Office of the Public Advocate

Submission to the Australian Law Reform Commission

Elder Abuse Discussion Paper (DP 83)

Introduction

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]

The Office of the Public Advocate commends initiatives to improve safeguards and protections provided to older Australians. However, our office respectfully suggests that some of the proposals in the Discussion Paper may extend beyond the purview of the Australian Law Reform Commission (ALRC). A number of significant proposals involve areas where states and territories have exclusive jurisdiction, especially regarding the way state agencies conduct law enforcement and investigations. The ALRC proposals in relation to state and territory matters go beyond the usual recommendations made by the ALRC for uniform state and territory laws. As such, they should be subject to a more comprehensive review process.

We would suggest referring some of the proposals that directly impact the operations and functions of state- and territory-based agencies to the Council of Australian Governments or its ministerial councils such as the Law Crime and Community Safety Council or Australian Guardianship and Administration Council for consideration of their jurisdictional and resourcing impacts.

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

Elder Abuse Discussion Paper

National Plan

The Office of the Public Advocate supports the ALRC's proposal for the development of a national plan to guide reform and facilitate long-term elder abuse strategies. It is hoped that the inclusion of elder abuse on the national agenda through a well-developed national plan will lead to the formulation of a nationally-consistent framework for the reform of policies, initiatives and programs. In turn, this should lead to greater public debate, improved safeguards for the rights of older Australians and more integrated and available services and supports.

It is important that a national plan engages with the issue of elder abuse in a holistic manner and is multi-faceted. A national plan provides an opportunity to address and improve culture and community attitudes, federal and state government policy, and on-the-ground supports and responses. The plan should also encompass subsets of the Australian population such as people with disability or mental health issues, people with impaired decision-making capacity, Indigenous Australians and people with different cultural backgrounds.

Improving the elder abuse evidence base should be a component of a national plan, however, the collection and collation of evidence must have a clear purpose and application. The focus of research and evidence-gathering activities should directly inform the implementation of a national plan and should not unnecessarily divert resources from practical elder abuse reforms and responses.

While the conduct of an elder abuse prevalence study is supported in principle, the purpose, application and costs of undertaking a national elder abuse prevalence study must be thoroughly considered. A prevalence study is likely to provide important benchmarking information, however it may need to be periodically repeated if it is to be used to assess the impact of a national plan over time.

Powers of investigation

The Office of the Public Advocate holds a number of concerns in relation to the proposals for the expansion of the powers of investigation for public advocates/guardians to investigate elder abuse. Many of the concepts underpinning these proposals are supported in principle, as they are already part of the Queensland guardianship system e.g. the guiding principles (Proposal 3-2), powers of investigation (Proposal 3-3), and protection of disclosure (Proposal 3-5).

A key concern relates to Proposal 3-1, the investigative functions proposed for public advocates/guardians. The proposed powers are similar to the powers of the Public Guardian in Queensland under s 12(1)(c) of the *Public Guardian Act 2014*, which require the Public

Guardian to investigate complaints and allegations about the actions of attorneys, guardians, administrators or people acting under an advance health directive. Proposal 3-1 would significantly broaden these powers to investigating elder abuse generally, not just misbehaviour against people with impaired decision-making capacity. This would amount to a considerable increase in the investigation responsibilities of all jurisdictions' relevant guardianship agencies.

Proposal 3-1 will require significant legislative reform by state and territory governments and, if adopted, would result in a dramatic increase in the workload of guardianship agencies, with no commensurate funding being proposed, as discussed further below.

The jurisdiction of guardianship agencies is limited to dealing with children and adults with impaired decision-making capacity (generally as guardians of last resort). Their expertise is in dealing with this cohort. Although their responsibilities often involve them dealing with people with age-related illnesses such as dementia, there is no reasonable basis to assume that public guardians/advocates necessarily have the expertise or the skills to deal with, or investigate, elder abuse generally.

Expanding these agencies' authority would require significantly more resources in terms of staff, equipment and skills, including in dealing with a wide variety of witnesses and complainants, new situations and scenarios, as well as being aware of various rules and regulations around evidence and investigation.

