



Senate Community Affairs References Committee

Submission to the inquiry into the effectiveness of the Aged Care
Quality Assessment and accreditation framework for protecting
residents from abuse and poor practices, and ensuring proper
clinical and medical care standards are maintained and practised

August 2017

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 adults with impaired decision-making capacity, and children and young people in the child protection system.

The purpose of OPG is to advocate for the human rights of our clients. For our adult clients, this means advocating for their rights, access to services, independence and choice as part of a supported decision-making model. For our clients who are children and young people, this means advocating for their rights, access to services and where appropriate, their independence and choice.

Advocacy means understanding the lives and views of our clients with the aim of promoting and protecting their human rights. Advocacy can mean working to prevent or address discrimination, abuse or neglect. Advocacy does not mean taking over a client's life or problems. Advocacy does not mean taking over the roles and responsibilities of other government agencies or service providers.

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

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

While OPG visitors do not visit aged care facilities, the Public Guardian is guardian for many residents in aged care facilities.

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 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.



Further information about the work of the Office of the Public Guardian can be found at www.publicguardian.qld.gov.au

Submission to the inquiry

Position of the Public Guardian

The Office of the Public Guardian (OPG) welcomes the opportunity to provide a submission to the Senate Community Affairs References Committee (the Committee) inquiry into the effectiveness of the Aged Care Quality Assessment and accreditation framework for protecting residents from abuse and poor practices, and ensuring proper clinical and medical care standards are maintained and practised (the inquiry). 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 inquiry's terms of reference where they relate to the experiences of the OPG and our clients, and raises additional issues for the Committee's consideration which the OPG considers significant to the inquiry.

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.

Overview and recommendations

The OPG strongly commends the inquiry and supports proposals that will bring improvements to the aged care system to better protect residents from abuse and poor practices.

Older adults with impaired capacity living in aged care facilities are vulnerable to abuse, particularly if they are experiencing a decline in cognitive abilities or onset of dementia and unable to advocate for themselves. Often these adults are heavily dependent upon daily personal support. They may have limited ability to speak out against ill treatment, abuse or poor practice. These factors place these individuals at risk of being taken advantage of by others, including staff, family and friends.

The Public Guardian is empowered with specific functions to provide support to adults with impaired capacity. For adults with impaired capacity who require decision-making support for personal matters (such as health, accommodation, service delivery or accommodation issues), the Public Guardian may be appointed as a person's guardian as a last resort if there is no other appropriate person available for appointment.

Consequently the Public Guardian's guardianship clients in the aged care system are the most likely to have nobody else in their lives; have the most complex needs; and can be vulnerable to abuse, and need someone to represent their rights and interests and speak out on their behalf.

The Public Guardian recommends:



- A broader review of the aged care system to address critical issues which may not fall within the ambit of this inquiry.
- Development of a national framework under the *Aged Care Act 1997* (Cth) to regulate restrictive and aversive practices in aged care, that is:
 - designed to address age-related issues.
 - aligned with Australia's ratification and implementation of the *Optional Protocol to the Convention Against Torture*.
- Development of a national protocol on reducing and eliminating restrictive and aversive practices in aged care.
- A fully resourced federal community visitor program with oversight of aged care empowered to take action on behalf of residents including the ability to: identify, investigate and advocate for residents in issues relating to abuse, neglect and exploitation.
- Development of national guidelines for the aged care community visitors scheme, including policies and procedures for visitors to follow if they have concerns about abuse or neglect of care recipients, as recommended by the Australian Law Reform Commission inquiry into elder abuse.
- Adequate supply and support of accredited aged care facilities in regional, rural and remote areas of Queensland.
- Amendment of the accreditation standards to include:
 - Specific mention that residents have equal human rights to all other people in Australia
 - A focus on positive behaviour support rather than behaviour management
 - A prohibition against using medication as a form of chemical restraint
 - A prohibition against the use of aversive practices
 - A positive obligation on aged care facilities to notify the appropriate state or territory authority when there are issues with a resident's private attorney, guardian or administrator
 - Criteria for a person's suitability to work in aged care facilities, including consideration as to whether national screening of workers across aged care, disability and children's services could be combined.
- National standards for aged care complaints mechanisms, including:
 - A mandate that a resident's needs and concerns should be a primary (and not secondary) concern to the operational and business requirements of aged care facilities
 - Express recognition of the will, preferences and rights of the residents
 - Access to funded advocacy, particularly for those vulnerable persons who have no other people in their lives who can act as an advocate for their rights and interests.
- Greater cooperation and collaboration between state and territory agencies and the Aged Care Complaints Commissioner to address serious issues and potential elder abuse experienced by residents at aged care facilities, including those perpetrated by a resident's personal attorney, guardian or administrator.
- An independent evaluation of optimal staffing levels in residential aged care facilities be undertaken.
- Imposition of penalties where an aged care facility threatens a resident's security or welfare as a result of the resident's complaint against the facility.
- Stronger protections and better outcomes for residents where aged care accreditation standards are not met.

