

Areas of opportunity

Area 3

Considering Legislation

ABUSE RESPONSE PRINCIPLES

Respect for older people's rights,
dignity, wishes and decisions

Empowerment, informed choice
and self-determination

Importance of relationships
and community connections

Capacity for decision making

Partnerships and collaborations

Least invasive and
applied incrementally

Diversity informs responses

SOUTH AUSTRALIAN LEGISLATION WITH PROVISIONS FOR OLDER PEOPLE

South Australian Civil Administrative Tribunal Act 2014 (SA)

Advance Care Directives Act 2013 (SA)

Aged Care Act 1997 (Cth)

Aged and Infirm Persons Property Act 1940 (SA)

Animal Welfare Act 1985

Australian Consumer Law as contained in Schedule 1 of the Australian Competition and Consumer Act 2010 (Cth)

Carers Recognition Act 2005 (SA)

Consent to Medical Treatment and Palliative Care Act 1995 (SA)

Coroners Act 2003 (SA)

Correctional Services Act 1982 (SA)

Criminal Law Consolidation Act 1935 (SA)

Equal Opportunity Act 1984 (SA)

Guardianship and Administration Act 1993 (SA)

Intervention Orders (Prevention of Abuse) Act 2009 (SA)

Mental Health Act 2009 (SA)

Office for the Ageing Act 1995

Powers of Attorney and Agency Act 1984 (SA)

Residential Parks Act 2007 (SA)

Retirement Villages Act 1987 (SA)

South Australian Public Health Act 2011 (SA)

Summary Offences Act (SA)

Supported Residential Facilities Act 1992 (SA)

ELDER ABUSE A NATIONAL LEGAL RESPONSE

Australian Law Reform Commission (ALRC) Final Report 2017 Recommendation 14: Safeguarding Adults at Risk

RECOMMENDATION 14–1

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'.

RECOMMENDATION 14–2

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'.

RECOMMENDATION 14–3

Adult safeguarding laws should define 'at-risk adults' to mean people aged 18 years and over who:

- (a) have care and support needs;
- (b) are being abused or neglected, or are at risk of abuse or neglect; and
- (c) are unable to protect themselves from abuse or neglect because of their care and support needs.

RECOMMENDATION 14–4

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:

- (a) in serious cases of physical abuse, sexual abuse, or neglect; or
- (b) if the safeguarding agency cannot contact the adult, despite extensive efforts to do so; or
- (c) if the adult lacks the legal capacity to give consent, in the circumstances.

RECOMMENDATION 14–5

Adult safeguarding laws should provide that, where a safeguarding agency has reasonable grounds to conclude that a person is an ‘at-risk adult’, the agency may take the following actions, with the adult’s consent:

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

RECOMMENDATION 14–6

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 only be able to exercise such powers where they have reasonable grounds to suspect that there is ‘serious abuse’ of an ‘at-risk adult’, and only to the extent that it is necessary to safeguard and support the ‘at-risk adult’.

RECOMMENDATION 14–7

Adult safeguarding laws should provide that any person who, in good faith, reports abuse to an adult safeguarding agency should not, as a consequence of their report, be:

- (a) liable civilly, criminally or under an administrative process;
- (b) found to have departed from standards of professional conduct;
- (c) dismissed or threatened in the course of their employment; or
- (d) discriminated against with respect to employment or membership in a profession or trade union.

RECOMMENDATION 14–8

Adult safeguarding agencies should work with relevant professional bodies to develop protocols for when prescribed professionals, such as medical practitioners, should refer the abuse of ‘at-risk adults’ to adult safeguarding agencies.



INTERNATIONAL CASE STUDY 1

British Columbia, Canada

British Columbia amended its *Adult Guardianship Act 1996* in 2000, inserting a new part into the Act which deals with abuse. Its purpose is to provide support and assistance for adults who are abused or neglected and who are unable to seek support or assistance because of:

- Physical restraint;
- A physical disability that limits their ability to seek help; or
- An illness, disease, injury or other condition that affects their ability to make decisions about the abuse or neglect.

‘Abuse’ is defined as the ‘deliberate mistreatment of an adult that causes the adult:

- Physical, mental or emotional harm; or
- Damage to or loss of assets.

