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Research Director  
Communities, Disability Services and Domestic and  
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Parliament House  
George Street  
BRISBANE QLD 4000

I refer to the request received from the Communities, Disability Services and Domestic and Family Violence Prevention Committee in relation to the reference concerning the adequacy of existing financial protections for Queensland Seniors.

The Office of Public Guardian [OPG] was established on 1 July 2014 under the provisions of the *Public Guardian Act 2014* and exercises responsibilities under that legislation for adults with impaired capacity for a matter and relevant children in out of home care under the Queensland Child Protection system.

### **Background**

The OPG combines the roles that were previously undertaken by the Adult Guardian and Child Guardian and has special responsibilities to support and protect the rights of children and young people in the child protection system. The OPG supports children in care through two specific programs; the community visitor program for children in care, which aims to ensure children and young people in the child protection system are safe and well and are being properly cared for, and the child advocacy program, which gives children in care an independent voice, ensuring their views are taken into consideration when decisions are made that affect them.

Children and young people in out-of-home care have particular needs that must be addressed in order to ensure their safety and improve their emotional, physical and psychological well-being.

The Charter of Rights for a child in care under the *Child Protection Act 1999*, section 74 and Schedule 1 describes the core rights that apply to every child and young person who is in the child protection system and includes the right 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.

The OPG also works to protect the rights and interests of adults who have an impaired capacity to make their own decisions, recognizing that everyone should be treated equally, regardless of their state of mind or health.

The OPG Charter with respect to adults with impaired capacity is to:

- Make personal and health decisions if we are their guardian or attorney
- Investigate allegations of abuse, neglect or exploitation
- Advocate and mediate for people with impaired capacity, and educate the public on the guardianship system.

The OPG also provides an important protective role in Queensland by administering a community visitor program to protect the rights and interests of the adult if they reside at a visitable site.

The *Public Guardian Act 2014* and *Guardianship and Administration Act 2000* set out OPG legislative functions and powers and the *Powers of Attorney Act 1998* regulates the authority for adults to appoint substitute decision-makers which can include OPG.

OPG is one element in the Queensland System that makes provision for the protection of adults with impaired capacity for matters. Other relevant legislation includes:

*Powers of Attorney Act 1998*:- empowers individuals to make provision in advance of loss of capacity by means of Enduring Powers of Attorney [EPOA] and Advanced Health Directives [AHD] for circumstances where they might in the future lose the capacity to make decisions for themselves

*Guardianship and Administration Act 2000*;-empowers the independent Queensland Civil and Administrative Tribunal to appoint guardians and /or administrators for an individual where QCAT is satisfied that an individual lacks capacity for a matter

*Public Guardian Act 2014*: - creates a statutory guardian of last resort

*Public Trustee Act 1978*:- creates a statutory administrator of last resort

### **Neglect, Exploitation and Abuse of Adults**

It is a sad fact that many adults, as they age, and who thus come within any description of “seniors”, do suffer a decline in their capacity to make decisions for themselves, particularly in relation to financial matters. Because of these factors of decline they also become increasingly subject to potential abuse at the hands of families, friends and carers again particularly in relation to financial matters.

OPG is vested with specific powers to investigate complaints or allegations relating to adults [Section 19] who it is suggested are:

- Neglected , exploited or abused
- Have inappropriate or inadequate decision-making arrangements.

Detailed provisions are made in Chapter 3 Part 3 of the *Public Guardian Act 2014* in relation to the conduct of these investigations. Where an investigation indicates the necessity for action to be taken e.g. if financial abuse of a person is indicated, the Public Guardian may take action such as suspending a guardian/administrator operating under an enduring instrument for up to 3 months [section 34] , bring an application to QCAT for the appointment of a guardian and/or an administrator, etc.

Where OPG investigations indicate that criminal offences may have occurred such investigations are referred as a matter of course to the Queensland Police Service for investigation as to any potential breach of the criminal law.

## **Financial Abuse**

Financial abuse can include any form of improper use of an older person's property or money without his or her knowledge, permission or consent. This can include, but is not limited to forgery, stealing, forced changes to a will, involuntary transfer of money or property to another person, withholding funds from the older person and failure to repay loans. Financial abuse can include the misappropriation of funds under an enduring power of attorney, such as when a trusted person (usually a family member or close family friend), is legally appointed with enduring powers to manage the financial affairs of the older person, who is increasingly unable to manage their own affairs.

As indicated it is an adult guardian function of the Public Guardian to 'protect' an adult with impaired capacity from neglect, exploitation or abuse. The Public Guardian may investigate any complaint or allegation that an adult with impaired capacity is being, or has been neglected. One of the challenges that the OPG faces is that abuse and mistreatment is often unrecognised, underreported and hard to detect.

