

Report 17

September 2022



South Australian Law Reform Institute

‘Autonomy and Safeguarding are not Mutually Inconsistent’: A Review of the Operation of the *Ageing and Adult Safeguarding Act 1995* (SA)

The **South Australian Law Reform Institute** was established in December 2010 by agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. It is based at the University of Adelaide Law School.

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Suggested Citation:

David Plater, Divya Narayan, Anita Brunacci, Holly Nicholls, Jemma Holt, Michaela Okninski, Olga Pandos, Taylor Portelli, Rachel Tan, Kim Tran, Sylvia Villios and John Williams, *'Autonomy and Safeguarding are not Mutually Inconsistent': A Review of the Operation of the Ageing and Adult Safeguarding Act 1995 (SA)* (South Australian Law Reform Institute, Adelaide, 2022)

Acknowledgement for cover picture:

<<https://emedia1.nhs.wales/PublicHealthWales/cache/file/34875228-9239-4711-914FOD46B94C7c8E.jpg>>.

Acknowledgement of Country:

SALRI acknowledges and respects Aboriginal people as the State's first people and recognises their traditional relationship with Country. We acknowledge that the spiritual, social, cultural and economic practices of Aboriginal people come from their traditional lands and waters, and that the cultural and heritage beliefs, languages and laws are still of importance today. The University of Adelaide, where SALRI is based, stands on Kaurna land.



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Terms of Reference

The South Australian Law Reform Institute ('SALRI') has been commissioned to conduct the independent review of the *Ageing and Adult Safeguarding Act 1995* (SA) under s 53 of the operation of this Act and to prepare a report on the review to the relevant Minister. This report is to be laid before both Houses of Parliament within six sitting days after receiving the report. SALRI's terms of reference are set out in the Project Brief. SALRI's review of the Act includes, but is not limited to, the following points:

- The extent to which the Act is achieving its purpose.
- Improvements that could be made to the operation of the Act, including interpretations and definitions (Part 1); functions of the Office for Ageing Well (Part 2); Adult Safeguarding Unit principles, functions, scope, powers of authorised officers (Part 3) and provisions set out in Parts 4, 5, 6 and 7.

The scope of this review is limited to the operation of the Act, with a focus on the extent to which the present Act is achieving its purpose(s) and any changes that could be made to clarify or improve present law and practice. This includes any suitable changes to law and practice relating both to the Office for Ageing Well ('OFAW') and the scope and powers of the Adult Safeguarding Unit ('ASU'). SALRI considered independent evaluations of the ASU as well as their policies, protocols and operations in the process of producing this Report. It is beyond the scope of SALRI's reference to examine the organisational structure of the ASU, its administrative operation (such as funding and staffing) or the day-to-day operations of the ASU. SALRI's focus is on the operation of the OFAW and ASU in relation to their intended purpose under the *Ageing and Adult Safeguarding Act 1995* (SA).

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Acknowledgements

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SALRI acknowledges the valuable input of Stephen McDonald SC, Jean Lee, Cassie Mason, Elicia White and Kathy Williams and the students of the Law Reform course at the University of Adelaide, especially Charlotte Ordynski, Lauren Bagshaw, Nicholas Bannister, Rynier Brandt, Hayley Crumb, Peter Dalrymple, Rebecca Gibbons, Laura Kelly, Gemma Kerin, Nili McGrath, Lukas Price, Esther Richards, Eva Squire and April Zimmerman.

Louise Scarman provided valuable research, proofreading and editorial assistance.

SALRI is grateful for the many insightful submissions received in relation to this reference. SALRI expresses its particular appreciation to Dr Mark Giancaspro of the University of Adelaide; Professor Gino Dal Pont of the University of Tasmania; Stephen McDonald SC of the SALRI Advisory Board and Dr Chris Moy of the Australian Medical Association (SA) for their valuable input.

SALRI would like to acknowledge the generous support of the State Government in providing funding for SALRI to undertake this reference. SALRI also thanks OpenBook Howden for its assistance with the publication of this Report.

Disclaimer

This Report deals with relevant law and practice as it was on 31 August 2022 and may not necessarily represent the current law.

Any views expressed in this Report are those of the South Australian Law Reform Institute and no other agency.

Glossary,¹ Notes on Terminology and Key Consultees

The following key terms and abbreviations are used in this Report:

ACD or ACDs	Advance care directive(s). See ‘Advance Care Directive’ definition below.
<i>AAS Act</i>	<i>Ageing and Adult Safeguarding Act 1995</i> (SA).
ACQS Commission	Aged Care Quality and Safety Commission. This body is responsible for protecting and enhancing the safety, health, wellbeing and quality of life for older people receiving services through the Australian aged care system. ²
Advance Care Directive	A legal document detailing a person’s wishes, preferences and instructions for future medical or personal decisions. An ACD may also confer authority upon a person to make medical or personal decisions in accordance with the individual’s values, preferences and directions. ³
ALRC	Australian Law Reform Commission.
<i>Aged Care Royal Commission</i>	<i>Royal Commission into Aged Care Quality and Safety, Care, Dignity and Respect</i> . ⁴
Ageism	An attitude which stereotypes a person, especially an older person, according to age rather than individual abilities. ⁵
ARAS	Aged Rights Advocacy Service.
ASU	Adult Safeguarding Unit.

¹ See also Law Reform Committee, Parliament of Victoria, ‘Inquiry into Powers of Attorney’ (Final Report, Parliamentary Paper No 352, August 2010) xxxv–xl.

² *Aged Care Quality and Safety Commission Act 2018* (Cth) s 6. The ACQS Commission’s responsibilities include accrediting residential aged care services, monitoring the quality of care and services and handling complaints regarding the responsibilities of providers of aged care services: ss 18, 19. The ACQS Commission conducts audits of aged care providers’ compliance with their responsibilities: s 59 and conducts quality reviews of home care services at least once every three years: s 52. The Aged Care Royal Commission found that many people within the aged care system experience substandard care, despite the current regulatory framework. See also *Aged Care and Other Legislation Amendment (Royal Commission Response No 1) Act 2021* (Cth).

³ See also *Advance Care Directives Act 2013* (SA) s 9.

⁴ *Royal Commission into Aged Care Quality and Safety, Care, Dignity and Respect* (Final Report, 26 February 2021).

⁵ Macquarie Dictionary definition. SALRI acknowledges that tackling ageism is one key aim of the South Australian government (one that SALRI fully shares) and that SALRI will help shift negative stereotypes around ageing and older people in the way SALRI portrays and discusses the various issues. SALRI affirms the comments of Professor Wendy Lacey which were adopted by the South Australian Select Committee into Elder Abuse:

I would like to highlight for the Committee the importance of adopting a rights-based approach to the area of elder abuse. It is all too easy to fall into an ageist approach when dealing with older persons and to just see that age alone means that people are automatically vulnerable. In any framework that is adopted for addressing elder abuse it is essential that we put the rights of the older person at the heart of whatever strategy is adopted. That includes respect for dignity, autonomy and the self-determination of the older person and empowering older people to exercise their rights as fully as possible for as long as possible.

Attorney	A person appointed by a principal under an enduring power of attorney to make decisions on the principal's behalf in the event that the principal has legal incapacity.
CALD	Culturally and Linguistically Diverse Background.
Capacity	Capacity is a legal term referring to an adult's ability to make a decision for themselves. ⁶ Generally, when a person has capacity to make a particular decision they can: • understand the relevant information involved; • retain this information; • use this information in the process of making a decision (weigh up the consequences) and; • communicate the decision (by any means).⁷
Capacity Assessment	A test or process used to determine whether a person has capacity to make a decision. This may be undertaken by a legal practitioner. A clinical capacity assessment may be undertaken by a psychiatrist, geriatrician, general practitioner, neuropsychologist or psychologist. ⁸
Carer	As raised by Carer and Community support in its submission to SALRI, carer is defined by the ABS as 'a person who provides any informal assistance (help or supervision) to people with disability or older people (aged 65 years and over)'. ⁹ This is distinct from the care provided by an individual or agency on a paid basis. ¹⁰
DACSSA	Disability Advocacy and Complaints Service South Australia.
<i>Disability Justice Plan</i>	Attorney-General's Department (SA), <i>Disability Justice Plan 2014–2017</i> (June 2014).
Disability Royal Commission	<i>Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability</i> .

⁶ The term is defined in s 5 of the *AAS Act*. 'Competence' or 'capacity' in the context of the *AAS Act* should be distinguished from the complex concept of 'witness competence' in South Australia and the criteria to provide unsworn or sworn evidence in court under s 9 of the *Evidence Act 1929* (SA). This involves a distinction of understanding the difference between truth and a lie (unsworn evidence) and the abstract distinction between telling the truth in an everyday social context versus the additional gravity and importance of telling the truth in court (sworn evidence). See *R v Starrett* (2002) 82 SASR 115; *R v Lomman* (2014) 119 SASR 463. Indeed, unsworn evidence under s 9 requires a warning as to the need for caution in accepting when compared with sworn evidence. SALRI at the request of the former State Attorney-General is presently examining the somewhat arcane area of witness competence in South Australia and the role and operation of s 9. The Hon Geoff Muecke and consultation with legal and health practitioners, the disability sector and disability community, service providers and academics to date have identified major concerns of both principle and practice with the operation and implications of s 9.

⁷ Legislative Council General Purpose Standing Committee No 2, Parliament of NSW, 'Elder Abuse in NSW' (Report No 44, June 2016) 11 [2.25]. See also s 5 of the *AAS Act*.

⁸ See also Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 121–75.

⁹ Australian Bureau of Statistics, 'Disability, Ageing and Carers, Australia: Summary of Findings' (Catalogue No 4430.0, 24 October 2019).

¹⁰ However, in consultation many parties used the term to refer to both.

Elder Abuse ¹¹	A single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation or implication of trust which causes harm or distress to an older person. It can take various forms, such as physical abuse, psychological or emotional abuse, financial abuse, sexual abuse, and neglect. ¹² An older person may experience multiple forms of abuse at the same time. ¹³ This term is not defined by the common law or in any legislative framework. ¹⁴
EPA(s)	Enduring Power of Attorney(s). Made under s 6 of the <i>POA Act</i> , an EPA lasts or ‘endures’ when the principal has legal incapacity. An attorney’s powers under an enduring power of attorney are generally characterised as financial and legal powers.
Family Violence	‘Violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes that family member to be fearful.’ ¹⁵

¹¹ In the course of its consultation, SALRI heard much concern as to the prevalence of abuse occurring within both aged care and disability residential facilities. The problem of ‘institutional abuse’ was often raised in both contexts. SALRI notes that this raises complex operational, legal and constitutional implications, due to the presence of both State and Commonwealth agencies. The ability of the ASU to intervene in such cases is far from settled. As the Western Australian Parliamentary Report stated: ‘The Committee considered the role that paid carers and aged care service providers play in this inquiry into elder abuse and notes that an investigation of the adequacy of aged care has a far broader scope than this inquiry alone.’ Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 5 [1.37].

¹² The most common forms of elder abuse are financial abuse and psychological abuse. See Rae Kaspiew, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, November 2018) 5–7; Kelly Purser, Tina Cockburn and Elizabeth Ulrick, ‘Examining Access to Formal Justice Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney’ (2019) 12(1) *Elder Law Review* 1, 9; Melanie Joosten et al, Seniors Rights Victoria, *Seven Years of Elder Abuse Data in Victoria* (Report, August 2020) 17–18, 34.

¹³ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 19 [1.8]. This description is used across a range of government and non-government bodies in Australia: at 37 [2.26]. See also World Health Organization, *The Toronto Declaration on the Global Prevention of Elder Abuse* (WHO Document, 2002); Select Committee into Elder Abuse, Legislative Council of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) i [3], 9. SALRI notes there is no universal satisfactory definition of elder financial abuse: Georgia Lowndes et al, Monash University, *Financial Abuse of Elders: A Review of the Evidence* (Report, June 2009) 5. See also at: 9–10. However, SALRI sees the cogency of the Australian Institute of Family Studies definition: ‘A single or repeated act or failure to act, including threats, that results in harm or distress to an older person. These occur where there is an expectation of trust and/or where there is a power imbalance between the party responsible and the older person’: Rae Kaspiew et al, *Elder Abuse National Research: Strengthening the Evidence Base* (Research Definition Background Paper, 2019) 4. See further below Part 9.

¹⁴ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 47 [2.74]; Mikaylie Page, ‘Public Trustee (WA) v Mack: An Uncertain Future for the Forfeiture Rule in Elder Abuse Cases?’ (2018) 18(1) *Macquarie Law Journal* 137, 141.

¹⁵ This was the definition adopted by the ALRC and NSWLRC in their 2010 *Family Violence: A National Legal Response* Report. The Report continued: ‘Such behaviour may include but is not limited to:

- (a) physical violence;
- (b) sexual assault and other sexually abusive behaviour;
- (c) economic abuse;
- (d) emotional or psychological abuse;
- (e) stalking;
- (f) kidnapping or deprivation of liberty;
- (g) damage to property, irrespective of whether the victim owns the property;
- (h) causing injury or death to an animal irrespective of whether the victims owns the animal; and
- (i) behaviour by the person using the violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above’.

Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response* (ALRC Report No 114, NSWLRC Report No 128, October 2010) Recommendation

Gaslighting	A form of ongoing emotional or psychological abuse in which the abuser manipulates the victim into questioning their own judgement, sanity or reality. ¹⁶
LGBTIQ	Lesbian, Gay, Bisexual, Transgender, Intersex and Queer. SALRI notes there are many terms and acronyms used to refer to people from these communities and uses LGBTIQ for consistency, including with its previous reports. ¹⁷
OFAW	Office for Ageing Well.
Older Person	The age at which a person may be considered ‘older’ is dynamic and depends on context. See below Notes on Terminology.
NDIS Quality and Safeguards Commission	The NDIS Quality and Safeguards Commission (NDIS Commission) is an independent agency established to improve the quality and safety of NDIS supports and services.
Perpetrator	When used in this Report, the term ‘perpetrator’ refers to the person alleged to be responsible for the abuse. SALRI recognises that the person perpetrating an abusive behaviour may not be aware that it is abusive and the behaviour may not be malicious, particularly in the adult safeguarding context. ¹⁸ Different language may be appropriate in practice depending on the facts of the particular case, such as where the adult subject to the report wishes to maintain a relationship with the ‘perpetrator’.
POA Act	<i>Powers of Attorney and Agency Act 1984</i> (SA).
POA Report	Sylvia Villios et al, South Australian Law Reform Institute, <i>Valuable Instrument or the Single Most Abused Document in our Judicial System? A Review of the Role and Operation of Powers of Attorney in South Australia</i> (Report No 15, December 2020). This report focussed on enduring powers of attorney (EPAs) only, and not general powers of attorney.
Principal	A person who makes an enduring power of attorney document appointing an attorney to make financial decisions on their behalf.
Psychological Abuse	Inflicting mental anguish, fear or feelings of shame and powerlessness. This may be verbal or nonverbal and part of a pattern of behaviour repeated over time and intended to control the person by maintaining a hold of fear over them. Examples include verbal intimidation, humiliation, harassment and shouting; threats of various forms; withholding affection; removal of decision-making power; an enduring guardian acting inappropriately. The signs include shame; depression; anxiety; resignation; confusion; social isolation; insomnia; marked passivity or anger. ¹⁹ SALRI

5. In some situations, the attributes of elder abuse can be compared to those of domestic violence between partners see Rosslyn Monro, ‘Elder abuse and legal remedies – practical realities?’ (Spring 2002) 81 *Reform*.

¹⁶ The term derives from a 1939 play, made famous by its 1944 film adaptation, *Gaslight*, in which a young woman, confined to her house, is lied to and made to feel crazy by her husband who is, amongst other things, manipulating the gas lights that illuminate the house at night. Diane L. Shoos, *Domestic Violence in Hollywood Film* (2017, Palgrave MacMillan) chapter 1; Paige L. Sweet, ‘The Sociology of Gaslighting’ (2019) 84(5) *American Sociological Review* 851.

¹⁷ The Western Australian Parliamentary Report provided a summary of the issues facing LGBTIQ people in the elder abuse context: see Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 37–8 [3.49]–[3.55].

¹⁸ Ibid i [4]–[5], 41 [3.68].

¹⁹ Ibid 18.

	has used this term throughout this Report to also include both ‘gaslighting’ and ‘coercive control’.
SACAT	South Australian Civil and Administrative Tribunal.
Safeguarding	The South Australian Law Reform Institute has proposed for a definition of safeguarding to be added into the <i>AAS Act</i> . Safeguarding for the purposes of this Act is taken to mean protecting people’s health, wellbeing and human rights, and enabling them to live free from harm, abuse and neglect.
SALRI	South Australian Law Reform Institute.
Substitute Decision-Making	Making decisions on behalf of another person. ²⁰
Supported Decision-Making	An approach to decision-making that recognises the autonomy of the individual and involves empowering that person to make decisions for themselves to the maximum extent possible. It emphasises that a person with impaired decision-making ability can make decisions for themselves, provided they have the necessary support to make and communicate those decisions. ²¹
Undue Influence ²²	Undue influence is a doctrine of equitable origin which allows a transaction to be set aside where the will of the transacting party has been overborne by another party. It has been described in varying ways: ‘to be undue influence in the eye of the law there must be — to sum it up in a word — coercion’ and ‘pressure overpowering ... volition’.
Victim	As with the domestic, family and sexual violence context, the term ‘victim’ is contested and is not preferred by all people who have experienced abuse. Consistent with previous reports, as well as the VLRC, SALRI adopts the term victim in this report, however acknowledges that its adoption is far from universal and should not replace the preferences of a person and how they wish to be referred to. ²³
Vulnerable Adult	Currently defined in the <i>AAS Act</i> as an adult person who, by reason of age, ill health, disability, social isolation, dependence on others or other disadvantage, is vulnerable to abuse. ²⁴ See below Notes on Terminology.

²⁰ See also Legislative Council Standing Committee on Social Issues, Parliament of New South Wales, ‘Substitute Decision-Making for People Lacking Capacity’ (Report No 43, February 2010).

²¹ Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 91. See also NSW Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, 2018) 19–21 [3.25]–[3.32]. The *AAS Act* has a strong focus on supported decision-making.

²² This draws on the original equitable formulations. See, eg, *Hall v Hall* [1868] LR 1 P & D 481; *Wingrove v Wingrove* (1885) 11 PD 81. This is considered further below Part 7.2.

²³ See David Plater et al, South Australian Law Reform Institute, *Providing a Voice to the Vulnerable: A Study of Communication Assistance in South Australia* (Report No 16, September 2021) 6–7 n 340; Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report, August 2016) 2 [1.3].

²⁴ *AAS Act* s 3.

Notes on Terminology

SALRI notes that much of the language used in this Report may be contentious, problematic or difficult to define. SALRI acknowledges that some terms do not command universal acceptance. In addition to the glossary, SALRI offers the following explanation for the use of certain terms:

‘Older Person’

The way in which society refers to older persons and defines older age is a ‘dynamic issue’.²⁵ This includes not only the terminology, but also how old older age is and how this should be defined in various legal contexts, including under the *AAS Act*. Indeed, this was a recurring theme in SALRI’s consultation. The OFAW and the ASU, for example, in their combined submission noted that terms such as ‘ageing’ and ‘ageing persons’ are often used in a negative manner which contributes to stereotyping and perpetuating a perception of older people as passive members of society and/or recipients of services. It was said that this does not support the rights and dignity of older South Australians and is not reflective of the broad range of skills, experience and contributions offered by older people that enrich our community across all aspects of society (including civically, socially and economically). Terms such as ‘the elderly’ are now widely seen as inappropriate and ageist.²⁶

Various terms were proposed to SALRI including ‘seniors’. SALRI, consistent with the approach of other recent studies, has used the term ‘older person’ (or ‘older South Australian’) in this Report. SALRI adopts the reasoning of the 2022 Queensland study:

Previously, the concepts of ‘elder’ and ‘elderly’ were typically used as descriptors for victims of elder abuse. However, the term ‘older persons’ is now preferred for the following reasons. First, in Aboriginal and Torres Strait Islander culture, the term ‘elder’ refers to appointed community representatives with cultural and other responsibilities, and may not necessarily denote, or be associated with, a person’s age.²⁷ Secondly, the terms ‘elder’ and ‘elderly’ have been rejected by various international bodies as ageist. Thirdly, the United Nations has shifted its description to remove references to ‘the elderly’ and other value laden terms and now uses ‘older persons’ and ‘ageing’ as central defining concepts.²⁸ Many people who could be labelled as ‘elderly’ would not self-identify as such and would dispute the term related to or applied to them. As such, ‘older persons’ is considered more appropriate terminology. Furthermore, ‘older persons’ accounts better for the ageing process which is important, because older persons are not homogenous, nor is the ageing process consistent. The WHO’s 2015 *World Report on Ageing and Health* heralded a landmark shift in our understanding of ageing, noting that the loss of ability typically associated with ageing is only loosely related to a person’s chronological age and that there is no ‘typical’ older person.²⁹ The Report noted that resulting diversity in the capacities and health needs of older people is not random but rooted in events throughout the life course that can often be modified, underscoring the importance of a life-course approach.³⁰

²⁵ Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 12.

²⁶ Ibid. It was noted to SALRI in this context that terms such as ‘elderly’ should also be avoided if possible. See also Dale Avers et al, ‘Use of the Term “Elderly”’ (2011) 34(4) *Journal of Geriatric Physical Therapy* 153, 153–154.

²⁷ This was also explained to SALRI by Aboriginal Elders at a session in Port Augusta.

²⁸ *International Year of Older Persons: Towards a Society for All Ages*, GA Res 50/140, UN GAOR, 50th sess, Agenda Item 105, UN Doc A/RES/50/141 (30 January 1996).

²⁹ World Health Organisation, *World Report on Ageing and Health* (Report, 2015) vii.

³⁰ Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 12.

For the purposes of this Report, an ‘older person’ refers to those aged 65 years and over. In the context of Aboriginal communities, ‘older person’ refers to those aged 50 years and over.³¹

‘Vulnerable Adult’

The *AAS Act* currently defines ‘vulnerable adult’ as ‘an adult person who, by reason of age, ill health, disability, social isolation, dependence on others or other disadvantage, is vulnerable to abuse.’³² A clear understanding and definition of this term is pivotal to the role and operation of the ASU (and therefore to this review) as a person can only access many of the services provided by the ASU if they are a ‘vulnerable adult’. It has been noted that:

Vulnerability is a concept fraught with paradox. To start with, the concept is in common use but its meaning is imprecise and contested. Confusing, complex, vague, ambiguous are but a few of the labels scholars across disciplines have used to refer to it.³³

The term ‘vulnerable adult’ and its definition proved a contentious issue in SALRI’s consultation. Serious misgivings were expressed to SALRI regarding the term vulnerable and the negative connotations it brings, especially for older people and people with disability. The survey responses expressed such misgivings, but struggled to identify a suitable replacement term with wide acceptance. The OFAW and ASU in their combined submission said the term ‘vulnerable adult’ set out in s 3 of the *AAS Act*³⁴ should be removed from the Act as it is said to define people as vulnerable based on broad characteristics (for example, age) which may be perceived as unjustly limiting a person’s rights and autonomy, leading to a sense of disempowerment. Others viewed the term as ‘paternalistic’ or too nebulous and some preferred the term ‘at risk’.

However, issues were also raised with the term ‘at-risk’. SALRI heard from several service providers and Elders and members of Aboriginal communities that, while the term ‘vulnerable’ does have problematic connotations, describing an Aboriginal person as being ‘at-risk’ raises greater concerns and the risk of offense due to the perceived similarity with child protection laws.³⁵ The term may be distressing, particularly for people affected by the Stolen Generations and is therefore particularly inappropriate. On this basis replacing the term ‘vulnerable’ with ‘at risk’ is inappropriate.

SALRI is of the view that the term ‘vulnerable’ should be understood as referring to people who, because of the interaction between their personal circumstances and the structures, networks or communities they exist within, are vulnerable to abuse.³⁶ This vulnerability to abuse need not be

³¹ This is also the approach used by the ASU. The lesser age limit for members of Aboriginal communities in referring to those aged 50 years and over is explicable by the much lower life expectancy for Aboriginal people. See also Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 32–33.

³² *AAS Act* s 3.

³³ Lourdes Peroni and Alexandra Timmer, ‘Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law’ (2013) 11(4) *International Journal of Constitutional Law* 1056.

³⁴ See further below Part 8.4.

³⁵ The concept is central to South Australia’s child protection system; see *Children and Young People (Safety) Act 2017* (SA) s 18.

³⁶ An Aboriginal Elder told SALRI that Aboriginal people are not inherently vulnerable, but by every measure are made vulnerable in a legal and health context because of the way these systems operate. See further below Part 8.4.

immediate, and in this way the term may be seen as broader than the concept of ‘at-risk’. For example, child protection laws apply only where a child has or is likely to experience harm.

For these reasons, SALRI, whilst accepting it is far from universally accepted, continues to use the term ‘vulnerable’ and its relevant recommendations proceed on this premise.³⁷ SALRI acknowledges and agrees with many of the submissions referenced above regarding the term vulnerable and accepts that no term is perfect. However, SALRI is of the view that ‘adult who may vulnerable to abuse’ best encompasses the types of adults the ASU is designed to assist — adults who due to their individual circumstances, be they related to age, disability, illness, cultural or language background, or other factors, are more vulnerable to abuse than the wider population.

Key Consultees

SALRI consulted widely for this report and has drawn on the submissions of a number of individuals and organisations. SALRI has particularly drawn from, and referred to, the expertise and technical input of the following parties:

- Cassie Mason — Director, Office for Ageing Well; Director, Adult Safeguarding Unit
- Elicia White — Former Chief Adult Safeguarding Practitioner
- Kathy Williams — Manager, Ageing Policy and Projects, Office for Ageing Well
- Natalie Wade — Founder and Principal Lawyer, Equality Lawyers
- Maggie Rutjens — Program Manager, Disability Advocacy and Complaints Service SA (‘DACSSA’)
- Carolanne Barkla — Chief Executive, Aged Rights Advocacy Service (‘ARAS’)

³⁷ See further below Part 8.5.

Executive Summary

Introduction

The South Australian Law Reform Institute (‘SALRI’), based at the Adelaide University Law School, has been asked to conduct an independent statutory review of the operation of the *Ageing and Adult Safeguarding Act 1995* (SA)³⁸ (*AAS Act*) under s 53 of that Act. The *AAS Act* establishes both the Adult Safeguarding Unit (‘ASU’) and the Office for Ageing Well (‘OFAW’). This Report contains SALRI’s examination of the operation of the *AAS Act*, including both of these agencies. Overall, SALRI makes a total of 46 recommendations for various changes to law and practice to clarify and improve the role and operation of the *AAS Act* as well as the OFAW and the ASU.

In framing its Report and recommendations, SALRI addressed its Terms of Reference³⁹ and considered its research and consultation with service providers, legal practitioners, medical and other health practitioners, community groups, both government and non-government agencies, experts and the community.⁴⁰ SALRI has particularly drawn on its consultation and engagement with regional⁴¹ and Aboriginal communities. This reference attracted broad interest and input from interested agencies and organisations, community members and the media. SALRI received 68 submissions by various means and 182 responses to the questions in its consultation survey (these questions are set out in Appendix A below), which informed SALRI’s understanding about the operation of the *AAS Act* and options for potential changes to present law and practice. These contributions came from a diverse range of sources, from community members to health and legal practitioners to interested agencies.

The ASU was established by the *Office for the Ageing (Adult Safeguarding) Amendment Act 2018*, which amended what is now the *AAS Act*. It is notable that the *AAS Act* was formulated in considerable haste.⁴² The ASU commenced operation on 1 October 2019. It was the first body of its kind in Australia. The ASU’s stated function is to receive reports of suspected abuse or neglect, to coordinate a multi-agency response,⁴³ and to focus on ‘early intervention, case coordination and information sharing’.⁴⁴ Its central premise is to safeguard vulnerable adults from abuse. There is a strong focus in

³⁸ The *AAS Act* is supplemented by the *Ageing and Adult Safeguarding Regulations 2019* (SA); *South Australian Adult Safeguarding Unit Code of Practice* (2019); *South Australian Charter of the Rights and Freedoms of Vulnerable Adults* and internal protocols.

³⁹ SALRI notes that its TOR are to examine the operation of the *AAS Act* with a focus therefore on the roles and operation of the OFAW and the ASU under that Act. It was beyond SALRI’s scope to conduct the type of wider review into the adult protection context and landscape that several parties urged in consultation. SALRI has recommended that such a wider review be carried out in five years’ time.

⁴⁰ SALRI notes the constructive input of the OFAW and ASU to this reference.

⁴¹ As part of its regional and rural consultation, SALRI visited Clare, Port Pirie, Port Augusta, Port Lincoln, Berri, Naracoorte and Mount Gambier.

⁴² SALRI highlights the fact that the *AAS Act* was formulated as a 100 day priority by the incoming Government. Several parties noted that drafting and legal and operational issues were not necessarily fully addressed or resolved in this process. SALRI notes it intends no criticism of the expertise of Parliamentary Counsel.

⁴³ South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1727 (Stephen Wade, Minister for Health and Wellbeing).

⁴⁴ South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3544 (Paula Leuthen).

the *AAS Act* on the individual's autonomy and supported decision-making. SALRI was routinely reminded that 'help should not be forced upon adults'.⁴⁵

The ASU was intended to 'fill the gaps' that had been identified in the protection of vulnerable adults, notably in relation to elder abuse⁴⁶ (though the ASU's legislative remit extends to all vulnerable adults).

The ASU is located within the OFAW, within the Department for Health and Wellbeing. The OFAW, as described to SALRI, has a broader role than the ASU, however this role is purely directed towards older people. Different business units within the OFAW define 'older' differently — from a policy perspective the OFAW engages with people 50 years and older, the Retirement Homes Unit engages with people 55 years and older, and the Seniors Card engages with people 60 years and over. The OFAW is responsible for a diverse range of functions and undertakes a range of policy development, projects and programs⁴⁷ while also leading the State Government's commitment to support all older South Australians to remain active and engaged in the community. The OFAW has broad objectives to lead, promote and support strategies, programs and initiatives across the social and structural determinants of health and wellbeing, to support all South Australians to age well.⁴⁸

There is a need to address ageist attitudes and simplistic stereotypes. The Aged Rights Advocacy Service ('ARAS'), for example, told SALRI that 'positive steps need to be taken to eradicate ageist attitudes and create a culture that does not discriminate against older adults and counters negative attitudes towards the ageing process'. The Western Australian Elder Abuse Parliamentary Report noted 'that a common ageist assumption in society is that older people are all frail, out of touch and suffering from cognitive decline.'⁴⁹ A 2022 Queensland Report aptly noted: 'There has been a paradigm shift away from a "best interests" approach to elder abuse towards a rights-based framework that seeks to do away with ageist attitudes and focus on balancing dignity and autonomy with protection and safeguarding'.⁵⁰

SALRI acknowledges that tackling ageism is a key aim of the South Australian Government⁵¹ and one that SALRI fully shares (and one it has sought to follow in this Report). SALRI echoes the comments of Professor Wendy Lacey which were adopted by the South Australian Joint Committee into Elder

⁴⁵ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 393 [14.80].