It includes intimidation, humiliation, physical assault, sexual assault, overmedication, withholding needed medication, censoring mail, invasion or denial of privacy or denial of access to visitors’.

The Act covers abuse or neglect occurring in:

- A public place;
- The adult’s home;
- A relative’s home;
- A carer’s home; or
- A care facility.

The Act provides that every adult is presumed to be capable of making decisions about personal care, health care, legal matters or about the adult’s financial affairs, business or assets, until the contrary is proven.

All persons with information about abuse or neglect may report the circumstances surrounding that abuse or neglect to a ‘designated agency’.



DESIGNATED AGENCIES

While the Act operates on the basis of a voluntary reporting system, it imposes a mandatory response framework involving 'designated agencies'

A designated agency must determine whether an adult needs support and assistance.

Designated agencies also have powers of investigation and are authorised to:

- Interview the adult's spouse, the adult's near relatives, the adult's friends or anyone else who may assist in the investigation; and
- Obtain any information from any agency that provides or has provided health or social services to the adult, and any person that manages the adult's financial affairs, business or assets.

Following an investigation, a designated agency is able to decide on a number of different actions including:

- To take no further action;
- To refer the adult to available health care, social, legal, accommodation or other services;
- To report the case to the Public Guardian and Trustee or another agency;
- To assist the adult in obtaining a representative;
- To apply to the court for an interim order requiring a person to stop residing at and stay away from the premises where the adult lives, unless the person is the owner or lessee of the premises;
- Not to visit, communicate with, harass or interfere with the adult;
- Not to have any contact or association with the adult or the adult's assets, business or financial affairs; or comply with any other restriction of relations with the adult, for a period of up to 30 days;
- To apply to the court for an order for the adult's maintenance; and
- To prepare a support and assistance plan that specifies any services needed by the adult, including health care, accommodation, social, legal or financial services.

Designated agencies must involve the adult, to the greatest extent possible, in decisions about how to seek support and assistance and explain the details of any support and assistance plan that has been developed.

An adult with capacity can refuse support and assistance and designated agencies. If a person does not have capacity (based on an assessment by the Public Guardian and Trustee), the agency can apply to the court for support and assistance orders. In serious cases, designated agencies are authorised to take actions necessary to preserve the adult's life or prevent serious harm without the consent of the adult.

COMMUNITY RESPONSE NETWORKS

Unique to the British Columbia model is its approach to involving the community in adult protection.

The Act enables the Public Guardian or Trustee to organise networks of bodies, organisations or persons for the provision of support and assistance to abused or neglected adults. British Columbia has an Association of Community Response Networks (CRNs), which funds nearly 40 CRNs throughout British Columbia. The CRNs are informal networks of agencies and organisations to build the community's capacity to address and prevent abuse through coordinating help to those who need it, and promoting education and awareness at the local level.

INTERNATIONAL CASE STUDY 2

Scotland, United Kingdom

Scotland's *Adult Support and Protection Act 2007* is designed to protect those adults who are unable to safeguard their own interests.

'Adults at risk' are defined as adults who meet all three of the following:

- Are unable to safeguard their own wellbeing, property, rights or other interests;
- Are at risk of harm; and
- Because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected.

Human rights principles are embedded into legislative and policy processes.

The Act approaches adult protection from the position that harm should be prevented, rather than labelling types of abuse.

A *Code of Practice for Local Authorities and Practitioners Exercising Functions* supports the Act which makes provision for inquiries, investigations, assessment orders, removal orders, banning orders, protection orders and visits, as well as the establishment of adult protection committees.

Anyone performing a function under the Act must ensure the action provide benefit to the adult which could not reasonably be provided without intervening in the adult's affairs is, the least restrictive to the adult's freedom. Actions must also consider

- **The wishes of the adult.**
- **The views of others** – if such views are relevant - ensuring the adult has the choice to maintain existing family and social contacts that may already be in place.
- **The importance of the adult participating as fully as possible** - in any decisions being made.
- **That the adult is not treated less favourably** - than the way in which a person who is not an 'adult at risk' would be treated in a comparable situation.
- **The adult's abilities, background and characteristics**, including age, sex, sexual orientation, religious persuasion, racial origin, ethnic group and cultural and linguistic heritage.