The benefits from investing what are essentially significant police investigative powers in guardianship agencies are unclear. Such a proposal requires wider consultation to determine whether public advocates/guardians are the most appropriate agencies to be undertaking this role. At minimum, law enforcement agencies around the country should be consulted to determine whether such a proposal would be practical and appropriate. Police services across the country already undertake these investigations, and have the requisite training and knowledge in investigations and evidence to deal with cases of elder abuse and see them through to a successful prosecution.

A better approach might be to encourage better training of police in the investigation of offences against older people (which is currently occurring in Queensland), the establishment of specialist elder abuse policing units and the development of closer working relationships between police and local public guardians/advocates to improve referrals and information sharing between these agencies.

Alternatively, consideration could be given to whether a Commonwealth agency may be better placed to undertake investigations of certain forms of elder abuse, such as abuse occurring in residential aged care services or abuse involving Centrelink payments. Since both of these service areas are within the responsibility of the Commonwealth Government, it may be more appropriate for a federal agency such as the Australian Federal Police, Department of Social Services or Department of Human Services to investigate these forms of elder abuse.

Enduring powers of attorney and enduring guardianship

The Office of the Public Advocate respectfully recommends general caution in relation to the proposal to establish a national online register of enduring documents and court and tribunal orders for the appointment of guardians and financial administrators (Proposal 5-1).

We recognise the intention of this proposal is to reduce the potential for abuse and misuse of these tools and appointments. However, this office is not satisfied that there is any evidence to suggest that the establishment and operation of an online register would achieve these ends. At the same time, it is anticipated that such a proposal may have a significant negative impact on the rate of uptake and finalisation of valid enduring documents within the community because of the likely additional costs of registration and additional effort to apply for registration.

Tasmania currently has a scheme of compulsory registration of enduring documents. The Tasmanian scheme potentially offers the opportunity to examine the impact of a mandatory register on the misuse and abuse of enduring documents by attorneys. However, the Discussion Paper provides no information about the effectiveness of this system in reducing abuse of these documents by the attorney. Unless there is evidence that the Tasmanian experience (or any other international jurisdiction that has implemented such a register) has reduced financial and other forms of misuse and abuse by attorneys under enduring documents and has not negatively impacted on the uptake of enduring documents generally compared with other jurisdictions, there is no reason to assume that the adoption of a national register will have that effect.

Our office would strongly recommend that a thorough analysis of the impact of compulsory registration of enduring documents in Tasmania is undertaken before serious consideration is given to adopting a national register for enduring documents.

The reference in paragraph 5.14 of the Discussion Paper to the 2016 report on *Elder Abuse in New South Wales*, by the New South Wales Legislative Council, General Purposes Standing Committee No. 2, observed that a register would:

> …enable solicitors, banks and others to check the authenticity of an instrument or to track one down and would also send the signal that these are documents to be taken seriously. It thus seems clear that mandatory registration would deliver greater safeguards against financial abuse.[2]

With respect, our office does not agree with the members of the Legislative Council in this matter. It is accepted that a register would assist to relieve banks and other financial institutions of some responsibility in relation to establishing the "authenticity" of an enduring document. If the register system were to operate the way the Torrens System of title operates in Queensland, it would essentially absolve any person or agency that relied on the authenticity of the registered document from legal responsibility for any fraud or wrong perpetrated using that document. This is likely to result in people and agencies who might

[2] Australian Law Reform Commission, *Elder Abuse Discussion Paper* (DP 83) (December 2016) 89.

have, in the past, sought further information or clarification of the legitimacy of the attorney's appointment, not seeking that evidence anymore, because the register has relieved them from that commercial or legal responsibility. That may assist the commercial sector, in terms of the costs of doing business. However, it is not apparent, how the register will protect people from abuse.

The further references in the Discussion Paper to evidence received by the New South Wales Parliamentary Committee about a proposed register is noted:

> It is too easy for an attorney to become a rogue attorney and not have any checks made until things have gone a long way wrong.[3]

Again, it is not clear how a register would undertake the "checks" referred to by Ms Breusch. There appear to be certain assumptions made about the effect of a register that, on close scrutiny, are not necessarily supported by evidence.

