

Office of the Public Advocate (Qld)
Systems Advocacy

**Submission to the
Australian Law Reform
Commission**

Elder Abuse Issues Paper

August 2016



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Introduction

The Public Advocate (Qld)

The Public Advocate was established by the *Guardianship and Administration Act 2000* (Qld) to undertake systems advocacy on behalf of adults with impaired decision-making capacity 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

In 2016, the Office of the Public Advocate estimates that up to 118,739 Queensland adults may experience impaired decision-making capacity.² This figure is calculated using information from the Australian Bureau of Statistics' Survey of Disability Ageing and Carers and general population projection data,³ and is based on the number of people who have conditions that may impact upon their decision-making capacity. These conditions include (but are not limited to) intellectual disability, acquired brain injuries arising from catastrophic accidents, mental illness, ageing conditions such as dementia, and conditions associated with problematic alcohol and drug use.

It is important to note that not all people with these conditions will have impaired decision-making capacity, that impaired decision-making capacity does not necessarily impact all areas of a person's life, and that capacity may fluctuate in response to situational issues. It is likely, however, that many people with these conditions may, at some point in their lives, if not on a regular and ongoing basis, experience impaired decision-making capacity.

Interest of the Public Advocate (Qld)

One of Australia's most significant social and demographic trends is its ageing population, described by the House of Representatives Standing Committee on Legal and Constitutional Affairs as "an inescapable demographic destiny".⁴ While an ageing population is increasingly being interpreted positively,⁵ growing numbers of older people will also increase the prevalence of age-related

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

² Office of the Public Advocate (Queensland), *The potential population for systems advocacy* (12 February 2016) 2 <http://www.justice.qld.gov.au/__data/assets/pdf_file/0006/457539/fs02-potential-population-v5.00.pdf>.

³ *Ibid.*

⁴ House of Representatives Standing Committee on Legal and Constitutional Affairs, *The Parliament of the Commonwealth of Australia, Older people and the law* (2007) vii.

⁵ See, for example, European Centre for the Development of Vocational Training, *Working and Ageing: The Benefits of Investing in an Ageing Workforce* (2012, Office of the European Union) 1.

conditions such as dementia that may impact upon decision-making capacity and increase a person's vulnerability to elder abuse. The National President of Alzheimer's Australia commented that "dementia is without question the single biggest health issue facing Australia in the 21st century".⁶ Forecasts by Deloitte Access Economics estimate that, in the absence of new medications to treat dementia, it will potentially affect up to 73,470 people living in Queensland by 2020, increasing to around 215,270 people by 2050.⁷

The Office of the Public Advocate commends initiatives to review and improve the safeguards and protections provided to older Australians. It is hoped that this Inquiry will provide a deeper understanding of Commonwealth systems impacting older people in Australia and their interactions with state- and territory-based systems, and identify improvements that could be implemented to protect older people from exploitation and abuse.

This submission responds to a number of questions in the Issues Paper as they relate to older people with impaired decision-making capacity.

Elder Abuse Issues Paper

What is elder abuse?

QUESTION 1 - TO WHAT EXTENT SHOULD THE FOLLOWING ELEMENTS, OR ANY OTHERS, BE TAKEN INTO ACCOUNT IN DESCRIBING OR DEFINING ELDER ABUSE: HARM OR DISTRESS; INTENTION; PAYMENT FOR SERVICES?

The World Health Organization defines elder abuse as "a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person".⁸ Elder abuse can take many forms, such as:

- physical – infliction of physical pain, injury or force;
- psychological/emotional – infliction of mental anguish, fear, feelings of shame and/or powerlessness;
- sexual – sexually abusive or exploitative behaviour;
- financial – improper or illegal use of an older person's finances or assets; and
- neglect – intentional or unintentional failure to provide care to an older person.⁹

⁶ Ita Buttrose, National President, Alzheimer's Australia as cited in Deloitte Access Economics, *Dementia Across Australia: 2011-2050* (9 September 2011) Alzheimer's Australia <<https://fightdementia.org.au/research-and-publications/reports-and-publications/access-economics-reports>> 7.

⁷ Deloitte Access Economics, *Dementia Across Australia: 2011-2050* (9 September 2011) Alzheimer's Australia <<https://fightdementia.org.au/research-and-publications/reports-and-publications/access-economics-reports>> 17.

⁸ World Health Organization, *Ageing and life-course - Elder abuse: What is elder abuse?* (2016) World Health Organization <http://www.who.int/ageing/projects/elder_abuse/en/>.

⁹ Ibid; Communities, Disability Services and Domestic and Family Violence Prevention Committee, Queensland Parliament, *Inquiry into the adequacy of existing financial protections for Queensland's seniors* (2015) 115.

While the World Health Organization definition is broadly accepted, there is ongoing discussion and a lack of consensus about what an operational definition of elder abuse should include.¹⁰ In the *Inquiry into the adequacy of existing financial protections for Queensland's seniors (FPQS Inquiry)*, the Communities, Disability Services and Domestic and Family Violence Prevention Parliamentary Committee (the Committee) in Queensland reported that older people perceive elder abuse as involving a broad range of behaviours and relationships such as disrespect, scams, bullying and systemic issues (for example, related to the provision of aged care).¹¹

There is no legal definition of elder abuse in Queensland, and legal interventions and offences rely on various legislation such as the *Domestic and Family Violence Protection Act 2012 (Qld)*, *Guardianship and Administration Act 2000 (Qld)*, and the *Criminal Code Act 1899 (Qld)*.

The primary consideration in the formulation of a definition for elder abuse is the purpose behind having a definition. If the purpose of defining elder abuse is to reflect the lived experiences of older people who have been victimised on the basis of their age, and to identify and better understand the social problem that is elder abuse to inform strategies to reduce and prevent it, the definition should be appropriately broad. However, discussions around the definition of elder abuse often appear to be proposing a legal definition for the purposes of developing a specific criminal offence or offences that would constitute elder abuse.

There is little value in developing a specific criminal offence of elder abuse. With the wide range of behaviours that might constitute elder abuse, the development of a definition that would effectively encompass all of those behaviours and the thresholds for criminality would be extremely difficult. In any event, there are already adequately tried and tested legal offences available to effectively prosecute a wide range of criminal behaviours that might constitute elder abuse.

If the object of developing an elder abuse offence is to more accurately record the prevalence of elder abuse that constitutes criminal behaviour, there may be other means by which those behaviours could be recorded. For example, certain offences (such as assaults, breaches of domestic and family violence orders, fraud and theft) could be identified as constituting elder abuse when the victim is an elderly person, and be appropriately recorded as such by prosecuting authorities and/or courts. Alternatively, a circumstance of aggravation could be created under criminal legislation for cases where the victim is an older person, and offences where this circumstance of aggravation is alleged could be recorded as elder abuse.

Intent should not be an element in the definition of elder abuse, especially in terms of a legal definition. Requiring intent as an element of elder abuse would create a further level of complexity and the need to prove this extra element could become a hindrance to prosecuting such matters. Further, having intent as an element for offending does not align well with existing criminal legislation in Queensland, as intention is specifically legislated as not being required to be proven except for very specific offences.¹²

¹⁰ Communities, Disability Services and Domestic and Family Violence Prevention Committee, Queensland Parliament, *Inquiry into the adequacy of existing financial protections for Queensland's seniors* (2015) 115; Elder Abuse Prevention Unit, *A 'wishlist' for a prevalence study* (2015) Elder Abuse Prevention Unit 3 <http://www.eapu.com.au/uploads/research_resources/EAPU%20Reference%20Group%20Research%20Subgroup%20%20Final%20Summary_Web.pdf>.

¹¹ *Ibid.*

¹² *Criminal Code Act 1899 (Qld)* s 23(2).

We acknowledge there may be very specific situations and offences where establishing intention as an element of elder abuse would be suitable. However, any detailed discussion on the complex issue of intention should be reserved for when, and if, such specific offences are proposed.

QUESTION 2 - WHAT ARE THE KEY ELEMENTS OF BEST PRACTICE LEGAL RESPONSES TO ELDER ABUSE?

