

Inquiry into the Quality of Care in Residential Aged Care Facilities in Australia

Submission to the Standing Committee
on Health, Aged Care and Sport

February 2018

Introduction

The Public Advocate was established under the *Guardianship and Administration Act 2000* (Qld) to undertake systems advocacy on behalf of adults with impaired decision-making capacity who live in Queensland. The primary role of the Public Advocate is to promote and protect the rights, autonomy and participation of Queensland adults with impaired decision-making capacity in all aspects of community life.

More specifically, the Public Advocate has the following functions:

- promoting and protecting the rights of adults with impaired capacity for a matter;
- promoting the protection of the adults from neglect, exploitation or abuse;
- encouraging the development of programs to help the adults reach the greatest practicable degree of autonomy;
- promoting the provision of services and facilities for the adults; and
- monitoring and reviewing the delivery of services and facilities to the adults.¹

Many users of aged care services have, or will develop, impaired decision-making capacity as a result of a range of circumstances and conditions, not the least of which is dementia. It is estimated that in 2018, there are 425,416 Australians living with Dementia.² Without new medical discoveries and interventions, the number of Australians living with dementia is expected to increase to over 1.1 million by 2056.³ In 2015, more than half of people who permanently resided in residential aged care had a diagnosis of dementia.⁴ This proportion is expected to increase over time as the number of people living with dementia increases as a proportion of the population.⁵ In light of this, it is likely that a significant proportion of aged care recipients will have or will experience impaired decision-making capacity at some point during their engagement with the residential aged care system.

The Public Advocate welcomes the opportunity to make this submission to the Inquiry into the Quality of Care in Residential Aged Care Facilities in Australia. The analysis in this submission does not include people with disability who are also recipients of residential aged care, some of whom are under the age of 65 years, and who may have conditions that contribute to impaired capacity such as acquired brain injury or intellectual disability.

Mistreatment of residential aged care residents

The unlawful use of restrictive practices

The use of restrictive practices to manage the challenging behaviours of people in the aged and disability sectors has become a key human rights issue in Australia.⁶ Detention, seclusion, restricted access to objects, physical, chemical and mechanical restraint (as well as electronic forms of restraint such as tracking bracelets, camera surveillance, or restrictions on media devices)⁷ are regularly employed in human service and criminal justice settings, such as disability accommodation and support services, residential aged care facilities, mental health services and

¹ *Guardianship and Administration Act 2000* (Qld) s 209.

² Dementia Australia, *Dementia statistics* (January 2018) Dementia Australia <<https://www.dementia.org.au/statistics>>.

³ Professor Laurie Brown, Erick Hansnata and Hai Anh La, *Economic Cost of Dementia in Australia 2016-2056* (February 2017) Alzheimer's Australia, 7 <<https://www.dementia.org.au/files/NATIONAL/documents/The-economic-cost-of-dementia-in-Australia-2016-to-2056.pdf>>.

⁴ Australian Institute of Health and Welfare, *Australia's Health 2016*, Australian Government, 109

<<https://www.aihw.gov.au/getmedia/9844cefb-7745-4dd8-9ee2-f4d1c3d6a727/19787-AH16.pdf.aspx?inline=true>>.

⁵ *Ibid* 108.

⁶ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws Report No 124* (2014) 243.

⁷ Alistair R. Niemeijer et al, 'Ethical and practical concerns of surveillance technologies in residential care for people with dementia or intellectual disabilities: An overview of the literature' (2010) 22(7) *International Psychogeriatrics* 1129, 1136.



prisons. Restrictive practices are used in these settings despite studies indicating that their use may result in negative physical and psychological effects on the person being restrained⁸ and may also constitute a breach of law and human rights.⁹

While some jurisdictions in Australia regulate the use of restrictive practices in the disability and/or mental health sectors,¹⁰ the law governing these practices in residential aged care is unclear and, for the most part, non-existent.¹¹ At present, the *Aged Care Act 1997* (Cth) does not regulate the use of restrictive practices such as chemical, physical and mechanical restraint.

This is concerning for a number of reasons. The number of people living with dementia is expected to increase substantially and many people with dementia will eventually experience the behavioural and psychological symptoms (such as challenging behaviours) associated with dementia. There is a growing body of research indicating that dementia-related behaviours are often being managed by unregulated restrictive practices,¹² and that restrictive interventions are in widespread use in both formal and informal aged care settings.¹³ This is particularly problematic given the number of people in residential aged care who have a diagnosis of dementia.