There is no suggestion in the proposal that there is any intention that a registration process should involve a process of "checking the authenticity" of the enduring document being registered. If this were to occur, it is much more likely to prevent the registration of fraudulent enduring, documents and a fraudulent or abusive attorney acting on them. However, the cost of such a scheme is likely to be prohibitive. The likely registration process under the current proposal will involve the presentation of an enduring document that appears, on its face, to be correctly completed, along with payment of the appropriate registration fee, and the document will be registered. Unless it is specifically provided for and funded, we have no basis to assume that the establishment of a national register would provide for the checking of the authenticity of the document being registered. In a sense, such a process has the potential to provide a much stronger assertion of legitimacy to a dishonest or abusive attorney than the system currently in operation in most Australian jurisdictions does.

There is a suggestion in paragraph 5.17 of the Discussion Paper that the proposed register should include enduring documents that have been made but are not yet active because the principal has decision-making ability. It is not clear how such a system would operate. The proposal does not explain how people searching the register would know that the enduring document was not active. Nor does it explain how such a register could recognise the fluctuating capacity of some people. Further, it is unclear what process and evidence would be required to inform the register that the enduring document has now been activated by the loss of capacity of the principal. Would it require some application to a tribunal for a declaration of incapacity? The Commission proposes that the register, with "both made and live documents offers an opportunity to review decisions as to loss of decision-making capacity".[4] It is not clear who would be reviewing those decisions about the loss of decision-making capacity, however it seems to suggest that the ALRC is recommending a regression to a much more formalised system that is more focused on "managing" people with impaired capacity, rather than the

[3] Evidence to Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, 18 March 2016 16 (Ms Breusch, University of Newcastle Legal Centre) as quoted in Australian Law Reform Commission, *Elder Abuse Discussion paper* (DP 83) (December 2016) 91.

[4] Australian Law Reform Commission, *Elder Abuse Discussion Paper* (DP 83) (December 2016) 89.

paradigm that the Commission itself has indicated we should be moving towards — a more modern "will, preferences and rights" model of supported decision-making.[5]

This office is not persuaded by the "broad range of submissions to this Inquiry supporting the establishment of a register".[6] Those submissions are made by people with genuine concerns about the occurrence of abuse, who are seeking a solution that they hope will work for the benefit and protection of the people they represent. However, evidence that a register has any significant effect on the rates of abuse has not been produced or discussed. Generally speaking, many policy proposals can seem to make sense but do not always translate to effective policy in practice that achieves the intended outcomes. The practicalities of the proposal to establish a register should therefore be further explored.

In relation to the commentary in the Discussion Paper under the heading "A register would reduce abuse", there are a series of persuasive arguments about how a register could help with clarity about when a valid enduring document exists, who is appointed, when an appointment has been revoked etc. These are genuine points about the general operation of enduring documents and the confusion that can arise when a person may have made multiple appointments over time. However, none of the arguments specifically address the issue of fraud and financial abuse of these instruments.

There were numerous submissions that did not support the establishment of a register for the same reasons articulated in this submission.[7]

While our office has strong reservations about the effectiveness of establishing a register for enduring documents and appointments, it is recognised that there are serious problems associated with the abuse of enduring documents and appointments by attorneys and guardians and that there are difficulties with information sharing about substitute decision-maker appointments, including enduring attorneys and guardians. Our position is that rather than adopt a response where we can only speculate about the potential benefits, more work should be invested in exploring the benefits of the Tasmanian experience and other possible sources of information and advice about reducing fraud and other abuses of these documents. In our view, it is important to recognise that the behaviours the register is seeking to prevent or curtail are criminal behaviours and a better understanding of the motivations and *modus operandi* of this cohort of offenders could assist in developing more appropriate, effective responses to this type of behaviour.

Our office respectfully suggests that advice be sought from criminologists to gain a better understanding of the motivations and likely deterrents for people who commit acts of dishonesty and fraud. Should a register be created, the greater the limitations on who can search any national online register (Question 5-1) the less it is likely to prevent abuse and fraud. If people close to the principal cannot search the register to satisfy themselves that the information the attorney or guardian is telling them about their power and authority is correct, they cannot raise concerns with authorities. The existence of the register raises serious

[5] Australian Law Reform Commission, *Elder Abuse Discussion Paper* (DP 83) (December 2016) 5.12 88.
[6] Australian Law Reform Commission, *Elder Abuse Discussion Paper* (DP 83) (December 2016) 92.
[7] Australian Law Reform Commission, *Elder Abuse Discussion Paper* (DP 83) (December 2016) 5.45 – 5.56 95-97.

challenges to our views about privacy. However, we know that older people are at greater risk of abuse when they have low social capital and fewer social networks and supports. If access to the register is limited, it may exacerbate this vulnerability for older people and will potentially undermine the effectiveness of the register.