- **Establishment of a reportable incidents scheme, which should incorporate mandatory reporting of suspected criminal offences to police for further investigations, and provide mechanisms for notification to also be made to guardians, attorneys or carers representing the adult.**
- **Greater collaboration between the Commonwealth and state and territory jurisdictions, obligating aged care providers to identify and report suspected abuse to the appropriate authorities.**

Review of aged care

This inquiry provides a significant opportunity for the Commonwealth to investigate and address systemic issues and barriers facing older persons in aged care. However, there are key issues relevant to aged care that do not appear to be within the purview of the current proposed inquiry. These include consideration of mechanisms that aged care facilities should invoke to prevent elder abuse either by staff, other residents or people holding powers of attorney in a person's life. A very significant proportion of the OPG's investigations into elder abuse relate to adults whom are resident within an aged care facility, where the facility could have acted earlier or even prevented the abuse. This is particularly pertinent where a Power of Attorney is abusing an adult's funds and the aged care fees fall into arrears (explained below). As the reader would be aware, this is a growing issue facing the aging population, and is an ongoing concern for the OPG. The OPG would like to draw the Committee's attention to the OPG's submissions to the Australian Law Reform Commission (ALRC) inquiry into elder abuse, which provides more detail about the Public Guardian's concerns in relation to elder abuse and aged care more broadly and can be found on the OPG website at: www.publicguardian.qld.gov.au/about-us/publications/submissions. It is therefore recommended that the inquiry be widened to include the examination of broader issues that are pivotal to improving service delivery and rights protection within aged care.

The central role of the OPG is to advocate for the rights and interests of adults with impaired capacity. Some of the key issues which impact on our client's fundamental human rights in aged care are set out below.

Restrictive practices in aged care

The unregulated use of restrictive practices is one of the greatest problems facing the OPG for clients who are residents in aged care facilities. The unlawful application, or inappropriate use of restrictive practices is an infringement of a person's human rights.

Need for legislative regulation of restrictive practices in aged care facilities

A key problem is the lack of appropriate legislative regulation or oversight of restrictive practices by the Commonwealth within the aged care system. The *Aged Care Act 1997* (Cth) (ACA) does not address nor regulate the use of restrictive practices in residential aged care.

It is recommended that a national legislative framework be established under the ACA to regulate, and prohibit the use of restrictive practices in aged care, except as a last resort. The OPG agrees with the Queensland Public Advocate's position set out in *Legal frameworks for the use of restrictive practices in residential aged care: An analysis of Australian and international jurisdictions* (June 2017)

and the call for the Commonwealth Government to end the unregulated use of restraints and other restrictive practices in aged care facilities.