Focusing on specific legal responses to elder abuse will not achieve the social change we, as a community, want to realise in this area.¹³ Elder abuse is essentially a social problem in Australia that is a consequence of a community that does not show sufficient respect for its elders or value the knowledge gained from life experience. In the face of ageism, many of our older people lose confidence and slowly lose their networks of support, ultimately living socially isolated lives. This isolation makes them particularly vulnerable to elder abuse.

Rather than focusing on legal responses once elder abuse has occurred, we encourage the ALRC to make recommendations about social programs and strategies to reduce or prevent elder abuse that will achieve long-term change. Strategies to keep older people more engaged in their communities and avoid social isolation should be high priorities for governments committed to reducing elder abuse; as should community education campaigns about elder abuse. The Australian community will also need well-resourced vehicles for delivering evidence-based responses that are effective at preventing and remedying elder abuse, such as family care conferences and interdisciplinary abuse teams.¹⁴

Once elder abuse occurs there should be appropriate legal responses such as criminal prosecutions and appropriate regulatory responses for service providers and care-givers to ensure that standards of quality and care are maintained and rogue operators and individuals are not permitted to remain in the sector.

QUESTION 3 - THE ALRC IS INTERESTED IN HEARING EXAMPLES OF ELDER ABUSE TO PROVIDE ILLUSTRATIVE CASE STUDIES, INCLUDING THOSE CONCERNING: ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE; PEOPLE FROM CULTURALLY AND LINGUISTICALLY DIVERSE COMMUNITIES; LESBIAN, GAY BISEXUAL, TRANSGENDER OR INTERSEX PEOPLE.

Systemic elder abuse within Australian society and the aged care system

There are two systemic examples of elder abuse to which this office would like to draw the attention of the ALRC.

The first is the practice in Australian society of moving older people against their will from their homes and into residential aged care. This enforced relocation to institutional care often occurs at points in older people's lives when they are considered to be failing in health and/or experiencing impaired decision-making capacity. These decisions are often made by family members and supported by medical professionals. Our office is aware of the many applications made by family members of older people or staff in Queensland Health to the Queensland Civil and Administrative Tribunal (QCAT) for guardianship for the purpose of making a decision to move the subject person from hospital into aged care.

These decisions are often made on behalf of the older person without giving serious consideration to the possibility of the person remaining in their own home with appropriate support and services,

¹³ Some authors similarly argue that responding to elder abuse primarily within the legal context can be problematic and requires an integrated systems response. See, for example, Brian K Payne, *Crime and Elder Abuse: An Integrated Perspective* (Charles C Thomas, 2005).

¹⁴ Donna M Wilson et al, 'Evidence-Based Approaches to Remedy and Also to Prevent Abuse of Community-Dwelling Older Persons' (2011) *Nursing Research and Practice* <<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3168910/>>.

even when the older person has indicated that is their preference. While family members may have genuine concerns for the health and safety of their aged relatives, some applications also appear to be driven by convenience, with family members wanting ‘things sorted out’ so that they can be relieved of the responsibility of their older relatives’ day-to-day care.

Our office is not certain of the policy basis for Queensland Health becoming involved in these matters. We are concerned that its involvement may be driven by risk and/or cost. The release of a patient into aged care transfers care and cost risks from Queensland Health to an aged care provider whereas allowing the person to return home does not. Further, if the older person has medical issues while in residential aged care, they can receive treatment in the place they reside, reducing the likelihood of the person returning to hospital and the subsequent cost to the health system. These considerations, while legitimate, should not take precedence over the rights of older people to autonomy and, to the greatest extent possible, to make decisions for themselves.

Decisions about the living arrangements for older people that are made without taking the older persons’ views and wishes into account and seeking to implement their desires, breach their human rights.

The United Nations *Convention on the Rights of Persons with Disabilities* (UNCRPD)¹⁵, to which Australia is a signatory, states:

Article 12 - Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests. (Emphasis added)

The obligations under the UNCRPD are relevant to the circumstances of older people experiencing conditions that may affect their decision-making capacity, such as dementia and other aged-related conditions that affect cognitive function. The obligations are also reflected in most guardianship legislation in Australian states and territories. In Queensland, the *Guardianship and Administration Act 2000* (Qld) contains numerous provisions supporting the rights of people with impaired capacity to make, and be supported to make, decisions:

¹⁵ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008).

Section 5 - Acknowledgements

This Act acknowledges the following—

- (a) an adult's right to make decisions is fundamental to the adult's inherent dignity;
- (b) the right to make decisions includes the right to make decisions with which others may not agree;
- (c) the capacity of an adult with impaired capacity to make decisions may differ according to—
 - (i) the nature and extent of the impairment; and
 - (ii) the type of decision to be made, including, for example, the complexity of the decision to be made; and
 - (iii) the support available from members of the adult's existing support network;
- (d) the right of an adult with impaired capacity to make decisions should be restricted, and interfered with, to the least possible extent;
- (e) an adult with impaired capacity has a right to adequate and appropriate support for decision-making.

Section 6 - Purpose to achieve balance

This Act seeks to strike an appropriate balance between—

- (a) the right of an adult with impaired capacity to the greatest possible degree of autonomy in decision-making; and
- (b) the adult's right to adequate and appropriate support for decision-making.

...

Section 11 - Principles for adults with impaired capacity

(1) A person or other entity who performs a function or exercises a power under this Act for a matter in relation to an adult with impaired capacity for the matter must apply the principles stated in schedule 1 (the general principles and, for a health matter or a special health matter, the health care principle).

...

(3) The community is encouraged to apply and promote the general principles.

The general principles referred to in section 11 of the Act (which are presented in full at Appendix 1) include strong statements of human rights and respect for dignity and self-determination that are consistent with the UNCRPD. While providing a statement of rights, the general principles also provide some guidance in relation to how to carry out decision-making on behalf of an individual, such as taking into consideration the views and wishes of the adult, as well as highlighting the importance of maintaining the person's autonomy and lifestyle.

Principle 5 of the general principles under the Act emphasises the importance of supporting a person to live life in the general community and to take part in activities, while principle 7 expresses the right of a person to participate as much as practicable in decisions affecting the adult's life and the right to make their own decisions.

When the rights of older people to make decisions or participate in decisions affecting their lives are disregarded, their human rights are breached. It is our view that people and agencies who fail to take account of their views and wishes are breaching the law.

The other form of elder abuse that our office understands is emerging as a practice in the aged-care sector, arises from aged care providers requiring that people have a valid enduring power of attorney or a guardianship/administration order before they will have their entry to the facility confirmed. The rationale for this policy is likely to be a financial and legal safeguard for the facility by

ensuring that all people seeking placement have a mechanism in place to ensure continuity of decision-making in respect of the person's placement should they cease to have capacity (particularly for financial matters) sometime in the future.¹⁶

While it is appropriate that all members of our community undertake appropriate planning for the challenges they will face as they aged and lose capacity, it is of significant concern that the concepts of informal and supported decision-making appear to be absent from the way in which some aged care providers operate. In many circumstances, there are family members who are available and willing to assist their ageing family member to make decisions in respect of their aged care placement or make decisions on their behalf, however this no longer appears to be sufficient.

The failure of residential aged care providers and other organisations to accept informal decision-making is a long-standing issue. In 2010, the Queensland Law Reform Commission reported that "the authority of an adult's informal decision-makers is not always recognised by service providers, medical practitioners and others who provide services to the adult".¹⁷

Further to this, this office has been informed anecdotally, that many aged care providers insist on only dealing with the person holding the enduring power of attorney, even when the aged family member still has legal capacity and the attorney's powers have not been enlivened. These practices breach the human rights of older people, are unlawful and constitute a form of elder abuse.

The policy of some residential aged care providers to require a person has a guardianship and/or administration order prior to securing a placement contravenes Queensland's guardianship legislation, the principles that underpin Queensland's guardianship legislation and the UNCRPD. Guardianship and/or administration is a last resort decision-making mechanism that should only be resorted to when all other less restrictive alternatives are exhausted. In essence, residential aged care providers, in adopting such policies, are requiring that the older person be stripped of their legal capacity.