It would also be contradictory to allow financial institutions to be able to access the register but not members of the person's family (even if there is a question about them being estranged from the principal). The effectiveness of land registers is due to their accessibility by the public at large.

It is unclear why, when a person has formally appointed another by law to be their attorney and essentially stand in the shoes of the principal for certain matters, the availability of this information should be limited in some way.

As to the suggestion that public advocates and public guardians have the power to conduct random checks of enduring attorneys' management of principals' financial affairs (Question 5-2), creates a potentially significant and new role and body of work for these agencies. The risk with all enduring documents is that the person who is entrusted the power to act for the principal may abuse that power. The problem with this suggestion is that without it the proposed national online register is likely to be ineffective in reducing financial abuse and exploitation by enduring attorneys, guardians and administrators. In our view, if a national online register is established it should be the responsibility of the administrators of the register to check the authenticity of documents registers and the conduct of enduring attorneys, guardians and administrators. This will ensure that the investigative aspect of the role is properly funded and supported and the agency responsible for the register is also given the power to ensure it is achieving its objectives, rather than requiring the two agencies to work together to achieve these outcomes.

Our office does not support the proposal for enhanced witnessing of enduring documents (Proposal 5-4). Such a proposal would set the standard for executing valid enduring documents higher than that required to execute a valid will.

Again, our office is unpersuaded that increasing the requirements for execution of these documents will reduce financial abuse and fraud by attorneys. In our view, a person who is prepared to engage in this type of behaviour and forge a signature of the principal or breach their commitment to the principal, will also not be discouraged from such a course because they may now need to forge a second signature or enlist another person in their abusive or fraudulent conduct.

At the same time, these additional requirements are likely to operate as a barrier or disincentive for principals to make enduring documents. This possibility is also recognised by the ALRC,[8] which also recognises that while being a source of abuse of older persons, enduring documents can also provide important protections for this group. Our concern is that in seeking to protect people from abuse under these documents, the proposals are likely to result in significantly fewer people making these documents and being exposed to abuse,

[8] Australian Law Reform Commission, *Elder Abuse Discussion Paper* (DP 83) (December 2016) 5.73 101.

exploitation and neglect as a result, and ultimately being forced into the formal guardianship system for support and protection.

Our office supports in principle the proposal to vest tribunals with the power to order compensation when enduring attorneys and guardians fail to comply with their obligations (Proposal 5-5). However, considering the amount of money that could potentially be misused or defrauded from people who are enduring attorneys or guardians, there should potentially be a monetary limit for the jurisdiction of the tribunal, after which time the matter falls into the jurisdiction of the courts.

Consideration should also be given to creating specific criminal offences regarding the misuse by substitute decision-makers of their powers. The Criminal Code provisions relating to stealing by agents might be an appropriate place to insert such offences.[9] Tribunals could then be required to refer criminal conduct to police for investigation. Upon conviction, offenders could be ordered to pay restitution.

The Proposals (5-6 – 5-9) for many of the safeguards involving enduring attorneys is already the law in Queensland.[10] Any further protections as proposed, such as the ineligibility of enduring attorneys when disqualified as a director or having convictions involving fraud or dishonesty are supported.

Our office also supports the proposal for state and territory governments to introduce nationally consistent laws governing enduring powers of attorney, enduring guardianship and other substitute decision-makers (Proposal 5-10). It would be convenient and more accessible for the community, as well as being sound legal policy and would reduce costs provided the laws around these issues are consistent across the country.

Our office has significant reservations about adoption of the term “representatives” for substitute decision-makers such as enduring attorneys, guardians and administrators and “Representatives Agreements” for the documents under which they are appointed (Proposal 5-11). The term representative is widely used in the community in a range of contexts, but in a much less formal sense. The community has a high level of understanding and recognition of terms such as “power of attorney”, even if they are not fully informed about the detail of the statutory roles and responsibilities that attach to the position. We are not sure what would be achieved by a change of name.

