Submission to the Australian Law Reform Commission in Response to the Elder Abuse Issues Paper

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# Abbreviations

ACA Aged Care Act 1997 (Cth)

ACAS Aged Care Assessment Service

ALRC Australian Law Reform Commission

DOLS (the) The United Kingdom’s Deprivation of Liberty Safeguards

EPA Enduring Power of Attorney

GAA Guardianship and Administration Act 1986 (Vic)

OPA Office of the Public Advocate

POAA Powers of Attorney Act 2014 (Vic)

VLRC Victorian Law Reform Commission

# Introduction

The Office of the Public Advocate (OPA) welcomes the opportunity to respond to the *Elder Abuse Issues Paper*. OPA sees elder abuse, and violence, abuse, neglect and exploitation of at-risk adults more broadly, as a pressing social policy issue. In keeping with our mandate to protect and promote the rights of people with disability, and our experience with protecting the rights of people who have cognitive impairment (including a large proportion of our guardianship clients who suffer from dementia), we have developed significant expertise on this topic.

OPA publications that are relevant to this review, many of which are referenced in this submission, include:

* John Chesterman, 2013, *Responding to violence, abuse, exploitation and neglect: Improving our protection of at-risk adults,* Report for the Winston Churchill Memorial Trust of Australia
* OPA, ‘Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper’, May 2010
* OPA, ‘Submission to the Victorian Law Reform Commission in Response to the Guardianship Consultation Paper’, May 2011
* Lois Bedson, ‘The incidence of elder abuse among guardianship clients: a preliminary analysis’, Presentation to the 4th National Elder Abuse Conference, 24 February 2016
* John Chesterman, ‘From recognition to reform: Planning the next generation of elder abuse response strategies’, Presentation to the 4th National Elder Abuse Conference, 24 February 2016
* Williams, Chesterman and Laufer, ‘Consent versus scrutiny: Restricting liberties in post-Bournewood Victoria’, *Journal of Law and Medicine*, Vol 21, 2014, pp 641-60

This submission provides responses to 36 of the 50 questions posed in the Issues Paper: those on which we could valuably comment.

## About the Office of the Public Advocate (OPA)

OPA is a statutory office, independent of government and government services that works to protect and promote the rights, interests and dignity of people with disability.

OPA provides a number of services to work towards these goals, including the provision of advocacy, investigation and guardianship services to people with cognitive impairments and mental illness. In 2015–16 OPA was involved in 1645 guardianship matters, 494 investigations and 61 new cases requiring advocacy.

Under the *Guardianship and Administration Act 1986* (GAA), OPA is required to arrange, coordinate and promote informed public awareness and understanding through the dissemination of information about the GAA and other legislation affecting persons with a disability.[[1]](#footnote-1) For example, we have played a significant role in promoting public awareness and understanding of the new *Powers of Attorney Act 2014* (POAA).

The OPA Advice Service offers information and advice on a diverse range of topics affecting people with disability. The issues raised by people contacting OPA are often complex, requiring a high level of expertise. During 2015–16, the Advice Service handled 17,469 enquiries, which was 23 per cent higher than the previous year due to the introduction of the new Powers of Attorney Act. Most calls relate to guardianship, administration or enduring powers of attorney (61per cent). For the first time, in September 2015, we were able to identify how many enquiries related to violence, abuse, exploitation or neglect: 10 per cent (however due to anonymity of callers we are not able to tell how many involved abuse of older people).

OPA coordinates a Community Education Program where staff address both professional and community audiences on a range of topics including the role of OPA, guardianship and administration, enduring powers of attorney and medical decision-making. Last year, the program delivered 194 presentations to a total audience of 8533 people. The largest audience group for presentations was health and community professionals. The remaining presentations were to general public audiences, tertiary students, and legal and justice services.

# The questions

## 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?

OPA accepts and employs the same definition of ‘elder abuse’ as the Victorian State Government, which it adopted from the Australian Network for the Prevention of Elder Abuse in 1999, that is:

“Any act occurring within a relationship where there is an implication of trust which results in harm to an older person. Abuse may be physical, sexual, financial, psychological, social and/or neglect.”

As described in more detail on the State Government website:

“Elder abuse is carried out by someone close to an older person with whom they have a relationship implying trust. This form of abuse typically involves a family member such as a spouse, adult child, grandchild, sibling, close friend or primary carer.

Abuse can be physical, psychological, financial or social, or take the form of neglect. An older person may suffer more than one type of abuse at one time. It can be a result of ignorance, negligence or deliberate intent, but also predatory action.”[[2]](#footnote-2)

In relation to payment for service, OPA would not see institutional violence, abuse or neglect towards an older person necessarily as elder abuse (for example, physical assault by a co-resident/paid staff member or unlawful restrictive practices). However, OPA accepts that an older person may develop a family-like relationship with a paid carer who they have employed for many years, and that, in those cases, violence, abuse or neglect by such a person would constitute elder abuse. It is possible for a ‘relationship implying trust’ to encompass a range of relationships, including employer/employee relationships or long-term co-residents in a supported accommodation setting who have become friends.

OPA notes that the name of the ‘*Elder abuse’ Issues Paper* for this Inquiry was narrower than the terms of reference which also apply to serious abuses of the rights of older persons not usually encompassed by the term ‘elder abuse’. These include the use of restrictive practices in aged care settings (which we discuss in Question 16) and situations where abuse is perpetrated in residential aged care (or other institutional settings) by another resident or by a ‘formal carer’ (for example, a nursing home employee).

### Question 2. What are the key elements of best practice legal responses to elder abuse?

Best practice legal responses to elder abuse are those:

* which “ensure that their adult protection laws and practices are consistent with human rights obligations”,[[3]](#footnote-3) with particular regard to the United Nations Convention on the Rights of Persons with Disabilities;
* where “policy and practice changes must in sum advance rather than limit the human rights of at-risk adults”[[4]](#footnote-4) including people suffering elder abuse;
* that are driven by, and form part of, a holistic framework designed to protect at-risk adults from abuse, neglect or exploitation;
* where adequate resources are devoted to implementing those responses, including staff training and health and community support services to meet the needs of at-risk adults;
* which have “a clear non-police contact point through which members of the public and service professionals can raise concerns about the well-being of at-risk adults”[[5]](#footnote-5) and a body “with clear authority to investigate [these] situations of concern, including in private residences as well as in supported accommodation, utilising a supportive intervention approach”;[[6]](#footnote-6) and
* where those “agencies involved in adult protection regularly liaise with one another away from the intensity of interactions on particular cases”[[7]](#footnote-7) to identify people and communities whose needs are not being met.

### 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; people with disability; or people from rural, regional and remote communities.

OPA has extensive contact with people who have experienced elder abuse via our Advocacy and Guardianship Program and our Community Visitors Program. Our Advice Service also offers advice and appropriate referrals to people who are concerned about an at-risk older person, or on occasion, to people experiencing elder abuse themselves. Many of these older people have a cognitive impairment or other disability.

Below are case studies relating to elder abuse and abuse of the rights of older persons that OPA has presented or published in other forums:

**Woman with history of mental ill health who developed dementia[[8]](#footnote-8)**

Mrs B was a woman in her early 70's when OPA first became her guardian in 2012. She had a long history of mental ill health, a more recent history of dementia, and, between 2011 and 2012, was frequently admitted to hospital with injuries which included broken bones. It was unclear whether those injuries were the result of falls or inflicted by her son Chris, who suffered from schizophrenia and was known to be physically violent towards his father (Mrs B’s husband).

The community mental health service who had previously supported Mrs B, said that Mrs B had told them her son hit her daily and they had documented bruising. Hospital staff were aware that she was subject to violence in the home (while mostly the fights were between her husband and son, she had been hurt trying to break them up). The hospital neuropsychologist had also documented an incident in which her husband left Mrs B lying on the ground for some hours after she fell.

During her hospital admissions in 2011, Mrs B was assessed as having the capacity to make her own hospital discharge decisions. She consistently chose to return home.

In 2012 the hospital noted Mrs B’s dementia was worsening and reassessed her capacity. The assessment found that she lacked the capacity to make lifestyle decisions. Based on their ongoing concerns about Mrs B’s safety in the home, and her husband not agreeing to the hospital’s recommendation that Mrs B enter a Transition Care Program, the hospital made an application to VCAT for guardianship and administration orders. If Mrs B had retained capacity, guardianship would not have been an option.