## **Investigations**

The investigative function of the OPG is a re-active (not pro-active) function. Allegations of abuse must be reported before any investigation can commence. Not being a proactive investigative power, the initiation of an investigative process relies upon those involved in the person's life to identify that the person is at risk of abuse. The OPG recognises that a person subject to abuse may not be able to report it, or be in a position to report it. In such circumstances, the OPG works with carers, support providers and family members to immediately report suspicions of abuse to the agencies involved with the person's care, and also to report the matter to the OPG or the police directly where a criminal offence is suspected.

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 summons to a person requiring them to provide information.<sup>1</sup>

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

- financial (such as misusing a person's money)
- exploitation (such as taking advantage of the person)
- abuse of power of attorney (such as under an Enduring Power of Attorney 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

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<sup>1</sup> See Chapter 3, Part 3 of the *Public Guardian Act 2014*

probabilities. Where possible, the OPG tries to resolve allegations informally, however if necessary, the OPG also refers matters to the police or where relevant, to QCAT.

### **Outcome of Investigations**

The OPG has limited powers when determining neglect, exploitation and abuse and it 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, an option might be for the adult to have a formal guardian appointed to make certain personal decisions on the person's behalf, or for an administrator to be appointed to make financial decisions. However, QCAT is responsible for determining the outcome of this matter – not the Public Guardian. An application would therefore 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 a friend.

There may be some complaints which the OPG cannot investigate, for example, if the person does not have impaired capacity or if there is a more appropriate body to investigate an allegation. In these cases, where the OPG has been advised of an issue outside of its jurisdiction, the OPG will refer the matter to the appropriate agency.

One problem that OPG currently encounters with its powers to investigate allegations of neglect, exploitation or abuse of a person is that any investigation currently underway ceases on the death of an individual. OPG has been seeking legislative empowerment to continue any such investigations to their logical conclusion notwithstanding the death of the individual whose affairs are being investigated.

### **Community Visitors 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 6000 Queensland adults who may be subject to abuse, neglect or exploitation due to their impaired decision-making capacity resulting from disability.

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 external agencies for investigation or resolution.

The Public Guardian has specific powers to protect against abuse of an adult with impaired capacity. This includes the power to suspend the operation of all or some of an enduring power of attorney's power if there is reasonable grounds to suspect that the attorney has neglected their duties or abused their powers.<sup>2</sup> The Public Guardian may also apply to the Queensland Civil and Administrative Tribunal (QCAT) for a warrant to enter and remove an adult where there are reasonable grounds to suspect immediate risk of harm, because of neglect (including self-neglect), exploitation or abuse.<sup>3</sup>

### **Visits to accommodation sites**

The OPG's adult community visitors independently monitor three different types of accommodation called 'visitable sites' where vulnerable adults live. Visitable sites are:

- 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

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<sup>2</sup> See section 34(1), (2)(b) of the *Public Guardian Act 2014*

<sup>3</sup> See section 36 of the *Public Guardian Act 2014* which empowers the Public Guardian to apply to QCAT under section 148 of the *Guardianship and Administration Act 2000* for a warrant to enter and remove the adult with impaired capacity.

community visitor then produces a report which 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 who 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, community visitors have observed and reported instances of financial abuse of persons with impaired capacity, particularly where family members have used the funds of persons with disability for their own means, or misused funds or other assets accessed under a power of attorney.

Further, in institutional or residential settings, community visitors have identified situations where inadequate financial management on behalf of a person with impaired capacity has led to failure to provide the person in their care with reasonable access to services such as dental, medical, podiatry, or assessments for other health care needs including, but not limited to, speech and language pathology, psychiatry, psychology, dieticians and diabetes services.

While these issues relate to persons with impaired capacity of all ages, many of these issues are particularly relevant for seniors with impaired capacity.

### **Fundamental Issues**

Under Queensland Law all persons are presumed to have full capacity to make any decision they wish in accordance with law.[Schedule 1 *Guardianship and Administration Act* 2000] It is only where it can be established on acceptable evidence that a person lacks capacity to make a decision on a particular matter at a particular time that the Queensland legislative scheme allows for the appointment of a person to make an assisted or substituted decision to be made for that individual in those circumstances.

The concept of assisted or substituted decision making for individuals who lack capacity is arguably no longer reflective of currently acceptable international standards for decision making for individuals who lack the necessary capacity. The United Nations *Convention on the Rights of Persons with Disabilities* has now set the international standard for decision making for individuals who lack capacity as being that of supported decision making. Queensland has not yet made the necessary legislative amendments to reflect such a new International standard in practice.

It is important to ensure that if government is mindful to introduce policies or legislation to assist specific groups in the community it does so in a way that does not discriminate against such groups or individuals within such groups.

Whilst the concept of seniors is normally taken to relate to persons over the age of 65, care must be taken to avoid stigmatising individuals who are part of such a group. Whilst the likelihood of capacity issues arising does increase with age, age of



itself should never be the justification for imposing constraints on individuals or giving them special privileges which do not reflect the fundamental principle that an individual possess full capacity to make their own decision until the contrary is individually established.