Evidence also suggests that some residential aged care staff do not have the knowledge and/or skills to manage behaviours appropriately,¹⁴ and that the wellbeing of the person being restrained may be negatively affected as a result.¹⁵ It is concerning that the inappropriate use of restraints in aged care facilities in Australia has been a factor in the deaths of some people upon whom the restraints were used.¹⁶ In one case, the use of restrictive practices was found to be a breach of the care principles under the *Aged Care Act*.¹⁷

⁸ Sarah Mott, Julia Poole and Marita Kenrick, 'Physical and chemical restraints in acute care: Their potential impact on the rehabilitation of older people' (2005) 11 *International Journal of Nursing Practice* 95, 96; Jenny Gowan and Louis Roller, 'Chemical restraint or pharmacological treatment for abnormal behaviours' (2012) 93 *The Australian Journal of Pharmacy* 58, 60; Jeffrey Chan, Janice LeBel and Lynne Webber, 'The dollars and sense of restraints and seclusion' (2012) 20(1) *Journal of Law and Medicine* 73, 74.

⁹ Donal Griffith, 'Substituted decision making: Part 1 When are restraints off the rails?' (2014) 17(2) *Retirement & Estate Planning Bulletin* 1, 1; *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd mtg, UN Doc A/810 (10 December 1948); Juan E. Mendez, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (A/HRC/22/53, 1 February 2013); The potential for human rights breaches in relation to the use of restrictive practices has been reinforced by the United Nations Committee on the Rights of Persons with Disabilities, which expressed concerns about the use of unregulated restrictive practices in its concluding observations on Australia's initial report under the *Convention on the Rights of Persons With Disabilities*. See Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia* (adopted by the Committee at its tenth session 2-13 September 2013) 5.

¹⁰ See, for example, *Disability Services Act 2006* (Qld) pt 6; *Mental Health Act 2016* (Qld) ch 8.

¹¹ Michael Williams, John Chesterman and Richard Laufer, 'Consent versus scrutiny: Restricting liberties in post-Bournewood Victoria' (2014) 21(3) *Journal of Law and Medicine* 641, 644; Judy Allen and Tamara Tulich, 'I want to go home now': Restraint decisions for dementia patients in Western Australia' (2015) 33(2) *Law in Context* 1, 4.

¹² Sally Borbasi et al, 'A Nurse Practitioner Model of Service Delivery in Caring for People with Dementia' (2010) 36(1-2) *Contemporary Nurse: A Journal for the Australian Nursing Profession* (Supplementary Advances in Contemporary Nursing: Workforce and Workplaces) 49-60; Tanya Davison et al, 'Non-Pharmacological Approaches to Managing Challenging Behaviors Associated with Dementia in Aged Care' (2010) 32(5) *InPsych*.

¹³ See, for example, Janet Timmins, 'Compliance with best practice: implementing the best available evidence in the use of physical restraint in residential aged care' (2008) 6(3) *International Journal of Evidence-Based Healthcare* 345, 345; Cath Roper, Bernadette McSherry and Lisa Brophy, 'Defining seclusion and restraint: Legal and policy definitions versus consumer and carer perspectives' (2015) 23(2) *Journal of Law and Medicine* 297, 298; Sarah N. Hilmer and Danijela Gnjidic, 'Rethinking psychotropics in nursing homes' (2013) 198(2) *Medical Journal of Australia* 77, 77; Office of the Public Advocate (SA), 'Annual Report 2012-2013' (2013) 46; Mary Courtney et al, 'Benchmarking clinical indicators of quality for Australian residential aged care facilities' (2010) 34(1) *Australian Health Review* 93, 98. Additionally, in a study of family carers of people with dementia, the use of psychotropic medications was the second most commonly used strategy for managing behavioural and psychological symptoms of dementia. See Kirsten Moore et al 'How do Family Carers Respond to Behavioral and Psychological Symptoms of Dementia?' (2013) 25(5) *International Psychogeriatrics* 743-753.

¹⁴ See Sally Borbasi et al, above n 12.

¹⁵ Nicholas G Castle, 'Mental Health Outcomes and Physical Restraint Use in Nursing Homes {Private}' (2006) 33(6) *Administration and Policy in Mental Health and Mental Health Services Research* 696-704; K Cubit et al, 'Behaviours of Concern in Dementia: A Survey of the Frequency and Impact of Behaviours of Concern in Residential Aged Care Staff' (2007) 26(2) *Australasian Journal on Ageing* 64-70.

¹⁶ See, for example, *Plover v McIndoe* (2000) 2 VR 385; Sarah Farnsworth, *Woman dies of heart attack while strapped to toilet* (17 August 2011) ABC News <<http://www.abc.net.au/news/2011-08-17/seymour-health/2843252>>.

¹⁷ *Saitta Pty Ltd v Secretary, Department of Health and Ageing* (2008) 105 ALD 55, at [122]. The application of restrictive practices was not the core matter being determined and the general use of restrictive practices was not explored in detail in the tribunal decision.