At the VCAT hearing, Mrs B denied that there had been recent violence and expressed a clear wish to return home.

VCAT appointed OPA guardian for Mrs B, with powers to make accommodation, services and healthcare decisions.

After careful consideration and consultation, the guardian decided not to return Mrs B to her home. They placed her in an aged care facility that was close to both her husband and daughter’s homes. They sought and were granted access to person powers after it came out that Mr B had been drugging her with his own medication on a regular basis, as he thought it helped with her hallucinations. Following this discovery the police applied for an intervention order on Mrs B’s behalf. The guardian ensured that Mrs B could still see her husband and son, as was her wish, but under safe, supervised conditions.

Mrs B’s health improved so significantly after entering aged care that the guardian had her capacity reassessed. This improvement may have been the result of improved access to mental health treatment. Ultimately, the capacity assessment stated that she could not process complex information sufficiently well to make informed decisions. The order remains in place today.

**Three cases of elder abuse against people under guardianship[[9]](#footnote-9)**

An elderly woman was socially isolated from her family and friends by her second husband. He was very controlling of her and emotionally abusive. The attempts of service providers to reconnect the woman with her children were intercepted and prevented by her husband, and the woman continued to be alienated from her children until her care needs were so great that she was moved into an aged care facility, where her family and friends were able to visit her.

An elderly woman was neglected, physically abused, and financially exploited by her daughter. Her daughter left her on the floor after a fall, withheld medications, and failed to feed her. The elderly woman agreed she was the victim of violence but as she wanted to stay out of residential care and her daughter was the only person who could assist her to remain living in the community, she was prepared to experience abuse and risk losing all of her money.

An older woman reported she was sexually exploited by the bus driver at her adult day service. After the abuse her behaviour changed and became more challenging for day service staff to manage. The day service manager had a personal connection with the bus driver and did not believe the woman’s report. The change in behaviours was the reason given for the woman being asked to leave the day service.

**Ombudsman investigation of Mentone Gardens SRS[[10]](#footnote-10)**

In September 2013, Mentone Gardens, a pension plus SRS, which housed 39 elderly residents, went into liquidation owing over $4.5 million including substantial resident bonds.

Ombudsman Victoria’s investigation uncovered that Mentone Gardens had not produced proper financial records for its entire 25-year history. During that time, the department had prosecuted this SRS twice for Act breaches:

• in 1995 the proprietor pleaded guilty and was fined for breaches of resident care

• in 2000, the proprietor pleaded guilty and was fined for care plan and accident record breaches. The Magistrate described the proprietor’s conduct as “appalling”.

The Victorian Ombudsman, Ms Deborah Glass, recommended that the government make ‘ex gratia’ payments to these residents, including their estates, to compensate for their loss because her report demonstrated that the department failed in its regulatory role. She also reviewed the department’s capacity to respond to a similar situation today and concluded that it had not taken the necessary steps to regulate SRS providers into the future.

OPA is happy to provide further case studies or information on request.

### 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?

The Australian Institute of Family Studies research report, *Elder Abuse: Understanding issues, frameworks and responses*[[11]](#footnote-11) provides an excellent and up-to-date analysis of existing evidence about elder abuse in Australia. OPA believes this report supports our belief that there is a pressing need for information about the prevalence and dynamics of elder abuse in Australia. OPA supports the development of a comprehensive, systematic research program to address this. Such a program would include (but not be limited to):

* A national prevalence study that incorporated information about the prevalence of elder abuse perpetrated against people with cognitive impairment and about people living in supported accommodation settings (which no national prevalence studies have included to date);
* Research on the risk factors for elder abuse, including on the characteristics of victims and perpetrators;
* Research into the dynamics of elder abuse among specific populations: including individual CALD groups, Aboriginal and Torres Strait Islanders, people with cognitive impairment; and
* Research to further support the development of a theoretical framework to understand the dynamics of elder abuse in Australia.

One research gap which OPA is working to fill relates to the experiences of elder abuse of guardianship clients. As we know, guardianship and administration orders are a common protective response for people with cognitive impairment who experience elder abuse; however, there has been no research to date on elder abuse amongst this cohort.

OPA is currently undertaking research into elder abuse among OPA guardianship clients who were involved in new matters received in the 2013–14 financial year. This provides insights into the prevalence of elder abuse among people with cognitive impairment under guardianship, as well as the types of abuse experienced and who perpetrates the abuse. For our initial findings please see the presentation given at the National Elder Abuse Conference in February 2016.[[12]](#footnote-12) Findings on outcomes for OPA clients who suffered elder abuse will be available later this year.

## Aged care

### Question 11. What evidence exists of elder abuse committed in aged care, including in residential, home and flexible care settings?

In its role as guardian of last resort, OPA is regularly informed by service providers or family members of suspected or confirmed abuse perpetrated against an older person under OPA guardianship.

Please note that the Victorian Civil and Administrative Tribunal (VCAT) need to be satisfied that a person meets certain legislative criteria[[13]](#footnote-13) before a guardianship order can be made, and as such, people under guardianship are not representative of the broader community.

OPA’s research into elder abuse among our guardianship clients found that in 42 per cent of matters involving elder abuse (N=51), the application for guardianship was initiated or supported by community care services. The majority of this group were involved with providing aged care in the home (case managers, personal care workers, Aged Care Assessment Service) as well as Royal District Nursing Service, General Practitioners and Aged Mental Health teams. This indicates that aged care services in the home were aware of around one third of the elder abuse cases (21 out of 51) that resulted in the appointment of an OPA guardian that year.

The research also found that six of the 51 people identified as experiencing elder abuse were residing in residential aged care at the time of the guardianship application. One of these cases involved the substantiated sexual assault of an elderly women by her son when she was taken to his house for the weekend. Three others involved financial abuse or exploitation. One involved a carer acting against medical advice and taking the older person for futile medical tests. One involved the use of restrictive practices by an aged care facility to prevent the older person from walking (due to the service’s concern about her risk of falls).

OPA has been vocal in recent years in our concern about the use of unlawful restrictive practices on people with a disability in supported accommodation settings. Restrictive practices employed in aged care facilities, where there is no clear regulatory framework to authorise the use of these often questionable practices, is a clear human rights issue.

OPA is aware of restrictive practices in aged care settings including physical restraint (in beds, on toilets, in chairs), chemical restraint (to reduce challenging behaviours and wandering behaviours in dementia sufferers) and other limitations on freedom of movement (for example the use of key pads to effectively ‘lock’ dementia wards). While this does not fall under the usual definition of elder abuse, it is certainly within the scope of the Terms of Reference of this inquiry. (More information on this issue in Question 16.)

OPA also would like to refer the Commission to a systematic review undertaken by the Victorian Institute of Forensic Medicine (and others) which looked at what is known about resident to resident assaults in nursing homes.[[14]](#footnote-14) The same team of researchers looked at the nature and extent of external-cause deaths of nursing home residents in Victoria and found seven resident-to-resident assaults that resulted in death between 2000 and 2012.[[15]](#footnote-15)

OPA’s contact at the Department of Forensic Medicine, Monash University, Dr Joseph Ibrahim has unpublished data indicating that the use of mechanical restraints has resulted in deaths of people in residential aged care. Dr Ibrahim is happy to provide this information to the Commission in confidence.

### Question 12. What further role should aged care assessment programs play in identifying and responding to people at risk of elder abuse?

Aged care assessment program staff are in an excellent position to identify and respond to people at risk of, or who are experiencing elder abuse. Their involvement in the life of an older person may be one of the few opportunities that person has had for contact with an independent person, particularly if they have been isolated by family violence for many years.

As such, ACAS staff need to be well trained (with regular training updates) in relation to family violence and the particular issues of elder abuse, and their role in responding to suspected and identified elder abuse situations.

They should use an appropriate screening tool at every assessment they undertake to increase the identification of elder abuse.

### Question 13 What changes should be made to aged care laws and legal frameworks to improve safeguards against elder abuse arising from decisions made on behalf of a care recipient?