The Act confers powers and duties primarily upon local councils to make inquiries and visit any place where it is known or believed that an adult is at risk of harm in order to investigate and establish whether action is required to protect the adult.

Certain bodies and office holders must cooperate with a council conducting inquiries. Voluntary and private service organisations do not have specific legal powers and duties under the Act, but have a duty to comply with requests to examine records and contribute to investigations, discussing and sharing information with relevant statutory agencies, and through providing advice and expertise to such agencies

If a public body or office holder believes that a person is an adult at risk of harm the facts and circumstances of the case must be reported to the council for the area.

The Act promotes cooperation between bodies as well as a multi-disciplinary approach to inquiries, investigations and training between the council, other bodies and specialist voluntary organisations.

ADULT PROTECTION COMMITTEES

The Act includes a requirement that councils establish Adult Protection Committees. Functions of the Committees include:

- Developing and introducing arrangements and protocols for inter-agency working and auditing and evaluating the effectiveness of these arrangements;
- Developing procedures, policies and strategies for protecting adults at risk and reviewing these;
- Developing and introducing arrangements to monitor, review, disseminate and report activity in relation to the protection of adults at risk including key information relating to:
 - numbers of inquiries and investigations;
 - number of adult protection referrals by age, client group, gender etc;
 - types of abuse;
 - agency involvement;
 - outcome of referrals and recommendations; and number of initial case conferences convened;
- Raising awareness and providing information and advice to the wider community and to professionals;
- Training and development activities;
- Improving local ways of working in light of knowledge gained through local and national experience, case review and research;
- Undertaking any other functions relating to the safeguarding of individuals as the Scottish Ministers may specify;
- The Act also provides a role for private and voluntary organisations on Adult Protection Committees.



CLOSING THE GAPS – ENHANCING SOUTH AUSTRALIA'S RESPONSE TO THE ABUSE OF VULNERABLE PEOPLE

**Office of the Public Advocate in collaboration
with University of South Australia**

October 2011

SUMMARY OF RECOMMENDATIONS

LEGISLATION

South Australia should consider enacting comprehensive legislation for the protection of vulnerable adults. Features of an Adult Protection Act should include the following:

- Clear definitions of abuse and vulnerability;
- The adoption of a human rights based approach, supported by a Charter of Rights and Freedoms of Older Persons and be accompanied by a set of guiding principles;
- Stepped powers of investigation and intervention conferred upon 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;
- A system of voluntary reporting of abuse, but a mandatory response system which is triggered by a report or notification of abuse;
- 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;
- An obligation on agencies and organisations to apply newly developed Information Sharing Guidelines, which should be based on consent and operate together with a Cabinet Exemption from the test of imminence of harm. (The Exemption should not to be sought until community consultation, particularly with older people, takes place.)
- Provision for the establishment of Community Networks for Adult Protection to promote education and awareness of abuse and the framework for responding to abuse;

Further consultation is required to examine South Australian support for legislation which encompasses protection of all vulnerable adults. New legislation should be accompanied by a practically focused Code of Practice that can be used to support the Act's implementation. Government should also consider the need and desirability for including a working with vulnerable people checking system as part of the proposed Act. (This issue was not the subject of detailed discussion throughout the project and would require further examination).

INTERIM MEASURE – POLICY DEVELOPMENT

As an interim measure, and pending legislative reform, the South Australian Government should adopt a whole-of-government policy for safeguarding vulnerable adults, as well as new Information Sharing Guidelines modelled on those which apply in South Australia with respect to children, young people and their families. The Guidelines should operate on a consent based system, and no Cabinet exemption should be sought until further consultation with relevant stakeholders, particularly clients, has been carried out. A Draft Policy and Draft Information Sharing Guidelines are attached to this Report.

FURTHER CONSULTATION

As part of the process leading to reform, government should conduct a process of consultation with the wider community and key stakeholders prior to the implementation of any reform measures. This project has only involved consultation with key agencies and service providers, but not with all providers or older persons.

REVIEW OF EXISTING LEGISLATION

If legislative reform is pursued, a review of related existing legislation will be necessary. In particular, the Guardianship and Administration Act 1993 (SA), the Criminal Law Consolidation Act 1935 (SA) and the Intervention Orders (Prevention of Abuse) Act 2009 (SA) will need to be reviewed and consequential amendments considered.