The increasing number of people with dementia and the potential harm that may occur as a result of ad hoc or poorly applied restrictive practices¹⁸ suggest an urgent need to clarify the legality of restrictive practices in the Australian aged care system. Further, restrictive practices should be regulated to achieve a more consistent, evidence- and rights-based approach to responding to dementia-related behaviours.

Legal frameworks for restrictive practices

On 15 June 2017, World Elder Abuse Awareness Day, the Public Advocate released the paper *Legal frameworks for the use of restrictive practices in residential aged care: An analysis of Australian and international jurisdictions*.¹⁹ The paper explored the existing laws, policies and practices in Australia and other international jurisdictions.

Australian legal framework

There is no specific legislation governing restrictive practices in residential aged care in Australia. Consequently, there is no legal basis for using restrictive practices without a legal justification or defence. There are very few cases in Australia where civil or criminal law has been used to challenge the use of restrictive practices. An example of one such case was *Skyllas v Retirement Care Australia (Preston) Pty Ltd*.

Skyllas v Retirement Care Australia (Preston) Pty Ltd. After the son of a Victorian residential aged care resident submitted an affidavit evidencing his belief of his mother's unlawful detainment, the court invoked the writ of habeas corpus (the power of a court to review the lawfulness of an arrest or detainment²⁰) and found it unlawful for a residential aged care facility to detain a resident against their will, regardless of their physical health. No further action was taken as the Public Advocate was appointed as the resident's legal guardian for accommodation matters.

This case highlighted that the detention of aged care residents can be considered to be unlawful if carried out without their consent, their attorney or guardian's approval (when allowed by law), or otherwise without legal authority or excuse.

Commonwealth legislation

The *Aged Care Act* is the primary piece of legislation governing aged care services in Australia. There are no provisions in this legislation that address or regulate the use of restrictive practices. Under section 96-1 the Minister for Health can create user rights, principles and standards which are reflected in the *Quality of Care Principles 2014* (Cth). These principles outline standards that may be used to protect residents who are vulnerable to restrictive practices, for example, the requirements to manage challenging behaviours effectively;²¹ provide a safe living environment;²² or to respect residents' independence,²³ dignity,²⁴ choice, and decision-making.²⁵

¹⁸ For example, behaviour driven by undiagnosed pain may be misinterpreted as a behavioural or psychological symptom of dementia and subsequently 'treated' with inappropriate administration of psychotropic drugs which can lead to complications such as falls, fractures, impaired cognition, and increased risk of death. See Edwin Tan et al, 'Analgesic Use, Pain and Daytime Sedation in People With and Without Dementia in Aged Care Facilities: A Cross-Sectional, Multisite, Epidemiological Study Protocol' (2014) 4(6) *BMJ Open*.

¹⁹ Office of the Public Advocate, *Legal frameworks for the use of restrictive practices in residential aged care: An analysis of Australian and international jurisdictions* (June 2017).

<http://www.justice.qld.gov.au/__data/assets/pdf_file/0005/524426/restrictive-practices-in-aged-care-final.pdf>.

²⁰ *Skyllas v Retirement Care Australia (Preston) Pty Ltd* [2006] VSC 409.

²¹ *Quality of Care Principles 2014* (Cth), sch 2 pt 2 item 2.13.

²² *Ibid* sch 2 pt 2 item 4.4.

²³ *Ibid* sch 2 pt 2 item 3.5.

²⁴ *Ibid* sch 2 pt 2 item 3.6.

²⁵ *Ibid* sch 2 pt 2 item 3.9.



Section 65-1 of the Act further states that if an aged care provider breaches any of its responsibilities under the Act (including its responsibility to act consistently with the care principles)²⁶, the Secretary of the Department of Health may impose sanctions that include the removal of funding or license to operate. In the case *Saiffa Pty Ltd v Secretary, Department of Health and Ageing*²⁷ the use of restrictive practices were found to be a breach of the care principles.

***Saiffa Pty Ltd v Secretary, Department of Health and Ageing.** The Administrative Appeals Tribunal upheld the Department of Health and Ageing's imposition of severe sanctions that led to the closure of the Belvedere Park Nursing Home in Melbourne, following an assessment that residents' safety was at severe and immediate risk. The tribunal described an incident where an unattended resident had been restrained to a chair with a lap-belt an hour after it should have been removed. This was considered a breach of the principle for the right to dignity, for residents to be assisted to achieve maximum independence, and for management to actively work in providing a safe and comfortable environment consistent with the residents' needs. However, there was no further discussion of restrictive practices as the matter focussed on many other serious incidents that led to the finding of severe immediate risk, including poor infection control; poor sanitation; inadequate incontinence management etc.*

Given the lack of clear precedent and the broad and ambiguous nature of the care principles, the key legislation governing the activities of federally-funded aged care services does not prohibit, legislate for, or regulate the use of restrictive practices to manage the challenging behaviours of some aged care residents. Further, it is not an effective mechanism for reducing the use of restrictive practices in residential aged care.