This office seeks a statement from the ALRC that the practices outlined in this section of our submission are unlawful, are breaches of the human rights of older people and constitute a form of elder abuse. We also seek recommendations, that the government take appropriate steps to prevent these forms of abuse, including developing and funding community education campaigns, increasing the availability of in-home aged care services and requiring service providers to adopt policies and practices that do not breach the rights of older people and are compliant with the law.

QUESTION 4 - THE ALRC IS INTERESTED IN IDENTIFYING EVIDENCE ABOUT ELDER ABUSE IN AUSTRALIA. WHAT FURTHER RESEARCH IS NEEDED AND WHERE ARE THE GAPS IN THE EVIDENCE?

There are clear benefits from gaining a better understanding of the prevalence and types of elder abuse. Reliable and robust evidence about elder abuse can be used to inform government policy and funding decisions to develop appropriate programs and services to reduce and prevent elder abuse. In November 2015, the Age Discrimination Commissioner advocated for the Commonwealth Government to fund a national elder abuse prevalence study due to the lack of national level data on the issue.¹⁸

¹⁶ Office of the Public Advocate (Queensland), *Position Paper – National Aged Care Reforms* (October 2015) <

http://www.justice.qld.gov.au/_data/assets/pdf_file/0005/440798/Position-Paper-on-Aged-Care-Reforms-October-2015.pdf>.

¹⁷ Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) vol 3, 13 [14.38-14.39].

¹⁸ Judith Ireland, 'Age Discrimination Commissioner Susan Ryan seeks George Brandis' help on elder abuse', *Sydney Morning Herald* (online), 9 November 2015 <<http://www.smh.com.au/federal-politics/political-news/age-discrimination-commissioner-susan-ryan-seeks-george-brandis-help-on-elder-abuse-20151108-gktmtp.html>>.

The Queensland Parliamentary report resulting from the *FPQS Inquiry* highlighted that ongoing data on the prevalence of elder abuse in Queensland is limited to the information collected through the Elder Abuse Prevention Unit Helpline.¹⁹ While this continues to be one of the best available time series data in Queensland, it has significant limitations as an indicator of the prevalence of elder abuse. The Parliamentary Committee recommended a Queensland study into the prevalence of elder abuse be commissioned.²⁰ The Queensland Government has since committed to “a review into the prevalence and characteristics of elder abuse in Queensland to inform the development of integrated service response models”.²¹

While these projects are welcomed and will provide important insights, they are not a substitute for a national prevalence study, particularly if such a study collects data about the characteristics of perpetrators, victims, the specific abusive behaviours and the circumstances in which elder abuse has occurred.

However, we caution against having attention and scarce resources diverted from addressing the practical issues of ageism and elder abuse now, by the desire for specific research evidence about the prevalence of elder abuse. We already have information suggesting that elder abuse is a significant problem, for example, it is thought to impact up to 10 per cent of older people living in developed countries like Australia,²² the United States of America²³ and Canada.²⁴ This percentage is an estimate only, and the actual incidence of elder abuse is likely to be much higher than is generally reported.²⁵ We also have data suggesting 20 percent of older Australians are affected by social isolation,²⁶ and we know that people who are socially isolated are more vulnerable to elder abuse.

Further, research commissioned by the Age Discrimination Commissioner in 2013 found that ageism and age discrimination were widespread and commonly experienced by older Australians. It also found that ageist attitudes were deeply ingrained and evident in all aspects of Australian society.²⁷ This is of concern considering that ageism has been described as “the underlying cause of abuse, mistreatment and exploitation of older persons.”²⁸

The ALRC is referred to Appendix 2 for other articles and reports from Queensland that provide some insights into elder abuse, including the 2015 report – *A ‘wishlist’ for a prevalence study* – which discusses what an ideal elder abuse prevalence study might comprise and a methodology which

¹⁹ Communities, Disability Services and Domestic and Family Violence Prevention Committee, Queensland Parliament, *Inquiry into the adequacy of existing financial protections for Queensland’s seniors* (2015) 137.

²⁰ *Ibid* 138.

²¹ Queensland Government, *Queensland Government Response to Communities, Disability Services and Domestic and Family Violence Prevention Committee Report No. 2: Inquiry into the adequacy of existing financial protections for Queensland’s seniors* (2016) 12.

²² The figure starts at 3 per cent in Australia. See Marianne James, ‘Abuse and Neglect of Older People’ (2016) 37 *Family Matters*, Australian Institute of Family Studies.

²³ Patricia Brownell, ‘Elder Abuse and Neglect’ in Catherine N Dulmus and Lisa A Rapp-Paglicci (eds), *Handbook of Preventative Interventions for Adults* (John Wiley and Sons, 2005) 376.

²⁴ Donna M Wilson et al, ‘Evidence-Based Approaches to Remedy and Also to Prevent Abuse of Community-Dwelling Older Persons’ (2011) *Nursing Research and Practice*.

²⁵ Brownell, above n 23, 379.

²⁶ Andrew Beer, ‘Worse than Cigarettes and Drink: The Impact of Social Isolation on Older Australians’ 2013 as cited in Communities, Disability Services and Domestic and Family Violence Prevention Committee, Queensland Parliament, *Inquiry into the adequacy of existing financial protections for Queensland’s seniors* (2015) 53.

²⁷ Australian Human Rights Commission, *Fact or fiction? Stereotypes of older Australians Research Report 2013* (June 2013) Australian Human Rights Commission <<https://www.humanrights.gov.au/our-work/age-discrimination/publications/fact-or-fiction-stereotypes-older-australians-research>> as cited in Townsville Community Legal Service Inc., Submission No 1 to Communities, Disability Services and Domestic Violence Prevention Committee, Queensland Parliament, *The adequacy of existing financial protections for Queensland’s Seniors*, (2015) 8.

²⁸ Townsville Community Legal Service Inc., Submission No 1 to Communities, Disability Services and Domestic Violence Prevention Committee, *The adequacy of existing financial protections for Queensland Seniors*, (2015) 6 as cited in Office of the Public Advocate (Qld), *Decision-making support and Queensland’s guardianship system* (2016) 23.

could be employed. It also includes information about the suitability of international prevalence studies as a model for implementation in Australia.²⁹

While this office supports further research into elder abuse to broaden our knowledge and understanding, we advocate for decisive and immediate action by government to implement strategies to directly address the elder abuse issues that we currently have knowledge about.

Social Security

QUESTION 6 - WHAT CHANGES SHOULD BE MADE TO LAWS AND LEGAL FRAMEWORKS RELATING TO SOCIAL SECURITY CORRESPONDENCE OR PAYMENT NOMINEES TO IMPROVE SAFEGUARDS AGAINST ELDER ABUSE?

Under the *Social Security (Administration) Act 1999* (Cth), there are two types of arrangements that allow the recipient ('principal') of social security payments to authorise another person or organisation to enquire or act on the principal's behalf. These are correspondence nominees, authorised to act and make changes on the principal's behalf, and payment nominees, authorised to receive the principal's payment into an account maintained by the nominee.³⁰

The appointment of a nominee under the *Social Security (Administration) Act 1999* (Cth) is only for the purposes of social security law.³¹ The Act also outlines the 'duty' of a nominee to 'act in the best interests' of the principal.³²

The *Social Security (Administration) Act 1999* (Cth) contains general principles, but these are in relation to the administration of social security law, and not in relation to decision-making or the obligations of nominees.³³

The limited requirement for nominees to 'act in the best interests' of their principals provides little guidance to ordinary people about their responsibilities in this role. 'Best interests' is a broad and ambiguous concept that allows the possibility of a nominee, who acts to the detriment of the principal, claiming that they believed they were acting in the principal's 'best interests'.

This issue is exacerbated by the fact that the appointment process of nominees involves little to no education or training. Coupled with the limited oversight of the role, it creates an environment ripe for financial exploitation and elder abuse.

