upon the person abusing them, such as relying upon the abuser for essential daily care. These adults are often unlikely or unable to disclose violence, and may also have impaired communication skills.

Often cognitive impairment is only one part of the overall picture. These adults are often at heightened risk of undetected abuse through social isolation. Evidence and research suggest that perpetrators of abuse often choose, or take advantage of their victims because of their disability, figuring that detection is unlikely. In other cases, they will perpetrate the injustice because of the 'passivity, vulnerability, lack of believability and cognitive ability' of their victims.[3] There are also circumstances where neglect or abuse by the carer, may be due to the carer placing their own interests above that of the adult parent.

However, elder abuse is not always intentional. Elder abuse often occurs within the close family context where an adult child has responsibility for caring for an increasingly dependent parent.

There may be multiple factors leading to abuse. While abuse may in some instances be deliberate neglect, or abuse, there may also be situations where the carer lacks the ability, knowledge, skill or support to manage the increasing burden of care. Therefore, any proposed legal definition of elder abuse should recognise that elder abuse may be intentional or unintentional in nature. It is recommended that the severity of criminal penalties attaching to abuse could take into consideration intentionality in their application.

[3] Gill, M. (2010) "Rethinking sexual abuse, questions of consent, and intellectual disability" *Sexuality Research and Social Policy*, *7*(3), 201-213 at 203-4

While the issues paper has queried whether payment for services should be taken into consideration in describing or defining elder abuse, it is considered that definitions of abuse should be focused upon the victim and whether or not they have been 'abused'; that is, whether the person has been personally abused (physically, emotionally, psychologically, or sexually) or financially. Whether or not the person who perpetrated the abuse is paid, or not paid for the service provided, should be irrelevant in determining whether abuse has occurred.

Best practice legal responses

Best practice legal responses need to support and strengthen community based strategies to address elder abuse. Key services, such as health (general practitioners), aged care facilities; social supports, and financial institutions that interact with older adults on a regular basis should be educated, equipped and skilled to recognise indicators of potential elder abuse, and know how and where to report such matters for investigation. Services should also be aware of how to link these adults with early access to appropriate services and supports, and advocacy.

These strategies should be supported by appropriate legislative powers to investigate, penalise and address abuse, in a manner that does not re-victimise the person abused, but supports the victim of abuse. As such, investigations and penalties taken in relation to elder abuse should be directed towards the actions of the abuser.

Investigations by the OPG into elder abuse

As adults age, they often decline in their capacity to make decisions for themselves. From the experience of the OPG, this can place the adult at risk of potential abuse by family members, friends and carers, particularly in relation to financial matters.

Complaints regarding financial abuse constitute the majority of matters referred to the OPG for investigation. Financial abuse can include any form of improper use of the property or money of an older person. This includes forgery, stealing, forced changes to a will, involuntary transfer of money or property to another person, withholding funds from the older person, failure to repay loans, or misappropriation of funds under an enduring power of attorney.

During 2011-16, the OPG closed 766 investigations relating to an adult aged 60 years or over with impaired capacity. The majority of these investigations (551) related to complaints concerning adults who were older than 80 years of age.

Table 1 below sets out the general nature of the different allegations investigated and closed by the OPG during the past five years. Notably, allegations concerning financial management were the most common allegations the OPG investigated during this time, followed by allegations of neglect.

Table 1 Closed investigations by nature of allegation, Queensland adults aged 60 years and over with impaired capacity

	2011-12	2012-13	2013-14	2014-15	2015-16
Nature of allegation[(a)(b)]	**Number**				
Financial management	63	119	123	141	139
Neglect	14	39	30	36	72
Emotional abuse	9	12	9	22	51
Self-neglect	9	10	4	4	8
Physical abuse	4	14	4	3	14
Other (specified)[(c)]	57	20	2	0	4
Other (not specified)	38	78	50	68	66
Total investigations	**108**	**163**	**149**	**177**	**169**

(a) Multiple allegations are possible within an investigation, hence summing allegations will not equal to the total number of investigations.

(b) Categories for nature of allegation within the database have changed over the timeframe shown; categories shown reflect the category selection at the time the investigation was active. Caution should be taken in comparing allegation categories over time.

(c) Other (specified) includes assault, capacity, financial administrator, financial attorney, financial other, health care attorney/guardian, personal matters attorney, personal matters guardian, personal matters other, sexual abuse.

Source: Office of the Public Guardian customised request, unpublished data.

The issues paper requested examples of elder abuse from a broad range of scenarios. This submission seeks to provide a number of de-identified examples of investigations conducted by the OPG into alleged elder abuse. The investigations originated from complaints made from a variety of different sources, including concerned family members or friends, financial institutions, and health practitioners. Some elements identified through the investigation process which are common to investigations into elder abuse include:

- inappropriate care arrangements in the home
- financial abuse
- cultural norms within indigenous family units
- rural isolation
- adult children residing in homes they consider to be their inheritance
- prioritisation of inheritance over adult's care needs
- low standards of health care provided by family member
- adult's pension used to fund another's expenses and financial problems
- gifting of property by parent on basis of providing ongoing future care
- fraud and misappropriation of funds under power of attorney
- informal family agreements that are not honoured
- lack of access to and provision of independent legal advice
- the central place of service providers in reporting (or failing to report) elder abuse

Elder abuse in Aboriginal and Torres Strait Islander communities

Abuse of elders spans all cultures and communities. In contrast to the general population where older persons are generally considered to be aged 65 years and above, 'older' Aboriginal and Torres Strait Islander Australians are recognised from 50-55 years of age. In these indigenous communities, both locally and regionally, there has been acknowledgement that elder abuse is a common and widespread problem.[4] However, despite this acknowledgement, there is concern that reports of elder abuse from these communities is significantly under reported, and therefore underrepresented in official data recording elder abuse.

Family is a critical and central pillar in these communities, where 'elders' in the community are generally recognised community representatives and custodians of culture and history. While not all older persons within these communities are at risk of abuse, their vulnerability to abuse increases with age, along with a combination of other known risk factors. This underreporting might be attributed to multiple factors. Some of the factors observed by the OPG that contribute to such vulnerability include:

- lack of regular visits to a general practitioner, exacerbated by a high turnover of general practitioners in remote communities who lack historic personal knowledge of the older person and their circumstances
- chronic ill health or disability, coupled with mental health or mental impairment
- looking after extended family members (such as children or grandparents)
- lack of understanding or knowledge in the local community as to how to identify and address elder abuse
- lack of knowledge (or take up) of advance planning mechanisms to assist with decision-making in the future that are culturally appropriate
- lack of access to services (including culturally competent services)
- poor socio-economic conditions
- financial issues such as financial hardship; unmanaged debts; 'income sharing' where informal decision makers access the elder persons income without consent
- housing that may be overcrowded or in disrepair
- social isolation
- history of separation (from land and family), leading to distrust of external services and systems.

The following examples are cases of elder abuse investigated by the OPG involving cultural norms within Aboriginal and Torres Strait Islander family units.