⁴⁶ See, eg, South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People* (Report, October 2011); Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017) Recommendations 4–5; Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 375 [14.1]–[14.2], Recommendation 14–1, 377, 382–4 [14.33]–[14.40]; Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 71–73 [6.66]–[6.71], 73 Recommendation 19; NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018).

⁴⁷ 'Office for Ageing Well' SA Health (Web Page) <<https://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/about+us/departments+for+health+and+wellbeing/office+for+ageing+well/office+for+ageing+well>>.

⁴⁸ *Ageing and Adult Safeguarding Act 1995* (SA) ss 8, 9.

⁴⁹ Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 18 [2.46].

⁵⁰ Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 12.

⁵¹ See South Australia's *Plan for Ageing Well 2020–2022* and *Strategy to Safeguard the Rights of Older Australians 2014–2021*.

Abuse (which are also applicable to persons with disability and other adults who may be vulnerable to abuse):⁵²

I would like to highlight for the Committee the importance of adopting a rights-based approach to the area of elder abuse. It is all too easy to fall into an ageist approach when dealing with older persons and to just see that age alone means that people are automatically vulnerable. In any framework that is adopted for addressing elder abuse it is essential that we put the rights of the older person at the heart of whatever strategy is adopted. That includes respect for dignity, autonomy and the self-determination of the older person and empowering older people to exercise their rights as fully as possible for as long as possible.⁵³

⁵² *Disability Royal Commission* (Issues Paper: Rights and Attitudes, April 2020) 1, 3–4. As the Disability Royal Commission noted: ‘We are committed to the rights of people with disability. Australia has ratified the UN Convention on the Rights of Persons with Disabilities. This means Australia has agreed to respect, protect and fulfil the rights described in that Convention. Article 8 of the UN Convention on the Rights of Persons with Disabilities requires the government to: “Raise awareness ... foster respect for the rights and dignity of persons with disabilities ... combat stereotypes, prejudices and harmful practices ... [and] promote awareness of the capabilities and contributions of persons with disabilities”’: at 1.

⁵³ Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017) 33.

There have been many recent academic⁵⁴ and official studies⁵⁵ as well as various reviews by law reform agencies,⁵⁶ parliamentary bodies⁵⁷ and Royal Commissions⁵⁸ into wider issues relating to both elder abuse and the abuse and exploitation of persons with disability.⁵⁹ The fact that such abuse may also amount to domestic or family violence has also been highlighted.⁶⁰

⁵⁴ See, eg, Leanne Dowse et al, 'Mind the Gap: the Extent of Violence against Women with Disabilities in Australia' (2016) 51(3) *Australian Journal of Social Issues* 341; Wendy Lacey et al, University of South Australia, *Prevalence of Elder Abuse in South Australia: Current Data Collection Practices of Agencies* (Report, February 2017); Cassandra Cross, Kelly Purser and Tina Cockburn, Crime and Justice Research Centre, Queensland University of Technology, *Examining Access to Justice for Those With an Enduring Power of Attorney (EPA) Who Are Suffering Financial Abuse* (Report, 2017); Rae Kaspiew, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, February 2016); Melanie Joosten et al, Senior Rights Victoria, *Seven Year of Elder Abuse Data in Victoria* (Report, August 2020); Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021).

⁵⁵ See, eg, Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (Report, February 2014); Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime* (Report, July 2014); NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018); Law Council of Australia, *The Justice Project: People with Disability* (Final Report, August 2018; Kelly Vincent and David Caudrey, *Safeguarding Task Force Report* (Report, 31 July 2020); Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022); Law Council of Australia, Submission to *Disability Royal Commission*, 'The Criminal Justice System: Issues Paper' (17 August 2020).

⁵⁶ See, eg, Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report No 124, August 2014); Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017); NSW Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018); Tasmanian Law Reform Institute, *Review of the Administration and Guardianship Act 1995 (Tas)* (Report No 26, December 2018); David Plater et al, South Australian Law Reform Institute, *Providing a Voice to the Vulnerable: A Study of Communication Assistance in South Australia* (Report No 16, September 2021).

⁵⁷ See, eg, Law Reform Committee, Parliament of Victoria, 'Inquiry into Powers of Attorney' (Final Report, Parliamentary Paper No 352, August 2010); Law Reform Committee, Parliament of Victoria, 'Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers' (Report, Parliamentary Paper No 216, 2013); 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); Family and Community Development Committee, Parliament of Victoria, 'Parliamentary Inquiry into Abuse in Disability Services' (Final Report, May 2016); Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, 'Elder Abuse in New South Wales' (Report, June 2016); Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017); Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017); Select Committee into Elder Abuse, Legislative Council of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018).

⁵⁸ *Royal Commission into Aged Care Quality and Safety*, 'Interim Report: Neglect' (Report, 2019); *Royal Commission into Aged Care Quality and Safety*, 'Experimental Estimates of the Prevalence of Elder Abuse in Australian Aged Care Facilities' (Report, 2021); *Royal Commission into Aged Care Quality and Safety, Care, Dignity and Respect* (Final Report, 26 February 2021); *Disability Royal Commission* (Interim Report, October 2020); Centre for Research Excellence and Health, Nature and Extent of Violence, *Disability Royal Commission*, 'Abuse, Neglect and Exploitation against People with Disability in Australia' (Research Report, March 2021); Centre for Evidence and Implementation and Monash University, *Disability Royal Commission*, 'Rapid Evidence Review: Violence, Abuse, Neglect and Exploitation against People with Disability in Australia' (Research Report, August 2021).

⁵⁹ SALRI acknowledges the helpful input to this reference of parties such as Natalie Wade, Maggie Rutjens and Purple Orange, and highlights that, whilst there are some common themes, the issues and concerns arising with respect to the abuse and exploitation of persons with disability are quite distinct and separate from elder abuse.

⁶⁰ John Chesterman, 'Taking Control: Putting Older People at the Centre of Elder Abuse Response Strategies' (2016) 69 (1) *Australian Social Work* 115, 117; Rosemary Croucher and Julie MacKenzie, 'Framing Law Reform to Address Elder Abuse' [2018] 18 *Macquarie Law Journal* 5, 8–9. The Victorian Royal Commission into Family Violence specifically examined violence against older people and noted that elder abuse and family violence are often used

SALRI in its review of the operation of the *AAS Act* has had careful regard to these various studies and Reports and the submissions to recent reviews. SALRI also drew upon its own prior work, including its reports into succession law,⁶¹ the role and operation of communication partners (also called intermediaries) to assist parties with complex communication needs to provide their best evidence⁶² and SALRI's current references into witness competence and the operation of s 9 of the *Evidence Act 1929* (SA)⁶³ and the operation of the *Mental Health Act 2009* (SA).⁶⁴

In addition to its research, SALRI has also drawn on its Report released in January 2021 into the role and operation of enduring powers of attorney ('EPA's) in South Australia ('POA Report').⁶⁵ This Report made a total of 120 recommendations (these are reproduced below at Appendix C) for changes to law and practice to clarify and improve the use and operation of EPAs in South Australia. These recommendations drew on SALRI's research and consultation with interested parties, experts and the community. The POA Report⁶⁶ discussed the concerning abuse and exploitation of both older persons and persons with disability and emphasised that such abuse obviously extends far beyond financial exploitation and the misuse of EPAs. It is crucial, as SALRI was often reminded in both its EPA and current consultation, to not only focus on elder abuse in relation to financial exploitation and other misconduct. The problem is wider and the abuse and exploitation of persons with disability or a cognitive impairment (regardless of age) must also be kept firmly in mind.⁶⁷ The troubling case of Ann

interchangeably in policy documents and statistics. See Victoria, *Royal Commission into Family Violence* (Summary and Recommendations, 2016) 68.

⁶¹ South Australian Law Reform Institute, *'Distinguishing Between the Deserving and the Undeserving': Family Provision Laws in South Australia* (Report No 9, December 2017). See especially 130 Recommendation 29.

⁶² David Plater et al, South Australian Law Reform Institute, *Providing A Voice to the Vulnerable: A Study of Communication Assistance in South Australia* (Report No 16, 2021).

⁶³ SALRI at the request of the former State Attorney-General is presently examining the arcane area of witness competence in South Australia and the role and operation of s 9 of the *Evidence Act 1929* (SA). The Hon Geoff Muecke and consultation to date with legal and health practitioners, service providers, Aboriginal Elders, interested parties, and the disability sector and disability community have identified major concerns of both principle and practice with the operation and implications of s 9, notably in its implications for witnesses with a disability or a cognitive impairment.

⁶⁴ See <<https://law.adelaide.edu.au/research/south-australian-law-reform-institute#mental-health-act-review>>.

⁶⁵ Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020). SALRI's Report was confined to the role and operation of EPAs. SALRI did not examine the role and operation of advanced care directives.

⁶⁶ See *ibid*.

⁶⁷ The available data is 'limited' and there is a surprising lack of reliable statistics as to the nature and extent of the abuse and exploitation of persons with disability: Centre of Research Excellence in Disability and Health, *Disability Royal Commission*, 'Nature and Extent of Violence, Abuse, Neglect and Exploitation of People with Disability in Australia' (Research Report, 2021) 8. See also 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) 37–8 [2.68]; Family and Community Development Committee, Parliament of Victoria, 'Parliamentary Inquiry into Abuse in Disability Services' (Final Report, May 2016) 27–32; Centre for Evidence and Implementation and Monash University, *Disability Royal Commission*, 'Rapid Evidence Review: Violence, Abuse, Neglect and Exploitation against People with Disability in Australia' (Research Report, August 2021) 5.

Marie Smith⁶⁸ was often raised to SALRI in both its EPA and current consultation to highlight the importance of addressing the abuse and exploitation of persons with disability.

The Scope and Scale of Abuse

As part of its EPA reference, SALRI was presented with powerful case examples in both its research and consultation about the misuse of EPAs and financial abuse of older persons and persons with disability, the consequent issues and barriers in reporting such abuse,⁶⁹ and the widely perceived lack of accessible and effective civil and criminal remedies to respond to such abuse.⁷⁰ The significant misuse of EPAs and financial abuse of older persons and persons with disability became apparent in SALRI's consultation and research. Concerns were raised during consultation about the prevalence of financial abuse and the nuances of financial abuse. Some cases are minor, while others are sophisticated and extensive. Some may be due to confusion or misunderstanding on the part of the attorney of their duties, a misguided sense of entitlement, or calculated and deliberate deceit.⁷¹ It was questioned during SALRI's EPA consultation whether the ASU would be a suitable organisation to deal with the misuse of EPAs and financial abuse cases, and what the legislative barriers are to reporting cases and accessing suitable remedies under the *AAS Act*.

During the present review of the *AAS Act*, SALRI was told by various parties that abuse in relation to both older persons and persons with disability may not be committed maliciously, as has been discussed elsewhere in the area of elder abuse.⁷² As a parliamentary report noted, '[it] may be unintentional or because of a lack of skills or support'.⁷³ Many of the calls to the ASU relate to queries for advice or reports of what is categorised as relatively minor abuse, such as adult children moving back home to live with their older parents and not paying their share of household bills or assisting with the maintenance of the house,⁷⁴ or relate to matters that are plainly the responsibility of other

⁶⁸ See also Kelly Vincent and David Caudrey, *Safeguarding Task Force Report* (Report, 31 July 2020); Alan Robertson, NDIS Commission, *Independent Review of the Adequacy of the Regulation of the Supports and Services Provided to Ms Ann-Marie Smith, an NDIS participant, who died on 6 April 2020* (Report, 31 August 2020).

⁶⁹ See also Family and Community Development Committee, Parliament of Victoria, 'Parliamentary Inquiry into Abuse in Disability Services' (Final Report, May 2016) 45–61; Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 220–329.

⁷⁰ See *ibid*.

⁷¹ *Ibid* ii.

⁷² Rebecca Turner, 'Elder Abuse: Many People Committing Financial Abuse Unintentionally, MP Says', ABC News (online, 13 September 2018) <<https://www.abc.net.au/news/2018-09-13/elder-abuse-report-handed-down/10241574>>.

⁷³ Select Committee into Elder Abuse, Legislative Council of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 41 [3.68]. 'Many perpetrators do not commit elder abuse maliciously and there are many instances of family members or carers (or those who are both) being overwhelmed with their responsibilities who inadvertently commit elder abuse because of their inability to cope ... Carer stress or "carer burnout" is also a risk factor for elder abuse, where a perpetrator may experience difficulties whilst caring for an older person or may not have/know of support services available': i [4]–[5]. See also 34 [3.35], 41–3 [3.66]–[3.73], Findings 18–20; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, 'Elder Abuse in New South Wales' (Report, June 2016) 42–6 [4.44]–[4.59], 50 Recommendation 2. SALRI was told by the disability sector that similar pressures and issues arise in relation to abuse and neglect of persons with disability.

⁷⁴ This seems a common form of financial abuse. See Melanie Joosten et al, Senior Rights Victoria, *Seven Year of Elder Abuse Data in Victoria* (Report, August 2020) 19; Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 36.

agencies such as SAPOL, the Aged Care Quality and Safeguards Commission or the NDIS Quality and Safeguards Commission.

The ASU advised SALRI that reports of what could be termed as significant, let alone serious, abuse were comparatively rare.⁷⁵ The ASU advised SALRI that a situation has yet to arise where it had concluded it necessary to exercise its robust powers under s 19 of the *AAS Act*:

The primary reason that the statutory powers of investigation have not been exercised to date is because, before exercising powers, an authorised officer will always seek the voluntary cooperation of the relevant adult, family member, or other person of interest and will only consider exercising formal powers if the person does not cooperate or it is not reasonably practicable to seek their cooperation ... In cases where a practitioner is experiencing some opposition from a person of concern, the act of advising the person that the powers exist and may be exercised is enough to encourage the person to engage voluntarily with the Unit.⁷⁶

Whilst it is important not to overstate the situation, it is also important not to overlook the incidence and implications of significant or serious abuse, even if such cases are not currently reported to the ASU.⁷⁷ SALRI, as in its EPA reference, was often provided by lawyers, health practitioners, service providers and NGOs with examples of what amounted to significant or serious abuse of older persons and persons with disability. A recurring theme in SALRI's present consultation, consistent with research elsewhere, was the significant incidence of the abuse of older people and people with disability in South Australia.⁷⁸

In its current consultation and research, SALRI was presented with four typical scenarios associated with elder abuse and/or the abuse of persons with disability in particular,⁷⁹ though these may be applicable to all adults vulnerable to abuse. The scenarios were:

⁷⁵ The ASU Annual Reports do not provide the breakdown to assess the extent of individual cases of abuse.

⁷⁶ Several parties such as ARAS and legal practitioners expressed the view to SALRI that, on occasion, at least in respect to what they viewed as serious abuse, the ASU has proved too cautious and could have taken a more robust approach and utilised these powers.

⁷⁷ The reluctance and problems in both older persons and persons with disability to report abuse are well established. See generally Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 220–329; Family and Community Development Committee, Parliament of Victoria, 'Parliamentary Inquiry into Abuse in Disability Services' (Final Report, May 2016) 45–61. There are various other reasons why cases of significant or serious abuse may have not been reported to the ASU. SALRI in both its consultation and survey responses (46%) found a wide lack of awareness of the existence and role of the ASU, even amongst lawyers and medical and health practitioners. Regional lawyers with close links in their communities noted that complaints of financial abuse may be more likely to be reported to them.

⁷⁸ There are conflicting figures as to the prevalence of elder abuse, but the most recent study found 15% of older persons in Australia experienced some form of elder abuse. See Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 30–35. There is a lack of reliable statistics regarding the nature and prevalence of the abuse and exploitation of persons with disability, but a comprehensive study commissioned by the *Disability Royal Commission* found 'the overarching finding across almost all studies was that people with disabilities were more likely to have experienced all types of violence, abuse, neglect and exploitation when compared to people without disabilities... People with disability have repetitive experiences of violence, abuse, neglect and exploitation across the lifespan': Centre for Evidence and Implementation and Monash University, *Disability Royal Commission*, 'Rapid Evidence Review: Violence, Abuse, Neglect and Exploitation against People with Disability in Australia' (Research Report, August 2021) 1–2. See also at: 16.

⁷⁹ These categories, whilst broadly consistent, doesn't wholly reflect the most recent research. See, eg, Melanie Joosten et al, Senior Rights Victoria, *Seven Year of Elder Abuse Data in Victoria* (Report, August 2020) 25; Lixia Qu et al,

1. Abuse carried out by family members;⁸⁰
2. Abuse carried out by paid carers;⁸¹
3. Abuse carried out by predatory ‘friends’ or neighbours;⁸² or
4. Abuse carried out under an EPA⁸³ or in a professional or fiduciary capacity.⁸⁴

Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 70–81.

⁸⁰ The ‘vast majority of elder abuse is perpetrated by the immediate family of an older person’: Select Committee into Elder Abuse, Legislative Council of Western Australia, Select Committee into Elder Abuse, Legislative Council of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 16 [2.40]. See also at: Finding 8, 17; Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 71. One recent study found 91% of elder abuse is committed by a family member. See Melanie Joosten et al, Senior Rights Victoria, *Seven Year of Elder Abuse Data in Victoria* (Report, August 2020) 25.

⁸¹ Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 71. ‘Abuse perpetrated by professionals, including service providers (6%) and professional carers (3%) is not as common as abuse perpetrated by family members and those known to an older person. However, this is likely to reflect the under-representation of people with a need for a higher level of care in this sample’: at 72. Paid carers were said to carry out 14% of reported instances of neglect. Other studies suggest on a far higher rate of financial elder abuse by paid carers, up to 31%. See Georgia Lowndes et al, Monash University, *Financial Abuse of Elders: A Review of the Evidence* (Report, June 2009) 15. Despite such studies and disturbing examples such as the case of Ann Marie Smith, SALRI is well aware, as often pointed out in its consultation, of the devotion and commitment of both paid and unpaid carers to older persons and persons with disability in often difficult circumstances. See also Select Committee into Elder Abuse, Legislative Council of Western Australia, Select Committee into Elder Abuse, Legislative Council of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 17 [2.44].

⁸² See Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 71–2. Friends and acquaintances accounted for a significant proportion of perpetrators at 12% and 9% respectively. Neighbours are also significant 7%. ‘Abuse perpetrated by neighbours, acquaintances and friends was also significant, with these groups accounting for approximately one-quarter of perpetrators combined. Together, this group of perpetrators was almost as large as the intergenerational familial group. Friends are particularly likely to be implicated in financial abuse’: at 80. The ‘befriender’ who takes advantage of the vulnerable victim’s vulnerability, often for financial exploitation, is notable. ‘The [Western Australian] Committee also heard evidence of a group of perpetrators of elder abuse who are not relatives of the older person, but who “befriend” the older person and then seek to gain (usually) financially through taking advantage of the person’s vulnerability. The type of person who seeks to gain from an older person can further be classified as potentially falling into one of two groups of “predatory carers” or “befrienders”’: Select Committee into Elder Abuse, Legislative Council of Western Australia, Select Committee into Elder Abuse, Legislative Council of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 17 [2.45]; Evidence to Select Committee into Elder Abuse, Legislative Council of Western Australia, Perth, 19 March 2018, 4 (Franca Ottolini, Suburbs Community Legal Centre).

⁸³ The significant incidence and implications of the misuse of EPAs was discussed at length by SALRI in its POA Report. See Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 220–329. See also Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, ‘Elder Abuse in New South Wales’ (Report, June 2016) xi, xiv, 77, 83–9 [6.16]–[6.42], 99–101 [6.94]–[6.102]. Legislative Council of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 74 [7.1]–[7.6], 80 [7.35]; Kelly Purser, Tina Cockburn and Elizabeth Ulrick, ‘Examining Access to Formal Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney’ (2019) 12 *Elder Law Review* 1. Cf Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 36.

⁸⁴ The 2021 AIFS study found about 6% of reports of elder abuse related to service providers: Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 71–2. ‘Service providers appeared to be especially likely to be associated with financial abuse’: at 80.

Elder abuse (and the abuse of persons with disability⁸⁵ and other vulnerable persons) has ‘gained significant attention in Australia [including in South Australia]⁸⁶ in recent years as a serious problem requiring increased policy focus’.⁸⁷ The kinds of abuse typically recognised are ‘financial abuse,⁸⁸ physical abuse, sexual abuse, psychological abuse (otherwise known as emotional abuse), and neglect.’⁸⁹ Similar concerns have been widely expressed as to the prevalence and types of abuse committed upon persons with disability.⁹⁰

Also raised to SALRI in its present consultation was the disquiet over the significant incidence and implications of psychological abuse (including the act of ‘gaslighting’)⁹¹ and its effects on an individual’s consent to action being taken under the *AAS Act* in relation to both older persons and persons with disability. Indeed, the presence and implications of ‘coercive control’⁹² by family members and others close to the victim in the context of both elder abuse and the abuse of persons with disability were raised to SALRI. There has been considerable recent discussion of coercive control,⁹³ typically in an

⁸⁵ See, eg, *Disability Royal Commission* (Interim Report, October 2020).

⁸⁶ See Wendy Lacey et al, University of South Australia, *Prevalence of Elder Abuse in South Australia: Current Data Collection Practices of Agencies* (Report, February 2017); South Australia, *Parliamentary Debates*, Legislative Council, 20 June 2018, 565 (Hon Steven Wade).

⁸⁷ Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 1. See also Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 42–44 [2.42]–[2.60]; Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 18–20 [2.46]–[2.50].

⁸⁸ See also Dale Bagshaw et al. ‘Financial Abuse of Older People by Family Members: Views and Experiences of Older Australians and their Family Members’ (2013) 66(1) *Australian Social Work* 86. Financial abuse is often said to be the most common form of elder abuse. Rae Kaspiw, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, 2016) 5–7, 46–7. One seven-year Victorian study found ‘the most common type of abuse reported by clients during the 2012–2019 period was psychological abuse (62.52%), followed closely by financial abuse (61.72%)’: Melanie Joosten et al, Senior Rights Victoria, *Seven Year of Elder Abuse Data in Victoria* (Report, August 2020) 15. The 2021 AIFS study found ‘14.8% of the sample reported experiencing at least one form of elder abuse’: Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 32.

⁸⁹ Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 1.

⁹⁰ See Centre of Research Excellence in Disability and Health, *Disability Royal Commission* ‘Nature and Extent of Violence, Abuse, Neglect and Exploitation of People with Disability in Australia’ (Research Report, 2021); Family and Community Development Committee, Parliament of Victoria, ‘Inquiry into Abuse in Disability Services’ (Final Report, Parliamentary Paper No 167, May 2016) 3–16.

⁹¹ Paige Sweet, ‘The Sociology of Gaslighting’ (2019) 84(5) *American Sociological Review* 851. See also Glossary.

⁹² See generally Parliament of New South Wales, Joint Select Committee on Coercive Control, ‘Coercive Control in Domestic Relationships’ (Report, 2021).

⁹³ See, eg, Heather Douglas, ‘Do We Need a Specific Domestic Violence Offence?’ (2015) 39(2) *Melbourne University Law Review* 434; Parliament of New South Wales, Joint Select Committee on Coercive Control, ‘Coercive Control in Domestic Relationships’ (Report, 2021); Women’s Safety and Justice Taskforce, *Hear Her Voice: Report One, Addressing Coercive Control and Domestic and Family Violence in Queensland* (Report, November 2021); House Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, ‘Inquiry into Family, Domestic and Sexual Violence’ (Report, September 2021). Various Bills have been introduced in South Australia to introduce such a crime in relation to domestic partners. See, eg, *Criminal Law Consolidation (Domestic Abuse) Amendment Bill 2020 (SA)* (see further South Australia, *Parliamentary Debates*, Legislative Council, 20 February 2020, 217); *Criminal Law Consolidation (Coercive Control Amendment) Bill 2020 (SA)* (see further South Australia, *Parliamentary Debates*, House of Assembly, 2 December 2020, 3601–3603 (Katrine Hildyard)); *Criminal Law Consolidation (Abusive Behaviour) Amendment Bill 2021* (see further South Australia, *Parliamentary Debates*, House of Assembly, 27 October 2021, 8379–81 (Vickie Chapman, Attorney-General)). These Bills did not proceed and lapsed with the 2022 State election.

intimate or domestic partner context.⁹⁴ However, the occurrence of coercive control in relationships outside domestic partnerships, and its relevance to the abuse of both older persons and persons with disability has been noted.⁹⁵ As a 2022 Queensland study commented:

In the past decade, a greater understanding has also developed of the different relationships within which abuse of older persons can occur. It is now acknowledged that elder abuse can share many of the same characteristics as family and domestic violence, including elements of coercive control.⁹⁶

It was highlighted to SALRI that the presence and implications of coercive control are not confined to domestic partner relationships and are also present in the abuse of older persons and persons with a disability (a theme that also emerges in recent commentary).⁹⁷

Another issue that was highlighted by many parties in SALRI's consultation was the close intersection between financial abuse and psychological abuse or coercive control in relation to older persons and persons with disability. These were seen as going 'hand and glove' and SALRI was told in relation to both older persons and persons with disability that financial abuse will be typically associated with psychological abuse. This intersection has also emerged in recent research. One study observed the link between psychological abuse and financial abuse, noting that the former is a grooming behaviour for the latter.⁹⁸ Psychological abuse 'seems to frequently co-occur with financial abuse, suggesting a pattern of behaviour analogous to grooming in the sexual abuse context.'⁹⁹

As the Western Australian Parliamentary Report observed:

The Committee has learned that financial abuse is the most prevalent form of elder abuse and of the complex interaction that occurs with psychological or emotional elder abuse: 'grooming' an

⁹⁴ Evidence to Parliament of New South Wales, Joint Select Committee on Coercive Control, Sydney, 23 February 2021, 47–8 (Margaret Duckett).

⁹⁵ Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 86–87; Parliament of New South Wales, Joint Select Committee on Coercive Control, 'Coercive Control in Domestic Relationships' (Report, 2021) 95–96 [5.75]–[5.81]; Ageing and Disability Commission, Submission to Parliament of New South Wales, Joint Select Committee on Coercive Control (2 February 2021) 7–8 <<https://www.parliament.nsw.gov.au/ladocs/submissions/70505/Submission%20-%20108.pdf>>.

⁹⁶ Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 10. SALRI has suggested that ASU practitioners, whilst respecting the presumption of capacity and supported decision-making, must be alive to the presence and implications of psychological abuse. Such abuse may be of such a nature and extent that the individual does not have decision-making capacity or any 'consent' may be in fact be involuntary and not free.

⁹⁷ Parliament of New South Wales, Joint Select Committee on Coercive Control, 'Coercive Control in Domestic Relationships' (Report, 2021) 95–96 [5.75]–[5.81]. Of the 156 submissions to the NSW review, only a handful raised the situation of persons with disability and older persons beyond domestic partners.

⁹⁸ Kylie Miskovski, Alzheimers Australia NSW, *Preventing Financial Abuse of People with Dementia* (Discussion Paper No 10, June 2014), See also, eg, Rae Kaspiew, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, February 2016) 8, 10, 47. A 2010 study based on an analysis of data from a range of agencies with close contact with elder financial abuse in Victoria found similar themes. The study confirmed that financial abuse was accompanied by psychological abuse that was intimidating, controlling and fear inducing. Among the ways in which financial abuse was carried out were misuse of powers of attorney, coerced changes to wills, unethical trading in title to property, and the coercion of people without capacity into signing documents in relation to assets that would result in financial gain for the perpetrator. See Jo Wainer, Peter Darzins and Kei Owada, Monash University, *Prevalence of Financial Elder Abuse in Victoria: Protecting Elders' Assets Study* (Report, 10 May 2010).

⁹⁹ Rae Kaspiew, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, February 2016) 47.

older person to either hand over money or assets or manipulating them so that they are unaware that they are being abused financially.¹⁰⁰

The relationship between forms of psychological abuse such as gaslighting and coercive control and the central concepts of capacity and consent was raised by numerous parties in consultation and forms an integral part of SALRI's Report. The vital premise of the ASU was, and remains, to respond to reports of abuse. The need for active safeguarding measures to help protect adults extends to ensuring that the decision-making capacity of adults is protected. Expanding the circumstances in which the ASU can take action without an individual's consent was therefore raised by many parties in SALRI's consultation.

Autonomy and Decision-Making Capacity

Supporting autonomy is an important aspect of adult safeguarding, which is why action is, in most circumstances, only taken with the adult's consent. Most often, safeguarding and support would involve providing educational material to the reporter or the adult who may be vulnerable to abuse, arranging for health, medical, legal and other services, or referring the person to a more appropriate authority. In some cases, it might also involve seeking court orders to prevent someone suspected of abuse from contacting the adult who may be vulnerable to abuse. Where necessary, the Australian Law Reform Commission ('ALRC') in its 2017 Report on elder abuse considered that adult safeguarding agencies should lead and coordinate the work of other agencies and services to protect 'at-risk adults' from abuse. However, in particularly serious cases, the safety of the adult may need to be secured, even against their wishes.¹⁰¹

These are not unfamiliar themes. SALRI's POA Report highlighted that, whilst it is important to prevent and address the financial (and other) abuse of older people and/or persons with disability, it is also important to respect the autonomy of adults.¹⁰² The ALRC observed that it sought to recommend changes to the law that both upheld autonomy and provided protection from harm.¹⁰³ The ALRC accepted the need for suitable safeguards, but to ensure that such safeguards are appropriately calibrated and do not unnecessarily burden principals or their attorney in making or acting under an EPA.¹⁰⁴

The ALRC Report made 43 recommendations to combat elder abuse in Australia. Importantly, the ALRC framed its recommendations within a rights-based framework based on two key principles:

¹⁰⁰ Select Committee into Elder Abuse, Legislative Council of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 92 [8.1]. See also at: 20–1 [2.51]–[2.53]; Georgia Lowndes et al, Monash University, *Financial Abuse of Elders: A Review of the Evidence* (Report, June 2009) 17–18; Jo Wainer, Peter Darzins and Kei Owada, Monash University, *Prevalence of Financial Elder Abuse in Victoria: Protecting Elders' Assets Study* (Report, 10 May 2010); Kylie Miskovski, Alzheimers Australia NSW, *Preventing Financial Abuse of People with Dementia* (Discussion Paper No 10, June 2014); Melanie Joosten et al, Senior Rights Victoria, *Seven Year of Elder Abuse Data in Victoria* (Report, August 2020) 19; Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 37–9.

