

# Office of the Public Advocate

Submission to the Senate  
Standing Committee on  
Community Affairs

Effectiveness of the Aged  
Care Quality Assessment  
and accreditation  
framework for protecting  
residents from abuse and  
poor practices, and  
ensuring proper clinical  
and medical standards  
are maintained and  
practiced

## Introduction

The position of Public Advocate was established by the *Guardianship and Administration Act 2000* (Qld) to undertake systemic advocacy on behalf of people 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 Queenslanders with impaired capacity in all aspects of community life.

I am encouraged to see the various efforts being undertaken to improve the lives of older people, including this current inquiry into the effectiveness of aged care standards. However, I note that this particular inquiry is one of many such federal inquiries in the area of elder abuse generally. Within the last year, I have made submissions to the Australian Law Reform Commission (ALRC) in response to their Issues Paper<sup>1</sup> and Discussion Paper<sup>2</sup> on their inquiry into elder abuse, as well as the Commonwealth Department of Health's *Review of National Aged Care Quality Regulatory Processes*<sup>3</sup> and the *Single Aged Care Quality Framework*.<sup>4</sup>

My concern regarding these various reviews dealing with issues for older people is that, to a large degree, they overlap in their scope. Many of the issues covered in this current inquiry have already been raised in many of the submissions made in response to the other inquiry processes.

While I welcome all efforts to protect older Australians from abuse and poor practices in aged care, I would caution against having too many investigations into the same issues. It is likely that not all of the organisations that have an interest in these issues are necessarily made aware of the various inquiries and calls for submissions. Where they are aware, they must duplicate their efforts in writing submissions. For many small agencies such as ours and non-government organisations, such processes require a significant investment of their limited resources. There is therefore a risk of inquiries not receiving the range of submissions that they should through lack of awareness, resource limitations that require them to make difficult decisions about where to apply those limited resources and 'submission fatigue' generally. Further, there is a real danger that responses by government may end up being duplicated as well, with the possibility that various initiatives resulting from these inquiries overlapping and expending resources that could be better utilised in a singular, more concentrated effort.

Given the intersection of issues being considered by this inquiry with those other inquiries mentioned above, this submission is largely based on previous submissions made to those inquiries. I would also respectfully suggest, if it is not already being contemplated, that the Committee have regard to the submissions made by other organisations and individuals to the

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<sup>1</sup> Australian Law Reform Commission, *Elder Abuse Issues Paper* (IP 47) (June 2016).

<sup>2</sup> Australian Law Reform Commission, *Elder Abuse Discussion Paper* (DP 83) (December 2016).

<sup>3</sup> Department of Health (Commonwealth), *Review of National Aged Care Quality Regulatory Processes* (June 2017).

<sup>4</sup> Department of Health (Commonwealth), *Single Aged Care Quality Framework – Draft Aged Care Quality Standards Consultation Paper 2017*.

ALRC and the Commonwealth Department of Health, and to the ALRC's final report for the Elder Abuse Inquiry (tabled in the Australian Parliament 14 June 2017).<sup>5</sup>

## Need for regulation of restrictive practices in aged care

On 15 June 2017, World Elder Abuse Awareness Day, I released the paper *Legal frameworks for the use of restrictive practices in residential aged care: An analysis of Australian and international jurisdictions* (see attached).<sup>6</sup> The paper aims to contribute to contemporary discussion about the regulation of restrictive practices in Australian residential aged care settings by exploring the existing laws, policies and practices in Australia and other international jurisdictions.

The paper notes that the use of restrictive practices to manage the challenging behaviours of people supported by the aged and disability sectors has become a key human rights issue in Australia. Detention, seclusion, physical, chemical and mechanical restraint, as well as electronic forms of restraint such as camera surveillance, are regularly used in residential aged care facilities. However, there is currently no legislative framework to regulate these practices. The use of restrictive practices in aged care settings, 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. Equally, staff in these facilities who are using 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 its June 2016 Issues Paper regarding elder abuse,<sup>7</sup> the ALRC also 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. The ALRC ultimately recommended in its final report that aged care legislation should regulate the use of restrictive practices in residential aged care.<sup>8</sup>

Therefore, to ensure proper clinical and medical care standards are maintained and practised in the aged care sector, it is submitted that the paper prepared by my office and the findings of the ALRC be considered by the Committee and that it recommend to the Commonwealth Government that it take steps to regulate the use of restrictive practices in residential aged care as a matter of urgency.

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<sup>5</sup> Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (ALRC Report 131) (May 2017).

<sup>6</sup> 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).

<sup>7</sup> Australian Law Reform Commission, above n 1, 24.

<sup>8</sup> Australian Law Reform Commission, above n 5, Recommendation 4-10.

## Review of National Aged Care Quality and Regulatory Processes

I note that this review was commissioned by the Australian government in response to the Oakden Report<sup>9</sup> which detailed failures in the quality of care delivered at the Oakden Older Persons Mental Health Service in South Australia. I have read the Restrictive Practices chapter of that report and note that the Oakden facility was gazetted as an Approved Treatment Centre under the *Mental Health Act 2009* (SA). Accordingly, restrictive practices applied to residents of Oakden (albeit with little regard to treatment standards and legal and reporting requirements), were likely covered by the restrictive practices framework under the Mental Health Act in that State.

However, other older people who are subjected to restrictive practices in residential aged care facilities in South Australia, and other parts of Australia, where those facilities are not regulated under the respective State or Territory mental health regimes (which is the majority of these facilities), are without any legislative regulatory framework or protections.

As noted above, the issue of properly regulating the use of restrictive practices requires immediate attention by the Commonwealth Government and I strongly urge that this be addressed as soon as possible.