[4] Elder Abuse Prevention Unit, *Aboriginal, South Sea Islander and Torres Strait Islander Strategy for responding to Elder Abuse*, Interim Report: March 2005 Update

Aunty Dee, aged in her early 80s

Aunty Dee lives in a remote Aboriginal community. She has significant health and mobility issues. Aunty Dee is unable to travel to the shops herself, so she is highly dependent upon her family for her care and welfare. Aunty Dee hasn't been to see her local general practitioner for two years, but she still requires regular medications. Her daughter Betty, is responsible for going to the local pharmacy every week to get her medications. However, Betty hasn't picked up her medications for six weeks, and Aunty Dee has not received any medications for that period of time. Aunty Dee also regularly goes to respite care. Whenever she arrives, she frequently arrives in an unhygienic state.

A service provider who is linked with Aunty Dee reported these concerns to the OPG, and also reported that they suspected that Betty was misusing Aunty Dee's income.

Since Aunty Dee hasn't been to the doctor in over two years, the doctor is unable to report on Aunty Dee's capacity to make her own decisions. Meanwhile, the health care centre arranged a family meeting, with Aunty Dee and Betty to discuss the current care arrangements, and Aunty Dee's health. However, this strategy failed to recognise that Aunty Dee would be questioned about any potential abuse in front of her alleged abuser.

A review of Aunty Dee's bank statements shows that nearly all her pension is withdrawn the day after it is deposited in the account. Sometimes the withdrawal is made in the town where Aunty Dee lives, and on other occasions, it is withdrawn in a major town about 8 hours' drive away. There are no other persons listed as authorised signatories on Aunty Dee's accounts, so Betty (or another family member) is withdrawing her funds using Aunty Dee's access card and PIN without the proper authority.

A challenge for the OPG in pursuing the investigation is the remoteness of the location, and the reliance upon telephone and email with interested parties to follow up the investigation. Investigators can only speak with Aunty Dee in a neutral environment, removed from external influence on those occasions when they physically visit the remote location. The investigation is ongoing.

Bev, an Aboriginal woman, aged in her 80s

Bev is an Aboriginal woman who lives in a regional area of Queensland in an aged care facility. Bev appointed her son as an attorney under an enduring power of attorney. Bev was diagnosed with dementia, and as her care needs increased, she became a resident in the high care section of the facility. Allegations were made to the OPG that her son was financially abusing his mother and inappropriately managing Bev's financial affairs.

Bev's son wouldn't provide any response to the investigator's attempts to request information or records about his mother's financial affairs. Information gathered from Bev's bank, care facility and other parties revealed that nearly $25,000 cash had been withdrawn by the son from Bev's account above and beyond that required to pay for her expenses, with no way to identify where those funds had gone. The Public Guardian applied to the Queensland Civil and Administrative Tribunal to seek appointment of an administrator for Bev. During the hearing, the son advised that within his community, and as a member of an indigenous family, it was appropriate for finances within a family unit to be shared: particularly with him, as he was the eldest son. Some of Bev's other children also attended the hearing; however, they didn't agree with this son's views. It was determined that the son had not been sharing the funds with other members of the family, or the community, but had been using the funds for himself. The Public Trustee was subsequently appointed as administrator for Bev.

Elder abuse in culturally and linguistically diverse communities

Similarly, there is little significant underreporting of elder abuse experienced by older persons from culturally and linguistically diverse backgrounds.

Culture, and language barriers have a significant impact upon the way that these communities recognise, understand and respond to elder abuse. Community education and information needs to be flexible enough to bridge the gap between cultural norms and language barriers and understanding what elder abuse is, and that it is unlawful.

Critical to addressing these barriers is involving interpreters, and communications in plain English. Therefore interpreters need to be accessible to both community members, as well as professionals working with service providers and engaging with these communities.

Again, while not all older persons within these communities are at risk of abuse, their vulnerability to abuse increases with age, along with a combination of other known risk factors, including:

- the older persons may speak little, if any, English
- financial assets in the older person's name being treated as 'family' assets by children
- difficulty in gaining access to information about services available due to language barriers, and the difficulty in navigating complex service systems
- difficulty in communicating their concerns, or needs due to language or communication barriers

- social isolation by not being fluent in English, exacerbated by migration, and lack of informal support networks in the community
- cultural mores, including keeping 'family matters' private
- lack of education, understanding and awareness of elder abuse.

During the course of investigations, the OPG has to overcome barriers to obtaining medical evidence about capacity, particularly where an independent interpreter is required. In some cases, the user of an interpreter to conduct cognitive testing may lead to unreliable results in determining capacity. In the absence of capacity tests in the person's first language, there is the risk that some cognitive tests become less reliable when conducted in the adult's second language.

The following is an example of elder abuse investigated by the OPG of a person from culturally and linguistically diverse background.

Rashima, aged in her 80s

Rashima is a widow in her early 80s. She immigrated to Australia several years ago with her husband and her six children, two of whom have since returned to live in their country of origin. Rashima doesn't speak any English and recently she moved from her social housing unit, to live with one of her adult sons as her care needs increased.

The OPG received a complaint that Rashima's financial assets were being abused, and that she was being inappropriately cared for.

When attempting to gather capacity evidence in relation to Rashima's ability to make decisions, the treating doctor requested an independent interpreter, and not one of Rashima's children, to assist him. This delayed the gathering of medical evidence about capacity. An interpreter was also required to facilitate communication between the OPG investigator and Rashima during the investigation.

Rashima had executed an Enduring Power of Attorney appointing her son, Raoul and his wife as her attorneys for financial and personal/health matters. The attorney's power for financial matters commenced immediately.

The family unit was conflicted about who had "control" over Rashima's life. This resulted in the attorneys not being as protective as they should have been with Rashima's finances because of their struggle to maintain family harmony whilst providing proper care to Rashima. Rashima's finances were treated as funds for the family, yet there was no evidence of other family member's funds being placed into this 'pool'. At times, Rashima's one bedroom unit was occupied by Rashima and other family members who did not contribute to expenses.

Rhees, another son, sent Rashima to her country of origin to live with and be cared for by her daughter. This wasn't approved by the attorneys. Rashima remained overseas for ten months. During this time, Rashima's health deteriorated significantly and she returned to Australia after receiving medical treatment and undergoing a lengthy recovery. Whilst Rashima was overseas, she remained listed as the only tenant on her unit. Rashima also continued to pay rent on this unit during her time overseas despite another son, Rhahid, residing in this unit during this period.

During Rashima's time overseas, Rhahid continued to access large sums of money from her accounts and claimed to be paying her bills and sending money to his sister because she was caring for her mother. Rhahid could not produce any records of the funds transfers to his sister and not could he demonstrate which bills he paid. Rhahid also received a carers payment from Centrelink whilst Rashima was overseas and arranged for Centrelink loans on her behalf. Rhahid was able to contact Centrelink and divert Rashima's pension payments to another account, despite not holding an Enduring Power of Attorney for her.

The attorneys made appropriate care arrangements for Rashima on her return to Australia. These care arrangements allowed her to stay with family and receive appropriate care. The challenge for this family will be when Rashima's care needs increase to the point that she requires placement in a care facility. It is unlikely Rashima will be able to obtain a room or bed in a facility where her linguistic and cultural environment and values can be maintained.

The attorneys did not make appropriate arrangements to protect her financial interests. The attorneys did not access Rashima's money for their own benefit, but they clearly did nothing to prevent other family members from accessing Rashima's funds in a way that wasn't for her benefit. A member of the conflicted family unit submitted an application to QCAT seeking the appointment of a guardian and administrator for Rashima. The Public Guardian recommended the appointment of an independent administrator to ensure Rashima's financial interests were protected. QCAT appointed a Guardian and Administrator for Rashima.