This should be contrasted with the obligations imposed on guardians, administrators and attorneys in Queensland, where a much more comprehensive set of principles are set out in the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld).³⁴ There are eleven general principles and a health care principle (collectively, 'the principles').³⁵ The principles must be applied by any person or entity who performs a function or exercises a power under the

²⁹ Elder Abuse Prevention Unit, *A 'wishlist' for a prevalence study* (2015) Elder Abuse Prevention Unit <http://www.eapu.com.au/uploads/research_resources/EAPU%20Reference%20Group%20Research%20Subgroup%20Final%20Summary_Web.pdf>.

³⁰ *Social Security (Administration) Act 1999* (Cth) ss 123B, 123C, 123F, 123H

³¹ *Ibid* ss 123B(a), 123C.

³² *Ibid* s 123O(1).

³³ *Ibid* s 8.

³⁴ *Guardianship and Administration Act 2000* (Qld) s 11; *Powers of Attorney Act 1998* (Qld) s 76

³⁵ *Guardianship and Administration Act 2000* (Qld) sch 1, pts 1-2; *Powers of Attorney Act 1998* (Qld) sch 1, pts 1-2. Also see Appendix 1 of this submission for the full text of the general principles.

guardianship legislation for a matter in relation to an adult who has impaired capacity.³⁶ The community is also encouraged to apply and promote the principles.³⁷

These broader guidelines arguably create better safeguards through guidance of substitute decision-makers about the rights-based approach that they should be applying in their roles. The general principles clarify that acting on behalf of another person with impaired decision-making capacity should involve wider considerations than the decision-maker's subjective opinion of what is in the 'best interests' of the principal and instead to take into consideration their wishes and preferences.

More specific duties apply to substitute decision-makers for financial matters under Queensland legislation. Both administrators and people appointed under enduring powers of attorney are required to keep records of their financial transactions on behalf of the principal. There are also rules in relation to gifts, investing, keeping property and money separate, and maintaining the adult's dependants.³⁸

Although not all of these obligations would be appropriate to apply to social security nominees, adopting some specific duties that should be followed by those that manage money on behalf of another would be an improvement on the current arrangements. Consideration should be given to more comprehensive, rights-based guidelines for nominees that more clearly outline their obligations and the rights of the principal when making decisions on their behalf. These new guidelines should align as much as possible with what already exists in state-based substitute decision-making systems to reduce complexity and confusion for decision-makers.

Consideration should also be given to reviewing whether administrators or attorneys under state- and territory-based laws should be automatically recognised as nominees under the social security system. This would potentially reduce complexity by not requiring a further application to be made to the Department of Human Services. This could also prevent situations where different people can be appointed as the social security nominee and as the administrator for financial matters under state-based legislation for the same principal, as is currently possible because each are appointed through different mechanisms.

Aged care

QUESTION 16 - IN WHAT WAYS SHOULD THE USE OF RESTRICTIVE PRACTICES IN AGED CARE BE REGULATED TO IMPROVE SAFEGUARDS AGAINST ELDER ABUSE?

At present, the *Aged Care Act 1997* (Cth) does not provide for the regulation of the use of restrictive practices such as chemical, physical and mechanical restraint or limiting access to facilities. There is a growing body of research, however, suggesting that unregulated restrictive practices are in widespread use in formal aged care services and are employed by informal carers³⁹ as a response to the behavioural and psychological symptoms of dementia.⁴⁰ Evidence suggests that some staff do

³⁶ *Guardianship and Administration Act 2000* (Qld) s 11; *Powers of Attorney Act 1998* (Qld) s 76.

³⁷ *Guardianship and Administration Act 2000* (Qld) s 11(3).

³⁸ *Guardianship and Administration Act 2000* (Qld) ss 49-55; *Powers of Attorney Act 1998* (Qld) ss 84-89.

³⁹ 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.

⁴⁰ 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* <<https://www.psychology.org.au/publications/inpsych/2010/october/davison/>>.

not have the knowledge and skills to manage these behaviours appropriately⁴¹ and that the wellbeing of the person with dementia may be negatively impacted as a result of being restrained.⁴² There are therefore strong indications that consumers of aged care services may benefit from a more systematic and evidence-based approach to working with dementia-related behaviours.

This proposition is supported by initiatives undertaken by the Queensland Government to regulate the use of restrictive practices and implement evidence-based approaches to support people with disability with behaviours that cause harm to themselves or others (behaviours of concern). In response to the late Honourable William Carter QC's report on the unregulated use of restrictive practices in Queensland's disability sector,⁴³ the Queensland Government implemented a restrictive practices regime for managing behaviours of concern exhibited by people with disability who were in receipt of government funding, including:

- amendments to the *Disability Services Act 2006* (Qld)⁴⁴ and *Guardianship and Administration Act 2000* (Qld);⁴⁵
- widespread introduction of the positive behaviour support theory and practices to guide frontline service provision to the cohort of people with behaviours of concern;⁴⁶ and
- the instigation of approval processes, multi-disciplinary assessment, and behaviour support plans for people with whom restrictive practices are used.

The Centre of Excellence for Behaviour Support was also established to provide evidence-based guidance about how best to respond to this cohort.⁴⁷

In addition to providing a greater degree of transparency in the use of restrictive practices, the effect of these initiatives has been to systematise and professionalise the support provided to people whose behaviours may result in harm to themselves or others. Anecdotal reports received by our office also suggest that these initiatives have contributed to a reduction in the use of restrictive practices and improved outcomes for people with disability with behaviours of concern. As has been demonstrated in the disability sector, appropriate regulation of restrictive practices in the aged care sector is necessary to protect people's rights to personal liberty and security.

While regulation of restrictive practices in aged care is clearly necessary, there are a number of other challenges that need to be addressed if regulation is to be effective. They include:

⁴¹ See 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.

⁴² 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 Dementia on Residential Aged Care Staff' (2007) 26(2) *Australasian Journal on Ageing* 64-70.

⁴³ W J Carter QC, *Challenging Behaviour and Disability: A Targeted Response* (Report to Honourable Warren Pitt MP, Minister for Communities Disability Services and Seniors, July 2006).

⁴⁴ *Disability Services Act 2006* (Qld) pt 6 - provisions relating to positive behaviour support and restrictive practices.

⁴⁵ *Guardianship and Administration Act 2000* (Qld) ch 5B - provisions relating to restrictive practices.

⁴⁶ Positive behaviour support is a widely supported approach to managing behaviours of concern for people with disability. See, for example, G LaVigna and T Willis, 'The Efficacy of Positive Behavioural Support With The Most Challenging Behaviour: The Evidence and its Implications' (2012) 37(3) *Journal of Intellectual and Developmental Disability* 185-195.

⁴⁷ In 2013, the Centre was expanded and became the Centre of Excellence for Clinical Innovation and Behaviour Support - Centre for Applied Disability Research, *Centre of Excellence for Clinical Innovation and Behaviour Support* <<http://www.cadr.org.au/centres-clearinghouses/centre-of-excellence-for-clinical-innovation-and-behaviour-support>>.

- The high workloads and substantially lower staff-to-client ratios that operate in the residential aged care sector may act as a barrier to implementing more costly and time-intensive approaches (such as positive behaviour support) to working with behaviours of concern.
- Restrictive practices in the Queensland disability sector are regulated within the formal care industry (government-funded service provision) but not the informal care sector (such as family). Family members who support another family member with behaviours of concern and who undertake restrictive practices of their own initiative, may be acting outside of the law. Similar situations are likely to occur in relation to older people where care is provided in informal settings (for example, by family members) and where carers restrict the actions of the older person.
- The introduction of person-centred and self-directed approaches in both the disability and aged care sectors also challenges the use of restrictive practices. It is unlikely that consumers would agree to service plans that would involve subjecting themselves to restrictive practices. Doing so contravenes the principles of 'choice' and 'control'. It is also unreasonable to require older people to fund unwanted interventions from their package that may, in addition to being unwanted, be illegal,
- Implementing a scheme to standardise behavioural support and monitoring the use of interventions is likely to substantially raise the cost of delivering non-institutional care.⁴⁸

In light of these issues, detailed consideration should be given to developing a legal framework that includes:

- an appropriate evidence-based behaviour support framework for use with people with dementia in receipt of aged care services;
- the development of behaviour support plans by appropriately qualified professionals for those individuals subject to restrictive practices;
- a legislated, decision-making framework for the approval and review of restrictive practices for older people;
- a regime of recording and reporting instances of the use of restrictive practices;
- the establishment of a best-practice agency to guide plan development, workforce development, and the application of restrictive practices for older people;⁴⁹ and
- the establishment of a visitor program⁵⁰ to provide independent on-site scrutiny of the use of restrictive practices.

