Office of the Public Advocate
South Australia

Submission

Review of the Ageing and Adult Safeguarding Act

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Review of the Ageing and Adult Safeguarding Act

1. Introduction

The Public Advocate welcomes the opportunity to provide a submission to the review of the *Ageing and Adult Safeguarding Act 1995* (the Act).

The creation of the Adult Safeguarding Unit (ASU) has been an important and welcome initiative in South Australia.

The ASU has filled a major gap in safeguarding adults at risk of abuse or neglect. It was established in recognition of the barriers that exist to effective safeguarding in the absence of a centralised body empowered to receive and act on reports of suspected or actual abuse of older adults. In 2020 the scope of the ASU was expanded to include all adults with a disability. Prior to the establishment of the ASU, responses were often disjointed, and individual agencies were limited in what they could do, despite their best efforts, to provide support in situations of abuse. These issues were explored in *Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People* (2011) (Office of the Public Advocate) which provided the catalyst for establishing the ASU. More recently these gaps were also highlighted in the report of the Safeguarding Task Force in relation to adults with disability. This report recommended to expand, earlier than was initially planned, the remit of the ASU to include people with disability under 65 years of age, which was subsequently acted upon.

The strong information-gathering powers and ability to coordinate a multi-agency response has allowed the ASU to work positively with, and for adults to facilitate safeguarding support, while preserving the relationships that are important to them. The ASU has also created an invaluable opportunity to collect evidence and data on adult safeguarding issues across South Australia, allowing for the identification of patterns and trends to inform future policy and service development.

OPA has a close working relationship with the ASU as a member of both the *Adult Safeguarding Advisory Group* and *Interagency Phone Line and Adult Safeguarding Unit Implementation Workgroup*. A Memorandum of Administrative Agreement (MOAA) dated 15 January 2020 is also in place to describe the way the ASU and the OPA will work together to support the administration of the Ageing and Adult Safeguarding Act 1995.

Prior to the early expansion of the ASU to include adults with disability, OPA lacked an appropriate pathway for a range of matters that are raised through our office. The ASU has therefore provided an important link in effectively responding to safety matters concerning South Australians referred through the OPA's Information Service. The OPA also refers some matters to the ASU through its Dispute Resolution Service (DRS) and as outlined in the MOAA.

There are difficulties from a legislative and administrative perspective, however, in terms of the ASU's location within the ageing portfolio. Whilst this makes sense from the point of view of responding to elder abuse, it is not a natural fit for safeguarding issues relating to other vulnerable adults. The historical context for this decision is

acknowledged, and these concerns are not an argument for limiting the scope of the unit. Whilst the ASU's close working relationship with the Office for Ageing Well is important in influencing prevention and early intervention strategies in relation to elder abuse, it is less clear how this will play out in other areas, in particular disability. The OPA has addressed this in more detail further on in this submission.

2. Terms of reference

The South Australian Law Reform Institute (SALRI) has been asked by the State Government to review the Act and, as part of this review, to:

- Identify the extent to which the Act is achieving its purpose.
- Review the functions and powers of the Office for Ageing Well and the Adult Safeguarding Unit (ASU).
- Consult with relevant parties, such as experts, interested groups, and community members with lived experience, such as older persons and persons with a disability.
- Consider independent evaluations of the ASU including their policies, protocols and operations.
- Recommend appropriate changes to the current law that promote human rights and best practices.

3.The Public Advocate

The South Australian Public Advocate promotes the rights and interests of people with impaired decision-making capacity. The Public Advocate is supported by the Office of the Public Advocate (OPA) to provide guardianship, investigation, advocacy, dispute resolution, and information to support people who need assistance with decision making.

The Public Advocate is a statutory officer. The Public Advocate advocates for and on behalf of people with impaired decision-making capacity and their families, carers and supporters. In particular, the Public Advocate administers South Australian laws that relate to adults who are unable to make decisions for themselves, who are at risk of abuse or neglect and may require assistance with decision making.