To suggest therefore that there may be a need for government to create specific schemes for seniors merely because they are seniors in relation to issues of financial literacy, etc. is arguably not justified. Given that capacity issues arise for individuals at all stages of their life, any such schemes, if introduced by government, should focus on the vulnerability of individuals no matter what their age and not upon persons merely because they are part of a particular age profile.

OPG fully supports the creation of programs that improve financial literacy, assist in independent financial decision making, target internet scams and provide advice and support for all persons who comprise the Queensland community but believes that these should be widely available and targeted at all persons who may vulnerable to abuse notwithstanding their age. It is vulnerability to abuse that should be targeted for government action, not merely a particular age segment of the Queensland community.

If such a general community wide approach is adopted this does not prevent relevant messages being developed that appeal to different age segments of the Queensland Community in accordance e.g. with different levels of technological skills possessed generally by particular age groups, etc. The advertising industry for example is well used to the adoption of principles of segmented marketing to cover the full gamut of the community.

Persons with impaired capacity are often socially isolated and dependent upon close family or friends who are entrusted by the person with their financial assets and resources. While not all seniors with impaired capacity will face financial abuse, their vulnerability places them at significant risk of abuse by unscrupulous family members or friends who have access to their financial assets. Failure to recognise and identify the risk factors can result in the person having their money stolen, or resources used against their will, for the benefit of a person other than the senior.

While community visitors are sometimes able to identify suspected financial abuse of seniors in residential or institutional care settings, they are limited by having no jurisdiction to visit persons with impaired capacity living in the community or at aged care facilities. In such circumstances, clinical staff (whether in residential, institutional or community settings) are often best placed to identify and address the common risk factors for abuse and exploitation, and recognise risk factors and potential perpetrators of abuse.

It is recommended that there be industry agreed standards of care for clinical staff regarding recognition and identification of risk factors relating to abuse and exploitation. Clinical staff should also be required to be mandatory reporters where abuse or exploitation of persons with impaired capacity is suspected, regardless of the nature of abuse or exploitation. Greater responsibility should be placed upon clinical staff and those persons involved in the day-to-day care to understand and

identify risk factors, particularly the ability to identify and address common risk factors for abuse and exploitation, both in recognizing the signs of abuse and risk factors identifying potential perpetrators of abuse.

### **Issues worthy of consideration**

It is the view of OPG that if the approach of addressing the needs of protecting all vulnerable persons in the community from financial abuse were to be adopted and not merely a focus on persons who might be classified as seniors the following issues would be worthy of detailed consideration:

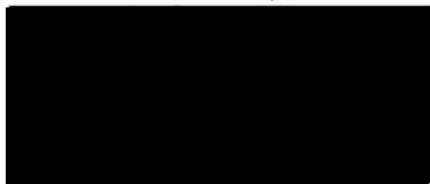
- Greater obligations to be imposed on financial service providers and similar suppliers of services to simplify all contractual documentation into Plain English and require such documentation to be certified by a relevant agency or professional body as being fair between all parties before utilisation to establish legal relationships.
- Impose a mandatory cooling off period [e.g. one to two weeks] whereby a consumer can withdraw from any contractual relationship at no cost to the consumer.
- Establishment of a public agency to which any person whose capacity for a matter is in question might complain particularly in relation to internet scams with such public agency being empowered to investigate the complaint and enforce any findings that the public agency might make in relation to the matter under complaint.
- Education programs focussing on all segments of the community explaining the rights of all individuals as consumers particularly consumers who may have an incapacity for a matter
- Provide explicitly that all contracts or other arrangements with any person with incapacity for a matter contain the right to make all such arrangements void at the instance of the person with the incapacity.
- Establishment of an agency which on a 24 hour basis can provide all persons with advice as to their obligations under all forms of financial or other arrangements.
- Imposing an obligation on Internet Service Providers to remove from access by search engines all material reasonably suspected as being fraudulent in intent.
- Mandatory reporting should be required for clinical staff working with people with impaired capacity, whether in residential or home support settings, to identify, report and prevent cases of financial abuse and exploitation. Suspected abuse or exploitation could be referred to the Public Guardian (or other appropriate agency) for investigation, or police where a criminal offence is suspected to have occurred.
- There should be funding and investment in training clinical staff to identify and address common risk factors for abuse, and funding for broad public education regarding how powers of attorneys operate, and how assets can and should be used as directed by the person, including what to do and where to go if financial abuse or exploitation is suspected.



No doubt there are many other suggestions that the Committee might consider to be meritorious.

If the Committee desires an expansion on any of the matters mentioned herein please do not hesitate to contact this office.

Yours sincerely,



**KEVIN MARTIN**  
Public Guardian