Elder abuse in the general community

The following is a de-identified case investigated by the OPG that encapsulates a 'perfect storm' of conditions for elder abuse. It involves: social isolation; family pressure to access money; an abusive adult child who moved in with, bullied and threatened his vulnerable parent; theft and withholding of income; abuse of an enduring power of attorney; neglect of personal care and medical needs; inappropriate care and living arrangements in the home; threatening and intimidation of support services; and failure of critical services and health practitioners to identify and report abuse. However, due to the action taken by a community-based service (a bank) to report suspected abuse, this abuse was investigated and stopped.

Betty, aged in her 80s

Betty had been going to the same bank for years where she held substantial cash assets. Betty had verbally advised the bank over many years that she didn't want her son to have access to her money. However, her son started to accompany her to the bank when Betty withdrew money. Whenever the son was present, Betty would become unclear about whether she wanted her son to have access to her money under a third party authority.

Betty's change of position regarding her son's access to her money raised concerns for bank staff. The bank staff always spoke to Betty on her own if she ever came to the bank with her son. This would aggravate the son, and he would intimidate and threaten bank staff whenever they sought to take his mother aside to obtain her views. If they took her into a separate office, the son would bash on the office door repeatedly and yell until his mother left the office. On one occasion, the bank received a recorded telephone message from Betty instructing the bank to allow the son access to her accounts. In the background a man (who sounded like the son) could be heard instructing Betty what to say. The bank followed internal procedures and maintained the view that Betty did not wish for her son to have access to her bank accounts. The son then produced an enduring power of attorney, appointing him for Betty's financial and personal affairs. At this point, the bank immediately reported the matter to the OPG for investigation, suspecting that Betty was being financially abused by the son.

The investigation identified that the son had moved into the home in which Betty was living. The house was run down and hazardous for Betty to live in, particularly as she had poor vision and mobility. The son had no interest in repairing the home, and was planning to demolish and re-build on the property with the purpose of making a personal profit. The investigation revealed the son was attempting to access Betty's funds to buy investment property. Betty owned several properties; however, over a five-year period, all rental income from these properties, and Betty's pension, were never received by her. All income was siphoned away by the son. No maintenance had been carried out on any of the rental properties, which were also in disrepair. Several service providers who attended the home, stopped coming due to physical threats made against them by the son. Betty was frequently hospitalised with severe constipation due to lack of adequate care in the home, and often hadn't had a bowel movement for up to eight days prior to her admission to hospital. On these occasions, the social worker would call for an ambulance, while the son allegedly dismissed the health concerns as trivial. Betty's long term treating general practitioner identified himself as a long term friend of the son, and expressed no concern for the mother's health or welfare, despite the fact that there was significant evidence of her health and welfare being at risk. During the investigation, Betty indicated how much she loved her son and regularly made excuses for his behaviour, telling people that he meant well, despite his behaviour being overbearing, abusive and threatening.

On the basis of the information provided to the OPG by the bank, and preliminary inquiries, sufficient evidence was gathered to support the reasonable suspicion that the attorney was not competent. As a result, the Public Guardian suspended the attorney's power for financial matters under section 34 of the *Public Guardian Act 2014*, and the Public Trustee of Queensland temporarily acted in the role as attorney for financial matters during the suspension period. In determining whether the elderly woman had capacity under the *Powers of Attorney Act 1998* (Qld), the medical evidence indicated that Betty had the ability to understand the nature and effect of decisions about the matter, and could communicate the decisions in some way. However, Betty was unable to be meet the third criterion for capacity; that is, being able to make decisions freely and voluntarily.

The OPG successfully applied to the Queensland Civil and Administrative Tribunal for the appointment of the Public Guardian as guardian and the Public Trustee as administrator for Betty. A domestic violence order is now in place, which the son has breached on a number of occasions.

The following is an example of elder abuse investigated by the OPG involving people living in rural, regional and remote communities.

Ellie, aged in her 80s

Ellie managed a rural property in remote Queensland, and had done so for many years, even though she had been widowed for a long time. Ellie and her husband had built a substantial portfolio of several rural properties during their time on the property. About 10 years ago, she gifted ownership of several of these rural properties to her son Peter. This included gifting the property on which she lived. Several years later, she wrote an enduring power of attorney, under which she appointed Peter as attorney for financial, and personal and health matters. About a year after this, she was formally diagnosed with dementia.

A close friend of Ellie subsequently advised the OPG, that at the time when Ellie gifted her property to her son Peter, she had started to exhibit changes of behaviour. She was occasionally forgetful, and had progressed to becoming increasingly vague. Despite her having gifted the property on which she lived to her son, she continued to live there by herself. As her dementia progressed, her care needs increased and she received minimal support or assistance, and had limited access to rural services. Ellie was unable to cook for herself or move around freely. There were no toilet facilities at the home, and it had become unliveable. Peter eventually moved Ellie onto his property into a donga. For some time, Ellie lived without access to a fridge. If Peter went away for a few days, he would place food in an esky with frozen bottles of water. Due to the hot temperatures experienced in this area, the frozen water bottles had often completely defrosted prior to the food being consumed, or Peter returning.

Following an investigator of the OPG visiting Ellie at the rural property, arrangements were made for her to be moved to an aged care facility.

At the same time, investigations were carried out into Ellie's financial affairs. An investigation into her finances showed that substantial sums of her pension were being spent in a way that did not appear to benefit Ellie, even after her admission to the care facility. Peter's finances were also investigated, as it appeared that he was using Ellie's income to supplement his own expenses to address his cash flow problems. As a power of attorney, it was determined that Peter failed to provide any financial records; keep his property separate; or act honestly, or with reasonable diligence. The OPG determined that Peter had not managed Ellie's funds as her power of attorney, in a way that was adequate or appropriate, and an application made to the Queensland Civil and Administrative Tribunal for the appointment of an administrator for Ellie.

B. Aged care

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, or the inappropriate use of aversive or restrictive practices.

Aged care assessments (Question 12)

One option raised in the issues paper is the ability to use aged care assessments to address elder abuse.

Aged care assessments are traditionally very narrow in their remit, identifying purely medical needs and eligibility, rather than broader categories of social or safeguarding needs. The OPG considers that having broadened assessments could assist with identifying and responding to people at risk of elder abuse, whether from families or within residential systems. Assessments would need to be cognisant of any overbearing family, carers or spouse, and clearly identify when there are concerns for the person being assessed.

One of the weaknesses of aged care assessments is that they generally operate as recommendations, and do not bind services or aged care facilities to prioritise and accommodate the needs of the aged person, over and above internal and administrative service priorities. However, broadening such assessments requires corresponding resourcing to fund the lengthier assessment, as well as provide the requisite supports and services to meet the identified needs.

Use of aversive practices (Question 16)

Aversive practices act as a form of punishment; are unregulated, and not appropriate from either an ethical, moral, or clinical position to manage challenging behaviour. There are also significant legal questions surrounding their validity and use. As such, there should be regulation that strongly prohibits the use of such practices.

One of the more serious concerns for the OPG is the use of 'aversive' practices in aged care facilities on clients for whom the Public Guardian is appointed as guardian. Further information about the role of the Public Guardian as guardian for personal and health matters is provided under section F.

