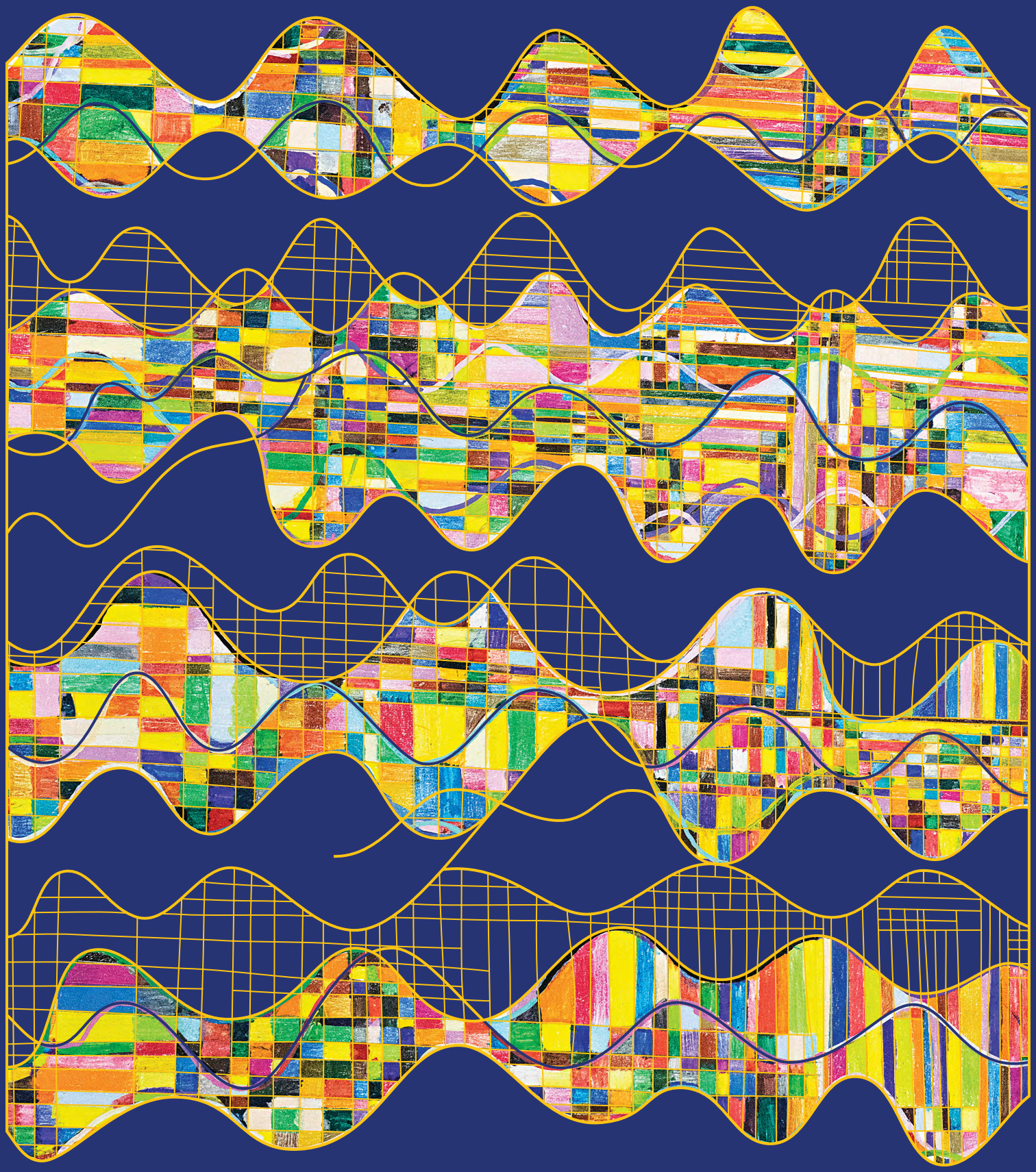
Line of sight: Refocussing Victoria's adult safeguarding laws and practices

Office of the Public Advocate

AUGUST 2022



Cover image
Monica Lazarri
Untitled, 2020
Greylead pencil, marker, paint pen, and pencil on paper
70 x 50 cm

Monica Lazzari creates complex abstract paintings and collage incorporating bold colour fields, bright saturated colours, dot technique, abstract shapes and geometric patterns. Vibrant and multi-layered, she employs a vast colour palette with meticulous application of media. The works are active spaces, resonating with energy. Lazzari has been a regular studio artist at Arts Project Australia since 2006.

Line of sight: Refocussing Victoria's adult safeguarding laws and practices

ISBN: 978-0-6484797-9-6

Published August, 2022

Acknowledgement of Country

This report was written on the land of the Wurundjeri and Boon Wurrung people of the Kulin Nation. We acknowledge and pay our respects to Aboriginal and Torres Strait Islander peoples and Traditional Custodians throughout Victoria, including Elders past and present. We also acknowledge the strength and resilience of all First Nations people whose social and emotional wellbeing continues to be negatively affected by discrimination, racism, child removal and other devastating ongoing effects of colonisation.

Contents

Abbreviations

ADC	Ageing and Disability Commission
ALRC	Australian Law Reform Commission
ASU	Adult Safeguarding Unit
Disability Act	Disability Act 2006 (Vic)
FVISS	Family Violence Information Sharing Scheme
MARAM	Multi-Agency Risk Assessment and Management Framework
NDIS	National Disability Insurance Scheme
OPA	Office of the Public Advocate
SRS	Supported Residential Services
The Charter	Victorian Charter of Human Rights and Responsibilities Act 2006
VCAT	Victorian Civil and Administrative Tribunal
VLRC	Victorian Law Reform Commission

Message from the Public Advocate

Like many Australians, I was shocked and appalled by the horrific circumstances surrounding the tragic death of Ann Marie Smith in South Australia in 2020.

Ms Smith reportedly died of severe septic shock and malnutrition, having been left in a chair for 24 hours a day for more than a year by her sole paid carer. Many people have rightly asked how this could happen in a country as prosperous as ours – and what steps we as a community can take to ensure such horrific neglect of vulnerable people with disability never happens again.

The Office of the Public Advocate (OPA) has long held concerns about the endemic levels of violence and abuse experienced by at-risk adults living in our community like Ms Smith who, because of their care and support needs, may be unable to protect themselves from abuse or neglect.

OPA's mission is to protect and promote the rights, interests and dignity of people with a disability. It is a statutory office, independent of government and government services.

Each year, OPA receives more than 1100 calls from people raising concerns about neglect or abuse of people with disability. The callers are service providers, neighbours or family members who are concerned enough to contact my office for advice and, in many cases, expect that OPA or another agency will take action to address the situation. Unfortunately, this is not always possible.

My current safeguarding functions enable my staff to respond to some – but not all – situations of concern reported.

For example, if the person at risk is living in Specialist Disability Accommodation or a Supported Residential Service, OPA's Community Visitors can visit the facility, monitor and report on the adequacy of the services provided and, where possible, communicate with residents to ensure they are being treated with dignity and respect. Many people with disability, however, like Ms Smith, live in private accommodation, which is not subject to the same oversight, and where OPA staff and Community Visitors do not have the legislative authority to make such a visit.

In situations where the person at risk is unable to make certain decisions due to their disability, an application for guardianship can be made. OPA may be asked by the Victorian Civil and Administrative Tribunal (VCAT) to investigate if guardianship or administration is required. If VCAT makes an order appointing me as guardian, I am then authorised to make decisions to safeguard the person's right to live free from violence, abuse and neglect.

While in some cases guardianship is an important protective mechanism, I am concerned that it is too often the only available option to protect the person. Guardianship by its very nature limits the human right of all adults to make their own decisions. It should only be used in limited cases, as a last resort, if there is no less restrictive alternative to protect and promote the human rights of an adult with disability.

In addition, in many of the situations reported to OPA raising concerns about the safety and wellbeing of an at-risk adult, there is no indication that the person may require guardianship. In these cases, there is nowhere for my staff to refer concerned callers, because unlike some other states and territories, there is no adult safeguarding agency with the responsibility to investigate these matters in Victoria.

This report draws on stories (which have been de-identified) that starkly illustrate the impact of the system failures on adults who are at-risk. It identifies gaps and failures in the current framework and makes seven recommendations to improve Victoria’s safeguarding laws and practices for all at-risk adults. The recommendations aim to ensure that we do not lose sight of any adult in our community who may be at risk of experiencing violence, abuse or neglect.

This report would not be possible without the generous input from many people and organisations who share OPA’s vision for a society in which the human rights of people with a disability are fully realised. In particular, I thank Deirdre Pinto, members of the initial project Steering Committee, participants at consultations, and everyone who provided feedback on the report.

Colleen Pearce
Public Advocate

Introduction

Recent Royal Commissions and other inquiries have heard harrowing accounts of the abuse, neglect and exploitation of Australian adults, often at the hands of people they relied on for care.[1]

While these inquiries have focused on specific cohorts and service systems – such as aged care,[2] family violence,[3] disability[4] and mental health[5] – the stories they heard show that adults at risk of abuse do not fall neatly into service-defined categories. This was noted in the report *Elder Abuse – A National Legal Response* by the Australian Law Reform Commission. The Commission recommended that adult safeguarding laws should define 'at-risk' adults to mean people aged 18 years and over who:

- have care and support needs
- are being abused or neglected, or are at risk of abuse or neglect
- are unable to protect themselves from abuse or neglect because of their care and support needs.[6]

Many Australians have been shocked and dismayed to hear of vulnerable members of the community being abused. For example, the death in South Australia of Ann Marie Smith in horrific circumstances in 2020 left Australians wondering how this could happen in this country.[7] Ms Smith reportedly died of 'severe septic shock, multi-organ failure, severe pressure sores, malnutrition and issues connected with her cerebral palsy after being stuck in a cane chair for 24 hours a day ... for more than a year.'[8]

1 Eugene Boisvert, 'SA Police investigating death of woman in "disgusting and degrading circumstances"', *ABC News* (online, 15 May 2020) <https://www.abc.net.au/news/2020-05-15/police-investigate-death-of-chairbound-woman-in-adelaide/12253326>.
2 'Home', *Royal Commission into Aged Care Quality and Safety* (Web Page) <https://agedcare.royalcommission.gov.au>.
3 'Report and Recommendations', *Royal Commission into Family Violence* (Web Page) <http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>.
4 'Home', *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Web Page) <https://disability.royalcommission.gov.au>.
5 'Final report available now', *Royal Commission into Victoria's Mental Health System* (Web Page) <http://rcvmhs.archive.royalcommission.vic.gov.au>.
6 Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Report No 131, May 2017), 387 [rec 14-3].
7 Stacey Pestrin and Daniel Keane, 'What has changed since the tragic death of Ann Marie Smith?' *ABC News* (online, 1 August 2021) <https://www.abc.net.au/news/2021-08-01/ann-marie-smith-what-changes-have-been-made/100335540>.
8 Eugene Boisvert (n 1).

Even though Ms Smith was in receipt of services regulated by the Australian Government, state government safeguarding agencies were in the spotlight.[9]

Victorians would like to think that such tragic circumstances could not occur here. Sadly, as is discussed in this report on the Office of the Public Advocate Adult Safeguarding Project, there are at-risk adults living in appalling circumstances in Victoria.

A continuing obligation to safeguard at-risk adults

The preventable death of Ms Smith highlights how swiftly state and territory disability regulators have been sidelined in the transition to federal funding and regulation of services and the simultaneous shift to consumer choice and control. The role of other Victorian Government safeguarding functions, such as the Community Visitors Program and the Public Advocate's safeguarding roles under the *Disability Act 2006* (Vic), are not keeping pace with the changing disability service environment – with new funding and support models, and providers, emerging rapidly. There are also instances where safeguards do exist but are not operating effectively due to resource constraints, lack of awareness, or information sharing barriers.

The Victorian Government's obligation endures, notwithstanding the state's diminishing footprint in the regulation of key sectors supporting at-risk adults. It is imperative that Victorians not covered by federal safeguarding arrangements are protected by Victorian safeguards, and that the interface between the Victorian and Australian safeguards operates effectively.

The COVID-19 pandemic has shone a light on the vulnerability and isolation of many at-risk adults, underscoring how important it is for the government to retain sight of these Victorians and ensure that laws and systems are in place to prevent, identify and respond to abuse.

Unlike some other Australian jurisdictions, the Victorian Government has yet to act on the recommendation of the Australian Law Reform Commission's 2017 report that:

> *'Adult safeguarding laws should be enacted in each state and territory. These laws should give adult safeguarding agencies the role of safeguarding and supporting "at-risk" adults'.*[10]

[9] Government of South Australia, *Safeguarding Task Force Report* (Report, 31 July 2020).
[10] *Elder Abuse – A National Legal Response* (n 6) 377 [rec 14-1].

The Adult Safeguarding Project

The Office of the Public Advocate (OPA), with funding from the Victorian Government, conducted the Adult Safeguarding Project to identify ways of better safeguarding at-risk adults.

The project found that there is a complex, difficult-to-navigate network of state and federal safeguarding arrangements. As noted by Dr David Caudrey, commenting on the death of Ms Smith:

> *'[t]here are multiple players and when there are multiple players, if you're not careful you find each player defines what they do, and everybody thinks that somebody else is taking responsibility'.*[11]

Although the Victorian Government has demonstrated a strong commitment to addressing violence and abuse in our community – and enormous advances have been made in the rollout of recommendations from the Royal Commission into Family Violence – OPA identified significant gaps in Victoria's adult safeguarding system.

A key issue is that regulatory bodies assume responsibility solely for the provision of the services they regulate, and their functions and powers are limited. Critically, there is no agency able to investigate the safety and wellbeing of at-risk adults who cannot access the services they need; who are experiencing abuse, neglect or exploitation that does not meet a criminal threshold; or who otherwise fall through the cracks between the maze of services and regulation in an environment that is continuously evolving.

As a result, my office is receiving an increasing number of calls from staff of service providers advising that they have been instructed to call OPA to 'report' that an at-risk client is being abused by someone in the community. Unless the person about whom concerns have been raised has a cognitive disability, my office has no powers to deal with these reports, nor in many cases is there an agency to which OPA can refer the caller.

The stories gathered as part of the Adult Safeguarding Project show that service providers may be well placed to identify abuse, but there is a risk that people will 'fall from view' if there is no agency for service providers and members of the public to report their concerns.

[11] Leah MacLennan, 'Ann Marie Smith was surrounded by privilege but died in squalor – and her life remains a mystery', *ABC News* (online, 23 May 2020) <https://www.abc.net.au/news/2020-05-23/little-is-known-about-the-life-of-ann-marie-smith/12275658>.

The report

The report, drawn from the findings of the Adult Safeguarding Project, begins by examining, in Chapter 1, the policy and service context for adult safeguarding. It puts forward a compelling case for change, based on the Victorian Government's human rights obligations, changes in the delivery and oversight of key services for at-risk adults, and evidence that the state is losing sight of at-risk adults with tragic consequences and costs for individuals and society.

In Chapter 2, relevant law reform recommendations are considered to identify the features of an effective adult safeguarding system.

Chapter 3 compares Victoria's current adult safeguarding system with the effective safeguarding features outlined in Chapter 2 and finds it wanting.

Stories are used in Chapter 3 to illustrate key points. They are mostly based on real cases or are typical of the types of situations seen by OPA. Names have been changed and identifying details removed to protect the privacy of the individuals involved. Other stories have been sourced from media reports or Coroner's findings. The names in those stories have not been changed.

The gaps and issues discussed in Chapter 3 are the basis for seven recommendations to the Victorian Government, presented in Chapter 4. Chapter 5 notes additional actions that are in the control of the Australian Government.

Rather than proposing a whole new service type or agency, the recommendations call for a series of manageable actions that the Victorian Government could take to refocus its adult safeguarding system. The cornerstone recommendation calls for the introduction of a new adult safeguarding function, within an existing agency, to respond to the abuse, neglect and exploitation of at-risk adults who fall through the widening gaps between existing safeguarding mechanisms. Appendix 1 discusses issues that would need to be considered in implementing this recommendation.

The cornerstone recommendation addresses many of the gaps identified across the system, but not all. A further six recommendations are made to ensure that the adult safeguarding system is effective in preventing and responding to the abuse, neglect and exploitation of at-risk Victorians.

The report notes that effective safeguarding depends on mainstream services being able to identify and respond to the abuse, neglect and exploitation of at-risk adults. Unfortunately, the underfunding of services in the family violence, aged care, mental health and disability sectors has been a common theme in the recent Royal Commissions in each of these areas. Each Royal Commission has linked underfunding to serious problems with the accessibility of services, and the quality, safety and appropriateness of the care they provide. Apart from the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, which is ongoing, each Royal Commission has recommended many reforms, almost

all of which will require new funding. It is to be hoped the investment in these services as part of implementing the respective Royal Commission recommendations will enable them to better recognise and support at-risk people in the community.

OPA further notes that significant reform is currently underway in Victoria that may go some way to addressing the gaps identified in this report. For example, under Objective 2 of the Safety Targeted Action Plan, the Victorian Government committed to amending the Disability Act to strengthen inclusion of people with disability and ensure that the legislation is responsive to Victoria's changing role in direct service delivery, oversight and safeguarding.[12] OPA's submission to the Victorian Government's Disability Act review argued that the review is an important opportunity to reconsider the Disability Act in light of the National Disability Insurance Scheme (NDIS) roll out. The NDIS has significantly changed the landscape of State provided disability services, including in relation to the regulation of new accommodation settings that have emerged because of the NDIS. OPA believes the regulation of this accommodation should fall within Victoria's remit, given the State has responsibility for tenancy rights. People are being left without the same levels of protections – statutory rights and safeguards – with the new accommodation variants that are emerging. OPA's submission to the Disability Act review made 69 recommendations for reform and can be found on OPA's website.

Social services reform is also underway, with legislation passing the Victorian Parliament to establish a new independent social services regulator and appoint a statutory officer. Among its responsibilities, the new regulator will cover Supported Residential Services (SRS). Consultation on the establishment of a single set of social service standards will shortly commence, as well as the development of supporting regulations. It is possible the new standards will be high-level, broad and subjective. OPA will strongly advocate for targeted standards to apply to the SRS sector. The changes to the regulation of the services by the new regulator will not, of themselves, resolve the gaps identified in this report which, in the main, concern violence, abuse and neglect perpetrated by members of the community. It will, however, be necessary, to ensure that the services regulated by the new regulator are obligated to prevent and respond to abuse and receive training and resources to do so.

The challenge for the Victorian Government at this point is to build an adult safeguarding system that can identify abuse and ensure a supportive intervention for all at-risk adults in all settings. While many key building blocks are in place, there are significant gaps through which at-risk adults are falling. This report offers a cohesive framework to address the gaps and risks identified through the Adult Safeguarding Project.

[12] Australian Government, *Safety Targeted Action Plan* (Plan, December 2021) 19. <https://www.disabilitygateway.gov.au/sites/default/files/documents/2021-12/1981-tap-safety-accessible-web.pdf>.

Summary and recommendations

In conducting the Adult Safeguarding Project, the Office of the Public Advocate aimed to identify opportunities to improve Victoria's safeguarding laws and practices for at-risk adults.

It conducted desktop research and interviewed stakeholders from relevant agencies in Victoria and other Australian jurisdictions to:

- identify current adult safeguarding reform recommendations and the background to these (including recommendations from the Australian Law Reform Commission and law reform commissions and their equivalents in Victoria, New South Wales, the Australian Capital Territory, Tasmania and Queensland)
- explore relevant and recent adult safeguarding law reform and practice developments in other Australian jurisdictions
- examine current and recent family violence reforms in Victoria and elsewhere, and consider their current and potential ability to meet the shortfalls identified nationally, and in Victoria, in the adult safeguarding field
- analyse the operation of current adult safeguarding laws and practices in Victoria, including in the guardianship, disability, and aged-care sectors
- develop recommendations for reform of the Victorian adult safeguarding system.

Summary of findings

The fundamental finding of the Adult Safeguarding Project concerns the lack of a comprehensive framework for protecting at-risk adults from abuse, neglect and exploitation. Victoria has a patchwork of agencies with specific roles, functions and powers, largely focused on the regulation of specific services or providers, or Victorians who have a decision-making disability. Some of those agencies lack the necessary powers to adequately protect and promote the rights of at-risk adults, while some adults fall between the various agencies completely.

The array of regulators and services is complex and difficult to navigate, and there is no central point for service providers and the public to report concerns about the abuse, neglect or exploitation of an at-risk adult. Further, current safeguards do not adequately capture violence, abuse or exploitation that does not meet a criminal threshold, such as neglect, psychological abuse, coercion or interference with supports.

Our cornerstone recommendation, for a new specialist adult safeguarding function, would go a long way towards filling the gaps in what is a fragmented set of services for at-risk adults, and would ensure that the Victorian Government can fulfill its ongoing responsibility to protect all at-risk adults from abuse, neglect and exploitation.

This, and our six other recommendations, would also address other key findings of the Adult Safeguarding Project. These are summarised below.

- While Victoria's family violence legislation and reform initiatives are transformative, there are gaps in the reform framework in terms of preventing and responding to family violence against at-risk adults. Specifically:
    - some types of 'family-like' relationships, such as residents living together in supported disability accommodation, are not covered by family violence legislation
    - the reforms do not cover significant service providers that work with at-risk adults. Financial institutions, and aged and disability services funded by the Australian Government, are not part of Victoria's family violence information sharing and risk assessment frameworks
    - the legislation does not explicitly reference common characteristics of abuse, neglect and exploitation of at-risk adults including, for example, cutting the person off from other supports and services
    - courts are not required to consider whether the respondent can understand and comply with any orders, leading to the criminalisation of some at-risk adults.

- Victoria's groundbreaking Family Violence Information Sharing Scheme does not apply outside the context of family violence, and service providers that suspect or encounter other forms of abuse lack clarity about when, how and with whom information should be shared. This is compounded by the lack of a central 'hotline' for reporting concerns about the abuse of at-risk adults. Privacy laws are not well understood, and agencies are generally risk averse in terms of potentially breaching privacy obligations by sharing information about abuse, neglect and exploitation.

- The analysis of relevant legislation conducted as part of the Adult Safeguarding Project revealed several opportunities to create a more comprehensive set of provisions for responding to various forms of abuse. Specific findings addressed by the report's recommended legislative reforms are that:

    - there is a gap between adult guardianship and child protection laws, such that neither the *Guardianship and Administration Act 2019* (Vic) nor relevant provisions of the *Children, Youth and Families Act 2005* (Vic) apply to young people who are 17 –years old.

    - some people are placed under guardianship when a less-restrictive option, if available, would be adequate to protect them

    - there is no accessible response for older people claiming less than a proprietary interest in assets for care disputes. The Australian Law Reform Commission had recommended that state and territory tribunals have jurisdiction to resolve family disputes involving residential property under these arrangements.[13]

- There is no overarching strategy for the prevention of abuse of at-risk adults in Victoria.