States and Territories

States and Territories have legislation regulating the use of restrictive practices in human services sectors such as disability and mental health, but these regimes are not consistent across the country.

Queensland has a comprehensive regulatory framework for the use of restrictive practices by state government-funded disability service providers, under the *Disability Services Act 2006* (Qld). This is a model that could be adapted for Australia's aged care sector. The adoption of a properly regulated regime has resulted in greater transparency around the use of restrictive practices in Queensland's disability sector and increased consistency, professionalism and oversight of these practices.

International legal frameworks

The legal and service quality frameworks for restrictive practices in aged care in international jurisdictions provide a range of options which could be considered for adoption in Australia. Some of the key features of these systems include:

- the implementation of legislation, standards, regulations and/or safeguards that outline best-practice, evidence-based requirements regarding the use of restrictive practices;
- establishing principles that underpin the framework, for example, that restrictive practices may only be used in instances where a person is at risk and when all other less restrictive measures have been attempted;
- prohibiting the use of medication as a form of chemical restraint;
- a rigorous system of auditing for restrictive practices;

²⁶ *Aged Care Act 1997 (Cth)* s 56-1(m).

²⁷ *Saiffa Pty Ltd v Secretary, Department of Health and Ageing* (2008) 105 ALD 55.



- substantial penalties for non-compliance with aged care service and restrictive practice standards;
- ensuring that state and national restrictive practice frameworks are congruent; and
- encouraging the judiciary to promote the freedoms and independence of older people.²⁸

There are some gaps in and criticisms of the existing international restrictive practice frameworks which include:

- legislation may focus more on meeting minimum standards than upholding older people's human rights;
- an overly bureaucratic approach to meeting minimum standards rather than focusing on customer satisfaction;
- policy frameworks may be overly influenced by the commercial, for-profit aged care sector;
- failure to establish and implement minimum resourcing requirements (e.g. workload limits and minimum staffing levels) to support the objectives of legislation;
- failure to establish functional interconnections between the legislative framework and professional practice;
- auditing criteria is not sufficiently specific to aged care and restrictive practices; and
- the lack of a consistent data collection and reporting strategy regarding the use of restrictive practices.²⁹

The need to uphold the rights of residential aged care residents and workers

The use of restrictive practices in residential aged care, without legal justification or excuse, is unlawful and amounts to elder abuse. The absence of a legal framework for the use of restrictive practices in residential aged care services leaves older Australians at risk of having their basic human rights breached by staff who do not have the knowledge or skills to manage challenging behaviours appropriately.

In its June 2016 *Elder Abuse Issues Paper*, the Australian Law Reform Commission (ALRC) recognised that some restrictive practices can constitute elder abuse, deprive people of their basic legal and human rights and be classified as assault, false imprisonment and/or other civil or criminal acts.³⁰

In May 2017, the ALRC published the final report for the Elder Abuse Inquiry – *Elder Abuse: A National Legal Response*. In that report, the Commission recommended that aged care legislation should regulate the use of restrictive practices in residential aged care.³¹ The ALRC recommended that any restrictive practice should be the least restrictive and used only:

- as a last resort, after alternative strategies have been considered, to prevent serious physical harm;
- to the extent necessary and proportionate to the risk of harm;
- with the approval of a person authorised by statute to make this decision;
- as prescribed by a person's behaviour support plan; and
- when subject to regular review.³²

The increasing number of people with dementia and the potential harm that may occur as a result of ad hoc or poorly applied restrictive practices suggest an urgent need to clarify the legality of restrictive practices in the Australian aged care system. Further, restrictive practices should be regulated to achieve a more consistent, professional, evidence- and rights-based approach to responding to dementia-related behaviours in residential aged care.

In the circumstances, the Committee is encouraged to recommend that the Commonwealth Government take steps to regulate the use of restrictive practices in residential aged care as a matter of urgency.

²⁸ Office of the Public Advocate, above n 19, 15.

²⁹ Office of the Public Advocate, above n 19, 16.

³⁰ Australian Law Reform Commission, *Elder Abuse Issues Paper* (IP 47) (June 2016) 238.

³¹ Australian Law Reform Commission, *Elder Abuse-A National Legal Response*, Report No 131 (2017) 11.

³² *Ibid.*



Another matter we would draw the Committee's attention to is the potential impact of the use of unregulated restrictive practices on aged care workers. Residential aged care workers who use restrictive practices do not have the protections of legal immunities that would be provided under a formal legislative regime and are at risk of criminal prosecution for unlawful deprivation of liberty or assault, or civil claims for false imprisonment, assault or battery.