The primary purpose of the use of restrictive practices should be to protect the person, or others, from harm, and should only be used as a last resort and be the least restrictive option available. Any use of restrictive practices should be accompanied by a plan for reduction and elimination of its use altogether. Provision of a legislative scheme should provide: stronger safeguards consistent with that proposed under the National Disability Insurance Scheme (NDIS); transparency in the use and prevalence of restrictive practices; a mechanism for independent oversight for people in aged care facilities; 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 persons with disability.

In Queensland, the *Guardianship and Administration Act 2000* and the *Disability Services Act 2006* collectively regulate the use of restrictive practices for adults with impaired decision-making capacity in Queensland disability service settings. Prior to the introduction of this statutory regime, the use of restrictive practices in the Queensland disability sector was self-regulated, and was subject to misuse. After extensive review,¹ it was acknowledged that self-regulation had not worked, and that legislative oversight was the only way to achieve proper regulation of the use of restrictive practices. This led to implementation of the strong regulatory scheme which now oversees the use of restrictive practices in Queensland.

In developing the appropriate legislative regime, the Commonwealth could give consideration to the Queensland statutory regime as a potential legislative model to be followed. This regime provides a process for the authorisation of actions that may otherwise constitute an assault, or other criminal offence against the adult by authorising the use of restrictive practices for the purpose of reducing the risk of harm to the adult or others. The legislative framework ensures the adult's rights and interests are safeguarded by providing for the assessment, approval, regulation, monitoring and review of the use of restrictive practices by disability service providers, including through the establishment of a positive behaviour support plan designed to reduce and eliminate the use of restrictive practices.

Need for regulation of restrictive practices to specifically address age-related issues

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 challenging behaviours, but also issues specific to aged persons. Evidence suggests that there is an increasing number of people with dementia who are being

¹ See the Hon. William Carter, Q.C. report, *Challenging Behaviour and Disability: A Targeted Response* (2006)



subjected to the unregulated 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, or 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. While the OPG has observed that there is a tendency towards classifying dementia wards as “high care” and the motivation behind this classification is not known directly by the OPG, 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 necessarily be addressed by traditional modalities of positive behaviour support,² 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 challenging behaviours; or cause harm to the person. As a degenerative illness, dementia should be treated with a more 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 may amount to a breach of a 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, encouraging and supporting them to live life as much as their health permits at any given time.

Regulation of restrictive practices under OPCAT

Regulation of restrictive practices in aged care facilities should also tie in with Australia’s ratification and implementation of the *Optional Protocol to the Convention Against Torture* (OPCAT), which is currently being considered by the Australian Government and the Australian Human Rights Commission. OPCAT provides for the establishment of ‘a system of regular visits to be undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment’. Implementation of OPCAT requires each state party to establish an independent National Preventative Mechanism (NPM) and identify suitable bodies to conduct inspections at all places of detention. Aged care facilities which are locked with no free ingress or egress, such as many dementia wards, would therefore likely fall within the jurisdiction of OPCAT.

Development of a national protocol on reducing and eliminating restrictive practices in aged care

Australia already has a clear national commitment to reducing and eliminating the use of restrictive practices in the disability and mental health sectors within Australia. It is recommended that a similar national protocol needs to be established for aged care services.

In the OPG’s experience, legislative recognition alone is insufficient to effect change; aged care practice and service delivery culture must also be addressed to ensure effective implementation. This

² Positive behaviour support is a practice that means that restrictive practices can be removed if strategies are implemented to avoid or de-escalate challenging behaviours.



requires investment in training and education resources, and the establishment of a national senior practitioner (equivalent to that of the NDIS) to oversee implementation of the statutory framework and protocol.

Community visitor oversight of aged care

It is recommended that the Commonwealth increases its oversight of the practices within aged care, through establishing a fully funded community visitor program with legislated imprimatur. It is strongly recommended that the Commonwealth scheme is properly resourced; and provided with more ‘teeth’ in line with the Queensland adult community visitor function (administered by the OPG), so that issues relating to abuse, neglect and exploitation of persons in aged care are identified and addressed.

