

**Office of the Public Advocate
South Australia**



**Submission to the Australian Law Reform Commission on
Protecting the Rights of Older Australians from Abuse**

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Submission to the ALRC Government Elder Abuse Issues Paper 47, June 2016

South Australian Office of the Public Advocate

Question 1 To what extent should the following elements, or any others, be taken into account in describing or defining elder abuse:

- harm or distress;
- intention;
- payment for services?

The Office of the Public Advocate (SA) (OPA) has adopted the definition of elder abuse set out in the South Australian Government Strategy to Safeguard the Rights of Older South Australians (2014 - 2021 which is:

Any act occurring within a relationship where there is an implication of trust which results in harm to the older person. Abuse can be physical, sexual, financial, psychological, social and/or neglect. (ANPEA 1999). The OPA adds to that definition by adding 'chemical and substance abuse'.

With regard to intention, OPA considers a broader approach such as "a relationship where there is an implication of trust" rather than intent. If intent must be present, then more subtle or evolving abuse may not be detected. Often, people including family members do not understand the rights of older persons and/or believe that they have a right or entitlement to an older person's assets, finances or decisions through the relationship they have with the older person.

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

Significant consideration should be given to enacting comprehensive legislation for the protection of vulnerable adults. Features of an Adult Support and 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 Information Sharing Guidelines.

- Provision for the establishment of Community Networks for Adult Protection to promote education and awareness of abuse and the framework for responding to abuse;
- Introduction of steps for redress including restorative justice, through to penalties with compliance and enforcement requirements where appropriate.

Question 4 The ALRC is interested in identifying evidence about elder abuse in Australia. What further research is needed and where are the gaps in the evidence?

It is difficult to obtain accurate data in relation to the incidence of Elder Abuse in Australia. Organisations, even within government departments, have different data collecting systems and differing criteria as to what is elder abuse. For example, in South Australia, if the Police are called to an incident of physical abuse involving an older person and a family member, this is likely to be recorded as assault rather than abuse of an older person. Financial abuse of an older person is likely to be recorded as fraud. This prevents an accurate measure of the incidence of abuse against older people or a profile of the perpetrator. There is no reliable national source of prevalence data that can be readily drawn upon.

The OPA acknowledges that the abuse of older persons is under reported. The barriers to reporting include:

- The absence of consistent definition and understanding of what is elder abuse
- The frailty and vulnerability of an older person, particularly if they have impaired cognition
- reluctance for the older person to report abuse, particularly if it is by family member as they often don't want to get a family member 'in trouble' or they fear repercussions by that family member
- An older person may fear 'being put in a nursing home' if they speak up about abuse
- older people are often not thought to be reliable witnesses due to impaired cognition
- Failure by service providers to recognise abuse or lack of confidence to make a report
- Social disconnection of the older person – inability to self report
- Difficulty in determining if a crime/offence has been committed. Less tangible abuse such as psychological abuse is difficult to prove and may not be seen as a 'crime'.

There needs to be an Australia wide approach to data collection across government and non - government agencies. This would necessitate agreed definitions of abuse and risk factor. Robust data collection could be quite complex as it would need to capture factors such as whether the abuse is alleged or substantiated; whether it was intentional or unintentional. Data collection would not only rely on the cooperation of the agencies but the workers within those agencies. Some workers have voiced a reluctance to report concerns, fearing their suspicions could be wrong or that they could have legal action taken against them by the client or suspected perpetrator.

The OPA would support a prevalence study that would enable the measurement of incidence, causes and contributors to abuse of older people. This work would assist in developing a profile of those who perpetrate abuse and their relationship to the older person. Such data, once analysed could assist in the prevention of, and timely response to, the abuse of older people.

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

Aged Care Assessments rely heavily on the information provided to them by others involved with the older person, particularly a family member. While it is acknowledged in the majority of cases the assessments are accurate and useful, it is our experience that the information provided by a family member can give a false impression of the older person's abilities. For example, a person's needs can be exaggerated to influence an assessment that the person requires residential care. At other times needs can be minimised in order to prevent an assessment that indicates an older person does not require residential care, so as to keep the person at home, isolated and vulnerable to abuse (particularly in cases of financial abuse).

Often, Aged Care Assessment Team (ACAT) members are the first (and sometimes only) professionals allowed into a home and are in a position to recognise the signs of elder abuse that are often subtle and hidden from view. Therefore team members should have good training to recognise the signs of elder abuse and have support from other team members to respond and make appropriate referrals to relevant organisations.