¹⁰¹ Rosemary Croucher and Julie MacKenzie, 'Framing Law Reform to Address Elder Abuse' [2018] 18 *Macquarie Law Journal* 5, 14. See further Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 392–402 [14.79]–[14.128].

¹⁰² It was also important to encourage the use of EPAs and the ability to make such instruments retain the utility and effectiveness of EPAs, and to promote their use.

¹⁰³ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 52 [2.94].

¹⁰⁴ *Ibid* 164 [5.16].

dignity and autonomy; and protection and safeguarding.¹⁰⁵ This framework emphasises that elder abuse should be responded to in a way that prioritises an older person's autonomy and independence, their fundamental right to make decisions that affect their lives, and their right to enjoy a self-determined life according to their personal circumstances.¹⁰⁶ Significantly, the ALRC recognised that:

Autonomy and protection are sometimes seen as opposing considerations that need to be balanced or traded off against each other, particularly when issues of whether and how to intervene to protect a person from abuse arise. However, protecting older people from abuse can be seen to support and enable their ability to live autonomous and dignified lives.¹⁰⁷

The ALRC concluded:

The recommendations in this Report seek to balance two framing principles: dignity and autonomy, on the one hand; and protection and safeguarding, on the other. The ALRC recognises that autonomy and safeguarding are not mutually inconsistent, as safeguarding responses also act to support and promote the autonomy of older people.¹⁰⁸

SALRI concurred with these comments in its POA Report and has reiterated this approach in this Report in relation to not only older persons, but also persons with disability and other adults who may be vulnerable to abuse. The balancing of safeguarding and autonomy, often a difficult exercise,¹⁰⁹ is both necessary and appropriate, as the ALRC observed. It is vital to recognise that safeguarding and autonomy are not mutually inconsistent and if the right balance is struck, the two ideals can also be seen as complementary in the context of the *AAS Act*.¹¹⁰

The *AAS Act*, reflecting international human rights and the shift away from a paternalistic 'best interests' approach, places a strong focus on supported decision-making and respecting an individual's autonomy. It is necessary to distinguish the safeguarding system for adults from the child protection system and recognise that an adult has the right and ability to make decisions for themselves, presuming they have capacity. Under the *AAS Act*, an adult who is the subject of a report of suspected abuse is free to decline the assistance of the ASU and to remain in a situation that an objective person may view

¹⁰⁵ Ibid 50 [2.83].

¹⁰⁶ Ibid 50–1.

¹⁰⁷ Ibid 51–2 [2.92].

¹⁰⁸ Ibid 20 [1.17].

¹⁰⁹ See, eg, Michael Preston-Shoot, 'Valuing Self-Determination: An Adult Protection Case Study (2001) 3(1) *Journal of Adult Protection* 4; Rachel Fyson and Deborah Kitson, 'Independence or Protection: Does It Have to be a Choice? Reflections on the Abuse of People with Learning Disabilities in Cornwall' (2007) 27(3) *Critical Social Policy* 426; Suzy Braye, David Orr and Michael Preston-Shoot, 'Autonomy and Protection in Self Neglect Work: The Ethical Complexity of Decision-Making' (2017) 11(4) *Ethics and Social Welfare* 320; Kathryn MacKay, 'Choosing to Live with Harm? A Presentation of Two Case Studies to Explore the Perspective of those who Experienced Adult Safeguarding Interventions' (2017) 11(1) *Ethics and Social Welfare* 1.

¹¹⁰ SALRI notes the presence of forms of psychological abuse such as gaslighting and coercive control may undermine the autonomy of the adult and impact their capacity to consent to action being taken. In these cases, ASU intervention may actually serve to promote the person's autonomy: 'It is important not to view protection and autonomy as essentially conflicting; sometimes protective action can promote a person's autonomy in the long term': Lorna Montgomery et al, 'Implications of Divergences in Adult Protection Legislation' (2016) 18(3) *Journal of Adult Protection* 149, 151. See also Kathryn Mackay et al, 'What Difference does the Adult Support and Protection (Scotland) 2007 Make to Social Work Service Practitioners' Safeguarding Practice?' (2012) 14(4) *Journal of Adult Protection* 197; Michael Preston-Shoot and Sally Cornish, 'Paternalism or Proportionality? Experiences and Outcomes of the Adult Support and Protection (Scotland) Act 2007' (2014) 16(1) *Journal of Adult Protection* 5; John Chesterman, 'Taking Control: Putting Older People at the Centre of Elder Abuse Response Strategies' (2016) 69(1) *Australian Social Work* 115; Rosemary Croucher and Julie MacKenzie, 'Framing Law Reform to Address Elder Abuse' (2018) 18 *Macquarie Law Journal* 5.

as unsatisfactory, or indeed even abusive. The individual is free to make decisions, as the *AAS Act* makes clear, that may well be regarded as unwise, imprudent or even rash.¹¹¹

The strong focus on the individual's autonomy is reflected in the position that the ASU is bound by the individual's wishes and can only take action under the *AAS Act* without the individual's consent in very limited circumstances (assuming the individual has decision-making capacity).¹¹² As one MP observed in the Parliamentary debate:

The Bill places the rights of the vulnerable adult at the centre of any measures or interventions aimed at safeguarding. Often, our more vulnerable senior citizens' rights are taken away and they are treated as if they are incapable of making decisions. This Bill aims to empower those vulnerable adults who experience abuse or neglect with a decision-making capacity to choose their own support in cases where no immediate harm is posed.¹¹³

Several parties in SALRI's consultation urged SALRI to retain this approach. This view emphasises the paramount importance of the individual's autonomy.¹¹⁴ However, it is notable that the broad consensus in consultation, notably from groups representing the interests of both older persons and persons with disability, was to adopt a more nuanced approach to this issue. Similar to the ALRC's approach, many parties agreed that autonomy and safeguarding are not necessarily inconsistent and emphasised the importance of maintaining an adult's autonomy. However, this is not an absolute or rigid proposition. There are limited and carefully defined circumstances already set out in the current *AAS Act*¹¹⁵ where an individual's autonomy is not and should not be absolute, as discussed in this Report. SALRI is of the view that the current narrow threshold where the ASU may intervene without consent¹¹⁶ is too restrictive and the ASU should be able to act¹¹⁷ without an individual's consent in relation to serious financial or physical abuse. Such intervention should not have to wait until the abuse escalates or is the final act.

¹¹¹ 'Dignity in risk must be observed through acknowledging the right of all vulnerable adults to take informed risks and to make decisions that others (no matter their experience or background) may regard as wrong, reckless or inappropriate': *AAS Act* s 12(e). See also *Re: T (Refusal of Treatment)* [1992] 3 WLR 782.

¹¹² *AAS Act* s 24.

¹¹³ South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3552 (Fraser Ellis).

¹¹⁴ See also Michael Dunn, Isabel Clare and Anthony Holland, 'To Empower or to Protect? Constructing the "Vulnerable Adult" in English Law and Public Policy' (2008) 28(2) *Legal Studies (Society of Legal Scholars)* 234.

¹¹⁵ *AAS Act* s 24.

¹¹⁶ While the views of the individual in question will normally determine whether an ASU investigation proceeds, that does not necessarily apply in situations of 'immediate risk', where the alleged abuse concerns a 'serious criminal offence', where the person has 'impaired decision-making capacity' as to the decision to consent to an investigation, or in situations where the person can't be contacted. See *AAS Act* ss 24(1) and (4).

¹¹⁷ This is not saying that the ASU **must** act, rather that the ASU **may** act. SALRI is of the view that this decision must depend on each individual case and the clinical professional judgement of the ASU. SALRI accepts, as it was often told in consultation, that intervention in some abusive situations may perversely make the situation worst. SALRI's community roundtable, for example, with older persons noted that intervention may sometimes lead to worse outcomes than not intervening. There may also be little, if anything, that the ASU can realistically do, even if it did wish to intervene. SALRI also accepts that, as it was often told (consistent with wider research), many victims of abuse often want to preserve the relationship they have with their abuser. Acting without consent could well damage such relationships. This point was made, for example, at SALRI's roundtable with medical and other practitioners.

It is also important to realise that that such abuse ‘clearly undermines dignity and autonomy’.¹¹⁸ Intervention in certain circumstances, far from undermining the apparent victim’s autonomy, will serve to promote it and can be seen to support and enable the ability of adults vulnerable to abuse ‘to live autonomous and dignified lives’.¹¹⁹ As the former ALRC President has observed:

Protecting these people from abuse will serve to support their autonomy and show respect for their dignity, because living in fear of abuse can prevent a person from making free choices about their lives and pursuing what they value...¹²⁰

The importance of an individual’s autonomy was often presented to SALRI, citing international human rights jurisprudence. ‘The notion of personal autonomy is an important principle underlying the interpretation of Article 8 [the right to privacy and family life, home and correspondence under the *European Convention on Human Rights*].’¹²¹ The European Court of Human Rights has noted that ‘the ability to conduct one’s life in a manner of one’s own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned.’¹²² However, it is important to note that, even for those adopting a human rights approach, this is a nuanced and complex question.¹²³ As the European Court of Human Rights has acknowledged:

[T]he need for domestic authorities to reach, in each particular case, a balance between the respect for the dignity and self-determination of the individual and the need to protect the individual and safeguard his or her interests, especially under the circumstances where his or her individual qualities or situation places the person in a particularly vulnerable position.¹²⁴

The respect for individual autonomy is integral to the *Convention on the Rights of Persons with Disabilities* (‘CRPD’). However, the need to protect persons with disability, especially those with cognitive impairment and psychosocial conditions, from outright exploitation, violence and abuse is explicitly provided for in Article 16.¹²⁵

Autonomy should not only be seen as involving a sphere of non-interference, but also in terms of considering what support is needed for a person to exercise their autonomy and decision-making ability.¹²⁶ The individual’s autonomy is obviously vital, but that also needs to be balanced against ‘the need to protect the individual and safeguard his or her interests’.

¹¹⁸ Rosemary Croucher and Julie MacKenzie, ‘Framing Law Reform to Address Elder Abuse’ [2018] 18 *Macquarie Law Journal* 5, 11.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.* 13.

¹²¹ *Goodwin v United Kingdom* [2002] ECHR 588, [90]. See also *Pretty v United Kingdom* [2002] ECHR 427 [61], [66]; *Evans v United Kingdom* [2007] ECHR 264 [71].

¹²² *Pretty v United Kingdom* [2002] ECHR 427 [62].

¹²³ See further European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights: Right to Respect for Private and Family Life, Home and Correspondence* (ECHR Guide, 31 August 2021) 30–1.

¹²⁴ *AMV v Finland* [2017] ECHR 273 [90].

¹²⁵ Marie Fallon-Kund, Michaela Coenen and Jerome Bickenbach, ‘Balancing Autonomy and Protection: A Qualitative Analysis of Court Hearings Dealing with Protective Measures’ [2017] 53 *International Journal of Law and Psychiatry* 69.

¹²⁶ Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press, 2016) 34–5.

Role of the Office for Ageing Well and Adult Safeguarding Unit

The OFAW has a broader role than the ASU that is targeted towards older people.¹²⁷ Among their functions they assist government in creating policies that affect older people and consulting with older people and other relevant parties for that purpose. The OFAW also has functions to monitor and promote government initiatives that affect older persons. They run initiatives such as the Seniors Card Program, State Ageing Plan, Aged Care Strategy Unit and the Retirement Villages Unit, as well as advising the Minister for Health and Wellbeing and contributing to policy, planning and development.¹²⁸ The OFAW also supports the function of the ASU.¹²⁹

The ASU was intentionally set up within the OFAW.¹³⁰ Although the ASU was always intended to apply to all adults, it arose within the elder abuse context and was intended only to apply to older persons in the community for the first three years of operation.¹³¹ The overarching aim of the ASU is to respond to reports abuse of adults who may be vulnerable to abuse, in particular older people and people with disabilities.¹³² The South Australian safeguarding framework includes a combination of voluntary reporting, mandatory graduated responses, a lead agency with quasi-investigative powers, a non-age specific focus on vulnerability and the coordination of a multi-agency approach. The focus of the model is intended to be on the principles of dignity and autonomy rather than protection.

The ASU investigates the abuse of ‘vulnerable adults’, which is defined as an adult who, by reason of age, ill health, disability, social isolation, dependence on others or other disadvantage, is vulnerable to abuse.¹³³ The functions of the ASU include investigating reports of abuse of all vulnerable adults, as well as coordinating responses to abuse by various government agencies and others.¹³⁴ Any person is able to make a voluntary report to the ASU if they suspect a vulnerable adult is at risk of abuse.¹³⁵ After completing an assessment of a report, the ASU must take one of three prescribed actions: investigating

¹²⁷ Different agencies define ‘older person’ with respect to various ages. From a policy perspective the OFAW engages with people 50 years and older, the Retirement Homes Unit engages with people 55 years and older, and the Seniors Card engages with people 60 years and over. SALRI notes that should these differing definitions be retained they should be clearly delineated within the *AAS Act*.

¹²⁸ SA Health, *Office for Ageing Well* (Web Page, 7 March 2022) <<https://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/about+us/departments+for+health+and+wellbeing/office+for+ageing+well>>.

¹²⁹ One suggestion SALRI received was that the term ‘Office for Ageing Well’ is inappropriate and discounts those who owing to their circumstances may not be ageing well. The Victim Support Service, for example, highlighted this view. SALRI expresses no view on this issue and considers that, given this title was only implemented in 2018, it is premature to consider whether any further change to this name is required. This is primarily an issue of Government policy. The rationale for changing the title of the former Office of Ageing to the Office for Ageing Well was that ‘it reflects this Government’s commitment to combating ageism and challenging the way ageing is perceived and framed in the language and the structure of the services that this Government delivers. It is ultimately the responsibility of all of us in this place and all of us in the community to collectively shift the existing mindset about ageing’: South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3559 (Matthew Cowdrey).

¹³⁰ South Australia’s model most closely resembles the ALRC Elder Abuse Report’s recommendations. See Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 82.

¹³¹ *AAS Act* sch 1, cl 2.

¹³² *Ibid* Part 3.

¹³³ *Ibid* s 3.

¹³⁴ *Ibid* s 15.

¹³⁵ *Ibid* s 22.

the matter further,¹³⁶ referring the case to another State Authority or prescribed body,¹³⁷ or taking no further action.

In addition to this, the ASU may report the matter to the relevant professional body,¹³⁸ or make a complaint to other agencies such as the Ombudsman.¹³⁹ The ASU will generally explore ways to support the adult to stop the abuse occurring or minimise the risk of further abuse. A multi-agency response may also be led by the ASU to provide support to the adult in addressing the abuse.¹⁴⁰

The ASU has various robust powers under s 19 of the *AAS Act*, though it is yet to exercise these powers¹⁴¹ (a fact that attracted concern from a number of parties in SALRI's consultation, at least in relation to what is perceived as serious abuse). However, the ASU was never intended to be a substitute police force and should follow a more nuanced approach.¹⁴² The ASU was not intended to be a 'watchdog agency' or an 'oversight body' nor is it intended to duplicate the functions of other agencies.¹⁴³ It was made clear that it is not within the remit of the ASU to punish perpetrators.¹⁴⁴ Rather, the stated function of the ASU is to receive reports of suspected abuse or neglect and to coordinate a multi-agency response,¹⁴⁵ and at the same time to focus on 'early intervention, case coordination and information sharing'.¹⁴⁶

The safeguarding rationale of the ASU received near universal support in SALRI's consultation. The ASU has a strong focus on safeguarding the rights of adults at risk of abuse, though its legal mandate was limited for the first three years, with the intention that the ASU would extend to apply to all adults vulnerable to abuse in October 2022.¹⁴⁷ The *AAS Act* initially supported older adults aged 65 and over, or Aboriginal and Torres Strait Islander people aged 50 and over. In 2020, adults with a disability (aged over 18 years) were also included within the ASU's remit under the definition of 'vulnerable adult'.¹⁴⁸ In October 2022, the ASU's remit is intended to expand fully to include all adults vulnerable to abuse.

¹³⁶ Ibid s 26.

¹³⁷ Ibid s 25.

¹³⁸ Ibid s 27.

¹³⁹ Ibid s 28.

¹⁴⁰ South Australian Adult Safeguarding Unit, *Code of Practice* (September 2019) 25.

¹⁴¹ SALRI was told the ASU has referred a number of subjects of reports with impaired decision-making capacity to SACAT. But it is otherwise yet to use its robust powers under s 19 of the *AAS Act* as the need has yet to arise.

¹⁴² South Australia, *Parliamentary Debates*, Legislative Council, 29 May 2018, 251. 'It is very important that we have a body that has the powers to investigate issues and to pursue information, but the advice that is reflected in the community discussion up to this point, and will be reflected in the Bill, is not that we don't need another police force. One of the reasons why we need an investigation agency like this is that older people and other vulnerable adults often feel very uncomfortable calling the police in on a matter that may involve one of their own family members. We need to have an approachable body. We need to have a body that is both approachable and empowered, that actually has the capacity to investigate and pursue matters but that can work in a positive multidisciplinary way to protect vulnerable adults and, if you like, try to restore the relationships. In many of these relationships, people want the abuse, financial or otherwise, to stop, but they don't want to lose the relationship': at 251 (Stephen Wade, Minister for Health and Wellbeing).

¹⁴³ South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1727 (Stephen Wade, Minister for Health and Wellbeing).

¹⁴⁴ Ibid 1716.

¹⁴⁵ Ibid 1727.

¹⁴⁶ South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3544 (Paula Leuthen).

¹⁴⁷ South Australian Adult Safeguarding Unit, *2019–2020 Annual Report* (Report, 2020) 3.

¹⁴⁸ Ibid; South Australia, *Parliamentary Debates*, Legislative Council, 11 November 2020, 3241 (John Gardner).

As well as this far reaching change, the *AAS Act* and related law and practice need to reflect the many changes which have occurred over recent years. SALRI notes the rate of cognitive impairment (especially dementia); the increasing wealth in modern society; inheritance impatience;¹⁴⁹ recognition of human rights (especially for older persons and persons with a disability) including the recognition of autonomy and the profound shift from a ‘paternalistic’ substitute decision-making model towards a supported decision-making approach; and greater awareness of abuse as important factors underpinning this Report.¹⁵⁰

There are ongoing changes in the service provision landscape with the shift from a previous State based framework to an increasingly Commonwealth based framework. SALRI is therefore of the view that the *AAS Act* and linked law and practice in this area require some amendments to meet evolving operational circumstances and community expectations. SALRI also suggests various educational and operational measures to enhance the use, operation and effectiveness of the ASU.

After comprehensive research and consultation, SALRI cautions against any radical revisions to, or a rewrite of, the *AAS Act*, or the roles and operation of the OFAW and the ASU. Any such sweeping changes would at this stage be premature and inappropriate. The ASU has only been in operation for three years and most of this period has been marked by the disruption of the COVID-19 pandemic. The generally positive views SALRI received as to the *AAS Act* and the vital roles and work of the OFAW and the ASU are significant.¹⁵¹

SALRI notes that although the majority of its consultation and survey responses focused on the ASU, consultees and respondents who referred to the role and expertise of the OFAW did so in overwhelmingly positive terms, especially as to highlighting its role and expertise in responding to elder abuse. Additionally, it appears that many people engaged with the Office through their workplace or are community members who have participated in their initiatives.

A considerable number of SALRI’s consultation and survey responses spoke positively about the role and functions of the ASU and its work to date. As Purple Orange, for example, said: ‘We wish to acknowledge the vital importance the Adult Safeguarding Unit plays in providing State-based oversight to safeguarding.’ There was near universal support in SALRI’s consultation and survey responses for retention of the ASU under the *AAS Act*. The vital nature of its unique and valuable role in safeguarding the rights of adults vulnerable to abuse was repeatedly emphasised to SALRI. Even those parties who were critical of either aspects of the *AAS Act* and/or the operation to date of the ASU, or who were unaware of its existence of the ASU, supported the retention of the ASU under the *AAS Act* (albeit with suggested improvements to present law and/or practice). The number and nature of reports and calls dealt with to date by the ASU (as set out below at Appendix B) is also significant.

¹⁴⁹ Select Committee into Elder Abuse, Legislative Council of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 14–15 [2.34].

¹⁵⁰ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report 124, August 2014); NSW Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, 2018) 19–21 [3.25]–[3.32]. Dementia Australia also raised the prevalence of dementia that is understated in elder abuse awareness campaigns and safeguarding for adults more generally.

¹⁵¹ There was near universal support in SALRI’s consultation and survey responses for retention of the ASU under the *AAS Act*. The vital nature of its unique and valuable role in safeguarding the rights of adults was repeatedly emphasised to SALRI. Even those parties who were critical of either aspect of the *AAS Act* and/or the operation to date of the ASU or who were unaware of its existence of the ASU, supported the retention of the ASU under the *AAS Act* (albeit with suggested improvements to present law and/or practice). The increasing workload of the ASU, in the face of the COVID-19 situation and despite a lack of broad community awareness of its role and existence, in its first three years of operation is also notable.

While the retention of the ASU's role was near universally favoured, SALRI's consultation and research has revealed a number of areas for clarification and improvements, especially relating to bridging the gap between operational practice and the legislative intention, and making the role, processes and functions of the ASU better known and more efficient and effective. Various amendments of the *AAS Act* are suggested by SALRI as well as linked changes to law and practice. The ASU should not be given too expansive a remit or it risks being spread too thinly to effectively carry out its core safeguarding role.

SALRI's Recommendations and Conclusions

Based on its terms of reference and the results of its consultation and research, SALRI has made a number of recommendations for reform to the *AAS Act* and related law and practice including:

1. The retention at this stage¹⁵² of both the OFAW and the ASU under the *AAS Act* in light of their vital roles and the broad support as expressed in consultation.
2. For the ASU to remain responsible for responding to reports of the suspected abuse of both older persons and persons with disability.¹⁵³
3. Various amendments to the *AAS Act* to update the functions of the OFAW to better reflect contemporary circumstances.
4. The inclusion of the key premise of 'safeguarding' as a purpose and function of the ASU.
5. The inclusion of a statement of objectives and general principles, incorporating the definition of safeguarding, in the *AAS Act*.
6. Setting out the roles, powers and responsibilities of the ASU within the *AAS Act*.
7. The introduction of a triage model into s 23 of the *AAS Act* to increase flexibility and enhance operational effectiveness and better reflect the work of the ASU.¹⁵⁴
8. The inclusion of more options, such as mediation¹⁵⁵ or providing advice and information for the ASU to respond to reports most effectively and to capture their existing services more accurately.
9. The retention of the wide powers currently open to the ASU under the *AAS Act*¹⁵⁶ (though further guidance should be provided for the use of the ASU's investigation powers under the Regulations or Code of Practice).

¹⁵² SALRI notes its recommendation that a further review of the *AAS Act* be undertaken after five years and that it may be desirable to make these changes following a wider review. The ASU has only been in operation for three years and as such SALRI considers it is unnecessary and premature to make such changes at this stage.

¹⁵³ There were differing views in SALRI's consultation on these points, but any such changes at this stage are premature and inappropriate. These questions can be considered as part of any wider future review.

¹⁵⁴ The ASU should have the flexibility to take the appropriate safeguarding response that is best tailored to the individual's circumstance. There was broad support in SALRI's consultation for this approach.

¹⁵⁵ The value of mediation in an elder abuse context was highlighted by several parties in consultation. Others were more cautious. See also Lixia Qu et al, Australian Institute of Family Studies, 'National Elder Abuse Prevalence Study' (Research Report, December 2021) 88–89.

¹⁵⁶ Whether these powers should be utilised more often in practice, as several parties contended to SALRI, is an issue where opinions have and will continue to differ. What is important is that the ASU should carefully consider the use of these powers in any potential case and be prepared to utilise them where they are satisfied there is an appropriate instance of serious abuse. As noted to SALRI, these powers are what substantially differentiates the

10. The enhancement of ASU staff's knowledge, expertise (including cultural awareness training and disability inclusion training) and capability to respond effectively to both elder abuse and the abuse and exploitation of persons with disability.
11. Changing the term 'vulnerable adult' to 'adult who may be vulnerable to abuse',¹⁵⁷ defined as: an adult **may** be vulnerable to abuse for reasons including, but not limited to age, disability; social isolation; ill health; dependence on others (social, financial, or otherwise); mental illness, cognitive impairment or cultural and language barriers. SALRI emphasises, reflecting a strong theme in its consultation, that the presence of one or more of these factors does NOT denote or presume vulnerability, merely that it may do so in the wider circumstances.¹⁵⁸
12. Amending the present, somewhat unwieldy, definition of 'abuse' in the *AAS Act* to incorporate the premise that abuse should be widely defined, but dependent upon the existence of a relationship of trust or dependence, or a power imbalance.¹⁵⁹ This is integral to both elder abuse and the abuse of persons with disability, as SALRI was told by the disability sector and practitioners and service providers in the area,¹⁶⁰ which the ASU was designed to address.¹⁶¹
13. The formulation and use of suitable capacity guidelines and certain improved practices in this area.
14. The introduction of a number of educational and operational measures to promote knowledge of the role of the ASU and to enhance its use and operation, especially in rural, remote and regional communities. Such measures should include promoting the awareness of abuse to communities that may be more vulnerable to abuse, such as CALD and Aboriginal communities and the disability community.¹⁶²

ASU from other service providers and protective mechanisms in this area and if they are not utilised when appropriate it could arguably make the existence of the ASU otiose.

¹⁵⁷ The term 'vulnerable' (or any replacement) is pivotal as it sets the scope of the ASU's role. There was much debate in SALRI's consultation and survey responses as to the term 'vulnerable' and any substitute term such as 'at risk'. However, no single term gained acceptance. The term 'at risk' was viewed as especially problematic to Aboriginal Elders and community groups. SALRI ultimately favours the term 'person who may be vulnerable to abuse', whilst making it clear that age or disability does not automatically denote vulnerability and is simply a factor that may do so. It moves away from the premise that having a particular characteristic makes an adult inherently vulnerable and focuses more on the type of abuse being perpetrated.

¹⁵⁸ SALRI acknowledges, in particular, as repeatedly highlighted in consultation that the notion that age or disability in itself denotes or presumes vulnerability is simplistic and inappropriate.

¹⁵⁹ See also Rae Kaspiew et al, Elder Abuse National Research – Strengthening the Evidence Base: Research Definition Background Paper (AIFS, 2019); Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 17–18, 20, 32; Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 13–16.

¹⁶⁰ See also Centre for Evidence and Implementation and Monash University, *Disability Royal Commission*, 'Rapid Evidence Review: Violence, Abuse, Neglect and Exploitation against People with Disability in Australia' (Research Report, August 2021) 2, 22, 25–6.

¹⁶¹ As one roundtable attendee said: 'The ASU can't be all things to all people.' There is a real concern its effectiveness and expertise will be diminished if its safeguarding role is spread too wide, notably where other services or agencies already exist and are better suited to meet that report. SALRI's suggested approach received wide, though not universal, support in consultation.

¹⁶² SALRI notes the need of making the ASU better known and for services to be available for culturally and linguistically diverse people, Aboriginal communities and people living in rural, regional and remote communities was often raised as a priority during SALRI's consultation, especially outside Adelaide.

15. The introduction of a number of educational and operational measures to promote and enhance awareness of the options for reporting suspected abuse, especially in regional and Aboriginal communities.
16. The retention of the presumption that an adult has the relevant decision-making capacity. Therefore, a formal capacity assessment in this context by a medical practitioner should only be required where there is evidence of impaired decision-making capacity which suggests that the presumption of capacity is displaced.
17. Maintaining the present definition of capacity in the *AAS Act*, which accords with the needs for clarity, consistency, modern medical knowledge and to account for fluctuating capacity.
18. Defining consent for clarity to mean a free and voluntary decision and free from coercion.¹⁶³
19. Widening the current narrow threshold in s 24 of the *AAS Act* allowing the ASU to intervene without an individual's consent. The current threshold — 'where there is an immediate threat to life or limb',¹⁶⁴ the adult lacks decision-making capacity, or the ASU has been unable to contact the relevant adult after reasonable inquiries¹⁶⁵ — is too restrictive. The ASU should be able to act¹⁶⁶ without an individual's consent in relation to serious financial or physical abuse and such intervention need not wait till escalation or the final act. 'Serious financial abuse', and 'serious criminal offence' must be approached on a case by case basis and should be defined in the *AAS Act* by reference to the outcome or potential outcome of such abuse on the apparent victim.¹⁶⁷
20. Conferring the powers in the *AAS Act*, presently given to the Magistrates Court, upon SACAT in light of its expertise, flexible processes and existing roles in this area.
21. Extending the orders open to SACAT under s 33 of the *AAS Act* to making an order for restitution or compensation for any loss, damage or harm resulting from the abuse and the any interested party with a proper interest as well as the ASU should be able to institute and/or join such proceedings.¹⁶⁸

¹⁶³ The ASU practitioner, whilst respecting the presumption of capacity and the individual's autonomy and supported decision-making, should be alive to the possible presence and effects of coercive behaviour, psychological abuse or undue influence and that such abuse may result in a lack of decision-making capacity and/or render consent invalid owing to a lack of free and voluntary decision. This is not an easy task, but is crucial as SALRI was told in consultation.

¹⁶⁴ South Australia, *Parliamentary Debates*, Legislative Council, 20 June 2018, 569.

¹⁶⁵ *AAS Act* s 24(4).

¹⁶⁶ This is not saying that the ASU **must** act, rather that the ASU **may** act. SALRI is of the view that this decision must depend on each individual case and the professional judgement of the ASU. SALRI accepts, as it was often told in consultation, intervention may result in a worst situation. There may also be little, if anything, that the ASU can realistically do, even if it did wish to intervene.

¹⁶⁷ The suggestion of classifying 'serious financial abuse', 'serious abuse' and 'serious criminal offence' under the *AAS Act* according to the penalty is impracticable as for some individuals, even a summary offence, let alone a minor indictable offence, may result in a substantial adverse outcome. For example, the misappropriation of \$100 is a summary offence and may not be significant to an affluent individual, but could result in a substantial, even drastic adverse outcome to an older person or a person with disability reliant upon the old age pension or disability support allowance. Again, it is the outcome of the abuse that is significant, not so much the action or any criminal penalty attached to that action.