Aged care facilities fall within Commonwealth jurisdiction and are therefore outside the jurisdiction of the adult community visitor program administered by the OPG. The OPG only has direct involvement with an aged care facility if the Public Guardian is appointed as guardian for a resident of an aged care facility, or if investigating an allegation of abuse, neglect or exploitation of a resident in relation to the facility. A significant number of OPG clients under guardianship (including young adults with intellectual disabilities) reside in aged care facilities. OPG guardianship officers have observed that the use of unregulated restrictive practices is prevalent in aged care facilities. Without adequate oversight such as through independent community visitors, these adults remain vulnerable to abuse through the unregulated use 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 resident. While building a strong relationship of trust with residents is important, without advocacy, monitoring and oversight, issues of abuse and neglect can remain unaddressed.

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 private hostels. Community visitors can make inquiries and lodge complaints for, or on behalf of, residents of the sites listed above. They also have broad powers to do all things necessary to perform these functions. Community visitors play an important role in identifying abuse which may otherwise remain undetected or unreported in aged care 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.

The OPG also supports the ALRC’s recommendation³ 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

³ Recommendation 4-14 of the ALRC Report 131.



should empower aged persons to overcome systemic barriers and support them to participate in their own rights protection.

Aged Care Quality Assessment and accreditation framework

Inquiry Terms of Reference (a): the effectiveness of the Aged Care Quality Assessment and accreditation framework for protecting residents from abuse and poor practices, and ensuring proper clinical and medical care standards are maintained and practised

Recognition of human rights

As an independent statutory office which promotes and protects human rights, the OPG is concerned that there is no specific acknowledgement of the human rights of older persons, or persons with disabilities (who reside in aged care facilities) in the accreditation standards document. Section 2-1(h) of the ACA provides that an object of the Act is to help recipients of aged care services enjoy the same rights as all other people in Australia; however, the accreditation standards make no mention of this. It is acknowledged that the Standard 3 Principle states that care recipients retain their personal, civic, legal and consumer rights; however, the standard would be strengthened by specific recognition that residents have equal human rights to all other persons.

Addressing market supply issues

Market supply of aged care facilities is a real challenge in regional, rural and remote areas. There is often no alternative accommodation option for people in these areas if the local aged care facility fails accreditation. The outcome is that a person can be left without accommodation or services, or may be removed and relocated away from their community in order to access an aged care facility.

Further, hospitals may choose not to take in residents who (for a variety of reasons) can no longer be housed by one aged care facility because it is a “social admission” only.⁴ While the OPG acknowledges that hospital is not the appropriate place for these people unless they require medical treatment, older persons need to have access to safe and stable accommodation. This should be a right that is recognised for all older persons, regardless of whether they live in urban, regional or remote areas, with facilities in regional and remote areas provided with appropriate support to meet the accreditation standards.

Behaviour management

Positive behaviour support

The existing accreditation standard regarding behaviour management requires that the needs of care recipients with challenging behaviours are managed effectively. However, there is no guidance provided as to what “challenging behaviours” means. It is therefore recommended that the accreditation standard include a focus on positive behaviour support rather than behaviour management.

⁴ A “social admission” is a hospital admission due to the patient’s social circumstances rather than the patient’s medical issues. For example, a person may initially be admitted to hospital for treatment, but cannot be discharged on completion of treatment because they have no alternative accommodation.

As discussed above, a great deal more description is required as to the usage of appropriate and tailored positive behavior support. This necessitates aged care facilities obtaining informed, researched clinical approaches to addressing behaviours subject of ‘management’.

Chemical restraint

There is also a risk that medication can be misused in aged care facilities as a form of chemical restraint to manage a person’s behaviour. The OPG has observed that such use of medication as chemical restraint occurs without formal oversight, review or use of positive behavioural support or other care methods (particularly in the case of clients with dementia).