OPA supports recommendation 6-2 from the Australia Law Reform Commission’s report *Equality, Capacity and Disability in Commonwealth Laws*, that:

“The Aged Care Act 1997 (Cth) should be amended to include provisions dealing with supporters and representatives consistent with the Commonwealth decision-making model.”[[16]](#footnote-16)

This would help ensure older people with cognitive impairment are adequately supported to make and enact decisions according to their will and preferences, thereby protecting them from people making decisions for them that contravene their rights.

OPA is concerned that the legal authorisation for restricting the movement of residents in aged care facilities remains unclear. OPA guardians making accommodation decisions on behalf of a represented person have been asked to consent to placing that person in a locked facility (for example, a secure dementia ward) and it is unclear whether they have the power to make an accommodation decision that has serious implications for future liberty of movement.

OPA sees restrictive interventions in supported accommodation settings (including aged care) as a key area for legislative reform.

See our response to Question 16 below for a discussion of the issue of restrictive interventions in aged care settings and proposed legislative changes to the ACA that would help address the existing gaps.

We also note that the Victorian Institute of Forensic Medicine is undertaking a project on physical restraint related deaths in nursing homes and is developing draft recommendations for prevention of physical restraint related deaths in nursing homes. One of their proposed recommendations is that a universal definition of physical restraint be legislatively articulated.

### Question 14. What concerns arise in relation to the risk of elder abuse with consumer directed aged care models? How should safeguards against elder abuse be improved?

As with all ‘consumer choice’ service models, OPA’s main concern is how people with cognitive impairment or mental ill-health are assisted to make decisions in these frameworks. In particular, OPA advocates for sufficient safeguards to ensure that both supported and substituted decisions about aged care are not open to abuse, and are made in such a way that is consistent with the Commonwealth decision-making model[[17]](#footnote-17) and that promotes the personal and social well-being of the older person.

Major decisions can be made on behalf of an older person, particularly in the financial realm with little scope for restitution when those decisions are detrimental to the older person’s personal and social well-being. OPA has a great deal of experience in situations where informal or formal decision-making arrangements have been abused. One example OPA is aware of involves an older woman whose younger relatives supported her premature placement in aged care in order to gain control of her house through fraudulent use of a power of attorney. OPA can provide further information about this matter on request.

As elder abuse affects a small but significant proportion of people with dementia a clear safeguarding framework is required to ensure the consumer directed aged care models do not undo the human rights gains they aim to promote.

### Question 16. In what ways should the use of restrictive practices in aged care be regulated to improve safeguards against elder abuse?

Currently, the ACA does not comprehensively regulate restrictions upon liberty.[[18]](#footnote-18) People with impaired capacity who do not actively resist can be admitted into an aged care facility (often via hospital) with the informal consent of a family member.[[19]](#footnote-19) Restrictive practices such as physical restraint, seclusion,[[20]](#footnote-20) and chemical restraint are common in aged care settings and are often intended to protect residents from harm (for example, serious injury from falls or from wandering into traffic). However, there is clear potential for aged care providers to be motivated to use restrictive practices to make it easier or less costly to care for residents, some of whom may have challenging behaviours. Residents who are restrained are also at risk from harm including death (see our response to Question 11).

Solutions to the adverse consequences from physical restraint in nursing home residents include legislative change, implementing dementia friendly environments, increasing awareness of the risk of restraints and better assessment, reporting, monitoring and authorisation of restrictive interventions by a qualified body.

The current situation in relation to regulation of restrictive practices involving people who lack decision-making capacity (and who do not protest impositions on their liberty), are discussed in the article “Consent versus scrutiny: Restricting liberties in a post-Bournewood Victoria” by Williams, Chesterman and Laufer.[[21]](#footnote-21) Therein the authors argue that there are a set of people in Victoria who (like the individual at the heart of the Bournewood legal case) are experiencing serious restrictions on their freedoms without any legal framework, potential for review of their situation or independent oversight, and that these legislative gaps need to be addressed to prevent human rights abuses.

The authors point out that use of restrictive practices in these unregulated settings contravenes Australia’s commitments to Article 14(1) in the *Convention on the Rights of Persons with Disabilities,*[[22]](#footnote-22) and the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment* *or Punishment*.

The authors critique two proposed methods for addressing this human rights issue, the United Kingdom’s Deprivation of Liberty Safeguards (the DOLS) and the proposal by the Victorian Law Reform Commission (VLRC) in its final report on the GAA of a “collaborative authorisation process”, and argue for an alternative framework modelled on the regulation of restrictive interventions under Victoria’s Disability Act 2006.[[23]](#footnote-23)

The authors point to the practical and conceptual complexity of the DOLS system in the United Kingdom and likely uneven coverage of situations of concern,[[24]](#footnote-24) and to the additional barrier of Australia’s state/federal divide in responsibilities (for health and disability services on one hand and aged care on the other) to dismiss it as unworkable in the Victorian context.[[25]](#footnote-25) These concerns would hold for Australia as a whole.

While the VLRC’s ‘collaborative authorisation process’[[26]](#footnote-26) is identified by the authors as “the most thoroughgoing consideration of the issue in Australia to date” they have a number of concerns about the proposal. These concerns include:

* the potential for the ‘health decision-maker’ to be someone who may be estranged or otherwise uninterested in the wellbeing of the person concerned
* the process lacks the involvement of an independent ‘disability rights’ advocate
* the process would only apply to particular types of services (the others would, ideally under this proposal, defer to the decision of a VCAT-appointed guardian, and
* the process does not clearly state which restrictive practices would trigger the use of the collaborative authorisation process (this would likely result in uneven use of the process).[[27]](#footnote-27)

OPA supports the authors’ recommendations to address the existing gaps in Victorian and federal legislation in relation to restrictive interventions. OPA believes that aged care legislation requires a clear framework for restrictive practices, which could be achieved through changes to the ACA or the incorporation of binding guidelines for service providers.[[28]](#footnote-28) However we believe that ideally these would be part of a suite of changes that bring comprehensive regulation and oversight to all of the supported accommodation settings where people without decision making capacity reside (including public and private providers). This will not be without challenge as the “solution should be sufficiently robust to protect vulnerable people but workable enough that service providers actually implement it”.[[29]](#footnote-29)

Changes to legislation must begin from the principle that “[a]ny interference with a person’s liberty is unlawful unless authorised by law”,[[30]](#footnote-30) making clear that “a restriction upon freedom is not rendered lawful simply because its motivation is benign”.[[31]](#footnote-31)

OPA supports amendments to the ACA which closely follow the ‘restrictive interventions’ regime in the Victorian Disability Act 2006 (the Act). Despite some limitations, the authors see the Act’s framework as a valuable one whose basic principles and procedures should be replicated across service contexts. These principles include:

* the legislation maintains the most limited role possible for restrictive practices
* the Senior Practitioner’s position that “through the adoption of other service approaches, the use of restraint and seclusion can, and should, be largely eradicated”.[[32]](#footnote-32)

Further, the authors identify the key benefits of this framework as including:

* the expert advice to services around complying with the legislation and the monitoring role of the Senior Practitioner (noting that the Senior Practitioner would be more appropriately independent from government service provision if it was a statutory body)
* the legislation requires that the restrictions being authorised must be ‘necessary in light of a person’s disability’, and ‘address behaviours that may cause physical harm’ further ensuring that any restrictions placed are the ‘least restrictive of the person as is possible in the circumstances’
* an ‘independent person’ is provided to explain the restrictions imposed and provide a reporting pathway to bring issues to the attention of the Public Advocate or the Senior Practitioner
* interested parties can request a review by VCAT, who have the power to confirm, request changes to the plan and end the use of restrictive interventions.

### Question 17. What changes to the requirements for reporting assaults in aged care settings should be made to improve responses to elder abuse?

As discussed in the Issues Paper,[[33]](#footnote-33) the ACA, section 63-1AA requires ‘reportable assaults’ to be reported to the police and to the Secretary of the Department of Health as soon as reasonably practicable (within 24 hours). However, the *Accountability Principles 2014* provide that reporting is not mandatory where the assaults are perpetrated by a resident with cognitive or mental impairment, and other requirements are satisfied (including that strategies to manage the perpetrator’s behaviours are in place within 24 hours of the assault).

OPA feels that providing an exception to mandatory reporting of assaults under these conditions is too lenient. Further, as mentioned above in our response to Question 16, without adequate regulation of restrictive practices, and assistance to reduce their use, we would hold concerns about the behaviour management strategies being implemented to address the behaviour of the perpetrator.