¹⁶⁸ This will often be another family member who discovers the abuse. But it could be a relevant NGO or other agency.

22. The ASU or any interested person should be able to apply to SACAT for remedial orders under Division 6 of the *AAS Act*, including interim and incidental measures and restitution to be made against the perpetrator in respect of harm, loss or damage sustained as a result of the abuse.

In addition to these specific recommendations, SALRI makes the following suggestions:

1. The question of extending mandatory reporting to the abuse of vulnerable adults raises complex issues of policy, practice and privacy and should be left for future and further consideration.¹⁶⁹
2. Providing SACAT with the jurisdiction to deal with the misuse of EPAs and disputes arising.¹⁷⁰
3. Existing crimes are adequate and new offences relating to elder or other abuse are unnecessary. The problem is not the law, but the enforcement of the law. Careful consideration needs to be given before any decision is made to extend any new offence of coercive control beyond domestic partners to other relationships involving older persons or persons with disability.¹⁷¹
4. The ASU should develop clear criteria and processes for consideration of the utility of an intervention order under the *Intervention Orders (Prevention of Abuse) Act 2007* (SA) in response to reports of suspected abuse and to consider in appropriate cases the possible referral of a case to SAPOL for their consideration whether to apply for an intervention order.¹⁷²
5. The role and operation of microboards to provide for the long-term care of older persons and/or persons with disability should be examined in further detail.¹⁷³
6. Given the ongoing developments in this area in service delivery, practice and research, a future review should be carried out of the operation of the *AAS Act*, but such a review should have a wider focus and context and not be restricted to a review of the operation of the *AAS Act*.¹⁷⁴

The specific details of these recommendations are found in the body of SALRI's Report. It is notable that there was a broad consensus in consultation on many of SALRI's key findings.

SALRI cautions that the notion that the *AAS Act*, notwithstanding its importance, 'is a panacea' to ensure the protection of persons with disability and older persons 'is overly simplistic'.¹⁷⁵ This supports

¹⁶⁹ See also Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) Recommendation 76.

¹⁷⁰ Ibid Recommendations 81–92.

¹⁷¹ See also Parliament of New South Wales, Joint Select Committee on Coercive Control, 'Coercive Control in Domestic Relationships' (Report, 2021) 95–6 [5.75]–[5.81].

¹⁷² SALRI also raises that the ASU should consider how it may assist victims and/or their representatives to make a private application to the Court for an intervention order in appropriate case.

¹⁷³ Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) Recommendation 118. See further at: 405–11 [10.1.1]–[10.1.21].

¹⁷⁴ The Statutory independence of the ASU was raised in the Parliamentary Debate with the Opposition moving an unsuccessful amendment to guarantee this. See South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1711 (Kyam Maher); South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3549 (Chris Picton). SALRI considers this is one question that ought to be dealt with by a future, wider review.

¹⁷⁵ Lorna Montgomery et al, 'Implications of Divergences in Adult Protection Legislation' (2016) 18(3) *Journal of Adult Protection* 149, 151. See also Janet Anand et al, 'Conceptualising Elder Abuse across Local and Global Contexts:

the need for a future wider review of not only the operation of the *AAS Act* and the roles and operation of the OFAW and the ASU, but other agencies and the wider adult safeguarding landscape and context.¹⁷⁶

SALRI particularly notes the valuable contribution to the consultation, research and writing of this Report by Divya Narayan, Anita Brunacci, Jemma Holt, Holly Nicholls, Dr Michaela Okninski, Olga Pandos, Taylor Portelli, Rachel Tan, Kim Tran and Dr Sylvia Villios.

The input of SALRI's expert Advisory Board Members is also acknowledged. SALRI expresses particular appreciation to Charlie Jackson OAM, Dr Chris Moy of the AMA(SA), Jean Lee, Anh Caprile, Cassie Mason, Kathy Williams and Elicia White for their contributions. SALRI also acknowledges the diligent contribution of Louise Scarman (SALRI Admin Officer) and the support of the State Government in providing the funding for SALRI to undertake this important reference. SALRI especially acknowledges the valuable contribution of students from the Law Reform class at the University of Adelaide (especially Lauren Bagshaw, Nicholas Bannister, Rynier Brandt, Hayley Crumb, Peter Dalrymple, Rebecca Gibbons, Laura Kelly, Gemma Kerrin, Nili McGrath, Charlotte Ordynski, Lukas Price, Esther Richards, Eva Squire and April Zimmerman) who have contributed much of the necessary research and background work.

SALRI finally notes the many insightful submissions and comments it received in relation to this reference and expresses its appreciation to the many legal practitioners, medical and other health practitioners, government and non-government agencies, community groups, the disability sector and the disability community, Aboriginal Elders and community members, interested parties, experts and members of the community who actively contributed in various ways to this reference. Their views and comments have been carefully considered and SALRI is grateful for their input.

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Implications for Policy and Professional Practice on the Island of Ireland' (2013) 14(6) *Journal of Adult Protection* 280.

¹⁷⁶ SALRI was encouraged by several parties to look at wider issues as part of its review, but SALRI's TOR are confined to a review of the operation of the *AAS Act*.

Summary of Recommendations

Part 1 - Introduction and Context

RECOMMENDATION 1

SALRI recommends that there should be a further review of the operation of the *Ageing and Adult Safeguarding Act 1995* (SA) after five years and that this review should include consideration of the roles and operation of both the Adult Safeguarding Unit and the Office for Ageing Well and the wider South Australian adult safeguarding context and landscape.¹⁷⁷

Part 2 – Office for Ageing Well

RECOMMENDATION 2

SALRI recommends that the role and operation of the Office for Ageing Well under the *Ageing and Adult Safeguarding Act 1995* (SA) should be retained.

RECOMMENDATION 3

SALRI recommends that the *Ageing and Adult Safeguarding Act 1995* should be amended in respect to the Office for Ageing Well by:

1. Replacing now outdated language and terminology in ss 8 and 9 with more inclusive and appropriate, respectful language in line with community standards. This may include, but is not limited to, replacing the term ‘ageing’ with ‘older people’¹⁷⁸ and replacing the phrase ‘those who suffer from physical or mental disabilities’ to ‘people with disability’ (s 9(k)).
2. Reviewing and updating its objectives outlined in s 8 to better reflect the Office’s current work and community expectations by:
 - a. replacing the term ‘creating’ in ss 8(c) and 8(d) with ‘promoting’;
 - b. replacing the term ‘multicultural’ in s 8(e) with ‘diverse’;
 - c. adding a new objective to articulate the Office’s role in combating ageism and ageist attitudes; and
 - d. adding a new objective to emphasise the Office’s life-course approach.

¹⁷⁷ Given the ongoing developments in this area in service delivery and research, such a future review was supported by a number of interested parties to SALRI. Such a review should have a wider focus and context and not be restricted to a review of the operation of the *AAS Act*. SALRI discussed in its POA Report the desirability or practicability of any agency assuming an active investigatory or other role to assist civil action by or on behalf of a vulnerable victim for financial abuse. It was rightly pointed out to SALRI that the ASU are not a SAPOL type investigatory unit and have a distinct role and rationale. SALRI recommended ‘that that the State Government should consider the future roles, practices and processes of the Office of the Public Advocate, the Adult Safeguarding Unit, South Australia Police, the Public Trustee and any other interested agency, to receive and respond to reports or claims in relation to the suspected abuse or misuse of EPAs, including the possible intervention or investigation of cases brought to SACAT’: Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) Recommendation 120. See also at: 429–31 [10.5.24]–[10.5.31]. SALRI’s current statutory review of the *AAS Act* was limited in scope to the ASU and the *AAS Act* and did not extend to carrying out such a review.

¹⁷⁸ See also Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, 2022) 12.

3. Reviewing and updating its functions outlined in s 9 to better reflect the Office's current work and community expectations by:
 - a. removing functions that are no longer applicable in terms of the Office's operations such as ss 9(c) and 9(h);
 - b. listing additional groups in s 9(k) to better reflect the diversity of older South Australians including, but not limited to, people of Aboriginal background, culturally and linguistically diverse backgrounds, LGBTIQ communities and people living in regional, rural and remote communities; and
 - c. updating s 9(p) to describe how the Office for Ageing Well supports the Adult Safeguarding Unit's functions by providing educational information and running community education initiatives on matters relating to older people if the Adult Safeguarding Unit remains situated in the Office for Ageing Well.

RECOMMENDATION 4

SALRI recommends that the entitlement of both older persons and persons with disability to live and make decisions without coercion, undue influence or psychological abuse is an important consideration and should be added to the South Australian *Charter of the Rights and Freedoms of Vulnerable Adults* (potentially under heading 'Liberty and Security').¹⁷⁹

Part 3– Background to and Functions of the Adult Safeguarding Unit and Safeguarding

RECOMMENDATION 5

SALRI recommends that the role and operation of the Adult Safeguarding Unit under the *Ageing and Adult Safeguarding Act 1995* (SA) should be retained. SALRI considers that a standalone Act to govern the role and operation of the Adult Safeguarding Unit is unnecessary.

RECOMMENDATION 6

SALRI recommends that, at this stage,¹⁸⁰ the Adult Safeguarding Unit should remain under the Office for Ageing Well.¹⁸¹

¹⁷⁹ It is significant that this Charter extends to the roles of both the OFAW and the ASU. The increasing awareness of the presence, effects and implications of coercive control, undue influence and psychological abuse in the context of both elder abuse and the abuse and exploitation of persons with disability, beyond domestic relationships, were widely raised in consultation to SALRI. See further Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 92 [8.1]; Parliament of New South Wales, Joint Select Committee on Coercive Control, 'Coercive Control in Domestic Relationships' (Report, 2021) 95–96 [5.75]–[5.81]; Evidence to Parliament of New South Wales, Joint Select Committee on Coercive Control, Sydney, 23 February 2021, 46 (Yumi Lee) (see also at 47–8 (Margaret Duckett)); NSW Ageing and Disability Commission, Submission No 108 to Joint Select Committee on Coercive Control, Parliament of New South Wales, *Coercive Control in Domestic Relationships* (2 February 2021) 2, 6 <<https://www.parliament.nsw.gov.au/ladocs/submissions/70505/Submission%20-%20108.pdf>>. See also below Part 7.2.

¹⁸⁰ See above n 177.

¹⁸¹ SALRI acknowledges that there are differing views on this issue. The question of possible conflicts of interest was raised. SALRI considers that, at this stage, it is premature and unnecessary to relocate the ASU from the OFAW. There is mutual interest and synergy between the roles and operation of both the OFAW and the ASU. Many

RECOMMENDATION 7

SALRI recommends that, at this stage,¹⁸² it is unnecessary for the *Ageing and Adult Safeguarding Act 1995* (SA) to include an explicit statement of the independence of the Adult Safeguarding Unit.¹⁸³

Part 4 – Functions and Purpose of the Adult Safeguarding Unit

RECOMMENDATION 8

SALRI recommends that, at this stage,¹⁸⁴ the Adult Safeguarding Unit should retain the responsibility under the *Ageing and Adult Safeguarding Act 1995* (SA) for responding to reports of the suspected abuse of all adults who may be vulnerable to abuse.¹⁸⁵

RECOMMENDATION 9

SALRI recommends that ‘safeguarding’ should be included in the *Ageing and Adult Safeguarding Act 1995* (SA) as the primary purpose of the Adult Safeguarding Unit. This will reflect that the key focus of the Adult Safeguarding Unit is to safeguard adults who may be vulnerable to abuse to safeguard their rights.¹⁸⁶ The definition should draw upon the phraseology in the *Care Act 2014* (UK) and be taken to

parties said what matters is not where the ASU is located, but rather its expertise and operation and capability to effectively perform its vital safeguarding role, notably for both elder abuse and the abuse of persons with disability. There is also no obvious agency to relocate the ASU to. See also Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 384–386 [14.43]–[14.50]. The location of the ASU is preferably considered as part of a future wider review. See also Recommendation 5.

¹⁸² See above n 177.

¹⁸³ Unsuccessful efforts to insert such an explicit provision in the *AAS Act* were made by the Opposition during the 2018 parliamentary debate: See generally South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1726–8; South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3547–9. SALRI considers this question is best left for any future wider review.

¹⁸⁴ SALRI notes its recommendation that a further review of the *AAS Act* be undertaken after five years and that it may be desirable to make these changes following a wider review. The ASU has only been in operation for three years and as such SALRI considers it is unnecessary and premature to make such changes at this stage.

¹⁸⁵ SALRI notes the validity of the view presented in consultation by Ms Natalie Wade, Principal Lawyer of Equality lawyers, and others that it is inappropriate for reasons of policy, practice and human rights for the ASU to be responsible for responding both to elder abuse and the abuse and exploitation of persons with disability. However, the general, though not universal, theme in SALRI’s consultation was whilst this may well be the case in an ‘ideal world’, having regard to operational, resourcing and logistical considerations, separate Adult Safeguarding Units are unlikely in South Australia. SALRI was told that what matters most is not what types of abuse the ASU covers, but ensuring that it and its staff have the knowledge, expertise and capability to respond effectively to all types of abuse within its remit, including and perhaps most significantly both elder abuse and the abuse and exploitation of persons with disability, especially with the imminent expansion of the ASU on 1 October 2022 to all ‘vulnerable adults’. SALRI considers this question is better considered as part of any future wider review.

¹⁸⁶ The inclusion of ‘safeguarding’ in the *AAS Act* received virtually unanimous support in SALRI’s consultations and was identified as an oversight in the original Act. Parliamentary comments during the passage of the *AAS Act* made it clear that the ASU was to exercise a crucial adult safeguarding role.

mean protecting people's health, wellbeing and human rights, and enabling them to live free from abuse.¹⁸⁷

RECOMMENDATION 10

SALRI recommends that the functions of the Adult Safeguarding Unit should be amended in the *Ageing and Adult Safeguarding Act 1995* (SA) to reflect that their primary focus is to respond to reports of abuse. For other functions such as advocacy or community education, the Adult Safeguarding Unit should not be leading the response, but rather should support other organisations and agencies in performing these functions.¹⁸⁸ This can be achieved by:

1. Removing s 15(1)(a) from the *Ageing and Adult Safeguarding Act 1995* (SA).
2. Removing the words 'promoting and' in s 15(1)(c).
3. Retaining the education function of the Adult Safeguarding Unit, but ensuring that the education is directed towards educating individuals who may make reports, educating the adult who may be vulnerable to abuse, and educating the general public and others on the existence, role, and functions of the Unit.

RECOMMENDATION 11

SALRI recommends that the concept of safeguarding should be supplemented by appropriate guidance in the Code of Practice¹⁸⁹ about the aims of safeguarding. SALRI further recommends that the following formulation (slightly adapted from the Statutory Guidance to the *Care Act 2014* (UK)) should be added to the Code of Practice:

- prevent harm and reduce the risk of abuse or neglect to adults with care and support needs;
- stop abuse or neglect wherever possible;
- safeguard adults in a way that supports them in making choices and having control about how they want to live;
- promote an approach that concentrates on improving life for the adults concerned;
- support public awareness campaigns so that communities as a whole, alongside professionals, play their part in preventing, identifying and responding to abuse and neglect;
- provide information and support in accessible ways to help people understand the different types of abuse, how to stay safe and what to do to raise a concern about the safety or well-being of an adult; and
- address what has caused the abuse or neglect, where practicable.

¹⁸⁷ For the purposes of this section, 'abuse' should be understood as that defined in s 4 of the *AAS Act*, subject to SALRI's recommendations. See also Recommendation 32. A more detailed elaboration of what 'safeguarding' involves is better left to the Code of Practice.

¹⁸⁸ Many health practitioners and NGOs, in particular, found that some of the functions of the ASU duplicate existing services, especially relating to community and individual education and advocacy. The original intention of the ASU was for their focus and funding to be utilised to respond to reports of abuse.

¹⁸⁹ Office for Ageing Well, Government of South Australia, *South Australian Adult Safeguarding Unit Code of Practice* (2019).

Part 5 – Adult Safeguarding Unit Processes and Operational Practices

RECOMMENDATION 12

SALRI notes the suggestion of mandatory reporting under the *Ageing and Adult Safeguarding Act 1995* (SA) of the suspected abuse of an older person or a person with disability is beyond the scope of this reference as it raises complex practice, privacy and policy implications and requires further consideration and consultation. SALRI therefore recommends, at this stage, against the imposition of mandatory reporting of the suspected abuse (including the abuse of an older person or a person with disability).¹⁹⁰

RECOMMENDATION 13

SALRI recommends that s 23 of the *Ageing and Adult Safeguarding Act 1995* (SA) should be amended to increase flexibility and better reflect the work of the Adult Safeguarding Unit. This should include a statement that following an assessment under this section, the Adult Safeguarding Unit must take any safeguarding action(s) that the Director (or their delegate) considers appropriate in the circumstances or, if no safeguarding action is required, take no further action (for the reasons currently detailed in ss 23(3)(c)(i)–(iii)).

SALRI considers that list of possible safeguarding actions should be included in the Code of Practice or Regulations, including:

1. Providing information or advice to the reporter, or other person(s) involved in the ongoing care or support of the adult (with such education to be able to be provided without consent of the individual).
2. Supporting a person to engage with alternative formal or informal supports.
3. Monitoring the issue (with basic monitoring to be able to occur without consent of the individual).
4. Investigating the matter (as in the current Act).
5. Referring the matter (as in the current Act)
6. Reporting the matter to a more appropriate body or agency.
7. Any other safeguarding action the Adult Safeguarding Unit considers appropriate in the circumstances.

RECOMMENDATION 14

SALRI recommends that a provision be inserted into s 23 of the *Ageing and Adult Safeguarding Act 1995* (SA) mandating that, where safe, practicable and appropriate, the reporter or the body or person who made a referral to the Adult Safeguarding Unit be notified about the outcome of an assessment.¹⁹¹

¹⁹⁰ See also Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) Recommendation 77.

¹⁹¹ The importance of closing the feedback loop was not only raised during SALRI's consultations, but in the Tetra Tech Year One Evaluation of the ASU as well.

RECOMMENDATION 15

SALRI recommends that ‘safeguarding’ should be explicitly included in the *Ageing and Adult Safeguarding Act 1995* (SA) as an action that the Adult Safeguarding Unit can take following an investigation commenced under s 26. Section 26 should **also** include an explicit power to refer a matter to SAPOL during the process of, or at the conclusion of, an investigation.

RECOMMENDATION 16

SALRI recommends that the practitioners in the Adult Safeguarding Unit should have the knowledge, expertise (including cultural awareness training and disability inclusion training) and capability to respond effectively to both elder abuse and the abuse and exploitation of persons with disability.¹⁹² SALRI further recommends that the Adult Safeguarding Unit practitioners have the necessary qualifications and expertise to understand the nuances of barriers and issues relating to Aboriginal communities, CALD backgrounds, elder abuse, disability issues and complex communication needs.¹⁹³

RECOMMENDATION 17

SALRI recommends that further guidance should be provided for the use of an investigation and investigation powers under sections 18, 19 and 26 of the *Ageing and Adult Safeguarding Act 1995* (SA), namely that:

1. The Code of Practice or Regulations should detail circumstances in which an investigation would be appropriate.¹⁹⁴
2. The Code of Practice or Regulations should include a definition of ‘serious abuse’.¹⁹⁵
3. The *Ageing and Adult Safeguarding Act 1995* (SA) should specify the actions that the Adult Safeguarding Unit can take once an investigation is complete. These should include safeguarding actions, referrals to police, and any other actions approved by the Director (or their delegate).
4. Section 23(4) should be replicated in s 26 to ensure that actions taken by the Adult Safeguarding Unit during an investigation are adequately recorded.

¹⁹² SALRI notes that several parties suggested that ASU should utilise a diverse range of skills and expertise, including the use of lawyer(s) where appropriate, including in more complex cases and/or those dealt with under s 24 of the *AAS Act*.

¹⁹³ The OFAW supported this recommendation and noted that this already occurs in practice.

¹⁹⁴ A strong theme of consultation was the present inflexibility with the mandatory actions that must be taken after an assessment is conducted. Another strong theme was that the distinction between an assessment and an investigation is blurred. This and the other recommendations in this Part are intended to address these concerns.

¹⁹⁵ In the interests of consistency, SALRI suggests that this definition, as with those recommended in recommendations 29–31, focus on the subjective impact on the abuse on the particular adult, rather than impose an objective standard or be guided solely by the nature and criminality of the act.

RECOMMENDATION 18

SALRI recommends the internal and external review provisions in the *Ageing and Adult Safeguarding Act 1995* should be amended as follows:¹⁹⁶

1. Adding a time frame into s 38 of the *Ageing and Adult Safeguarding Act 1995* (SA) within which the Chief Executive must conduct an internal review of a decision.
2. Amending s 38 and s 40 of the *Ageing and Adult Safeguarding Act 1995* (SA) to ensure that reasons for a decision at review are provided by the decision-maker.
3. Amending s 40(1) of the *Ageing and Adult Safeguarding Act 1995* (SA) to enable the Ombudsman to conduct or continue an external review process if in the public interest.

RECOMMENDATION 19

SALRI recommends that the *Ageing and Adult Safeguarding Act 1995* (SA) should be amended to allow the Director of the Adult Safeguarding Unit to delegate their functions to the Chief Adult Safeguarding Practitioner or other practitioner(s) where appropriate.¹⁹⁷

RECOMMENDATION 20

SALRI recommends that s 49 of the *Ageing and Adult Safeguarding Act 1995* (SA) should be amended to clarify that the identity of a person who makes a report of abuse is confidential, unless the person making the report has given consent for their identity to be revealed for a particular purpose, or identifying them is otherwise necessary such as where a report has been referred to police.

Part 6 – Decision-Making Capacity

RECOMMENDATION 21

SALRI recommends that the current definition of ‘impaired decision-making capacity’ in s 5 of the *Ageing and Adult Safeguarding Act 1995* (SA) should be retained and no changes are necessary.

RECOMMENDATION 22

1. SALRI recommends that the most suitable department or agency should draft capacity assessment guidelines in South Australia to be utilised as an educative tool for any interested member of the community or medical or other health practitioner.¹⁹⁸ Such guidelines should be concise, written in plain English and easily accessible formats (such as Easy read and videos) to all members of the community and should be made available in various translated languages.

¹⁹⁶ These recommendations were raised by the South Australian Ombudsman in their submission after various external reviews highlighted some shortcomings in the current review processes.

¹⁹⁷ This was raised by the ASU in SALRI’s current consultations and raised previously in the Tetra Tech Year One Evaluation of the ASU as an area of improvement to make the ASU processes more efficient and practicable.

¹⁹⁸ Given the assessment of capacity is a key feature of the work of ASU practitioners, this recommendation has both specific application for the ASU and general application.

2. SALRI further recommends that such guidelines should specifically address:
 - a. Implications of capacity and its assessment for Aboriginal communities and culturally and linguistically diverse communities, noting that such communities should be consulted to facilitate a process of co-design; and
 - b. Coercive behaviour, psychological abuse and undue influence, as it relates to free and voluntary decisions. To facilitate this, SALRI recommends that a similar list of ‘red flags’, as observed in the Queensland Capacity Assessment Guidelines, should be adopted. It should be noted that, in undertaking their role/functions, the Adult Safeguarding Unit must be aware of the significance and implications of coercive behaviour, psychological abuse and undue influence, including that such abuse may vitiate consent.¹⁹⁹

RECOMMENDATION 23

SALRI recommends that any determination under the *Ageing and Adult Safeguarding Act 1995* (SA) of whether the Adult Safeguarding Unit should override the consent of an adult who may be vulnerable to abuse with decision-making capacity must be made on a case-by-case basis.²⁰⁰

RECOMMENDATION 24

1. SALRI recommends that further training and education should be provided to relevant staff of the Adult Safeguarding Unit regarding the assessment of capacity.
2. Further, SALRI recommends that a clinical capacity assessment may be sought in complex cases where it is reasonably suspected the adult’s decision-making capacity to reach a voluntary choice is partially or completely subordinated due to the presence of coercive behaviour, psychological abuse or undue influence. This assessment may be undertaken by a psychiatrist, geriatrician, general practitioner, clinical psychologist or neuropsychologist.

Part 7 – Consent and Coercion

RECOMMENDATION 25

SALRI recommends that a statutory definition of ‘consent’ should be included in the *Ageing and Adult Safeguarding Act 1995* (SA) which defines consent as ‘a free and voluntary decision’. SALRI further recommends that this definition should include the vital premise drawing on s 8(1)(k) of the *Voluntary Assisted Dying Act 2021* (SA) that every person vulnerable to abuse has the right to make decisions requiring their consent under the *Ageing and Adult Safeguarding Act 1995* (SA) freely, and not as a consequence of the suggestion, pressure or coercion of others.

¹⁹⁹ There is increasing awareness of the nature and effects of coercive behaviour and psychological abuse, and that such abuse may result in a lack of decision-making capacity and/or render consent invalid owing to a lack of free and voluntary decision. These behaviours are not limited to relationships between domestic partners. These were recurring themes in SALRI’s consultation and recent research.

²⁰⁰ The ASU practitioner, whilst respecting the presumption of capacity, autonomy and supported decision-making, should be alive to the possible presence and effects of coercive behaviour, psychological abuse or undue influence and that such abuse may result in a lack of decision-making capacity and/or render consent invalid owing to a lack of free and voluntary decision.

RECOMMENDATION 26

SALRI recommends that, in deciding whether to take action under s 24 of the *Ageing and Adult Safeguarding Act 1995* (SA), the Adult Safeguarding Unit should be encouraged to intervene at an early stage before the abuse escalates, where it is appropriate in all of the circumstances.

RECOMMENDATION 27

SALRI recommends that the term ‘serious criminal offence’ in s 24(4)(a)(ii) of the *Ageing and Adult Safeguarding Act 1995* (SA) should be defined. This definition should provide that what constitutes a serious criminal offence is to be determined by the outcome of such an offence (current or potential) in that such an offence has resulted, or will result, in a substantial adverse impact on the individual who may be vulnerable to abuse and/or their ordinary quality and standard of living. The impact on the individual must be determined on a case-by-case basis and cannot be determined by the classification of the offence or the penalty of the offence under the criminal law.

RECOMMENDATION 28

SALRI recommends that s 24(4)(a) of the *Ageing and Adult Safeguarding Act 1995* (SA) should be amended to widen the circumstances in which the Adult Safeguarding Unit may²⁰¹ be entitled to intervene without the consent of the relevant individual to include ‘serious financial abuse’.²⁰²

RECOMMENDATION 29

SALRI recommends that ‘serious financial abuse’ should be defined in the *Ageing and Adult Safeguarding Act 1995* (SA) by reference to the outcome or potential outcome of such abuse on the apparent victim in that such abuse will result in a substantial adverse impact on the individual who may be vulnerable to abuse and/or their ordinary quality and standard of living.

SALRI further recommends that ‘serious financial abuse’ should be determined on a case-by-case basis.²⁰³ When deciding whether the abuse meets this threshold, the Adult Safeguarding Unit may draw upon the following as non-exhaustive examples of serious financial abuse:²⁰⁴

²⁰¹ The ASU’s power to intervene under the *AAS Act* should be utilised with diligence and care. Intervention should not be mandated, but depend upon an individual judgement in each case. Many parties pointed out to SALRI that, whilst supporting this threshold, intervention may leave the person at risk of abuse in an even worse situation.

²⁰² SALRI notes that autonomy and safeguarding are not mutually inconsistent and, whilst obviously very important, an apparent victim choosing to remain in a serious abusive situation and not consent to ASU intervention cannot be conclusive. There was wide, but not universal, support for this proposition in SALRI’s consultation. It proved a prominent topic in consultation. There was particular support to SALRI for the view that the ability of the ASU to intervene should extend to serious financial abuse, noting that in practice it is typically accompanied by coercion, psychological abuse and undue influence.

²⁰³ It is impossible to define serious financial abuse by reference to either monetary value or the penalty attached to any offence. What is a modest sum to one victim, may be a large amount to another.

²⁰⁴ Whether this list of factors be included in the *AAS Act*, Regulations or Code of Practice is a matter for the Minister, Parliament and Parliamentary Counsel.

- a. Risk of homelessness;
- b. Being moved into a residential aged care facility against the wishes of the apparent victim and at their personal expense;
- c. Selling or transferring assets (including a home) against the wishes of the apparent victim;
- d. Inability to financially support activities of the apparent victims' ordinary life such as grocery shopping, medication, rent, and other basic necessities;
- e. Withholding money or preventing access to funds;
- f. Misuse of a Power of Attorney (or Enduring Power of Attorney);
- g. Misuse of the powers and functions of a Trustee;
- h. Exerting undue influence to give away assets or gifts;
- i. Pressuring the adult who may be vulnerable to abuse to make or change their estate planning measures.²⁰⁵

RECOMMENDATION 30

SALRI recommends that when determining whether to override the decision of an adult with decision-making capacity under s 24(4) of the *Ageing and Adult Safeguarding Act 1995* (SA), the Adult Safeguarding Unit should take into account the following, non-exhaustive, list of factors.²⁰⁶

- a. The decision-making capacity of the adult;
- b. The adult's autonomy and right to make 'poor decisions';
- c. The influence of culture, family and language;
- d. The nature/dynamic of the relationship and its significance to the adult;
- e. The underlying premise of the influence (religion, cultural expectation/norm, obligation);
- f. The risk of displacement or destitution from preferred residence;
- g. The validity of consent and whether a decision was made freely and voluntarily;
- h. The gravity of the abuse (whatever form(s) it may take);
- i. The presence of psychological abuse and its severity and effects;
- j. The potential outcomes of the proposed actions for the adult who may be vulnerable to abuse and any other relevant parties; and
- k. Whether the coercive conduct justifies the Adult Safeguarding Unit's intervention and subsequent interference with the adult's decision-making autonomy.

SALRI further recommends that where consent is overridden in the case of an adult with decision-making capacity, that intervention should be necessary, reasonable and proportionate.

²⁰⁵ Estate planning measures includes wills, enduring guardianship, powers of attorney and superannuation nominations.

²⁰⁶ Whether this list of factors be included in the *AAS Act*, Regulations or Code of Practice is a matter for the Minister, Parliament and Parliamentary Counsel.