COMMUNITY EDUCATION / COMMUNITY ENGAGEMENT

Reform measures should be accompanied by a detailed plan for community education and awareness, and training programs devised and delivered across government agencies and to relevant organisations within the aged care sector. In addition, there is a need for a creative strategy to engage the various and diverse community groups to provide contact points and support to older people in the community.

SERVICE RESPONSE, LEADERSHIP AND COORDINATION

The current government response needs leadership and coordination. Central to moving forward to provide a coordinated response to vulnerable older people at risk, is the identification of a clear point of accountability within the government. Service providers and community members need to know where to go if they have a concern about vulnerable older people and to have confidence that a response will be offered. A central body would provide the point of accountability and carry responsibility for leadership in these reforms both at a policy and a practical level.

DATA COLLECTION

There needs to be a State wide data collection system across government and non-government agencies to collect accurate data about abuse of older people. The data system should enable the measurement of the incidence, causes and contributors to abuse of vulnerable older people. This work should assist in developing a profile for those who perpetrate abuse and their relationship to the older person. Such data could be analysed to assist the prevention of, and timely response to, the abuse of older people.

RISK ASSESSMENT TOOLS

Risk assessment and risk management are significant components of adult protection work to ensure that the individual circumstances of vulnerable older adults are considered in order to produce outcomes that respect self determination and choice to the fullest extent of the older person's abilities.

Assessment of risk to a vulnerable older person can be a complex matter, needing to consider the older person's wishes, lifestyle, physical environment, any physical dependence, mental ability and any power and influence being exerted upon them from another individual.

The development of a risk assessment model to enable a rights-based, coordinated, interagency response is likely to be a complex task, but one which needs to be undertaken to enable consistency throughout the system.

FINAL REPORT OF THE JOINT COMMITTEE ON MATTERS RELATING TO ELDER ABUSE

October 2017

RECOMMENDATIONS

The Recommendations complement those made by the Australian Law Reform Commission, *Elder Abuse- a National Legal Response (ALRC Report)* released on 15 June 2017 and the elder abuse prevention decisions of the Federal Government announced on 1 October 2017.

The Recommendations respond to issues raised in evidence and expert advice provided to the Committee; and cover points raised by victim advocates, abuse experts, government, peak bodies and the aged care service provision industry.

The Recommendations strike a balance between respecting the autonomy and privacy of adults with capacity to make decisions, and the duty of care of responsible officers and workers.

The Recommendations are also mindful of competing budget priorities and restraints and support the good work currently being carried out in SA.

RECOMMENDATION 1

The Committee calls on the South Australian Government to advocate strongly to the Federal Government to demonstrate strong leadership in developing and coordinating an ambitious, comprehensive and coordinated approach to elder abuse in Australia.

In particular, that the Federal Government brings the states and territories together to realise the full scope of the elder abuse prevention Recommendations proposed by the Australian Law Reform Commission (ALRC) in their report of June 2017 including;

- consistent laws across states and territories
- a nationwide prevalence study
- a national register of power of attorney documents
- a serious incident response scheme; and
- financial abuse training for bank tellers.

RECOMMENDATION 2

The Committee calls on the South Australian Premier and the Minister for Ageing to lobby the Federal Government to implement a national elder abuse strategy, in addition, or as part of, setting up the proposed new, national, elder abuse peak body, Elder Abuse Action Australia.

The Committee supports the implementation of a national strategy (in accordance with a rights-based approach) with ongoing funding.

The Committee calls on the South Australian Government to:

- Work towards this as a priority at the fifth national Elder Abuse Conference in 2018, which will be sponsored by the Federal Government; and
- Support the ALRC Recommendation that unregistered aged care workers, providing direct care, be subject to:
 - the planned National Code of Conduct for Health Care Workers
 - a national employment screening process for Federal regulated aged care; aged care legislation to regulate the use of restrictive practices in residential aged care; and
 - consideration of further safeguards in relation to the use of restrictive practices in residential aged care.

RECOMMENDATION 3

The Committee calls on the South Australian Government to actively collaborate with the Federal Government to ensure progress is made in preventing and addressing elder abuse in our state; including, but not limited to, participating in the initiatives announced by the Federal Government on 1 October 2017.