- Effective prevention strategies, and the ongoing development of a comprehensive adult safeguarding system, require good data about the level, nature and risk factors for abuse, neglect and exploitation. Currently, the publicly available data is inadequate for this purpose.

- Notwithstanding the need for a specialist safeguarding function, effective safeguarding of at-risk adults also depends on having mainstream services – such as disability, aged care, and mental health services – with the capability to assess abuse risks, recognise signs of abuse, and support people who are being abused. As well as a need to ensure adequate funding and appropriate staffing of these services generally, there is need for additional training and resources to build the capacity of mainstream services to identify and respond to the abuse, neglect and exploitation of at-risk adults.

[13] Elder Abuse – A National Legal Response (n 6) 214 [rec 6-1].

Recommendations

The Office of the Public Advocate's recommendations, outlined below, together form a comprehensive strategy to prevent and respond to the abuse, neglect and exploitation of at-risk adults.

It is recommended that the Victorian Government should:

Recommendation 1

Introduce legislation (adult safeguarding legislation) to establish a new, specialist adult safeguarding function, preferably within an existing agency such as the Office of the Public Advocate. The legislation should:

a. enable the agency to receive and assess reports of abuse, neglect and exploitation of at-risk adults via a well-resourced and publicised helpline; undertake investigations; and make and coordinate referrals to other agencies

b. be underpinned by human rights principles, including the principles of supported decision-making and informed consent to safeguarding actions, wherever possible

c. provide that the functions and powers of the new adult safeguarding agency apply to a specific cohort of at-risk adults who are unable to protect themselves from abuse, neglect and exploitation because of their care and support needs

d. provide a broad definition of abuse that captures the type of controlling behaviors commonly exhibited by perpetrators of abuse of at-risk adults.

Recommendation 2

Amend the *Family Violence Protection Act 2008* (Vic) to provide effective protection for at-risk adults. The legislation should:

a. specify that residents cohabitating in Supported Disability Accommodation are in 'family-like relationships' for the purposes of the Act

b. explicitly include behaviors common in cases of violence against at-risk adults, such as making the person dependent on the abuser, isolating the at-risk person from friends and family, and limiting the at-risk adult's access to services, as forms of family violence and provide examples in the legislation

c. ensure that, before making a Family Violence Intervention Order, the court is required to consider whether the respondent can understand the nature and effect of the order and is able to comply with its conditions.

The Victorian Government should negotiate with the Australian Government in relation to the prescription of Australian Government entities as Information Sharing Entities and in respect of the Multi Agency Risk Assessment and Management Framework. Relevant Australian Government entities include the National Disability Insurance Agency, the National Disability Insurance Scheme Quality and Safeguards Commission, and the Aged Care Quality and Safety Commission.

Recommendation 3

Ensure that robust information-sharing arrangements are in place in relation to violence against at-risk adults that are not instances of family violence. This will require, among other actions, amending the *Privacy and Data Protection Act 2014* (Vic) and the *Health Records Act 2001* (Vic) to (a) clarify that a serious threat to an individual's life, health, safety or welfare includes a serious threat to the individual's financial safety or welfare and (b) prescribe development of an education campaign for service providers and financial institutions on appropriate information-sharing.

Recommendation 4

Make additional legislative reforms to enable a more comprehensive range of responses to at-risk adults, including:

a. increasing the age jurisdiction of the *Children, Youth and Families Act 2005* (Vic) to under 18 years, to ensure that appropriate safeguarding mechanisms apply to young people aged 17 years old

b. granting the Victorian Civil and Administrative Tribunal the power to make a wider range of orders in relation to at-risk adults, as alternatives to guardianship orders, such as:

    i. entry and assessment orders
    ii. removal and placement orders
    iii. service provision orders
    iv. banning orders

c. extending the jurisdiction of the Victorian Civil and Administrative Tribunal under Part IV of the *Property Law Act 1958* (Vic) to cover disputes over claims of interests in land that arise in the context of assets for care arrangements. This would ensure that accessible dispute resolution options are available for older people claiming an interest other than a proprietary interest in the land that is the subject of the dispute (for example, a dispute over a right to reside in the property for the rest of the person claiming the interest's life).

d. in relation to at-risk adults with a decision-making disability, amending the Public Advocate's existing functions under the *Guardianship and Administration Act 2019* (Vic) to:

    i. give the Public Advocate the function of receiving complaints in relation to the abuse, neglect or exploitation of people with impaired decision-making ability due to a disability, and the misuse of powers by private individuals or organisations appointed to substitute decision-making and supportive decision-making roles

    ii. provide that where the Public Advocate believes that an investigation of these complaints is warranted, she should be able to investigate on her own motion

    iii. enable the Public Advocate, when conducting an investigation, to serve a written notice to a person requiring them to attend a conference and/or provide specified documents, written responses to questions, or other materials relevant to the investigation

    iv. make it an offence for a person to refuse or fail to provide information, or to attend a conference, when directed by the Public Advocate to do so

    v. permit the Public Advocate to apply to the Victorian Civil and Administrative Tribunal or to the Magistrates Court of Victoria for a warrant authorising entry to any premises where she believes that a person with impaired decision-making ability due to a disability is being abused, exploited or neglected.

Recommendation 5

Develop and implement a statewide strategy and action plan for the prevention of abuse, neglect and exploitation of at-risk adults, building on its Free from Violence and Dignity, Respect and Safer Services abuse prevention strategies.

Recommendation 6

Ensure that data about the incidence and nature of abuse of at-risk adults is collected and publicly reported.

Recommendation 7

Build the capacity of mainstream services to identify and respond to the abuse of at-risk adults.

Other options to improve the adult safeguarding system in Victoria are within the remit of the Australian Government and are noted in Chapter 5.

1.0

Why Victoria needs a safeguarding system for adults

The Victorian Government imperative for change stems from:

- → the global movement in attitudes towards disability
- → the transfer of funding and regulation of many disability services to the Australian Government
- → Australian Government regulation of most Victorian aged care services
- → increasing evidence of failures in adult safeguarding.

Together these have created an imperative for the Victorian Government to do more to ensure that all its citizens live free from abuse, neglect and exploitation.[14]

This chapter presents the 'case for change' in terms of refocusing Victoria's adult safeguarding system.

[14] The *Convention on the Rights of Persons with Disabilities* states that 'State Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects': *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 16.

1.1 Human rights obligations

A human rights approach affirms the inherent worth of every individual, recognising all people as rights bearers, and promotes and protects universal human rights.

International human rights treaties provide a framework for protecting the rights and dignity of all people and place obligations on state parties to respect, protect and fulfil rights. Governments must ensure not only that they and their agents do not violate human rights but must also take positive action to protect people from having their rights interfered with by third parties and punish perpetrators.[15]

The United Nations' *Convention on the Rights of Persons with Disabilities* places obligations on state parties, of which Australia is one, to provide dignity for all people with disability. Articles 12 and 16 require states parties to take:

- appropriate measures to provide persons with disabilities access to the support they may require in exercising their legal capacity, and to ensure that all related safeguarding measures respect the rights, will and preferences of the person

- all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse.[16]

The shift in attitudes towards people with disability required by the *Convention on the Rights of Persons with Disabilities*, as interpreted by Australia, is reflected in the shift in Victoria from the 'best interests' approach of the *Guardianship and Administration Act 1986* (Vic), to the 'will and preference' paradigm of the new *Guardianship and Administration Act 2019* (Vic). Under the new paradigm, a person with a disability requiring support to make decisions should be supported to make and participate in decisions affecting them, and their will and preference should direct, 'as far as practicable', decisions made for them.[17] To that end, a key objective of the new legislation is to protect and promote the human rights and dignity of people with a disability by supporting them, where necessary, 'to make, participate in and implement decisions that affect their lives'.[18]

[15] Revised Explanatory Statement, Crimes (Offences Against Vulnerable People) Legislation Amendment Bill 2020 (ACT).
[16] *Convention on the Rights of Persons with Disabilities* (n 14) art 12, art 16.
[17] *Guardianship and Administration Act 2019* (Vic) s 8.
[18] *Guardianship and Administration Act 2019* (Vic) s 7.

While there is no convention specifically relating to the rights of older people, there are several non-binding instruments, including the *United National Principles for Older Persons*[19] and the *Madrid International Plan of Action on Ageing*.[20] These instruments require state parties to ensure that older people can live free from violence and abuse, and make their own decisions about their lives.[21]

The Victorian *Charter of Human Rights and Responsibilities Act 2006* (the Charter) is also relevant. Of special importance are the rights to equality before the law; right to life; protection from torture and cruel, inhuman or degrading treatment; freedom of movement; privacy and reputation; protection of families and children; property rights; and the right to liberty and security of person.[22]

A human right may be limited only to the extent that can be justified based on human dignity, equality and freedom, and considering factors such as: the nature of the right; the importance and purpose of the limitation; the relationship between the limitation and its purpose; and any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.[23]

At its core, the challenge in designing an adult safeguarding system is striking an appropriate balance between the human right to legal capacity and the right to be free from all forms of exploitation, violence and abuse. The right to legal capacity, like any human right, should only be limited in circumstances where there is no less-restrictive means reasonably available to achieve the purpose of the limitation. This balance is particularly pertinent when considering the circumstances in which it is permissible to override a person's legal decision-making rights to ensure their safety.

1.2 Changing policy and service context

Some of the safeguarding gaps identified in this report have been created, or widened, by recent reforms that have seen the Australian Government assume responsibility for some disability and aged care services that were traditionally the responsibility of the Victorian Government. Major policy and service changes are outlined in this section.

[19] *United Nations Principles for Older Persons*, GA Res 46/91, UN GAOR, 46th sess, 74th plen mtg, Agenda Item 94(a), UN Doc A/RES/46/91 (16 December 1991) annex I.
[20] Second World Assembly on Ageing, *Political Declaration and Madrid International Plan of Action on Ageing*, Madrid, Spain (8–12 April 2002).
[21] *United Nations Principles for Older Persons* (n 19) annex I, [14], [17]; *Political Declaration and Madrid International Plan of Action on Ageing* (n 20) para 110.
[22] *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 8-10, 12-13, 17, 20-21.
[23] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7.

National Disability Insurance Scheme

The shift in attitudes to rights of people with disability and the *Convention on the Rights of Persons with Disabilities* have had a practical bearing on the adult safeguarding system. Specifically, the rollout of the NDIS, beginning in 2013, has brought significant reform to the disability sector.

The NDIS is Australia's first national program for people with disability. In a major change to traditional funding of disability services, it provides funding packages directly to individuals with disability, with the stated intention of enabling 'people with a disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports.'[24] As at the end of June 2021, '466,619 participants were receiving supports' under the scheme.[25]

While the NDIS has the potential to empower and transform the lives of people with disability, and in many cases is delivering real benefits, some people with complex and challenging support needs are not seeing the benefits that the scheme is intended to deliver. The individualised funding model and the marketisation of the sector has resulted in an increased number of services being involved in a participant's life: while each service system may have a duty of care and other legal obligations in terms of their own service delivery, in many cases there is no agency with responsibility for a care recipient's overall safety and wellbeing. The service model also gives providers liberty to refuse service provision, while 'thin markets' can result in there being no available services.

In addition to services for people with physical and intellectual disabilities, many of the Victorian Government's 'mental health community support services' for people with severe and enduring mental illness have transitioned to the NDIS. Although this has benefited some people with psychosocial disabilities, the Royal Commission into Victoria's Mental Health System found that the introduction of the NDIS has led to difficulties in accessing necessary and appropriate services – especially given that the NDIS has 'disrupted and depleted the non-government workforce that has traditionally provided wellbeing supports' to this group of people.'[26]

Similar failures exist in the context of aged care. The transition to federal regulation together with the increasing marketisation of aged care services has significant implications for state and territory governments in terms of safeguarding at-risk older adults.

---

[24] *National Disability Insurance Scheme Act 2013* (Cth) s 3(1)(e).

[25] National Disability Insurance Agency, *Annual Report 2020-2021* (Report, 29 September 2021) 5 <https://www.ndis.gov.au/about-us/publications/annual-report>.

[26] *Royal Commission into Victoria's Mental Health System Final Report Volume 1: A new approach to mental health and wellbeing in Victoria* (Report, February 2021) vol 1, 383.

Policy commitments for the prevention of elder abuse

The *National Plan to Respond to the Abuse of Older Australians 2019-2023* commits state and territory governments to 'review state and territory legislation to identify gaps in safeguarding provisions.'[27] The corresponding implementation plan commits the Victorian Government to 'review existing legislation in response to the recommendations in Chapter 14 of the Australian Law Reform Commission Report, which relate to the enactment of laws to safeguard and support at-risk adults.'[28]

Changing oversight of at-risk adults by state agencies

As discussed in Section 3.1 (page 47), there is a now complex network of state and federal safeguarding arrangements for the provision and oversight of disability services and aged care in Victoria. The focus of the regulation is on the conduct of providers. However, there is a growing unease that the shift to federal funding and regulation of disability services, in particular, has left no settled 'provider of last resort' to ensure service provision for people with complex needs.

Alongside the new regulatory framework and new business models emerging in the new environment, there has been an impact on Victorian Government safeguarding functions. The impacts on two key Victorian safeguards, the Public Advocate and the Community Visitor Program, are noted below.

The key issue – that the sector is growing outside the existing regulatory arrangements – means more people have no access to safeguarding protections. The growth of disability housing is putting more pressure on the existing safeguarding arrangements, and the NDIS funding and support models have seen an increase in uncategorised accommodation types that are not covered by any Act.

Public Advocate

As well as her roles described in Section 3.1, Table 2 (page 60), the Public Advocate plays an important safeguarding role in relation to the residency rights of residents of certain disability housing. Under the Disability Act, a disability service provider may issue a group home resident with a notice of temporary relocation or a notice to permanently vacate the group home. These notices, which are often initiated because of behaviours associated with the person's disability, may involve a person being required to urgently (often on the same day) relocate from their familiar surroundings and routine, with possible eviction to follow.

[27] Council of Attorneys-General, *National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019-2023* (Plan, 9 July 2019) 32 <https://www.ag.gov.au/rights-and-protections/publications/national-plan-respond-abuse-older-australians-elder-abuse-2019-2023>.

[28] Council of Attorneys-General, *Implementation Plan to support the National Plan to Respond to the Abuse of Older Australians 2019-2023* (Plan, 8 July 2019) 27 <https://www.ag.gov.au/rights-and-protections/publications/implementation-plan>.

Providers are required to notify the Public Advocate about any such notices they issue. The Public Advocate's safeguarding role in response to receiving such a notification is to ensure that the provider complies with their obligation to take all reasonable steps to resolve the issues that gave rise to the notice, and to provide advocacy in relation to issues that OPA considers have not been adequately addressed. Advocacy may also involve referral to the Community Visitors Program or to legal advocacy for the person, who may have grounds to challenge their eviction.

The Public Advocate endeavours to work with the resident in providing this safeguarding response, but there are times where people are not aware of the advocacy work undertaken on their behalf.[29]

Since the roll out of the NDIS, the residential rights of people with disability are increasingly being governed by Part 12A of the *Residential Tenancies Act 1997* (Vic) instead of Part 5 of the Disability Act. Part 12A of the Residential Tenancies Act applies to dwellings enrolled as Specialist Disability Accommodation. Except for State managed and funded Specialist Forensic Disability Housing and a few outliers, nearly all residents of current gazetted group homes will transition or have transitioned to protections under the Residential Tenancies Act. However, there are subtle differences in the protection of residential rights under these two regimes, which is diminished in some respects under the Residential Tenancies Act. Most concerningly, residents who enter a residential rental agreement are not afforded any of the protections available in Part 12A of the Residential Tenancies Act. This is discussed more below.

The Public Advocate's safeguarding role now extends to a growing number of Specialist Disability Accommodation properties. While Specialist Disability Accommodation notices drive a significant amount of work, their separation from Supported Independent Living services makes it more difficult for OPA (and other disability and legal advocates) to effectively advocate for actions to address the concerns that led to the notice within the statutory timeframe required. The Specialist Disability Accommodation provider is required to issue the notice and meet the requirements to resolve the issues, but this is problematic when the provider does not provide Supported Independent Living and has little to no involvement with the person or their support needs.

It is noted that OPA has not received ongoing additional funding to fulfil these statutory safeguarding functions under the Disability Act or the Residential Tenancies Act. Such funding is critical to ensure OPA can continue to fulfil its intended safeguarding functions for all Victorians with disability who are affected by processes and interventions under the Disability Act and Residential Tenancies Act.

[29] This also extends to the specialised individual advocacy undertaken by OPA under the Disability Act in relation to restrictive practices, civil detention and compulsory treatment for people with disability.

New safeguarding gaps

Another issue arising from the introduction of the NDIS is that an increasing number of people with disability are now living in novel accommodation arrangements that are outside the scope of existing residential rights frameworks.

Specialist Disability Accommodation is provided to only a small proportion of NDIS participants with extreme functional impairment or very high support needs and who meet specific eligibility criteria. People who do not meet these requirements need other forms of accommodation. This is also true of many people who want to leave their group homes and move to different accommodation, a quite common occurrence.

To accommodate people with disability who do not qualify for Specialist Disability Accommodation, Supported Independent Living providers have set up houses that operate like group homes used to; that is, the provider supports the residents with the activities of daily living. However, the funding for these houses can be from the residents – who usually pay rent (sometimes under a standard residential rental agreement) as well as contribute funds allocated in their NDIS plan for supported independent living services.

While the demand for housing in general remains high and the supply of Specialist Disability Accommodation is restricted, accommodation provided by Supported Independent Living providers will continue to grow. The residents of this type of Supported Independent Living allied accommodation and other novel accommodation and support arrangements do not appear to be covered by residential rights protections under Part 5 of the Disability Act nor Part 12A of the Residential Tenancies Act. Providers are therefore not required to notify the Public Advocate about any action they take to restrict or extinguish the residential rights of people living in these accommodation arrangements.

These types of accommodation arrangements do not clearly (or appropriately) fall under the *Supported Residential Services (Private Proprietors) Act 2010* (Vic) either. And, while the NDIS Quality and Safeguarding Commission has compliance powers, it is unclear how the Commission would assist individual residents with tenancy problems in accommodation provided by a Supported Independent Living provider.

The ambiguity of the protections afforded to residents in these settings is untenable and unfair. This regulatory and safeguarding gap poses a significant risk for residents. OPA's submission to the Review of the Disability Act makes a variety of recommendations relevant to this issue.

Community Visitors

OPA also manages Victoria's Community Visitors Program. Community visitors provide a key oversight role as independent volunteers appointed by the Governor in Council under the Disability Act, the *Supported Residential Services (Private Proprietors) Act 2010* (Vic) and the *Mental Health Act 2014* (Vic).

Community Visitors conduct regular unannounced visits to people with a disability and/or mental illness who live in a range of residential settings, including:

- any premises where a disability service provider is providing residential services, including dwellings enrolled as Specialist Disability Accommodation
- 24-hour mental health facilities
- Supported Residential Services.

Community Visitors provide extra eyes and ears to observe what is happening in a vulnerable person's life, but their role is becoming more complicated due to the shift to federal funding and regulation of disability services.

The Community Visitors Program exists within a multi-system approach to safeguarding the rights of people with disability in Victoria. The role of Community Visitors is to observe and report and, if unable to resolve issues with the relevant service, to refer issues to safeguarding agencies that are empowered to take action. The impact of the work of the Community Visitors therefore depends on effective relationships with other agencies within the multi-agency system. This includes establishing relationships with new providers that have assumed operational responsibilities for state-run group homes, and any new Specialist Disability Accommodation providers coming into the market.

There has been an explosion of new disability accommodation models with the influx of NDIS funding, but this has not been matched by changes to regulatory frameworks. Community Visitors are no longer visiting some residents with disability who they had been visiting for many years because the resident moved into alternate supported accommodation after transitioning to the NDIS (for example, settings leased by Supported Independent Living providers).

Some people living in supported accommodation settings hold residential rights (to different degrees according to the law that applies to them), but there are also people in qualitatively similar settings who do not. Many people who require assistance with the tasks of daily living, and do not independently own or rent their home, are now receiving NDIS-funded services in accommodation settings where they have no clear residential rights or access to Community Visitor safeguards.

OPA's submission to the Disability Act review discusses this topic extensively but confines its formal recommendations to legislative amendments to the Disability Act. However, legislation is only as effective as the mechanisms that support its

implementation in practice. To that end, OPA encouraged the Victorian Government to ensure all people with disability accessing supported accommodation settings (new and old) would have clear residential rights protections and access to the independent oversight of Community Visitors.

1.3 Prevalence and impact of abuse and neglect

It is well established that the incidence of violence, abuse and neglect is far higher for some community groups than others.

As stated in Australia's Disability Strategy, 'people with disability are more likely to experience violence, abuse, neglect'.[30] For example:

> *'[p]eople with disability are more likely to feel unsafe in their home than people without disability and over a twelve-month period are more than twice as likely to experience violence and abuse as people without disability. Women with disability experience higher rates of intimate partner violence, emotional abuse, stalking and sexual violence than women without disability and men with disability. Men with disability are also more likely to experience all these forms of violence and abuse than men without disability, particularly physical violence.'* [31]

A research report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability discussed the Personal Safety Survey (administered by the Australian Bureau of Statistics), which is the only national survey that collects data on the prevalence of different types of violence experienced by adults with disability living in private dwellings. While the authors noted several limitations of the survey data, the findings they cited included that:

> *'Since the age of 15, 64 per cent of people with disability (2,375,997 people) report experiencing physical violence, sexual violence, intimate partner violence, emotional abuse and/or stalking compared to 45% of people without disability.*
>
> *In the last 12 months, people with disability are at 1.8 times the risk of all types of violence in comparison to people without disability.'* [32]

---

[30] Australian Government, *Australia's Disability Strategy 2021-2031* (Strategy, December 2021) 14 <https://www.disabilitygateway.gov.au/document/3106>.

[31] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Violence and abuse of people with disability at home* (Issues paper, December 2020) 3 <https://disability.royalcommission.gov.au/publications/violence-and-abuse-people-disability-home>.

[32] Centre of Research Excellence in Disability and Health, *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability Research Report: Nature and extent of violence, abuse, neglect and exploitation against people with disability in Australia* (Report, March 2021) 9 <https://disability.royalcommission.gov.au/publications/research-report-nature-and-extent-violence-abuse-neglect-and-exploitation-against-people-disability-australia>.