The OPG has anecdotal evidence received from guardians, community visitors and other sources, that aversive practices are used.

OPG guardianship services will receive complaints about aged care services from families concerned about the use of aversive practices, which can include complaints such as clients being tied to their chair, or bed, all day. Further, OPG guardianship staff have provided anecdotal evidence that they regularly address complaints of unmonitored and unregulated use of chemical restraint, or unauthorised detention of OPG guardianship clients within locked wards.

While a substantial proportion of our clients have complex behavioural needs, these practices should be either strictly regulated by legislation, or prohibited.

Use of restrictive practices (Question 16)

There is already clear national commitment to reducing and eliminating the use of restrictive practices in the disability and mental health sectors within Australia. There is, however, no clear commitment across all service sectors, nor consistent approaches to the use of restrictive practices across all life stages.

There is a need for significant 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 National Disability Insurance Scheme (NDIS) offers a significant and timely opportunity to adopt a national approach; to bring greater national consistency, as well as internal consistency, to the use of restrictive practices across the life span of all Australians. For example, restrictive practices on minors are generally not regulated. However, when a person reaches the age of the 18 they may be subject to the use of restrictive practices, which is regulated in different ways depending upon the state or territory in which the person lives. Then, when they enter into an aged care facility later in life, they may once again find themselves living in a sphere where the use of restrictive practices is unregulated, and open to abuse, or misuse.

National legislation should be passed to regulate the implementation and use of evidence based positive behaviour supports, for when a person exhibits challenging behaviour. This legislation should apply in all sectors where restrictive practices are used, whether in the disability, health, or aged care sectors, and for all persons, whether young or old, who need to have legislative safeguards, and regular monitoring and oversight of the use of such practices. The 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 in line with the aim of reducing and eliminating the use of restrictive practices for the person. Compliance with legislative obligations should not be negotiable for any person seeking to use restrictive practices, whether as a registered or un-registered provider of services. All persons and organisations seeking to provide services or supports to 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 creation of the new position of Senior Practitioner under the NDIS also provides a unique

opportunity to explore how this office could operate across all sectors and age groups to oversee and safeguard the use of restrictive practices nationally.

Notably, self-regulation of restrictive practices in the disability sector was a failure. Historically, issues had been identified in the disability sector that restrictive practices were not legislatively supported, and family members and direct care givers and service providers were exposed to allegations of acting unlawfully. Further, it was considered that as restrictive practices involve serious impositions upon the fundamental human rights of liberty and security of a person, their use should be subject to rigorous legislative protections, oversight and review. These problems and others relating to inadequate legislative oversight of restrictive practices in Queensland were identified by the Hon. William Carter, Q.C. in his report in 2006, *Challenging Behaviour and Disability: A Targeted Response*.[5] This report identified that self-regulation with respect to restrictive practices in the disability sector had not worked and legislative reform was needed. This led to implementation of a strong regulatory scheme under the *Disability Services Act 2006* (Qld) which now oversees the use of restrictive practices in the disability sector in Queensland. While the oversight of the use of restrictive practices in the disability sector has since been broadened in Queensland to encompass non-government service providers funded under the NDIS, a more comprehensive and national approach to regulating restrictive practices remains essential. A national approach should ensure consistent regulation of the use of all restrictive practices used upon persons of all ages, regardless of whether the practices are used in health, aged care, residential or disability facilities, or in the home.

Without a consistent national approach, the governing legal framework will remain a combination of inconsistent and disconnected Commonwealth and state or territory law, amounting to a piecemeal approach to the protection of the interests and rights of persons who are vulnerable to abuse, and will likely result in gaps in safeguards.

Complaints mechanisms (Questions 18, 20)

The issues paper has asked what changes can be made to aged care complaints mechanisms to improve their responses to elder abuse. From the experience of the OPG, many complaints mechanisms are completely ineffective. With minimal oversight and regulation, these complaints mechanisms are infamous for their inability to achieve outcomes for our clients where there are serious issues of concern. Often, the only recourse available for OPG guardianship clients where there are serious issues of concern, is to move the person to a different facility. Complaints processes often offer little opportunity, if any, to resolve serious issues.

When determining the nature of elder abuse, and how aged care facilities can improve complaints systems, it is worth identifying the impact that business models have upon perpetuating or facilitating the abuse of an aged person's rights. It is arguable that a

[5] Available at https://www.communities.qld.gov.au/disability/help/search?query=Challenging+Behaviour+and+Disability%3A+A+Targeted+Response&profile=communities

person's rights may be 'abused' where their needs and concerns are secondary to operational and business requirements. The OPG often has to face issues where guardianship clients are moved to other placements due to the operational needs of the organisation, without proper consultation or determination as to whether the new placement is suitable for the person. A recent example was when notification was received from an aged care facility that they were moving an OPG guardianship client to another facility within 24 hours, following an internal organisational policy change within the organisation. While the client had been living in an unrestricted ward, the client was now being moved to a locked dementia ward in another facility. There was no evidence that the client required this type of accommodation. The OPG investigations team also receives complaints of aged persons being moved into locked wards in aged care facilities just because there are vacancies on the ward, without assessing whether it is appropriate to meet the needs and requirements of the person, or having any consideration as to whether it is in accordance with the will, preferences and rights of the person.

One aspect of improving aged care complaints mechanisms is to ensure that there is greater access to funded advocacy. A critical issue is the need for advocacy to give voice to concerns of this cohort. Similarly, there is a lack of funded and accessible advocacy programs which are able to meet the expanding needs of an aging population.

C. The National Disability Insurance Scheme

The issues paper has queried whether there is evidence of elder abuse within the NDIS.

The OPG has limited experience with the NDIS to date. However, it is expected that the scheme will significantly impact a substantial proportion of OPG clients as it is rolled out.

While the Quality and Safeguards Framework for the NDIS is still being finalised, there are significant concerns regarding the generalised, and somewhat limited attention given to addressing the needs of those persons who experience multiple levels of disadvantage, and are at heightened risk of abuse. There is minimal detail within the framework to specifically address: issues of marginalisation experienced by those individuals with complex circumstances and needs; those from Aboriginal or Torres Strait Islander, or non-English speaking cultural backgrounds; persons in remote areas with limited access to services, or those with limited availability to additional support options; or professional advocacy for persons experiencing heightened vulnerability. It is not suggested that the framework be considered an ideal model to adopt to provide safeguards against elder abuse. However, it may be more appropriate to examine models being developed to address and safeguard against domestic violence.

D. Superannuation

The following is a de-identified example of an OPG investigation into a matter involving a self-managed superannuation fund (SMSF).

Peter, aged in his 80s

Peter lived in a grand home until moved into care due to health needs. Peter had been a well-respected professional within the community, and was very wealthy with complex financial affairs. Among Peter's many financial assets was a self-managed superannuation fund (SMSF), of which Peter had been appointed director of the trustee company of the fund. A couple of years after moving in care, Peter was diagnosed with dementia, at which time Peter's attorneys, appointed under an enduring power of attorney, assumed control of Peter's financial affairs. A complaint was made to the OPG that the attorneys were financially mismanaging Peter's funds. Peter was aged in the late 80s at the time of the complaint.