While OPA notes that resident-to-resident assaults involving people with cognitive impairment very likely result from the “expression of frustration from residents with unmet needs”[[34]](#footnote-34) as the Victorian Institute of Forensic Medicine found in their review of research into deaths due to resident to resident assault in residential aged care, we do not feel that avoiding mandatory reporting is in the interests of aged care residents. Indeed, ensuring that all assaults are reported, ideally with enhanced investigation skills and detailed reporting that is regularly analysed, will help “grow our knowledge of the nature of resident to resident assaults to prevent harm to a vulnerable population”.[[35]](#footnote-35)

The findings and recommendations in relation to the reporting of assaults in disability service settings from the Victorian Parliament’s *Inquiry into abuse in disability services: Final Report* and the Victorian Ombudsman’s *Reporting and investigation of allegations of abuse in the disability sector: Phase 2 – incident reporting* may also be of interest to the Commission.

### Question 18. What changes to aged care complaints mechanisms should be made to improve responses to elder abuse?

A review of the use of restrictive practices by an oversight body should be able to be requested.

### 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?

Providing residents with independent and accessible advocacy services is essential to protecting the rights of older people in care. This is particularly important when moving to a consumer directed model of care to enable consumers to get the full benefit of such a system: including advocacy services that can support and advocate for people with cognitive impairment.

The Community Visitors Scheme operating in nursing homes, engages volunteers to visit elderly isolated residents. These volunteers may be the only potential independent advocate a person has; however, the visit is ‘social’ in nature and does not allow visitors to take on an advocacy role on behalf of residents. This is different from the Community Visitors Volunteer Program hosted by OPA, which operates in a range of supported accommodation settings in Victoria, where visitors have a clear mandate to inquire into any case of suspected abuse or neglect of a resident and can make reports directly to the Department of Health and Human Services and the Victorian Parliament.

Amending the functions of the aged care community visitors scheme to include such functions (and providing appropriate training) would likely improve identification and responses to elder abuse in nursing homes.

### Question 21 What other changes should be made to aged care laws and legal frameworks to identify, provide safeguards against and respond to elder abuse?

OPA has proposed various legislative changes in our responses to Question 13 and Question 16. We have nothing further to add here.

## The National Disability Insurance Scheme

### Question 22 What evidence exists of elder abuse being experienced by participants in the National Disability Insurance Scheme?

Given the age limit of 65 years that applies to NDIS participants at the point of joining the scheme there are unlikely to be many existing participants old enough to be experiencing elder abuse. OPA is not aware of any older participants at this stage.

### Question 23. Are the safeguards and protections provided under the National Disability Insurance Scheme a useful model to protect against elder abuse?

The NDIS National Safeguards framework has not yet been released. In transition to full NDIS rollout existing state safeguards continue to apply.

As discussed in relation to restrictive interventions, the existing safeguards and protections for consumers under the Victorian Disability Act are excellent and may provide a useful human rights focused model to consider (see response to Question 16).

## Financial institutions

### Question 25. What evidence is there of elder abuse in banking or financial systems?

Common avenues for financial abuse of older people that OPA is aware of include:

* Informal arrangements where a trusted family member or friend uses the older person’s key card to access their funds
* Misuse of Power of Attorney instruments to access funds
* Joint bank accounts where the older person’s pension is deposited and the funds are misused (or otherwise inaccessible).

OPA refers the Commission to the reports that present the findings of the Protecting Elders’ Assets Study, funded by State Trustees Ltd and undertaken by Monash University.[[36]](#footnote-36)

### Question 26. What changes should be made to the laws and legal frameworks relating to financial institutions to identify, improve safeguards against and respond to elder abuse? For example, should reporting requirements be imposed?

A case study from OPA’s advice service, published in Chesterman 2013, demonstrates just some of the complexities in identifying and responding to financial abuse:

“A woman is accompanied to a bank by her son and one other family member, who withdraw significant amounts from a joint account. The manager of the bank has concerns that the woman is being coerced, but with no evidence of incapacity, and voicing concerns about privacy laws, he is uncertain what he should do. On contacting a professional administrator, who raised the matter with OPA, the manager is advised to conduct an initial inquiry into the woman’s ability to make her own decisions, with advice that an administration application should be lodged if there are concerns.”[[37]](#footnote-37)

Chesterman goes on to highlight the benefits to those involved in this matter of a clearly identified complaints and investigations body to whom the bank manager could have reported his concerns.[[38]](#footnote-38) As detailed in our response to Question 33 below we believe OPA is well placed to fulfil this role.

OPA is not convinced that mandatory reporting should be imposed in such cases, however we are open to further argument.

Training in identifying and responding to elder abuse, as well as uniform Power of Attorney laws across Australia, would support financial institutions to more fully and appropriately respond to financial abuse.

## 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?

As the Issues Paper notes,[[39]](#footnote-39) there are different mechanisms by which a person may come to be a legally recognised substitute decision-maker for someone else. In OPA’s experience, the different mechanisms of appointment and diverse safeguards that govern these appointments raise different issues and opportunities for redress. In our response to this question we will consider powers of attorney separately from court or tribunal appointed guardians and administrators (see Question 32 below).

Powers of attorney, including enduring powers of attorney (EPAs), are personal (as opposed to tribunal) appointments. OPA is very aware of the possibilities for abuse of these powers by those appointed, some of which is malevolent and some inadvertent or resulting from a lack of understanding of the responsibilities of the role. Through our role as ‘guardian of last resort’, and our free public advice service, we have direct experience of many cases where these personal appointments have been abused or fraudulently gained (for example, signed after the person concerned lost the capacity to sign an EPA).[[40]](#footnote-40)

OPA had significant input, through submissions and consultations, into the development of the Victorian *Powers of Attorney Act 2014* (POAA) that came into effect on 1 September 2015. Throughout this process OPA has maintained that, despite their associated risks, Enduring Powers of Attorney (EPAs) are “an effective means by which individuals can retain some control over their affairs in the event of their incapacity, through the assistance of a trusted person.”[[41]](#footnote-41) They are therefore considered less restrictive than tribunal appointed substitute decision makers.

OPA has advocated for a number of safeguards to be built into the regulation and operation of EPAs to protect vulnerable people and mitigate the likelihood of their misuse and abuse. Some of these were incorporated into the new Victorian POAA, for example:

* new indictable offences for dishonestly obtaining, revoking or using an EPA, punishable by up to five years imprisonment[[42]](#footnote-42)
* power to Supreme Court or VCAT to order financial compensation from the attorney to the ‘principal’[[43]](#footnote-43) for loss caused by the attorney acting under an EPA[[44]](#footnote-44)
* strengthened witnessing requirements for EPAs[[45]](#footnote-45)
* simplifying instruments of personal appointment by bringing EPA (Financial) and Enduring Power of Guardianship under the one new POAA and allowing one form to be used to give a person (or separate people) different powers.[[46]](#footnote-46)

OPA supports the development of new POA legislation in other states modelled on our new act, as recommended by the NSW Parliament’s General Purpose Standing Committee in the report on the findings of their inquiry into elder abuse in NSW in 2016.[[47]](#footnote-47) The power to order the attorney to pay compensation in the event of misuse of an EPA is particularly significant as financial abuse is a very common form of elder abuse and without this power it is both expensive and difficult, sometimes impossible, to get money back even when wrongdoing is evident.[[48]](#footnote-48)

Key safeguards that OPA continues to advocate for include mandatory registration and uniform national laws governing Powers of Attorney. Mandatory registration of instruments would help prevent elder abuse by enabling banks, solicitors and others presented with an EPA by an attorney to check that it is current and authentic, or to determine who holds a EPA in relation to a particular person (if anyone). This ensures the autonomy of the person by the enacting their EPA in the event that they lose capacity. Mandatory (or compulsory) registration of powers of attorney before they are considered legally valid was recommended by Queensland and Victorian committees,[[49]](#footnote-49) this was supported by the VLRC in their review of the GAA[[50]](#footnote-50) and extended to a broader recommendation of “an online register of all appointments of substitute decision makers [for example, including VCAT appointments], co-decision makers and supporters”.[[51]](#footnote-51) Whether the register should be a national one, as recommended by the House of Representatives Standing Committee on Legal and Constitutional Affairs in their report *Older people and the law* in 2007,[[52]](#footnote-52) or a series of state based registers, will be influenced by moves towards uniform legislation.