If such a proposal were to be adopted, a large community education campaign would need to be developed to inform the community about the proposed change and what it means for them.

While our office does not support the change of name to a Representatives Agreement, we would support a proposal to develop model enduring documents that could be adopted across all Australian jurisdictions (Proposal 5-12).

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[9] See, for example, *Criminal Code Act 1899* (Qld) s 398.8.

[10] See, for example, conflict transactions: *Powers of Attorney Act 1998* (Qld) s 73; eligibility for enduring attorneys: *Powers of Attorney Act 1998* (Qld) s 29; prohibited transactions: *Powers of Attorney Act 1998* sch 2 s 3; keeping records *Powers of Attorney Act 1998* (Qld) ss 85, 86.

Guardianship and financial administration orders

The proposal to better inform and educate guardians and administrators on the scope of their roles (Proposals 6-1, 6-2 and Question 6-1) is supported. The 2016 report – *Decision-making support and Queensland's guardianship system*[11] – presented the Public Advocate's research into the extent to which relevant provisions of Queensland's guardianship legislation[12] were translated into practice, including how substitute decision-makers complied with their legislative obligations. The report highlighted a low level of awareness of the obligations under guardianship legislation among substitute decision-makers, which was unsurprising given that there is scant practical guidance, education or training provided to guardians, attorneys and administrators about their roles and obligations, nor about how to apply the principles in the legislation.[13]

Training for guardians, administrators and attorneys should be available, however their participation should be voluntary. Guidance about the availability of information and training, and the responsibilities and obligations of substitute decision-makers should be provided at the time a substitute decision-maker is appointed under a power of attorney document or by a tribunal. This should also be accompanied by information concerning the consequences of the breach of such responsibilities. A comprehensive range of easy-to-understand resources should be made available online and easily accessible so that people can refer to them as needed.

The value of a requirement that newly-appointed guardians and financial administrators sign an undertaking to comply with their responsibilities and obligations (Proposal 6-2) is questionable. As long as their responsibilities and obligations are made clear to substitute decision-makers at the time of their appointments, there is little benefit in requiring the signing of an undertaking by guardians and administrators. Proposal 6-2 should also include people appointed under powers of attorney who have similar responsibilities and obligations to guardians and administrators.

There is a risk that a requirement for the signing of a document of this type would devolve into a bureaucratic process, involve excessive administration and result in the object of the exercise being lost. Instead, focus should be placed on the education of substitute decision-makers about their obligations and responsibilities.

Banks and superannuation

The Office of the Public Advocate supports the proposal that the *Code of Banking Practice* should provide that banks take reasonable steps to prevent the financial abuse of older customers through staff training, software to identify suspicious transactions and reporting suspected abuse to authorities (Proposal 7-1).

[11] Office of the Public Advocate (Queensland), *Decision-making support and Queensland's guardianship system* (2016).
[12] *Guardianship and Administration Act 2000* (Qld) and *Powers of Attorney Act 1998* (Qld).
[13] Office of the Public Advocate (Queensland), *Decision-making support and Queensland's guardianship system* (2016) 9.

Many financial institutions already have these types of protections in place to protect customers from financial abuse. These practices should be adopted as part of standard banking practice. Often, banks are the first institution to become aware of unusual transactions on older people's bank accounts. They are therefore well positioned to detect fraud and financial abuse, and act early to prevent or stop it.

Our office does not support the proposal to increase the witnessing requirements for arrangements that allow people to authorise third parties to access their bank accounts (Proposal 7-2). The proposal does not recognise the reality, motivations and behaviours of criminal actors. If a person is prepared to forge one signature, they will simply forge two if the form requires it. Therefore an increase in witnessing requirements is unlikely to have any real effect on dishonest family members or other people who would be 'helping' the older person. They are, however, likely to create more work and obstacles for honest people trying to make these arrangements for the benefit of the older person.