The OPG investigated the matter and identified cash withdrawals of concern, including the transfer of funds identified as conflicting with the interests of the attorneys. However, the greatest concern was the identification that the attorneys were not competent to manage Peter's financial affairs due to the complexity, and their lack of understanding of the laws regulating SMSFs.

The investigation identified that, following Peter's loss of capacity to make decisions, no changes had been made to the SMSF and Peter remained the director of the trustee company. The accountant, who had managed the accounting for Peter's business for years, was transacting on the SMSF after Peter lost capacity. During an interview with one of the attorneys, they advised that they had no idea as to whether Peter was a director of the SMSF, or the relevance to the SMSF of Peter having lost capacity. The attorneys did not take any action to ensure that the SMSF was compliant after Peter lost capacity, and were allowing the accountant to make decisions in relation to the SMSF when he had no authority to do so.

A critical issue regarding the management of SMSFs is the need for a certain level of skill and knowledge, as well as awareness of the legal issues surrounding SMSFs. In Peter's case above, there was significant lack of knowledge of the law and practice regarding what happens to a person if they lose capacity while sole director of a SMSF. This does not appear to be an isolated issue. From OPG experience, there appears to be a significant gap in community knowledge and understanding regarding the law in this area.

It is recommended that one option for addressing such abuse would be through establishing and promoting an education program relating to SMSFs. The purpose of this program should be to assist people who set up SMSFs, as well as those who assume responsibility for a person's financial affairs under an enduring power of attorney, including what must happen if the sole director of the SMSF loses capacity.

E. Family agreements

The OPG has investigated a number of allegations of abuse in relation to the use of family agreements. Concerns mainly arise where an older member of the family agrees with another trusted person, usually an adult child, to transfer title to their property on the basis that they will receive ongoing and future care, support and housing.

On the one hand, family agreements can offer a flexible way for families to provide for older members as they age; without regulation, formal documentation and independent legal advice to all parties involved, they can be used to strip a person of their assets, leaving the victim with minimal recourse to restitution or protection of their rights at law. There should be an obligation placed upon solicitors not to act for all family members when a family agreement is made that is not nullified by the older person giving consent,[6] ensuring that older family members have separate, and independent legal advice. There should also be greater education available for persons transferring title to their property, to ensure that such family arrangements are formalised, and the rights and interests of all parties clearly protected. It is recommended that deeds of family arrangements should be required in order to protect vulnerable parties, as proof of such arrangements, and to protect and provide enforceable rights to the older member of the family.

The example of Fred below, relates to one such matter that the OPG investigated in relation to a family agreement. This case demonstrates how failure to obtain independent legal advice for the father, as well as inadequate documentation securing the family agreement, exposed the adult to loss of assets needed at a later time to pay for his care.

[6] Australian Solicitors Conduct Rules, r 11, Conflict of duties concerning current clients

Fred, aged in his 90s

Fred and his wife Doris purchased their home about 30 years ago. Patty (their daughter) and her husband moved in to help care for her parents about 10 years ago. Not long after this, Doris died, and Fred made an agreement with Patty and her husband to transfer a share of his home to them as joint tenants. Patty and her husband then sold their own home and used some of this money to fund an extension to Fred's home, of which they were now joint tenants.

About 5 years ago, Fred executed an enduring power of attorney under which he appointed Patty as his attorney for financial, and personal and health matters. The power of attorney for financial matters commenced immediately. A couple of years after this, Fred started to find it difficult to get around the property, so they sold the house they were living in to buy a more accessible property. The new property was bought in the name of Patty and her husband on the understanding that Fred would have a life tenancy in the property; however, Fred would not be listed on the title. All of Fred's financial capital from the sale of the original property went into the new property. Any residual funds were deposited into Patty and her husband's account. No Deed of Family Arrangement or other formal documentation regarding the agreement was ever prepared. There was only a letter from the solicitor advising Fred that he would be provided with a life-time tenancy. No independent legal advice was obtained for, or by, Fred, and the solicitor did not appear to be independent, as he also acted for Patty and her husband in the transaction regarding the new house.

Despite being offered a life-time tenancy, Fred paid half the cost of rates and water expenses, and renovations carried out on the property. No consideration was given to whether Fred's needs might increase to the point that he may not be able to remain in the home. Fred now lives in an aged care facility and has dementia. Following his move to the facility, his monthly expenses have exceeded his income by approximately $500. Fred lost his ability to earn income after all his money was invested in Patty and her husband's property. Fred also lost the ability to realise the benefit from the life tenancy after he moved into the aged care facility. Patty, as his power of attorney, was responsible for ensuring Fred's rights and interests were protected; however, she had a significant conflict of interest. She failed to take any action on Fred's behalf to assess whether a change should be made to the family arrangement due to the fact that the benefit from the life tenancy could no longer be realised by Fred.

An application was made to the Queensland Civil and Administrative Tribunal to seek a direction about the manner in which the life tenancy had been set up. It was found that there was sufficient evidence for the existence of a family agreement, and the tribunal ordered the attorney to make arrangements for Fred's life interest to be properly secured and documented.

F. Appointed decision-makers

Role of the OPG in preventing elder abuse

Under the *Guardianship and Administration Act 2000* (Queensland), adults with impaired capacity may become clients of the Public Guardian by means of an appointment by the Queensland Civil and Administrative Tribunal (QCAT).[7] A person may independently appoint the Public Guardian as their attorney for personal or health matters under an enduring document.[8] The Public Guardian may also act as attorney for personal matters for a person following the suspension of an attorney's powers.[9]

The Public Guardian may claim and recover possession of the property of an adult with impaired capacity, or seek damages, or payment by money on the person's behalf in the Supreme Court, if the Public Guardian considers the property of the adult is wrongfully held, detained, converted or injured, or there is money payable to the adult.[10]

In addition to its substitute decision-making roles, the Public Guardian may also represent a person's rights and interests when appointed as allied person under the *Mental Health Act 2000* or the *Forensic Disability Act 2011*,[11] or when appointed as a separate representative to help represent a person's views, wishes and interests in a matter before QCAT.

Advance health directives and enduring powers of attorney remain the primary mechanisms by which an individual in Queensland can make decisions in advance regarding their own health care, personal and financial matters. However, where a person does not have an advance health directive, guardian or attorney, the OPG also offers a comprehensive 24 hour, 365 day a year service as statutory health attorney of last resort.

The OPG also engages in community education programs regarding issues of capacity, particularly in relation to healthcare decisions. Through this program, the OPG ensures that all Hospital and Health Services in Queensland have been made aware of the relevant issues impacting upon the capacity of an individual to consent to medical treatment, and of the statutory powers and responsibilities of guardians and attorneys, including the OPG. This area requires regular and repeat education, given the constant turnover of staff in health facilities.

[7] Section 14 *Guardianship and Administration Act 2000* (Qld)

[8] Section 29 *Powers of Attorney Act 1998* (Qld)

[9] Section 35 *Public Guardian Act 2014* (Qld) for a period of 3 months. The Public Trustee may act as attorney for financial matters during this time, until a formal appointment is made.