Indeed uniform legislation on POA across states and territories was recommended in that report[[53]](#footnote-53) and the recently completed inquiry and report titled *Elder abuse in New South Wales* suggests the benefits of a national register be carefully considered by this inquiry.[[54]](#footnote-54) OPA supports calls for uniform legislation as it would reduce complexity in this area for both individuals moving states in later life, which many retirees do, and for financial institutions and other organisations that operate nationally helping ensure valid EPAs are respected and dealt with appropriately.[[55]](#footnote-55)

Other things OPA believes could help prevent and redress elder abuse related to misuse of EPAs include:

* education for attorneys committing elder abuse through ignorance (for example, financial mismanagement, not keeping track of a person’s funds or mixing them with their own funds)
* random audits of attorneys’ management of the principals’ financial affairs[[56]](#footnote-56) (also supported by Justice Connect).

### 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?

Yes, OPA is on record as supporting mandatory registration of powers of attorney.[[57]](#footnote-57) OPA also supports an electronic register for advance directives and medical and lifestyle instructional directives.[[58]](#footnote-58)

In relation to the reviews of Victorian laws in this field, OPA proposed the Victorian Registry of Births Deaths and Marriages as a possible host of a new register for POAs.[[59]](#footnote-59)

OPA would also support the introduction of a national register for Powers of Attorney and related instruments.

### Question 31. Should the statutory duties of attorneys and other appointed decision-makers be expanded to give them a greater role in protecting older people from abuse by others?

No, OPA perceives that expanding the statutory duties of attorneys may discourage potential attorneys from taking on the role, which we believe acts to protect the rights of persons with disability by allowing a trusted, chosen, person to make decisions on their behalf.

OPA does support the incorporation of new offences for misuse of substitute decision making instruments in the relevant legislation of Australia’s other states and territories following Victoria’s new POAA, sections 135 to 137.

### Question 32. What evidence is there of elder abuse by guardians and administrators? How might this type of abuse be prevented and redressed?

Elder abuse may also be experienced by people subject to a guardianship or administration order of VCAT (or relevant state/territory court or tribunal). While tribunal oversight when making the order makes it is less likely, OPA has occasionally been appointed guardian following allegations of elder abuse against a private guardian or has seen a professional administrator appointed after a private administrator failed to present VCAT with adequate records and was suspected of financial mismanagement.

In relation to preventing and redressing abuse by non-professional guardians and administrators, OPA has recommended:

* Education and training for private guardians and administrators, which could be provided in Victoria by OPA and State Trustees[[60]](#footnote-60)
* Annual reports to VCAT by guardians and administrators, with reports VCAT has concerns about referred to OPA for investigation[[61]](#footnote-61)
* Tribunal powers to order compensation (or repayment) by administrators misusing funds (as is now possible under the POAA)
* Civil penalties for abuse or misuse of powers without criminal intent, with abuse involving criminal intent referred for criminal investigation[[62]](#footnote-62). For example, OPA supports VLRC recommendation 305: “New guardianship legislation should provide that it is unlawful for a person with responsibility to care for a person with impaired decision-making ability because of a disability to abuse, neglect or exploit that person.”[[63]](#footnote-63)
* Expanded powers of investigation for OPA to look into suspected elder abuse, which includes circumstances where a private guardian is the perpetrator.

For further information, OPA’s submissions to the VLRC’s review of the GAA in 2010 and 2011 consider the question of how this abuse might be prevented or redressed.

In relation to professional guardians and administrators, OPA supports VLRC’s proposed merits review of OPA guardians and State Trustees administrators’ decisions by VCAT.[[64]](#footnote-64)

## Public advocates

### Question 33. What role should public advocates play in investigating and responding to elder abuse?

A number of people have identified a gap in the current ability of government agencies and the health service system to combat elder abuse: the problem of who is responsible for investigating and responding to a situation of concern involving a vulnerable older person where there is no obvious crime or medical emergency.[[65]](#footnote-65)

To address this gap “OPA would like the Public Advocate to have the power to investigate where a person with a disability is believed to be suffering abuse, exploitation or neglect.”[[66]](#footnote-66) This proposal extends the Victorian Public Advocate’s current powers of investigation, which are currently limited to circumstances in which where guardianship either is in place or should be in place.[[67]](#footnote-67)

As highlighted in the Issues Paper (paragraph 156), the VLRC made a set of recommendations[[68]](#footnote-68) in relation to new complaints and investigation functions for the Victorian Public Advocate. These recommendations included expanded investigation powers: own motion investigations, requiring persons to attend conferences or provide written materials pertinent to OPA’s investigation, a new offence for not providing required information to the Public Advocate’s investigation, and a process for obtaining a warrant to enter any premises where a person with disability is believed to be suffering abuse, exploitation or neglect. OPA supports these recommendations, which would ensure that all complaints and notifications of suspected abuse, exploitation and neglect of a person with a decision-making disability could be appropriately investigated and, where relevant, referred for follow-up or action to another agency, service or government body.

“The utilization by OPA of an enhanced investigation power would lead to a number of outcomes, which would include: applications for guardianship; advocacy with service providers (including arranging for emergency alternative accommodation); referrals to outside agencies such as the Ombudsman and Victoria Police; and the referral for action over breaches of the guardianship [and current Powers of Attorney] legislation.”[[69]](#footnote-69)

OPA would, however, prefer the proposed extended investigation powers to have broader application than just to adults with impaired decision-making disability, seeing at-risk adults as also benefiting from this extended power.[[70]](#footnote-70)

In total these powers would effectively fill the existing investigations gap and enable OPA to more fully respond to the requests it already receives to investigate these sorts of situations.

A second benefit of giving OPA broader investigation powers as opposed to other bodies or agencies is that OPA’s investigators are already skilled in the use of a supportive intervention approach: where “OPA investigators will see it as key to their role not only to report on what they have found, but to make immediate support referrals as soon as they begin investigating”.[[71]](#footnote-71)

Again with reference to Victoria’s situation, Chesterman’s Churchill Fellowship report discussed the possibility of dividing responsibility for investigating situations of concern on the basis of where people reside (in supported accommodation settings or the general community) but recommended against this on the grounds of the number of policy and legislative changes likely to be required:

 “A far simpler option, and the preferred one, is to give OPA the power as recommended by the VLRC, and allow institutional protocols to guide decisions about investigations in settings where multiple agencies have roles. Many of the visited jurisdictions have protective agencies whose roles overlap to some extent, and this can work well so long as there exist appropriate protocols and so long as there is institutional and interpersonal respect for the role of each agency.”[[72]](#footnote-72)

All this is to say that Public Advocates, and their equivalents in different states and territories, are well placed to receive complaints and investigate situations of concerns involving people with disability which do not involve a crime or a medical emergency. (The New South Wales Upper House inquiry into elder abuse, which made its final report in June 2016, made a recommendation that is consistent with the position put here.)[[73]](#footnote-73) Given the different complaints, administrative and service systems operating across Australian jurisdictions, each State and Territory would need to develop their own protocols to suit their circumstances.[[74]](#footnote-74)

These changes would be well complemented by a national elder abuse strategy.

### Question 34. Should adult protection legislation be introduced to assist in identifying and responding to elder abuse?

OPA is on record as supporting broad adult protection legislation.[[75]](#footnote-75) We are however mindful of the danger of attempting to replicate in Victoria the legislative frameworks seen overseas that operate in overseas jurisdictions with different health and care service systems.[[76]](#footnote-76) Indeed “while Victoria does not have a named ‘adult protection’ system as such, our combined disability and aged care approach does provide protection for at-risk adults in a way comparable to other jurisdictions that utilise the term adult protection in his Churchill fellowship. Chesterman finds that “Victoria’s system does not require …any wholesale overhaul” however “there are some significant changes that could be made that would improve our protection of at-risk adults”.[[77]](#footnote-77)

The key legislative changes Chesterman identified were to:

* entrust a government or semi-government agency with clear authority to investigate situations of concern, including in private residences as well as in supported accommodation, utilising a supportive intervention approach; (discussed in Q33 above) and
* enable Victorian courts and tribunals to make a wider range of protective orders than are currently available (as alternatives to guardianship orders): including entry and assessment orders, removal and placement orders, service provision orders, banning orders, and supported decision-making orders.[[78]](#footnote-78)

These new VCAT orders should be based on vulnerability, as opposed to decision-making impairment due to disability, with vulnerable adult defined as “someone in need of community care services by reason of mental or other disability, age or illness; and who is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation.”[[79]](#footnote-79)

Other legislative changes that would protect the rights of older Australians (more broadly defined than usually accepted under elder abuse definitions) include:

* Deprivation of liberty safeguards (discussed in relation to aged care above);
* Amending guardianship legislation (in Victoria, and other states/territories as required) to include routine use of pharmaceuticals (like anti-libidinal medication and sedatives) under ‘medical treatment’ to ensure the personal and social well-being of the represented person is considered in these types of decisions, and avoid unlawful restrictive interventions.[[80]](#footnote-80)
* New criminal laws relating to the ‘failure to protect at-risk adults’ by an organisation with a duty of care (see response to Question 42 for more details).