People living with mental illness are also more likely to be a victim of crime than people without a mental illness. The Royal Commission into Victoria's Mental Health System reported research from the American National Crime Victimization Survey, which found that people living with severe mental illness were about 11 times more likely to be a victim of violent crime compared with the general population.[33]

Similarly, older people are also at an increased risk of experiencing violence, abuse and neglect. In releasing findings of its National Elder Abuse Prevalence Study, based on a survey of 7,000 Australians aged 65 years old and over who live in the community (that is, not in residential aged care settings), the Australian Institute of Family Studies reported that:

- *'One in six older Australians reported experiencing abuse in the twelve months prior to being surveyed between February and May 2020 (14.8%).*
- *Elder abuse can take the form of psychological abuse (11.7%), neglect (2.9%), financial abuse (2.1%), physical abuse (1.8%) and sexual abuse (1%).*
- *Perpetrators of elder abuse are often family members, mostly adult children, but they can also be friends, neighbours and acquaintances.*
- *People with poor physical or psychological health and higher levels of social isolation are more likely to experience elder abuse.'* [34]

While the data is limited, as discussed in Section 3.5, available evidence indicates that elder abuse, neglect and exploitation seriously harms not only the affected person but the broader community. A recent review by the National Ageing Research Institute found that:

> *'[e]lder abuse has deleterious consequences for the health and wellbeing of older people, as well as enormous social costs, warranting attention of policy makers … as a serious health issue'.*[35]

[33] In its Final Report, the Royal Commission into Victoria's Mental Health System cited LA Teplin, GM McClelland, KM Abram, and DA Weiner, 'Crime victimization in adults with severe mental illness: comparison with the National Crime Victimization Survey' (2005) 62(8) *Archives of General Psychiatry* 911-921: *Royal Commission into Victoria's Mental Health System Final Report Volume 3: Promoting inclusion and addressing inequities* (Report, February 2021) 355.

[34] 'Elder Abuse Prevalence Study', *Australian Institute of Family Studies*, (Web page) <https://aifs.gov.au/projects/national-elder-abuse-prevalence-study>.

[35] E Owusu-Addo, K O'Halloran, B Birjnath and B Dow, *Primary prevention interventions for elder abuse: A systematic review* (National Ageing Research Institute, 2020) 5 <https://www.nari.net.au/primary-prevention-of-family-violence>.

In economic terms, it was estimated that violence against women cost the Victorian community around $5.3 billion per year in 2015-16,[36] an unknown proportion of which relates to older women and women with disability. As heard by the New South Parliament:

> *'There is a financial cost to society when abuse and neglect results in increased demands on emergency services and hospitals, and on healthcare services and on aged care services, not to mention the damage done to the wellbeing of society as a whole when we fail in our collective moral responsibility to keep vulnerable people safe.'* [37]

1.4 Evidence that people are falling through the gaps

The Safety Targeted Action Plan under Australia's Disability Strategy reports that:

> *'individuals who experience, or are at risk of, violence, abuse, neglect and exploitation, face significant barriers to accessing and engaging with service systems designed to support them including those that take corrective action to address abuse and neglect. These barriers largely exist because these service systems often rely on individuals to seek out information, communicate and advocate for their needs, make informed decisions, and navigate within and across systems, to deliver services and supports effectively'.*[38]

Throughout this report, stories are used to illustrate many ways in which Victorians who are unable to seek out and access services are falling through the gaps in the state's current safeguards for at-risk adults.

In one story, a young man with a profound disability who was under the care of his mother who has a mental illness was discovered by police in dire circumstances. He had been confined to a room that was in a squalid condition and was so malnourished that hospital staff considered him at risk of re-feeding syndrome. He was a participant in the National Disability Insurance Scheme.

In another story, an ageing woman was found tied to a bed by officers from the family violence command. In yet another story, an adult son and his wife were prosecuted following the horrific death of the man's mother, who had been removed from aged care. She weighed 34 kilograms when she was found dead in a soiled nappy and covered in bruises or scabs.

---

[36] KPMG, *The cost of violence against women and their children in Australia: Summary Report* (Report, 2017) 2 <https://www.vic.gov.au/sites/default/files/2019-05/Cost-of-family-violence-in-Victoria.pdf>.

[37] New South Wales, *Parliamentary Debates*, Legislative Council, 5 June 2019, 62 (Damien Tudehope, Minister for Finance and Small Business) <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1820781676-78911>.

[38] *Safety Targeted Action Plan* (n 12) 2.

While there is a clear police response in these situations, there are many more circumstances where at-risk adults experience abuse, neglect or exploitation where the response is not so clear, and the abuse is at risk of being undetected. Examples include the family member interfering with a person's supports and the woman accompanied to the bank by a family member who withdraws an unusually large sum from her account. These stories illustrate why reforming adult safeguarding laws in Victoria is so critical.

Sadly, the stories in this report are not isolated examples, and there are serious repercussions for the people involved and the whole community.

2.0

Features of an effective safeguarding system

The best safeguard for any vulnerable individual is to have many people in their lives, preferably people who love and look out for them, who make sure the person is not left to their own devices when things go wrong.[39]

As part of the Adult Safeguarding Project, OPA examined recent adult safeguarding law reform recommendations in other Australian jurisdictions. This chapter outlines the key themes of these recommendations.

Six core features of effective adult safeguarding systems were identified, which are discussed in this chapter. These are:

- agencies with well-defined functions and powers to investigate and respond to reports of abuse, including through referral to other services, coordination of a supportive intervention, reporting to police, and applications for a court order to stop the abuse
- systems and measures to ensure abuse is identified, including workforce training and authorisation of information sharing with safeguarding agencies
- clear pathways for reporting abuse, including a central helpline to receive and assess reports of abuse
- a statewide, person-centered strategy grounded in human rights
- a prevention framework and program of activities to prevent the abuse of at-risk adults before it occurs
- mainstream services with the capacity and capability to recognise abuse and take appropriate action.

[39] *Safeguarding Task Force Report* (n 9) 22.

2.1 Well-defined powers and specialised resources

Many reports have noted that there should be agencies with appropriate functions, powers and resources to investigate instances of possible violence, abuse and neglect of at-risk adults. Recommendations have been made for new specialist agencies to fulfill these roles, either for all at-risk adults or specific cohorts, as well as for enhancements to the functions of existing safeguarding mechanisms, such as public advocates and guardians.

Some of the key reports and recommendations are outlined below.

Specialist agencies

In 2017, when the Australian Law Reform Commission published Elder Abuse – A National Legal Response, it reported that:

> *'…no government agency in Australia had the clear statutory role of safeguarding and supporting adults who, despite having full decision-making ability, are nevertheless at risk of abuse. In the ALRC's view, this protection and support should be provided by state adult safeguarding agencies.'* [40]

As a result, the Australian Law Reform Commission made the following recommendations:

- Adult safeguarding laws should be enacted in each state and territory. These laws should give adult safeguarding agencies the role of safeguarding and supporting at-risk adults.[41]

- Adult safeguarding agencies should have a statutory duty to make inquiries where they have reasonable grounds to suspect that a person is an 'at-risk adult'. The first step of an inquiry should be to contact the at-risk adult.[42]

The Tasmanian Coroner similarly recommended that the Tasmanian government consider the establishment of an independent body with specific responsibility for elder abuse by, inter alia, investigating complaints, researching and responding to the ill-treatment of older people, developing community education programs and overseeing cases where there is a risk of elder abuse.[43]

---

[40] *Elder Abuse – A National Legal Response* (n 6) 384 [14.40].
[41] *Elder Abuse – A National Legal Response* (n 6) 377 [rec 14-1].
[42] *Elder Abuse – A National Legal Response* (n 6) 386 [rec 14-2].
[43] *Mackozdi, Janet* (2018) 274 TASCD 44 <https://www.magistratescourt.tas.gov.au/__data/assets/pdf_file/0018/440280/Mackozdi,-Janet-Lois-latest-version.pdf>.

The South Australian *Closing the Gaps* report recommended stepped powers of investigation and intervention conferred on a new Adult Protection Unit, which has responsibility for receiving referrals, collating data, monitoring agency responses to reported cases, convening multi-agency adult protection case conferences and coordinating an interagency response in cases of reported abuse.[44] The Adult Safeguarding Unit (ASU) has been established and commenced operation on 1 October 2019.

The NSW Law Reform Commission similarly recommended that proposed new legislation should introduce new functions to be carried out by a new statutory agency, including to:

- investigate suspected abuse, neglect and exploitation on its own motion or in response to a complaint
- intervene in court or Tribunal cases in certain cases
- refer possible offences under the Act to law enforcement and prosecuting authorities.[45]

Finally, the NSW Ombudsman recommended that the NSW Government implement the recommendations of the NSW Law Reform Commission in relation to the establishment of an independent statutory body to investigate and take appropriate action in relation to the suspected abuse and neglect of vulnerable adults in NSW, as outlined in its report on the *Review of the Guardianship Act 1987*.[46]

In terms of the powers that the proposed specialist agency would need to perform the recommended functions, the Australian Law Reform Commission's *Elder Abuse – A National Legal Response* report recommended that adult safeguarding laws should provide adult safeguarding agencies with necessary coercive information gathering powers, such as the power to require a person to answer questions and produce documents.

Agencies should exercise such powers only where they have reasonable grounds to suspect that there is 'serious abuse' of an at-risk adult, and only to the extent necessary to safeguard and support the person.[47]

[44] Office of the Public Advocate (SA) *Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People* (Report, 2011) 14.
[45] New South Wales Law Reform Commission, *Review of the Guardianship and Administration Act* (Report No 145, May 2018).
[46] New South Wales Ombudsman, *Abuse and neglect of vulnerable adults in NSW – the need for action* (Report, November 2018) 4.
[47] *Elder Abuse – A National Legal Response* (n 6) 407 [rec 14-6].

The NSW Law Reform Commission recommended that the new statutory agency (which has since been established)[48] have the power to:

- apply to an authorised officer under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) for a search warrant of any premises, if the Public Advocate has reasonable grounds to believe that a person in need of decision-making assistance is at risk of abuse, neglect or exploitation on the specified premises or that the new Act is being contravened
- execute a search warrant issued by an authorised officer, including by entering specified premises, inspecting those premises for evidence of abuse, neglect or exploitation and seizing any evidence relevant to abuse, neglect or exploitation of a person in need of decision-making assistance
- require people, departments, authorities, service providers, institutions and organisations to provide documents, answer questions, and attend compulsory conferences
- refer complaints or allegations of abuse and neglect to public advocates (or equivalent) outside NSW for investigation or other appropriate action in response to alleged victims and/or alleged abusers moving across borders
- exchange information with the relevant bodies (including the Tribunal, the NSW Ombudsman's office, the National Disability Insurance Agency, the NDIS Quality and Safeguarding Commissioner, and relevant non-government organisations) on matters affecting the safety of a person in need of decision-making assistance – such as information relating to allegations of abuse and neglect
- have read-only access to the police and child protection databases.[49]

The Australian Law Reform Commission recommended a suite of responses where a safeguarding agency has reasonable grounds to conclude that a person is an at-risk adult. The report recommended that the agency may take any of the following actions, with the adult's consent:

- coordinate legal, medical and other services for the adult
- meet with relevant government agencies and other bodies and professionals to prepare a plan to stop the abuse and support the adult
- report the abuse to the police
- apply for a court order in relation to the person thought to be committing the abuse (for example, a violence intervention order)
- decide to take no further action.[50]

---

[48] 'Home', *New South Wales Government Ageing and Disability Commission*, (Web page) <https://www.ageingdisabilitycommission.nsw.gov.au>.

[49] New South Wales Law Reform Commission, *Review of the Guardianship and Administration Act* (Report No 145, May 2018) rec 13.1.

[50] *Elder Abuse – A National Legal Response* (n 6) 402 [rec 14-5].

Public advocates

Many inquiries have also made recommendations concerning the functions and powers of public advocates or their equivalent, either as an alternative or addition to the establishment of a specialist agency.

The Victorian Parliament Law Reform Committee recommended that the Victorian Government empower OPA to receive reports of suspected abuse of powers of attorney.[51] The Victorian Government stated that this recommendation required further consideration.[52]

The Victorian Law Reform Commission's *Guardianship: Final Report*, tabled in Parliament in 2012, went further than this, recommending that the Public Advocate should have a new function of receiving and investigating complaints in relation to the abuse, neglect or exploitation of people with impaired decision-making ability due to a disability. Further, it was recommended that the Public Advocate should be able to conduct an investigation on her own motion in relation to the abuse, neglect or exploitation of people with impaired decision-making ability due to a disability where she believes that an investigation is warranted.[53]

The Victorian Law Reform Commission also proposed that it should be an offence to refuse or fail to provide information, or to attend a conference or interview when directed by the Public Advocate to do so. It was recommended that the Public Advocate's powers of entry and inspection be retained, and that the Public Advocate should be permitted to apply to the Victorian Civil and Administrative Tribunal or the Magistrates' Court of Victoria for a warrant authorising entry to any premises when she believes that a person with impaired decision-making ability due to a disability who is on the premises is being abused, exploited or neglected.[54]

Examples of recommendations relevant to public advocates' functions and powers in other Australian jurisdictions are noted below.

- The NSW Legislative Council recommended that the NSW Government establish an Office of the Public Advocate with powers of investigation.[55]

[51] Victorian Parliament Law Reform Committee, *Inquiry into Powers of Attorney* (Report, August 2010) 190.
[52] Victorian Government, *Government response to the Parliament of Victoria Law Reform Committee Inquiry into Powers of Attorney Report* (Tabled Document, 10 February 2011) <https://www.parliament.vic.gov.au/assembly/publications-a-research/fact-sheets/49-lawreform/inquiry-into-powers-of-attorney/1029-content-and-news>.
[53] Victorian Law Reform Commission, *Guardianship Final Report* (Report No 24, 2012) lxxiii [rec 328 -329].
[54] Ibid lxxiii [rec 330 -334].
[55] General Purpose Standing Committee no. 2, Parliament of New South Wales, *Inquiry into Elder Abuse in New South Wales* (Report No 44, 24 June 2016) xvii [rec 1], Portfolio Committee No. 2 - Health and Community Service, Parliament of New South Wales, *Implementation of the National Disability Insurance Scheme and the provision of disability services in New South Wales* (Report, 6 December 2018) xiii [rec 23].

- The Tasmanian Coroner recommended, as an alternative to establishing a new independent body with specific responsibility for elder abuse, that the Tasmanian Government consider enhancing the power of, and appropriately resourcing, the Office of the Public Guardian to investigate complaints; research and respond to the ill-treatment of older people; develop community education programs; and oversee cases where there is a risk of elder abuse.[56]

- The Tasmanian Law Reform Institute recommended that the Public Guardian have the additional functions and powers to investigate:
    - complaints and allegations against supporters and representatives, including persons responsible
    - matters of its own motion
    - circumstances where a person with a disability is suspected to be subject to or at risk of harm, abuse, exploitation or neglect.[57]

- Recommendation 50 of the *Western Australian Statutory Revie*w into the Guardianship Act report proposed the extension of the Public Advocate's power so that the Public Advocate could investigate whether a person is in need of a guardian, in addition to an administrator.[58] Recommendation 48 called for the Guardianship and Administration Act be amended to provide that when undertaking an investigation, the Public Advocate may apply to the State Administrative Tribunal for a warrant authorising entry to any premise to determine if there is evidence that the person with a decision-making disability is experiencing abuse.[59]

2.2 Timely identification of abuse

Timely recognition of abuse is critical to minimising its impacts and the likelihood of escalation. Relevant law reform recommendations identify three important aspects of early identification: information sharing between service providers; workforce training; and specialist 'outreach' safeguards.

Information sharing

Law reform recommendations made by inquiries into elder abuse and vulnerable adults have recommended that relevant agencies should be able to share information to promote the safety of vulnerable or at-risk adults.

---

[56] *Mackozdi, Janet* (2018) 274 TASCD.
[57] Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas), Final Report* (Report No 26, December 2018) 377 – 395 [recs 16.1-16.6].
[58] Ibid 377–395 [rec 50, 52].
[59] Department of Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Report, November 2015) 52 [rec 48, 52].

The New South Wales Ombudsman's report, *Abuse and Neglect of Vulnerable Adults in NSW*, recommended that, as part of the establishment of the independent statutory body and to support the development and implementation of an effective and integrated safeguarding approach for vulnerable adults, the NSW Government should introduce legislative provisions to enable relevant agencies to exchange information that promotes the safety of vulnerable adults.[60]

The South Australian *Closing the Gap* report recommended that features of adult protection legislation should include an obligation on agencies and organisations to follow newly developed Information Sharing Guidelines.[61]

Workforce training

Broad workforce training is necessary to ensure that all workers likely to come into contact with an at-risk adult have the skills and knowledge to identify when a person might be experiencing abuse, neglect or exploitation.

The *NSW Legislative Council Inquiry into Elder Abuse in New South Wales* recommended an ambitious training plan to enable service providers to identify and respond appropriately to abuse.[62]

Outreach-based safeguarding mechanisms

There are some at-risk cohorts for whom abuse is less likely to be detected by third parties due to the person's vulnerability and the setting in which they receive care. It is important that there are mechanisms in place to assertively outreach into those settings and check on the wellbeing of residents.

[60] *Abuse and neglect of vulnerable adults in NSW – the need for action* (n 46) 4.
[61] *Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People* (n 44) 14.
[62] *Inquiry into Elder Abuse in New South Wales* (n 55) xvii [rec 1].

Victoria's Community Visitors Program, managed by OPA, is one such mechanism. Several inquiries have noted the value and importance of safeguarding mechanisms such as community visitors. For example, the Productivity Commission noted in its inquiry into disability care and support:

> *Community visitors are a well targeted way of monitoring groups with particular vulnerability who receive care and support in situations where poor practices or outcomes are more likely to go undetected. The capacity for random inspection strengthens industry wide incentives to comply with service standards as well as other laws and regulations. As such, these schemes should be implemented in states where they do not currently exist under the appropriate state and territory statutory bodies, potentially with funding assistance from the NDIS. In doing so it is desirably to replicate features of the Victorian model, including the publication of annual reports and the use of volunteers.*[63]

2.3 Clear pathways for reporting abuse

Inquiries into elder abuse have noted the importance of having clear and straightforward ways for people to report suspected abuse. Many have recommended a central helpline to facilitate voluntary reporting.

For example, in making recommendations for a comprehensive, coordinated, and ambitious approach to elder abuse, the Legislative Council Inquiry into Elder Abuse in New South Wales recommended an enhanced role for the NSW Elder Abuse Helpline and Resource Unit.[64]

Similarly, the *Western Australia Select Committee into Elder Abuse Committee* recommended that the Government provide funding to continue the Elder Abuse Helpline.[65] The recommendation was accepted.[66]

Reports on this issue commonly note that people who report abuse via helplines should be protected from any adverse consequences from calling. For example:

- The South Australian *Closing the Gaps* report recommended that features of adult protection legislation should include a system of voluntary reporting of abuse, but a mandatory response system triggered by a report or notification of abuse.[67]

---

[63] Productivity Commission, *Disability Care and Support: Productively Commission Inquiry Report* (Report, 10 August 2011) vol 1, 509.

[64] *Inquiry into Elder Abuse in New South Wales* (n 55) xvii [rec 1].

[65] Select Committee into Elder Abuse, Parliament of Western Australia, *'I never thought it would happen to me': When trust is broken: Final Report* (Paper no 1787, September 2018) vii [rec 11].

[66] Western Australian Government, *Government Response 'I never thought it would happen to me': When trust is broken: Final Report of the Select Committee into Elder Abuse* (Tabled Paper no 2182, 20 November 2018) 4.

[67] *Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People* (n 44) 14.

- The Australian Law Reform Commission's report on elder abuse recommended that any person who, in good faith, reports abuse to an adult safeguarding agency should not, because of their report, be subject to legal penalties or employment-related sanctions, discrimination or job-loss.[68]

2.4 Rights-based approaches

An adult safeguarding system must be grounded in human rights if it is to comply with Australia's international obligations and the Victorian Charter described in Section 1.1.

Recent law reform reports have emphasised the importance of ensuring that safeguarding legislation and policy are grounded firmly in human rights principles. For example:

- The Victorian Law Reform Commission recommended that proposed new guardianship legislation be grounded in a range of human rights principles.[69]

- The New South Wales Legislative Council recommended a rights-based elder abuse framework that empowers older people and upholds their autonomy, dignity and right to self-determination.[70]

- The South Australian *Closing the gaps* report recommended that features of adult protection legislation should include the adoption of a human rights-based approach, supported by a Charter of Rights and Freedoms of Older Persons and accompanied by a set of guiding principles.[71]

Person-centred care and supported decision making

A fundamental aspect of rights-based approaches is ensuring that service provision is tailored to people's individual needs and that they are supported to participate in decision-making about the services and forms of care they receive. A broad range of inquiries, in contexts ranging from elder abuse and guardianship to the abuse and neglect of people with disability, have made recommendations to this effect. Examples are as follows.

[68] *Elder Abuse – A National Legal Response* (n 6) 412 [rec 14-7].
[69] Victorian Law Reform Commission, *Guardianship Final Report* (Report No 24, 2012) xxxv [rec 21].
[70] *Inquiry into Elder Abuse in New South Wales* (n 55) xvii [rec 1].
[71] *Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People* (n 44) 14.

- The Australian Law Reform Commission's 2014 report, *Equality, Capacity and Disability in Commonwealth Laws*, made 55 recommendations concerning national decision-making principles, safeguards for people requiring decision-making support and supported decision-making in Australian Government laws, amongst other things.[72] The report also recommended the introduction of an Australian Government model, consistent with the principles, that promotes supported decision-making in its laws and frameworks.[73]

- A Victorian report from the Senate Community Affairs References Committee, *Violence, Abuse and Neglect Against People with Disability in Institutional and Residential Settings*, recommended that the Australian Government consider driving a nationally consistent move away from substitute decision-making towards supported decision-making models, and work with state and territory governments to implement the recommendations of the Australian Law Reform Commission report noted above.[74]

- The Victorian Ombudsman, in a report on the investigation of allegations of abuse in the disability sector, noted as a point of principle the need for advocacy to support decision-making by people with disability.[75]

- The New South Wales Law Reform Commission's *Review of the Guardianship and Administration Act* report recommended a new model that requires decision-makers to give priority to the person's will and preferences wherever possible.[76]

- In the NSW Ombudsman's report *Abuse and Neglect of Vulnerable Adults in NSW*, the Ombudsman recommended that, as part of the establishment of the independent statutory body and an integrated safeguarding approach for vulnerable adults, the NSW Government should ensure that there are enhanced options for vulnerable adults to access appropriate decision-making assistance.[77]

---

[72] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report No 124, August 2014).
[73] Ibid 13 [rec 4-1].
[74] Senate Community Affairs References Committee, Parliament of Australia, *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age-related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability* (Report, November 2015) xviii [recs 10-11].
[75] Victorian Ombudsman, *Reporting and investigation of allegations of abuse in the disability sector: Phase 1 – the effectiveness of statutory oversight* (Report, 25 June 2015) 88.
[76] New South Wales Law Reform Commission, *Review of the Guardianship and Administration Act* (Report No 145, May 2018) 30.
[77] *Abuse and neglect of vulnerable adults in NSW – the need for action* (n 46) 4.