The OPA's Dispute Resolution Service can provide preliminary assistance and mediation if a person has made an Advance Care Directive (ACD); there is a dispute about consent to medical treatment and there is a disagreement about decisions or decision-makers.

The Public Advocate can be appointed by the South Australian Civil and Administrative Tribunal (SACAT) as a guardian of last resort if a person has impaired decision-making capacity, there is a lifestyle, accommodation, and/or health decision to be made and there is no other appropriate person to be appointed.

What this means in practice is that the Public Advocate will only be appointed if there is no one else in a person's life able or willing to make necessary decisions, or if there is family conflict meaning that agreement on decisions is difficult or not possible. Consequently, the Public Advocate often must make decisions for people who have complex needs or experience complex situations and who may be without support networks.

4. Disability Advocate

The Disability Advocate is a position located within the Office of the Public Advocate and was established in November 2018. The purpose of the role of the Disability Advocate is to "ensure that South Australians with a disability and their families are getting a good deal from the National Disability Insurance Scheme (NDIS)."

Throughout 2019 the Disability Advocate attended over 150 meetings with people with disability, family, advocates, and carers to speak with people about their experiences with the NDIS, what was working well and areas for improvement. Regular reports were presented to Ministers and senior State and NDIA officers.

The role has since been extended with funding until 2023. COVID-19 and other work (such as the Safeguarding Taskforce) made it difficult to undertake face to face meetings in 2020 however the Disability Advocate managed to conduct over 270 virtual meetings with external stakeholders during the year. Meetings continued in 2021 and 2022, with regular reports prepared for the NDIA and State ministers. All reports are available on the OPA website at opa.sa.gov.au.

5. Responses to the Review

The structure of the responses below reflects the fact sheets prepared by SALRI (i.e. each section corresponds to a particular fact sheet).

5.1 Office for Ageing Well

The objectives of the Office for Ageing Well (OFAW) remain largely relevant but there is room to strengthen some of the language around the inclusion of older people. In line with developments in the disability sphere, the Act could make reference to the role of OFAW in upholding the rights of older people as equal citizens. Part 8 could be simplified to make it clear that one of the aims of OFAW and broader government strategy is to eliminate discrimination based on age altogether.

The language currently used to describe older people in Part 2 of the Act is outdated and reflects the era when this legislation was originally developed. This review provides an opportunity to amend the terminology to be more appropriate with contemporary standards, i.e. 'older person' rather than 'ageing'.

5.2 Background to the Adult Safeguarding Unit

Although the ASU is currently focused on responding to reports of abuse or neglect involving older people and adults with disability, from October 2022 this will extend to all adults vulnerable to abuse. This remains an important and critical remit and should not change.

There is merit in having a single place where people can go for guidance and support. By providing a range of actions that the ASU may take following a report, the legislation creates a framework of graduated responses depending on the circumstances. The ASU is a place where people can get information or assistance when they have concerns which may not necessarily result in a 'report' but may instead involve linking the person with a more appropriate service and, in the process, educating them about the role of the ASU. In the absence of this, there is a risk that people may fall through the gaps or receive an inadequate response because they do not know where to go.

The ASU also provides a valuable mechanism for collecting evidence and data on adult safeguarding issues. This information could be used to observe trends and gaps to inform policy and service delivery development. It could also assist in identifying patterns at an individual level that may otherwise be missed.

Recommendation 1: That the scope of the Adult Safeguarding Unit should remain broad and include any adult at risk of abuse or neglect, regardless of age or disability.

5.3 Guiding Principles of the ASU

In addition to the key international human rights treaties outlined in Fact Sheet 4, the United Nations Convention on the Rights of People with Disability (UNCRPD) also provides an important reference point in the development of policy and legal frameworks that affect people with disability. The UNCRPD sets out the standards and principles for the treatment of people with disability from a rights-based perspective and so is an important instrument to consider in the context of safeguarding vulnerable adults.