In July 2017, the Minister for Aged Care, responded to a letter from the Public Advocate calling for the regulation of restrictive practices by advising that “[I]n making decisions on the application of restrictive practices, care providers must balance a patient's basic legal and human rights (in accordance with aged care standards) with their duty of care to protect the patient, other residents and staff from harm”.³³ This response assumes that residential aged care workers have an appropriate understanding of human rights and the law, and that they are able to apply those complex principles in their day-to-day care of aged care residents and within their current workload. This is not a reasonable assumption to make and leaves workers and care providers exposed to prosecution or litigation.

Effectiveness of various aged care systems in ensuring consumer protection

Single aged care quality framework

The current quality standards applicable to the treatment and care of people in residential aged care are contained in the *Care and services for residential care services* and the *Accreditation Standards* that are schedules 1 and 2 of the *Quality of Care Principles* made under the *Aged Care Act 1997*. These standards make no reference to the use of restrictive practices in residential aged care facilities or that the goal is for residential aged care facilities to be “restraint-free environments”, or that restrictive practices only be used as a last resort.

The Australian Government funded the development of the *Decision-Making Tool: Supporting a Restraint Free Environment in Residential Aged Care*. However, there is no reference to this document in any of the aged care legislation or in the *Quality of Care Principles*. This document available on the Australian Government Department of Health, Ageing and Aged Care website under “Training and learning resources”. However, there is no requirement that residential aged care facilities train their staff in these matters to meet legislative or accreditation requirements.

The Australian Government has recently released new Draft Aged Care Quality Standards, which have been developed as a single set of quality standards to replace the Accreditation Standards, Home Care Standards, Transition Care Standards and the National Aboriginal and Torres Strait Islander Flexible Aged Care Program Quality Framework Standards.

The Draft Aged Care Quality Standards contain eight standards:

- Consumer dignity and choice;
- Ongoing assessment and planning with consumers;
- Personal care and clinical care;
- Services and supports for daily living;
- Organisation's service environment;
- Feedback and complaints;
- Human resources; and
- Organisational governance.

³³ The Honourable Ken Wyatt AM (Minister for Aged Care), letter to Mary Burgess (Public Advocate-Queensland), received by Mary Burgess on 6 July 2017, Reference No MC17-011202.



The only standard that makes any reference to restrictive practices and the principles that should guide their use in residential aged care is Standard 8 – Organisational governance which includes a requirement for residential aged care providers to have “effective governance supported by organisation-wide systems for safety and quality, including systems for ... minimising the use of physical and chemical restraint”.³⁴

While this is a positive inclusion, the quality standards fall far short of what should be expected of service providers, in terms of quality care where there may be a need to use restrictive practices. The quality standards could be strengthened by a greater focus on human rights and a focus on the reduction and elimination of the use of restrictive practices in all of the standards. For example, the organisation statement for Standard 1 – Consumer dignity and choice could incorporate a commitment to upholding the rights of consumers and respecting their views and wishes and the ALRC recommendation that any restrictive practice should be the least restrictive and used only:

- as a last resort, after alternative strategies have been considered, to prevent serious physical harm;
- to the extent necessary and proportionate to the risk of harm;
- with the approval of a person authorised by statute to make this decision;
- as prescribed by a person's behaviour support plan; and
- when subject to regular review.³⁵

The consumer statement for Standard 1 could be improved through an inclusion about consumer rights being respected. The reduction and elimination of the use of restrictive practices should also form part of standards 2 through to 5.

In order to better protect aged care residents and workers and enable real change, the strengthened quality standards must be supported by an appropriate legislative and regulatory framework. The Commonwealth Government must urgently establish an appropriate restrictive practice regime to provide for the appropriate regulation of restrictive practices in the aged care sector. The quality framework should mirror these arrangements and establish appropriate standards to support the operation of the restrictive practices regime. Restrictive practices should only be used in accordance with a formal, legal regime similar to that used in Queensland for dealing with challenging behaviours of people with disability.

The importance of effective complaints systems

Complaints mechanisms are integral to a comprehensive system of safeguards for older people. A project undertaken by this office about complaints management systems for adults with impaired decision-making capacity identified a range of barriers that prevent many of these people from having their issues resolved through formal complaints mechanisms.³⁶ In addition to the usual reasons for not making formal complaints,³⁷ people with impaired decision-making capacity (including older people with dementia) may experience greater barriers to making complaints for a range of reasons including:

³⁴ Department of Health, *Draft Aged Care Quality Standards and Draft Application of Draft Aged Care Quality Standards by service type* (30 January 2018) Australian Government <<https://agedcare.health.gov.au/quality/single-set-of-aged-care-quality-standards/draft-aged-care-quality-standards-and-draft-application-of-draft-aged-care-quality-standards-by-service-type>>.

³⁵ Australian Law Reform Commission, above n 31.