## Health services

### Question 35. How can the role that health professionals play in identifying and responding to elder abuse be improved?

OPA supports the development of specific elder abuse training, informed by the WHO’s *Clinical Policy Guidelines on Responding to Intimate Partner Violence and Sexual Violence Against Women* as referenced in the Issues Paper.[[81]](#footnote-81)

The role of health professionals in identifying and responding to elder abuse can be strengthened by enhanced training on these issues, developing clear response and reporting protocols (informed by the will and preference of the older person), and the use of in-house champions of improved responses to elder abuse (along with funding to achieve these improvements). Clarity around where concerns should be reported to where no obvious crime has occurred could be enhanced by empowering OPA to investigate abuse, neglect and exploitation of at-risk adults (as discussed in Question 33).

As referenced in the Issues Paper,[[82]](#footnote-82) St Vincent’s Hospital in Melbourne has undertaken these practice improvements, developing a unique integrated model of care that promotes effective responses to elder abuse.

### Question 37. Are health-justice partnerships a useful model for identifying and responding to elder abuse? What other health service models should be developed to identify and respond to elder abuse?

Yes, OPA supports the development and evaluation of health-justice partnerships. Hospitals and health services provide a ‘window of opportunity’ for people experiencing health issues to disclose abuse. It is widely acknowledged that effective responses to elder abuse require a coordinated multi-disciplinary approach. Legal advice empowers people to act if and when they decide they want to, while health and community services can help strengthen the person’s circle of support and protect them from abuse.

### Question 38. What changes should be made to laws and legal frameworks, such as privacy laws, to enable hospitals to better identify and respond to elder abuse?

OPA encourages the Commission to consider changes to legislative frameworks which would ensure the wellbeing of at-risk adults is not compromised by overly rigid privacy laws.

## Forums for redress

### Question 39. Should civil and administrative tribunals have greater jurisdiction to hear and determine matters related to elder abuse?

Yes, taking Victoria as an example, OPA and others have identified a dearth of protective mechanisms for older people at-risk in the community:

“Where judicial intervention is warranted here, then guardianship orders and intervention orders tend to be the key protective mechanisms. While other protective orders are possible (including in the fields of involuntary mental health treatment, criminal justice, civil detention and public health…) guardianship and intervention orders are the key protective orders available for adults who are at-risk in the community (but who are not in a state of mental health crisis).”[[83]](#footnote-83)

As discussed in previous submissions,[[84]](#footnote-84) and recognised by the VLRC in their review of guardianship laws, and the ALRC in their inquiry into equal recognition before the law of people with disability,[[85]](#footnote-85) there are a number of excellent reasons to avoid turning guardianship orders into a catch-all protective mechanism: including contravening the *Convention on the Rights of Persons with Disabilities.[[86]](#footnote-86)*

Following his study of leading overseas adult protection jurisdictions, Chesterman recommended that:

“The Victorian Parliament should grant the Victorian Civil and Administrative Tribunal the power to make a wide range of orders in relation to at-risk adults, as alternatives to guardianship orders, including:

* entry and assessment orders;
* removal and placement orders;
* service provision orders;
* banning orders; and
* supported decision-making orders.”

OPA supports this recommendation and believes it would, with due process safeguards embedded in legislation, both reduce the reliance on guardianship orders and benefit people experiencing elder abuse (both who have a decision-making disability and who do not, but are nevertheless vulnerable and in need of protection).

### Question 40 How can the physical design and procedural requirements of courts and tribunals be improved to provide better access to forums to respond to elder abuse?

With regard to tribunal hearings, OPA supports moves towards regionalisation to promote access to tribunal proceedings for a greater number of people. OPA supports the use of community spaces, as opposed to courts, where possible to help ensure tribunal hearings “are conducted with as little formality as possible and from within a therapeutic jurisprudence approach”.[[87]](#footnote-87) OPA would support other physical design improvements that promoted accessibility for people with disability and reduced the formality of the setting.

OPA also supports moves to make courts and tribunals more accessible to the CALD community through use of interpreters in hearings, diversity training for members and the judiciary, and accessible translated materials.[[88]](#footnote-88)

OPA is also on record as supporting the amendment of the *Victorian Civil and Administrative Tribunal Act 1998* to give a “represented person a right to legal representation in all guardianship matters. In addition, VCAT should be statutorily empowered to appoint independent representatives where this is deemed appropriate. Further … people who may be subject to guardianship orders should be provided with information and referrals about advocacy services before hearings.”[[89]](#footnote-89)

### Question 41. What alternative dispute resolution mechanisms are available to respond to elder abuse? How should they be improved? Is there a need for additional services, and where should they be located?

OPA is wary of alternative dispute resolution mechanisms being used in elder abuse matters, as power imbalance is clearly an issue. There would need to be excellent safeguards in place for OPA to support the use of mediation or other dispute resolution processes.

## Criminal law

### Question 42. In what ways should criminal laws be improved to respond to elder abuse? For example, should there be offences specifically concerning elder abuse?

OPA believes there is scope to improve the response to elder abuse through the development of a range of new offences or amendments to existing laws. Possibilities include:

* enhance criminal law relating to age-related vulnerability (Rodney Lewis NSW has proposed a new law along these lines)
* broaden current crimes against people with cognitive impairment to include victims with age-related vulnerability
* new crime of ‘failure to protect at-risk adults’, following Victoria’s stronger ‘Failure to Protect’ laws to protect children from sexual abuse.[[90]](#footnote-90) In relation to elder abuse, this law would ideally include organisations that have substantial involvement with the at-risk adult (for example, aged care providers and day services).
* create indictable offences for misuse of powers of attorney in all states and territories (See for example, Victoria’s POAA 2014, sections 135-137, and recent recommendation from NSW Elder Abuse Inquiry to follow suit).[[91]](#footnote-91)
* broaden victims of crime compensation
* expand definitions of family violence to include subtle financial abuse, as proposed by Justice Connect.

OPA would prefer new offences to have the potential to address elder abuse, as opposed to being limited to circumstances involving elder abuse. OPA believes that laws that address crimes against ‘at-risk adults’ and/or people with ‘age-related vulnerability’ will more successfully address existing gaps in current legislative frameworks than new ‘elder abuse’ offences.

### Question 43. Do state and territory criminal laws regarding neglect offer an appropriate response to elder abuse? How might this response be improved?

As noted in the Issues Paper,[[92]](#footnote-92) Victoria has no criminal law regarding neglect (or ‘failure to provide the necessities of life’ by someone with a duty to do so). OPA has no specific comment on how the laws of other states and territories could be improved.

As discussed above in Question 42, OPA supports the development of a new ‘failure to protect at-risk adults’ law that could address neglect of an older person by organisations with a duty of care.

### Question 44 Are protection orders being used to protect people from elder abuse? What changes should be made to make them a better safeguard against elder abuse?

OPA is not aware of the level of use of Victoria’s Family Violence Act’s Intervention Orders and Personal Safety Orders in relation to elder abuse. The experience of Seniors’ Rights Victoria suggest that many older people do not see intervention orders as a good option for them:

* they want the abuse to stop but may not be willing to see their family member prosecuted; or
* where the person responsible for the abuse is also their carer, they may see the violence as preferable to ending up without a carer and having to move into an aged care facility.

We are keenly aware of guardianship being used as a protective measure, and guardianship applications are a common response to elder abuse by health and community services where the person suffering abuse has a cognitive impairment. As discussed in Question 39, OPA believes this is not always the best response.