2.5 A strategy and plan to prevent abuse

A range of inquiries have recommended the implementation of primary prevention activities in respect of violence and abuse, and that the causes of abuse should be understood, and activities evaluated.

While the following recommendations were made in the context of elder abuse, they are equally applicable to action to prevent the abuse of all at-risk adults:

- The Australian Law Reform Commission recommended that the Australian Government, in cooperation with state and territory governments, develop a national plan to combat elder abuse. It stated that the goals of the plan should include promoting the autonomy and agency of older people; addressing ageism and promoting community understanding of elder abuse; safeguarding at-risk adults and improving responses; and building the evidence base. It should consider the different experiences and needs of older persons with respect to gender, sexual orientation, disability, cultural and linguistic diversity, older Aboriginal and Torres Strait Islander people and older people living in rural and remote communities.[78]

- The Tasmanian Coroner recommended that the Tasmanian Government develop, as a matter of priority, a renewed elder abuse prevention action plan. The Coroner said that the plan should include:

    - a strategy to ascertain the prevalence of elder abuse in the Tasmanian community

    - a strategy for responding to and preventing elder abuse in the Tasmanian community; and

    - establishment of a steering committee or other mechanism to ensure efficient implementation of the plan.[79]

[78] *Equality, Capacity and Disability in Commonwealth Laws* (n 72) 60.
[79] *Mackozdi, Janet* (2018) 274 TASCD 43.

- In Western Australia, the *Select Committee into Elder Abuse* recommended that the Western Australian Government develop and fund a comprehensive plan to prevent and address elder abuse, using a human rights-based approach that upholds the inherent dignity and autonomy of older people.[80] The committee recommended that the plan should complement or improve the National Plan to Combat Elder Abuse, identify gaps and priorities in agency responses and create a more effective framework to address elder abuse.[81] The Western Australian Government accepted this recommendation[82] and in 2019 it released the state's first ever strategy into elder abuse.[83]

- In 2015, the New South Wales Legislative Council General-Purpose Standing Committee Number 2 recommended that the NSW Government embrace a comprehensive, coordinated, and ambitious approach to elder abuse with the following elements:[84]

    - a major focus on prevention and community engagement
    - an active commitment to building the evidence base for policy.[85]

- Finally, the South Australian *Closing the Gaps* report recommended that features of an adult protection law should include provision for the establishment of Community Networks for Adult Protection to promote education and awareness of abuse and the framework for responding to abuse.[86]

Similar calls have been made in relation to the prevention of family violence. Victoria's Royal Commission into Family Violence explicitly recommended the inclusion of a primary prevention strategy.[87]

[80] *'I never thought it would happen to me': When trust is broken: Final Report* (n 65)109 [rec 34].
[81] *'I never thought it would happen to me': When trust is broken: Final Report* (n 65) 109 [rec 35].
[82] Western Australian Government, *Government Response 'I never thought it would happen to me': When trust is broken: Final Report of the Select Committee into Elder Abuse* (Tabled Paper no 2182, 20 November 2018) 12.
[83] 'Elder Abuse Strategy', *Government of Western Australia* (Web Page) <https://www.wa.gov.au/organisation/department-of-communities/elder-abuse-strategy>.
[84] *Inquiry into Elder Abuse in New South Wales* (n 55) xvii [rec 1].
[85] *Inquiry into Elder Abuse in New South Wales* (n 55) xvii [rec 1].
[86] *Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People* (n 44) 14.
[87] *Royal Commission into Family Violence, Report and Recommendations* (Report, March 2016) vol 6, 57 [rec 187].

2.6 Mainstream services that can recognise and respond to abuse

As discussed in Section 2.1, the role of an adult safeguarding agency is likely to include coordinating legal, medical and other 'mainstream' services needed by the client.[88] The effectiveness of this specialist service ultimately depends on the availability and capability of other services to support at-risk adults, including legal services, aged care, disability and family violence services, and mental health services, among others.

The South Australian *Closing the Gaps* report recommended that features of adult protection legislation should include an obligation on key agencies to assist with the investigation of abuse and with any plan developed for the support and protection of vulnerable adults in accordance with the Act.[89]

Currently, the capacity and capability of relevant mainstream Victorian services to detect and respond to abuse of at-risk adults is hampered by underfunding and related challenges. This is discussed in Section 3.6.

[88] *Elder Abuse – A National Legal Response* (n 6) 402.
[89] *Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People* (n 44) 14.

3.0

Gaps in Victoria's safeguards for at-risk adults

Currently in Victoria, there are many different agencies and service types with specific roles, functions and powers in relation to the abuse, neglect and exploitation of adults. These focus on the regulation of specific services or providers, or on people who have a decision-making impairment. Many of those agencies lack the powers to adequately protect and promote the rights of at-risk adults, while some adults fall between the various agencies completely.

This chapter describes these issues in detail, comparing Victoria's current situation with the features of an effective adult safeguarding system identified in Chapter 2. Stories are used throughout the chapter to illustrate key points. As noted previously, in most cases, names have been changed to protect people's privacy.

3.1 System complexity and fragmentation

In Victoria, there is a complex array of agencies and services to which enquiries can be made about the wellbeing and safety of at-risk adults. These include:

- Seniors Rights Victoria Elder Abuse Helpline
- National Elder Abuse Helpline
- Safe Steps Family and Domestic Violence Support Centre
- 1800RESPECT (National sexual assault, domestic family violence counselling service)
- Orange Door, a service for adults, children and young people who are experiencing or have experienced family violence and families who need extra support with the care of children
- other specialist family violence services
- five public health services participating in a trial of an Integrated model of care for responding to suspected elder abuse.[90] The model of care includes workforce development, secondary consultation with a liaison officer, counselling (including financial counselling) and mediation services, and an Elder Abuse Prevention Network.
- Hospitals, including as part of the Strengthening Hospital Responses to Family Violence project
- Elder Rights Advocacy (for elder abuse in the context of Australian Government-funded aged care services)
- No to Violence (a men's referral service)
- OPA's advice service
- Disability Services Commission
- Disability Workers Commission
- NDIS Quality and Safeguards Commission
- Aged Care Quality and Safety Commission
- Victoria Police
- Mental health triage phone lines in Victoria's area mental health and wellbeing services.

These agencies are spread across several different sectors that are not well known to each other. Some sectors, such as disability services, have a complex array of regulators within the sector itself.

[90] 'Integrated model of care for responding to suspected elder abuse', *Department of Health* (Vic) (Web Page), <https://www.health.vic.gov.au/wellbeing-and-participation/integrated-model-of-care-for-responding-to-suspected-elder-abuse>.

Agencies might invite people to call even if they are not sure about which regulator is appropriate, but the system remains extremely difficult for members of the community to navigate. The remainder of this section examines the reasons why there are gaps in our adult safeguarding system, and why people can 'fall from view' of existing services for at-risk adults.

Multiple agencies but no central helpline

→ Our recommendations propose that a central helpline, as part of a specialist adult safety function with appropriate resources and powers, could help fill the gaps in Victoria's current safeguarding system.

There are well-publicised hotlines for people experiencing family violence, and to a lesser extent, elder abuse. However, it is very difficult for third parties who are concerned about an at-risk adult experiencing abuse to know where to go for help.

The number of callers to OPA's advice service from providers reporting concerns about the conduct of family members is evidence that service providers are well-placed to identify abuse. However, there is a risk that people will fall through the cracks if there is no central helpline or agency for providers to report their concerns (noting that this alone will not absolve the agency from complying with their own legal obligations). Despite receiving the calls from providers with concerns about the conduct of members of the community, the Public Advocate is unable to investigate the allegations. Where matters concerning alleged interference with NDIS supports have been referred to the NDIS Quality and Safeguards Commission, it declined to take any action on the basis that the referral was outside its remit.

Other examples of where people fall through cracks in the safeguarding system are given below.

People leaving aged care and hospitals

A safeguarding gap exists in relation to residents of aged care facilities who are removed by family members, often for financial benefit. For example, the money returned by the aged care provider might be used to pay the mortgage of an adult child in return for care. Older people are extremely vulnerable in these circumstances as they are often moved away from their treating doctor and from any form of oversight. However, there is nowhere for a service provider to report concerns about the capacity of the family member to provide the care required by a former resident or inpatient.

The tragic death of a Tasmanian woman, Janet Lois Mackozdi, in 2018 in a shipping container being used as a home[91] is a terrible example of this situation. The Tasmanian Coroner reported that Mrs Mackozdi was removed from an aged care facility and moved interstate to live with her adult daughter and her family. Mrs Mackozdi, who had been diagnosed with dementia and had relatively high medical and care needs, was moved away from her treating medical practitioner and died in a shipping container from hypothermia.

Similarly, in Victoria, *The Age* newspaper reported that a frail woman aged well into her eighties, was removed from a nursing home to live with her son and his family where, tragically, she did not get the care that she needed. The paper reported that paramedics were called in 2013 after one of her grandchildren discovered her body. They discovered the woman's 34-kilogram body in a soiled nappy on a rotten mattress. Subsequent tests were reported to reveal that the woman's body had begun to decompose, parts of her body were covered in bruises or scabs and her legs and stomach were discoloured. The forensic pathologist believed that the woman died from aspiration pneumonia, and it was alleged that she had been fed despite being unable to swallow following a stroke.

The media reported that the woman had lived in the back room of the house for the last two and a half years of her life, often calling out. The family used earplugs to help them sleep. While living in the nursing home, the woman had monthly check-ups with a general practitioner (GP), whereas she visited a doctor just twice during the time she lived with her family and did not see a GP at all for one year. The son and his wife were charged with neglect and remanded until their County Court trial.[92]

In these circumstances, criminal charges could be applied – due to the severity of the abuse.

Examples like these highlight the fact that there is nowhere for an aged care provider to report concerns about the capacity of a family member to provide the care required by the former resident. By the time anyone outside the home knew what was happening, it was too late.

Similarly, hospital social workers may have concerns about patients being discharged into the care of a family member or friend, particularly in circumstances where that person refuses access to services.

While in Anna's story, outlined below, there was sufficient information to enable the police to force entry, and this situation was serious enough for the police to arrange to transport Anna to hospital, in less critical situations police may not have sufficient information to take action.

---

[91] *Mackozdi, Janet* (2018) 274 TASCD.

[92] Adam Cooper and Tammy Mills, 'Son and his wife to stand trial on neglect charges after elderly mother's death', The Age (online 13 July 2017) <https://www.theage.com.au/national/victoria/son-and-his-wife-to-stand-trial-on-neglect-charges-after-elderly-mothers-death-20170713-gxaqxh.html>.

Anna's story

A hospital worker contacted the OPA Advice Service. The hospital was concerned about Anna, a woman recently discharged from hospital to the care of a family member, and contacted the police to request a welfare check. It took a long time for the family member to let police into the house, but the officers tasked with the welfare check did see Anna covered up in bed.

The hospital worker was concerned about the length of time the family member took to let the police into the house so the OPA Advice Service advisor suggested contacting the Family Violence Unit. Members from that Unit subsequently attended the property and, when the family member again took a long time to come to the door, they forced entry to discover Anna tied to a bed. The police officers arranged for Anna to be taken to hospital for assessment.

People experiencing self-neglect

Similarly, in the following story there was nowhere for neighbours to turn to for help when they had concerns about Andrew's living conditions.

Andrew's story

Andrew was a man in his early 50s who had a mild intellectual disability. He lived in a private residence which was shared with his mother until her death. Andrew did not shower and chose to spend most of the day watching children's television shows. His only exercise involved going to the shops and his diet consisted mainly of bread and potato cakes. His house was approaching squalor, with bags on the dining room table that appeared to have been unopened for years, and his garage was full of toys and newspapers collected over many years.

The house was damp, and Andrew's health was poor. Among his health problems, Andrew had a treatable skin condition, but he refused to apply medicinal cream and nor would he allow others to treat him. While Andrew was not resistant to receiving supports to enable him to stay in his home, he did not keep appointments without support.

People experiencing financial abuse

Financial abuse is also often difficult to detect, and in the absence of evidence of clear criminality, there is no agency authorised to respond to concerns. This is illustrated in the following stories.

Li's story

Li was accompanied to a bank by her son Alex and another relative, who withdrew significant amounts from a joint account. The manager of the bank was concerned that Li was being coerced, but with no evidence of incapacity, and worried about privacy laws, he was uncertain what he should do.

Kosta's story

Kosta was an older man with dementia whose wife had passed away. He appointed someone he had met in a professional capacity as his attorney who subsequently made an application to sub-divide Kosta's land and build a unit for himself and his wife. There were also a number of transfers from Kosta's account to an account held jointly with his attorney. Payments from that account were made to liquor outlets.

Concerns about financial abuse of older people are not unique to Victoria. In 2015, the NSW Legislative Council General-Purpose Standing Committee Number 2 conducted an inquiry into elder abuse in NSW.[93] The committee found that there were insufficient safeguards in NSW laws to prevent financial abuse.

One of the key functions of Victoria Police is to help those in need of assistance, and police officers are working much more closely with other agencies since the introduction of the Victoria Police Financial Elder Abuse trial. The trial implemented recommendation 155 of the Royal Commission into Family Violence, which recommended that Victoria Police 'scope options for a trial of a dedicated family violence and elder abuse response team' with the 'capacity to investigate financial abuse'. The trial involves 'the identification of, and response to, financial elder abuse from a policing, healthcare and support services perspective', among other things.[94]

[93] *Inquiry into Elder Abuse in New South Wales* (n 55).

[94] 'Scope options for a trial of a dedicated family violence and elder abuse response team', *Victorian Government*, (Web Page) <https://www.vic.gov.au/family-violence-recommendations/scope-options-trial-dedicated-family-violence-and-elder-abuse>.

However, the police role is limited to offering a referral in cases where there is no clear evidence of criminality and officers endeavour to help people access the services they need.[95] Victoria Police's ability to investigate cases of financial elder abuse is also hampered by the fact that banks and other financial service providers are not prescribed under the Victorian Family Violence Information Sharing Scheme.[96]

As discussed in Section 2.3, many inquiries have noted the importance of having a central helpline to facilitate voluntary reporting of suspected abuse, neglect and exploitation – noting also that callers should be protected from any adverse consequences of making such a report.

Limitations of family violence safeguards

→ OPA's recommendations call for several amendments to Victoria's family violence legislation to provide more effective protection for at-risk adults. OPA has also recommended that robust information sharing arrangements are in place in relation to violence against at-risk adults that are not instances of family violence.

A distinguishing feature of the adult safeguarding landscape in Victoria, compared with other Australian jurisdictions, is the strength of Victoria's family violence system.

The Family Violence Protection Act provides the legislative basis for the system. The non-justice component of the system promotes workforce development (to train workforces to identify family violence); risk assessment; early identification; risk management; and services for people experiencing family violence. Specialist family violence services play a case coordination role, with support from other services such as Seniors Rights Victoria.

Information sharing and collaborative practice are central to this system, and to effective justice and police interventions.[97] The Family Violence Information Sharing Scheme and MARAM schemes have transformed information-sharing between relevant agencies and risk assessment in the context of family violence.[98] These schemes are outlined in Table 1.

[95] Correspondence from Victoria Police to OPA, April 2022.
[96] Interview with Victoria Police (OPA, 8 October 2020).
[97] Correspondence from Family Safety Victoria to OPA, 30 November 2020.
[98] Family Violence Information Sharing Scheme', *Victorian Government*, (Web Page) <https://www.vic.gov.au/family-violence-information-sharing-scheme>.

Table 1.

Victoria's Family Violence Information Sharing Scheme and Multi Agency Risk Assessment Framework

The Family Violence Information Sharing Scheme (FVISS) authorises the sharing of information to assess and manage family violence risk. The scheme aims also 'to create a cultural shift in information sharing practice to support effective assessment and management of family violence risk'.[99]

Under the scheme, Information Sharing Entities (ISEs) can share information related to assessing or managing family violence risk with other ISEs.[100] ISEs are prescribed by the *Family Violence Protection (Information Sharing and Risk Management) Regulations 2018* and, to date, a comprehensive range of Victorian family violence and mainstream agencies and entities have been prescribed.

The disclosure of information is permitted in circumstances where there is a 'serious threat' to someone's life, health, safety or welfare.[101] It is still necessary, however, for workers to 'consider if sharing the information is necessary to prevent or lessen a threat.'[102] There is practice guidance available to agencies required to apply the relevant test.

The Monash University Family Safety Victoria Review of the Family Violence Information Sharing Legislative Scheme Final Report, tabled in Parliament on 18 August 2020, found that the scheme:

- appears to have resulted in an increase in both the quantity and quality of family violence information sharing[103] and workers felt more confident sharing information under the scheme
- has produced positive outcomes, particularly concerning increased sharing of perpetrator information, keeping the perpetrator in view. Some victim survivors are experiencing improved outcomes.[104]

Victoria Police reports that the FVISS, together with relationships built with agencies through involvement in an Elder Abuse Prevention Network, has improved their ability to investigate cases of abuse, violence, or neglect of at-risk adults.[105]

The MARAM Framework aims to ensure that services are effectively identifying, assessing and managing family violence risk. The MARAM Framework has been redeveloped to address issues and gaps identified by the Royal Commission into Family Violence, the Coronial Inquest into the death of Luke Geoffrey Batty and the 2016 Monash University Review of the framework.[106]

The framework supports prescribed organisations to recognise risk indicators for children, older people and diverse communities, and keep perpetrators in view and accountable. Agencies prescribed include Victoria Police, the Disability Services Commissioner, Support and Safety Hubs, maternal child health services and alcohol and other drugs services, among others.

Training for the information sharing and MARAM reforms has been or will be available for a range of workforce types and roles, including the specialist family violence workforce and a range of state-funded health and human services.[107] Training for hospital staff is provided through the Strengthening Hospital Responses to Family Violence program.[108]

---

[99] Family Safety Victoria, *Family Violence Information Sharing Guidelines: Guidance for Information Sharing Entities* (Guidelines, April 2021) 7.
[100] 'Family Violence Information Sharing Scheme', *Victorian Government* (Web Page) <https://www.vic.gov.au/family-violence-information-sharing-scheme>.
[101] Office of the Victorian Information Commissioner, *Removal of 'Imminent' from the IPPs and HPPs* (Factsheet, undated)
[102] Ibid
[103] J McCulloch, J Maher, K Fitz-Gibbon, M Segrave, K Benier, K Burns, J McGowan and N Pfitzner, *Review of the Family Violence Information Sharing Scheme Final Report* (Report, Monash Gender and Family Violence Prevention Centre, Faculty of Arts, Monash University, 2020).
[104] Ibid 129.
[105] Meeting with Victoria Police (OPA, 8 October 2020) and telephone interview with Victoria Police (OPA, 23 March 2022).
[106] 'Family Violence Multi-Agency Risk Assessment and Management Framework', *Victorian Government*, (Web Page) <https://www.vic.gov.au/family-violence-multi-agency-risk-assessment-and-management>.
[107] 'Training for the Information Sharing and MARAM Reforms', Victorian Government (Web Page) <https://www.vic.gov.au/training-for-information-sharing-and-maram>.
[108] 'Strengthening Hospital Responses to Family Violence Tool Kit', *The Royal Women's Hospital* (Web Page) <https://www.thewomens.org.au/health-professionals/clinical-resources/strengthening-hospitals-response-to-family-violence>.

Although Victoria's family violence reforms have been transformative, the scope of the system is currently limited in several ways. The key findings that shaped OPA's recommendations for changes to Victoria's family violence legislation are outlined below.

Family violence frameworks do not apply to all relevant services and workforces

As the rollout of the recommendations of Victoria's Royal Commission into Family Violence continues, more mainstream workforces will be brought into the MARAM Framework and Family Violence Information Sharing Scheme, ensuring that more eyes are on at-risk adults than ever before.[109]

Phase two of the FVISS and the MARAM Framework, which took place in 2021, prescribed state-funded aged care and disability services, among others.[110] However, given that the funding and regulation of disability and aged care services has largely shifted to the Australian Government, it is concerning that no Australian Government agencies or funded services have yet been prescribed as information-sharing entities in respect of the MARAM Framework. Ultimately, prescribing them in respect of the FVISS and MARAM Frameworks is important to ensure early and accurate risk assessment and responses when concerns are raised about at-risk adults. It would be necessary to negotiate with the Australian Government to reach agreement on this approach.

Financial institutions are also not prescribed as information-sharing entities under the Family Violence Protection Act. Victoria Police noted that this was a key inhibitor to banks approaching police with concerns over suspect transactions.[111]

Similarly, financial institutions are well placed to identify financial abuse, as illustrated in Li's story (page 51), and related forms of abuse, such as forced sexual servitude.[112] Often people experiencing financial abuse are also being abused in other ways, as noted by Queensland's Public Guardian:

> *I cannot tell you the number of times that a bank refers a case of financial abuse to us, we lift the veil and go and visit the person and we find them locked up in a room under the house, completely dehydrated, walking around in soiled underpants, not knowing what time of day it is. They may not have eaten for days, and the family who is living upstairs have just left.*[113]

[109] Interview with Family Safety Victoria (OPA, 28 October 2020).
[110] 'About the Information Sharing and MARAM Reforms', *Victorian Government* <https://www.vic.gov.au/about-information-sharing-schemes-and-risk-management-framework>.
[111] Interview with Victoria Police (OPA, 8 October 2020).
[112] Sarah Sharples, 'How banks are identifying signs of sexual slavery', *News.com.au* (online, 4 February 2022) <https://www.news.com.au/finance/business/banking/how-banks-are-identifying-signs-of-sexual-slavery/news-story/dde8d9520280a1683f3b55f4d73874d9>.
[113] Natalie Siegel-Brown cited in Caxton Legal Centre, *Rock the Boat: Safeguarding models through the human rights looking glass – a legal perspective* (Discussion Paper No 2, 2019) 13.

The person must be able to contact and engage with services

Another key limitation of the family violence system response is that it can only respond if the at-risk adult experiencing or at risk of abuse is able to contact and engage with services. As noted in the Safety Targeted Action Plan, 'service systems often rely on individuals to seek out information, communicate and advocate for their needs, make informed decisions, and navigate within and across systems, to deliver services and supports effectively'.[114] This is a barrier to accessing and engaging with service systems designed to support people with disability. OPA and the NSW Ageing and Disability Commissioner (ADC)[115] are aware of many cases where, for example, family members interfere with supports and prevent at-risk people from accessing services. Family violence services have no statutory authority to gain access to an at-risk adult in those circumstances where the person has no way to access support services or to advocate for themselves.