Given the rapidly increasing numbers of people with dementia⁵¹ it is imperative that a legal framework be developed that protects human rights and ensures people's wellbeing. This framework must also ensure that restrictive practices are only ever used in aged care environments

⁴⁸ Such as that provided through the Home Care Package – Australian Government, *Home Care Packages*, (1 July 2015) My Aged Care <<http://www.myagedcare.gov.au/aged-care-services/home-care-packages>>.

⁴⁹ Queensland Government Department of Communities, Child Safety and Disability Services, *Centre of Excellence for Clinical Innovation and Behaviour Support* (30 May 2016) <<https://www.communities.qld.gov.au/disability/key-projects/positive-behaviour-support/centre-of-excellence-for-clinical-innovation-and-behaviour-support>>. See agencies in other states that support best practice in managing behaviour such as: Victoria State Government Human Services, *The Office of Professional Practice* <<http://www.dhs.vic.gov.au/about-the-department/our-organisation/organisational-structure/our-groups/office-of-professional-practice>>.

⁵⁰ See the response to question 20.

⁵¹ Deloitte Access Economics, above n 7.

as a last resort, that they are complemented by appropriate safeguards and that there is appropriate monitoring and oversight of their use.

QUESTION 18 - WHAT CHANGES TO AGED CARE COMPLAINTS MECHANISMS SHOULD BE MADE TO IMPROVE RESPONSES TO ELDER ABUSE?

Complaints mechanisms are integral to a comprehensive system of safeguards for older people. A recent project 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.⁵² In addition to the usual reasons for not making formal complaints,⁵³ people with impaired decision-making capacity (including older people with dementia) may experience greater barriers to making complaints for a range of reasons including:

- 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;⁵⁴ and
- those individuals who receive services from others are often reluctant to make complaints for fear of reprisals or withdrawal of services.⁵⁵

Our complaints management systems 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.⁵⁶ These adults frequently required additional support to use complaints systems effectively.⁵⁷ 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. In support of this, the UNCRPD places obligations

⁵² Office of the Public Advocate (Queensland), *Strengthening Voice: A Scoping Paper About Complaints Management Systems for Adults with Impaired Capacity* (February 2015) 8-15 <<http://www.justice.qld.gov.au/public-advocate/activities/current/complaints-management>>.

⁵³ 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.

⁵⁴ Office of the Public Advocate, above n 52, 8-10.

⁵⁵ 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>.

⁵⁶ Office of the Public Advocate, above n 52.

⁵⁷ Office of the Public Advocate, above n 52, 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>.

on state parties to make reasonable adjustments to supports, systems and processes to ensure they are accessible to people with disability.⁵⁸ Our office identified strategies that could be used to strengthen the voices of older and vulnerable Australians who interact with the aged care system. These approaches 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.⁵⁹

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.

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 abuse. Ensuring that complaints management systems incorporate or link to advocacy and community visitor programs may, also help mitigate against elder abuse in institutional settings such as residential aged care. 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.

QUESTION 20 - WHAT CHANGES TO THE ROLE OF AGED CARE ADVOCACY SERVICES AND THE COMMUNITY VISITORS SCHEME SHOULD BE MADE TO IMPROVE THE IDENTIFICATION OF AND RESPONSES TO ELDER ABUSE?

As discussed in the response to question 18, advocacy and visitor programs play a critical role in identifying and responding to elder abuse in aged care facilities. However, anecdotal information suggests that neither of these systems is currently sufficiently resourced to meet the needs of a rapidly growing cohort of older Australians with impaired decision-making capacity.

A primary concern regarding the Commonwealth Government's National Aged Care Advocacy Program (NACAP) is the need to ensure adequate funding to meet demand. Insufficient resourcing of advocacy is a significant barrier to addressing elder abuse in aged care in any significant way. At present, there are nine community-based NACAP agencies that offer advocacy in relation to aged

⁵⁸ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008).

⁵⁹ Office of the Public Advocate, above n 52.

care service provision.⁶⁰ There were 273,503 government-funded aged care places in Australia as of 30 June 2015.⁶¹

It may not be possible for this small number of agencies to be able to identify, address and resolve the number and range of issues that may arise from the provision of aged care services and require the assistance of an independent advocate. The lack of resourcing of advocacy is particularly relevant to this inquiry given that output data provided by the NACAP agencies indicate that elder abuse is an increasing concern among advocacy services across jurisdictions.⁶² Accordingly, there is a need to revisit the Productivity Commission's 2011 report⁶³ and the Department of Social Services' (DSS) 2015 report⁶⁴ 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.⁶⁵

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.⁶⁶ These individuals may or may not have the skills or inclination to identify and address elder abuse 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.⁶⁷ 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.⁶⁸ Community visitors can lodge reports with the Office of the Public Guardian⁶⁹ that provides the report to the service provider for follow-up action.⁷⁰

This office 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.

⁶⁰ 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>>.

⁶¹ Australian Institute of Health and Welfare, *Residential aged care and Home Care 2014–15* (2016) <<http://www.aihw.gov.au/aged-care/residential-and-home-care-2014-15/>>.

⁶² 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>>.

⁶³ 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>>.

⁶⁴ 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>>.

⁶⁵ *Ibid.*

⁶⁶ Australian Government Department of Health, above n 60; See also *Aged Care Act 1997* (Cth) ch 5 pt 5.6 div 82 s 82-1(1)(a)(b)(c).

⁶⁷ Office of the Public Guardian, *Community Visitors* <www.publicguardian.qld.gov.au/adult-guardian/adult-community-visitors>.

⁶⁸ Office of the Public Guardian, *Community Visitors* <www.publicguardian.qld.gov.au/adult-guardian/adult-community-visitors>.

⁶⁹ *Public Guardian Act 2014* (Qld) s 47(1).

⁷⁰ *Ibid* s 47(3)

Appointed decision-makers

QUESTION 29 - WHAT EVIDENCE IS THERE OF ELDER ABUSE COMMITTED BY PEOPLE ACTING AS APPOINTED DECISION-MAKERS UNDER INSTRUMENTS SUCH AS POWERS OF ATTORNEY? HOW MIGHT THIS TYPE OF ABUSE BE PREVENTED AND REDRESSED?

Abuse committed by appointed decision-makers

In Queensland, the Office of the Public Guardian has significant investigative powers in relation to complaints and allegations made about the actions of an attorney, guardian, administrator or other people appointed by enduring documents or under a QCAT order.⁷¹ The Office of the Public Guardian may investigate any complaint or allegation about a person who may have impaired decision-making capacity being neglected, exploited or abused, or having inappropriate or inadequate decision-making arrangements.⁷²

The Office of the Public Guardian is in the best position to outline their work in this area for this inquiry. However, we would like to make some observations about their investigations of alleged or suspected abuse of a person with impaired decision-making capacity as reported in their annual reports.

In 2014-15, the Office of the Public Guardian commenced 200 investigations into the alleged or suspected abuse of a person with impaired decision-making capacity.⁷³ Most of the investigated matters related to the conduct of attorneys appointed for financial matters, personal matters or both.⁷⁴ It should be noted that not all of these matters would constitute elder abuse, as some of the investigations may have involved other conditions involving impaired capacity such as people with acquired brain injury who had appointed an enduring attorney prior to their injury. In 100 of the matters, the Public Guardian either declined to investigate because the matter was outside of their jurisdiction or found the allegations unsubstantiated. However, in 26 matters, the Public Guardian suspended attorneys and took immediate protective action due to significant financial or personal abuse.⁷⁵

While these cases clearly involve significant breaches of duties by attorneys, it should be pointed out that the number of cases of abuse dealt with by the Office of the Public Guardian annually are very low considering the potentially large number of enduring power of attorney instruments likely to be in use at any time in Queensland. While power of attorney instruments have the potential to be used inappropriately by unscrupulous attorneys, they also offer a simple and effective way for members of the community to put arrangements in place to deal with their personal, financial and health affairs when they are no longer capable of making those decisions.