[10] Section 33 *Public Guardian Act 2014* (Qld)

[11] Section 342 *Mental Health Act 2000* (Qld); section 26 *Forensic Disability Act 2011* (Qld)

Role of OPG guardians

In Queensland, a guardian acts as a substitute decision-maker for personal or health matters for a person who has impaired capacity, whether by virtue of intellectual disability, cognitive impairment or mental illness. The appointment of a guardian by QCAT must only be made where there is a need for a decision and where, without an appointment, the person's needs will not be adequately met or their interests protected.[12] Decisions must be made in accordance with the General Principles set out in the *Guardianship and Administration Act 2000* (GAA).[13]

People aged over 65 years currently comprise approximately 30% of guardianship appointments made by QCAT to the Public Guardian. Given the aging population, it is considered that in the future this percentage will continue to increase over time.

Appointments to the Public Guardian are made where there is no other appropriate person available for appointment.[14] The GAA upholds the role and importance of family members and others acting in an informal capacity for a person. Given this context, the Public Guardian is given formal powers to exercise decision-making on behalf of a relatively small number of Queenslanders with impaired capacity. In 2014-15, the Public Guardian provided guardianship services to a total of 2,900 people, which represents approximately 2.5% of the total estimated number of adults with impaired capacity in Queensland (115,745 people).

In the case of older persons, the vast majority of guardianship appointments are driven by the need for decisions to be made regarding permanent residential aged care. These appointments are often instigated by hospitals where there are concerns that the adult is unable to be returned from the hospital to live independently in their own home. These adults become subject to a guardianship order in favour of the Public Guardian for one of two reasons: they either have no family or friends in their lives; or their family or friends are not appropriate for appointment, in particular, whether they have been the perpetrators of abuse or neglect.

Many of the older OPG guardianship clients come from highly complex and conflicted family situations. These family relationships may be characterised by long-standing conflict; blended families; entrenched disputes between siblings over their parent/s financial assets; and a history of the older person being isolated by one family member who refuses to allow contact with other family members. These highly fractured family environments experienced by the person prior to the Public Guardian's appointment mean that the person has often been subjected to emotional abuse of some description; social isolation; and in some cases, neglect of their basic support and healthcare needs. In such cases, a significant proportion of the work of the OPG officers responsible for these clients is taken up with managing and mediating family conflict on behalf of the older guardianship client.

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[12] Section 12 *Guardianship and Administration Act 2000* (Qld)

[13] Section 34 and Schedule 1, Part 1 *Guardianship and Administration Act 2000* (Qld)

[14] Section 14(2) *Guardianship and Administration Act 2000* (Qld)

Evidence of abuse by powers of attorney

The inquiry has asked for evidence of elder abuse committed by people acting as appointed decision-makers under instruments such as powers of attorney.

The greatest proportion of investigations by the OPG concern suspected abuse by financial administrators or attorneys. In the financial year 2015-16, of the 169 investigations closed relating to adults over the age of 60: 126 related to investigations into financial administrators or attorneys; two related to health care decision-makers; 29 related to attorneys for personal matters; and 12 related to guardians or other decision-makers for personal matters. Further discussion of the role of the OPG regarding the ability to oversee and investigate elder abuse is discussed in the next section. The following are two de-identified cases of elder abuse by persons acting as appointed decision-makers under powers of attorney, and investigated by the OPG.

Max, aged in his 90s

Max executed a power of attorney for financial matters 10 years ago, appointing Alex (his son) and a trustee company jointly as attorneys. The joint appointment required all financial decisions to be made jointly and unanimously by Alex and the trustee company. A few years later, Max was diagnosed with dementia. Not long after this, allegations of financial mismanagement by Alex as attorney were made to the OPG.

Upon investigation, the trustee company advised that they had no knowledge of the way that Max's finances were being managed, and had taken no active part in them. Alex lived rent-free in Max's home, and provided care to Max.

Medical records indicated that Max required 24-hour care, and mobility issues made it difficult for him to reside in his home, which was on several levels. On one occasion Alex left Max home alone without care, and travelled overseas. Max had a fall during Alex's absence, and was found on the floor by service providers. This required Max to be admitted to hospital for an extended period of time. While Max was in hospital, a large mortgage was taken out over Max's home in the name of Alex and Max. The funds from the mortgage were in excess of half a million dollars, and were invested in a company controlled by Alex.

A complaint was made to the OPG that Alex was abusing his role as attorney.

During the investigation it was determined that the trustee company was not consulted, or involved in the financial transaction on Max's behalf. The paperwork for the financial transactions were drawn up and signed while Max was recovering in hospital after his fall. Alex attended the hospital with a staff member from the bank, whose job it was to explain the mortgage forms to Max. Notes from the hospital describe Max as being extremely confused, and also state that it took about two hours for Alex and the bank staff member to get Max to sign the paperwork. While this was going on, a staff member from the hospital explained to Alex that Max did not have capacity to be signing the documents. Alex assured the staff member that even though he was the attorney, the bank still required Max's signature regardless of his capacity to make the decision.

Alex claimed that the income from the investment would be used to pay for modifications to Max's home to allow him to live there with assistance. This was despite evidence that it was extremely unlikely Max would have been able to return to independent living, due to his high care needs.

The company in which Alex invested the funds ultimately failed. The matter was referred to the Queensland police, and Alex was charged with, and ultimately found guilty of, fraud.

Vera, aged in her 80s

Vera owned a number of residential properties. About four years ago, Vera appointed her son and daughter to be her attorneys for financial, and personal and health matters. Not long after this, Vera was diagnosed with dementia and she went to live at a respite centre. She lived at the facility for a lengthy period of time. Several months ago, Vera was removed from the facility to live with her son's family. Her son refused to pay the (substantial) outstanding care fees. Both the son and daughter lived in separate properties owned by Vera, and did not pay rent. While the other properties earned a rental income, the rates for all the residential properties had not been paid for about a year.

The care arrangements made by the son for Vera upon her removal from the facility involved Vera being locked in her bedroom to prevent her wandering, and contain her in her confusion. Service providers who attended the home five days a week, regularly found Vera soaked in her own urine, with the door locked by a barrel bolt from the outside. During a daily check on Vera by service providers, they found her locked in her bedroom, with no one else home. The police were called and returned later that evening to perform a welfare check. When police attended again that evening, they found Vera locked in her bedroom, dressed in extremely warm clothing (despite the weather not being cold), with no access to food or water. Vera had defecated herself, and had clearly been left in that condition for some time. The son and his wife had gone away for the weekend, leaving two children with a babysitter. The babysitter advised that she had locked up Vera in the evening in accordance with the son's instructions, and that she would let Vera out in the morning, also in accordance with the son's instructions. The Queensland Ambulance Service was called and formed the view that the arrangement did not provide the standard of care Vera required, and Vera was immediately transported to the local hospital.

Allegations of inappropriate care arrangements and financial mismanagement were raised with the OPG in relation to Vera. The OPG investigated the matter and determined that Vera's interests were not adequately protected, and that there had been numerous breaches of the *Powers of Attorney Act 1998* (Qld). The Public Guardian suspended the attorney's power for financial and personal/health matters under section 34 of the *Public Guardian Act 2014*, and an application was made to the Queensland Civil and Administrative Tribunal to seek the appointment of a guardian and administrator for Vera.

Register of decision-making instruments (Question 30)

The issues paper queries whether the creation of a register of powers of attorney and other decision-making instruments would improve safeguards against elder abuse. While on the one hand, a register can provide third parties with a clear means of identifying whether a person has a valid power of attorney or similar agreement, there is little evidence to substantiate the proposition that a register would provide a safeguard, or protection, against elder abuse. For example, a register may be a useful tool for banks and hospitals.