Definitions of 'family member' and 'family violence' are limited

While Victoria's Family Violence Protection Act uses a definition of family violence that is broader than other jurisdictions,[116] in that it includes any person the relevant person regards as being like a family member,[117] it does not expressly include people living in group homes. Therefore, the abuse described in Maurice's story (page 70) was not considered family violence, and the police took no action.

OPA's recommendations in Chapter 4 call on the Victorian Government to amend the Family Violence Protection Act to explicitly state that co-residents in supported disability accommodation are in 'family-like relationships' for the purposes of the legislation. This would entirely address the gap identified, ensuring that residents like Maurice are able to access the protections offered by the family violence framework.

Further, while the reference to 'in any other way control or dominates the family member' potentially covers some of the behaviors commonly exhibited by the perpetrators of abuse against at-risk adults, there is no explicit reference to those behaviours in the legislation. These behaviours include making the at-risk person dependent on or subordinate to the abusive person or limiting the at-risk adult's access to services. These behaviours are expressly included in the definition of abusive conduct in the ACT's *Crimes Act 1900* (ACT). In Chapter 4, OPA recommends the inclusion of an express reference to these behaviours in the Victorian legislation.

[114] *Safety Targeted Action Plan* (n 12) 2.
[115] Ageing and Disability Commission, *Annual Report 2019-20* (Report, 2020) 26.
[116] For example, comparable Tasmanian legislation is limited to intimate partners, *Family Violence Act 2004* (Tas) s 7.
[117] *Family Violence Protection Act 2008* (Vic) s 8.

Another potential gap identified during the consultations for the Adult Safeguarding Project concerns intentional or unintentional neglect. Family members may not fully appreciate the care needs of an at-risk adult, as was the case with Janet Lois Mackozdi's family in Tasmania.[118]

The definition of family violence in Victoria's legislation describes behavior that is physically, sexually, emotionally, psychologically or economically abusive, is threatening or coercive, or in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another family member.[119] A failure to provide appropriate support and care where there is a responsibility to do so and where this results in harm may constitute a family violence behaviour under the current law. However, while there is reference to neglect as an outcome of isolation in the Victim Survivor Practice Guide in respect of Responsibility 7,[120] there is no explicit reference to 'failure to act' behaviours causing harm in the definition of family violence.[121] The express reference to neglect in the definition could provide clarity and have the effect of setting standards of appropriate behaviour.

However, careful consideration should be given to expanding the definition in this way given the potential for criminalising neglect if an order is breached. In OPA's analysis of its clients on guardianship orders who have experienced elder abuse, in many cases the perpetrator did not appear malevolent. Rather, they were more likely unable to cope or seemed unable to accept the declining health and cognition of the person under guardianship. For example, a family member persisted in undertaking health care steps against medical advice, such as feeding a person who could no longer chew safely.[122] It may be that a supportive intervention to better address the support needs of the at-risk adult and the carer is a more appropriate response in these cases.

Perpetrators may not understand or be able to comply with orders

The Magistrates' Court is currently not required to consider whether the respondent is able to understand and comply with the conditions in a Family Violence Intervention Order before making the order. This can result in the criminalisation of people with a disability, as occurred in the case below, which was investigated by the Victorian Ombudsman.

[118] *Mackozdi, Janet* (2018) 274 TASCD
[119] *Family Violence Protection Act 2008 (Vic)* s 6(1).
[120] Victoria State Government, *Practice Guides: Responsibility 7: Comprehensive Risk Assessment* (Guide, Undated) 331 <https://www.vic.gov.au/maram-practice-guides-and-resources/responsibility-7>.
[121] *Family Violence Protection Act 2008* (Vic) s 5.
[122] L Bedson, L, J Chesterman and M Woods, 'The prevalence of elder abuse among adult guardianship clients' (2018) 18 *Macquarie Law Journal*, 15-33 <http://classic.austlii.edu.au/au/journals/MqLawJl/2018/3.html>.

Rebecca's story

Rebecca, 39, had a significant developmental disorder with a long history of behavioural difficulties to the point that her family applied for and were granted a Family Violence Intervention Order. Rebecca did not understand the order and attempted to visit her parents in breach of the conditions on the order. She was subsequently found unfit to stand trial and was imprisoned for 18 months because there was nowhere for her to go.

The Ombudsman described the investigation as 'the saddest case I have investigated in my time as Ombudsman', noting that both Rebecca and society were still paying a high price.[123]

For these reasons, before making a Family Violence Intervention Order, it is important that courts consider whether the respondent can understand the nature and effect of the order and is able to comply with its conditions.

Privacy obligations are not well understood by agencies

Despite the Family Violence Information Sharing Scheme having improved confidence about information sharing in the context of family violence, privacy obligations are poorly understood.

Information may be shared without consent under the scheme where the information sharing entity reasonably believes that the collection, use or disclosure of the confidential information is necessary to lessen or prevent a serious threat to an individual's life, health, safety or welfare.[124] Provisions that mirror this exemption are also contained in the Privacy and Data Protection Act[125] and Health Records Act.[126]

There is a definition of 'serious threat' in the Family Violence Risk Assessment and Risk Management Framework – a legislative instrument under Part 11 of the Family Violence Protection Act – and the supporting MARAM Framework. Serious risk is defined in the framework as 'risk factors associated with the increased likelihood of the victim survivor being killed or nearly killed'.[127]

[123] "Saddest case": 18-month imprisonment of a Victorian woman found unfit to stand trial', *Victorian Ombudsman* (Web Page) <https://www.ombudsman.vic.gov.au/our-impact/news/saddest-case-18-month-imprisonment-of-a-victorian-woman-found-unfit-to-stand-trial>.
[124] *Family Violence Protection Act 2008* (Vic) s 144NA.
[125] *Privacy and Data Protection Act 2014* (Vic) s 2(d)(i).
[126] *Health Records Act 2001* (Vic) s 2(h)(i).
[127] Victorian Government, *Family Violence Multi-Agency Risk Assessment and Management Framework, A shared responsibility for assessing and managing family violence risk* (Framework, June 2018) 57 <https://content.vic.gov.au/sites/default/files/2021-02/Family%20violence%20multi-agency%20risk%20assessment%20and%20management%20framework%20%2811%29.pdf>.

There is practice guidance available to agencies as to whether a threat can be considered 'serious.' The guidance suggests that in making an assessment as to whether a threat is 'serious' under the relevant legislation, organisations should consider the severity of the consequences of the threat, and the relative likelihood of harm occurring. Secondary factors may also be considered, including the timing of the threat, nature of the harm, and vulnerability of the affected person to the threat. The guidance materials note that 'seriousness should be determined on a case-by-case basis, as the circumstances surrounding a threat will differ'.[128] Two out of the three examples provided in the guidance materials concerned threats to the life of a former partner or suicide, and the remaining example concerned a serious risk to staff.[129]

There is no definition of 'serious threat' in the Privacy and Data Protection Act and Health Records Act, but the documents referred to above provide practice linkages between the definitions in the three Acts.

While the flexibility of the current approach permits a case-by-case consideration, the lack of legislative definition concerning an exemption to an obligation that generates significant and arguably disproportionate apprehension, may have the unintended consequence of inhibiting information-sharing. This issue warrants further consideration, potentially as part of the five-year legislative review of the operation of Part 5A of the legislation.[130]

There is also a lack of certainty about whether the harm contemplated by privacy legislation encompasses financial harm. This is a critical barrier to the identification of financial abuse of at-risk adults, particularly those who are isolated or dependent on the perpetrator for support. Their bank's algorithm may be the only mechanism available to detect financial abuse. Identifying financial abuse can result in the discovery of other forms of abuse taking place.[131]

The Australian Banking Association reports that it has 'spent considerable time working with the Office of the Australian Information Commissioner to map rules to assist banks when they are handling the personal information of customers experiencing vulnerability' and 'have concluded that there are limited circumstances where banks can use or disclose personal information for the purposes of taking extra care of customers without explicit and informed consent'.[132]

---

[128] *Removal of 'Imminent' from the IPPs and HPPs* (n 101) 4.
[129] *Removal of 'Imminent' from the IPPs and HPPs* (n 101) 4.
[130] *Family Violence Protection Act 2008* (Vic) s 144SA.
[131] The prevalence study found that 24 per cent of respondents experienced multiple sub-types of abuse. See Australian Government, *National Elder Abuse Prevalence Study: Final Report* (Report, July 2021) 47 <https://aifs.gov.au/sites/default/files/publication-documents/2021_national_elder_abuse_prevalence_study_final_report.pdf>.
[132] Australian Banking Association, Submission to Australian Attorney-General's Department, *Privacy Act Review* (4 December 2020) 3 <https://www.ag.gov.au/sites/default/files/2021-01/australian-banking-association.pdf>.

The association recommends that the Privacy Act should be amended to allow for 'good faith' disclosure of information in circumstances where an individual's financial safety may be compromised.[133] OPA agrees that relevant privacy legislation should be amended to clarify that a serious threat to an individual's life, health, safety or welfare includes a serious threat to the individual's financial safety or welfare.

Limited oversight of compliance

There is limited oversight of prescribed agencies' compliance with the provisions of the Family Violence Protection Act. Data is published concerning the activities of certain key agencies, but the system is otherwise dependent on workers identifying and responding appropriately to suspected violence, which is difficult work. The Monash University evaluation report noted that services not used to working in this space find it difficult, and the scheme certainly adds to the workload of agencies. Whilst there are penalties for non-compliance in the legislation, the current approach is to provide education and support to services rather than take a punitive regulatory approach.[134] There will be an opportunity to review this approach as part of the five-year statutory review of the scheme.

Narrow remit of disability and aged care regulators

While there are several regulatory bodies responsible for at-risk adults, as discussed below, they focus on people with impaired decision-making capacity and/or in receipt of aged care or disability services.

Table 2 summarises the functions and powers of key agencies that have roles in investigating and responding to the safety concerns about older adults and people with disability. The report then identifies the limitations of these agencies as they relate to gaps in Victoria's adult safeguarding system.

[133] Australian Banking Association, Submission to Australian Attorney-General's Department, *Privacy Act Review* (4 December 2020) 3.
[134] Interview with Family Safety Victoria (OPA, 28 October 2020).

Table 2.

Functions and powers of key disability and aged care regulators

Regulator	Function/Power
Public Advocate	The Public Advocate has the power to 'investigate any complaint or allegation that a person is under inappropriate guardianship or is being exploited or abused or in need of guardianship.'[135] A guardian is a person legally appointed by the Victorian Civil and Administrative Tribunal (VCAT) to make specific lifestyle decisions for another person who, due to disability (including dementia), lacks decision-making capacity for a decision that needs to be made. In cases where there is no-one known to the person who is suitable, the Public Advocate may be appointed as the guardian of last resort.[136] OPA undertakes investigations on referral from VCAT. In 2020 to 2021, it conducted 425 new investigations.[137] As part of the investigations, the Public Advocate may require, but not compel, a person, government department, public authority, service provider, institution or welfare organisation to provide information for the purposes of an investigation.[138] In the event that an investigator requests documents, for example, and the person fails to produce them, the investigator would include reference to the failure to comply in the report to VCAT.[139] OPA also manages Victoria's Community Visitors Program. Community Visitors provide a key oversight role as independent volunteers appointed by the Governor in Council under the Disability Act. Community Visitors conduct regular unannounced visits to people with a disability and/or mental illness who live in a range of residential settings. The Public Advocate also has functions under the Disability Act. The Public Advocate plays an important safeguarding role in relation to the residency rights of residents of certain forms of disability housing and provides advocacy in relation to safeguard protections involving the use of restrictive practices, civil detention and compulsory treatment.[140]
Disability Services Commissioner	The Disability Services Commissioner works with people with a disability to resolve complaints about disability service providers and works with providers to improve outcomes for people with a disability.[141] Changes to the Disability Act in 2017 strengthened the Commissioner's powers to investigate allegations of abuse and neglect in Victorian disability services. The changes to the legislation came about as part of the Victorian Government's response to the *Parliamentary Inquiry into Abuse in Disability Services* in 2016.[142]

[135] *Guardianship and Administration Act 2019* (Vic) s 16(1)(g).
[136] *Guardianship and Administration Act 2019* (Vic) s 33(1).
[137] Office of the Public Advocate (Vic), *Annual Report 2020–21* (Report, 2021).
[138] *Guardianship and Administration Act 2019* (Vic) s 16(1)(i).
[139] Interview with investigator (OPA, 25 August 2020).
[140] *Disability Act 2006* (Vic) pt 5, pt 7, pt 8.
[141] 'What we do', *Disability Services Commissioner* (Web Page) <https://www.odsc.vic.gov.au/about-us/what-we-do>.
[142] 'Preventing and responding to abuse and neglect', *Disability Services Commissioner* (Web Page) <https://www.odsc.vic.gov.au/abuse-prevention/>.

Table 2. Cont.

NDIS Quality and Safeguards Commission	The National Disability Insurance Scheme Quality and Safeguards Commission (NDIS Commission) is an independent Australian Government agency which was established to improve the quality and safeguards of NDIS supports and services. From July 2019, the Commission began managing quality and safeguards in Victoria. It can help NDIS participants, and their families and carers, to resolve concerns or complaints about NDIS supports and services.[143] The Commission is responsible for: • registration and quality assurance of NDIS providers • the complaints process • management and reporting of incidents • new practice standards for the NDIS • the new NDIS Code of Conduct.
Aged Care Quality and Safety Commission	The Aged Care Quality and Safety Commission regulates aged care service providers. In addition to ensuring providers meet applicable standards and receiving complaints, it is responsible for incident reporting. The reportable incident may have been perpetrated by a staff member or a visitor. Under the Serious Incident Response Scheme introduced in 2021, providers are obliged to report a wider range of serious incidents to the Commission than has historically been the case. The Commission also provides resources to support workers to identify abuse. Guidance associated with the Serious Incident Response Scheme requires that a sub-set of incidents are also reported to the police.

[143] 'About', *National Disability Insurance Scheme*, (Web Page) <https://www.ndiscommission.gov.au/about>.

The Public Advocate

→ The Public Advocate should be able to receive complaints and undertake 'own motion' investigations.

The Victorian Law Reform Commission has noted that the Public Advocate's powers are 'limited in their application to circumstances where a guardianship or administration order might be appropriate,' with OPA not having a comprehensive range of powers to carry out these functions. In practice, this has limited OPA's investigation powers to situations where complaints are made about the well-being of people who have guardians or who may need an appointed guardian.'[144]

The Public Advocate undertakes investigations on referral from VCAT, but she does not have a function of receiving and investigating complaints in relation to the abuse, neglect or exploitation of people with impaired decision-making ability due to a disability where she believes that an investigation is warranted.[145]

Despite this, OPA receives many calls from service provider staff who have been told to call the Public Advocate to report concerns about the abuse of a client by someone in the community. The Public Advocate has no functions or powers to deal with these reports where the adult does not have a cognitive disability; nor in many cases is there an agency to which the caller can be referred. OPA's Advice Service advises callers that OPA is not authorised to receive or investigate these reports and provides information about the service's obligations in relation to their concerns.

A further limitation is that, despite the power to require information for her investigations, the Public Advocate does not have powers to compel the production of documents or materials, or to compel anyone to answer questions or attend a conference. OPA investigators can refer to the failure to comply with a request to provide information or documents in the report that goes back VCAT, and VCAT may make inferences from this failure, but there is no way to compel the information. The powers are to an extent meaningless if they cannot be enforced.

In 2012, the Victorian Law Reform Commission recommended that the Public Advocate should have the function of receiving and investigating complaints in relation to (a) the abuse, neglect or exploitation of people with impaired decision-making ability due to a disability and (b) the misuse of powers by private individuals or organisations appointed to substitute decision-making and supporter roles.[146] Further, the Commission recommended that guardianship legislation should provide that, where the Public Advocate believes that an investigation of these matters is warranted, she should be able to conduct an investigation on her own motion. Ten years later, these recommendations are yet to be implemented. OPA has re-stated the recommendations in this report.

---

[144] J Chesterman, *Responding to violence, abuse, exploitation and neglect: Improving our protection of at-risk adults* (Report, 2013) 72 citing the Victorian Law Reform Commission, *Guardianship Final Report* (Report, 2012) 447 <https://www.churchilltrust.com.au/fellow/john-chesterman-vic-2012/ >.

[145] Victorian Law Reform Commission, *Guardianship Final Report* (Report No 24, 2012) lxxiii [rec 328-329].

[146] Ibid lxxiii [rec 328-329].

Public advocates and their equivalents have broader powers in some other jurisdictions. The Public Guardian in Queensland can similarly investigate 'any complaint or allegation that an adult (a) is being or has been neglected, exploited or abused or (b) has inappropriate or inadequate decision-making arrangements.'[147] There are penalties that apply if a person does not comply with a request from the Public Guardian.[148]

Disability regulators

There is a complex and evolving patchwork of oversight and regulation of disability services in Victoria, the key focus of which is the conduct of disability workers and providers. There are several different safeguarding mechanisms intended to proactively identify abuse. Abuse and neglect matters are reported to the Disability Commissioner for former Department of Health and Human Services' disability homes; to the NDIS Commission; to the service provider for low-risk matters; and to the (now) Victorian Department of Health or various Supported Residential Services across Victoria.[149]

For disability services that remain within the state system, the Disability Services Commissioner and the Disability Worker Commission and Registration Board of Victoria have been prescribed as family violence information-sharing entities, ensuring that information relevant to family violence risk may be shared with and by relevant agencies to ensure the safety of people with disability who may be experiencing or at risk of family violence.

The Victorian Disability Code of Conduct provides the following guidance for disability workers:

> *Disability Service Safeguards Code of Conduct Element 6:*
>
> *All disability workers to take all reasonable steps to prevent and respond to all forms of violence against, and exploitation, neglect and abuse of, people with disability places an obligation on disability workers to identify and respond to situations that could lead to violence, abuse, neglect and exploitation.*[150]

[147] *Public Guardian Act 2014* (Qld) s 19.
[148] *Public Guardian Act 2014* (Qld) s 21.
[149] Office of the Public Advocate, *Community Visitors Annual Report 2019-20* (Report, 2020) 6.
[150] Victorian Disability Worker Commission, *Disability Service Safeguards Code of Conduct, Guidance for disability workers* (Code of Conduct, 2020).

Guidance on the code of conduct provides that violence, abuse, neglect and exploitation are understood broadly to include, but are not limited to domestic, family and interpersonal violence:[151]

> *'[i]n addition to following all relevant laws, disability workers should use their initiative to be alert to situations that may give rise to violence, exploitation, abuse and neglect and take all appropriate steps within their control to avert such situations… If an incident or act of violence, abuse, neglect or exploitations does occur, the primary focus of disability workers must be to ensure that the person(s) affected is safe and their wellbeing is being promoted. Immediately after this, they must report the incident to their supervisor, if relevant and/or any relevant authorities, including the police where appropriate.'* [152]

There is also an obligation on service providers to cooperate with the Disability Workers Commission and other relevant authorities, such as the Disability Services Commission, the NDIS Commission and the police, in the investigation of incidents of violence, abuse, neglect and exploitation.

Any member of the community, including people with disability, family members, friends, workers, advocates and others can make a complaint to the Disability Workers Commission about the conduct of a disability worker in Victoria, including if they think there has been a breach of the Disability Service Safeguards Code of Conduct.

This provision of the Disability Code of Conduct neatly brings the obligation to prevent and respond to all violence and exploitation of people with a disability clearly within the scope of the regulator. The changes have had the effect of imposing more onerous obligations on all Victorian disability workers in terms of identifying potential abuse, neglect and exploitation, than ever before.

However, disability workers will need training to be able to comply with this element of the code of conduct. Currently, in the Certificate IV in Disability course that disability workers are required to complete, the subject *Responding to suspected abuse* is an elective unit rather than a core unit.[153]

Further, the Disability Services Commissioner focuses on violence and abuse associated with the provision of disability services. The Commissioner is not an avenue for members of the community to report violence, abuse or neglect of a resident by someone who is not a staff member. A complaint could be made to the Commissioner about how a service provider responded to an incident but, unless the perpetrator is a registered disability service provider, the Commissioner could not act in relation to the incident itself.

---

[151] Ibid 17.
[152] Ibid 18.
[153] 'Qualification Details', *training.gov.au: a Joint Initiative of the Australian and State and Territory Governments* (Web Page) <https://training.gov.au/Training/Details/CHC43115>.

Nor is the Australian Government's NDIS Commission an avenue for members of the community to report violence, abuse or neglect of a person by someone who is not a service provider. Even when service providers are involved, the requirements for NDIS providers to report abuse incidents to the NDIS Commission set a high bar for the types of incidents and situations that are considered 'abuse':

- registered NDIS providers are only required to report 'reportable incidents' to the NDIS Commissioner. A 'reportable incident' means:
    - the death of a person with disability
    - serious injury of a person with disability
    - abuse or neglect of a person with disability
    - unlawful sexual or physical contact with, or assault of, a person with disability
    - sexual misconduct committed against, or in the presence of, a person with disability, including the grooming of the person for sexual activity
    - the use of a restrictive practice in relation to a person with disability, other than where the use is in accordance with an authorisation (however described) of a state or territory in relation to the person.[154]
- non-registered NDIS providers are not required to provide the commission with notifications of reportable incidents.

While registered NDIS service providers have an obligation to take all reasonable steps to prevent and respond to all forms of violence against, and exploitation, neglect and abuse of people with disability, the incident management scheme applies to incidents that occur in connection with providing supports and services to people with disability.[155]

OPA regularly receives calls from members of the public reporting concerns about family members of at-risk adults interfering with the adult's independent supports. The Public Advocate has referred one such matter to the NDIS Commission, to be advised that it was outside the scope of the role of the agency. If interference with the provision of NDIS funded supports falls outside the jurisdiction of the NDIS Commission, the question arises as to which agency does have safeguarding responsibility for people in these situations?

[154] *National Disability Insurance Scheme Act 2013* (Cth) s 73Z(4).
[155] 'Incident Management and Reportable Incidents (NDIS Providers)', *NDIS Quality and Safeguards Commission* (Web Page) <https://www.ndiscommission.gov.au/providers/incident-management-and-reportable-incidents>.

Aged Care Commission

The Australian Government introduced a Serious Incident Response Scheme on 1 July 2021. Under the scheme, residential aged care providers must report to the Aged Care Quality and Safety Commission on a broader range of serious incidents, including neglect and psychological or emotional abuse, in connection with the provision of residential care or flexible care provided within a residential setting. Providers also have to report incidents of abuse and aggression between aged care residents, where the resident who commits the incident has a cognitive or mental impairment.[156] Where there are reasonable grounds to report the incident to police, this must be done within 24 hours.[157] The scheme was expanded to cover in-home aged care services from July 2022.[158]

However, the scheme is not, in itself, an avenue for members of the community to report violence, abuse or neglect of a resident by someone who is not a staff member. As discussed further in Section 3.5, the Aged Care Commission is not prescribed to be part of Victoria's Family Violence Information Sharing Scheme. Its role in identifying and responding to the abuse of at-risk adults by family and other visitors is therefore limited.