³⁶ Office of the Public Advocate, *Strengthening Voice: A Scoping Paper About Complaints Management Systems for Adults with Impaired Capacity* (February 2015) 8-15 <http://www.justice.qld.gov.au/_data/assets/pdf_file/0020/362342/strengthening-voice-scoping.PDF>.

³⁷ Sarah Cook, *Complaint Management Excellence: Creating Customer Loyalty Through Service Recovery* (electronic version, Kogan Page, 2012); Clay M Voorhees, Michael K Brady and David M Horowitz, 'A Voice from the Silent Masses: An Exploratory and Comparative Analysis of Noncomplainers' (2006) 34(4) *Journal of the Academy of Marketing Science* 514-527.



- they do not understand their rights;
- the process or the entry points for making complaints are less accessible;
- not being believed or taken seriously when they do make a complaint;
- not being able to manage and present evidence to support their complaint;³⁸ and
- those individuals who receive services from others are often reluctant to make complaints for fear of reprisals or withdrawal of services.³⁹

The project also identified that complaints systems were not always sufficiently responsive to individuals with impaired decision-making capacity who may be unable to take the action necessary to initiate and progress a complaint through to resolution.⁴⁰ These adults frequently required additional support to use complaints systems effectively.⁴¹ The type of support that people may require varies, from assistance to identify the need to make a complaint to assisting people with most or all aspects of the complaint-making process, including progressing the complaint to an external complaints agency. This support is not always offered through organisational complaints management systems. This was also observed to be the case for some organisations whose role it was to provide specialist supports to this group.

These and other issues are likely to significantly reduce the effectiveness of complaints systems for older people who are diagnosed with dementia or other capacity-affecting conditions. Complaints schemes for this group should therefore incorporate mechanisms that maximise accessibility of complaints management systems for people with impaired decision-making capacity and support to actively engage in the complaint-making process.

The United Nations *Convention on the Rights of Persons with Disabilities* places obligations on Australia to make reasonable adjustments to supports, systems and processes to ensure they are accessible to people with disability. The Convention recognises that disability is an evolving concept that results from the interaction between persons with impairments and their environment.⁴² Therefore this concept, and the Convention more broadly, has applicability in the context of residential aged care.

Strategies that could be used to strengthen the voices of older and vulnerable Australians who interact with the residential aged care system include:

- prioritising satisfaction;
- proactively identifying dissatisfaction;
- ensuring access to independent advocacy;
- adopting facilitative and inquisitorial approaches;
- guaranteeing safety and freedom from reprisal;
- recognising the value of informal complaint-making processes; and
- ensuring a responsive system.⁴³

This office's complaints management systems project also highlighted how additional systemic review mechanisms may ameliorate some of the inadequacies of formal complaints management systems. For example, the frequent and on-going presence of external visitors may assist with identifying and raising issues for people with impaired decision-making capacity and progressing them to resolution. Independent advocates can perform similar functions, although engaging their services generally requires proactive effort that may be beyond the capabilities of some people with impaired decision-making capacity.

³⁸ Office of the Public Advocate, above n 36, 8-10.

³⁹ See, for example, Alisoun Milne, 'Commentary on Protecting My Mother' (2011) 13(1) *The Journal of Adult Protection* 53-56; Queensland Parents for People with a Disability (QPPD), *Papering Over the Cracks: The Veneer of Prevention* (2005) 39 <http://www.qppd.org/images/docs/ci_report_2005.pdf>.

⁴⁰ Office of the Public Advocate, above n 36.

⁴¹ Office of the Public Advocate, above n 36, 28; International sources also identify the importance of support during complaint making, see Healthwatch England, 'Suffering in Silence: Listening to Consumer Experiences of the Health and Social Care Complaints System' (A Healthwatch England Report, October 2014) <http://www.healthwatch.co.uk/sites/healthwatch.co.uk/files/complaints-summary_0.pdf>.

⁴² *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008) ('*Convention on the Rights of Persons with Disabilities*') preamble.

⁴³ Office of the Public Advocate, above n 36.



Mechanisms to provide direct access to independent advocates, rights advisors or professionals who have similar advocacy functions, along with regular engagement with personal visitors and the establishment of an independent and professional community visitor scheme are crucial inclusions to safeguard against the mistreatment of aged care residents. Ensuring that complaints management systems incorporate or link to advocacy and community visitor programs (such as the community visitor program established under the *Public Guardian Act 2014 (Qld)*) may, also help mitigate the mistreatment of aged care residents. It should therefore be recognised that, while necessary, complaints schemes are insufficient mechanisms in themselves for protecting older people from abuse and exploitation and must also be complemented by additional safeguards.⁴⁴

Aged Care Complaints Commission

The Aged Care Complaints Commissioner's Annual Report contains some very useful information about the role and functions of the Commission and its handling of complaints. The Commissioner's Annual Report for 2016-17 detailed that 4,713 complaints were received in that year, a 20% increase on the previous year. It also provided some high-level detail about complainants e.g. the proportion of complainants that were made by people receiving aged care services or by family member or other representatives.⁴⁵

The Annual Report highlighted that 78% of all complaints were about residential aged care and that the number of complaints about residential aged care was greater than in the previous year.⁴⁶

However, the report provides no information about the types of complaints received by that office.