However, in the context of abuse, it would be unrealistic to expect a register to be of significant use.

Any register would have to take into consideration how this would impact upon the current flexibility and usefulness of the mechanism of powers of attorney, and the purpose and effectiveness of any register. Increased regulation (through mechanisms such as registers) might detract from their usefulness, and deter people from using them.

Further, the risk is that creation of a register would provide little substance in protecting legal rights and preventing abuse. For example, the majority of the 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 this submission that involve an enduring power of attorney, a register would have provided little, if any, additional protection to the person abused, or have prevented the abuse from occurring.

If a register were introduced, consideration would also need to be given as to how the register would be maintained, or used, once developed. Further, consideration would need to be given as to whether the register would include independent audits of powers of attorney, or other registered decision-making instruments.

Expansion of the duty of private attorneys and other decision-makers to protect against abuse (Question 31)

The issues paper queries whether the duties of attorneys and other appointed decision-makers should be expanded to give them a greater role in protecting older people from abuse.

Any roles and responsibilities of attorneys and decision-makers should clearly articulate a fiduciary role, and the responsibility of decision-makers to represent the rights, will and preferences of the person whom they are representing. However, rather than expanding the role of attorneys and other decision-makers to require them to protect against abuse, it is recommended that investigative and monitoring powers be located in an independent body, or the police, appropriately empowered to audit, investigate and prosecute elder abuse. A significant deficiency of legislation in this area can be the lack of 'teeth' enabling both investigation and prosecution of these matters. In Queensland a guardian's role includes protecting the rights and interests of a client. However, the ability to fulfil this role may be restricted through limitations inherent within the relevant legislation. For example, a guardian may make a 'contact' decision as to persons who should not be able to contact the client. However, if the person keeps contacting the client, unless that person does something harmful or illegal, there is little that a guardian can do to enforce the decision. Further, if the client resides in a nursing home, a guardian is dependent upon third parties (service providers) to enforce those contact decisions. However, states such as New South Wales and South Australia have enforceable contact decisions within their legislation.

Protective models should also consider the investigative and prosecution powers more recently adopted to address issues of domestic violence. In Queensland, elder abuse is considered a form of domestic and family violence,[15] to which elderly people are recognised as being particularly vulnerable.[16] However, elder abuse manifests differently to the usual conceptions of domestic and family violence, particularly in terms of the perpetrator and type of abuse. For example, adult children are more likely to be perpetrators of abuse against an elderly parent, than the parent's partner. The type of abuse is also more likely to be financial abuse, including misappropriation of finances and property; emotional abuse, including intimidation and controlling behaviour; or neglect, including under-medicating, over-medicating, or not taking someone to the bathroom. Therefore, it warrants further exploration as to how domestic violence orders might be better utilised in situations of elder abuse. For a start, this suggests the fundamental principle underpinning any safeguards to protect against elder abuse, should be to move the focus from elder abuse being a 'family' matter, to being a 'criminal matter'.

In situations of domestic violence there are often competing claims of one party against another, in which the issuing of a 'piece of paper' is generally not effective to stop violent behaviour. However, the threat of criminal charges may effect behavioural changes. Similarly, elder abuse is often perpetrated by one family member, or close friend, against the older person, and often only the threat of serious criminal charges can bring a halt to the abuse. Persons subject to elder abuse often don't, or won't come forward, and may also have increased vulnerability due to risk of diminished or impaired capacity.

Where elder abuse is perpetrated by a service provider, consideration should be given to ensuring that there are sufficient independent monitoring bodies, who are sufficiently empowered to ask the right questions, obtain evidence, and are focused upon protecting the rights and interests of the older person. Critically, in such circumstances, the older person remains vulnerable on the basis that they are dependent upon the abuser for their support and services. The person may be afraid to speak out for fear of losing that service or support. The issue of abuse by paid carers also raises the lack of regulation and monitoring of paid carers who support a person in a home. Such carers have unsupervised access to people in their own homes; invariably assisting them with personal care in a way that is not dissimilar to disability support workers. And yet, many lack requisite skills, and training, and the older person is reliant upon the employer having conducted appropriate pre-employment checks and on-going monitoring to ensure that they are not only providing quality services, but are upholding the dignity, rights and respect for the person that they are providing services for.

While legislation could impose more stringent duties of protection upon statutory decision-makers, greater regulation does not always provide the solution. In practice, most people

[15] Section 4(d) *Domestic and Family Violence Protection Act 2012* (Qld)

[16] 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

exercising private powers of attorney struggle to understand their role and what they are to do. More importantly, there is need for increased community education and training for people to understand the fundamental nature of their roles. The existing flexibility and ease with which most powers of attorney can be made and used works for the vast majority of the population, and their attorneys represent their views and wishes without abusing their role. However, imposing more stringent duties and responsibilities risks scaring away other people for whom such an instrument might be extremely useful.

Community education and awareness campaigns, and opening conversations within older communities have started to make some ground in raising awareness of the issues and risks of elder abuse. Community education can provide opportunities to discuss issues such as: inheritance; the need to have unfettered access to the older person's assets to meet their care needs; abuse as more than physical abuse, including financial or emotional abuse; broader concepts of neglect, including failure to help the person access medical services, or to take a person to medical appointments.

There is also a vast proportion of people in our society who provide support and services to their parents, and other older members of the community, at great cost and self-sacrifice. These factors need to be borne in mind, so that in addressing elder abuse, mechanisms are not put in place that inadvertently restrict or over-regulate those positive arrangements that are working well and benefiting the aged in our communities. Further, while elder abuse should be taken seriously, with appropriate criminal offences attached to findings of abuse, there should also be a focus on primary and early intervention, not only on crisis intervention. For example, consideration should also be given as to how our community addresses the needs and stressors on carers, particularly where they are providing high care needs, to ensure carers are educated and aware of effective service and respite provision, and have access to support.

G. The role of Public Advocates and Guardians

The OPG in Queensland has a key role in monitoring and investigating allegations of elder abuse. However, the role is limited in that there are some complaints which the OPG cannot investigate: for example, if the person does not have impaired capacity, or there is another, more appropriate body to investigate the allegation, such as the police. In these cases, where the OPG receives an allegation for a matter outside of its jurisdiction, the matter is referred to the appropriate agency for further action.

Investigations role

The investigative function of the OPG is primarily a re-active (rather than pro-active) function, in that allegations of abuse must be reported before any investigation can commence. Not being a proactive investigative power, the initiation of the investigative process relies upon those involved in the person's life to identify that the person is at risk of abuse.

The OPG has observed that the person subject to abuse is often neither able, nor in a position, to report the abuse they have been subjected to. These persons are often socially isolated and are at higher risk of their abuse remaining unreported. In such cases, the OPG is reliant upon information received from community visitors, carers, support providers and family members who suspect abuse.

Under its investigative powers, the Public Guardian has the power to require people to produce records and accounts; gain access to any relevant information, including medical files; or issue a notice to attend to a person, requiring them to answer questions, produce documents and give information.[17]

Investigations of allegations of abuse may include but are not limited to:

- physical
- sexual
- psychological (such as threats and harassment)
- financial (such as misusing a person's money)
- neglect (such as withholding medication or not providing regular food)
- exploitation (such as taking advantage of the person)
- abuse of power of attorney (such as under an Enduring Power of Attorney where the person may not be acting in the interests of the person with impaired capacity).