Tightly targeted public mental health services

As outlined in the final report of the Royal Commission into Victoria's Mental Health System, there is a complex mix of regulatory and independent oversight arrangements for Victoria's public mental health services.[159]

Key arrangements that interface directly with people experiencing mental illness or distress, and their families, carers and supporters, are noted below.

The Mental Health Complaints Commissioner:

- accepts, assesses, manages and investigates complaints relating to public mental health services in Victoria, mental health service providers, and to resolve complaints
- issues compliance notices to mental health services
- makes recommendations to the Victorian Government for improving mental health services, based on analysis of the complaints it receives.

[156] 'Serious Incident Response Scheme', *Australian Government, Aged Care Quality and Safety Commission* (Web Page) <https://www.agedcarequality.gov.au/sirs>.
[157] 'Frequently Asked Questions', *Australian Government, Aged Care Quality and Safety Commission* (Web Page) <https://www.agedcarequality.gov.au/sirs/frequently-asked-questions>.
[158] 'Serious Incident Response Scheme for In-Home Aged Care Services', *Department of Health* (Web Page) <https://consultations.health.gov.au/aged-care-reform-compliance-division/serious-incident-response-scheme-home-care-service>.
[159] *Royal Commission into Victoria's Mental Health System* (Final Report, 2021) vol 4, 253.

The Mental Health Tribunal is an independent statutory tribunal which seeks to protect the rights and dignity of people with mental illness. Its primary function is to determine whether the criteria for compulsory mental health treatment, as set out in the Act, apply to a person and therefore whether they can be placed (or kept) on a treatment order.

Volunteer Community Visitors can visit Victorian public mental health inpatient facilities to monitor and report on the adequacy of services, as noted on page 26, and can assist consumers to resolve issues or make a complaint.

Like the regulatory mechanisms in the disability and aged care sectors, the above agencies and programs were created to oversee the quality and safety of mental health services and are not avenues for members of the public wishing to report concerns about an at-risk adult in the community.

However, all Victoria's public mental health services are expected to deliver a 24/7 phone service that provides access to a triage mental health clinician. Andrew, whose story appears on page 50, is potentially someone who would be referred to a mental health service if there were concerns that his self-neglect was caused by mental illness.

Triage clinicians assess people's eligibility and priority for public mental health services, but unfortunately are forced to act as gatekeepers to a dramatically under-resourced service system. The mental health Royal Commission found that the lack of investment in the public mental health system, coupled with increasing demand pressures, has meant that services have become crisis-driven and focused on specific forms of mental illness (such as psychosis). Consequently, many people who require mental health services do not receive them.

> *The meagre resources in the public mental health system are currently directed to people with the most severe and urgent or acute experiences of mental illnesses, and yet frequently fail to provide treatment, care and support of the necessary intensity and duration even for this group.*[160]

Due to the high volume of calls to mental health triage services, callers are often not connected with or even directed to alternative services if they do not meet the strict criteria for accessing public mental health services.[161]

[160] *Royal Commission into Victoria's Mental Health System* (n 159) vol 4, 13.
[161] *Royal Commission into Victoria's Mental Health System* (n 159) vol 4, 463.

Criminal focus of safeguarding role of Victoria Police

Victoria Police's role is to uphold the law to promote a safe, secure and orderly society. Victoria Police achieves this by protecting life and property, detecting and apprehending offenders and helping those in need of assistance. It can investigate and charge perpetrators who are alleged to have committed a criminal offence.

In Victoria, a police officer is authorised to enter premises without a warrant in certain circumstances: by invitation; to carry out an arrest; or on *reasonable suspicion* that an offence is being committed or that a 'breach of the peace' is occurring or is about to occur.

Victoria Police officers can also enter a property to conduct a welfare check if there are concerns about the safety of a person; for example, if a person has not been seen for some time and this is out of character; if services, family or neighbours cannot contact the person; and/or if known risk factors for the person require contact to be made with them. The purpose of a welfare check is to locate the person and ensure they are alive and safe.

Victoria Police also has a role in implementing government policy and legislation for specific groups of at-risk adults. For example:

- Victoria Police has rolled out 31 Family Violence Investigation Units across the state, with at least one in each police division, to work with high-risk family violence cases, and improve the safety of victim survivors through police responses. The Units are staffed by detectives with specific family violence training and supported with tools to help identify risk and prioritise interventions.[162]

- Victoria Police was responsible for delivering several initiatives under the State Disability Plan, *Absolutely Everyone – State Disability Plan 2017–2020*.[163] These included developing a protocol with the Disability Services Commissioner to clarify investigation roles and processes when responding to allegations of abuse perpetrated against people with a disability, and incorporating the recommendations of the Victorian Equal Opportunity and Human Rights Commission report, *Beyond Doubt: the Experiences of People with Disabilities Reporting Crime*.[164] The organisation publicly committed to continued work to better meet the needs of people with a disability.[165] From late 2019, a police member from each region has appointed a 'disability liaison officer' to help police members translate policy into practice.

[162] 'Ending Family Violence – Victoria's 10-Year Plan for Change', *Victorian Government* (Web Page) <https://www.vic.gov.au/ending-family-violence-victorias-10-year-plan-change>.
[163] Victorian Government, *Inclusive Victoria: State Disability Plan 2022–2026* (Plan, March 2022); Department of Families, Fairness and Housing, *Absolutely Everyone: State Disability Plan 2017–2020* (Plan, 2017) <https://www.statedisabilityplan.vic.gov.au>.
[164] Victorian Equal Opportunity & Human Rights Commission, *Beyond doubt: the experiences of people with disabilities reporting crime* (Report, Jul 2014) <https://www.humanrights.vic.gov.au/resources/beyond-doubt-the-experiences-of-people-with-disabilities-reporting-crime-jul-2014/>.
[165] *Inclusive Victoria: State Disability Plan 2022–2026* (n 163).

- Similarly, under the current Disability Action Plan, Victoria Police has committed to: working with Scope Australia to provide police with the knowledge and skills to improve interactions with people with complex communication needs; updating and promoting the Voluntary Disclosure Process; establishing a network of employees to champion good practice and services that respond to the needs of people with disability; working with people with disability to co-design initiatives under the Victoria Police Disability Action Plan; and working with victim services and OPA to increase police awareness and use of intermediaries and Independent Third Persons.[166]

- Victoria Police's *Working with Older People, A Service Provider's Guide to Welfare Checks and Suspected Abuse*, advises service providers to contact the local police if there are concerns that an older person is being subject to violence, coercion (including financial coercion), physical or emotion control, denied access to necessary services, or otherwise being abused by a family member, friend, neighbour or carer.[167]

- Victoria Police is undertaking a Financial Elder Abuse Trial in five rural, regional and metropolitan areas across Victoria. It involves police working with community organisations to identify and respond to the financial exploitation of older people.[168]

- Section 351 of the Mental Health Act outlines the powers of a police officer (an authorised person under the Act) to apprehend a person (who appears to have mental illness) to prevent serious and imminent harm to the person or any other person. *The Department of Health–Victoria Police Protocol for Mental Health* sets out the agreed arrangements for interactions between Victoria Police and Victoria's area mental health services when supporting people with mental illness.[169]

Police officers do have a welfare role to assist people in need; they can enter properties to access at-risk adults where concerns have been raised and offer referrals to other agencies. However, Victoria Police is essentially a law enforcement agency and in matters that do not involve clear criminality, the police response will generally be limited to offering referrals to other relevant agencies. As the following story illustrates, the police do not necessarily act in cases where people have been abused but not seriously physically injured.

[166] *Inclusive Victoria: State Disability Plan 2022–2026* (n 163) 61.
[167] 'Elder Abuse', Victoria Police (Web Page) <https://www.police.vic.gov.au/elder-abuse>.
[168] 'New trial to disrupt financial elder abuse', *Mirage News* (online, 15 June 2020) <https://www.miragenews.com/new-trial-to-disrupt-financial-elder-abuse>.
[169] Department of Health and Human Services, State of Victoria, *Victoria Police Protocol for Mental Health: A Guide for Clinicians and Police* (Guide, October 2016) <https://www.health.vic.gov.au/sites/default/files/migrated/files/collections/policies-and-guidelines/p/protocol-for-mental-health.pdf>.

Maurice's story

Maurice shared a residential unit with Ray. There had been numerous incident reports about Ray, who had an acquired brain injury, epilepsy and some neurological decline and who was aggressive towards other residents. Ray is alleged to have poured boiling water over Maurice. An ambulance was called, and the incident reported to police. No action was taken by police.[170]

No specialist agency with statutory functions for at-risk adults

→ OPA's cornerstone recommendation is for an agency in Victoria to be given the clear statutory function of safeguarding and supporting at-risk adults.

In Victoria, there is no agency tasked with ensuring the safety and wellbeing of at-risk adults who are unable to access the services that they need, or who otherwise fall through the cracks between the maze of services and regulation.

Some individual services such as specialist family violence services, can support at-risk adults to arrange services and develop a safety plan. Similarly, there is a central phone number (managed by Seniors Rights Victoria) for people to call concerning older people experiencing abuse. Seniors Rights Victoria also provides a specialist integrated advocacy and legal service for older people who meet the agency's eligibility criteria. However, these services do not have a statutory function of safeguarding at-risk adults (nor the associated powers required to do so) and people who do not meet the eligibility criteria for those services do not receive the support that they need.

This situation is at odds with some other Australian states and territories that have agencies with a clear statutory role of safeguarding and supporting adults who, despite having full decision-making ability, are nevertheless at risk of abuse (see Table 3).

[170] Office of the Public Advocate (Vic), *Community Visitors Annual Report 2018-2019* (Report, 2019) 34.

The cornerstone recommendation of the Adult Safeguarding Project is that the Victorian Government legislates to establish an adult safeguarding function within an existing agency. Among other things, the agency responsible would investigate reports of violence, abuse and neglect of at-risk adults and support people to connect with appropriate services. This recommendation is explained further in Chapter 4, and Appendix 1 presents a range of implementation considerations relating to the drafting of the proposed legislation and the location and scope of the proposed adult safeguarding function. Essentially, however, the agency would:

- promote and advocate for the rights of at-risk adults
- provide advice and assistance to the public
- receive reports of abuse and neglect of at-risk adults
- assess reports relating to the suspected abuse of at-risk adults
- undertake investigations (own motion and on receipt of a complaint or notification), including to see and speak with the at-risk person
- provide decision-making support for the at-risk adults it assists
- coordinate supportive responses to reports in relation to the suspected abuse of at-risk adults with agencies with other agencies and service providers
- make applications to a court or tribunal, including the power to intervene in VCAT guardianship and administration proceedings.

A specialist safeguarding function in practice

As examples of how this could work in practice, consider the stories presented earlier in this chapter. Having a Victorian agency with an adult safeguarding function would provide:

- A central point for people concerned about family members interfering with the supports of an at-risk adult to discuss their concerns. The safeguarding agency would be able to liaise with the service providers to coordinate support for the adult to maintain their independence.
- The bank manager would be authorised to contact the agency with concerns about Li. Through the information sharing provisions, the agency would be able to conduct a risk assessment and approach Li to facilitate support to safeguard her financial interests.
- If Andrew's neighbours witnessed his living conditions and were concerned for his wellbeing, they could contact the agency for advice. The agency would also be able to coordinate a supportive response, including referral to ongoing intensive support and help with attending appointments (subject to adequate supports being available).

Having an agency in Victoria with the powers and resources undertake these activities would help establish the following features of an effective adult safeguarding system, as discussed in Chapter 2:

- well-defined powers and resources to safeguard at-risk adults
- clear pathways for reporting abuse
- timely identification of abuse.

The specialist adult safeguarding function could also promote:

- rights-based, person-centered approaches to decision-making (for example, supported decision making about safety planning)
- whole-of-government abuse prevention strategies
- capacity building in mainstream services.

Of course, an agency performing a specialist adult safeguarding function cannot be the sole remedy to the issues and gaps outlined in this section. For example, given that not all violence is perpetrated by someone who falls within the definition of family-like relationship, there must be other mechanisms in place to ensure accurate and timely identification and risk assessment of all forms of abuse, neglect and exploitation. Therefore, this report makes a series of additional recommendations to ensure that robust information-sharing arrangements are in place in relation to violence against at-risk adults that are not instances of family violence (see Chapter 4).

Table 3.

Specialist adult safeguarding roles in other Australian states and territories

Jurisdiction	Adult safeguarding arrangement
New South Wales	In July 2019, the New South Wales Government established the Office of the Ageing and Disability Commissioner. It was established to better protect vulnerable adults who are at risk of abuse, neglect and exploitation in NSW home and community settings by strengthening safeguards, improving oversight, and addressing gaps in existing investigative and complaint bodies.[171] The Ageing and Disability Commission (the Commission) is an independent New South Wales Government agency and is not subject to Ministerial direction and control.[172] The former Elder Abuse Helpline and Resource Unit and Ageing and Disability Abuse Helpline are now part of the Commission and the helpline is called the Ageing and Disability Abuse Helpline. The Official Community Visitor Scheme is also now part of the Commission and no longer sits with the NSW Ombudsman. The Commission is supported by the Ageing and Disability Advisory Board, which advises the Commissioner on relevant matters or matters referred to the Board by the Commissioner.
South Australia	South Australia's Adult Safeguarding Unit (the ASU) is established by the *Ageing and Adult Safeguarding Act 1995 and Ageing and Adult Safeguarding Regulations* 2019. It is guided by human rights principles, a new *Charter of the Rights and Freedoms of Vulnerable Adults* (the Charter) and its Code of Conduct. The ASU is in the Office for Ageing Well and commenced operation on 1 October 2019. It has a focus on safeguarding the rights of adults at risk of abuse. It is not a regulatory agency, and its objectives are to work positively with the adult at risk to facilitate safeguarding support while preserving relationships that are important to the person, rather than to punish perpetrators. Key functions include: • responding to reports of suspected or actual abuse of adults who may be vulnerable (and initiating investigations where the Director deems it appropriate) • providing support to safeguard the rights of adults experiencing abuse, tailored to their needs, wishes and circumstances (in the form of coordination of a safety plan) • raising community awareness of strategies to safeguard the rights of adults who may be at risk of abuse. Reporting suspected or actual abuse to the ASU is voluntary. Once a report has been made, the unit will assess the report to determine the most appropriate action, which must be to investigate, refer the matter or decline to take further action. It operates the South Australian Elder Abuse Prevention Phone Line. The Elder Abuse Prevention Phone Line is a confidential service that members of the community can call if they or someone they know is concerned about elder abuse. Staff can help the person to find services, provide information about the person's rights or advice to help the situation. The caller can remain anonymous.[173]

Table 3. Cont.

	An evaluation of the ASU's first year of operation found that it is effectively discharging its legislative requirements; has established relatively efficient operating procedures and systems; and appears to be working effectively with a broad range of stakeholders. The evaluation report made recommendations for how the ASU could strengthen its performance in these areas and clarify areas of focus for its future operations.[174] In 2020, the Minister for Human Services established the Safeguarding Taskforce with responsibility to examine and report quickly on safeguarding gaps for people with a disability. The South Australian Government has accepted the taskforce's recommendation to expand the role of the unit so that its scope includes vulnerable adults of any age.[175]
Australian Capital Territory	From May 2020, the ACT Human Rights Commission has had jurisdiction to consider complaints concerning at-risk adults. It arose following the ALRC's Elder Abuse inquiry and is loosely modelled on the NSW Ageing and Disability Commission model. A person may complain to the Commission about the treatment of a vulnerable person if the person believes on reasonable grounds that the vulnerable person is subject to or at risk of abuse, neglect or exploitation. Division 4.2 of the *Human Rights Commission Act* 2005 outlines the Commission's approach to dealing with complaints.[176] The Commission may: • consider the complaint[177] • ask for information, documents and attendance at meetings (it is an offence to fail to comply)[178] • refer the complaint for conciliation[179] • provide a final report to the complainant and person complained about, among other things. (The Commission must provide an opportunity for a person to respond to any adverse comments)[180] • recommend that action be taken and within a specific time.[181] The Commissioner may, but is not required to, refer a complaint to a statutory office holder. This will generally depend on the outcome that the complainant is seeking, and be managed by way of a warm referral to the office holder.[182]

[171] 'Who we are', *NSW Ageing and Disability Commission* (Web Page) <https://www.ageingdisabilitycommission.nsw.gov.au/about-us/who-we-are>.
[172] 'Ageing and Disability Commissioner', *NSW Government, Communities and Justice* (Web Page) <https://www.facs.nsw.gov.au/inclusion/disability/ageing-and-disability-commissioner>.
[173] 'Stop Elder Abuse', *Government of South Australia* (Web Page) <https://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/conditions/stop+elder+abuse/stop+elder+abuse>.
[174] Report commissioned by the South Australian Department for Health and Wellbeing: Tetra Tech International Development, *Evaluation Report Adult Safeguarding Unit: Year One Evaluation* (Report, 2021)
[175] Government of South Australia, *Safeguarding Task Force Interim Report* (Report, 2020)
[176] *Human Rights Commission Act 2005* (ACT) s 41B.
[177] *Human Rights Commission Act 2005* (ACT) s 69 and div 4.4.
[178] *Human Rights Commission Act 2005* (ACT) s 73.
[179] Ibid s 51.
[180] Ibid s 80.
[181] Ibid s 81.
[182] Ibid s 52A.

3.2 Gaps in legal response options

→ OPA has recommended additional legislative reforms to fill specific gaps in the legal response options available in cases of the abuse, neglect and exploitation of at-risk adults.

There are a range of legal responses that can be used where adults are at risk of or have experienced abuse, neglect and exploitation. These depend on the severity of the abuse, the needs of the abused person, and their relationship with the abuser.

Many cases of abuse are reported to the police. In family violence matters, police have the power to:

- apply for a warrant to ensure the safety of, or preserve the property of the affected family member, or ensure that the respondent attends court[183]
- apply for a police family violence safety notice[184]
- apply for an intervention order.

While there is a clear police response if concerns about family violence are communicated to the Family Violence Unit, as was the case in Anna's story on page 50, the police response is more limited outside the context of family violence.[185] Police can apply for a personal safety intervention order in circumstances where the respondent and affected person are not family members.[186] If there is sufficient evidence, police can charge the perpetrator with an offence such as assault, sexual assault, fraud or theft.

The Adult Safeguarding Project identified three main areas in which legislative reform is needed to ensure appropriate responses to all forms of abuse, neglect and exploitation of adults in Victoria. These relate to the need for:

- a wider range of orders as alternatives to guardianship and administration orders
- changes to ensure that the protections under the Children, Youth and Families Act apply to young adults aged 17years old
- resolution options for people who have interests other than proprietary interests in disputed assets.

[183] Family Violence Protection *Act 2008* (Vic) s 50, *Personal Safety Intervention Orders Act 2010* (Vic) s 21 if not family violence.
[184] *Family Violence Protection Act 2008* (Vic) s 26.
[185] Interview with Victoria Police (OPA, 8 October 2020).
[186] *Personal Safety Intervention Orders Act 2010* (Vic) s 61.

No alternatives to guardianship and administration orders

The guardianship and administration system is a key adult safeguarding mechanism in Victoria.

Applications for the appointment of a guardian, supportive guardian, administrator or supportive administrator (or for a re-hearing) are made to VCAT. VCAT may appoint the Public Advocate as guardian of last resort, or State Trustees as administrator.

VCAT may make a guardianship or administration order if satisfied that:

- because of the proposed represented person's disability, the person does not have decision-making capacity in relation to the personal or financial matter for which the order is sought
- the person needs a guardian or administrator.[187]

The system plays a critical role in upholding the rights of people with disability, for example where a guardian is needed to promote the autonomy and implement the will and preference of a person whose family does not respect their right to make their own decisions about where they live or who they see.[188]

This was confirmed in an analysis of cases of elder abuse undertaken by OPA. It found that guardianship effectively protected most clients from non-financial elder abuse.[189] However, the guardianship research found that a small group were not fully protected by guardianship. This primarily occurs where:

- the abuse is financial
- there are difficulties monitoring the behaviour of family members in the privacy of the home
- abuse continued after the admission of the client into aged care, for example emotional abuse, or sneaking in unsafe food from home.[190]

There are potential legal remedies in each of these situations. For example, in a small number of cases, guardians make applications to VCAT to appoint an administrator to stop financial abuse.[191] If appointed as guardian to make accommodation decisions, OPA can decide to move the at-risk adult to a safer environment. Perpetrators of abuse in these situations can also be subject to a Family Violence Intervention Order or, where the perpetrator is not a family member of the at-risk adult, a Personal Safety Intervention Order.

[187] *Guardianship and Administration Act 2019* (Vic) s 30.
[188] See for example, *THD (Guardianship)* 2020 VCAT 677 and *NCX (Guardianship)* (2021) VCAT 544 (Judge Hampel, V-P).
[189] Internal analysis by the Office of the Public Advocate (Vic).
[190] L Bedson, L, J Chesterman and M Woods (n 122).
[191] L Bedson, L, J Chesterman and M Woods (n 122) 15.

Despite its effectiveness in many situations, guardianship should only ever be a last resort, due to the restrictions it places on people's autonomy. Currently, however, the guardianship net is not cast as narrowly as it could be because of the absence of other less-restrictive options. OPA has long argued that if 'Victoria is to make less use of guardianship, there needs to be alternative options available, with due process safeguards embedded, when some degree of compulsion is required to ensure the protection of an individual.'[192] The Adult Safeguarding Project has reinforced OPA's belief that the system would be significantly improved if VCAT were able to make less-restrictive orders than guardianship to ensure the safety of at-risk adults without the person losing their legal capacity.

The Victorian Government could ask Parliament to grant VCAT 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.

Absence of safeguarding mechanisms for young adults aged 17-years

→ OPA has recommended that the protections available under the Children, Youth and Families Act should apply to 17-year-olds.

Currently in Victoria, applications may be made to VCAT for a guardianship order or administration order appointing a guardian[193] or administrator[194] for an adult with a disability (where the person is not yet an adult the order takes effect on that person attaining 18 years of age).

However, unless the young person is already subject to an order under the Children Youth and Families Act that extends until they turn 18, there is no safeguarding option available to protect and uphold the rights of people who are 17 years old. Protective action can be taken under the Children, Youth and Families Act in respect of children under the age of 17. Ric's story on the following page highlights this problem.