The OPG has observed and obtained anecdotal information that chemical restraint is used in aged care settings in a significant number of instances where it may be perceived as a substitute for staff shortages or appropriate training and skills.

Furthermore, in the OPG’s experience, if a doctor prescribes a medication, the aged care facility will administer it without question, without providing additional safeguards such as independent oversight or review of the use of medication. Therefore, in addition to the Commonwealth restrictive practices framework recommended above, the OPG strongly recommends that the accreditation standard relating to medication management include a prohibition against using medication as a form of chemical restraint.

Case example 1

A woman who was non-verbal with a primary diagnosis of Down syndrome was living alone in an apartment with drop-in support. This arrangement worked for a time; but as her physical and mental capacity changed, she became unable to cope. The woman was moved into aged care and was visited by a support service. The support service raised concerns about the woman’s care at the aged care facility and the Public Guardian was appointed as the woman’s guardian. When the OPG went to the aged care facility, it was discovered that the woman was being held in restraints in a chair for up to 12 hours per day, was screaming all the time; and had also been assaulted in the chair by another resident at the facility. It was also found that the woman was on excessive amounts of medication. The OPG arranged for the woman to be removed from the chair and taken to hospital by ambulance. The Public Guardian made a decision that the woman should not be returned to the aged care facility, and the woman was moved to another nursing home.

Aversive practices

Further, it is also recommended that the accreditation standard should explicitly prohibit the use of aversive practices. Aversive practices are methods of punitive behavioural control that seriously breach a person’s human rights. Further, these practices have been shown to be ineffective in achieving behavioural change and only serve to damage a person’s physical and mental health. **The OPG has anecdotal evidence from guardians, community visitors and other sources that aversive practices are still used in aged care facilities. The fact that they remain unregulated and continue to be used in aged care facilities is a significant and fundamental human rights concern that the Commonwealth should rectify as a priority.**

Inappropriate and inadequate decision-making

The accreditation standards should impose a positive obligation on aged care facilities to notify the appropriate state or territory authority when there are concerns of abuse, neglect or exploitation, or concerns of inappropriate or inadequate decision-making by a resident's private attorney, guardian or administrator.

In Queensland, the Public Guardian has powers to investigate any complaint or allegation that an adult with impaired capacity is being or has been neglected, exploited or abused, or has inappropriate or inadequate decision-making arrangements. The OPG has frequently observed situations where a person's finances are under the management of an attorney or private administrator and the nursing home fees are not paid. This is a common occurrence which would fall within the investigations jurisdiction of the OPG; however, the aged care facility does not notify the OPG and instead results in eviction proceedings against the resident.

The need to identify and prevent elder abuse is a joint responsibility between the states and territories and the Commonwealth. In order to fulfill this responsibility, services and governments in both jurisdictions should work together collaboratively. To assist this process, aged care facilities should have formalised responsibility for identifying potential abuse (whether emotional, physical or financial) of their residents, and reporting it to the relevant authority in each state or territory.

Case example 2

In a recent matter, an attorney for a person residing in aged care neglected to pay the nursing home fees, and did not respond to unpaid fee notices. The nursing home proceeded to evict the resident rather than contacting the OPG about the issues with the resident's attorney. The OPG was notified of the matter by a relative of the attorney who saw the paperwork about the outstanding fees and pending eviction.

National screening of aged care workers

The OPG recommends the accreditation standards address a person's suitability to work in aged care facilities. Greater protection of residents from abuse and poor practices might be achieved if there were consistent national processes for the screening of aged care workers.

In Queensland, the Blue Card system assesses a person's suitability to work with children. The aged care regime would benefit from a similar mechanism to assess a person's suitability to work in aged care based on the accreditation standards that are applied to aged care facilities. In light of the national screening process being explored under the NDIS quality and safeguards framework, it is recommended that the Commonwealth explore whether national screening of workers across aged care, disability and children's services could be brought together, reducing administrative duplication between the state, territory and Commonwealth jurisdictions in all these service areas.