OPA believes that VCAT should be endowed with the power to make a greater range of protective orders (as specified in Question 39) to improve safeguards for at-risk adults.

### Question 45 Who should be required to report suspected elder abuse, in what circumstances, and to whom?

OPA encourages the Commission to consider how laws like the Northern Territory law, which, as highlighted in the Issues Paper,[[93]](#footnote-93) requires an adult to report their belief that domestic violence has occurred,[[94]](#footnote-94) might help protect people from elder abuse.

OPA is not convinced that additional mandatory reporting requirements,[[95]](#footnote-95) beyond what we recommend in our answer to question 42, will lead to improved protections for at-risk adults. However we are open to further discussion on this topic.

OPA instead looks to encourage reporting through the designation of a clear state (or national) point of contact for concerns about at-risk adults alongside a public education and awareness campaign. See the model proposed by the VLRC, for example, where OPA is empowered to receive complaints and allegations of abuse, neglect and exploitation and investigate them. (Further information provided in response to Question 33).

### Question 46. How should the police and prosecution responses to reports of elder abuse be improved? What are best practice police and prosecution responses to elder abuse?

The Issues Paper highlighted the benefit of the NSW Police Force’s policy of mandated action in response to family violence.[[96]](#footnote-96) Victoria also has a *Code of Practice for the Investigation of Family Violence*[[97]](#footnote-97) that specifies compulsory police “action on any family violence incident reported to them, regardless of who made the report and how it was made”.[[98]](#footnote-98) This document specifies a range of actions, considerations and referrals required by Victoria Police which could inform the development of best practice responses to elder abuse.[[99]](#footnote-99) OPA has direct experience of the benefits of this policy for people threatened by family violence. The same policy guideline defines family violence broadly, and includes “abuse of elderly people by family members”,[[100]](#footnote-100) however understanding of and service responses to elder abuse are not as advanced as they are in the field of intimate partner violence.

Police responses could be further enhanced by training around elder abuse, and, as mentioned already in the Issues Paper, increased specialisation in crimes against older people with a focus on financial abuse as recommended by the Victorian Royal Commission into Family Violence.[[101]](#footnote-101)

OPA supports two further recommendations regarding the development of expertise in relation to financial abuse of at-risk adults:

* Chesterman’s 2013 report’s recommendation that “Victoria Police and the Victorian Office of Public Prosecutions should be encouraged to examine and replicate the work of the Seattle Police Department and King County prosecutors in investigating and prosecuting individuals involved in crimes against at-risk adults.”[[102]](#footnote-102)
* Queensland Parliamentary Committee’s recommendation that: “the Queensland Police Service explore further opportunities to leverage financial sector partnerships and technological systems to trace questionable or irregular transactions and identify early intervention opportunities.”[[103]](#footnote-103)

The introduction of a new ‘Failure to protect at-risk adults’ crime would bring the opportunity to develop further expertise in the investigation and prosecution of elder abuse involving neglect, violence and exploitation.

### Question 47 How should victims’ services and court processes be improved to support victims of elder abuse?

OPA supports the provision of court support services to victims of elder abuse, and all other measures designed to enhance access to justice, including legal representation and advocacy services. Training and education for court staff and the judiciary on elder abuse and cultural diversity would also be appropriate (see also our response to Question 40).

### Question 50 What role might civil penalties play in responding to elder abuse?

In circumstances where criminal prosecution is unlikely to proceed due to difficulties gathering evidence (which can be the case where the victim has a cognitive impairment), civil penalties can be useful because they can be successfully prosecuted with less evidence.

For example, OPA supports the VLRC recommendations in relation to “civil penalties for a new public wrong”.[[104]](#footnote-104) In particular:

* Recommendation 305. New guardianship legislation should provide that it is unlawful for a person with responsibility to care for a person with impaired decision-making ability because of a disability to abuse, neglect or exploit that person; and
* Recommendation 306. A person who is found to have committed this wrong should be liable to a civil penalty.

OPA is on record as supporting civil penalties for abuse or misuse of substitute decision-making powers without criminal intent, with abuse involving criminal intent to be referred for criminal investigation.[[105]](#footnote-105) Either way, abuse or misuse of substitute decision-making powers should result in the immediate revocation of that power and the person being ruled ineligible for subsequent appointment as a substitute decision-maker.

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16. Australian Law Reform Commission, 2014, *Equality, Capacity and Disability in Commonwealth Laws:* *Summary Report* *124*, p. 24 [↑](#footnote-ref-16)
17. Ibid [↑](#footnote-ref-17)
18. Spivakovsky, C., 2012, *Restrictive Interventions in Victoria’s Disability Sector Issues for Discussion and Reform*, Office of the Public Advocate: Melbourne, p. 4-5 [↑](#footnote-ref-18)
19. Victorian Law Reform Commission (VLRC), 2012, *Guardianship Final Report*, p. 318 [↑](#footnote-ref-19)
20. For example, practices such as doors secured with “keypads” to prevent some residents wandering may impact other people who do not benefit from these measures; or physical restraints to confine people to their bed or chair. [↑](#footnote-ref-20)
21. Williams, M., Chesterman, J., and Laufer, R., 2014, “Consent versus scrutiny: Restricting liberties in a post-Bournewood Victoria”, *Journal of Law and Medicine*, Vol 21, pp. 641-660 [↑](#footnote-ref-21)
22. This is because the article provides that individuals cannot be “deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty must be in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty” (Smith, A & Sullivan, D (2012) “A New Ball Game: The United Nations Convention on the Rights of Persons with Disabilities and Assumptions in Care for People with Dementia”, *Journal of Law and Medicine*, Vol 20, cited in Williams et al, 2014) [↑](#footnote-ref-22)
23. Williams et al, 2014 [↑](#footnote-ref-23)
24. Ibid, p. 650 [↑](#footnote-ref-24)
25. Ibid, p. 651 [↑](#footnote-ref-25)
26. This involves a tripartite authorisation process for deprivations of liberty for people in supported residential settings: the approval of the person running the accommodation facility, a doctor and the “health decision-maker” (a person able to make medical treatment decisions under the GAA) must be gained to authorise restrictions on the person’s liberty. (Williams et al, 2014, p.652-3) [↑](#footnote-ref-26)
27. Williams et al, 2014, pp.654-655 [↑](#footnote-ref-27)
28. As OPA stated in its submission to the VLRC in response to the final report on Guardianship, we believe “that it is important for the federal government to develop deprivation of liberty guidelines as part of its general regulation of aged care”. (OPA, 2012, *Response to the Victorian Law Reform Commission’s Final Report on Guardianship*, p. 6) [↑](#footnote-ref-28)
29. Williams et al, 2014, p. 657 [↑](#footnote-ref-29)
30. VLRC, 2012, p. 320 [↑](#footnote-ref-30)
31. Williams et al, p. 657 [↑](#footnote-ref-31)
32. Ibid, p. 659 [↑](#footnote-ref-32)
33. Australian Law Reform Commission (ALRC), 2016, *Elder Abuse Issues Paper*, p. 25 [↑](#footnote-ref-33)
34. Farrah et al, 2015 [↑](#footnote-ref-34)
35. Ibid [↑](#footnote-ref-35)
36. Available to download from www.statetrustees.com.au/financial-elder-abuse-research/ [↑](#footnote-ref-36)
37. Chesterman, 2013, p. 25 [↑](#footnote-ref-37)
38. Ibid, p. 10 [↑](#footnote-ref-38)
39. ALRC, 2016, pp. 33-34 [↑](#footnote-ref-39)
40. OPA is not alone in this experience: the NSW Trustee and Guardian’s submission to the NSW Parliamentary Inquiry into Elder Abuse noted that 73 matters involving financial elder abuse were responded to by their legal unit in 2014-15. More than a quarter of those matters involved a person misusing a POA, 15 were the child of the person they were acting for. p. 4 <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-submission-details.aspx?pk=%2053851> (accessed 22 July 2016). [↑](#footnote-ref-40)
41. OPA, 2010, *Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper*, p. 38 [↑](#footnote-ref-41)
42. POAA, s135 [↑](#footnote-ref-42)
43. ‘Principal’ is the person giving the power [↑](#footnote-ref-43)
44. POAA, s77 [↑](#footnote-ref-44)
45. The new POAA (section 35) requires that at least one of the two witnesses needed is either a medical practitioner or someone authorised to witness affidavits (as opposed to just a statutory declaration as previously (*Instruments Act*, s125)), and neither can be a relative of either the ‘principal’ (person endowing the power) or the appointed ‘attorney’. These changes are intended to prevent new EPAs being made where the ‘principal’ lacks the capacity to make this decision. [↑](#footnote-ref-45)
46. POAA, s22(2) “…a person may make an enduring power of attorney for personal or financial matters or both.” [↑](#footnote-ref-46)
47. NSW Parliament, General Purpose Standing Committee No. 2, 2016, *Elder abuse in New South Wales,* Report No. 44,p. xviii [↑](#footnote-ref-47)
48. Ibid, pp. 86-88 [↑](#footnote-ref-48)
49. Communities, Disability Services and Domestic and Family Violence Prevention Committee (Qld), 2015, *Inquiry into the adequacy of existing financial protections for Queensland’s seniors*, Report No. 2, 55th Parliament, Rec. 37; Victorian Parliament Law Reform Committee, 2010, *Inquiry into Powers of Attorney Final Report*, Rec. 67 [↑](#footnote-ref-49)
50. VLRC, 2012, Rec. 97 [↑](#footnote-ref-50)
51. Ibid, p. 350; and see also Recs 259-262 [↑](#footnote-ref-51)
52. House of Representatives Standing Committee on Legal and Constitutional Affairs, 2007, *Older people and the law*, Rec. 20 [↑](#footnote-ref-52)
53. Ibid, Rec. 16 [↑](#footnote-ref-53)
54. NSW Parliament, 2016, p. 101 [↑](#footnote-ref-54)
55. See for example the Australian Banking Association’s submission cited in the Communities, Disability Services and Domestic and Family Violence Prevention Committee (Qld), 2015, pp. 149-150 [↑](#footnote-ref-55)
56. OPA, 2011, *Submission to VLRC’s Guardianship Consultation Paper*, p. 40 [↑](#footnote-ref-56)
57. Ibid, p. 14 [↑](#footnote-ref-57)
58. Ibid, p. 19 [↑](#footnote-ref-58)
59. Ibid, p. 14 [↑](#footnote-ref-59)
60. Ibid, p. 47 and VLRC, 2012, Recs 293 and 294 (which include appointments being subject to ‘undertaking a designated training program’ and Victoria’s professional guardianship and administration bodies being funded to provide community education on new laws), p. 413 [↑](#footnote-ref-60)
61. OPA, 2011, p. 39 [↑](#footnote-ref-61)
62. “Civil penalties should be applied to substitute decision makers who abuse or misuse their powers, but without apparent criminal intent. In addition to being liable for a civil penalty such as a fine, substitute decision makers who abuse or misuse their powers should have their powers revoked immediately, and be ruled ineligible for subsequent appointment as substitute decision makers.