Encouraging people to engage in advance planning helps to relieve demand on guardianship systems and to ensure that when people are no longer able to make those decisions for themselves, they have family or friends who they know and trust who can make decisions for them. It is important that any proposed response to elder abuse committed by people acting as appointed decision-makers under instruments such as powers of attorney does not have the effect of discouraging the use of powers of attorney in appropriate circumstances.

⁷¹ Ibid s 12(c).

⁷² Ibid s 19.

⁷³ Office of the Public Guardian, *Annual Report 2014-15* (2015) 45.

⁷⁴ Ibid 46.

⁷⁵ Ibid 45.

Some of the ways that this type of abuse may be prevented and redressed are outlined below.

Support networks

Support networks are a critical safeguard for older people with impaired decision-making capacity. Arguably, some of the best safeguards are those that exist in response to the specific needs of an older person who may have impaired decision-making capacity, for example having a close network of people involved in the person's everyday life. These people may be family members, friends, neighbours, paid and unpaid support providers, members of social groups/clubs or other trusted persons.

The people with whom an older person regularly interacts can observe various aspects of the person's life and some may be well positioned to identify any changes to the person's health, wellbeing or circumstances that might indicate the person is experiencing elder abuse. These people may also identify when decisions are being made by or for the person that do not appear consistent with the person's personality, views or typical behaviour. Decisions that appear to be outside the person's ordinary behaviour could indicate that they may have been made under duress, without the person's involvement or against their wishes.⁷⁶

Social isolation is a key risk factor for abuse, neglect and exploitation and may be experienced by around 20% of older Australians.⁷⁷ "The absence of family, friendship or other caring or cooperative social relationships at any stage of life, but particularly when people are least able to care for themselves, can have a serious impact on personal wellbeing as well as on wider social cohesion."⁷⁸

Any program to address and reduce the incidence of elder abuse in our community should involve strategies to reduce the social isolation of older people.

Information and community education

In Queensland, there is no obligation to ensure that older people who may have impaired decision-making capacity are provided with information about their rights (with the exception of people who are subject to restrictive practices).

Information about various aspects of the guardianship system should be produced in accessible formats and provided to older people who may have impaired capacity and those who are subject to decision-making by an attorney, guardian or administrator. When people are the subject of guardianship proceedings or have a substitute decision-maker appointed or an enduring attorney, they should have access to information outlining their rights in these processes.

Those who exercise power or perform a function under guardianship legislation (including attorneys) should have the responsibility to inform the person who is the subject of a matter about upcoming processes and/or decisions and how the person can exercise their rights. Similarly, there should be a requirement for applicants to QCAT or other equivalent Tribunals to make the older person who is the subject of the application for an appointment of a decision-maker aware of the processes that the application will trigger and the person's rights during these processes. Publications or materials to support this process should be developed and provided to Tribunal applicants.

⁷⁶ Office of the Public Advocate (Queensland), *Decision-making support and Queensland's guardianship system* (2016) 107

⁷⁷ Andrew Beer, above n 26.

⁷⁸ Australian Bureau of Statistics, *Measures of Australia's Progress 2010: Is life in Australia getting any better? Summary Information*, Cat No. 1370.0 (13 November 2013) Australian Bureau of Statistics, 7
<[http://www.abs.gov.au/Ausstats/free.nsf/vwLookupSubject/1370.0~2010~MAP%20downloads%20\(8\)~13700_Sep2010_Brochure.pdf/\\$file/13700_Sep2010_Brochure.pdf](http://www.abs.gov.au/Ausstats/free.nsf/vwLookupSubject/1370.0~2010~MAP%20downloads%20(8)~13700_Sep2010_Brochure.pdf/$file/13700_Sep2010_Brochure.pdf)>.

While some people may deliberately set out to exploit or abuse a person for whom they are acting as a guardian, administrator or attorney, it is reasonable to assume that the majority of substitute decision-makers want to do the right thing but may be unaware of their responsibilities and obligations. For example, administrators and attorneys may be unaware of the requirement to keep their assets separate to those of the person for whom they make decisions in order to avoid conflict transactions.⁷⁹ They may also be ignorant of the general principles under the *Guardianship and Administration Act* that must be complied with by a person or entity who performs a function or exercises a power under the Act for a person with impaired capacity.⁸⁰

The provision of information to substitute decision-makers about decision-making principles, and their role and responsibilities should operate as a safeguard. As identified by research undertaken by this office, there was low awareness of the general principles in the *Guardianship and Administration Act* and the roles and responsibilities of attorneys, guardians and administrators. Increased knowledge may reduce the likelihood of a person's rights being inadvertently or deliberately obstructed or denied, their disempowerment and/or risk of abuse, neglect, harm or exploitation.

Duties and responsibilities of decision-makers

In Queensland, as mentioned above in answer to question 6, guardians, administrators and attorneys are subject to a number of obligations under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld). For example, an administrator must apply the general principles; act honestly; keep detailed records about transactions and dealings; submit accounts according to Tribunal decisions; avoid conflict transactions; keep their own property separate to that of the person for whom they represent; and invest prudently and obtain financial advice. If there is more than one administrator or if there is also a guardian or attorney appointed, they must consult with the other appointees and make decisions together.⁸¹

Similarly, an attorney must apply the general principles; keep detailed records about transactions and dealings made on behalf of the adult; avoid conflict transactions; keep their own property separate to the adult's; and if there is more than one attorney or if there is also a guardian and/or administrator, they must consult with the other appointees and make decisions together.⁸²

A guardian is also required to apply the general principles; act honestly and with reasonable diligence; avoid conflict transactions; and consult with any other guardian, administrator or attorney.⁸³

Consideration must be given to strategies that may increase awareness of, and compliance with, the duties and responsibilities of appointed decision-makers. To ensure that decision-makers better uphold their duties and obligations, the Victorian Law Reform Commission (VLRC) recommended that the Tribunal be given the power to make the appointment of a guardian or administrator subject to them undertaking a designated training program.⁸⁴ The VLRC also recommended that guardianship legislation require all substitute decision-makers to undertake in writing that they will act in accordance with their responsibilities and duties.⁸⁵

⁷⁹ Office of the Public Advocate (Queensland), above n 76, 108

⁸⁰ *Guardianship and Administration Act 2000* (Qld) s 11.

⁸¹ *Ibid* ch 4, pt 1 sets out further functions, duties and powers of an administrator.

⁸² *Powers of Attorney Act 1998* (Qld) ch 5 sets out further functions, duties and powers of an attorney.

⁸³ *Guardianship and Administration Act 2000* (Qld) ch 4, pt 2 sets out further functions, duties and powers of a guardian.

⁸⁴ Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) 413.

⁸⁵ *Ibid* 414.

A recommendation from the *FPQS Inquiry* was that the *Powers of Attorney Act* be amended to clearly provide that “attorneys demonstrate explicit and actual knowledge of an attorney’s duties and responsibilities before they are appointed as attorney”.⁸⁶ In its response to the Inquiry, the Queensland Government indicated that it supported the Committee’s recommendation in principle and committed to examining ways to address the aim of the recommendation.⁸⁷

QUESTION 30 - SHOULD POWERS OF ATTORNEY AND OTHER DECISION-MAKING INSTRUMENTS BE REQUIRED TO BE REGISTERED TO IMPROVE SAFEGUARDS AGAINST ELDER ABUSE? IF SO, WHO SHOULD HOST AND MANAGE THE REGISTER?

Our office advocates for strategies to increase the number of Queenslanders who engage in advance planning. Initiatives that encourage people to create an enduring power of attorney are important as they promote decision-making autonomy (by enabling a person to appoint an attorney of their choosing to make decisions on their behalf should the need arise) and can mitigate some of the demand on the guardianship and administration system.