[192] J Chesterman (n 144) 72 citing the Victorian Law Reform Commission, *Guardianship Final Report* (Report, 2012) 84.
[193] *Guardianship and Administration Act 2019* (Vic) s 22.
[194] *Guardianship and Administration Act 2019* (Vic) s 23.

Ric's story

Ric, 17, has a profound disability. He lived with his parent who was suffering from a significant mental illness. Ric had an NDIS plan, but when the planner came to Ric's house for the plan review meeting, his parent insisted that the meeting take place on the front porch and the planner did not see inside the house.

A family member, who did not live with Ric and his parent, became increasingly concerned about the parent's mental health and called the local Crisis and Assessment Team. It attended the home with local police to discover Ric locked in a room, seriously malnourished, in soiled clothing and bedding.

The parent was admitted as an involuntary patient and Ric was admitted to hospital. He was so malnourished concerns were raised about the potential risk of re-feeding syndrome. The parent was deemed not to have decision-making capacity to make medical treatment decisions for Ric, nor were they able to consent to discharge arrangements.

There is no power for either the Secretary of the Department or the Public Advocate or anyone else other than a parent to make decisions on behalf of a 17-year-old.

The VLRC recommended that:

- the age jurisdiction for guardianship and administration be lowered to 16 years and over in proposed new guardianship legislation, and increased to 18 years in the Children, Youth and Families Act to enable a protection application to be made in relation to any person under the age of 18 years. A similar recommendation was made in relation to financial administrators as well as a recommendation that both Acts provide guidance about when it is preferable to make orders under either depending on the primary need.

- VCAT should be permitted to refer an application for the appointment of a personal guardian or financial administrator for a young person (as per a new proposed definition) to the Children's Court if it believes that the application is better dealt with as a protection application under the Children, Youth and Families Act (and vice versa).[195]

OPA considers that the preferred approach is to change the definition of a child in the Children, Youth and Families Act to a person under 18 years of age to ensure that the protections available under that legislation apply to children 17 years old.

[195] Victorian Law Reform Commission, *Guardianship Final Report* (Report No 24, 2012) [rec 407-408, 516].

There is currently a Bill before Parliament (the *Children, Youth and Families Amendment (Child Protection) Bill 2021*) that addresses the gap concerning 17-year-olds.[196] Given that there has been some opposition to other elements of the Bill, its passage through Parliament is not yet assured.

Dispute resolution for interests other than proprietary interest in assets

→ Disputes over an interest in land less than ownership could be heard and determined by the Victorian Civil and Administrative Tribunal.

One form of financial elder abuse occurs in the context of family agreements. In what is commonly understood as an 'assets for care' arrangement, an older person transfers their 'home or other assets to a trusted family member in exchange for a promise of long-term care and support'.[197] These agreements are rarely in writing, and when things go wrong, the older person may lose the money invested under the agreement and find themselves at risk of homelessness.

The Commissioner for Senior Victorians reported that '[o]lder people have raised their concerns with me about how challenging it can be for them to take elder abuse matters through the courts, particularly in regard to matters such as assets for care where it is adult children who are the perpetrators of abuse. As outlined by the Australian Law Reform Commission, it is vital that appropriate pathways are available in cases of abuse, including situations where there is a transfer of assets in return for the provision of care'.[198]

Part IV of the Property Law Act gives VCAT jurisdiction to determine disputes between legal and equitable co-owners of land. This is a unique feature of the Victorian safeguarding system. If it is determined that under the agreement, the parties intended the older person to share in the ownership of the family member's property, the dispute can be determined by VCAT under these provisions.

However, the available remedy in these cases is highly dependent on the circumstances of the case. In cases where it cannot be established that the parties intended that the older person was to be a co-owner of the property, the older person may be entitled to another remedy such as compensation for the loss of what was promised to them. Similarly, the older person might have a life interest in the property, enabling them to stay in the home for the remainder of their life. These other interests, that do not amount to ownership, cannot be determined by VCAT. There is no accessible response for older people claiming less than ownership of the family member's property when a dispute arises over an 'assets for care' arrangement.

[196] Children, Youth and Families Amendment (Child Protection) Bill 2021 (Vic). <https://www.legislation.vic.gov.au/bills/children-youth-and-families-amendment-child-protection-bill-2021>.
[197] *Elder Abuse – A National Legal Response* (n 6) 204.
[198] Email from the Commissioner for Senior Victorians, Ambassador for Elder Abuse Prevention, to OPA, 5 April 2022.

The Australian Law Reform Commission has recommended that state and territory tribunals should have jurisdiction to resolve family disputes involving residential property under an 'assets for care' arrangement.[199] The Western Australia Select Committee into Elder Abuse recommended that the Western Australian Government's government direct the Law Reform Commission of Western Australia to inquire into the possible expansion of the State Administrative Tribunal's jurisdiction to cover disputes that involve assets for care arrangements.[200]

As stated by the Australian Law Reform Commission, 'one of the particular advantages of VCAT having this jurisdiction is that it gives the parties access to alternative dispute resolution without going through a number of pre-trial steps, which may be required in the Supreme Courts'.[201]

The Victorian Government could consider extending the jurisdiction of VCAT under the Property Law Act to deal with any dispute arising in the context of assets for care arrangements. This would ensure accessible dispute resolution options are available for older people claiming an interest other than a proprietary interest in the land that is the subject of the dispute.

3.3 Lack of person-centred approach and decision-making supports

→ An agency with a specialist adult safeguarding function, as recommended in this report, could provide decision-making supports for the at-risk adults it assists.

In line with current human rights legislation and policy, key law reform reports have recommended adult safeguarding systems should be person centered and provide decision-making supports to the at-risk adult.

In Victoria, the human right to participate in decisions concerning our lives has been legislated in certain contexts, and there are pockets of pilot projects to provide decision-making support to people who require it.

For example, OPA partnered with the Victorian Advocacy League for Individuals with Disability (VALID) on the OVAL project[202] to recruit, train and match volunteer supporters with 60 isolated people with decision-making disabilities who wished to receive support with decision-making about their NDIS support plan.[203]

[199] *Elder Abuse – A National Legal Response* (n 6) 214 [rec 6-1].
[200] *'I never thought it would happen to me': When trust is broken: Final Report* (n 65).
[201] *Elder Abuse – A National Legal Response* (n 6) 217.
[202] 'The Oval Project', *Office of the Public Advocate (Vic)* (Web Page). <https://www.publicadvocate.vic.gov.au/opa-s-work/research/144-research-item-on-frontpage>.
[203] Ibid.

Similarly, OPA is delivering the Healthy Discussions project which aims to upskill and support health professionals, particularly those in the public sector, to improve their communication with, and understanding of, people with disability who have specific communication needs. The project is funded through an NDIS Capacity Building grant. It uses a supported decision-making lens and assumes that people should be provided with practical and appropriate support to make decisions about their health and medical treatment, and that public sector organisations and employees should assist people with such support when it is needed.

Outside the various pilot programs, there is a dearth of decision-making support available for those who need it and an absence of a statewide strategy for providing support when it is required. This is because legislation and policy promoting supported decision making has not necessarily been backed by the funding necessary to ensure that the legislative intent is realised in practice. For example, the recent Royal Commission to Victoria's Mental Health System identified limited oversight and no public reporting on how mental health services are complying with the principles of the Mental Health Act, which require services to support consumers to make decisions about treatment consistent with their expressed preferences.[204]

In the disability and aged care sectors, issues with implementation of supported decision-making are exacerbated by the complexity of the interface between Victorian legislation and national funding and regulation of disability and aged care services. For example, decision-making support is not funded in NDIS support plans.

3.4 No comprehensive abuse prevention plan

→ OPA has recommended that the Victorian Government implements a statewide strategy to prevent the abuse, neglect and exploitation of at-risk adults. The proposed new adult safeguarding function could include a primary prevention role.

As discussed in Chapter 2, a range of inquiries have recommended that a comprehensive prevention framework should guide action to prevent and respond to the abuse, neglect and exploitation of at-risk adults.

[204] *Royal Commission into Victoria's Mental Health System* (n 159) vol 4, 407.

Victoria has several different strategies and plans to prevent abuse of specific cohorts of at-risk adults in Victoria. Analysis of these documents revealed that:

- While there are prevention strategies in relation to family violence, violence against women and in relation to the abuse of people with disability, there is no Victorian elder abuse prevention framework.[205] The Victorian Government reports that it is committed to developing an elder abuse primary prevention framework. Work on this initiative has, as is the case with many activities, been impacted by the COVID-19 pandemic but is expected to be completed in 2022.[206]
- There is considerable cross-over between the target groups of the various strategies, so that at-risk adults may fall within more than one of the strategies. For example, in many cases, elder abuse is a form of family violence, older people have disabilities and people with disability are at a greater risk of experiencing family violence. Consequently, family violence and the work under the National Plan to Respond to the Abuse of Older Australians are included in the state disability plan, the *Inclusive Victoria State Disability Plan 2022-2026*, and the *Free from Violence* family violence prevention strategy incorporates strategies to prevent elder abuse.
- There is no overarching strategy or action plan to guide action to prevent and respond to the abuse of at-risk adults.

The comprehensive prevention strategy and action plan recommended in Chapter 4 of this report could, among other things, identify and empower lead agencies and drive collaborative responses, across sectors in respect of an adult safeguarding strategy.[207] This approach would also enable monitoring and evaluation of the strategy.

3.5 Lack of information about abuse

→ OPA has recommended better collection and reporting of data about the incidence and nature of abuse of at-risk adults.

While the drivers of family violence are generally well-understood, the development and evaluation of targeted abuse prevention activities requires better data about abuse, neglect and exploitation of specific groups of at-risk adults.

For example, it is difficult to quantify exactly the proportion of economic costs of family violence to victim survivors who are older or who have a disability, and there have been calls to improve reporting of family violence data to enable policy makers to 'better understand and respond to violence and abuse against people with disability.'[208]

[205] National Ageing Research Institute, *Primary prevention interventions for elder abuse: Results from a systematic review* (Report, 2020) 10.
[206] Interview with Department of Fairness, Families and Housing representative (OPA, 21 March 2022).
[207] J Chesterman 'Taking Control: Putting Older People at the Centre of Elder Abuse Response Strategies', (2016), 69(1) *Australian Social Work* 115-124.
[208] *Violence and abuse of people with disability at home* (n 31) 3.

The recent publication of the National Elder Abuse Prevalence study has provided much needed evidence into the prevalence and dynamics of elder abuse. However, the study was limited in that it did not include older people with a cognitive impairment or from a residential aged care service and did not ask about experience of abuse over the course of the respondents' lifetime.[209]

There is also 'limited high-quality evidence regarding the implementation, evaluation and effectiveness of elder abuse primary prevention interventions.'[210] The drivers of elder abuse are poorly understood, but existing literature suggests that ageism, gender inequality, racism, homophobia, transphobia, ableism and living in a society where a person's worth is defined by their capacity to contribute financially, are among the predictors of elder abuse.[211]

As noted in Section 3.1, aged care providers are required to make a police report in relation to incidents where there are reasonable grounds to contact the police as well as the Aged Care Commission. Data in relation to those reports is not publicly available.[212] It would assist to understand the nature and prevalence of violence, neglect and abuse of people in residential aged care facilities to have publicly accessible data on the incidents that are reported to Victoria Police, including their outcomes.

Amendments to Victoria's family violence legislation and regulations, as discussed in Section 3.1, are also relevant here. Prescribing additional agencies – such as financial services and Australian Government entities responsible for disability and aged care services – as information sharing entities and in respect of the MARAM Framework would result in more comprehensive data and information about family violence. As noted in that section, this would require collaboration between the Victorian and Australian Governments.

3.6 Need to build mainstream services' capacity and capability

→ OPA has made a broad recommendation that the Victorian Government commit to building the capacity of mainstream services to identify and respond to the abuse, neglect and exploitation of at-risk adults.

As mentioned in Section 2.6, the effectiveness of any adult safeguarding system ultimately depends on the availability of services for at-risk adults.

[209] *National Elder Abuse Prevalence Study: Final Report* (n 131) 21.
[210] *Primary prevention interventions for elder abuse: Results from a systematic review* (n 205) 8.
[211] Ibid 10.
[212] Latest Victorian Crime Data', *Victorian Government Crime Statistics Agency* (Web Page) <https://www.crimestatistics.vic.gov.au/crime-statistics/latest-victorian-crime-data>.

There are a range of publicly funded services available to at-risk adults across several domains, including legal services, aged care, disability, family violence and mental health services, among others. These 'mainstream' services must have the capability to assess abuse risks and recognise signs of abuse and the capacity to support people who are being abused. This is currently hampered by systemic funding and workforce challenges, as briefly outlined below.

Underfunding

The Victorian Government and the Australian Government have increased funding for a range of services, but most health, community and justice services remain under pressure. Recent Royal Commissions into aged care, family violence and mental health services have revealed many common themes: difficulties of access and navigation, especially for disadvantaged and marginalised members of the community; long waiting times for services; substandard models of care; problems in recruiting and retaining skilled workers, and inadequate supports for clients to participate in decisions about their care. The Royal Commissions have identified underfunding of the relevant service sectors as a key reason why too many people receive inadequate treatment, care and support, or none at all.

As the grassroots advocacy organisation Every Australian Counts has said, although the NDIS is making a big difference to many lives, it isn't working well for everyone – and making sure the scheme is securely funded, now and into the future, is fundamental to improving its effectiveness.[213]

Need for workforce capacity building

While detailed consideration of the challenges facing mainstream services is beyond the scope of this project, the report has identified a need for staff of mainstream services to be better skilled in identifying and responding to abuse. This includes knowing when and how to share information about abuse risks and understanding client consent and privacy obligations.

In recognition of the importance of the workforce having the right skills and knowledge, the Royal Commission into Family Violence recommended that the Victorian Government develop a ten-year industry plan. *Building from Strength: 10-year Industry Plan for Family Violence Prevention and Response*[214] outlines the Victorian Government's long-term vision and plan for the workforces that aim to prevent and respond to family violence. While the plan focuses on the specialist family violence and primary prevention sectors, it includes actions for other workforces that intersect with family violence including community services, health, justice and education and training sectors.

[213] 'About', *Every Australian Counts* (Web Page) <https://everyaustraliancounts.com.au/about/>.
[214] Victorian Government, *Building from Strength: 10 Year Family Violence Industry Plan for Family Violence Prevention and Response* (Plan, 2017) <https://www.vic.gov.au/building-strength-10-year-industry-plan>.

Outside the family violence framework, training on the topic of identifying and responding to abuse generally relates to specific cohorts such as older people or people with a disability. For some services, such as disability service providers, the narrower focus is appropriate. In other mainstream services, coordinated training, support and processes to identify and respond to the abuse of all at-risk adults may be more appropriate.

The Victorian Government could develop a coordinated approach to support and train mainstream sectors of the workforce to identify and respond to the abuse of at-risk adults. New workforce development initiatives could build on a range of existing training and resources. These include:

- OPA's *Interagency Guideline for Addressing Violence, Neglect and Abuse*[215]
- *Responding to allegations of abuse involving people with disabilities: guidelines for disability service providers and Victoria Police*[216]
- The Victorian Government's elder abuse workforce development, one component of which was the development of elder abuse prevention online training.[217] The online training will be replaced with an Elder Abuse MARAM eLearn. The MARAM eLearn is currently under development and will be available later in 2022.
- The *With Respect to Age – 2009 Guidelines*. These are practice guidelines for health services and community agencies for the prevention of elder abuse.[218]
- the trial of an integrated model of care for responding to suspected elder abuse, which includes workforce training delivered by The Bouverie Centre to train clinical staff and partners of the trial health services to respond to suspected elder abuse.[219]
- training of community bilingual educators as part of the Raising Awareness of Elder Abuse in Ethnic Communities Project.[220]
- Seniors Rights Victoria professional education to workers on how to identify and respond to elder abuse.

[215] Office of the Public Advocate (Vic), *Interagency guideline for addressing violence, neglect and abuse (IGUANA)* (Guideline, 2012).
[216] Department of Health and Human Services (Vic), *Responding to Allegations of Abuse involving People with Disabilities: Guidelines for Disability Service Providers and Victoria Police* (Guidelines, June 2018) 6.
[217] 'Elder abuse professional development', Department of Health (Web Page) <https://www2.health.vic.gov.au/ageing-and-aged-care/wellbeing-and-participation/preventing-elder-abuse/elder-abuse-professional-development>.
[218] Ibid.
[219] Ibid.
[220] 'Elder Abuse Prevention', *Ethnic Communities' Council of Victoria* (Web Page) <https://eccv.org.au/elder-abuse-prevention>.

4.0

Recommendations to the Victorian Government

4.1 Cornerstone recommendation: a specialist adult safeguarding function

The Victorian Government should:

1. Introduce legislation (adult safeguarding legislation) to establish a new, specialist adult safeguarding function, preferably within an existing agency such as the Office of the Public Advocate. The legislation should:

    a. enable the agency to receive and assess reports of abuse, neglect and exploitation of at-risk adults via a well-resourced and publicised helpline; undertake investigations; and make and coordinate referrals to other agencies

    b. be underpinned by human rights principles, including the principles of supported decision-making and informed consent to safeguarding actions, wherever possible

    c. provide that the functions and powers of the new adult safeguarding agency apply to a specific cohort of at-risk adults who are unable to protect themselves from abuse, neglect and exploitation because of their care and support needs

    d. provide a broad definition of abuse that captures the type of controlling behaviors commonly exhibited by perpetrators of abuse of at-risk adults.

OPA's research and consultations for the Adult Safeguarding Project revealed a range of factors that would need to be considered in the implementation of an adult safeguarding function in Victoria. Key considerations are outlined in Appendix 1.

4.2 Supporting recommendations

Amendments to the Family Violence Protection Act 2008 (Vic)

The Victorian Government should:

2. Amend the Family Violence Protection Act to provide effective protection for at-risk adults. The legislation should:
    a. specify that residents cohabitating in Supported Disability Accommodation are in 'family-like relationships' for the purposes of the Act
    b. explicitly include behaviors common in cases of violence against at-risk adults, such as making the person dependent on the abuser, isolating the at-risk person from friends and family, and limiting the at-risk adult's access to services, as forms of family violence and provide examples in the legislation
    c. ensure that, before making a Family Violence Intervention Order, the court be required to consider whether the respondent can understand the nature and effect of the order and is able to comply with its conditions.

The Victorian Government should also collaborate with the Australian Government in relation to the prescription of Australian Government entities as Information Sharing Entities and for the Multi Agency Risk Assessment and Management (MARAM) Framework. Relevant Australian Government entities include the National Disability Insurance Agency, the NDIS Commission, and the Aged Care Quality and Safety Commission.

Information sharing for abuse that is not family violence

The Victorian Government should:

3. Ensure that robust information sharing arrangements are in place in relation to violence against at-risk adults that are not instances of family violence. This will require, among other actions, amending the *Privacy and Data Protection Act 2014* (Vic) and the *Health Records Act 2001* (Vic) to (a) clarify that a serious threat to an individual's life, health, safety or welfare includes a serious threat to the individual's financial safety and welfare, and (b) prescribe development of an education campaign for service providers and financial institutions on appropriate information-sharing.

Additional legislative reforms for more comprehensive responses

The Victorian Government should:

4. Make additional legislative reforms to enable a more comprehensive range of responses to at-risk adults, including:

    a. increasing the age jurisdiction of the *Children, Youth and Families Act 2015* (Vic) to under 18 years to ensure that appropriate safeguarding mechanisms apply to young people aged 17 years old

    b. granting the Victorian Civil and Administrative Tribunal the power to make a wider range of orders in relation to at-risk adults, as alternatives to guardianship orders, such as:

        i. entry and assessment orders
        ii. removal and placement orders
        iii. service provision orders
        iv. banning orders.

    c. extending the jurisdiction of the Victorian Civil and Administrative Tribunal under Part IV of the *Property Law Act 1958* (Vic) to cover disputes over claims of interests in land that arise in the context of assets for care arrangements. This would ensure accessible dispute resolution options are available for older people claiming an interest other than a proprietary interest in the land that is the subject of the dispute (for example, a dispute over a right to reside in the property for the rest of the person claiming the interest's life).

    d. in relation to at-risk adults with a decision-making disability, amending the Public Advocate's existing functions under the *Guardianship and Administration Act 2019* (Vic) to:

        i. give the Public Advocate the function of receiving complaints in relation to the abuse, neglect or exploitation of people with impaired decision-making ability due to a disability, and the misuse of powers by private individuals or organisations appointed to substitute decision-making and supportive decision-making roles

        ii. provide that where the Public Advocate believes that an investigation of these complaints is warranted, she is able to investigate on her own motion

        iii. enable the Public Advocate, when conducting an investigation, to serve a written notice to a person requiring them to attend a conference and/or provide specified documents, written responses to questions, or other materials relevant to the investigation

iv. make it an offence for a person to refuse or fail to provide information, or to attend a conference, when directed by the Public Advocate to do so

v. permit the Public Advocate to apply to the Victorian Civil and Administrative Tribunal or to the Magistrates Court of Victoria for a warrant authorising entry to any premises where she believes that a person with impaired decision-making ability due to a disability is being abused, exploited or neglected.

A statewide prevention strategy

The Victorian Government should:

5. Develop and implement a statewide strategy and action plan for the prevention of abuse, neglect and exploitation of at-risk adults, building on its Free from Violence and Dignity, Respect and Safer Services abuse prevention strategies.

Better understanding of abuse

The Victorian Government should:

6. Ensure that data about the incidence and nature of abuse of at-risk adults is collected and publicly reported.

Enhanced capacity of mainstream services

The Victorian Government should:

7. Build the capacity of mainstream services to identify and respond to the abuse of at-risk adults.

Other options to improve the adult safeguarding system in Victoria are within the remit of the Australian Government and are noted in Chapter 5.

5.0

What the Australian Government could do

While this report has focused on the adult safeguarding role of the Victorian Government, there are several potential reforms at the Australian Government level that would result in better safeguarding of at-risk adults in Victoria.

These are briefly outlined below.

- **Community Visitors.** The Australian government could ensure Community Visitor oversight in relation to new disability accommodation models.
- **National Disability Insurance Agency (NDIA) – compliance with state legislation.** The Australian Government could amend the *NDIS Practice Standards, Core Module 2 Provider Governance and Operational Management* to include compliance with state and territory legislation relating to the protection of vulnerable adults and family violence protection.
- **National Disability Insurance Scheme Quality and Safeguards Commission.** As part of its regular quality audits, the Commission could require evidence of compliance with legislative obligations relating to the protection of at-risk adults and family violence protection when assessing compliance with *NDIS Practice Standards, Core Module 2 Provider Governance and Operational Management*.
- **NDIS risk assessment.** The Australian Government could require the National Disability Insurance Agency to develop an operational protocol for planners (and Local Area Coordinators) to incorporate a formal and holistic assessment of participant risk, as outlined in the NDIS Quality and Safeguarding Framework. The assessment framework could be developed through a consultation process.