Recommendation 2: That the guiding principles of the Adult Safeguarding Unit outlined in Section 12 of the Act be reviewed against the UNCRPD to ensure alignment.

A rights-based approach to adult safeguarding is essential, in line with the UNCRPD and other human rights treaties. Respect for a person's autonomy and right to self-determination should be paramount and must guide any response, avoiding measures that are paternalistic or overly restrictive.

However, careful consideration is required when navigating the challenges inherent in balancing a person's right to autonomy and the need to protect against harm.

Sometimes declining help when someone is vulnerable may be part of the vulnerability. There are often complex factors and layers underlying a person's decision not to want action taken. For example, grief, fear or a sense of (or actual) dependency can be major barriers to seeking or accepting help. This requires a variety of perspectives to be brought to bear on a situation (including trauma-informed approaches and gender lenses) when supporting someone who is in an abusive situation. This is by no means a straightforward task. It is complex and dynamic. Often it requires incremental effort and ongoing opportunities to seek out help (not a once-off).

The legislation should avoid viewing the concepts of autonomy and safety as a dichotomy (opposing states) where a person's wishes are either respected or overruled for the sake of safety. These concepts should instead be framed as a spectrum, where autonomy and safety are continuously navigated to facilitate choice and control though things like supported decision-making and positive risk-taking.

To the extent that is possible, the principles outlined in Section 12 should reflect the interrelationship between autonomy and safety in the context of abuse and neglect. Principle (c), for example, reinforces this relationship as a dichotomy by stating that 'the primary consideration in the operation of this Act is to ensure that a vulnerable adult's autonomy is respected and maintained *rather than* safeguarding the person from abuse' (our emphasis).

Recommendation 3: The principles should be amended to better reflect the tensions and complex dynamics associated with supporting a person who is in an abusive situation but is declining help.

5.4 Functions of ASU

The OPA considers the role of ASU as complementing, not duplicating, other services. The functions of the unit as outlined in Section 15 are largely adequate in responding to reports of abuse and fostering collaborative strategies with other agencies or services, which is critical in safeguarding vulnerable adults.

By acting as a central body where people can report abuse, the ASU has filled a gap in the system by making it simpler for a member of the public to raise concerns. The strong information-gathering powers in particular are unique to the ASU and allow for a more coordinated and effective approach in responding to abuse.

Whilst it is acknowledged that there are other services available to respond to the needs of vulnerable adults at risk of abuse, including Family and Domestic Violence services or homelessness services, the ASU performs an important coordination function and acts as a 'go to place' where people can get information or make a report. This does not necessarily mean the ASU will be the primary responder in every case. The legislation already allows for this by empowering the ASU to 'refer' a matter if it is more appropriately dealt with by another organisation.

The ASU acts as an important repository of information and evidence to identify patterns and trends that can inform future policy development and program responses. This places the ASU in a unique position to promote and assist in the development of coordinated strategies for prevention and early intervention of abuse of vulnerable adults, including advising other government agencies and organisations to guide their practice.

The relationship with OFAW, particularly in relation to this early intervention and prevention work, is critical to supporting the ASU in exercising its functions. The resources available through OFAW to influence societal attitudes and raise awareness about elder abuse is critical. What is less clear is how similar efforts can be achieved for other vulnerable adults within the ASU's remit. This highlights the challenging dynamics of having a unit responsible for responding to reports of abuse against all vulnerable adults sitting within a piece of legislation originally focused on ageing policy, and subsequently locating the unit under the same directorate. Ideally, the ASU would be located within a different area of State Government to better reflect its mandate.

Recommendation 4: Due to the breadth of the role of the Adult Safeguarding Unit, the location of the unit should be reviewed.

5.5 Definition of Vulnerable Adult

The characteristics currently listed under the meaning of *vulnerable adult* are indicators of vulnerability but do not provide an adequate definition for the term "vulnerable". It is important to emphasise that a person should not be considered vulnerable by reference to their age or disability alone. Vulnerability can result from a combination of personal characteristics and social circumstances. Any one thing does not make someone vulnerable.