In light of this focus, our office acknowledges the potential benefits of a register of decision-making instruments, however approaches the concept with caution. The 2016 report – *Decision-making support and Queensland’s guardianship system* – published by our office highlighted that “the process of creating and updating enduring documents can be a barrier to advance planning if it is not easily accessed, understood and utilised”.⁸⁸ The report noted that some Queensland stakeholders felt that a mechanism should be devised to help maintain knowledge of who has enduring documents and that without such a mechanism, enduring documents are not being given their maximum effect as the details of their existence are not always known.⁸⁹ However, there is a risk that establishing a registration scheme could create further barriers to people creating or updating enduring documents because of the additional effort required to register the instrument and the likelihood that any system will involve fees for registration which will operate as a further disincentive.

In 2010, the Queensland Law Reform Commission (QLRC) recommended against the establishment of mandatory registration of enduring powers of attorney. It determined that the benefits of a requirement to register an enduring power of attorney did not outweigh the implementation burden.⁹⁰ The QLRC was concerned that the formality, costs and complexity of the registration scheme might also discourage people from making enduring power of attorneys.⁹¹

More recently, the *FPQS Inquiry* report noted that some jurisdictions have mandatory licencing of attorneys and recommended “that the Queensland Government consider and adopt strategies to regulate and record the appointment of attorneys in Queensland”.⁹² The Committee noted the range of benefits associated with the registration of powers of attorney and commented that these benefits may outweigh the costs of administering a register. The Committee recommended the compulsory registration of powers of attorney instruments in Queensland.⁹³

⁸⁶ Communities, Disability Services and Domestic and Family Violence Prevention Committee, above n 19, 147.

⁸⁷ Queensland Government, *Queensland Government Response to Communities, Disability Services and Domestic and Family Violence Prevention Committee Report No. 2: Inquiry into the adequacy of existing financial protections for Queensland’s seniors* (2016), 13.

⁸⁸ Office of the Public Advocate (Queensland), above n 76, 48.

⁸⁹ *Ibid* 50.

⁹⁰ Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report No 67 (2010) vol 3, 186 [16.259].

⁹¹ *Ibid*.

⁹² Communities, Disability Services and Domestic and Family Violence Prevention Committee, above n 19, 147.

⁹³ Communities, Disability Services and Domestic and Family Violence Prevention Committee, above n 19, 151-152.

In response, the Queensland Government noted the existence of competing views in relation to the compulsory registration of powers of attorney and committed to examining ways to address the aims of the Committee's recommendation.⁹⁴

Public advocates

QUESTION 33 - WHAT ROLE SHOULD PUBLIC ADVOCATES PLAY IN INVESTIGATING AND RESPONDING TO ELDER ABUSE?

In Queensland, the Public Advocate has a very specific role under the *Guardianship and Administration Act 2000* (Qld) to undertake systemic advocacy on behalf of people with impaired capacity:

Section 209 Functions—systemic advocacy

- (1) The public advocate has the following functions—
- (a) promoting and protecting the rights of adults with impaired capacity for a matter;
 - (b) promoting the protection of the adults from neglect, exploitation or abuse;
 - (c) encouraging the development of programs to help the adults to reach the greatest practicable degree of autonomy;
 - (d) promoting the provision of services and facilities for the adults;
 - (e) monitoring and reviewing the delivery of services and facilities to the adults.
- (2) However, it is not the function of the public advocate to investigate a complaint or allegation that concerns a particular adult with impaired capacity for a matter.

The Public Advocate also:

- can report about a systemic matter;⁹⁵
- has the power necessary to perform the public advocate's functions;⁹⁶
- may intervene in a proceeding before a court or tribunal or an official inquiry involving the protection of the rights or interests of adults with impaired capacity;⁹⁷
- has a right to all information:
 - necessary to monitor and review the delivery of services and facilities to adults with impaired capacity;⁹⁸
 - about the arrangements for the provision of services and facilities to a class of the adults;⁹⁹ and
 - about the policies and procedures of a service or facility relating to the provision of services to the adults.¹⁰⁰

⁹⁴ Queensland Government, above n 87, 13.

⁹⁵ *Guardianship and Administration Act 2000 (Qld)* s 209A.

⁹⁶ *Ibid* s 210(1).

⁹⁷ *Ibid* s 210(2).

⁹⁸ *Ibid* s 210A(1)(a).

⁹⁹ *Ibid* s 210A(1)(b).

¹⁰⁰ *Ibid* s 210A(1)(c).

The role of the Public Advocate in Queensland is distinct from, but in many respects, complementary to, the role of the Public Guardian, who is appointed under the *Public Guardian Act 2014* (Qld). The functions of the Public Guardian in relation to adults with impaired capacity are outlined in section 12 of the *Public Guardian Act 2014* (Qld):

Section 12 Functions—adult with impaired capacity for a matter

(1) The public guardian has the following functions (***adult guardian functions***) in relation to an adult with impaired capacity for a matter—

- (a) protecting the adult from neglect, exploitation or abuse;
- (b) providing a program called the community visitor program to protect the rights and interests of the adult if the adult resides at a visitable site;
- (c) investigating complaints and allegations about actions by—
 - (i) an attorney; or
 - (ii) a guardian or administrator; or
 - (iii) another person acting or purporting to act under a power of attorney, advance health directive or order of the tribunal made under this Act or the Guardianship Act;
- (d) mediating and conciliating between attorneys, guardians or administrators or between attorneys, guardians or administrators and others, for example, health providers, if the public guardian considers this appropriate to resolve an issue;
- (e) acting as attorney—
 - (i) for a personal matter under an enduring power of attorney; or
 - (ii) under an advance health directive; or
 - (iii) for a health matter if authorised as a statutory health attorney; or
 - (iv) if appointed by the court or the tribunal;
- (f) acting as guardian if appointed by the tribunal;
- (g) approving, under the Guardianship Act, chapter 5B, part 4 the use of a restrictive practice (as defined under section 80U of that Act) in relation to an adult to whom that chapter applies;
- (h) consenting to a forensic examination under section 38;
- (i) seeking help (including help from a government agency, or other institution, welfare organisation or provider of a service or facility) for, or making representations for, an adult with impaired capacity;
- (j) educating and advising persons about, and conducting research into, the operation of this Act, the Guardianship Act and the Powers of Attorney Act.

In Queensland, the Public Guardian acts in the individual interests of adults with impaired decision-making capacity, and can investigate and respond to elder abuse. Some of the functions managed by the Office of the Public Guardian to respond to elder abuse, such as community visitor programs, have been discussed above.

In contrast, the Public Advocate role focuses on systemic advocacy, but that advocacy function can include monitoring, reviewing and reporting on systemic issues that may amount to elder abuse or that may contribute to or impede the identification or investigation of elder abuse. The role of the Public Advocate also extends to monitoring and reviewing the delivery of services by the Public Guardian to people with impaired decision-making capacity.

All Australian jurisdictions have a statutory body with similar functions and powers to Queensland's Public Guardian. The Public Advocates in the Australian Capital Territory, South Australia, Victoria

and Western Australia, and the Public Guardian in Tasmania also have functions relating to systemic advocacy.¹⁰¹

The importance of systemic advocacy should not be underestimated. It focuses on influencing the legislative, policy and practice aspects of legal and service systems and provides a cost-effective way of addressing issues affecting large numbers of people with impaired decision-making capacity compared with responding to individual complaints or advocating in individual cases. Systemic advocacy provides an important additional layer of protection for the rights of people with impaired decision-making capacity, with the person charged with systemic advocacy functions being uniquely positioned to influence government and non-government agencies.¹⁰²

This office is concerned that, with the Australian Government assuming responsibility for aged care service delivery, there appears to be no proposal to establish a Public Advocate, or equivalent office, at the federal level that can undertake systemic monitoring and advocacy to protect the rights and interests of older people with impaired decision-making capacity. State- and territory-based Public Advocates and their equivalents do not have the legal authority to access information and data beyond our jurisdictions. This limitation, significantly diminishes the ability of Public Advocates to perform their important function to advocate to protect older people with impaired decision-making capacity.