Part 8 - Definition of Vulnerable

RECOMMENDATION 31

1. SALRI recommends replacing the term ‘vulnerable adult’ used in the *Ageing and Adult Safeguarding Act 1995* (SA) with ‘relevant adult’.²⁰⁷

Specifically, SALRI recommends s 3 of the *Ageing and Adult Safeguarding Act 1995* (SA) define:

- a. ‘Relevant adult’ as ‘an adult who may be vulnerable to abuse’.
 - b. ‘Adult’ as a person 18 years and older.
2. When determining whether an adult may be vulnerable to abuse, the Adult Safeguarding Unit should take into account the following, non-exhaustive, list of factors:
 - a. age,²⁰⁸ or
 - b. disability; or
 - c. social isolation; or
 - d. ill health; or
 - e. dependence on others (social, financial, or otherwise); or
 - f. mental illness, or
 - g. cognitive impairment; or
 - h. cultural and language barriers; or
 - i. adults living in regional, remote or rural areas; or
 - j. education; or
 - k. gender; or
 - l. sexual orientation.²⁰⁹

Part 9 – Definition of Abuse

RECOMMENDATION 32

SALRI recommends that the *Ageing and Adult Safeguarding Act 1995* (SA) should be amended to include the following definition of abuse: ‘Abuse is defined as — an act or series of acts, including lack of appropriate action, occurring within a relationship of trust, dependency or imbalance of power,’²¹⁰

²⁰⁷ The use of a short term in legislation was considered essential for operational reasons.

²⁰⁸ There was substantial support to SALRI for the notion that classifying either age or disability or other factors as automatically giving rise to vulnerability under the *AAS Act* is inappropriate and unhelpful. It was made clear to SALRI that an age of vulnerability should not be prescribed and therefore definitions of age as they relate to the Office for Ageing Well should not be imported into the ASU’s consideration of age as a vulnerability factor.

²⁰⁹ Whether this list of factors be included in the *AAS Act*, Regulations or Code of Practice is a matter for the Minister, Parliament and Parliamentary Counsel.

²¹⁰ This formulation of the situation or relationship giving rise to the abuse to fall within the ASU’s remit received considerable support in SALRI’s consultation. The essential feature of elder abuse (and SALRI was told of the abuse and exploitation of persons with disability) is the existence of a relationship or trust and/or power imbalance. ‘Characteristics of the relationship identified in the definition are a relationship of trust or a power imbalance’: Lixia Qu et al, Australian Institute of Family Studies *National Elder Abuse Prevalence Study* (Research Report, 2021) 20. See also at: 17, 18, 19, 31–2, 164–5. This definition draws on the widely used World Health Organisation definition.

which causes harm or distress to a vulnerable adult. For the purposes of this definition, this may include, but is not limited to:

- a. Financial abuse; or
- b. Physical abuse; or
- c. Psychological or emotional abuse; or
- d. Sexual abuse; or
- e. Neglect; or
- f. Social abuse.

Part 10 – Civil and Criminal Redress for Abuse

RECOMMENDATION 33

SALRI recommends that the roles and powers presently found in sections 31 to 37 of the *Ageing and Adult Safeguarding Act 1995* (SA) (or equivalent powers) should be conferred upon the South Australian Civil and Administrative Tribunal in preference to the Magistrates Court.²¹¹

RECOMMENDATION 34

SALRI recommends that incidental changes should be made to sections 31 to 37 of the *Ageing and Adult Safeguarding Act 1995* (SA), in particular s 33, to support and strengthen the powers available to the South Australian Civil and Administrative Tribunal,²¹² including adding to the existing orders listed in s 33, a new power to allow the South Australian Civil and Administrative Tribunal to order compensation or restitution for loss, damage or harm resulting from abuse in an appropriate case.²¹³

²¹¹ The cost, accessibility, role, expertise and flexible processes of South Australian Civil and Administrative Tribunal (SACAT) were widely noted to SALRI (as also expressed to SALRI in the EPA reference), along with the fact that SACAT already deals with closely linked areas such as guardianship and administration. It is also thought that the SACAT procedure will complement and support the role of the ASU. SACAT advised SALRI that they hold no concerns regarding this proposed additional jurisdiction and that this jurisdiction would be exercised by the SACAT President or a senior Member.

²¹² SALRI is not proposing more radical suggestions such as a new statutory civil remedy through SACAT comparable to the equitable doctrine of undue influence.

²¹³ Acknowledging the input of Stephen McDonald SC of the SALRI Advisory Board, SALRI offers the below revised version of s 33 as a possible model.

‘33—Orders that may be made

(1) If, on an application under this Act, the Tribunal is satisfied that it is appropriate to do so, the Tribunal may make 1 or more of the following orders in relation to a vulnerable adult:

- (a) an order authorising or requiring an examination or assessment of a specified kind of the vulnerable adult;
- (b) an order requiring a specified person to do a specified thing, or to refrain from doing a specified thing, in respect of the vulnerable adult;
- (c) an order authorising the Adult Safeguarding Unit, the Director or an authorised officer to take specified action where the vulnerable adult has refused to consent to the taking of that action;
- (d) such other orders as may be necessary or appropriate to enable the functions conferred on the Adult Safeguarding Unit under this Act to be performed in respect of the vulnerable adult;
- (e) such consequential or ancillary orders as the Tribunal thinks fit, including but not limited to an order requiring a specified person to pay an amount by way of compensation or restitution to a vulnerable adult who has suffered loss, harm or damage.

(2) The Tribunal may make such interim orders in relation to an application under this Act as the Tribunal thinks fit.

RECOMMENDATION 35

SALRI recommends that Division 6 of the *Ageing and Adult Safeguarding Act 1995* (SA) should be amended to allow any interested party to seek an order of the kind listed in ss 33(1)(a), (b) and (c). SALRI notes that this will enable ‘any party with a legitimate interest in the matter’ to bring an action.²¹⁴ In these cases, the Director should not automatically be a party to that proceeding, but may choose to be added as an interested party.

RECOMMENDATION 36

SALRI reiterates its view from its Report into the role and operation of Powers of Attorney that the South Australian Civil and Administrative Tribunal should be conferred with the jurisdiction to deal with disputes and claims of misuse as to Powers of Attorney, including interim and incidental orders. SALRI recommends that the relevant recommendations (81–92) from its Report into the role and operation of Powers of Attorney should be implemented in South Australia.²¹⁵

RECOMMENDATION 37

SALRI considers that a new crime of elder abuse (or such similar crime in relation to persons who may be vulnerable to abuse such as persons with disability) is unnecessary in South Australia.²¹⁶

RECOMMENDATION 38

SALRI recommends that further consultation and research should be undertaken to consider whether any new offence of coercive control should be extended beyond domestic partners to other family members or other relationships where the victim is vulnerable, including older persons and persons with disability.²¹⁷

(3) The Tribunal may, on an application by a party to the proceedings, vary or revoke an order under this section.’

²¹⁴ SALRI has been told this may be a family member who uncovers the financial or other abuse of a vulnerable adult and wishes to intervene, especially if speed is required (say where the abusive family member is about to dispose of a major asset). The Supreme Court will remain available, typically for more complex claims.

²¹⁵ SALRI’s recommendation that the powers in ss 31 to 37 of the *AAS Act* (or equivalent powers), and the recommended associated changes, to be conferred upon SACAT, complements the recommendations in SALRI’s POA Report for a new statutory remedy for the misuse of a POA to be vested in SACAT along with interim and incidental powers (see Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) Recommendations 81–92).

²¹⁶ SALRI is of the view that the problem is not the absence of an applicable offence, but rather issues and problems in enforcement of the present law. Most of the misconduct that would be within such a specific crime is caught by existing offences. See also Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought it Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 68 [6.52], finding 36; Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 369 [13.27]; Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, 2022) 42. SALRI remains of the view that a new specific crime in South Australia for the abuse of an EPA is also unnecessary and existing general offences of dishonesty are adequate; the issue again is the enforcement of such laws. See also Sylvia Villios et al, South Australian law Reform institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020). Recommendation 95, 290–4 [7.3.10]–[7.3.19], 316 n 1671, 307 [7.4.64].

²¹⁷ See also Parliament of New South Wales, Joint Select Committee on Coercive Control, ‘Coercive Control in Domestic Relationships’ (Report, 2021) 95–6 [5.75]–[5.81]. In its consultation, SALRI was often told about the complexities of coercive control and the difficulties that it can cause in regard to identifying abusive behaviours

RECOMMENDATION 39

SALRI recommends that the Adult Safeguarding Unit should develop clear criteria and processes to assess the utility of an intervention order under the *Intervention Orders (Prevention of Abuse) Act 2007* (SA) in response to reports of the suspected abuse of an adult vulnerable to abuse. This should include, in appropriate cases, possible referral of a case to SAPOL for their consideration whether to apply for an intervention order.²¹⁸ This should include cases where action is taken without the victim's consent under s 24 of the *Ageing and Adult Safeguarding Act 1995* (SA).²¹⁹ It is also recommended that the Adult Safeguarding Unit should consider how it may assist persons vulnerable to abuse and/or their representatives to make a private application to the Court for an intervention order in appropriate cases.²²⁰

Part 11 – Implications for Aboriginal Communities and Diverse Communities

RECOMMENDATION 40

SALRI recommends that educational resources relating to abuse, and the functions/role of the Office for Ageing Well and the Adult Safeguarding Unit should be translated into community languages present within South Australia and widely published across Government, legal and medical service providers, and community organisations (including groups representing older persons, Aboriginal advocacy and community organisations, disability advocacy and community organisations and multicultural organisations). SALRI further recommends that this translated material could contain information on various topics including, but not limited to:

- a. Relevant contacts — both Government departments and community organisations;
- b. How to access information, services and support — such as interpreters, translators and legal practitioners;
- c. Understanding rights and responsibilities;
- d. Identifying signs or triggers of incapacity;
- e. Identifying signs of financial abuse or exploitation; and
- f. How to report known or suspected cases of abuse.

and in obtaining valid consent. These complexities also emerge in much of the limited research undertaken to date. Having regard to both SALRI's current terms of reference and the resulting limitations of both the consultation and the wider research in this area undertaken to date SALRI is not expressing any view in regard to the appropriate outcome of any enquiry into an offence of coercive control and who, if anyone, should be covered within any such offence. SALRI supports further research and consultation with interested parties in this area before any decision is made.

²¹⁸ See also Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 62–5 [6.27]–[6.43].

²¹⁹ See above Recommendations 27–32. SALRI emphasises that it is not saying such cases must be referred to SAPOL, but may be referred. It will depend upon the circumstances of each case and the considered assessment and judgement of the ASU.

²²⁰ See *Intervention Orders (Prevention of Abuse) Act 2009* (SA), s 20(1)(b).

RECOMMENDATION 41

SALRI recommends that the Adult Safeguarding Unit should undertake further measures to promote greater awareness of its role in rural, regional and remote communities, including how to make reports to the Adult Safeguarding Unit relating to the suspected abuse of vulnerable adults.²²¹ As part of this increased promotion, the Adult Safeguarding Unit should make increased provision and avenues for residents in rural, regional and remote communities to make reports of the suspected abuse of an adult who may be vulnerable to abuse.

RECOMMENDATION 42

SALRI recommends that the Adult Safeguarding Unit should take further measures to promote greater awareness of its role in Aboriginal communities and how to make reports²²² to the Adult Safeguarding Unit of the suspected abuse of adults vulnerable to abuse. The Adult Safeguarding Unit should also make improved provision and avenues for members of Aboriginal communities to provide reports in an effective and culturally sensitive manner.²²³

RECOMMENDATION 43

SALRI recommends that consideration be given to:

1. The establishment of appropriate position(s) for an ASU practitioner(s) in each regional area or Local Health Network; and
2. The establishment of appropriate position(s) within the ASU for an Aboriginal Advocate(s) or Aboriginal Liaison Officer(s) in metropolitan and regional areas; and
3. The availability of accredited and independent interpreters and the use of suitable and culturally and linguistically appropriate capacity assessment tools for people from Aboriginal communities and CALD individuals.

RECOMMENDATION 44

SALRI recommends that quality assurance measures are adopted to ensure translated materials are accurate and that educational materials be distributed by various platforms and in a number of formats.²²⁴

²²¹ SALRI notes that the ASU only operates Monday to Friday from 9am–5pm. The ASU is based in Adelaide. There was disquiet often voiced to SALRI in regional and rural communities as to the ASU's perceived lack of a presence or profile outside Adelaide and various suggestions were made for the ASU to enhance awareness in such communities of its role and how to make reports. See further below Part 11.

²²² During consultation parties highlighted to SALRI the importance of diverse and culturally appropriate avenues for members of Aboriginal communities to be able to make a report to the ASU.

²²³ SALRI again notes that the ASU only operates Monday to Friday from 9am–5pm. The ASU is based in Adelaide. Elders and members of Aboriginal community groups and health agencies and service providers and health practitioners noted their disquiet to SALRI as to the effectiveness and cultural soundness of reporting suspected abuse within Aboriginal communities. It was often noted that it is unlikely members of Aboriginal communities will simply call an Adelaide phone number or send an email.

²²⁴ This could include ethnic television or radio programs, community radio stations and community education sessions; digital and print fact sheets/brochures; the national relay service; audio files; videos and graphics; and social media.

Part 12 – Other Issues

RECOMMENDATION 45

SALRI recommends that any consequential or incidental amendments should be made to the *Ageing and Adult Safeguarding Regulations 2019* (SA), *Charter of the Rights and Freedoms of Vulnerable Adults*,²²⁵ and Standard Operating Procedures required as a result of any adopted recommendations from this Report to amend the *Ageing and Adult Safeguarding Act 1995* (SA).

RECOMMENDATION 46

SALRI notes the suggestion of microboards to provide for the long-term care of older persons and/or persons with disability has apparent merit, but it is beyond the scope of this reference. SALRI recommends that it should undertake a future reference in close consultation with interested parties to examine the role and operation and implications of microboards.²²⁶

²²⁵ For example, the name of the Charter should be updated in line with any changes made to the terminology used in the Act.

²²⁶ See Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report, no 15, December 2020) Recommendation 118. This issue arose surprisingly often in both SALRI's EPA and present consultation as an alternative to both an EPA and an order of guardianship. See further at 405–11 [10.1.1]–[10.1.21].

Part 1 – Background

1.1 The South Australian Law Reform Institute

1.1.1 This Report contains the independent statutory review by the South Australian Law Reform Institute (SALRI) of the operation of the *Ageing and Adult Safeguarding Act 1995* (SA).

1.1.2 SALRI is an independent non-partisan law reform body based at the University of Adelaide Law School. SALRI conducts inquiries or references into various areas of the law. It is assisted by an expert Advisory Board. The subject of a reference is determined by the SALRI Advisory Board and may be at the request of other parties such as the South Australian Attorney-General, the Law Society of South Australia (‘the Law Society’) or other sources (in this case, the State Minister for Health and Wellbeing). SALRI conducts extensive multidisciplinary research and looks at similar law and practice and its operation in other jurisdictions (both in Australia²²⁷ and overseas).²²⁸ SALRI consults widely with interested parties, experts and the community. Based on the work and research undertaken during an inquiry, SALRI makes recommendations to the Attorney-General (and in this reference the Minister for Health and Wellbeing) so that the Government and South Australian Parliament can make informed decisions about any appropriate changes to the law. SALRI’s recommendations do not necessarily become law. Rather, any decision on accepting and implementing its recommendations is entirely for the Government and South Australian Parliament.

1.1.3 SALRI was established in December 2010 under an agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia²²⁹ and is assisted by an expert Advisory Board. SALRI is based on the Alberta law reform model, which is also used in Tasmania,²³⁰ and is linked to the Law Reform elective course at the University of Adelaide. The class work undertaken in the Law Reform elective plays a valuable role in informing and supporting SALRI’s work (including this reference).

²²⁷ See also Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 71–3 [6.66]–[6.71]. SALRI notes that interstate law and practice, whilst persuasive and illustrative, cannot be simply adopted in South Australia. A NSW barrister, for example, in consultation highlighted that the relevant law and practice (and indeed culture) is different in NSW.

²²⁸ In the context of the present review, several parties favoured the multiagency UK approach to adult protection. See *Care Act 2015* (UK). See also Rae Kaspiew, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, 2016) 41–2, 43–4. The passage of the *Care Act* places on a statutory basis the duties imposed on local authorities by Article 5 of the *European Convention on Human Rights* to intervene where adult abuse is suspected (see *Re A and Re C* [2010] EWHC 978 (Fam)). The *Care Act* requires every local authority to set up a multi-agency Safeguarding Adults Board (‘SAB’) in their area. The Act provides that membership of a SAB must include the local authority, the chief officer of police and a local representative of the National Health Service. SALRI notes the UK approach, however the UK operates to a very different constitutional, legal, service, cultural and geographical landscape to South Australia and the application of the UK model in a South Australian context is problematic. Any international model in this area must be adapted for the ‘the idiosyncrasies of such legislation in the Australian context’: South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1719 (Stephen Wade).

²²⁹ SALRI can be seen as the successor to the Law Reform Committee of South Australia which operated between 1968 and 1987. During its operation, the Law Reform Committee produced a remarkable output of 106 reports. See <<https://law.adelaide.edu.au/research/south-australian-law-reform-institute>>.

²³⁰ See Kate Warner, ‘Institutional Architecture’ in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 55, 62–4, 68. There are close links and joint research between SALRI and the Tasmania Law Reform Institute.

1.1.4 When undertaking its work, SALRI has a number of objectives. These include to identify law reform options that would modernise the law, fix any problems in the law, consolidate areas of overlapping law, remove unnecessary laws, or, where desirable, bring South Australian law into line with the law of other States and Territories.²³¹ Under its guiding objectives, SALRI is required to consider the case for uniform laws where desirable. This issue arises in the present reference.²³² The issues raised in the adult safeguarding context are the shared responsibility of Commonwealth, State and Territory:

Among the nine legal jurisdictions within Australia there are a number of laws that have particular relevance to older Australians. At the Commonwealth level, legislation in the areas of aged care, superannuation, social security and veteran's entitlements is of particular relevance as we age. In state and territory jurisdictions, legislation relating to substitute decision-making, guardianship, retirement villages, wills and probate affects the population as it ages. Criminal matters, such as fraud and other forms of financial abuse, are dealt with primarily at the state and territory level, although Commonwealth legislation covers certain criminal matters. Unlike a number of overseas jurisdictions, there are no specific laws in Australia dealing with what might be broadly classed as 'elder abuse'.²³³

1.1.5 The service and constitutional landscape is complicated which 'makes responding to elder abuse a complex issue — both from the perspective of laws, but also in terms of practical responsibility'.²³⁴ There is no single regulatory or oversight body at either a state or national level, with both Government and non-government agencies operating. The role of the Commonwealth has expanded significantly following the introduction of the NDIS and Commonwealth aged care regulation. This raises vexed constitutional implications, and it has been suggested that the Commonwealth has 'covered the field' with respect to both the regulation of aged care and disability services and rendered state interventions, potentially extending so far as safeguarding bodies, invalid. This view was challenged in SALRI's consultation as many individuals with disability are not even

²³¹ The issue of uniformity is especially significant in the context of succession law. See Queensland Law Reform Commission, National Committee for Uniform Succession Laws, *Family Provision: Report to the Standing Committee of Attorneys General* (Miscellaneous Paper No 2, December 1997) ii–iii.

²³² Legislative Council General Purpose Standing Committee No 2, Parliament of NSW, 'Elder Abuse in New South Wales' (Report No 44, June 2016) 23–4 [3.36]–[3.39]; Select Committee into Elder Abuse, Legislative Council of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 71–3 [6.66]–[6.71]. There has been a shift over recent years from a largely State based model to an increasingly Commonwealth based system. To add to the complications, service providers and regulatory bodies, both Government and non-Government, operate at both a State and national level.

²³³ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, 'Older People and the Law' (Report, September 2007) [1.7]. 'Elder abuse offers one example where the myth of Commonwealth dominance can be exposed; outside the *Aged Care Act 1997* (Cth) and the *Home and Community Care Act 1985* (Cth), the Commonwealth has only limited constitutional capacity to effect an adult protection regime that would safeguard all vulnerable older persons. The Commonwealth does not have the constitutional ability to effect a comprehensive elder abuse prevention and response framework, other than through funding a scheme that would be largely administered by state and territory agencies, including public advocates, guardianship boards, public trustees, police and emergency services, legal services and advocacy bodies. In the absence of a national framework, the states and territories have developed strategies for coordinated inter-agency approaches to responding to elder abuse, but these are presently contained in variable and relatively weak policy instruments, if they exist at all.' Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' (2014) 36(1) *Sydney Law Review* 99, 102.

²³⁴ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 48 [2.75]. This theme was often highlighted in SALRI's consultation. One Port Pirie service provider noted that, given even experts struggle to understand the 'bewildering array' of agencies dealing with elder abuse and the abuse of persons with disability, 'what hope does the ordinary person have, especially someone with disability or low literacy'.

within NDIS, coverage for which stops at age 65, and many older people have no need to access aged care services. It is beyond the scope of this Report to enter this involved legal and constitutional area.²³⁵

1.1.6 Additionally, it is very difficult, even for an experienced practitioner, to know where to report what abuse and which agency is responsible for what response. There will also be situations where abuse is multifaceted and the ASU should retain a safeguarding role. SALRI was presented with powerful and apparently not unique case examples of such abuse, featuring abuse that gives rise to both Commonwealth and State regulatory remit. There is a need for clear protocols and understanding between the ASU and Commonwealth agencies of their respective roles and operational practices. As a 2016 Australian Institute of Family Studies (‘AIFS’) study noted:

[R]esponses to the management and prevention of elder abuse sit within a range of complex policy and practice structures across different levels of government, and various justice system frameworks within the private sector and across non-government organisations.²³⁶

1.1.7 Similar issues arise in the response to the abuse and exploitation of persons with disability.²³⁷ This is particularly the case following the introduction of the National Disability Insurance Scheme (‘NDIS’).

1.1.8 An additional premise of law reform is to promote the clarity, comprehension and accessibility of the law. SALRI adopts the view of Kirby J in this context: that law reform exists to promote ‘the right of citizens ... to have the most modern, well-informed, efficient system of law that the state can reasonably provide.’²³⁸ SALRI has sought to follow this approach in this reference.

1.2 Terms of Reference and Scope

1.2.1 SALRI has been commissioned to conduct the independent review of the *Ageing and Adult Safeguarding Act 1995* (SA) under s 53 of the operation of this Act and to prepare a report on the review to the relevant Minister. SALRI’s terms of reference are set out in the Project Brief. SALRI’s review of the Act includes, but is not limited to, the following points:

- The extent to which the Act is achieving its purpose.
- Improvements that could be made to the operation of the Act, including interpretations and definitions (Part 1); functions of the Office for Ageing Well (Part 2); Adult Safeguarding Unit principles, functions, scope, powers of authorised officers (Part 3) and provisions set out in Parts 4, 5, 6 and 7.

²³⁵ However, it may impact on the ASU’s ability to bring proceedings in certain cases before SACAT, should that power be made available to them: see below Part 10.2.

²³⁶ Rae Kaspiew, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, 2016) 1.

²³⁷ 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) 23 [2.27], 24–5 [2.31]. ‘[E]ach jurisdiction has its own policy and legal frameworks that are not necessarily consistent or clear ... Disability advocates and people with disability described mechanisms that are complicated and inadequate in terms of access and enforceable outcomes’: 34 [2.63]–[2.64].

²³⁸ Michael Kirby, ‘Changing Fashions and Enduring Values in Law Reform’ (Speech at the Conference on Law Reform on Hong Kong: Does it Need Reform?, University of Hong Kong, 17 September 2011) <<http://www.alrc.gov.au/news-media/2011/changing-fashions-and-enduring-values-law-reform>>.

1.2.2 The scope of this review is limited to the operation of the *AAS Act*, with a focus on the extent to which the present Act is achieving its purpose(s) and any changes that could be made to clarify or improve present law and practice. This includes any suitable changes to law and practice relating both to the OFAW and the scope and powers of the ASU. SALRI considered independent evaluations of the ASU as well as their policies, protocols and operations in the process of producing this Report. It is beyond the scope of SALRI's reference to examine the organisational structure of the ASU, its administrative operation (such as funding and staffing) or the day-to-day operations of the ASU. SALRI's focus is on the operation of the OFAW and ASU in relation to their intended purpose under the *AAS Act*.

1.2.3 When introducing the *AAS Act*, the then Minister for Health and Wellbeing explained of the requirement for a statutory review:

The operation of the Act will also be independently reviewed within its first three years of operation to ensure that it is meeting the needs and expectations of the South Australian community. This Bill is the first of its kind in Australia. This Bill is an important milestone for South Australia and I trust it will lead the way for adult safeguarding reform across the nation.²³⁹

1.2.4 The terms of reference for this review were set out by the State Government. SALRI has, however, not taken a rigid or mechanical approach,²⁴⁰ but it is bound by its terms of reference.²⁴¹ This is a statutory review of the operation of the *AAS Act* and is not and could not be the wider systematic review several parties urged SALRI to make. A number of topics were raised in SALRI's consultation that, whilst significant, were outside SALRI's terms of reference and therefore have not been the subject of detailed consideration in this Report.²⁴²

1.2.5 SALRI has recommended that there should be a further review of the operation of the *Ageing and Adult Safeguarding Act 1995* (SA) after five years and that this review should include consideration of the roles and operation of the ASU, the OFAW, and the wider adult safeguarding context and landscape.²⁴³ Given the ongoing developments in this area in service delivery and research, a review of this nature was supported by a number of interested parties to SALRI. Such a review should have a wider focus on the broad context in which the Act exists and not be restricted to a review of the operation of the *AAS Act*.

²³⁹ South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1717 (Stephen Wade).

²⁴⁰ One Government MP in the 2018 debate raised the review's expectations as follows: 'That independent review will reveal whether or not the unit is meeting community expectation and, even more importantly, whether it is meeting the needs of vulnerable adults in our community. That review will hold this Government to account and ensure that we are able to continue to ensure that we are progressing in a manner consistent with the wishes of the people of South Australia': South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3552 (Fraser Ellis).

²⁴¹ Several parties such as COTA (SA) asked SALRI to take an expansive approach.

²⁴² See below Part 12.1.

²⁴³ See also Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) Recommendation 120. See also at: 429–31 [10.5.24]–[10.5.31].

1.2.6 It is also beyond the scope of this Report to discuss or consider in detail all of the complex law and practices in South Australia (let alone interstate) involving a plethora of different Acts and various agencies²⁴⁴ relating to the protection of vulnerable adults.

1.3 Consultation Approach

1.3.1 SALRI is committed to an impartial, inclusive and accessible consultation process with the South Australian community, and all interested parties including, but not confined to, the ‘usual suspects’.²⁴⁵ SALRI is particularly keen to include rural, regional²⁴⁶ and Aboriginal²⁴⁷ communities in its consultation. Such wide and inclusive consultation is integral to modern law reform. As Neil Rees has observed:

Effective community consultation is one of the most important, difficult and time consuming activities of law reform agencies ... community participation has two major purposes: to gain responses and feedback and to promote a sense of public ‘ownership’ over the process of law reform ... consultation often brings an issue to the attention of the public and creates an expectation that the government will do something about the matter.²⁴⁸

²⁴⁴ These agencies include the ASU, the Office of the Public Advocate, the Public Trustee, SAPOL, SACAT and the Legal Services Commission as well as interested NGOs such as ARAS and the Elder Abuse Unit of Uniting Communities. It is a very complex field with both Commonwealth and State Government and non-Government implications.

²⁴⁵ Michael Kirby, ‘Are We There Yet’ in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 433, 436. See further Sarah Moulds, ‘Community Engagement in the Age of Modern Law Reform: Perspectives from Adelaide’ (2017) 38(2) *Adelaide Law Review* 441.

²⁴⁶ Aidan Curtis, ‘SALRI visits Upper Spencer Gulf for Community Consultations on Vulnerable Adult Safeguarding and Mental Health’, *Port Pirie Recorder* (online, 20 May 2022), <<https://www.portpirierecorder.com.au/story/7747188/law-reform-institute-meets-with-local-experts/>>. The need to include a remote, rural and regional perspective, both generally and in the context of this reference, was highlighted to SALRI by the Member for Sturt, the Hon Geoff Brock MP, the Port Pirie Deputy Mayor, Alan Zubrinich, Dr Mark Giancaspro and regional legal and health practitioners and service providers. See also Law Council of Australia, *The Justice Project: Rural, Regional and Remote (RRR) Australians* (Final Report, August 2018).

²⁴⁷ SALRI is committed to honest and respectful engagement with Aboriginal communities. See Shari Hams, ‘Law Students Learn about Injustices for Aboriginal People in SA’s Court System’, *ABC News* (online, 30 July 2021) <<https://www.abc.net.au/news/2021-07-30/law-students-learn-injustices-aboriginal-people-face/100336256>>; Aidan Curtis, ‘Elders Meet with SALRI on how the Law can better include Aboriginal Communities’, *The Transcontinental* (Port Augusta) (online, 25 May 2022) <<https://www.transcontinental.com.au/story/7753043/elders-have-their-say-on-law-reform/>>. See also Law Council of Australia, *The Justice Project: Aboriginal and Torres Strait Islanders* (Final Report, August 2018) 7–10. SALRI is grateful for the insightful contribution of Charlie Jackson OAM and other Aboriginal Elders and members of Aboriginal community organisations to this reference, including for raising other areas of law reform concern, especially for Aboriginal communities. There are regular criticisms of token or perfunctory consultation with Aboriginal communities. See Melinda Miller, ‘Consultation with Aboriginal and Torres Strait Islander People in Early Childhood Education: The Impact of Colonial Discourses’ (2015) 42(5) *Australian Educational Researcher* 549, 553; Kylie Lingard, ‘The Impact of the Law on Consultation Practices and Purpose: A Case Study of Aboriginal Cultural Heritage Consultations in NSW’ [2012] (1) *International Journal of Rural Law and Policy* 1; Janet Hunt, Australian Institute for Family Studies, *Engaging With Indigenous Australia: Exploring the Conditions for Effective Relationships with Aboriginal and Torres Strait Islander Communities* (Issues Paper No 5, 2013) 30.

²⁴⁸ Neil Rees, ‘The Birth and Rebirth of Law Reform Agencies’ (Conference Paper, Australasian Law Reform Agencies Conference, Vanuatu, 10–12 September 2008), <http://www.lawreform.vic.gov.au/sites/default/files/ALRAC%2BPaper%2B_NeilRees.pdf>. See also Roslyn Atkinson, ‘Law Reform and Community Participation’ in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 160; Michael Kirby, ‘Changing Fashions and Enduring Values in Law Reform’ (Speech, Conference on Law Reform on Hong Kong: Does it Need Reform?, University of Hong Kong, 17

1.3.2 This reference has involved comprehensive research and consultation. SALRI visited Berri, Port Lincoln, Clare, Port Pirie, Port Augusta, Naracoorte and Mount Gambier. The consultation proved an onerous exercise owing to the ongoing presence of COVID-19 in the community.