The term 'at risk' would be more appropriate because it describes a state linked to circumstances (which can change) rather than focusing on individual characteristics. This term is also preferred by the Disability Royal Commission, for the same reason.

Factors that contribute to a person being at heightened risk include, but are not limited to:

- Having impaired decision-making capacity and no one else in your life to assist with decision-making.
- A lack of social connections or people who care for you and your wellbeing.
- A lack of external eyes or people keeping an eye out for you e.g. neighbours, social connections, groups, clubs, education, or employment.
- Having a sole service provider/carer.
- Living alone.
- Exhibiting behaviours of concern which may increase the risk of the person being subject to the use of unregulated restrictive practices or having their rights being abrogated or impinged on.
- Having communication difficulties or being non-verbal.

- Being disempowered to make decisions and exercise choice and control in your life.

Importantly though, given that any one thing does not make someone vulnerable the Act should avoid an exhaustive list if possible, through use of the phrase ‘including but not limited to.’

Recommendation 5: That the definition of ‘vulnerable adult’ focus more on the circumstances surrounding a person’s situation rather than on individual characteristics and that the term ‘at risk’ be considered more appropriate in describing people who may need the support of the Adult Safeguarding Unit.

5.6 Definition of Abuse

In OPA’s experience, one of the major gaps in the ASU’s mandate relates to self-neglect.

Self-neglect can manifest in a variety of ways but can commonly involve things like squalid living conditions or hoarding and refusal of services. There is often an inadequate response available to people whose health and safety is at serious risk in these situations leading to missed opportunities to intervene early to avoid further deterioration. Adults in these situations would benefit from the skills and expertise of the ASU, especially in terms of promoting a coordinated response from various agencies that may be involved in the person’s life. The following examples illustrate this point:

OPA was contacted by a local council about concerns for a woman’s health and safety due to living conditions, including hoarding and squalor. The situation was not able to be resolved despite a range of agencies involved with the person because she was refusing services. The matter was referred to the ASU, but action was not possible because the case was outside of their remit. OPA continued to support the local council through guidance on where to refer the matter for further support, including mental health services and the NDIS Quality and Safeguards Commission. This case study also highlights the challenges associated with relying on capacity as a reason for not being involved. Even if the ASU had jurisdiction over instances of self-neglect, the person had capacity but was refusing services. Despite this, there is still merit in the involvement of a centralised body such as the ASU through overseeing and coordinating a multi-agency response.

In another example, the OPA was contacted by a health care professional with concerns about a woman living in squalid-like conditions with her two adult children. ASU did not intervene because prima facie it was considered self-neglect. The OPA continued to support the healthcare provider by linking them to possible supports and referral pathways. It came to light some time later that there was abuse between the two adult children, both of whom had an intellectual disability. Earlier involvement with the family due to concerns about their living conditions may have assisted in identifying and addressing the abuse sooner.

Adding an additional requirement within the definition of 'abuse' for a relationship of trust or duty of care to exist is likely to further limit the ability of the ASU to act in these circumstances and prevent further harm from occurring.

The Act should also capture a holistic view of abuse within its definition, particularly in relation to early intervention efforts. More specifically, in situations where a single instance of abuse or neglect in isolation does not appear serious but when considered as part of a pattern of behaviour, places a person at risk of significant harm.

The current definition of 'abuse' may also need to be amended to remove the use of 'and' in place of 'or' after each sub-paragraph.

Recommendation 6: The definition of abuse should be broadened to encompass self-neglect.

5.7 Interaction with Current Law within ASU's Service Model

It is noted that reports to the ASU are made on a voluntary basis. The OPA considers this an appropriate contrast to the child protection space where reporting of suspected abuse is mandatory in certain circumstances. The Act instead establishes a 'mandatory response' approach as described in the *Closing the Gaps* report. Once received, the ASU is obliged to assess the report and take one of three actions prescribed in the legislation:

- undertake an investigation;
- refer the matter;
- decline to take further action.