### Aged care quality standards

As mentioned above, the Commonwealth Department of Health has released the *Single Aged Care Quality Framework – Draft Aged Care Quality Standards Consultation Paper 2017*.<sup>10</sup> In my response to this Consultation Paper,<sup>11</sup> I supported the Australian government's approach to developing a single set of standards that are sufficiently broad for use within all aged care services. A single set of standards should, in theory, reduce the administrative burden on aged care providers and deliver a more consistent and streamlined approach to quality within the sector.

Such standards would clearly improve the effectiveness of the framework around aged care quality assessment and accreditation in protecting the residents from abuse and poor practice.

The numerous references throughout the draft standards to addressing the abuse, neglect and exploitation of older people in formal care were also supported, as was the inclusion of: 1) the focus on consumer needs, goals and preferences, and 2) articulating expected consumer outcomes, provider requirements, and key features of the draft standards.

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<sup>9</sup> Groves A et al, *The Oakden Report* (April 2017).

<sup>10</sup> Department of Health (Commonwealth), above n 4.

<sup>11</sup> Office of the Public Advocate, *Submission to the Commonwealth Department of Health – Single Aged Care Quality Framework: Draft Aged Care Quality Standards and options for assessing performance against Aged Care Quality Standards* (April 2017) <[http://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0019/526132/20170406-single-aged-care-quality-framework-final.pdf](http://www.justice.qld.gov.au/__data/assets/pdf_file/0019/526132/20170406-single-aged-care-quality-framework-final.pdf)>.

The current processes for quality accreditation/certification of aged care providers are both confusing and onerous. There is clearly a need for a single set of standards that guide quality among all government-funded aged care providers as well as a single, straightforward system of quality accreditation/certification that both reduces the administrative burden on providers and is easily understood by consumers and their supporters.

## The importance of effective complaints mechanisms

In its inquiry into elder abuse, the ALRC considered other issues in aged care that are relevant to the current inquiry. In particular, the ALRC examined proposals to expand and enhance reporting and protections for older people in aged care and the adoption of a reportable incidents scheme that requires approved aged care providers to notify reportable incidents to the Aged Care Complaints Commissioner. I supported these proposals.<sup>12</sup> However, I also strongly recommended that such a scheme should require such reports be mandatorily made to State police agencies where there is a suspicion of criminal offending. Further consultation with law enforcement agencies must be undertaken to establish the best way to make these reports, either through a dedicated liaison or more regular channels. Although reports of these incidents could also be passed on to police by the Aged Care Complaints Commissioner, any delay in reporting of offending that could result in criminal prosecution may result in the loss of evidence.

The ALRC ultimately recommended that a national employment screening process be created for Commonwealth-regulated aged care.<sup>13</sup> Such a process would complement a reportable incidents scheme by ensuring that workers who pose unreasonable risks are not employed in roles that allow them access to vulnerable older people.

Further to the above, I submitted to the ALRC during the Issues Paper stage of their inquiry into elder abuse regarding what changes should be made to aged care complaints mechanisms to improve responses to elder abuse.<sup>14</sup>

*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.<sup>15</sup> In addition to the usual reasons for not making formal complaints,<sup>16</sup> people with impaired decision-making capacity (including older people with dementia) may experience greater barriers to making complaints for a range of reasons including:*

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<sup>12</sup> Office of the Public Advocate, *Submission to the Australian Law Reform Commission – Elder Abuse Discussion Paper (DP 83)* (March 2017) <[http://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0003/515694/submission-alrc-elder-abuse-mar-2017.pdf](http://www.justice.qld.gov.au/__data/assets/pdf_file/0003/515694/submission-alrc-elder-abuse-mar-2017.pdf)>.

<sup>13</sup> Australian Law Reform Commission, above n 5, Recommendation 4-9.

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

<sup>15</sup> 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>>.

<sup>16</sup> 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;<sup>17</sup> and
- those individuals who receive services from others are often reluctant to make complaints for fear of reprisals or withdrawal of services.<sup>18</sup>

*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.<sup>19</sup> These adults frequently required additional support to use complaints systems effectively.<sup>20</sup> 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 on state parties to make reasonable adjustments to supports, systems and processes to ensure they are accessible to people with disability.<sup>58</sup> 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;

<sup>17</sup> Office of the Public Advocate, above n 15, 8-10.

<sup>18</sup> 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](http://www.qppd.org/images/docs/ci_report_2005.pdf)>.

<sup>19</sup> Office of the Public Advocate, above n 15.

<sup>20</sup> Office of the Public Advocate, above n 15, 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](http://www.healthwatch.co.uk/sites/healthwatch.co.uk/files/complaints-summary_0.pdf)>.

- *adopting facilitative and inquisitorial approaches;*
- *guaranteeing safety and freedom from reprisal;*
- *recognising the value of informal complaint-making processes; and*
- *ensuring a responsive system.*<sup>21</sup>

*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.*<sup>22</sup>

## Concluding comments

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 aged care services and facilities and associated costs. 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.

Thank you for the opportunity to provide feedback to your Committee regarding the effectiveness of the Aged Care Quality Assessment and accreditation framework for protecting residents from abuse and poor practices in the aged care sector. I trust that the Committee will recommend strict quality standards and complaints systems that will establish a rigorous framework that will protect residents from abuse and neglect. Should the opportunity arise, I

<sup>21</sup> Office of the Public Advocate, above n 15.

<sup>22</sup> Office of the Public Advocate, above n 14, 13-14.

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 cursive script, appearing to read 'Mary Burgess', written in a dark ink.

Mary Burgess  
**Public Advocate (Queensland)**