1.3.3 SALRI contacted a wide range of community groups, legal practitioners, health practitioners, disability advocates, aged rights advocates, professional bodies, affected agencies, experts in the area and potential interested parties to invite them to take part in consultation or provide their comments. These parties included the South Australian Bar Association,²⁴⁹ the Law Society of South Australia,²⁵⁰ the Strategic Policy and Partnerships Unit in the Department of Human Services, the Australian Institute of Family Studies,²⁵¹ the Legal Services Commission, South Australian Crown Solicitor, the Police Commissioner,²⁵² the NDIS Quality Safeguarding Commission, the Minister for Human Services (the Hon Nat Cook), the crossbench, the Opposition, Aboriginal Legal Rights Movement, the Commissioner for Aboriginal Engagement, the Australian Human Rights Commission, the Elder Abuse Unit at Uniting Communities,²⁵³ Uniting Country,²⁵⁴ AMA(SA), Purple Orange, the Chief Psychiatrist (Dr John Brayley), the Hon Steven Wade MLC,²⁵⁵ the Hon Geoff Brock MP,²⁵⁶ the Deputy Mayor of Port Pirie (Alan Zubrinich), Flinders University, the University of South Australia,²⁵⁷ the Disability Research Unit at the University of Melbourne, the Australian Banking Association,²⁵⁸ the

September 2011) <<http://www.alrc.gov.au/news-media/2011/changing-fashions-and-enduring-values-law-reform>>.

²⁴⁹ The South Australian Bar Association did not make a submission, but SALRI was much assisted by Stephen McDonald SC, the Bar Association's representative on the SALRI Advisory Board.

²⁵⁰ Letter from Law Society to SALRI dated 15 June 2022, <<https://lssa.informz.net/lssa/data/images/Website/Submissions/L%20150622%20to%20SALRI%20re%20Ageing%20and%20Adult%20Safeguarding%20Act%20Review%20FINAL.pdf>>. The Law Society submission noted the intersection between the role and operation of the ASU and EPAs. SALRI also acknowledges the particular input of Mr Genders of the Law Society.

²⁵¹ See also Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021).

²⁵² SAPOL did not make a written submission, but attended the Health Minister's expert reference group.

²⁵³ Uniting Communities have an active role to assist victims of elder abuse. They attended one of SALRI's roundtables, but did not provide any submission.

²⁵⁴ SALRI held an initial meeting and a very helpful session with members of Uniting Country in Port Augusta on 20 May 2022. SALRI thanks Dr Harry Randhawa and Chris Kennett for their assistance.

²⁵⁵ Mr Wade was the relevant Minister responsible for the passage and implementation of the 2018 Act.

²⁵⁶ The Hon Geoff Brock MP is a regular contributor to SALRI and highlights the importance of including regional, rural and remote communities. The issues raised in the present reference have been highlighted by Mr Brock. See also below Part 7.4.

²⁵⁷ SALRI notes the helpful input of a group of elder abuse researchers based at the University of South Australia.

²⁵⁸ No response was received. SALRI also made detailed efforts as part of its POA reference to engage the banking sector by various means in relation to this reference, but the response was less than overwhelming. See Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 14 n 176. The vital role and operation of the banking sector with respect to the use and misuse of EPAs and any reporting obligations of suspected abuse proved prominent themes in SALRI's EPA research and consultation. SALRI heard from the Australian Banking Association that banks and other financial institutions take the misuse of EPAs seriously and now have established internal procedures to try to identify the signs of financial abuse that may occur, even where a valid EPA exists for a customer. See at: 246 [6.3.33]. It is of some interest that the Western Australian Parliamentary Report also experienced a mixed response by the banking sector. 'The Committee sought evidence from the banking industry, but notes that there was reluctance on the part of banks to appear before the Committee to discuss financial elder abuse and what banks are doing to protect their older customers. The Committee wrote to the four major banks that operate branches in Western Australia, but did not receive submissions from them': Legislative Council Select Committee into Elder Abuse, Parliament of

South Australian Civil and Administrative Tribunal (“SACAT”), the Chief Justice and the Chief Magistrate. SALRI also contacted various leading practitioners and academics in the area including Professor Heather Douglas, Associate Professor Kate Fitz-Gibbon,²⁵⁹ Professor Wendy Lacey,²⁶⁰ Associate Professor Eileen Webb and Professor Joseph Ibrahim.

1.3.4 SALRI has liaised with the OFAW and the ASU throughout this reference and acknowledges the helpful input of Cassie Mason, the Director of the OFAW, Kathy Williams, the Manager of the Ageing Policy and Projects Team in the OFAW, and Elicia White, the former Chief Practitioner at the ASU.²⁶¹ SALRI has also worked with the Law Society of South Australia, Maggie Rutjens, the program manager at Disability Advocacy and Complaints service of South Australia Inc (‘DACSSA’), the Aged Rights Advocacy Service (‘ARAS’), Council on the Ageing SA (‘COTA (SA)’), and JFA Purple Orange, along with helpful input from Francois FF Salama, Barrister, *TEP*.

1.3.5 SALRI prepared a consultation video to outline the scope of the review and to encourage community participation.²⁶²

1.3.6 SALRI conducted its main consultation between 1 May 2022 and 30 June 2022. This was facilitated through the use of an online survey, the release of SALRI’s Factsheets and Consultation Questions,²⁶³ and meeting with reference groups formed by the OFAW.²⁶⁴ The survey was responded to by 183 people and reached beyond metro Adelaide to those living in greater Adelaide and regional South Australia.²⁶⁵ The respondents ranged from social workers, nurses and other health practitioners to retired community members, lawyers and a wide range of other professions. Many of the respondents were older people aged 65 years or over and those living with disability.²⁶⁶

Western Australia, *I Never Thought It Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 95 [8.16].

²⁵⁹ Professor Fitz-Gibbon has particular expertise in coercive control, a recurring theme in SALRI’s consultation. See Sandra Walklate, Kate Fitz-Gibbon and Jude McCulloch, ‘Is More Law the Answer? Seeking Justice for Victims of Intimate Partner Violence through the Reform of Legal Categories’ (2018) 18 (1) *Criminology and Criminal Justice* 115. See below Part 7.2.

²⁶⁰ Professor Lacey had a significant role in the formulation of the 2018 Act. ‘In conclusion, I thank some of the many who have championed and contributed to this legislation ... In particular, I thank Professor Wendy Lacey. When laws are often dubbed with names, this Bill could well be called “Wendy’s law”: South Australia, *Parliamentary Debates*, Legislative Council, 20 June 2018, 566–7 (Stephen Wade). See also South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1718.

²⁶¹ SALRI also thanks the notable contributions of Rebecca Norman and Jodie Smith from the ASU.

²⁶² See also University of Adelaide: Faculty of Arts ‘Promotional Video: Ageing and Adult Safeguarding South Australian Law Reform Institute (Full Version)’ (YouTube, 19 May 2022) <<https://www.youtube.com/watch?v=FGxUfoVhhHk>>.

²⁶³ Please see SALRI webpage: <<https://law.adelaide.edu.au/research/south-australian-law-reform-institute#ageing-and-adult-safeguarding>> for a copy of the Fact Sheets and Consultation Questions. See also Appendix A below.

²⁶⁴ The Terms of Reference stipulated that SALRI would ‘consult with two stakeholder reference groups (one consisting of members with relevant professional expertise, the other consisting of members with a diverse range of lived experience) will be established to provide advice to the independent reviewer on the review and the development of practical recommendations’.

²⁶⁵ Of the 183 survey respondents, 60.5% were from metro Adelaide, 18.5% were from Greater Adelaide, 18% from regional South Australia and 2.5% from other locations.

²⁶⁶ Notably, around a quarter of the respondents were retired and just over a third of respondents were aged 65+, and 12.5% of respondents were living with disability.

1.3.7 SALRI has been much assisted by the survey responses and expresses its appreciation for all who took part.

1.3.8 On 10 May 2022, the first stakeholder reference group was jointly held by SALRI and the OFAW and chaired by Anne Burgess. The meeting was attended by a range of government and non-government interested parties, including the South Australian Police, the Office of the Public Advocate, the ARAS, COTA (SA), Legal Services Commission, and Uniting Communities.²⁶⁷ On 11 May 2022, the first lived experience reference group was jointly held by SALRI and the OFAW and chaired by Anne Burgess. The meeting was attended by eight community members. These sessions provided initial helpful feedback for SALRI's reference.

1.3.9 On 15 July 2022, SALRI held a second meeting with the stakeholder reference group which was again attended by representatives from various government and non-government organisations. On 12 July 2022, SALRI held a second meeting with the lived experience reference group which was attended by seven members of the community. During these meetings, SALRI discussed the consultation themes and obtained feedback on the viability and practicability of potential recommendations. Both sessions provided constructive and helpful input.

1.3.10 On 19 May 2022, SALRI held a helpful meeting in Clare with several lawyers and a local media representative.²⁶⁸

1.3.11 On 19 May 2022, SALRI also conducted consultation in Port Pirie. The first session was an open forum at the Tarpari Wellbeing Centre and was attended by a number of Aboriginal health practitioners. SALRI also met community members, local service providers and health and other practitioners. SALRI participated in interviews with local newspapers and media outlets to promote community awareness of its presence and how to make comment on this reference. SALRI also met with lawyers for an evening legal CPD event. On 20 May 2022, SALRI met community members at the Port Pirie Uni Hub Spencer Gulf.

1.3.12 On 20 May 2022, SALRI was in Port Augusta and met with representatives from Uniting Country SA, a leading regional service provider, and other advocacy bodies at the Central Augusta Football Club Conference Room. SALRI then held an engagement session at the same venue with Charlie Jackson OAM and other Aboriginal Elders who provided invaluable insight into the role and context of 'safeguarding' from the perspective of Aboriginal communities. Finally, SALRI met with three health practitioners from the Port Augusta Hospital.

1.3.13 On 27 May 2022, SALRI held various sessions in Berri. The first session was attended by five health practitioners. During the day SALRI also met regional lawyers and community members.

1.3.14 On 2 June 2022, SALRI and Purple Orange jointly held a focus group at the office of Purple Orange and this session was attended by members of the disability community. The community members offered their valuable insight on the impact of the ASU and the *AAS Act* on persons with disability. SALRI acknowledges the assistance of Purple Orange in holding this event.

²⁶⁷ Other attendees include Wellbeing SA, Council of the Ageing, Department of Human Services, Flinders University, disability advocates, health practitioners and the State Attorney-General's Department.

²⁶⁸ Isabella Carbone, 'Eyes on the Law', *Plains Producer* (Clare), 25 May 2022, 17.

1.3.15 On the morning of 9 June 2022, SALRI held a roundtable at the University of Adelaide attended by academics, government bodies and experts to discuss the various issues and consultation questions identified in SALRI's Factsheets.²⁶⁹

1.3.16 On the afternoon of 9 June 2022, SALRI held a roundtable at the University of Adelaide for health practitioners²⁷⁰ to discuss the various issues and consultation questions identified in SALRI's Factsheets.

1.3.17 On the morning of 10 June 2022, SALRI held an informative roundtable with NGOs and advocacy bodies²⁷¹ representing the interests of both older persons and persons with disability at the University of Adelaide to discuss the various issues and consultation questions identified in SALRI's Factsheets.

1.3.18 On the afternoon of 10 June 2022, SALRI held a roundtable for older community members at the University of Adelaide to discuss the various issues and consultation questions identified in SALRI's Factsheets.

1.3.19 All of the roundtables were conducted under the Chatham House rule. SALRI is grateful for the constructive and considered input of all who took part.

1.3.20 On 16 June 2022, SALRI visited Port Lincoln and held various consultation sessions. The first session was with the Port Lincoln Aboriginal Health Service Inc. The second session was with health practitioners at the Port Lincoln Hospital. A third session was held with the Family Violence Legal Service Aboriginal Corporation which was attended by three representatives from the organisation. SALRI also met with lawyers from the Port Lincoln region.

1.3.21 On 17 June 2022, SALRI held open consultation meetings with Port Lincoln community members and a roundtable with health practitioners which was attended by seven practitioners.

1.3.22 On 22 June 2022, SALRI met Peter Westley and James Norcock (leading local lawyers) in Naracoorte. This proved a particularly informative meeting.

1.3.23 On 23 June 2022, SALRI held various consultation meetings in Mount Gambier. The first session for medical practitioners and health practitioners was attended by medical practitioners and representatives from the Pangula Mannamurna Aboriginal Corporation. The lunch session was attended by local lawyers and community members. The final session with health practitioners and service providers was attended by fourteen people.

1.3.24 On 1 July 2022, SALRI held a specialised legal focus group run by Dr Sylvia Villios which was attended by five legal practitioners²⁷² with varied experience to discuss key issues in the reference, especially relating to the prevalence of financial abuse and the role of the ASU and other options in addressing the abuse of vulnerable adults.

²⁶⁹ This session was attended by parties including Dr Sarah Moulds, David Caudrey, Cassie Mason, Elizabeth Mansfield, Natalie Wade, adjunct professor Dale Bagshaw, Associate Professor Ben Livings, Elizabeth Lyster, Rod Genders, Kate Jensen and Alan McConnach.

²⁷⁰ This session was attended by Cathy Brook, Lui Di Venuto, Chris Moy, Elicia White, Belinda Dichiera and Karen Phillips.

²⁷¹ This session was attended by Anna Barton, Maggie Rutjens, Carolanne Barkla, Jodi Slater, Nicole Stockdale, Skye Kakoschke-Moore, Kayla Dickeson and Jenny Hughes.

²⁷² Attendees at this session were Richard Jackson, Julia Van Der Velde, Alf Macolino, Harry Patsias, and Melissa Yule.

1.3.25 On 5 July 2022, SALRI held a focus group with members of the Multicultural Communities Council of South Australia (‘MCCSA’) attended by eight people from various multicultural backgrounds and community groups. These attendees provided their valuable input to SALRI about the need to consider cultural and language barriers and acknowledge and account for diversity in educating, providing services to, and helping people from CALD backgrounds. SALRI acknowledges the assistance of MCCSA in holding this event.

1.3.26 It is significant that this reference attracted considerable interest from interested parties, the community and the media. SALRI received positive feedback particularly from regional consultees, the disability community, and the Aboriginal community about the extent of its consultation. SALRI received a total of 68 submissions from interested parties, industry bodies, legal and health practitioners, academics, Government and non-Government bodies and the community. These submissions took the form of formal written submissions or comments provided by various means including online or face-to-face meetings. The input varied from comments on technical issues to comprehensive written submissions.

1.3.27 SALRI conducted a number of media interviews with radio and television stations and newspapers in Adelaide, Berri, Port Pirie, Port Augusta, Port Lincoln and Mount Gambier. Between 1 May 2022 and 24 August 2022 SALRI appeared in over 19 news items across various platforms including TV, newspaper, online publications, magazines and radio interviews. These were primarily in regional South Australia.

1.3.28 In the preparation of this Report, SALRI had careful regard to all the various views expressed to it. SALRI is grateful for the time and valuable contributions of all survey respondents, attendees and interested parties who responded and contributed to this Report. SALRI has also had regard to the various reviews of law and practice in relation to both elder abuse²⁷³ and the abuse and exploitation of persons with disability.²⁷⁴ SALRI has also been much assisted by the work of the ALRC and other law reform agencies in Australia and the Law Commission of England and Wales.

²⁷³ See, eg, South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia’s Response to the Abuse of Vulnerable Older People* (Report, October 2011); Rae Kaspiew, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, 2016); Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, ‘Elder Abuse in New South Wales’ (Report No 44, June 2016); Wendy Lacey et al, *Prevalence of Elder Abuse in South* (Report, University of South Australia, Australia, February 2017); Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017); Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017); Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *‘I Never Thought It Would Happen to Me’: When Trust is Broken* (Final Report, September 2018); Melanie Joosten et al, Senior Rights Victoria, *Seven Year of Elder Abuse Data in Victoria* (Report, August 2020); Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study: Final Report* (Research Report, December 2021).

²⁷⁴ See, eg, *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, ‘Interim Report’ (Report, October 2020); Family and Community Development Committee, Parliament of Victoria, ‘Inquiry into Abuse in Disability Services’ (Final Report, Parliamentary Paper No 167, May 2016); 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); Kelly Vincent and David Caudrey, *Safeguarding Task Force* (Report, 31 July 2020).

1.3.29 SALRI acknowledges the significant contribution of the students from the Law Reform class at the University of Adelaide Law School. SALRI acknowledges the financial support of the State Government to enable SALRI to undertake this topical and important reference. SALRI finally wishes to express its appreciation to the many legal practitioners, medical and other health practitioners, Aboriginal Elders, community groups, interested parties, experts and members of the community who have generously contributed in various ways to this reference. Their views and comments have been carefully taken into account and SALRI is grateful for their input.

1.4 Context to this Report

SALRI's Previous References

1.4.1 SALRI has undertaken several recent references which have considered the appropriate response of modern law and practice to the abuse and exploitation of ‘vulnerable’²⁷⁵ persons, including older persons and/or persons with disability. These references include succession law and practice,²⁷⁶ the role and operation of EPAs,²⁷⁷ the role and operation of communication partners (also called intermediaries) to assist parties with complex communication needs to provide their best evidence,²⁷⁸ and SALRI’s current references into witness competence and the operation of s 9 of the *Evidence Act 1929*²⁷⁹ and statutory review of the operation of the *Mental Health Act 2009* (SA).²⁸⁰

1.4.2 Copies of the Papers and Reports mentioned above can be found at <https://law.adelaide.edu.au/research/south-australian-law-reform-institute> under ‘Projects’.

²⁷⁵ See above Note on Terminology. See also below Part 8 (‘Definition of Vulnerable’).

²⁷⁶ South Australian Law Reform Institute, *Distinguishing Between the Deserving and the Undeserving: Family Provision Laws in South Australia* (Report No 9, December 2017).

²⁷⁷ Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020).

²⁷⁸ David Plater et al, South Australian Law Reform Institute, *Providing a Voice to the Vulnerable: A Study of Communication Assistance in South Australia* (Report No 16, October 2021).

²⁷⁹ SALRI at the request of the former State Attorney-General is currently examining witness competence in South Australia and the role and operation of s 9 of the *Evidence Act 1929* (SA). The Hon Geoff Muecke held roundtables with legal and health practitioners, service providers and the disability sector and disability community in February 2020 and early 2022 which identified major concerns of both principle and practice with the operation and implications of s 9, notably in its implications for witnesses with a disability or a cognitive impairment. See further <https://law.adelaide.edu.au/research/south-australian-law-reform-institute#witness-competence>.

²⁸⁰ See also <https://law.adelaide.edu.au/research/south-australian-law-reform-institute#mental-health-act-review>.

1.4.3 Various issues were raised in SALRI's succession law reference.²⁸¹ A prominent issue that arose, especially in the context of its Report into the *Inheritance Family Provision Act 1972* (SA),²⁸² was the role and operation of powers of attorney,²⁸³ and the potential for abuse and exploitation in this context. During SALRI's succession law consultation many parties expressed concerns to SALRI about EPAs and advance care directives, and the financial exploitation of older Australians resulting from the use of these instruments. Particular concerns were expressed about the operation of the *Powers of Attorney and Agency Act 1984* (SA). SALRI noted that there appeared to be an opportunity for unscrupulous family members to exploit other family members, especially an older relative, through the exercise of their powers.²⁸⁴ This exploitation can continue over many years and there is little effective civil or criminal recourse that can be taken against the appointed attorney as a result of the abuse of power, as the person exploited is likely to prove unable or unwilling to pursue any complaint and generally lacks capacity (hence the activation of the EPA) and may well lack the ability to function as an effective witness and has a relationship of trust with the attorney.²⁸⁵

1.4.4 SALRI noted that there has been an increasing awareness of cases of financial abuse of this nature and these cases are likely to become more prevalent as a result of greater wealth,²⁸⁶ increasing

²⁸¹ The tension between many of the concepts in present British-based succession laws in Australia and Aboriginal kinship and customary law and practice was often raised to SALRI in its succession law consultation. See generally Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, 11 June 1986); Lidia Xynas, 'Succession and Indigenous Australians: Addressing Indigenous Customary Law Notions of "Property" and "Kinship" in a Succession Law Context' (2011) 19(2) *Australian Property Law Journal* 199; Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture* (Final Report No 94, September 2006) 239–41. SALRI has considered examining these issues in a future law reform project and to include in this project the law relating to funeral instructions, the disposal of human remains and the resolution of disputes that may arise. These particular issues have been highlighted to SALRI on more than one occasion in the course of its succession reference and raise particular complexities and sensitivities, especially for Aboriginal communities. SALRI would only undertake such a reference if it was identified as a real problem by Aboriginal communities and with the support and close input and involvement of Aboriginal communities. See also South Australian Law Reform Institute, *South Australian Rules of Intestacy* (Report No 7, July 2017) 58–61; South Australian Law Reform Institute, 'Distinguishing Between the Deserving and the Undeserving': *Family Provision Laws in South Australia* (Report No 9, December 2017) 118–25; South Australian Law Reform Institute, *Riddles, Mysteries and Enigmas: The Common Law Forfeiture Rule* (Report No 14, February 2020) 254–6 [9.3.1]–[9.3.13], Recommendation 66.

²⁸² South Australian Law Reform Institute, 'Distinguishing Between the Deserving and the Undeserving': *Family Provision Laws in South Australia* (Report No 9, December 2017) 127 [10.2.1]–[10.2.3]. See further Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017), 37–47, 159–202.

²⁸³ The concerns over the role and operation of EPAs are not recent. See, eg, Law Reform Committee of South Australia, *Relating to Powers of Attorney* (Report No 47, 1981) 9–10.

²⁸⁴ South Australian Law Reform Institute, 'Distinguishing Between the Deserving and the Undeserving': *Family Provision Laws in South Australia* (Report No 9, December 2017) 127 [10.2.1].

²⁸⁵ Ibid. See also Natalia Wuth, 'Enduring Powers of Attorney with Limited Remedies: It's Time to Face the Facts!' [2013] (7) *Elder Law Review* 1–30; Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 269–329.

²⁸⁶ Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 42.

life expectancy,²⁸⁷ and the associated increase in cases of dementia.²⁸⁸ This also reflected the views expressed in SALRI's succession consultation.

1.4.5 This remains a concern, compounded by the dramatic recent increases in Australian house prices.²⁸⁹ This problem of 'inheritance impatience'²⁹⁰ translates to some adult children possessing a sense of entitlement and become too impatient to wait for their parent's death before resorting to financial abuse and taking or distributing assets they consider 'theirs'.²⁹¹ SALRI has previously referred to a 'culture of entitlement', particularly among adult children.²⁹² Mr O'Brien, a former Berri legal practitioner, referred SALRI to 'a sense of expectation, if not entitlement' amongst adult children.²⁹³

²⁸⁷ See also, eg, Caroline Overington, "‘Loved Ones’ Pose Biggest Threat to Old People's Assets", *The Australian* (Sydney, 9–10 September 2017); Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 37–47, 159–202; Mike Clare, Barbara Blundell and Joseph Clare, University of Western Australia, *Examination of the Extent of Elder Abuse in Western Australia*, (Research Report, April 2011) 1, 31.

²⁸⁸ South Australian Law Reform Institute, *'Distinguishing Between the Deserving and the Undeserving': Family Provision Laws in South Australia* (Report No 9, December 2017) 127 [10.2.2]. See also Victorian Law Reform Committee, Parliament of Victoria, 'Inquiry into Powers of Attorney' (Final Report, Parliamentary Paper No 352, August 2010) 3–4; Kelly Purser, 'Assessing Testamentary Capacity in the 21st Century: Is *Banks v Goodfellow* Still Relevant?' (2015) 38(3) *University of New South Wales Law Journal* 854, 854–5, 865; Rae Kaspiew, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, 2016) 8, 10, 16, 47; Select Committee into Elder Abuse, Legislative Council of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 34–5 [3.36]–[3.40].

²⁸⁹ See, eg, Liz Farquhar, 'Legal Service Links Rising House Prices to High Rates of Elder Abuse', ABC News (online, 5 November 2021) <<https://www.abc.net.au/news/2021-11-05/high-house-prices-linked-to-elder-abuse/100593796>>.

²⁹⁰ See, eg, Evidence to Parliament of Western Australia, Legislative Council Select Committee into Elder Abuse, Perth, 26 March 2018, 3–4 (Mr Roche); Tracy Bowden, 'Call to Criminalise Financial Abuse of Elderly as Woman Reveals How Mother's \$2m Home was Sold by Son', ABC News (online, 19 November 2015) <<https://www.abc.net.au/news/2015-11-19/call-to-criminalise-financial-abuse-of-elderly/6954874>>; Rebecca Turner, 'Elder Abuse: Many People Committing Financial Abuse Unintentionally, MP Says' ABC News (online, 13 September 2018) <<https://www.abc.net.au/news/2018-09-13/elder-abuse-report-handed-down/10241574>>; Caroline Baum, 'Inheritance Impatience: "Our Family has been Wrecked by this Experience"', *The Guardian* (online, 13 September 2018) <<https://www.theguardian.com/lifeandstyle/2018/sep/12/inheritance-impatience-our-family-has-been-wrecked-by-this-experience>>.

²⁹¹ See, eg, Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, 'Elder Abuse in New South Wales' (Report No 44, June 2016) 80–1; Rebecca Turner, 'Elder Abuse: Many People Committing Financial Abuse Unintentionally, MP says' ABC News (online, 13 September 2018) <<https://www.abc.net.au/news/2018-09-13/elder-abuse-report-handed-down/10241574>>; Kirsty Needham, 'Inheritance Impatience Causing Families to Rob Granny for School Fees, Renovations', *Sydney Morning Herald* (online, 21 November 2015) <<https://www.smh.com.au/national/nsw/inheritance-impatience-causing-families-to-rob-granny-for-school-fees-renovations-20151121-gl4im7.html>>; Kelly Purser, Tina Cockburn and Elizabeth Ulrick, 'Examining Access to Formal Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney' [2019] 12 *Elder Law Review* (1–32), 22–3.

²⁹² South Australian Law Reform Institute, *'Distinguishing Between the Deserving and the Undeserving': Family Provision Laws in South Australia* (Report No 9, December 2017) 16–17 [2.2.2]–[2.2.3], 18 [2.2.6]. See also Myles McGregor-Lowndes and Frances Hannah, Queensland University of Technology, *Every Player Wins a Prize? Family Provision Applications and Bequests to Charity* (Report, October 2008) 75–6; Rosalind Croucher, 'If We Could Start Again: Re-Imagining Family Provision Law in the 21st Century' (Conference Paper, STEP Australia Conference, 2–4 August 2017) 19; Lindsay Ellison, 'Family Provision: Double or Nothing: The Two Legged Lottery' (Conference Paper, STEP Australia Conference, 2–4 August 2017).

²⁹³ This idea is supported elsewhere. One article highlights the potential for financial abuse where an adult child holds an EPA and is also the beneficiary of a will. The child may act to preserve their inheritance, say by not selling the family home to release funds for an assisted accommodation bond, even though this is needed for their parent. A strong risk factor of abuse was noted as 'a family member having a strong sense of entitlement to an older person's property or possessions': Rae Kaspiew, Rachel Carson and Helen Rhoades, 'Elder Abuse in Australia' [2016] 98 *Family Matters* 64, 69.

1.4.6 The Hon Tom Gray QC and others raised to SALRI the concerns arising from the role and operation of EPAs to be a serious problem and questioned whether there are appropriate safeguards in the existing law which address abuses of power under these instruments. It was suggested to SALRI as part of its succession reference that the *Powers of Attorney and Agency Act 1984* (SA) and linked legislation in this context was in need of thorough review.²⁹⁴

1.4.7 SALRI agreed with this suggestion and, whilst this issue was beyond the scope of its Report into the *Inheritance Family Provision Act 1972* (SA), considered to be an important issue that would benefit from further research and consultation in a future reference.

1.4.8 SALRI therefore recommended:

[S]ubject to appropriate funding, it undertake a future law reform project to examine the role and operation of the current law in South Australia with respect to powers of attorney under the *Powers of Attorney and Agent Act 1984* (to include advance care directives and the *Advance Care Directives Act 2013* and other linked legislation if appropriate) and with a particular view to addressing any concerns of abuse and exploitation.²⁹⁵

1.4.9 SALRI considered after further reflection that its proposed review should focus on the role and operation of EPAs alone as it would be too wide a reference to consider both the role and operation of EPAs and advance care directives. SALRI obtained funding from the Law Foundation of South Australia Inc in its September 2019 grant round, with a revised focus on powers of attorney only. The former Attorneys-General, the Hon John Rau SC, and the then Attorney-General, the Hon Vickie Chapman MP, both supported the review of the role and operation of powers of attorney in South Australia as a SALRI reference.

1.4.10 In January 2021, SALRI released its major Report into the role and operation of EPAs in South Australia.²⁹⁶ This Report made a total of 120 recommendations for changes to law and practice, to clarify and improve the use and operation of EPAs in South Australia. SALRI's recommendations drew on its research and consultation with interested parties, experts and the community.

1.4.11 SALRI's POA Report highlighted the concerns over financial abuse over older persons and/or persons with disability.²⁹⁷ Such abuse has been described as 'the perfect crime'²⁹⁸ and noted as

²⁹⁴ South Australian Law Reform Institute, 'Distinguishing Between the Deserving and the Undeserving': Family Provision Laws in South Australia (Report No 9, December 2017) 127 [10.2.3].

²⁹⁵ Ibid 130, Recommendation 29.

²⁹⁶ Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020). SALRI's 120 recommendations are reproduced below at Appendix C.

²⁹⁷ Financial abuse is often said to be the most common form of elder abuse. See Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 18 [2.47], 20 Finding 9, 23 n 72. However, more recent research qualifies this. 'The findings suggest that psychological abuse, sexual abuse and neglect warrant more attention. This is not to say that focus should be diverted from financial abuse and physical abuse. However, with financial abuse commonly perceived to be the most common form ... it is evident that other types of abuse may not have received sufficient attention to date.' Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 5.