In practice, an outcome of ASU's involvement with a person may include the development of an individual safeguarding plan. The value of including the development of such a plan within the suite of actions available to the ASU as described in the legislation could be considered. This may better reflect the actual operation of the Unit and could strengthen this important component of their work.

Dispute resolution is another useful tool as part of a suite of safeguarding responses that could be included as an option for the ASU following assessment of a report. The Dispute Resolution Service is an important statutory function within OPA. It supports positive outcomes where there may be a dispute in relation to an Advance Care Directive or consent to healthcare/medical treatment. Dispute resolution plays an important role in upholding the rights of adults through least restrictive methods by preserving family and care networks and avoiding the need for guardianship. It can also support the prevention of abuse and provide effective early intervention. Whilst in practice the ASU already adopts an informal dispute resolution/family conference approach in many circumstances, this could be strengthened by including it as a legislated option.

Recommendation 7: The development of an 'individual safeguarding plan' and access to dispute resolution should be included as possible actions that the ASU could take following the assessment of a report.

According to the ASU Annual Report 2020-21, 56.5% of reports requiring action resulted in an investigation by the unit, whilst 41.3% resulted in no action following an assessment. It is recognised that there are many reasons the Unit determines that no further action is necessary, including that a range of 'safeguarding' measures may be identified through the initial assessment phase.

Safeguarding should be framed in the broadest possible sense and be seen to encompass a wide range of factors ranging from societal attitudes, policies and practice, initiatives, and responses. The act of receiving and assessing a report is, in and of itself, an important safeguarding activity in the 'corrective' sense. On the other hand, natural or developmental safeguards like peer support networks and inclusion in community life are also important factors in reducing someone's risk of abuse or neglect. It is difficult to capture the broad range of possible safeguard measures within a definition in the Act without limiting the ability of the ASU to tailor safeguarding strategies based on best practice and clinical judgement.

Recommendation 8: That 'safeguarding' be defined in the broadest possible terms to sufficiently include all actions that have a safeguarding effect, but that further detail be spelt out in policy.

5.8 Capacity and Consent

The section on decision-making capacity within the Act reflects current standards in relation to providing consent, in particular, that capacity is presumed and is decision specific.

In practice, however, capacity and consent in the context of abuse or neglect is challenging and complex, especially where capacity is unclear. Declining support when someone is in an abusive situation is often a part of the dynamics of the abuse (for example someone may be conditioned not to give consent). Coercive control amplifies this power imbalance. As explored in section 5.3 of this submission, the key is to offer ongoing opportunities for the person to seek out support.

This is difficult terrain to negotiate (balancing risk with upholding rights), and the skills and experience of ASU staff plays a significant role in supporting positive outcomes. It is noted from the ASU Annual Report 2020-21 that of cases where no action was taken following an assessment, 4.8% was due to consent not being given and 10.6% was due to consent being withdrawn. Thus, in majority of reports received, the unit acquired the consent of the person experiencing the abuse before taking action. These statistics are encouraging but the challenges associated with capacity and consent cannot be underestimated.

Greater emphasis could be placed in the Act on supported decision-making and equipping ASU staff to navigate these difficult scenarios whilst seeking to empower a

person to exercise their right to self-determination, even where there may be impaired decision-making.

Supported decision-making is an emerging and increasingly accepted concept which involves assisting people with impaired decision-making capacity to participate in their own decision-making to the greatest extent possible. It is explored in the ASU Code of Practice as a best practice approach to working with people who may lack the capacity to provide legal consent. The right to supported decision-making could be included in the Act to strengthen this existing practice and reinforce the recognition that consent in the context of abuse and neglect can be murky, so people should be provided with the support they need with their decision-making.

Recommendation 9: That access to supported decision-making when consenting to action by the Adult Safeguarding Unit be included as a requirement in the Act.