Where there are grounds for a reasonably held view that substitute decision makers have abused their power with criminal intent, because they appear to have acted with malevolence or reckless indifference to the well-being of the person, there should be a heightened approach. In these cases, they should be subject to immediate removal by VCAT and referral to Victoria Police for criminal investigation.” OPA, 2011, p. 41 [↑](#footnote-ref-62)
63. VLRC, 2012, p. 422 [↑](#footnote-ref-63)
64. OPA, 2011 p. 41; VLRC, 2012, Recs. 315 to 317 [↑](#footnote-ref-64)
65. For example: Chesterman, 2013; Lacey “Neglectful to the point of cruelty? Elder abuse and the rights of older persons in Australia”, *Sydney Law Review,* 2014, vol. 36, pp. 99-130 [↑](#footnote-ref-65)
66. OPA, 2011, p. 43 [↑](#footnote-ref-66)
67. GAA, section 16(1)(h) [↑](#footnote-ref-67)
68. VLRC, 2012, Recs. 328-334 [↑](#footnote-ref-68)
69. OPA, 2011, pp. 43-44 [↑](#footnote-ref-69)
70. OPA, 2010, p. 27: “New guardianship legislation should outline ability of Public Advocate to report on, and provide advocacy in, individual situations where people have a disability, or where people are otherwise vulnerable due to a lack of autonomy.”; NSW Parliament, 2016, p.142 [↑](#footnote-ref-70)
71. Chesterman, 2013, p. 81 [↑](#footnote-ref-71)
72. Ibid [↑](#footnote-ref-72)
73. Recommendation 11: “That the NSW Government introduce legislation to establish a Public Advocate’s Office along the lines of the Victorian model, with powers to investigate complaints and allegations about abuse, neglect and exploitation of vulnerable adults, to initiate its own investigations where it considers this warranted, and to promote and protect the rights of vulnerable adults at risk of abuse…” NSW Parliament, 2016, p. xviii [↑](#footnote-ref-73)
74. For example, Chesterman’s 2013 report (p. 81) recommends with regard to the Victorian context that ”In order properly to exercise a broader investigation power, the Office of the Public Advocate should develop protocols, or amend existing protocols, between it and: Victoria Police; the Department of Human Services; the Department of Health; the Victorian Civil and Administrative Tribunal; the Disability Services Commissioner; State Trustees Ltd; Seniors Rights Victoria; the new Commissioner for Senior Victorians; and other relevant agencies.” [↑](#footnote-ref-74)
75. OPA, 2010, pp. 6 and 11 [↑](#footnote-ref-75)
76. OPA, 2010, p. 6 [↑](#footnote-ref-76)
77. Chesterman, 2013, p. 78 [↑](#footnote-ref-77)
78. Ibid, Rec. 2, p. 7 [↑](#footnote-ref-78)
79. OPA, 2010, p. 7 [↑](#footnote-ref-79)
80. Ibid, p. 8 [↑](#footnote-ref-80)
81. ALRC, 2016, p. 39 [↑](#footnote-ref-81)
82. Ibid, p. 40 [↑](#footnote-ref-82)
83. Chesterman, 2013, p. 82 [↑](#footnote-ref-83)
84. OPA, 2010, p. 6 [↑](#footnote-ref-84)
85. ALRC (2014) recommended decision-making support for persons who require it (Rec 3-2) and review of state and territory legislation (Rec 10-1) including in relation to guardianship laws. [↑](#footnote-ref-85)
86. Chesterman, 2013, p. 83 [↑](#footnote-ref-86)
87. OPA, 2011, pp. 54-55 [↑](#footnote-ref-87)
88. Ibid, p. 54 [↑](#footnote-ref-88)
89. Ibid, p. 51 [↑](#footnote-ref-89)
90. *Crimes Act 1958*, section 49C [↑](#footnote-ref-90)
91. NSW Parliament, 2016, Rec 7, p. xviii [↑](#footnote-ref-91)
92. ALRC, 2016, p. 43 [↑](#footnote-ref-92)
93. Ibid [↑](#footnote-ref-93)
94. For further details see the Northern Territory’s *Domestic and Family Violence Act*, sect 124A, ‘Reporting domestic violence’ [↑](#footnote-ref-94)
95. Which exist in the *Aged Care Act* *1997*, and, for example, in the *Disability Act (Vic) 2006* in relation to residential services [↑](#footnote-ref-95)
96. ALRC, 2016, p. 45 [↑](#footnote-ref-96)
97. Victoria Police, *Code of Practice for the Investigation of Family Violence*, 3rd Edition June 2014, (accessed July 29, 2016 <http://www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media_ID=464>) [↑](#footnote-ref-97)
98. For more detail on required response see ‘Section 2.3 Compulsory Police Action’, Victoria Police, *Code of Practice for the Investigation of Family Violence* [↑](#footnote-ref-98)
99. Ibid [↑](#footnote-ref-99)
100. Ibid [↑](#footnote-ref-100)
101. Royal Commission into Family Violence (Victoria), 2016, *Summary and Recommendations*, Rec. 155 [↑](#footnote-ref-101)
102. Chesterman, 2013, p. 79 [↑](#footnote-ref-102)
103. Queensland Parliament, Communities, Disability Services and Domestic and Family Violence Prevention Committee, 2015*,* Rec. 19 [↑](#footnote-ref-103)
104. VLRC, 2012 [↑](#footnote-ref-104)
105. OPA, 2011, p. 41 [↑](#footnote-ref-105)