²⁹⁸ Joseph Ibrahim, 'Elder Abuse is the Perfect Crime: If We Don't Address It, You Could be a Victim Too', ABC News (online, 14 June 2019) <<https://www.abc.net.au/news/2019-06-14/elder-abuse-australia-victims-rarely-receive-justice/11204986>>.

increasing and described as ‘significant, insidious and frightening’ in which victims can lose their home or the entire resources that they’ve set up for their later life.²⁹⁹

1.4.12 In its consultation and research, SALRI found evidence of significant financial abuse of both older persons and persons with a disability facilitated by the improper use of EPAs. SALRI was presented with powerful case examples in both its research and consultation and heard from most parties in its EPA consultation of concern over financial abuse and the present lack of accessible and effective civil and criminal remedies to respond to such abuse.³⁰⁰ Notwithstanding their utility, it became apparent in SALRI’s consultation and research that the misuse of EPAs takes place in South Australia. Some are minor, while others are sophisticated and extensive.³⁰¹ Some may be due to confusion or misunderstanding on the part of the attorney of their duties and a misguided sense of entitlement or calculated and deliberate deceit.³⁰²

1.4.13 SALRI was often reminded in its EPA consultation that financial exploitation through the misuse of EPAs is not just a problem of elder abuse, but involves the abuse of persons with disability or a cognitive impairment (regardless of age), as well as other adults who may be vulnerable to abuse.³⁰³ SALRI’s Report noted that these issues cannot be looked at in isolation and any solution must be comprehensive and multi-faceted.³⁰⁴

1.4.14 SALRI was also asked in consultation to look beyond just the abuse that occurs under an EPA. The financial abuse of older persons and persons with disability must be viewed alongside such issues as the role and operation of the ASU, civil remedies to address abuse and effective and accessible education and information to both older people and the disability community.³⁰⁵ This need for a wider

²⁹⁹ Norman Hermant, “‘Significant, Insidious’ and Often Unreported, Financial Elder Abuse is Increasing, Lawyers say”, *ABC News* (online, 5 August 2022) <<https://www.abc.net.au/news/2022-08-05/lawyers-say-financial-elder-abuse-in-families-significant/101300242>>.

³⁰⁰ Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 269–329.

³⁰¹ SALRI was presented with various examples of what could only be described as open, if not brazen, fraud such as ‘loans’ and ‘gifts’ to the attorney, the attorney residing rent free in the principal’s home and even attorneys charging a close family member excessive ‘fees’ for performing routine tasks under an EPA. See *ibid* 230 [6.2.27].

³⁰² *Ibid*; Law Reform Committee, Parliament of Victoria, ‘Inquiry into Powers of Attorney’ (Final Report, 2010) 29. See also General Purpose Standing Committee, Legislative Council of NSW, ‘Elder Abuse in New South Wales’ (Report No 44, June 2016) 83 [6.19] noting that ‘while most attorneys (the majority of whom are family members) carry out their responsibilities appropriately and often very generously, a minority do not, whether through incompetence, a misguided sense of entitlement, or wilful theft’.

³⁰³ See also NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018); Kelly Vincent and David Caudrey, *Safeguarding Task Force Report* (Report, 31 July 2020).

³⁰⁴ Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 12 [1.2.21]. See also South Australia, Parliamentary Debates, House of Assembly, 13 November 2018, 3556–8 (Vickie Chapman).

³⁰⁵ *Ibid*. The former Attorney-General’s comments are significant. ‘There has to be real and effective statutory protection and policy programs that actually work and are going to protect people. It is fair to say that probably I was, like a lot of people who come into this Parliament, largely unaware of the plight of vulnerable older persons or even significantly of the disabled community before coming into the parliament. In our own families we have older parents or people with disability who are known to us, and of course we see them fall into areas of vulnerability. Obviously, in the law I had quite a bit of exposure to dealing with issues regarding power of attorney and the like. In fact, I used to give a lecture called “Sex in the 70s”, which was designed for an audience of older people. I am sure they came along to it hoping to learn about more enjoyable activities in the bedroom, but it was, in fact, a lecture about protecting themselves against the sometimes rapacious and certainly exploitative “greedy

and systematic approach also emerged in consultation in SALRI's present review of the operation of the *Ageing and Adult Safeguarding Act 1995* (SA).³⁰⁶

1.4.15 SALRI highlighted that, whilst it is important to prevent and address misuse and fraud, it is also important to respect the autonomy of principals to make such instruments, retain the utility and effectiveness of EPAs, and to promote their use.³⁰⁷

Existing Literature

1.4.16 SALRI's review is timely. Recent developments have compounded the concerns over the abuse and exploitation of both older people and persons with disability as raised by both the Aged Care Royal Commission³⁰⁸ and the Disability Royal Commission.³⁰⁹

1.4.17 These issues, and particularly that of elder abuse, have also been considered in a number of recent law reform and Parliamentary Committee reports. SALRI has drawn upon these in its research for this reference.

1.4.18 The ALRC considered elder abuse to be “everybody’s business”. It is also everybody’s responsibility — a responsibility not only to recognise elder abuse, but most importantly, to respond to it effectively.³¹⁰

1.4.19 The ALRC observed that it sought to recommend changes to the law that both upheld autonomy and provided protection from harm.³¹¹ The ALRC accepted the need for suitable safeguards,

little grandchild” sector, as I call it. It ensured that whatever their financial arrangements or personal arrangements regarding their cohabitation — whether they had been married, widowed, re-cohabiting, remarrying, sharing a house with another person who was a friend — these were all things that needed to be clearly thought about. This was especially the case if there was issue — that is, children or grandchildren — of unions in their lifetime because the testamentary intent of a will is not always even enough to stop exploitation while they are alive in terms of getting access to property or money, or stop big fights after someone dies. These are important things that we ask our older South Australians to think about and protect themselves against as much as possible to ensure they have access to their rightful assets and income and that they are not exploited by others — sadly, frequently family members. Of course, that is not only a relationship of trust but also a relationship of affection, which makes that person even more vulnerable. As we mature, these issues become more important’: at 3556–7.

³⁰⁶ See below Part 1.7 (‘A Wider Approach?’).

³⁰⁷ Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) ii.

³⁰⁸ *Royal Commission into Aged Care Quality and Safety*, ‘Care, Dignity and Respect’ (Final Report, 26 February 2021). The Aged Care Royal Commission was established on 8 October 2018 after reports of neglect and inadequate conditions in residential aged care facilities. The Royal Commission’s final Report, ‘Care, Dignity and Respect’, was released on 26 February 2021. The Report emphasised the prevalence of abuse and neglect in residential aged care settings and made 148 recommendations to reform Australia’s aged care system. The four main findings of the Report were: first, Australia needs a rights based *Aged Care Act* to underpin the aged care system as opposed to the current ration based consumer style framework; secondly, the aged care system needs stronger governance, including regulation of the quality of care and an independent price setting mechanism; thirdly, the system must improve aged care workforce conditions and capability; and fourth, a proposed new funding model is required to secure Australia’s aged care system into the future. See also at: 24, 69–79.

³⁰⁹ *Disability Royal Commission*, ‘Interim Report’ (Report, October 2020). See generally NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018); Family and Community Development Committee, Parliament of Victoria, ‘Inquiry into Abuse in Disability Services’ (Final Report, Parliamentary Paper No 167, May 2016).

³¹⁰ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 29 [1.66].

³¹¹ *Ibid* 52 [2.94].

but to ensure that such safeguards are appropriately calibrated and do not unnecessarily burden parties in the exercise of their autonomy.³¹² The ALRC concluded:

The recommendations in this Report seek to balance two framing principles: dignity and autonomy, on the one hand; and protection and safeguarding, on the other. The ALRC recognises that autonomy and safeguarding are not mutually inconsistent, as safeguarding responses also act to support and promote the autonomy of older people.³¹³

1.4.20 SALRI concurs with these comments and has also sought to follow this approach in this Report.³¹⁴

1.4.21 Many of these reports also deal with the prevalence of elder abuse. The ALRC noted that the '[e]vidence suggests that financial abuse is the most common form of elder abuse and that, in a significant minority of cases, the financial abuse is facilitated through misuse of a power of attorney'.³¹⁵ Financial abuse appears to be the other most common type of elder abuse, accounting for over a third of the calls that reported abuse to a Victorian elder abuse helpline.³¹⁶ It was found 7% of calls reported abuse of EPAs.³¹⁷ A Victorian Parliamentary Report noted that the abuse of EPAs was 'not uncommon'.³¹⁸

1.4.22 This also emerges from the ASU's records. An analysis of the ASU Annual Reports³¹⁹ reveal that almost half the reports of abuse made to the ASU involve some element of financial abuse and psychological abuse, with both of these being the most prevalent forms of abuse.

1.4.23 The incidence and implications of significant or serious abuse, even if such cases are not currently necessarily reported to the ASU,³²⁰ also emerged in SALRI's current research and

³¹² Ibid 164 [5.16].

³¹³ Ibid 20 [1.17].

³¹⁴ This is a difficult balance. 'One of the most important, and the most difficult, of the issues involved in adult protection matters is how to strike a balance between the right to personal autonomy, self-determination and protection': Katja Karjalainen, 'Strengthening the Right to Personal Autonomy and Protection of Vulnerable Adults: from Human Rights to Domestic and European legislation on Voluntary Measures' in Katja Karjalainen, Iina Tolberg and Aleksi Pursiainen (eds), *International Actors and the Formation of Laws* (Springer, 2022) 65.

³¹⁵ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 160.

³¹⁶ Melanie Joosten, Briony Dow and Jenny Blakey, National Ageing Research Institute and Seniors Rights Australia. *Profile of Elder Abuse in Victoria: Analysis of Data about People Seeking Help from Seniors Rights Victoria* (Summary Report, June 2015) 32. See also Georgia Lowndes et al, Monash University, *Financial Abuse of Elders: A Review of the Evidence* (Report, 2009).

³¹⁷ Melanie Joosten, Briony Dow and Jenny Blakey, National Ageing Research Institute and Seniors Rights Australia. *Profile of Elder Abuse in Victoria: Analysis of Data about People Seeking Help from Seniors Rights Victoria* (Summary Report, June 2015) 32.

³¹⁸ Law Reform Committee, Parliament of Victoria, 'Inquiry into Powers of Attorney' (Final Report, Parliamentary Paper No 352, August 2010) 27. See also at: 26–30.

³¹⁹ See below Appendix B for the Annual Report Data; Adult Safeguarding Unit, *2018–2019 Annual Report* (Report, 2019); Adult Safeguarding Unit, *2019–2020 Annual Report* (Report, 2020). SALRI also received preliminary data findings from the ASU for the 2021–2022 financial year.

³²⁰ The reluctance and problems in both older persons and persons with disability to report abuse are well established. See generally Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 220–329; Family and Community Development Committee, Parliament of Victoria, 'Parliamentary Inquiry into Abuse in Disability Services' (Final Report, May 2016) 45–61. There are various other reasons why cases of significant or serious abuse may have not been reported to the ASU. SALRI in both its consultation and survey responses (46%) found a wide lack of awareness of the existence and role of the

consultation. SALRI, as in its EPA reference, was often provided by a range of parties, agencies, practitioners, service providers and NGOs with examples of what amounted to significant, or even serious abuse of older persons and persons with disability in South Australia.³²¹

1.4.24 In its consultation and research, SALRI was presented with four typical scenarios of abuse. The scenarios were:

1. Abuse carried out by family members;³²²
2. Abuse carried out by paid carers;³²³
3. Abuse carried out by predatory ‘friends’ or neighbours;³²⁴ or

ASU, even amongst lawyers and medical and health practitioners. Regional lawyers with close links in their communities noted that complaints of financial abuse may be more likely to be reported to them.

³²¹ See Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 30–5.

³²² The ‘vast majority of elder abuse is perpetrated by the immediate family of an older person’: Select Committee into Elder Abuse, Legislative Council of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 16 [2.40]. See also at: Finding 8, 17; Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 71. One recent study found 91% of elder abuse is committed by a family member. See Melanie Joosten et al, Senior Rights Victoria, *Seven Year of Elder Abuse Data in Victoria* (Report, August 2020) 25.

³²³ Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 71. ‘Abuse perpetrated by professionals, including service providers (6%) and professional carers (3%) is not as common as abuse perpetrated by family members and those known to an older person. However, this is likely to reflect the under-representation of people with a need for a higher level of care in this sample’: at 72. Paid carers were said to carry out 14% of reported instances of neglect: at 71. Other studies suggest on a far higher rate of financial elder abuse by paid carers, up to 31%: See Georgia Lowndes et al, Monash University, *Financial Abuse of Elders: A Review of the Evidence* (Report, June 2009) 15. Despite such studies and disturbing examples such as the case of Ann Marie Smith, SALRI is well aware, as often pointed out in its consultation, of the devotion and commitment of both paid and unpaid carers to older persons and persons with disability in often difficult circumstances.

³²⁴ See Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021). Friends and acquaintances accounted for a significant proportion of perpetrators at 12% and 9% respectively. Neighbours are also significant 7%: at 71–2. The ‘befriender’ who takes advantage of the victim’s vulnerability, often for financial exploitation, is notable. ‘The [Western Australian] Committee also heard evidence of a group of perpetrators of elder abuse who are not relatives of the older person, but who “befriend” the older person and then seek to gain (usually) financially through taking advantage of the person’s vulnerability’: Select Committee into Elder Abuse, Legislative Council of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 17 [2.45].

4. Abuse carried out under an EPA³²⁵ or in a professional or fiduciary capacity.³²⁶

1.4.25 The Western Australian Parliamentary Report, drawing on evidence before it,³²⁷ highlighted that financial abuse is the most prevalent form of elder abuse,³²⁸ but emphasised that it goes hand in hand with ‘the complex interaction that occurs with psychological or emotional elder abuse: “grooming” an older person to either hand over money or assets or manipulating them so that they are unaware that they are being abused financially’.³²⁹ One study observed the link between psychological abuse and financial abuse, noting that the former is a grooming behaviour for the latter.³³⁰ Psychological abuse ‘seems to frequently co-occur with financial abuse, suggesting a pattern of behaviour analogous to grooming in the sexual abuse context.’³³¹

1.4.26 This theme was echoed by many parties in SALRI’s consultation who noted the intersection between financial abuse and psychological abuse or coercive control. As ARAS noted to

³²⁵ The significant incidence and implications of the misuse of EPAs was discussed at length by SALRI in its POA Report: Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 220–329. See also Cassandra Cross, Kelly Purser and Tina Cockburn, Queensland University of Technology, *Examining Access to Justice for Those With an Enduring Power of Attorney (EPA) Who Are Suffering Financial Abuse* (Report, 2017) 8, 20–1, 34–40; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, ‘Elder Abuse in New South Wales’ (Report, June 2016) xi, xiv, 77, 83–9 [6.16]–[6.42], 99–101 [6.94]–[6.102]; Select Committee into Elder Abuse, Legislative Council of Western Australia, *I Never Thought It Would Happen To Me’: When Trust is Broken* (Final Report, September 2018) 74 [7.1]–[7.6], 80 [7.35]; Kelly Purser, Tina Cockburn and Elizabeth Ulrick, ‘Examining Access to Formal Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney’ (2019) 12 *Elder Law Review* 1. Cf Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 36.

³²⁶ The 2021 AIFS study found about 6% of reports of elder abuse related to service providers: Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 71–2. ‘Service providers appeared to be especially likely to be associated with financial abuse’: at 80.

³²⁷ ‘We do have examples of what we call befriending cases. Yes, we have had quite a few, but we lump them into “friends” there because that is what they have done; they have befriended so that they can take the advantage of a vulnerable individual or vulnerable older person ... Yes. Primarily [this will be financial abuse], it looks first as emotional abuse, but the underlying reason for that emotional attachment is financial gain’: Evidence to Select Committee into Elder Abuse, Legislative Council of Western Australia, Perth, 19 March 2018, 4 (Franca Ottolini, Suburbs Community Legal Centre). However, such ‘grooming’ may well also be committed by children or other family members: at 5. See further below Part 7.3.

³²⁸ See also Rae Kaspiew, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, Australian Institute of Family Studies, 2016) 5–7, 47.

³²⁹ Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen to Me’: When Trust is Broken* (Final Report, September 2018) 20 Finding 9, 92 [8.1]. See also Wendy Lacey et al, University of South Australia, *Ageing in South Australia 2016: Insights from the Aged Care Sector* (Report, September 2016).

³³⁰ Kylie Miskovski, Alzheimers Australia NSW, *Preventing Financial Abuse of People with Dementia* (Discussion Paper No 10, June 2014), See also, eg, Rae Kaspiew, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, 2016) 8, 10, 47. A 2010 study based on an analysis of data from a range of agencies whose operations bring them into contact with elder financial abuse in Victoria found similar themes. The interviews with professionals confirmed that financial abuse was accompanied by psychological abuse that was intimidating, controlling and fear inducing. Among the ways in which financial abuse was carried out were through misuse of powers of attorney, coerced changes to wills, unethical trading in title to property, and the coercion of people without capacity into signing documents in relation to assets that would result in financial gain for the perpetrator. See Jo Wainer, Peter Darzins and Kei Owada, Monash University, *Prevalence of Financial Elder Abuse in Victoria: Protecting Elders’ Assets Study* (Report, 10 May 2010).

³³¹ Rae Kaspiew, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, 2016) 47.

SALRI: ‘Whatever you call it, emotional abuse, coercive control or gaslighting, we virtually always see it go together with the reports to us of financial elder abuse. It is the means by which the financial abuse is able to be carried out.’³³² Similar themes were provided to SALRI in relation to the abuse of persons with disability. Maggie Rutjens of DACSSA emphasised the close link between the financial abuse of a persons with disability and coercive control.³³³

1.4.27 Indeed, a regular theme highlighted to SALRI in consultation as part of this reference (though, at least not in those terms, not during the EPA reference) was the significant incidence and implications of coercive control and gaslighting³³⁴ by family members and others close to the victim in the context of both elder abuse and the abuse of persons with disability. Such psychological abuse is not confined to domestic partners,³³⁵ as may be commonly supposed.³³⁶ This theme also emerges from recent commentary³³⁷ and can be found in the ASU Annual Report Data.³³⁸

1.4.28 Despite this concern, SALRI was reminded that elder abuse and the abuse of persons with disability is not always committed maliciously.³³⁹ The Western Australian Parliamentary Report found ‘there are many instances of family members or carers (or those who are both) being overwhelmed with their responsibilities who inadvertently commit elder abuse because of their inability to cope.’³⁴⁰ The motivations of a perpetrator of elder abuse exist on a spectrum.³⁴¹

1.4.29 While much of this existing literature concerns elder abuse, SALRI reminded, in both its EPA and current consultation,³⁴² that the abuse and exploitation of persons with disability must also

³³² SALRI’s NGO sector roundtable comprising of both disability sector and aged care groups significantly noted the most common forms of abuse reported to them is financial abuse and this is typically accompanied by emotional abuse.

³³³ Ms Rutjens explained that the abuse of people with disability is commonly multifaceted, leveraging multiple forms of power over a person in order to access and use instruments of abuse. For example, using a power dynamic and dependence for care, to coercively control and financially abuse a person with disability. This is complicated by structural barriers that can enable these power dynamics such as a lack of community disability awareness and opportunities for people with disability to participate meaningfully in decision-making.

³³⁴ See Glossary. See also below Part 7.2.

³³⁵ Joint Select Committee on Coercive Control, Parliament of New South Wales, *Coercive Control in Domestic Relationships* (Report, 2021).

³³⁶ It is notable that of the 158 submissions to the recent NSW parliamentary inquiry on coercive control, only a handful looked beyond the application of coercive control to domestic partners and raised older persons and persons with disability who may also be family members and victims of such conduct. See below Part 7.3.

³³⁷ See also Parliament of New South Wales, Joint Select Committee on Coercive Control, ‘Coercive Control in Domestic Relationships’ (Report, 2021).

³³⁸ See below Appendix B.

³³⁹ Rebecca Turner, ‘Elder Abuse: Many People Committing Financial Abuse Unintentionally, MP Says’, *ABC News* (online, 13 September 2018) <<https://www.abc.net.au/news/2018-09-13/elder-abuse-report-handed-down/10241574>>.

³⁴⁰ Select Committee into Elder Abuse, Legislative Council of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) i [4]. See also at: 41–44 [3.66]–[3.73].

³⁴¹ Ibid 34 [3.35]. See also at: 42 [3.72] quoting Barbara Blundell, Mike Clare and Amy Warren, Submission No 40 to Select Committee into Elder Abuse, Legislative Council of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (23 November 2017) 8.

³⁴² This was highlighted by parties such as Skye Kakoschke-Moore of Purple Orange, Advocacy for Disability Access and Inclusion Inc and Natalie Wade of Equality Lawyers, and at the expert medical and industry Roundtable on 3 November 2020.

be kept firmly in mind.³⁴³ There is also an intersection between elder abuse and the abuse of persons with disability.³⁴⁴ The ALRC has identified that persons with a cognitive impairment are ‘more vulnerable to experiencing elder abuse. Where a person has a disability, this will often be correlated with other risk factors: the need for support and assistance, as well as an increased likelihood of social isolation and lower socioeconomic resources.’³⁴⁵ The Western Australian Parliamentary Report elaborated:

A significant cause of vulnerability in older people is the increased onset of cognitive impairment that is associated with ageing, as well as disability, whether age-related or not ... People who have some form of decision-making disability or another form of disability are more likely to experience abuse due to their increased vulnerability; this applies equally to people as they age. The Committee has heard that having a cognitive impairment puts an older person at a higher risk of experiencing elder abuse and increases their state of vulnerability.³⁴⁶

1.4.30 There is now a relative wealth of data available regarding the nature and extent of elder abuse.³⁴⁷ In contrast, the available data as to the abuse and exploitation of persons with disability is ‘limited’³⁴⁸ and there is a surprising lack of reliable statistics as to the extent and nature of such abuse and exploitation. As a recent study commissioned by the Disability Royal Commission noted:

The historical omission of people with disability from national data collections, and the lack of up-to-date analyses where data on violence and disability are available, means there is limited empirical

³⁴³ ‘It is — or should be — self-evident that the impact of violence, abuse, neglect and exploitation can be and often is devastating to the lives of people with disability. Trauma, physical injuries, psychological damage and financial exploitation have profound consequences’: *Disability Royal Commission*, Interim Report (Report, October 2020) 51. See also Family and Community Development Committee, Parliament of Victoria, ‘Inquiry into Abuse in Disability Services’ (Final Report, Parliamentary Paper No 167, May 2016); Kelly Vincent and David Caudrey, *Safeguarding Task Force* (Report, 31 July 2020); NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018). The NSW Ombudsman in its 2018 Report noted that a quarter of the many reports it had received concerning the abuse of persons with disability concerned financial abuse and exploitation: at 14.

³⁴⁴ See, eg, R Acierno, M Hernandez and D Kilpatrick, ‘Prevalence and Correlates of Emotional, Physical, Sexual and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study’ (2010) 100(2) *American Journal of Public Health* 292; Rae Kaspiew, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, 2016) 8. Dementia is significant in this context: at 8, 16, 47; Select Committee into Elder Abuse, Legislative Council of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 34–5 [3.36]–[3.40]. Dementia Australia told SALRI that ‘dementia is the single greatest cause of disability in older Australians and the third leading cause of disability overall’.

³⁴⁵ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 47 [2.73]. As a 2022 Queensland study noted: ‘The rate of disability increases with age making it more complex to understand the intersections between violence, disability and elder abuse. Due to small sample sizes, the data on older people with disability tends to be unreliable because it cannot necessarily be said to be representative of the wider population of older persons living with disability, particularly given the heterogeneity of disability. Nonetheless, disability is more common among older people. More than 80% of people aged 85 years or over have some disability. Almost one third of people aged 75 years or over have ‘severe or profound core activity limitations’’: Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 34.

³⁴⁶ Select Committee into Elder Abuse, Legislative Council of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 34 [3.33]–[3.35].

³⁴⁷ See generally Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021).

³⁴⁸ Centre of Research Excellence in Disability and Health, *Disability Royal Commission*, ‘Nature and Extent of Violence, Abuse, Neglect and Exploitation of People with Disability in Australia’ (Research Report, 2021) 8. See also Centre for Evidence and Implementation and Monash University, *Disability Royal Commission*, ‘Rapid Evidence Review: Violence, Abuse, Neglect and Exploitation of people with Disability’ (Research Report, 2021) 5.

evidence to inform governments, institutions and the community about best practices in prevention and response.³⁴⁹

There are common themes in the abuse and exploitation of older persons and persons with disability and there is an intersection between age and disability.³⁵⁰ But it is important to note that elder abuse and the abuse or exploitation of persons with disability are distinct and separate issues and the considerations made in cases of elder abuse cannot be automatically extended to the abuse of persons with disability.³⁵¹

1.4.31 Surprisingly, there is a lack of reliable statistics regarding the nature and prevalence of the abuse and exploitation of persons with disability.³⁵² However, a comprehensive study commissioned by the *Disability Royal Commission* found ‘the overarching finding across almost all studies was that people with disabilities were more likely to have experienced all types of violence, abuse, neglect and exploitation when compared to people without disabilities ... People with disability have repetitive experiences of violence, abuse, neglect and exploitation across the lifespan.’³⁵³

1.4.32 SALRI has sought, as far as practicable, to discuss the abuse of both older persons and persons with disability in the context of the *AAS Act*, but the wealth of research and commentary on elder abuse, as opposed to the abuse and exploitation of persons with disability is notable.

The Need to Address Assumptions

1.4.33 SALRI was told in consultation of a need to address ageist attitudes and simplistic stereotypes.³⁵⁴ ARAS, for example, told SALRI ‘positive steps need to be taken to eradicate ageist attitudes and create a culture that does not discriminate against older adults and counters negative attitudes towards the ageing process’. SALRI acknowledges that tackling ageism is a key aim of the South Australian government.³⁵⁵ SALRI shares the views of Professor Wendy Lacey which were

³⁴⁹ Centre of Research Excellence in Disability and Health, *Disability Royal Commission*, ‘Nature and Extent of Violence, Abuse, Neglect and Exploitation of People with Disability in Australia’ (Research Report, 2021) 5.

³⁵⁰ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 47 [2.73]; Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 34.

³⁵¹ As Maggie Rutjens told SALRI: ‘Existing research about people with disability who experience abuse is limited and insufficient. Additionally, it is problematic to rely on literature and statistics about elder abuse to shape the approach to disability safeguarding. There is important nuance to the instruments of abuse used against people with disability, the environments where abuse occurs and the impact for people with disabilities. While some principles of safeguarding may be transferrable among cohorts, it is critical that a safeguarding framework is intelligible of these differences. Without a tailored approach to people with disability, safeguarding outcomes may be limited.’

³⁵² 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 and People with Disability’ (Report, November 2015) 37–8 [2.68].

³⁵³ Centre for Evidence and Implementation and Monash University, *Disability Royal Commission*, ‘Rapid Evidence Review: Violence, Abuse, Neglect and Exploitation against People with Disability in Australia’ (Research Report, August 2021) 1–2. See also at: 16.

³⁵⁴ Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 12. Margaret Castles has noted: ‘Benign or ignorant paternalism, motivated by the perceived best interests of the elder person, is pervasive and can result in cultural blindness to the foundational rights of older people. This perception permeates society, and lawyers are no exception’: Margaret Castles, ‘A Critical Commentary on the 2017 ALRC Elder Abuse Report: Looking for an Ethical Baseline for Lawyers’ [2018] 18 *Macquarie Law Journal* 115, 117.

³⁵⁵ See South Australia’s *Plan for Ageing Well 2020–2022* and *Strategy to Safeguard the Rights of Older Australians 2014–2021*.

adopted by the South Australian Select Committee into Elder Abuse (which are also applicable to persons with disability):

I would like to highlight for the Committee the importance of adopting a rights-based approach to the area of elder abuse. It is all too easy to fall into an ageist approach when dealing with older persons and to just see that age alone means that people are automatically vulnerable. In any framework that is adopted for addressing elder abuse it is essential that we put the rights of the older person at the heart of whatever strategy is adopted. That includes respect for dignity, autonomy and the self-determination of the older person and empowering older people to exercise their rights as fully as possible for as long as possible.³⁵⁶

1.4.34 It is also essential to avoid similar stereotypes in relation to persons with disability as SALRI was reminded in consultation by parties such as Natalie Wade, Purple Orange, Maggie Rutjens and others from both the disability sector and disability community.³⁵⁷ As the Disability Royal Commission noted:

Australia has ratified the UN *Convention on the Rights of Persons with Disabilities*. This means Australia has agreed to respect, protect and fulfil the rights described in that Convention. Article 8 of the UN Convention on the Rights of Persons with Disabilities requires the government to: ‘Raise awareness ... foster respect for the rights and dignity of persons with disabilities ... combat stereotypes, prejudices and harmful practices ... [and] promote awareness of the capabilities and contributions of persons with disabilities’.³⁵⁸

1.4.35 The South Australian Council on Intellectual Disability told SALRI:

Using language that avoids stereotyping people with intellectual disability and being defined by their capacity and their risk of being abused, ensures that adults with intellectual disability are described in a person- and human-centred way. People with intellectual disability have said that they want to be described in an empowering way, focusing on their abilities ... too often, people with intellectual disability are left out of conversations about their lives. They are the expert in their life and conversations need to be had in ways that the person can understand.

Human Rights Framework

1.4.36 The importance of approaching law reform with a human rights framework has been previously raised by SALRI³⁵⁹ (and other bodies).³⁶⁰ The vast jurisprudence under treaties such as the

³⁵⁶ Joint Committee on Matters Relating to Elder Abuse, ‘Final Report of the Joint Committee on Matters Relating to Elder Abuse’ (Report, October 2017) 33.

³⁵⁷ *Disability Royal Commission*, ‘Rights and Attitudes’ (Issues Paper, April 2020) 1, 3–4. Maggie Rutjens added in consultation that it is critical for dignity of risk to be afforded to people with disability and that it’s not assumed that disability as a factor is seen as an inherently vulnerable factor, or that a person with disability is unable to make decisions to take risks. ‘The stereotypes about disability place them at risk of being overrepresented in matters where dignity of risk is removed, restrictions are put in place and oppression of individual liberty occurs.’

³⁵⁸ *Disability Royal Commission*, ‘Rights and Attitudes’ (Issues Paper, April 2020) 1.

³⁵⁹ South Australian Law Reform Institute, *Discrimination on the Grounds of Sexual Orientation, Gender, Gender Identity and Intersex Status in South Australian Legislation* (Audit Paper, September 2015) 35–6; South Australian Law Reform Institute, ‘*Lawful Discrimination: Exceptions under the Equal Opportunity Act 1984 (SA) to Unlawful Discrimination on the Grounds of Gender Identity, Sexual Orientation and Intersex Status*’ (Report, June 2016) 23–32.