The purpose of an investigation is to identify the level of risk for the vulnerable person and the action needed to best protect them. Investigations gather evidence to find out whether the allegations can be substantiated on the balance of probabilities. Where possible, the OPG tries to resolve allegations informally; however, where there is evidence of a criminal offence, or protective action needs to be taken, the OPG refers matters to the police or the appropriate authority.

The OPG has limited powers when determining neglect, exploitation and abuse, and does not have the power to prosecute cases of abuse. The primary focus of an investigation is to determine whether the decision-making support or care is deficient and amounts to neglect, exploitation or abuse, and then help the person with impaired capacity obtain better arrangements for their support and care.

Where an investigation reveals that an adult with impaired capacity has inadequate decision-making support in place, one option is to seek an appointment by QCAT for a formal guardian for the adult to make certain personal decisions on the person's behalf, or for an administrator to make financial decisions. An application would be made to QCAT to determine the most appropriate person to make decisions for the adult for personal or financial matters. QCAT may determine that the most appropriate person to make these decisions is someone from the adult's supportive network, such as a family member or friend.

[17] See Chapter 3, Part 3 of the *Public Guardian Act 2014* (Qld)

Currently there is a lack of an appropriate authority to investigate elder abuse where an adult retains decision-making capacity, according to the definition of capacity, but they are reluctant or unwilling to address the abuse themselves.

Community Visitor Program

Role of Community Visitors

The Public Guardian appoints community visitors on a casual basis to protect the rights and interests of adults with intellectual, psychiatric or cognitive disability. Community visitors provide a rights protection and abuse prevention service to more than 6,000 Queensland adults who may be subject to abuse, neglect or exploitation due to their impaired decision-making capacity.

Community visitors make inquiries and lodge complaints for, or on behalf of, residents of visitable sites. Community visitors have the power to refer complaints to an external agency—for example, the Department of Communities, Child Safety and Disability Services (DCCSDS), Queensland Health, or the Residential Services Unit, where appropriate.

Issues that may be enquired into by a community visitor include:

- adequacy of services provided for assessment, treatment and support
- appropriateness of standards of accommodation, health and wellbeing
- provision of services in a way that is least restrictive of the person's rights
- adequacy of information available for consumers about their rights
- operation of an accessible and effective complaints process.

OPG community visitors can also inquire into other matters at the request of the Public Guardian, and refer unresolved complaints to the OPG investigations team or external agencies for investigation or resolution.

Visits to accommodation sites

The OPG's adult community visitors independently monitor three different types of accommodation called 'visitable sites' where adults with impaired capacity live. Visitable sites include:

- disability accommodation provided or funded by DCCSDS
- authorised mental health services
- private hostels (level 3 accreditation).

Adult community visitors conduct regular visits to more than 1,200 visitable sites across Queensland. These visits are unannounced so that community visitors can observe the standard of service delivery provided by the site on a typical day. However, when they attend a site, community visitors are required to:

- notify staff when they arrive at the site
- discuss any concerns with consumers and staff
- clarify any issues when reasonable and practical to do so

- resolve complaints by or for a consumer
- report to staff when leaving the site.

When on the site, the community visitor has legislative authority to: access all areas of a site; require staff to answer questions; request documents related to the support of adults with impaired capacity at the site; make copies of relevant documents; and talk in private with the adults, or staff at the facility. At the end of each visit, the community visitor then produces a report that is sent to the service provider, and the Public Guardian.

Community visitors perform an essential function of being independent 'eyes and ears' on the ground, and are able to identify issues that others (including family) may not be able to see.

Observations by Queensland community visitors

Under the community visitor program, instances of financial abuse of persons with impaired capacity have been observed and reported. A regular occurrence involves family members using the funds of persons with impaired capacity for their own means, or misusing funds or other assets accessed under a power of attorney.

Community visitors have identified situations where inadequate financial management on behalf of older adults with impaired capacity has led to failure to provide that adult with reasonable access to services such as: dental; medical; podiatry; or assessments for other health care needs. Other health care needs may include, but are not limited to, speech and language, pathology, psychiatry, psychology, dieticians and diabetes services.

H. Health services

The issues paper has enquired as to how the role that health professionals play in identifying and responding to elder abuse could be improved.

As discussed at the outset of this submission, early intervention community based strategies are key to addressing elder abuse. Critical to this are those services at the front line, such as general practitioners. General practitioners are a key frontline service that should be equipped, trained and educated in identifying and addressing elder abuse. They are often the only regular and stable service provider in an elderly person's life. General practitioners often have the opportunity to observe the elderly person and whether their health and personal needs are being met; they may also have access to the carer, and have insight into whether the carer is able to cope with the role that they have taken on, either with or without additional support. Therefore, general practitioners should be integral to any elder abuse prevention strategy, through education, training, support in identifying and reporting suspected elder abuse, as well as having information available and accessible in doctor's surgeries about elder abuse, and carer support.

Critical to the success of any education program is knowledge of the appropriate authority to report the matter to, and ensuring that action is taken by the relevant authority. In Queensland, the Office of the Public Guardian is the agency to whom allegations of elder

abuse can be made where that adult lacks the capacity to make decisions; or alternatively, the police. The doctor must be able to share information about a patient without fear of breaching laws relating to confidentiality. It is therefore recommended that greater examination be given to the law, to allow doctors to share confidential information with relevant agencies, or the police, when they have a reasonable suspicion of abuse.

A further possible strategy might be to reconsider how carer assessments are done by Centrelink. An option could be for Centrelink to require a doctor's assessment of the suitability and appropriateness of the carer whenever applications are made for carer payments, or whether the carer needs specific supports to meet the needs of the person being cared for. Currently, doctor's assessments are conducted only with respect to an aged person's care needs, rather than the carer's suitability or what is needed to ensure appropriate support is provided to the aged person.

I. Criminal law

One of the questions raised in the issues paper, is who should be required to report suspected elder abuse, in what circumstances, and to whom?

While mandatory reporting mechanisms may be touted by some as a means of placing reporting responsibility on key service providers, they should not be seen as a panacea to addressing abuse. One of the critical problems with mandatory reporting models is the shifting of risk and responsibility. In many ways, a person may report to absolve their reporting responsibility, and then fail to take any further action to stop the abuse that they are observing before them. There is also a risk that people over report in order to meet the legislative requirement, which can result in so many reports being made that no one actions them, as they clog the system and leave the system unresponsive and ineffective.

Mandatory reporting can give people a false sense of comfort that they have done what is required, while in the meantime, the person is still being abused.

Another risk is that reporting is inhibited because people aren't sure where to go, or to whom to report.

In lieu of mandating reporting of abuse, there should be increased education. There should also be recognition within professional codes of conduct, that abuse should not be tolerated, but addressed, both in ensuring that the person has access to immediate support, and in reporting the matter to the appropriate authorities. Professional services should promote taking triage action as good practice, such as seeking immediate access to advocacy or relevant social supports and services to assist the adult, while an independent agency, or police, investigate the allegation of abuse. The authorities empowered to investigate abuse should be adequately resourced, not only to investigate abuse, but to provide community education programs to ensure that service providers and the greater community are aware of warning signs of elder abuse, as well as how, and to whom, to report suspected abuse.