Complaints handling processes

Inquiry Terms of Reference (b): the adequacy and effectiveness of complaints handling processes at a state and federal level, including consumer awareness and appropriate use of the available complaints mechanisms

Need for national standards for complaints mechanisms

In the experience of OPG staff, complaints processes within aged care facilities often offer little opportunity, if any, to resolve serious complaints. In relation to OPG guardianship clients who have serious issues within an aged care facility, complaint mechanisms invariably fail to effect any change, and often the only recourse available is for the OPG to arrange for the adult to be moved to a different facility. These issues may be addressed in part by the introduction of national standards for aged care complaints mechanisms, including independent regulation and oversight of aged care facilities.

When determining how aged care facilities can improve complaints systems, it is recognised that business models for aged care facilities can perpetuate or facilitate the abuse of an aged person's rights. The OPG has experienced issues where guardianship clients are moved to other placements due to the 'operational needs' of the organisation, without consultation or determination as to whether the new placement is suitable, appropriate, or the preference of the person. Invariably this can occur against the person's will. There should be mandatory requirements placed upon aged care facilities to observe that a resident's needs and concerns should be a primary (and not secondary) concern to the operational and business requirements of the facility.

Case example 3

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.

Recognition of the will, preferences and rights of aged care residents

In line with the above recommendation that a resident's needs and concerns should be a primary concern for aged care facilities, nationally consistent complaints standards should be founded upon recognition of the will, preferences and rights of the residents. The OPG investigations team often receive complaints concerning aged persons who are being moved into locked wards in aged care facilities merely because there are vacancies on the open ward. No consideration is given as to the breach of the person's human rights, whether it is appropriate to meet the needs and requirements of the person, or whether it is in accordance with the will, preferences and rights of the person, and will invariably occur despite objection by the person or their legally appointed representative.

Complaints mechanisms should provide access to funded advocacy

Improving aged care complaints mechanisms requires access to funded advocacy, particularly for those vulnerable persons who have no other people in their lives who can act as an advocate for their rights and interests. Many highly vulnerable persons living in aged care need advocates to give voice to their concerns or issues, let alone navigate a complaints system which can appear overwhelming and complex. This is critical particularly where residents need support, and may fear retribution for speaking out against abuse. Funded and accessible advocacy programs should be prioritised by the Commonwealth in order to meet the expanding needs of an aging population.

Oversight by the Aged Care Complaints Commissioner

In addition to navigating complaints mechanisms at the local level with aged care facilities, in the experience of the OPG, it can be challenging to navigate the Commonwealth's formal complaints mechanism, and achieve outcomes for our clients.

The OPG has on occasion referred complaints relating to adults in aged care services to the Aged Care Complaints Commissioner (ACCC) for investigation and resolution. While the OPG has had some positive experiences with the ACCC, there have been circumstances in which the ACCC has refused to engage with the OPG in relation to its state legislative function to investigate suspected elder abuse; or has refused to provide information to the OPG in relation to guardianship clients. The OPG reiterates the need for greater cooperation and collaboration between state and territory agencies, including the Commission, in order to address complaints and proactively address suspected elder abuse experienced by residents at aged care facilities, including abuse perpetrated by a resident's private attorney, guardian or administrator.

Case example 4

The OPG was investigating the conduct of a resident's attorney, which also involved concern about the resident's aged care service provider. The complaint was referred to the Aged Care Complaints Commissioner under the aged care complaints scheme. The Commission claimed that the consent of the person's decision maker was required to investigate the complaint against the aged care facility, despite the fact that the complaint also related to the attorney, and would not accept unsolicited complaints from the OPG.