In particular:

That the State Government ensures sufficient funding and deployment of resources to maximise our State's membership and co-chairing of the national Elder Abuse Working Group, established in January 2017, to promote collaboration and provide advice on policy and legislative reforms focusing on responding to the June 2017 recommendations of the Australian Law Reform Commission. Office for the Ageing is participating in this working group.

The Committee calls on the South Australian representatives of the Elder Abuse Working Group to raise and discuss matters clarified in this report; including, but not limited to, the points below:

- The most efficient and effective way to establish a national online register of enduring documents, and court and tribunal appointments of guardians and financial administrators;
- The value of, and processes involved in, implementing mandatory reporting of suspected elder abuse; including abuse of persons under Guardianship Orders, taking into account evidence provided to this Committee²⁹ and the Elder Abuse in NSW Inquiry; and
- The value of, and processes involved in, implementing the deployment of surveillance cameras in private rooms in residential aged care, bearing in mind differing views on their value. This discussion will include options for management of any such resources, including if the footage should be made available to the family of the vulnerable older person.

And:

That the State Government ensures sufficient funding and deployment of resources to enable active South Australian participation in the new research funded by the Federal Government at the Australian Institute of Family Studies.

This report notes the Australian Attorney-General's 1 October 2017 media release that advised: "This new research will focus on the prevalence and nature of elder abuse in Australia and be done in collaboration with the National Ageing Research Institute, the Social Research Centre (ANU) and the Social Policy Research Centre (UNSW)."

And:

That the State Government ensures sufficient funding and deployment of resources to enable active South Australian participation in the Federal Government's proposed Knowledge Hub, to be hosted by the new peak body, Elder Abuse Action Australia, which will provide: "an online gateway raising awareness and providing information and training materials for the public and professionals about preventing and responding to elder abuse."

RECOMMENDATION 4

The Committee calls on the South Australian Government to introduce a Bill to develop a new South Australian Adult Protection Act, a key recommendation of the *Closing the Gaps Report of 2011*³⁵ and recommended in evidence to the Committee by Professor Wendy Lacey.

The Bill to be developed in consultation with

- Professor Wendy Lacey
- South Australia's Public Advocate
- the Public Trustee
- the South Australian Legal Services Commission; and
- other stakeholders as invited by the South Australian Government.

RECOMMENDATION 5

The Committee calls on the South Australian Government to provide ongoing funding, through reallocating existing resources and applying additional funding as required, to establish a South Australian Elder Abuse Prevention Unit, as previously recommended in the *Closing the Gaps* report.

The proposed Unit to:

- Among other functions, house or utilise a Multi-Agency Protection Service/Support (M.A.P.S.) team (see Some Positive Notes) as recommended in evidence by the Public Advocate; using the example of the M.A.P.S. domestic violence initiative currently in place in South Australia.
- Have investigatory powers, particularly to cover the gap identified by the Public Advocate, of people not in residential or community care.

A multi-agency approach in the proposed unit may also assist with the creation of a SAPOL Public Protection Branch, as recommended in evidence by SAPOL.

The Committee notes the view of Professor Wendy Lacey that an Adult Protection Unit could be developed through an expansion of the Office of the Public Advocate, or established inside a State Government Department, such as the Department of Communities and Social Inclusion (DCSI), with an across-government focus for whole-of government policy.

The Committee calls for the new unit, once established, to:

- In partnership with South Australia's Office for the Ageing, closely liaise with Elder Abuse Action Australia, the proposed new national, elder abuse peak body.
- Liaise with the Legal Services Commission to provide a strategy to respond to the approximate 5-10% of about 80,000 calls to the Commission per annum related to some sort of elder abuse inquiry.
- Conserve administrative resources by providing the free 1800 South Australian Elder Abuse Prevention Phone Line, currently administered by the Aged Rights Advocacy Service (ARAS).

To read the full report: www.parliament.sa.gov.au/Committees



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People's rights do not diminish with age.

Older South Australians have the right to be safe and to be treated with dignity and respect.

Decisions about their lives, finances, where they live, health care, lifestyle and relationships are important and older people have the right to make these decisions as they wish.

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