Australian banks have enormous financial resources and capabilities. They routinely have mobile staff travel to visit customers to establish banking and lending arrangements. Banks could use their mobile staff, who have received appropriate training about elder financial abuse and undue influence, to talk to customers face-to-face in their homes, to satisfy themselves that the arrangements for third parties to access their accounts are appropriate.

Australian banks make enormous profits from the business they transact in the Australian community. Along with their unparalleled commercial success comes a level of social responsibility. Banks could provide these types of services as part of a commitment to social responsibility and as an expression of appreciation for the commitment by government on behalf of the Australian community made to the banks during the Global Financial Crisis i.e. the Guarantee Scheme for Large Deposits and Wholesale Funding which allowed Australian banks to keep trading during the crisis with minimal impact on their operations.

Social security

The Office of the Public Advocate supports the need for relevant Commonwealth departments such as the Department of Human Services to have strategies to prevent, identify and respond to the abuse of older persons (Proposal 10-1). This would include Centrelink developing proper training and policies (Proposals 10-2 to 10-4) and require appropriate coordination and the establishment of official lines of communication and protocols between relevant agencies such as law enforcement, service providers and Centrelink in relation to elder abuse.

The proposals regarding social security abuses are relevant to the proposals around powers of investigation (Proposal 3-1). As raised in our response to Proposal 3-1 (powers of investigation), a Commonwealth department or other agency such as the Australian Federal Police, may be more appropriate to investigate elder abuse identified by these agencies, rather than relying upon state/territory agencies such as public guardians/advocates. Otherwise, there is the risk of overlap with any investigations being conducted by public

guardians/advocates and various other Commonwealth agencies when investigating certain cases of elder abuse.

Aged care

The Office of the Public Advocate supports proposals to expand and enhance reporting and protections to older persons in aged care. While the establishment of a reportable incidents scheme as per Proposal 11-1 is supported, our office strongly suggest that such reports should also be mandatorily made to state police agencies where there is a suspicion of criminal offending. It is respectfully suggested that further consultation with law enforcement agencies is undertaken to establish the best way to make reports, either through a dedicated liaison or more regular channels. Although reports of these incidents should also be passed on to police by the Aged Care Complaints Commissioner, any delay in reporting offending that could result in criminal prosecution may result in the loss of evidence.

It should be noted that there have been some questions raised regarding how well the Aged Care Complaints Commissioner has responded to serious complaints, such as an attack by an aged care resident on another resident resulting in death.[14]

The reporting of incidents to police will need careful management to ensure that all reportable incidents are properly responded to, especially when police are unable to bring a prosecution. There is a risk that aged care providers may misinterpret police taking no action on a reportable incident as meaning they have no further responsibilities in responding to the incident. Police taking no further action in relation to an incident may, however, simply mean that the evidence gathered does not meet the threshold for a criminal prosecution. It may be that, while not strictly criminal in nature, these incidents reflect more subtle forms of elder abuse that are caused by mistakes and poor staffing practice, poorly designed organisational systems and/or insufficient resourcing. Additionally, to prevent police being inundated by unsubstantiated allegations of abuse, it will be necessary to adequately resource state police agencies to incur the additional workload involved with assessing, investigating or referring allegations of elder abuse that amount to a criminal offence.

As the prosecuting authority in the first instance, police should determine whether a matter should be pursued criminally. Therefore, all potential criminal offences should be reported to police. Those working in the aged care sector and their supervisors do not have the expertise or qualifications to make determinations as to whether a matter should be investigated by police and prosecuted.

However, it is unclear as to how any proposed reporting scheme would fit in with the proposed expanded responsibilities of public advocates/guardians (Proposal 3-1). Aged care providers should be provided with guidance and education about what types of reportable

[14] ABC News, *Nursing home regulator's response to attack on bed-bound patient 'underwhelming', coroner says*, (8 December 2016) ABC News <http://www.abc.net.au/news/2016-12-08/regulators-response-to-st-basils-death-underwhelming-coroner/8102964>.

incidents constitute criminal behaviour versus poor worker practice so that, if the matter is not prosecuted, they have a framework to guide internal action to remedying issues.