In the absence of a federal systemic advocacy office, the Australian Government should formally recognise the role of state and territory Public Advocates and their authority to access information and undertake systemic advocacy in the interests of people with impaired decision-making capacity who are receiving services within the federal aged care system.

Concluding comments

Elder abuse is a significant social issue in the Australian community and is gaining increasing importance due to Australia's ageing population. We support the ALRC's inquiry into protecting older Australians from elder abuse. This office is hopeful that this inquiry will result in a greater understanding of elder abuse, with specific recommendations for social policy strategies to improve services and support to older Australians, increase their engagement with their communities and improve their quality of life. We recognise that social change will require genuine government commitment to social policy strategies, demonstrated through the provision of appropriate funding, careful implementation and cooperation between federal and state governments.

We look forward to the ALRC making a clear statement that, the widespread practices of moving older people against their will from their homes and into aged care, and aged care providers requiring a person to have made an enduring power of attorney or be the subject of a guardianship order before they will be accepted into an aged care facility, breach the human rights of older people. Any significant steps to address these two issues could achieve substantial and meaningful improvements in the quality of life of a large proportion of older Australians.

Further, we request the ALRC recommend adoption of an appropriately legislated restrictive practices regime and other safeguards including adequately resourced advocacy and community visitor programs.

¹⁰¹ Queensland Law Reform Commission, above n 90, 232-233.

¹⁰² Office of the Public Advocate, *Our role* (1 February 2016) Office of the Public Advocate < <http://www.justice.qld.gov.au/public-advocate/about-us/role>>.

We also look forward to the ALRC considering the need for an agency to undertake systemic advocacy to protect the rights and interests of people with impaired capacity who are receiving services in the federal aged care system.

Thank you for the opportunity to provide a submission in relation to the Elder Abuse Issues Paper. I would be pleased to make myself available to elaborate on the issues that I have raised in this submission should additional information be required.

Yours sincerely



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Appendix 1

General principles and health care principles from the *Guardianship and Administration Act 2000* (Qld):¹⁰³

No.	Principle
1	Presumption of capacity An adult is presumed to have capacity for a matter.
2	Same human rights (1) The right of all adults to the same basic human rights regardless of a particular adult's capacity must be recognised and taken into account. (2) The importance of empowering an adult to exercise the adult's basic human rights must also be recognised and taken into account.
3	Individual value An adult's right to respect for his or her human worth and dignity as an individual must be recognised and taken into account.
4	Valued role as member of society (1) An adult's right to be a valued member of society must be recognised and taken into account. (2) Accordingly, the importance of encouraging and supporting an adult to perform social roles valued in society must be taken into account.
5	Participation in community life The importance of encouraging and supporting an adult to live a life in the general community, and to take part in activities enjoyed by the general community, must be taken into account.
6	Encouragement of self-reliance The importance of encouraging and supporting an adult to achieve the adult's maximum physical, social, emotional and intellectual potential, and to become as self-reliant as practicable, must be taken into account.
7	Maximum participation, minimal limitations and substituted judgement (1) An adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life, including the development of policies, programs and services for people with impaired capacity for a matter, must be recognised and taken into account. (2) Also, the importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions must be taken into account. (3) So, for example, (a) the adult must be given any necessary support, and access to information, to enable the adult to participate in decisions affecting the adult's life; and (b) to the greatest extent practicable, for exercising power for a matter for the adult, the adult's views and wishes are to be sought and taken into account; and (c) a person or other entity performing a function or exercising a power under this Act must do so in a way least restrictive of the adult's rights. (4) Also, the principle of substituted judgement must be used so that if, from the adult's previous actions, it is reasonably practicable to work out what the adult's views and wishes would be, a person or other entity performing a function or exercising a power under this Act must take into account what the person or other entity considers would be in the adult's views and wishes. (5) However, a person or other entity performing a function or exercising a power under this Act must do so in a way that is consistent with the adult's proper care and protection.

¹⁰³ *Guardianship and Administration Act 2000* (Qld) sch 1.

- (6) Views and wishes must be expressed orally, in writing or in another way, including, for example, by conduct.

8 Maintenance of existing supportive relationships

The importance of maintaining an adult's existing supportive relationships must be taken into account.

9 Maintenance of environment and values

- (1) The importance of maintaining an adult's cultural and linguistic environment, and set of values (including any religious beliefs), must be taken into account.
- (2) For an adult who is a member of an Aboriginal community or a Torres Strait Islander, this means the importance of maintaining the adult's Aboriginal or Torres Strait Islander cultural and linguistic environment, and set of values (including Aboriginal tradition or Island custom), must be taken into account.

10 Appropriate to circumstances

Power for a matter should be exercised by a guardian or administrator for an adult in a way that is appropriate to the adult's characteristics and needs.

11 Confidentiality

An adult's right to confidentiality of information about the adult must be recognised and taken into account.

12 Health care principle

- (1) The health care principle means power for a health matter, or special health matter, for an adult should be exercised by a guardian, public guardian, the tribunal, or for a matter relating to prescribed health care, another entity-
- (a) in the way least restrictive of the adult's rights; and
- (b) only if the exercise of power-
- (i) Is necessary and appropriate to maintain or promote the adult's health or wellbeing; or
- (ii) Is, in all the circumstances, in the adult's best interests.

Example of exercising power in the way least restrictive of the adult's rights-

If there is a choice between a more or less intrusive way of meeting an identified need, the less intrusive way should be adopted.

- (2) In deciding whether the exercise of power is appropriate, the guardian, the public guardian, tribunal or other entity must, to the greatest extent practicable-
- (a) seek the adult's views and wishes and take them into account; and
- (b) take the information given by the adult's health provider into account.
- (3) The adult's views and wishes may be expressed-
- (a) orally; or
- (b) in writing, for example, in an advance health directive; or
- (c) in another way, including, for example, by conduct.
- (4) The health care principle does not affect any rights an adult has to refuse health care.
- (5) In deciding whether to consent to special health care for an adult, the tribunal or other entity must, to the greatest extent practicable, seek the views of the following person and take them into account-
- (a) a guardian appointed by the tribunal for the adult;
- (b) if there is no guardian mentioned in paragraph (a), an attorney for a health matter appointed by the adult;
- (c) if there is no guardian or attorney mentioned in paragraph (a) or (b), the statutory health attorney for the adult.

Appendix 2

Articles and reports from Queensland that provide some insights into elder abuse including:

Organisation	Publication
Caxton Legal Centre	Submission No 15 to the Inquiry into the adequacy of existing financial protections for Queensland's seniors
Cheryl Tilse, Jill Wilson, Ben White, Lindy Willmott, Anne-Louise McCawley	Enduring powers of attorney: promoting attorney's accountability as substitute decision-makers (Australasian Journal of Ageing)
Communities, Disability Services and Domestic and Family Violence Prevention Committee	Inquiry into the adequacy of existing financial protections for Queensland's seniors
Deborah Setterlund, Cheryl Tilse and Jill Wilson	Substitute Decision Making and Older People (Australian Institute of Criminology journal)
Elder Abuse Prevention Unit	The EAPU Helpline: results of an investigation of five years of call data A 'wishlist' for a prevalence study The cost of elder abuse in Queensland: Who pays and how much
Jill Wilson, Cheryl Tilse, Deborah Setterlund and Linda Rosenman	Older people and their assets: A range of roles and issues for social workers (Australian Social Work journal)
Leonie Sanders	Financial abuse of older people: A financial perspective
Lifeline Community Care Queensland	Law Reform Needed to Combat Elder Abuse in Queensland
Office of the Public Advocate (Qld)	Elder abuse: How well does the law in Queensland cope?
Queensland Law Society	Joint Issues Paper: Elder Abuse
Special Taskforce on Domestic and family Violence in Queensland	Not now, Not ever: Putting an end to domestic and family violence in Queensland
University of Queensland and Queensland University of Technology	Enduring documents: improving the forms, improving the outcomes