The legislation could prescribe a minimum level of scrutiny that is required before being satisfied that a person's refusal to consent has been made free of coercion or undue influence. There could also be greater guidance for staff on non-intrusive steps that can be taken to ensure safety even when consent is not provided, including support to organisations who are already working with a person. There are still steps that can be taken to safeguard/support a person even if consent to do so is not provided.

For example, the OPA received a report through the Information Service about concerns for a woman with disability who was being cared for by her partner. Upon admission to hospital, it became apparent that she was in a terrible state of neglect potentially due to abuse by her partner. The ASU was contacted but consent was not provided by the woman for them to take any action. Similarly, during previous admissions hospital staff held concerns about the woman's safety but consent for support was not provided. The OPA continued to liaise with the hospital to check on her wellbeing due to the intersectional complexity of disability, vulnerability and domestic violence. The OPA worked with the hospital Social Worker to engage supports to ensure her safeguarding; the Exceptional Needs Unit (ENU) in DHS, the NDIS Complex Needs Team, the hospital Patient Journey Coordinator, Support Coordinator and allied health professionals including dietician, occupational therapist and physiotherapist. With such supports in place, over time and with distance from her partner whilst in hospital, she began disclosing abuse and indicated that she wanted support to leave the relationship. Eventually the woman felt comfortable providing consent to move into Residential Aged Care once discharged from hospital. This example highlights that sometimes the provision of consent by a person in an abusive situation can take time and requires ongoing effort including provision of supports and referrals.

6. Conclusion

It is recognised that the ASU has a significant mandate, especially with its scope set to expand in October 2022 to all vulnerable adults, as always intended in the legislation. However, narrowing the scope or amending the functions to be more

specific in focus risks returning to the disjointed system previously where people could fall through the gaps.

While it is acknowledged that the scope of this review is specific to the operations of the Act, the OPA would like to make the following points about safeguarding more generally. Safeguarding is a broad concept. It encompasses a variety of measures across a spectrum ranging from *corrective* measures like responding appropriately to abuse when it occurs through to action that *prevents* abuse from happening in the first place. Effort also needs to be driven at the *developmental* level to enhance the natural safeguards of individuals and communities. This involves building the capacity of people with disability, including cognitive impairment, or anyone at risk of abuse to defend their rights through advocacy, peer support networks, or access to education and employment. It also involves a cultural element where people with disability, older people and others at risk are valued by an inclusive society and treated fairly and properly. Concerns relating to adult safeguarding cannot be addressed without consideration of those broader societal and systemic issues. Government has a role to play here, as much as it does in providing a response when things go wrong.

7. Recommendations

Recommendation 1: That the scope of the Adult Safeguarding Unit should remain broad and include any adult at risk of abuse or neglect, regardless of age or disability.

Recommendation 2: That the guiding principles of the Adult Safeguarding Unit outlined in Section 12 of the Act be reviewed against the UNCRPD to ensure alignment.

Recommendation 3: The principles should be amended to better reflect the tensions and complex dynamics associated with supporting a person who is in an abusive situation but is declining help.

Recommendation 4: Due to the breadth of the role of the Adult Safeguarding Unit, the location of the unit should be reviewed.

Recommendation 5: That the definition of ‘vulnerable adult’ focus more on the circumstances surrounding a person’s situation rather than on individual characteristics and that the term ‘at risk’ be considered more appropriate in describing people who may need the support of the Adult Safeguarding Unit.

Recommendation 6: The definition of abuse should be broadened to encompass self-neglect.

Recommendation 7: The development of an ‘individual safeguarding plan’ and access to dispute resolution should be included as possible actions that the ASU could take following the assessment of a report.

Recommendation 8: That ‘safeguarding’ be defined in the broadest possible terms to sufficiently include all actions that have a safeguarding effect, but that further detail be spelt out in policy.

Recommendation 9: That access to supported decision-making when consenting to action by the Adult Safeguarding Unit be included as a requirement in the Act.