This broad level of reporting does not enable the public, or agencies such as the Public Advocate, to determine whether there are any, or many, complaints about the use of restrictive practices or other conduct that would amount to elder abuse in residential aged care facilities, whether those complaints were substantiated or are increasing. Considering the number of complaints made about residential aged care, the unregulated use of restrictive practices, the vulnerability of many consumers and the importance of respecting their human rights, the Age Care Complaints Commissioner should be required to provide the public with greater detail about the type and nature of complaints received and the outcomes of those complaints.

Publishing more detailed information about complaints will facilitate greater system transparency and accountability. The community is entitled to this information. Most importantly, older Australians and their family members are entitled to know more about complaints that are made in relation to the use of restrictive practices in residential aged care settings.

Consumer protection for residents who do not have available support

Effective complaints system

The importance of an effective complaints system was discussed earlier in this submission in the context of response mechanisms for the mistreatment of aged care residents. An effective complaints system is also an important consumer protection for residents, particularly those who do not have an informal support network.

Aged care residents may face a number of barriers to making a complaint (such as those discussed on pages 8 and 9). Many older people may require additional support to use complaints

⁴⁴ Office of the Public Advocate, *Submission to the Australian Law Reform Commission – Elder Abuse Issues Paper* (August 2016) 13-14 <http://www.justice.qld.gov.au/__data/assets/pdf_file/0007/484450/alrc-submission-final.pdf>.

⁴⁵ Aged care Complaints Commissioner, *Annual Report 2016-17* (2017) Australian Government, 2 <<https://www.agedcarecomplaints.gov.au/wp-content/uploads/2017/09/Annual-Report-2016-17-PDF.pdf>>.

⁴⁶ *Ibid.*



systems effectively, particularly those who do not have family, friends or other people available to provide them with support.

The type of required support will vary from person to person. It may involve identifying the need to make a complaint, articulating and lodging the complaint or assisting people with most or all aspects of the complaint-making process, including progressing the complaint through complaints and review processes.

The *Convention on the Rights of Persons with Disabilities* places responsibility on Australia to take appropriate measures to ensure the accessibility of services and systems to all people (including those with aged-related impairments) and provide appropriate assistance and support.⁴⁷ Further, the Convention proclaims that States must ensure that people receive the support that they need to exercise their legal capacity and make decisions for themselves.⁴⁸ This should include assisting people to enforce their rights as consumers and to exercise choice to change service providers when they are dissatisfied with their care and treatment. Accordingly, all complaints and consumer protection mechanisms in the aged care sector must uphold the principles of the Convention and, to the greatest extent possible, support people to exercise their autonomy and legal capacity.

Advocacy and community visitors

As discussed on pages 9 and 10, advocacy and community visitor programs play a critical role in identifying and responding to the mistreatment of people in aged care. However, anecdotal information suggests that neither of these systems are sufficiently resourced to meet the needs of a rapidly growing cohort of older Australians with impaired decision-making capacity.

The Commonwealth Government must ensure that the National Aged Care Advocacy Program (NACAP) is adequately funded to meet current and future demand for advocacy services. One of the strengths of the NACAP is that older Australians have access to free advocacy. The insufficient funding of advocacy services could become a significant barrier to aged care residents being able to seek redress for mistreatment and abuse and to access consumer protection mechanisms. It is critical that people continue to be able to access advocacy at no cost in the future. This is particularly the case for people on low incomes.

The issue of adequate resourcing of advocacy is particularly relevant to this inquiry given that data provided by the NACAP agencies indicate that elder abuse and the mistreatment of older people is an increasing concern among advocacy services across Australia.⁴⁹ Accordingly, there is a need to revisit the Productivity Commission's 2011 report⁵⁰ and the Department of Social Services' 2015 report⁵¹ recommendations to expand the NACAP to meet anticipated demand:

The predicted increase in the proportion, and absolute numbers, of people aged over 65 years of age is likely to drive higher demand for advocacy services. At a minimum, funding could increase in line with these projections and inflation to maintain current service levels.⁵²

⁴⁷ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008) ('*Convention on the Rights of Persons with Disabilities*') art 9.

⁴⁸ *Ibid* art 12.

⁴⁹ Department of Social Services, *Review of Commonwealth Aged Care Advocacy Services: Final Report* (December 2015) 44 <<https://agedcare.health.gov.au/support-services/aged-care-advocacy/review-of-commonwealth-aged-care-advocacy-services-final-report>>.