Standards of care concerns

Inquiry Terms of Reference (c): concerns regarding standards of care reported to aged care providers and government agencies by staff and contract workers, medical officers, volunteers, family members and other healthcare or aged care providers receiving transferred patients, and the adequacy of responses and feedback arrangements

Ensuring aged care facilities are adequately staffed

In the OPG's experience, the ratio of staff to residents in nursing homes is very low. This may be a contributing factor that impacts upon the ability of the aged care facility to ensure that the standards of care are met for their clients. In light of this, the OPG recommends that an independent evaluation of optimal staffing levels be undertaken in line with the ALRC Report 131 recommendation 4-7.

Difficulty raising standards of care concerns in a limited market

As discussed above, there is limited availability of aged care facilities in regional, rural and remote areas. This lack of alternative service and accommodation options can lead to a power imbalance between the local aged care facility and the resident. The OPG has observed that accredited aged care facilities in regional, rural or remote areas may threaten to relinquish a resident if issues are raised about the facility. Residents should be able to make frank and fearless complaints without fear of retribution or reprisal. **The OPG recommends that the aged care complaints framework**



should impose a penalty if a facility threatens the resident's security or welfare as a result of a complaint.

Stronger protections for residents where accreditation standards are not met

The OPG recommends that there needs to be stronger protections for residents when the aged care accreditation standards are not met. OPG staff have anecdotally observed that residents' needs in relation to: hearing assessments, hearing aid batteries or replacements, and assistance in putting in dentures, as well as maintenance and security of personal property are not always met by the aged care facility. Residents' personal property, including clothes (and even personal items such as dentures) frequently go missing. Further, the accreditation standard regarding sensory loss, which provides that care recipients' sensory losses are identified and managed effectively, is also not always well implemented.

In addition to this, in the experience of OPG clients, aged care facilities often do not appear to have a strong commitment to fulfilling the accreditation standard regarding cultural and spiritual life, and are often ill-equipped to meet the individual interests, customs, beliefs, and cultural and ethnic backgrounds of residents, particularly those valued and fostered by our Aboriginal and Torres Strait Islander clients. Given that Aboriginal and Torres Strait Islander people are eligible for aged care from 50 years it is particularly important that culturally and spiritually appropriate services and facilities are readily available for this cohort, both within, and close to their country and communities.

Injury and mortality incidents

Inquiry Terms of Reference (e): the adequacy of injury prevention, monitoring and reporting mechanisms and the need for mandatory reporting and data collection for serious injury and mortality incidents

Need for a reportable incidents scheme

The OPG recommends the establishment of a reportable incidents scheme, consistent with that proposed in recommendation 4-1 of the ALRC Report 131. From the experience of OPG clients, abuse may be manifested through neglect; suboptimal service delivery; and the use of aversive or restrictive practices. It is therefore recommended that such a scheme incorporate mandatory reporting of suspected criminal offences to police for further investigations, and provide mechanisms for notification to be made to guardians, attorneys or informal carers representing the adult. The scheme would require investment in training and education of staff, and should also include mechanisms for internal review of service delivery, and disciplinary procedures for inappropriate staff conduct where criminal thresholds are not met.

Reporting and acting on adverse incidents

Inquiry Terms of Reference (f): the division of responsibility and accountability between residents (and their families), agency and permanent staff, aged care providers, and the state and the federal governments for reporting on and acting on adverse incidents

In the OPG's experience, reporting of incidents in nursing homes is inconsistent across the sector; some nursing homes are diligent at reporting incidents to the OPG, while others are not always as

responsive or timely. Where the Public Guardian is appointed as guardian or attorney, the OPG will request information about the incident in writing and request a doctor see the client depending on the nature of the incident.

Consistent with the OPG's previous recommendations, greater collaboration between the Commonwealth, state and territory jurisdictions is required to ensure that aged care providers identify and report suspected abuse, neglect or exploitation to the appropriate authority. The accreditation standards should impose a positive reporting obligation on aged care providers, and obligate aged care providers to build strong relationships of accountability within the state or territory jurisdiction in which they operate.