- **NDIS data.** The Australian Government could publish disaggregated data and detailed thematic analyses on emerging safeguarding issues, including the following:
    - complaints received (for example, the nature of the complaint, who made the complaint, time to resolution, out-of-scope complaints, outcome)
    - incident reports (for example, provider compliance with incident reporting requirements)
    - use of restrictive practices (for example, number of approved and unapproved restrictive practices)
    - prevalence of violence and abuse occurring in services
    - deaths in services (for example, cause of death, investigations undertaken)
    - actions taken by the Commission in relation to the above.

The data could present national, state and territory figures, as well as year-to-year comparisons.

- **Unregistered NDIS providers.** The Australian Government could amend the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018* (Cth) so that Supported Independent Living support providers are required to be registered providers.

- **NDIS information sharing.** The Australian Government could review the *National Disability Insurance Scheme (Protection and Disclosure of Information – Commissioner) Rules 2018* (Cth). The NDIS Quality and Safeguards Commission should encourage individuals and organisations with significant concerns about the wellbeing of NDIS participants to communicate those concerns to the Commission. The NDIS Quality and Safeguards Commission should as a matter of practice provide meaningful feedback to any such individual or organisation where:
    - the Commission, on reasonable grounds, considers the individual or organisation to be playing a positive role in the participant's life
    - the provision of such information would assist the individual or organisation to promote and protect the rights and wellbeing of the participant.

Appendices

Appendix 1: Implementation of adult safeguarding legislation and function

OPA's research and consultations for the Adult Safeguarding Project revealed a range of factors that would need to be considered in the implementation of an adult safeguarding function in Victoria, and examples of how these issues have been approached in other jurisdictions. Key considerations are outlined below.

Principles

OPA has recommended that legislation containing new adult safeguarding functions and powers should be underpinned by human rights informed principles. These could include the following:

- At-risk adults are entitled to support to make decisions about their care.
- The will and preference (or wishes) of the at-risk adult must be respected.
- At-risk adults have the right to refuse support, assistance or protection.
- The need to protect from abuse or neglect is balanced with respect for the person's right to make their own decisions about their care.
- At-risk adults receive the least restrictive and intrusive form of support.

The principles could, to the extent possible, align with the principles of other relevant Victorian legislation, for example, the *Powers of Attorney Act 2014* (Vic) and the Guardianship and Administration Act.

Definitions

Cohort

Broadly, there are three alternative approaches to defining the cohort to which the proposed legislation applies:

- define the cohort by reference to care and support needs or other factors impacting on the person's vulnerability to abuse. This is the approach used in this report, based on the preference of the Australian Law Reform Commission, which recommended that adult safeguarding laws should define 'at-risk' adults to mean people aged 18 years old and over who:
    - have care and support needs
    - are being abused or neglected, or are at risk of abuse or neglect
    - are unable to protect themselves from abuse or neglect because of their care and support needs.[221]

[221] *Elder Abuse – A National Legal Response* (n 6) 387.

- define the cohort by reference to their age and/or disability without reference to care and support needs or other factors impacting on the person's vulnerability to abuse
- define the cohort by reference to both care and support needs or other factors impacting on the person's vulnerability to abuse, with a requirement that the person has a disability or is over a particular age.

In South Australia, reports can be made to its Adult Safeguarding Unit about a 'vulnerable adult'. A vulnerable adult is defined as 'an adult person who, by reason of age, ill health, disability, social isolation, dependence on others or other disadvantage, is vulnerable to abuse'.[222] The requirement for the person to have care or support needs or to be otherwise unable to protect themselves is consistent with the Australian Law Reform Commission recommendation and international approaches.[223]

Given the coercive powers that safeguarding agencies have at their disposal, it is arguably a more human rights-compliant approach that the functions and powers should apply to a specific cohort of adults who are unable to protect themselves from abuse and neglect because of their care and support needs (as opposed to the New South Wales model, for example, which applies to, among others, all adults above a particular age).

However, to ensure a clearly defined scope, the Victorian Government might consider it appropriate to retain the reference to disability and age rather than simply define the cohort by reference to vulnerability factors as recommended by the Australian Law Reform Commission.

The question of the most appropriate label or term for the cohort has also been much debated. The South Australian legislation uses the term 'vulnerable adult' to define the people to whom the legislation applies. This term implies that there is something inherent to the individual that results in a need for protection. The Office of the Public Advocate prefers the term 'at-risk', as used in the Scottish legislation, as it does not suggest an inherent deficiency of the person in the way that the term 'vulnerable adult' might.

Abuse

As per Recommendation 1 described above, a broad definition of abuse should apply to the proposed new safeguarding function and the definition should capture the types of abuse commonly perpetrated against at-risk adults.

The South Australian adult safeguarding legislation includes a detailed definition of abuse which includes, for example, the abuse or exploitation of a position of trust or authority existing between the vulnerable adult and another person, or a denial, without reasonable excuse, of the basic rights of the vulnerable adult. The legislation provides for further other acts or omissions to be declared by the regulations.[224]

---

[222] *Ageing and Adult Safeguarding Act 1995* (SA) s 3.
[223] *Care Act 2014* (UK) s 42(1); *Adult Support and Protection (Scotland) Act 2007* (Scot) s 3(1).
[224] *Ageing and Adult Safeguarding Act 1995* (SA) s 4.

In the Australian Capital Territory, Section 5 of the *Crimes (Offences Against Vulnerable People) Legislation Amendment Act 2020* (ACT) inserts new sections 36A in the *Crimes Act 1900* (ACT). Section 36A explicitly defines abusive conduct in a way that 'captures a broad range of manipulating and controlling behaviours which are directed at vulnerable people'.[225]

There are also clear definitions of abuse in the context of people with disability in various Codes of Conduct and Victoria's first disability abuse prevention strategy,[226] in the context of elder abuse and family violence legislation.

Capacity

The adult safeguarding legislation could include a definition of capacity that is consistent with the definition in other comparable Victorian legislation such as section 5 of the Guardianship and Administration Act and section 4 of the Powers of Attorney Act.

Location of the new safeguarding function

This report recommends that the proposed new adult safeguarding function be given to an existing agency rather than establishing a new adult safeguarding agency. This option would cost less than establishing a new agency (due to savings in executive, corporate, administration, and accommodation expenses) and would limit the number of different state agencies (resulting in less confusion for the public). Potentially, the work of existing staff positions at the host agency would overlap with the new functions, creating synergies and bringing valuable expertise to the new safeguarding activities.

The Australian Law Reform Commission noted that 'Existing Public Advocates and public guardians … may be appropriate for the broader safeguarding function.[227] However, the Commission recognised that the context of each jurisdiction is unique. Accordingly, each Australian jurisdiction that has implemented the Commission's recommendation has taken a different approach.

[225] Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, Hansard, 7 May 2020 <http://www.hansard.act.gov.au/hansard/2020/week04/951.htm>.
[226] Victorian Government, *Dignity, respect and safer services: Victoria's disability abuse prevention strategy* (Strategy, March 2018) 4.
[227] *Elder Abuse – A National Legal Response* (n 6) 25.

In Victoria, the proposed new adult safeguarding function would align with the Public Advocate's existing functions:

- In addition to guardianship functions, the Public Advocate has an existing investigations role, and a function to protect people with a disability from abuse, neglect and exploitation. These existing powers could simply be clarified and extended to other adults.
- The Public Advocate has 'existing working relationships with the police, government departments, helplines and other bodies.'[228]
- The existing OPA Advice Service already receives concerns from people about the abuse and mistreatment of at-risk adults.
- OPA has a business manager, other executive support and well-established governance arrangements, policies and procedures.
- OPA's Community Visitors are well placed to detect violence and abuse in residential settings.

There may be a concern that, if OPA were the adult safeguarding agency, there could be a conflict of interest if a report is received concerning the conduct of an advocate guardian. There are, however, existing mechanisms in place to address that. The Victorian Civil and Administrative Tribunal has a role to consider whether guardians appointed under the Guardianship and Administration Act perform their duties in compliance with section 41 of that Act. Similarly, the Victorian Ombudsman is also empowered to receive complaints about decisions of a public statutory body (*Ombudsman Act 1973* (Vic)).

Scope

There are two broad options in relation to the scope of the proposed safeguarding role. The scope could be confined to circumstances that are not covered by another regulator, or the scope could be broader with the option for referral of matters in appropriate circumstances.

For example, the NSW model defines the cohort broadly but mandates referral of matters that could be dealt with by other regulatory agencies including the Aged Care Quality and Safety Commission and the NDIS Quality and Safeguards Commission.[229] The NSW government stated that by establishing an Ageing and Disability Commissioner it was 'taking the initiative in improving protections for vulnerable people who do not come within the ambit of other complaints mechanisms'.[230] It claimed that this model 'provides the widest possible protection for people with a disability and older people but avoids overlap, duplication and forum shopping'.[231]

[228] *Elder Abuse – A National Legal Response* (n 6) 384.
[229] *Ageing and Disability Commissioner Act 2019* (NSW) s 13(8).
[230] New South Wales, *Parliamentary Debates*, Legislative Council, 5 June 2019 <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1820781676-78911>.
[231] Ibid.

In contrast, the Human Rights Commission in the ACT can receive complaints in relation to prescribed services, which includes services for people with a disability and services for older people. The definition used to prescribe these services is broad and encompasses any service provided specifically for people with a disability or their carers or for older people in the ACT, regardless of whether the service is funded (and regulated) by the Australian Government or State Government.[232]

The ACT Government was concerned to ensure that vulnerable people were able to access local ACT remedies for concerns or complaints, notwithstanding the fact that the Australian Government also has a role in this space. The Human Rights Commission can initiate a quick intervention, usually taking a case conference approach focused on the outcome that the complainant is seeking, rather than focusing on whether a provider has breached relevant standards.[233] Matters may be referred to a statutory officer-holder, usually depending on the outcome sought by the complainant.[234]

It is also worth noting that guardianship processes are a last resort, and an intervention from an adult safeguarding agency that preserves decision-making capacity would be much less-restrictive. Therefore, it should be available to at-risk adults with impaired decision-making as an earlier intervention that may avoid the need for guardianship.

Roles and powers

As outlined in Recommendation 1, the agency responsible for the adult safeguarding function should be able to receive and assess reports of abuse, neglect and exploitation of at-risk adults via a well-resourced and publicised helpline; undertake investigations; and make and coordinate referrals to other agencies.

The safeguarding unit should be able to receive reports directly from the public and, on a non-mandatory basis, from both Australian Government and state-funded service providers, as well as other agencies such as financial institutions. The agency would therefore need to collaborate with a range of other service providers to:

- promote understanding of the adult safeguarding unit and how and when at-risk clients should be referred to it
- agree on referral criteria and pathways from the adult safeguarding unit to other service providers that can provide necessary treatment, care and support

[232] *Human Rights Commission Act 2005* (ACT) ss 6A, 8-9.
[233] Interview with the ACT Human Rights Commissioner (OPA, 5 January 2021).
[234] Ibid.

Key collaborating agencies would include:

- Victoria Police
- National Disability Insurance Agency
- NDIS Quality and Safeguards Commission
- Aged Care Quality and Safety Commission
- The Orange Door
- VCAT
- other statutory agencies (Victorian Ombudsman, Health Complaints Commissioner, Disability Services Commissioner, Mental Health Complaints Commissioner, Victorian Disability Worker Commissioner, Residential Tenancies Commissioner)
- advocacy agencies
- financial institutions
- service agencies (Community Legal Centres, Seniors Rights Victoria, financial counsellors, mediators).

A very well-resourced and experienced helpline service would be critical to the operation of the adult safeguarding unit. This should provide a single-entry point for service providers and members of the community who are concerned about the safety and wellbeing of an at-risk adult. The existence of the helpline would enable clear messaging about where people with concerns should go to for assistance and referrals to appropriate services.

If matters require more intensive support and/or investigation, the at-risk person would be referred internally and/or to other service providers or regulators. Referrals would usually be made by way of an informal warm referral (i.e., the adult safeguarding unit would help people to access the service).

The experience of the NSW Ageing and Disability Commission suggests that most matters received are resolved by the helpline. For example, in 2020–2021, the Commission received 5000 matters, comprising 3566 reports and 1434 enquiries. Of the 5000 matters, 3769 were dealt with by the helpline. Of these, 2335 reports were resolved by early intervention, including support, referral and early case coordination.[235]

The data in Table 4, reproduced from the Ageing and Disability Commission's Annual Report 2020–2021, shows that there is often a need to work with or refer the matter to other parties to address risks and improve outcomes. Therefore, strong links and protocols would be required between staff of the helpline and other agency staff responsible for conducting investigations and coordinating follow-up supports for an at-risk person (and any other safeguarding functions performed by the agency, such as community visitors). These relationships are one of the benefits of a fully integrated system, enabling a stepped approach to matters to ensure the most appropriate response to each matter.

[235] NSW Ageing and Disability Commission, *Annual Report 2020-2021* (Report, 2021) 14 <https://www.ageingdisabilitycommission.nsw.gov.au/download?file=820760>.

Table 4.

Primary action taken by the Ageing and Disability Commission (ADC); reports closed in 2020–21[236]

Primary action taken by ADC	Number of cases
1. Early intervention/resolution (helpline only)	**2,335**
a. Assistance and support provided	1,992
b. Referred externally	277
c. Early case coordination	66
2. Closed after preliminary inquiries	**392**
a. Appropriate actions underway to address/manage risks	254
b. No or low risk identified	81
c. Person has capacity and refused investigation/involvement	57
3. Community supports	**379**
a. Risk identified – risk removed or managed with intervention	202
b. No or low risk identified	128
c. Risk identified – risk removed or managed prior to intervention	41
d. Risk identified – risk remained	8
4. Declined at outset	**107**
a. Insufficient details to progress	93
b. Premature/actions underway	14
5. Consolidated into another matter	**110**
6. Referred to Police	**96**
7. Referred externally (not at helpline)	**68**
8. Investigation	**15**
a. Risk identified – risk removed or managed with intervention	12
b. No or low risk identified	2
c. Risk identified – risk removed or managed prior to intervention	1
Total closed reports	**3,502**

[236] NSW Ageing and Disability Commission, *Annual Report 2020-2021* (Report, 2021) 17

It should be noted that Seniors Rights Victoria provides a trauma-informed specialist elder abuse helpline, staffed by experienced advocates, that is an integrated component of the Seniors Rights Victoria service model. Careful consideration will be necessary to ensure that, when designing the adult safeguarding framework for Victoria, callers receive expert advice and assistance and that appropriate referral pathways exist between Seniors Rights Victoria (and other relevant agencies) and the adult safeguarding agency. It will also be critical to ensure that the services to which the agency refers matters are adequately resourced to respond to the associated increase in demand.

The nature of the investigations and supportive interventions offered by the adult safeguarding unit should, as much as possible, reflect the preferences of the at-risk person. Key questions to determine the response would include: What does the person want? What support does the person need? Is there evidence of wrongdoing? Is there an appropriate referral agency or agencies? This is consistent with how the ACT Human Rights Commission, for example, operates: it focuses on the outcome that the vulnerable person is looking to achieve, calling in relevant parties and in appropriate cases, referring the matter to conciliation.[237]

An approach favoring community supports rather than legal interventions, where possible, also aligns with the intention of the NSW's *Ageing and Disability Commissioner Act 2019* to better safeguard adults with a disability and older people.[238] This was reflected in the second reading speech in the NSW Parliament:

> *'While the commissioner will have strong powers of investigation, we envisage that the commissioner will have an invaluable role in resolving core issues that gave rise to the abuse, neglect or exploitation, or allowed it to occur, and in assisting all parties involved – the vulnerable adult, carers and service providers – to better provide for the safety, welfare and wellbeing of the vulnerable adult'.*[239]

Ultimately, the best approach may be a stepped one, going to where the person is and working with them to build supports. In cases of serious harm, matters may be escalated to a more legal response. This is Child FIRST's approach in Victoria, whereby a person with concerns about the wellbeing of a child may refer the matter to Child FIRST for a supportive intervention.[240] If Child FIRST staff form the view that the child may need protection, Child FIRST must refer the matter to Child Protection. The Child FIRST program is currently transitioning into The Orange Door. Like Child FIRST, the Orange Door is an access point for women, children and young people who are experiencing family violence or families that need assistance with the care and wellbeing of children.

---

[237] *Human Rights Act 2005* (ACT).
[238] NSW Ageing and Disability Commission, *Annual Report 2020-2021* (Report, 2021) 25.
[239] New South Wales, *Parliamentary Debates*, Legislative Council, 5 June 2019 <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1820781676-78911>.
[240] *Children Youth and Families Act 2005* (Vic) s 31.

The extent of the adult safeguarding unit's involvement in safety planning and service coordination would be determined on a case-by-case basis. Ideally, the person would be referred to an appropriate mainstream service that can arrange services and develop a safety plan. For example, Seniors Rights Victoria provides support and education to help prevent elder abuse and safeguard the rights, dignity and independence of older people.[241] Specialist family violence services are also intended to play a case management role for people who are eligible for family violence services,[242] as are specialist mental health services.[243]

However, while some mainstream services do provide safety planning, care coordination and/or case management, these services are only for people who meet the eligibility criteria of the service provider. OPA has observed a dearth of case-management, especially since the transition of disability services to the NDIA. When designing an adult safeguarding model, consideration should be given to whether this role appropriately sits with an adult safeguarding agency, recognising that case management may be needed to avoid escalation of abuse to the point where more restrictive intervention, such as a guardianship order, is necessary.

The agency with the proposed new safeguarding function could also have related roles recommended in this report, such as building the capacity and capability of mainstream services to detect and respond to abuse or developing and monitoring a whole-of-government abuse prevention strategy and action plan.

Information sharing

Robust information sharing provisions would be important to provide avenues for informal referrals outside of the statutory referral process, and to ensure that the adult safeguarding unit can provide a coordinated supportive response.

There are three mechanisms through which the proposed safeguarding agency could gather and share information, more than one of which may applicable. The proposed safeguarding legislation could:

- provide the safeguarding agency with the power to request information from a broad range of information holders for assessment and safeguarding purposes (including non-government providers and financial institutions). The holder of the information could be required to provide the requested information[244]
- enable information-sharing for assessment and safeguarding purposes through an information-sharing scheme with key entities specified in the safeguarding legislation

[241] 'Our Services', *Seniors Rights Victoria* (Web Page) <https://seniorsrights.org.au/our-services/>.
[242] Interview with Family Safety Victoria (OPA, 28 October 2020).
[243] *Royal Commission into Victoria's Mental Health System Interim Report* (Report, November 2019) 165.
[244] See for example, *Ageing and Adult Safeguarding Act* (SA) s 19 and *Ageing and Disability Commissioner Act 2019 No7* (NSW) s 16.

- prescribe the safeguarding agency as an information-sharing entity under Victoria's Family Violence Information Sharing Scheme. While this would enable efficient information-sharing in family violence matters, it would be necessary to ensure alternative authorisation for information-sharing in matters that do not fall within the definition of family violence.

Given the shift to federal funding and regulation of aged care and disability services, it will be critical to establish information sharing mechanisms with agencies funded by the Australian Government as well as with state-funded services.

Consent

The Australian Law Reform Commission recommended that adult safeguarding laws should provide that the consent of an at-risk adult must be secured before safeguarding agencies investigate, or take any other action, in relation to the abuse or neglect of the adult. However, consent should not be required:

- in serious cases of physical abuse, sexual abuse, or neglect
- if the safeguarding agency cannot contact the adult, despite extensive efforts to do so
- if the adult lacks the legal capacity to consent, in the circumstances.[245]

The issue of consent raises tensions between a person's competing rights to autonomy and to safety. As mentioned above, the safeguarding agency should aim to speak to the person about whom concerns have been raised, to offer and coordinate the provision of supports to enhance the rights and wellbeing of the person. The at-risk adult must be at the centre of any response, and their consent to any interventions must be required in all but the most exceptional circumstances.

However, without access to relevant information and to the person, it is impossible to make an accurate risk assessment to ensure that person's safety or ascertain whether one of the exceptions to consent applies. Some cases described in this report involve circumstances where concerns are raised about an at-risk adult that no one has been able to speak to because the alleged perpetrator is interfering with supports. For example, Anna (see page 50) would not have been discovered had the police not entered her property without her consent. While there was clear criminality in that case, this situation is not uncommon, and a police response may not always be appropriate. In these circumstances, it may be necessary to take initial action, including entering the property without consent. If the person refuses assistance, in most cases, no further action should be taken.

[245] *Elder Abuse – A National Legal Response* (n 6) 392.

In rare cases, a person may not wish action to be taken, but the risks to their safety are such that it may justify a limitation on the person's right to make that decision. For example, if Anna had refused to go to hospital, it may have been appropriate in the circumstances to override her refusal given the perilous state she was found in.

As recommended by the Australian Law Reform Commission, it may be necessary for consent to be overridden in certain circumstances to protect the human right of the person to live free from violence, abuse and neglect. There are risks associated with this, such as a potential escalation of violence if the alleged perpetrator remains living with the at-risk adult. As a result, taking any action without consent or acting when a person is not consenting to that action should only occur, if at all, in very constrained circumstances. These include situations where there is a serious risk to the person and all other options to preserve decision-making capacity, such as the provision of decision-making support, have been exhausted.

The safeguarding agency would need to develop policies and procedures defining how its staff are to respond in circumstances where they cannot secure a person's consent to necessary action.

If the person is unable to consent to any proposed action because of a cognitive impairment, other options such as an application for a guardianship and administration order are available to safeguard the rights of that person.

Protections for reporters

The adult safeguarding legislation would include authorisation for individuals, agencies and their staff (including financial institutions) to report the abuse of at-risk adults to the safeguarding agency. Reporting should not be mandatory, and the legislation should seek to protect reporters from any negative consequences of making a report.

Other Australian jurisdictions that have safeguarding functions have various legislative provisions to protect reporters who genuinely believe that an at-risk adult is (or will be) subject to, or at risk of, abuse, neglect or exploitation. For example, the Queensland *Guardianship and Administration Act 2014* (Qld) provides that a person may give the information despite any other law that would otherwise prohibit or restrict the giving of the information. If a person, acting honestly, gives the information to the public guardian, the person is not liable, civilly, criminally or under an administrative process, for giving the information. Further, the Queensland legislation provides that, in giving information, the person cannot be held to have breached any code of professional etiquette or ethics; or departed from accepted standards of professional conduct.

Office of the
Public Advocate

Level 1, 204 Lygon Street
Carlton Victoria 3053
Phone: 1300 309 337
Fax: 1300 787 510
NRS: 133 677 DX: 210293
publicadvocate.vic.gov.au