ACAT staff may also be in a position to adopt supported decision making practice and demonstrate this to family members where possible, to assist families/others in practising it rather than outright substitute decision making.

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

Refer to response at Question 2

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

- Aged Care Service Networks that OPA has been involved with relay the difficulties in relation to strict time limits for service providers to perform specific services required by the client (e.g. showering). This has the potential to prevent the worker from identifying elder abuse as they don't have the time to spend with the client beyond the specific service required.
- Lack of case management for complex cases means that there is no central point of reporting concerns or monitoring a suspicious situation
- Reduced service provision due to the cost of each service
- Family members directing care that suits their needs rather than what the client wants
- Family members/carers determining expenditure levels on particular services and possibly for their benefit or convenience and not necessarily the clients preferences

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

- Provide a single point of contact (such as a 1800 number) where concerns could be received and acted upon (this could mean giving advice or making referrals in the first

instance and /or linking in with an appropriate service provider).

- For agencies to develop partnerships with others to assist in responding to needs of vulnerable older adults.
- For a coordinated, mandatory response to be activated by a central body – a system is needed where a problem can be identified and for someone to have the authority to respond to concerns about the safety of older people and/or coordinate a response from a partner agency.
- A liaison person to work across all agencies to ensure ‘quality control’ of responses and to ensure consistency of practice in relation to response to abuse of older people.
- Need to have dedicated resources in all agencies to be able to respond to requests from a coordinator of a central system.
- Response should be to vulnerable older persons, not limited by definitions of mental capacity / incapacity.
- Ensure that concerns would be tracked to ensure that they were followed up appropriately.
- Ensure that a system of monitoring a vulnerable adult is in place if there is a decision not to act at this time. This could be ‘low key’.
- An agency to be authorised to undertake investigations if a vulnerable older person is thought to be at significant risk.
- Redress options for victims
- Penalties and responsibilities for compliance and enforcement

Question 29: What evidence is there of elder abuse committed by people acting as appointed decision-makers under instruments such as powers of attorney? How might this type of abuse be prevented and redressed?

- **Advance Care Directives (formerly called Enduring Power of Guardianship)**

Substitute decision makers (SDMs) under Advance Care Directives (ACDs) should make decisions that reflect the values and past and current views and wishes of the person as outlined in the *Advanced Care Directives Act 2013*. Elder abuse can be perpetrated by the decision maker in a number of ways including (but certainly not restricted to) the following:

- Denying access of the older person to family members and friends
- Not providing the appropriate level of care (including community services)
- Making health and accommodation decisions that reflect their own wishes and values, not those of the older person
- Restricting access to food and appropriate hygiene

- Punishment if the older person does not obey the rules set down by the SDM

Case study

An 87 year old woman lived in her own home with her adult daughter who was SDM. The woman had to do the majority of the housework, including putting the bins out which was very difficult as she required a walking frame for mobility. If the woman had not completed the duties set out by the SDM she was denied food and prevented from going to her day care option.

- **Financial Decision Making using an Enduring Power of Attorney**

The OPA does not have data on the incidence of financial abuse but is aware that Enduring Powers of Attorney can be an instrument of abuse and misuse by the Attorney and is of the view that this incidence is significant in number.

- Older people can be coerced or tricked into signing documents without understanding the powers that they are donating. Therefore, witnesses must interview the person on their own and ensure that they are not being coerced or tricked into making and EPA

Case study 1

An 89 year old woman (without any family members) appointed a younger neighbour to be her Enduring Power of Attorney. It was doubtful whether the woman was competent to execute the document at the time. A few months after the document was made, the woman was admitted to hospital in a neglected state and it was found that the Attorney had been using large amounts of the older person's money for her own needs and not providing the woman with adequate food, care or support.

Case study 2

An 80 year old man appointed his son as Enduring Power of Attorney. The man was placed in residential aged care and some months later it was found that the son had sold the man's home using the EPA and deposited the funds into his own bank account, not into the older person's.

Case Study 3

An 80year old woman with advance dementia was admitted to residential aged care with very few belongings and inappropriate, inadequate clothing and personal items. The Attorney was a nephew, the only relative of the older person. It was found that the Attorney had used the older person's life savings of \$70,000 to support his gambling habit. Residential aged care was only sought when the Attorney had exhausted all of the older person's funds.

The OPA suggests a number of measures to address financial abuse using an EPA.