The expansion of reportable incidents is also supported (Proposal 11-2). However, it is questionable whether there should be two separate definitions for reportable incidents occurring in residential or home/flexible care. Abuse, neglect, exploitation and inappropriate or harmful worker practice, should not be accepted in either of these service environments. If a potential crime has occurred, then all such incidents should be referred to police and other relevant regulatory bodies, irrespective of the context in which care is being provided. To do any less would be to treat older people as having less value and deserving of less protection than the general public.

Enhanced screening for aged care employees is supported (Proposal 11-4). As noted in the Discussion Paper, "working with children" checks have been developed in state jurisdictions to capture a broad range of information and could be used as a guide for the development of an enhanced screening system for aged care. Similar approaches to those that apply to working with children checks should therefore apply, such as closer scrutiny of criminal charges, not just convictions.

There should be a scheme for recording reportable incidents and relevant disciplinary proceedings or complaints. Our office supports the establishment of a national database to record the outcome and status of employment clearances. Complaints management data should also be used to screen out workers whose conduct and treatment of older people fall below acceptable standards. The complaints data will also ensure that workers with histories of poor performance cannot simply move between employers to avoid scrutiny. Where a worker is the subject of an adverse finding in respect of a reportable incident where the behaviour would constitute a criminal offence (excluding traffic offences), they should be excluded from working in aged care.

The use of complaints information for screening purposes would ideally extend beyond the aged care sector so that workers who have transferred across sectors (such as from the disability service system), and who have had substantiated complaints made against them, are fully screened and assessed in relation to potential risk. For this to occur, there would need to be a cross-sector integrated employment screening and complaints system that provides for the sharing of information about workers between the two systems. The transfer of disability services funding to the Commonwealth Government represents an opportune time to develop such a system that aligns with the employment screening and complaints scheme established under the National Disability Insurance Scheme.

Proposal 11-6 which suggests that unregistered aged care workers who provide direct care be subject to the planned National Code of Conduct for Health Care Workers, is supported. However, we are aware that many staff in the aged care sector have limited education and many are from culturally and linguistically diverse backgrounds. Requiring these workers to acquire this level of knowledge will require significant investment in education and training from the aged care sector. If such a proposal were to be adopted it will need to be accompanied by a clear and accessible education and communication campaign for workers to

ensure they understand the Code of Conduct and their obligations and duties under it. Alternatively, there may be benefits in developing a specific code of conduct for aged care workers.

The Office of the Public Advocate strongly supports the regulation of the use of restrictive practices in aged care (Proposal 11-7). Our office is preparing a paper – *Legal frameworks for the use of restrictive practices in residential aged care* – that examines the use and regulation of restrictive practices in Australia and select international jurisdictions. This document will be sent to the ALRC when complete, and will also be published on our website.[15] The paper highlights that while New Zealand, the United Kingdom and most Canadian provinces have enacted laws that regulate restrictive practices, Australia has yet to introduce restrictive practices legislation in aged care. Australia is falling behind in regulating these practices, many of which technically constitute criminal acts against older persons in aged care. As discussed in the response of this office to the ALRC's Issues Paper, detailed consideration should be given to developing a legal framework that includes the features outlined in the Discussion Paper (Proposal 11-7) in addition to the following:

- 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;[16] and
- the establishment of a visitor program to provide independent on-site scrutiny of the use of restrictive practices.

Any framework must also ensure that restrictive practices are only ever used in residential aged care environments as a last resort, that they are complemented by appropriate safeguards, and that there is appropriate monitoring and oversight of their use.

Proposal 11-8 is strongly supported by this office. As noted in the Discussion Paper, requiring a person to have an appointed decision maker before entry into aged care is an encroachment on the rights of older people.

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[15] Office of the Public Advocate, <http://www.justice.qld.gov.au/public-advocate>.

[16] 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>.

Concluding comments

As noted in our submission to the initial issues paper, the Office of the Public Advocate recognises that elder abuse is a significant social issue in the Australian community.

Our office welcomes all efforts to recognise and better address elder abuse. However, our office also advocates that any law reform and policy proposals must offer genuine outcomes and be effective in addressing the elder abuse, exploitation and neglect. This requires careful policy and legislation development, appropriate funding and implementation and cooperation between Commonwealth and state governments.

Thank you for the opportunity to provide a submission in relation to the Elder Abuse Discussion 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

Mary Burgess
Public Advocate
Office of the Public Advocate