⁵⁰ Australian Government Productivity Commission, *Caring for Older Australians* (Productivity Commission Inquiry Report No 53 Vol 1) (2011) lxix <<http://www.pc.gov.au/inquiries/completed/aged-care/report>>.

⁵¹ Department of Social Services, *Review of Commonwealth Aged Care Advocacy Services: Final Report* (December 2015) 6-7 <<https://agedcare.health.gov.au/support-services/aged-care-advocacy/review-of-commonwealth-aged-care-advocacy-services-final-report>>.

⁵² *Ibid*.



The Commonwealth-funded aged care community visitor scheme also has potential to reduce the incidence of elder abuse in aged care. At present, the Commonwealth scheme links volunteer community members with aged care residents for the purpose of companionship and friendship.⁵³ These individuals may or may not have the skills or inclination to identify and address the mistreatment of residents appropriately and effectively.

In contrast, the Queensland community visitor program for adults with impaired decision-making capacity employs community visitors to undertake regular announced and unannounced visits to specified accommodation sites for the purpose of monitoring service delivery.⁵⁴ Queensland community visitors have legislative authority to undertake functions such as lodging and resolving complaints on behalf of residents with impaired decision-making capacity, talking with staff and residents to clarify issues and concerns, and reviewing documentation and programs relating to their support and care.⁵⁵ Community visitors can lodge reports with the Office of the Public Guardian⁵⁶ that provides the report to the service provider for follow-up action.⁵⁷

The Public Advocate would support the establishment of a government-funded aged care community visitor scheme based on the community visitor program provided for under the *Public Guardian Act 2014* (Qld). Such a program, along with an expanded NACAP, would form a significant part of a comprehensive government response to elder abuse in residential and community-based aged care services.

Concluding comment

Australia has been slow to act to regulate the use of restrictive practices to manage the challenging behaviour of people with dementia and mental health issues in residential aged care. The current lack of policy and legislation regulating restrictive practices is out of step with the laws, standards and regulations currently in operation in other comparable Western countries including New Zealand, the United Kingdom, the United States of America and Canada.

It is difficult to understand why no action has been taken by the Commonwealth Government to address the unregulated use of restrictive practices in residential aged care, when on a daily basis aged care residents across Australia are being subjected to physical and chemical restraint and seclusion without any oversight or accountability. These actions potentially amount to criminal assaults and other civil and criminal wrongs. The inaction of Government occurs amidst seemingly strong agreement among all of those advising the government that regulation should occur.⁵⁸

The need to protect residents of aged care facilities from abuse and poor practices and to ensure that proper clinical and medical care standards are practiced and maintained has never seemed more important than at the present time. A larger proportion of the Australian population than ever before is older and ageing, resulting in much higher levels of demand for residential aged care. However, in recent months the community has been shocked by reports of terrible abuse and neglect, poor treatment practices and unconscionable financial practices in the residential aged care sector.

The regulation of restrictive practices in residential aged care settings will advance the protection of the legal and human rights of older Australians, however regulation alone will not result in reduced or eliminated use of restrictive practices in aged care settings. Issues relating to the current culture, staffing and operation of services in the sector must also be addressed in order to

⁵³ Australian Government Department of Health, Ageing and Aged Care: Review of the Commonwealth Aged Care Advocacy Services (20 February 2016) <<https://agedcare.health.gov.au/support-services/national-aged-care-advocacy-framework-consultation>>; See also *Aged Care Act 1997* (Cth) ch 5 pt 5.6 div 82 s 82-1(1)(a)(b)(c).

⁵⁴ Office of the Public Guardian, *Community Visitors*, Office of the Public Guardian <www.publicguardian.qld.gov.au/adult-guardian/adult-community-visitors>.

⁵⁵ *Ibid.*

⁵⁶ *Public Guardian Act 2014* (Qld) s 47(1).

⁵⁷ *Ibid* s 47(3).

⁵⁸ Also see recommendation 7 of the *Review of National Aged Care Quality Regulatory Processes* by Ms Cate Carnell AO and Professor Ron Paterson ONZM (October 2017) which recommended the legal regulation of restrictive practices in line with the ALRC recommendation referred to at page 6 of this submission.



see real gains in improving the quality of life and safeguarding the rights of older people living in residential aged care settings in Australia. Increased transparency in relation to residential aged care complaints, through more detailed reporting by the Aged Care Complaints Commissioner is also needed.

Thank you for the opportunity to provide feedback to your Committee regarding the quality of care in Australian residential aged care facilities. Should the opportunity arise, I would be pleased to be part of further discussions in relation to these matters or any other issues raised in my submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Mary Burgess', written in a cursive style.

Mary Burgess

Public Advocate (Queensland)