There should be reporting obligations for Enduring Powers of Attorney. Although formal obligations would be preferred, reporting obligations could also be informal with safeguards written in the document by donors. For example

- if the estate is significant then the EPA document could state that the accounts should be audited annually.
 - If one or two family members are appointed, financial statements could be given to other family members to ensure that the finances are managed for the person's benefit only.
 - Consultations should occur around large transactions, such as the purchase or sale of property. The donor could name (in the EPA) who should be consulted in regard to these matters
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- Donees should be made fully aware of their role and responsibilities prior to accepting the appointment. EPA forms should contain information about this and, when accepting the role, the Attorney, must sign not only indicate acceptance of the role, but to indicate that he/she has read the responsibilities of the role and agrees to abide by these. This would be similar to the process for the appointment of a substitute decision maker appointed in an Advance Care Directive (in SA).
 - Donees should be educated in supported decision making practices that are rights based to maximise independence, choice and control for older people as far as possible.
 - Authorised witnesses must be trained and of appropriate authority, to discern if the person has capacity to complete the document and fully understand the authority that they are donating to the Attorney.
 - There is currently no way of recording the decision of a witness to decline witnessing an EPA or for the witness to raise the concerns to ensure that, if another witness is approached, they are aware of the issues. A register of EPAs which has an alert function for these cases would prevent such occurrences.

Question 30: Should powers of attorney and other decision-making instruments be required to be registered to improve safeguards against elder abuse? If so, who should host and manage the register?

- **Enduring Powers of Attorney**

Enduring Powers of Attorney should be registered.

It is not unusual for a person to have made several Enduring Powers of Attorney over the years without revoking the previous documents. Registration of EPAs would ensure that the most current document is being used and revocations would be tracked.

The OPA doesn't have a view as to who should host and manage the register, but it should be a simple system

- **Advance Care Directives**

It would be useful to register Advance Care Directives to ensure that they are able to be accessed readily if a person experiences cognitive impairment (through accident or illness) and there is an urgent decision to be made.

Documents could be uploaded on to a central health recording system, accessible by health practitioners, Paramedics etc.

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

Public Advocates should be able to play a significant part in investigating and responding to concerns that an older person is being abused. In SA the Public Advocate has the authority to investigate matters if directed by the South Australian and Administrative Tribunal (SACAT) pursuant to Section 29 of the *Guardianship and Administration Act 1993*. This level of investigation is hampered by the OPA's lack of authority to enter a premises and to demand information or documentation.

The Office of the Public Advocate (OPA) should be able to respond to concerns raised about possible abuse or neglect of a vulnerable older person in a timely manner, without the matter having to go first of all to the Tribunal. The OPA is of the view that responses should be made to concerns about all vulnerable adults, not restricted to adults who have a known mental impairment.

To respond appropriately to the abuse or harm of a vulnerable older person, there needs to be a single point of entry into the system where concerns could be received and acted upon. This could mean giving advice or making referrals in the first instance and /or linking in with an appropriate service provider.

However, to provide an effective system, the Public Advocate would need to be given powers to investigate matters. This could be on receipt of a concern by a community member or professional person. Authority given would need to include the ability to gather information from relevant interested parties and enter premises occupied by the older person. Provisions should be made for the Public Advocate to work in partnership with the Police and provide any information and evidence to them as necessary with appropriate referral powers and clarity about responsibilities for compliance and enforcement of outcomes

In addition to investigations of complaints or reports of abuse, powers for own motion investigation for individual and systemic matters would be valuable.

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

Adult protection legislation, similar to the Adult Support and Protection (Scotland) Act 2007 which provides a mandatory, tiered response to concerns raised about the abuse of vulnerable adults should be introduced. Legislation would bring a rights based, comprehensive, consistent multidisciplinary approach to addressing concerns raised about abuse or harm to a vulnerable older person.

Legislation must include a set of principles (similar to SA legislation, the *Advance Care Directives Act 2013*) which ensures that any response must take into account the views of the older person and must be the least restrictive option available to the person.

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

Health professionals should be able to play an important part in recognising and responding to abuse of older persons:

- They must receive initial and ongoing follow up training to recognise the signs of abuse, including those which are subtle.
- There must be clear guidelines and procedures to assist staff, including risk assessment and screening tools to ensure consistency and referral pathways
- Multidisciplinary teams should be established in health settings to ensure appropriate responses and assistance to an older person who has experienced abuse

Health professionals can be supported by education and training to improve the identification and detection of abuse as well as clarity about where to refer people and where to report abuse.

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

In the absence of Adult Protection Legislation or in addition to increased authority to Public Advocates to respond to and investigate suspicions of elder abuse, it is necessary for Civil and Administrative Tribunals a broader range of orders to include:

- Older people experiencing abuse who may have decision making capacity but who may be vulnerable and in need of protection
- Entry and assessment orders
- Removal and placement orders
- Banning orders
- Substitute decision making ordersⁱ

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

Easier application processes are required, particularly for community members including people with cognitive impairment. The provision of medical evidence is often required before the Tribunal can proceed to hear a matter, and this can be difficult for an applicant (especially for community members), to obtain.

The settings for hearings should be as informal and welcoming as possible to enable participants, particularly vulnerable elderly adults, to be comfortable to relay their views and wishes.

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

In South Australia, the Public Advocate has the authority to mediate matters in relation to an Advance Care Directive. The application process is simple and does not need to be accompanied by a medical report about the older person's cognitive ability (as the South Australian Civil Appeals Tribunal (SACAT) does). Although the Dispute Resolution Service was not set up to deal with matters of elder abuse, the incidence of abuse, harm or neglect is cited in a number of the applications received. On occasion, while working with those in dispute, the Dispute Resolution Practitioner may identify that a substitute decision maker is abusing an older person, or at least has a strong suspicion that abuse or harm to the older person is occurring. In these cases, the Public Advocate can make an application to the Tribunal for the revocation of the Advance Care Directive and the appointment of a guardian, if the person has a mental incapacity and is unable to make their own decisions.

Although the Public Advocate is authorised to deal with disputes about health, accommodation and personal issues, the dispute resolution process has highlighted issues of financial abuse of the older person. In these cases the OPA will refer the matter to the Tribunal and, in some cases, will make an application for an Administrator to be appointed to manage the person's finances. In both these scenarios there are no powers to deal with consequences for perpetrators.

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

- There needs to be specialised police, prosecution and legal services to work with older people who have been the victim of abuse. Response Police Teams should include social workers with experience in working with older people
- In South Australia, the Disability Justice Plan addresses the needs of vulnerable people in interviews and in the court system. The *Statutes Amendment (Vulnerable Witnesses Act 2015)* provides for specialist interviewing techniques and communication assistants. SAPOL and other key government investigators are currently being trained in specialist interviewing designed by the University of New South Wales. Training and education is being developed for prosecutors and members of the courts. Communication assistants are also provided for in the abovementioned Act who can be called upon to assist people with complex communication skills during a police interview and/or court interviews. (Links to this work is provided in the next question.)
- Older people are often not considered to be good witnesses and this prevents the prosecution process going forward. More support needs to be given to vulnerable older people to enable them to give evidence in relation to court matters, such as not having to be present in court, but rather give evidence 'in camera'.
- Police and Public Prosecution staff should be included in ongoing research in regard to finding more appropriate ways of assisting an older person to go through the court process

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

Please refer to the South Australian Access to Justice Plan for people with disabilities and the *Statutes Amendment (Vulnerable Witnesses Act 2015)* for examples of some improvements currently underway. A link to the website and Act are below.

<http://www.agd.sa.gov.au/initiatives/disability-justice-plan>

[https://www.legislation.sa.gov.au/LZ/V/A/2015/STATUTES%20AMENDMENT%20\(VULNERABLE%20WITNESSES\)%20ACT%202015_16/2015.16.UN.PDF](https://www.legislation.sa.gov.au/LZ/V/A/2015/STATUTES%20AMENDMENT%20(VULNERABLE%20WITNESSES)%20ACT%202015_16/2015.16.UN.PDF)

Whilst this Act was initiated from work in the disability sector, the definition of cognitive impairment in the Act is inclusive and relevant to older people as highlighted below:

“cognitive impairment includes the following:

- (a) a developmental disability (including, for example, an intellectual disability, Down syndrome, cerebral palsy or an autistic spectrum disorder);
- (b) an acquired disability as a result of illness or injury (including, for example, dementia, a traumatic brain injury or a neurological disorder);
- (c) a mental illness; “

Question 49: What role might restorative justice processes play in responding to elder abuse?

It is the experience of the OPA that older people want abuse and exploitation by a family member to stop but often they do not want to take any legal action against them or report their family member to the authorities.

Restorative justice that fosters dialogue between the victim and offender has been said to show high rates of victim satisfaction and offender accountability. The OPA would support the development of a restorative justice model as a non-legal remedy to situations where abuse/harm or misuse has taken place

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

Civil penalties may be appropriate particularly where criminal prosecution is unlikely to occur as a result of difficulties with gathering evidence. This is often the case where a victim has impaired decision making or cognitive impairment.

ⁱ Dr John Chesterman , Churchill Fellow 2012 Travel and Report 2013