³⁶⁰ The Terms of Reference, for example, of the *Disability Royal Commission* acknowledge the international obligation to take ‘appropriate legislative, administrative and other measures’ to comply with the Convention: *Disability Royal Commission* (Letters Patent, April 2019) 1. The Disability Royal Commission notes ‘we seek to translate the human rights recognised in the CRPD into practicable and sustainable policies and practices that will promote the right

International Covenant on Civil and Political Rights ('ICCPR') and the *Convention on the Rights of Persons with Disabilities* ('CRPD') is significant.

1.4.37 Australia has signed and ratified a number of international conventions and agreements that are relevant to this reference including the rights owing to children,³⁶¹ persons with disability³⁶² and Aboriginal people.³⁶³ This human rights framework, notably the CRPD,³⁶⁴ also informed the South Australian *Disability Justice Plan*,³⁶⁵ and has informed SALRI's current report. Persons with a disability, as SALRI was often reminded in its consultation, are vulnerable to abuse and exploitation. This systemic issue has remained prevalent for some time, with the Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability being recently established to investigate these issues.³⁶⁶ It is well established that persons with a disability face disadvantages, which impede upon the fundamental principles of equality, self-determination, autonomy and participation.

1.4.38 There is no binding international treaty or instrument established for the protection of older persons. The United Nations *Principles for Older Persons*³⁶⁷ and the *Madrid International Plan of Action on Ageing*³⁶⁸ relate to the human rights of older persons, but these international instruments are non-binding.³⁶⁹ The Commonwealth has indicated its view that a case has not been made for a separate convention for older persons.³⁷⁰

1.4.39 The *AAS Act* has a strong focus on the individual's autonomy and supported decision-making. The Act provides 'except in those cases involving serious and imminent harm, 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.'³⁷¹

1.4.40 The crucial premise of autonomy also emerges under international human rights law. The importance of an individual's autonomy was often presented to SALRI, citing international human rights. 'The notion of personal autonomy is an important principle underlying the interpretation of Article 8 [the right to privacy and family life, home and correspondence under the *European Convention*

of people with disability to live free from violence, abuse, neglect and exploitation': *Disability Royal Commission, 'Interim Report'* (Report, October 2020) xi. See also at: 10–11, 96, 342–3.

³⁶¹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

³⁶² *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) preamble, art 1, art 3.

³⁶³ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007).

³⁶⁴ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

³⁶⁵ Attorney-General's Department (SA), *Disability Justice Plan 2014–2017* (June 2014) 2.

³⁶⁶ *Disability Royal Commission, 'Interim Report'* (Report, October 2020).

³⁶⁷ *United Nations Principles for Older Persons*, GA Res 46/91, UN GAOR, 46th Session, 74th Plen Mtg, Agenda Item 94(a), UN Doc A/RES/46/91 (16 December 1991) annex 1.

³⁶⁸ Second World Assembly on Ageing, *Political Declaration and Madrid International Plan of Action on Ageing*, Madrid, Spain, (8–12 April 2002).

³⁶⁹ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 49 [2.81].

³⁷⁰ Linda Belardi, 'Govt Rejects International Convention for Older People', *Ageing Agenda* (Blog, 5 September 2014) <<https://www.australianageingagenda.com.au/executive/policy/govt-rejects-international-convention-for-older-people/>>.

³⁷¹ *AAS Act* s 12(c).

on Human Rights].³⁷² The European Court of Human Rights has noted that ‘the ability to conduct one’s life in a manner of one’s own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned.’³⁷³ However, it is important to note that even for those adopting a human rights approach this is a nuanced and complex question.³⁷⁴ As the European Court of Human Rights has acknowledged:

[T]he need for domestic authorities to reach, in each particular case, a balance between the respect for the dignity and self-determination of the individual and the need to protect the individual and safeguard his or her interests, especially under the circumstances where his or her individual qualities or situation places the person in a particularly vulnerable position.³⁷⁵

1.4.41 The respect for individual autonomy is also integral to the CRPD. This is complemented by the need to protect persons with disability, especially those with cognitive impairment and psychosocial conditions, from outright exploitation, violence and abuse, which is explicitly provided for in Article 16.³⁷⁶

1.4.42 Promoting autonomy should not be seen only as non-interference, but also in terms of considering what positive support is needed for a person to exercise their autonomy and decision-making ability.³⁷⁷ Intervention in certain circumstances, far from undermining the apparent victim’s autonomy, will serve to promote it and can be seen to support and enable the ability of adults vulnerable to abuse ‘to live autonomous and dignified lives’.³⁷⁸ The abuse of a vulnerable adult ‘clearly undermines dignity and autonomy’.³⁷⁹ As the former ALRC President has observed:

Protecting [vulnerable adults] from abuse will serve to support their autonomy and show respect for their dignity, because living in fear of abuse can prevent a person from making free choices about their lives and pursuing what they value...³⁸⁰

1.5 Adult Safeguarding

1.5.1 The establishment of the ASU was a significant landmark in South Australia.³⁸¹

1.5.2 The ASU was established by the *Office for the Ageing (Adult Safeguarding) Amendment Act 2018*, which amended what is now the *AAS Act*. The ASU commenced operation on 1 October 2019.

³⁷² *Goodwin v United Kingdom* [2002] ECHR 588, [90]. See also *Pretty v United Kingdom* [2002] ECHR 427 [61], [66]; *Evans v United Kingdom* [2007] ECHR 264 [71].

³⁷³ *Pretty v United Kingdom* [2002] ECHR 427 [62].

³⁷⁴ See further European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights: Right to Respect for Private and Family Life, Home and Correspondence* (ECHR Guide, 31 August 2021) 30–1.

³⁷⁵ *AMV v Finland* [2017] ECHR 273 [90].

³⁷⁶ Marie Fallon-Kund, Michaela Coenen and Jerome Bickenbach, ‘Balancing Autonomy and Protection: A Qualitative Analysis of Court Hearings Dealing with Protective Measures’ (2017) 53 (July–August) *International Journal of Law and Psychiatry* 69; Amanda Keeling, ‘Article 16: Freedom from Exploitation, Violence and Abuse’ in Ilias Bantekas, Michael Stein and Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press, 2018) 466.

³⁷⁷ Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press, 2016) 34–5.

³⁷⁸ *Ibid.*

³⁷⁹ Rosalind Croucher and Julie MacKenzie, ‘Framing Law Reform to Address Elder Abuse’ [2018] 18 *Macquarie Law Journal* 5, 11.

³⁸⁰ *Ibid.* 13.

³⁸¹ The background to the establishment of the ASU is further discussed in Part 3.

It was the first body of its kind in Australia. The ASU's stated function is to receive reports of suspected abuse or neglect and to coordinate a multi-agency response.³⁸² It is intended to focus on 'early intervention, case coordination and information sharing'.³⁸³ Its central premise is to safeguard vulnerable adults from abuse. There is a strong focus on the individual's autonomy and supported decision-making: SALRI was often reminded that 'help should not be forced upon adults'.³⁸⁴

1.5.3 The ASU was intended to 'fill the gaps' that had been identified in the protection of vulnerable adults, notably in relation to elder abuse³⁸⁵ (though the ASU's legislative remit extends to all vulnerable adults). This remit was expanded because, as the then Minister for Health and Wellbeing explained:

[W]e know that age alone does not make a person vulnerable to abuse, neglect or harm. It is the combination of age — whether advanced age or the fact that child protection laws no longer apply — combined with other factors, which make a person vulnerable. This may be ill health, disability, cognitive dysfunction or dementia, dependence on others for one's care, mobility or day to day lifestyle challenges or even social isolation. Age, combined with one of these factors, is what makes an adult potentially vulnerable to abuse or harm. All vulnerable adults deserve to have their rights safeguarded and to live a life of dignity and autonomy as far as is possible or practical.³⁸⁶

1.5.4 The ASU is located within the OFAW, within the South Australian Department for Health and Wellbeing. The role purpose and functions of the OFAW are considered elsewhere in this report.³⁸⁷

1.5.5 The Minister explained of the rationale and role of the new Adult Safeguarding Unit:

Underpinned by guiding principles that ensure that any actions are premised on respecting a vulnerable person's right to autonomy, dignity and self-determination, the new adult safeguarding unit will complement the role of the police and other government and non-government agencies by providing the South Australian community with an approachable, empowered body, with statutory responsibility and accountability for responding to reports of abuse or neglect of vulnerable adults. The functions of the adult safeguarding unit are set out in s 15 of the Bill. A key focus of the unit will be on the prevention of abuse through awareness raising and community education. However, where reports of alleged or suspected abuse are received, the unit will be responsible for assessing and investigating these reports and then either referring them on to appropriate persons or bodies, or working in collaboration with other agencies to coordinate a

³⁸² South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1727 (Stephen Wade, Minister for Health and Wellbeing).

³⁸³ South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3544 (Paula Leuthen).

³⁸⁴ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 393 [14.80].

³⁸⁵ See, eg, South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People* (Report, October 2011); Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017) Recommendations 4–5; Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 375 [14.1]–[14.2], Recommendation 14–1, 377, 382–4 [14.33]–[14.40]; Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 71–73 [6.66]–[6.71], 73 Recommendation 19; NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018).

³⁸⁶ South Australia, *Parliamentary Debates*, Legislative Council, 20 June 2018, 565.

³⁸⁷ See below Part 2.

multiagency and multidisciplinary approach to responding to concerns in a way that puts the rights of the vulnerable adult at the centre ...

The legislation and operation of the unit will be further supported by a charter of the rights and freedoms of vulnerable adults, which will be developed in consultation with vulnerable adults, their carers and families. Regulations and a comprehensive code of practice will also be developed, which will outline in a detailed and practical way how the act is to be implemented and, in particular, how prescribed agencies will work together to fulfil their obligations.³⁸⁸

1.5.6 The Bill passed with all party support.³⁸⁹ The expansion of the ASU's remit to include all vulnerable adults occurred earlier than had been planned. This was a recommendation of the Safeguarding Taskforce³⁹⁰ which was tasked with investigating gaps in protections for South Australians with disability in response to the disturbing case of Ann Marie Smith.³⁹¹

1.5.7 An update on the role and operation of the ASU was provided in June 2022 by Mr Wade:

It is still early days—two and a half years—and while much has been achieved there is much more to be done. Considerable work has occurred to support the unit's operations, including formalising clear reporting pathways, the development of memoranda of administrative agreements with key stakeholders, a code of practice, a charter of rights and freedoms of vulnerable adults, and an annual community education campaign focused on raising community awareness about the unit as well as reinforcing the rights of vulnerable South Australians.³⁹²

1.5.8 SALRI discussed in its POA Report the desirability or practicability of any agency assuming an active investigatory or other role to assist civil action by or on behalf of a vulnerable victim for financial abuse. The case for an enhanced civil investigatory or regulatory role in responding to suspected or actual financial abuse of vulnerable adults was often raised in SALRI's EPA consultation.³⁹³ It was pointed out such a role could support or further any civil action brought through SACAT (including SACAT requesting or directing an investigation be carried out).

³⁸⁸ South Australia, *Parliamentary Debates*, Legislative Council, 20 June 2018, 566–7.

³⁸⁹ South Australia, *Parliamentary Debates*, Legislative Council, 6 September 2018, 1297–1298 (Connie Bonaros); South Australia, *Parliamentary Debates*, Legislative Council, 19 September 2018, 1417 (Mark Parnell); South Australia, *Parliamentary Debates*, Legislative Council, 18 October 2018, 1654–1655 (John Darley); South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1710 (Kyam Maher) 1710–11; South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1711–14 (Frank Pangallo); South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3544–6 (Paula Luethen); South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3546–50; South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3550–2 (Fraser Elis); South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3552–5 (Zoe Bettison); South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3555–8 (Vickie Chapman); South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3558–9, 3590–1 (Matthew Cowdrey); South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3591–3 (Joshua Teague); South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3593–4 (Natalie Cook); South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3594–8 (Stephen Patterson); South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3598–602 (Nick McBride); South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3603–4 (Daniel Van Holst Pellekkan).

³⁹⁰ See Kelly Vincent and David Caudrey, *Safeguarding Task Force* (Report, 31 July 2020).

³⁹¹ The expansion of the ASU, which responds to concerns of abuse of vulnerable people, was brought forward. Previously the Unit only had jurisdiction to investigate abuse allegations concerning South Australians, aged 65 years or older, and was originally due to be broadened to apply to all vulnerable adults, including those with a disability in 2022.

³⁹² South Australia, *Parliamentary Debates*, Legislative Council, 15 June 2022, 532.

³⁹³ See also Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 384 [14.38].

1.5.9 This is a complicated area and agencies such as the Public Trustee, the Public Advocate and the ASU already exercise various roles and powers in the broad and often linked areas of EPAs, guardianship and ACDs. A number of other agencies and NGOs are also active in this area. There was wide support expressed to SALRI in both the EPA and present reference for a proactive approach to address the financial abuse of vulnerable adults and the value of a new effective civil remedy through SACAT for the victim and an interested party. However, the complexity of the area was emphasised. SALRI's EPA consultation also viewed any suggestion of the ASU undertaking an investigation to assist SACAT with considering remedies in relation to a civil complaint brought to SACAT as to the misuse of an EPA as potentially problematic. SALRI accepted this caution.

1.5.10 The ASU, in its comments to SALRI as part of the EPA reference, supported a new civil remedy through SACAT and the need for a proactive approach to address the financial abuse of vulnerable adults (including the misuse of an EPA). The ASU informed SALRI that their role includes responding to reports of financial abuse (including the misuse of an EPA which is not an uncommon event) but they are not a SAPOL type investigatory unit and have a distinct role and rationale. They observed:

The majority of investigations that the ASU undertake are with a person's consent. Investigators do not make findings or determinations. Investigations are usually undertaken in an informal manner, by speaking with the person at risk, to understand their situation with the view of developing a safeguarding plan in accordance with the persons wishes and needs. The ASU is not focused on punishing perpetrators but rather working with the person to implement support that attempts to reduce the person's risk of abuse. The consent and rights focused aspect of ASU investigations is important as the abuse is often perpetrated by family members. The person at risk will regularly state that they want the abuse to stop but do not want to see their family members getting into trouble. There is a risk that should the ASU be tasked with undertaking investigations which are aimed at assisting SACAT to make a finding and consider a remedy, the willingness of a person currently experiencing abuse to make a report or consent to an investigation may be limited, which in some cases increases their risk of further abuse. I strongly support the need for there to be an alternative to Supreme Court for a person seeking a remedy however feel that further consideration is required to consider how this alternative may work in practice.³⁹⁴

1.5.11 The ASU and many other consultees thought it was premature and impracticable to propose firm suggestions as to how law or practice could or should be formulated relating to the investigation and response by interested agencies to the financial abuse of a vulnerable adult (including the misuse of an EPA) and if or how any interested agency could support or further any civil action brought through SACAT (including SACAT requesting or directing an investigation be carried out by a suitable agency). SALRI accepted this reasoning.³⁹⁵ SALRI was therefore of the view it would be inappropriate to make any suggestions as to how law or practice should be formulated relating to the investigation and response by agencies such as the Public Advocate, SAPOL, the Public Trustee or the ASU to the abuse or misuse of an EPA. This a very complicated area that raises issues of policy, professional and operational roles and practices and resources. The recency of both the ASU and the

³⁹⁴ Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 430–1 [10.5.28].

³⁹⁵ Ibid 431 [10.5.30]. See further ibid 421–31 [10.5.1]–[10.5.32].

Ageing (Adult Safeguarding) Amendment Act 2018 (SA) were also significant.³⁹⁶ SALRI noted these were complex issues for future consideration and development.³⁹⁷

1.5.12 SALRI, as part of its POA Report, recommended ‘that that the State Government should consider the future roles, practices and processes of the Office of the Public Advocate, the Adult Safeguarding Unit, South Australia Police, the Public Trustee and any other interested agency, to receive and respond to reports or claims in relation to the suspected abuse or misuse of EPAs, including the possible intervention or investigation of cases brought to SACAT.’³⁹⁸

1.5.13 SALRI adheres to this view.

1.5.14 Several lawyers and other parties during present consultation again raised the ASU assuming a more active investigatory role and, in light of the well-established barriers and difficulties for vulnerable adults in pursuing legal redress, assisting victims in civil recovery, notably at SACAT. Such a premise is not without merit, but it is premature and raises major issues and implications of policy and practice. It was pointed out to SALRI, both as part of the EPA and present references, that the ASU are not a SAPOL type investigatory unit and they have a distinct role and rationale.

1.5.15 SALRI’s current statutory review of the operation of the *AAS Act* is limited in scope to the operation of the ASU under the *AAS Act* and did not extend to carrying out such a wider review as raised in its POA Report.

1.6 Consultation Data Overview

The Valuable Role of the ASU

1.6.1 Many of SALRI’s consultation and survey responses spoke positively about the role and functions of the ASU and its work to date. As Purple Orange, for example, said: ‘We wish to acknowledge the vital importance the Adult Safeguarding Unit plays in providing State-based oversight to safeguarding.’ Several specialist SAPOL officers spoke in ‘really positive’ terms of the role and work to date of the ASU and that it has proved a ‘valuable resource’.³⁹⁹ There was near universal support in SALRI’s consultation and survey responses for retention of the ASU under the *AAS Act*. The vital nature of its unique and valuable role in safeguarding the rights of adults was repeatedly emphasised to SALRI. Even those parties who were critical of either aspects of the *AAS Act* and/or the operation

³⁹⁶ Ibid 431 [10.5.30]. SALRI also noted it was relevant that s 53 of the *AAS Act* provides for an independent review of the Act to be undertaken within its first three years of operation to ensure that the legislation is meeting the needs and expectations of the South Australian community.

³⁹⁷ Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 431 [10.5.30]. The ALRC also refrained from detailed operational recommendations in this area. See Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 386 [14.50].

³⁹⁸ Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) Recommendation 120. See also at: 429–31 [10.5.24]–[10.5.31].

³⁹⁹ The officers noted the close and effective mutual links between SAPOL and the ASU. It was noted that, whilst SAPOL has had ‘relatively few’ cases of suspected criminal abuse drawn to its attention by the ASU, the ASU has proved effective in allowing SAPOL to refer issues and concerns that don’t meet the criminal threshold for the ASU to help find the best way forward. SAPOL often finds cases that, whilst strictly outside the criminal law, raise issues for the ASU. The ASU’s role as a ‘conduit’ to help parties vulnerable to abuse to find the most suitable service was praised by the officers.

to date of the ASU, or who were unaware of its existence of the ASU, supported the retention of the ASU under the *AAS Act* (albeit with suggested improvements to present law and/or practice).

1.6.2 The increasing workload of the ASU, in the face of the ongoing COVID-19 pandemic and despite a lack of broad community awareness of its role and existence, in its first three years of operation is also notable.⁴⁰⁰

1.6.3 COTA (SA) said: ‘The amended provisions of the Act and the establishment of the ASU were important and bold steps to prevent and respond to elder abuse.’ Robbi Williams of Purple Orange acknowledged the ‘vital importance’ of the ASU in providing State-based oversight to safeguarding, adding that since the establishment of the ASU in 2019 there had been a reduction in both funding and scope of the Community Visitor Scheme. Mr Williams noted:

We have witnessed the tragic death of Ann Marie Smith which highlighted the risks of relying on only one avenue for safeguarding those at greater risk. This tragedy also underscored that the NDIS Quality Safeguarding Commission on its own is not an adequate safeguarding measure.

1.6.4 The comments of the Public Advocate of the value of the ASU are significant:

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.

...

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.

A Wider Approach?

1.6.5 The need to ensure the *AAS Act* remains flexible and contemporary and ‘future proofed’ was made clear by the OFAW and ASU in their combined submission:

It is essential that the important work of the Office for Ageing Well and the Adult Safeguarding Unit is underpinned by a contemporary, flexible and enabling legislative framework and any amendments to the *AAS Act* should be drafted with ‘future proofing’ in mind, to encourage agile and contemporary legislation that remains relevant for both current and future generations of South Australians... It is important that the provisions of the *AAS Act* remain relevant for current and future generations of South Australians.

1.6.6 A number of parties highlighted to SALRI that, whilst the *AAS Act* and the ASU’s role are important, this is only part of a wider picture and there is a need for a wider systematic focus on the safeguarding of vulnerable adults. This theme was presented to SALRI by the expert reference group assembled by the OFAW to provide advice to SALRI on the review and the development of practical recommendations for this review.

1.6.7 The South Australian Public Advocate also drew attention for the need for a wider systematic approach:

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

⁴⁰⁰ The breadth of the ASU’s work in this time is shown in the Annual Report data found in Appendix B.

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.

1.6.8 Purple Orange stated its firm belief to SALRI that the key challenge to find solutions to the systemic safeguarding of persons living with heightened vulnerability involves a focus on changing the environment and the conditions that surround a person, rather than focusing solely on the individual. ‘In this way the pressure for change is shifted from the individual and re-focused on the environment.’ A similar theme was noted to SALRI by Maggie Rutjens of DACCSA.

1.6.9 COTA (SA) noted that it is important, given the formative nature of the ASU in South Australia and the absence of similar models in other jurisdictions, to see the ASU as it currently operates as only the first step and important progress toward improved protection of the safety and human rights of older people and other vulnerable adults. ‘It is very unlikely to represent the final shape of an optimal response.’ COTA (SA) also noted the need to properly include the role and work of the OFAW in any wider review; something they thought was perhaps lacking in this review.

1.6.10 Dementia Australia argued that ensuring the continued safety of people with dementia is fundamental to empowering victims of abuse to come forward. People with dementia, their families and carers must also have full confidence in the system. This was said to require a cross-sectorial commitment from community, service providers, law enforcement, and the ASU.’

1.6.11 Care and Community Support emphasised the situation of caregivers and also commented on the need for future wider review in this area:

In line with the original intention of the [AAS] Act (to fill an identified gap in policy and services) it is appropriate that a particular focus remains on older adults and people with a disability. However, society is constantly evolving and consideration should be given to how the scope of the ASU can evolve over time to safeguard vulnerable adult populations that may not be adequately provided for through other legislation, public policy and services. Caregivers are a population that may fall into this category. Little is known about the extent of this problem, however, our experience is that incidence is much higher than is currently understood and that the ability of caregivers to safeguard themselves may be significantly compromised. Care and Community Support ask that the Review consider whether the Act can provide for specific focus on safeguarding vulnerable older people and people with a disability, and retain the ability to expand/change focus over time to address other populations of unmet need as they emerge/are better understood.

1.6.12 This is a fast-changing area in various respects. It is important that law and practice remains up to date.⁴⁰¹ Professor Ibrahim urged a further review in three or five years’ time, once the ASU has started operating for all adults. ARAS made a similar point. SALRI considers there is value in a future review and suggests that a further review be undertaken of the role and operation of the

⁴⁰¹ Queensland Law Society and Queensland Public Advocate, *Elder Abuse: Joint Issues Paper* (Joint Issues Paper, February 2022) 5.

AAS Act in three or five years' time. Such a review can consider how best to balance autonomy and safeguarding and the value of a wider systematic approach and the need to work towards a profound shift in adult safeguarding at a systematic level, including both older persons and persons with disability, at a systematic level, and not just consider the ASU. Any such review can also consider the wider investigatory issues raised in SALRI's POA Report.⁴⁰²

1.7 SALRI's Observations and Conclusions

The Role of the ASU⁴⁰³

1.7.1 SALRI cautions against any radical revisions to, or a rewrite of, the *AAS Act*, or the roles and operation of the OFAW and the ASU. Any such sweeping changes would at this stage be premature and inappropriate. The ASU has only been in operation for three years and most of this period has been marked by the disruption of the COVID-19 pandemic. The generally positive views SALRI received as to the *AAS Act* and the vital roles and work of the OFAW and the ASU are significant. The number and nature of reports and calls dealt with by the ASU (as set out below at Appendix B) are also significant.

1.7.2 There was near universal support in SALRI's consultation and survey responses for the retention of the ASU under the *AAS Act*. The vital nature of its unique and valuable role in safeguarding the rights of adults vulnerable to abuse was repeatedly emphasised to SALRI. Even those parties who were critical of either aspects of the *AAS Act* and/or the operation to date of the ASU or who were unaware of its existence of the ASU, supported the retention of the ASU under the *AAS Act* (albeit with suggested improvements to present law and/or practice).

1.7.3 While the retention of the ASU's role was near universally favoured, SALRI's consultation and research has revealed a number of areas for clarification and improvements, especially relating to bridging the gap between operational practice and the legislative intention, and making the role, processes and functions of the ASU better known and more efficient and effective. Various amendments of the *AAS Act* are suggested by SALRI as well as linked changes to law and practice. The ASU should not be given too expansive a remit or it risks been spread too thinly to effectively carry out its core safeguarding role.⁴⁰⁴

A Wider Approach?

1.7.4 As raised by a number of parties to consultation, and foreshadowed in the Parliamentary debate when the ASU was introduced, the issues arising in this Review extend beyond those relevant to the operation of the *AAS Act* and may require examination within a broader review.

⁴⁰² Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) Recommendation 120.

⁴⁰³ This is considered below in greater detail: see Part 3.

⁴⁰⁴ There was near universal support in SALRI's consultation and survey responses for retention of the ASU under the *AAS Act*. The vital nature of its unique and valuable role in safeguarding the rights of adults was repeatedly emphasised to SALRI. Even those parties who were critical of aspects of the *AAS Act* and/or the operation to date of the ASU, or who were unaware of its existence of the ASU, supported the retention of the ASU under the *AAS Act* (albeit with suggested improvements to present law and/or practice).

1.7.5 SALRI considers such a future wider review is of benefit. The operation of adult safeguarding laws and practices should be kept under ongoing review and consideration. SALRI does not wish to suggest reviews for their own sake. Cassie Mason and Elicia White noted that the ASU has already been subject to more than one internal review in its relatively short existence. However, a number of parties in consultation urged SALRI as one of its recommendations to include the need for a further wider review of the role and operation of the *AAS Act*. It was noted to SALRI that, given the ongoing developments in service delivery at both a state and national level, community expectations and research and understanding (for example, to the increasing awareness of the nature and effects of coercive control and gaslighting)⁴⁰⁵ and ongoing Royal Commissions⁴⁰⁶ and reviews, such a future review of the operation of the *AAS Act* would prove timely and appropriate.⁴⁰⁷ It was also noted to SALRI that the ASU is the first such body of its kind in South Australia and its relatively short existence to date, it is important for the ASU to establish itself before further assessment of their role and operation is undertaken.⁴⁰⁸ ARAS, for example, ‘would welcome the ongoing monitoring and a further review of the impact in three years to ensure any unintended consequences are mitigated.’ Professor Joseph Ibrahim from Monash University expressed a similar view.

1.7.6 The need to ensure the *AAS Act* remains flexible and contemporary and ‘future proofed’ was made clear by the OFAW and ASU in their combined submission: ‘It is important that the provisions of the *AAS Act* remain relevant for current and future generations of South Australians.’

1.7.7 SALRI suggests that there should be a further review of the operation of the *Ageing and Adult Safeguarding Act 1995* (SA) after five years and that this review should include consideration of the roles and operation of both the OFAW and the ASU and the wider adult safeguarding context and landscape. Given the ongoing developments in this area, such a future review was supported by a number of interested parties to SALRI. Such a review should have a wider focus and context and not be restricted to a review of the operation of the *AAS Act*.

1.7.8 SALRI cautions that the notion that the *AAS Act*, notwithstanding its importance, ‘is a panacea’ to ensure the protection of persons with disability and older persons ‘is overly simplistic’.⁴⁰⁹ This supports the need for a future wider review of not only the operation of the *AAS Act* and the roles and operation of the OFAW and the ASU, but other agencies and the wider adult safeguarding landscape and context.⁴¹⁰

⁴⁰⁵ See below Part 7.4.

⁴⁰⁶ *Royal Commission into Aged Care Quality and Safety, Care, ‘Dignity and Respect’* (Final Report, 26 February 2021). See also Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 24, 69–79.

⁴⁰⁷ See also South Australia, *Parliamentary Debates*, Legislative Council, 19 September 2018, 1417 (Mark Parnell).

⁴⁰⁸ SALRI found a wide lack of knowledge of the role and even the existence of the ASU in its consultation, especially in regional and rural communities. See further below Part 11.3.

⁴⁰⁹ Lorna Montgomery et al, ‘Implications of Divergences in Adult Protection Legislation’ (2016) 18(3) *Journal of Adult Protection* 149, 151. See also Janet Anand et al, ‘Conceptualising Elder Abuse across Local and Global Contexts: Implications for Policy and Professional Practice on the Island of Ireland’ (2013) 14(6) *Journal of Adult Protection* 280.

⁴¹⁰ SALRI was encouraged by several parties to look at wider issues as part of its review, but SALRI’s TOR are confined to a review of the operation of the *AAS Act*.

RECOMMENDATION 1

SALRI recommends that there should be a further review of the operation of the *Ageing and Adult Safeguarding Act 1995* (SA) after five years and that this review should include consideration of the roles and operation of both the Adult Safeguarding Unit and the Office for Ageing Well and the wider South Australian adult safeguarding context and landscape.

Part 2 – The Office for Ageing Well

2.1 Background

2.1.1 SALRI's review of the operation of the *AAS Act* encompasses both the OFAW and the ASU, who are established under the Act. The majority of SALRI's consultees focused on the ASU, but there was still significant discussion of the OFAW.

2.1.2 The OFAW, previously known as the Office for the Ageing, is established under Part 2 of the *AAS Act* and is situated within the South Australian Department for Health and Wellbeing. The OFAW consists of a Director, appointed by the Minister, responsible for the administration of the *AAS Act*, and other Public Service employees assigned or appointed to assist the Director.⁴¹¹ At present, the *AAS Act* is administered by the South Australian Minister for Health and Wellbeing.

2.1.3 The OFAW is responsible for a diverse range of functions. The OFAW is tasked with fulfilling the Government's commitment to help all South Australians to age well.⁴¹² The OFAW supports older people to remain active and engaged in the community through continued consultation, including the voices of older people in decisions that affect them, and by undertaking a range of policy development, projects and programs.⁴¹³ The OFAW is comprised of five business units to deliver its functions: the ASU; Aged Care Strategy Unit; Ageing Policy Unit; Business Services and Seniors Card Unit; and the Retirement Villages Unit.⁴¹⁴

2.1.4 The OFAW has broad objectives to lead, promote and support strategies, programs and initiatives across the social and structural determinants of health and wellbeing to support all South Australians to age well.⁴¹⁵ A component of this is leading the development and implementation of a rights-based approach to safeguarding the rights of older people and promoting abuse prevention, recognition and response.⁴¹⁶ This work recognises and celebrates the contributions of older people and seeks to support current and future generations of South Australians to remain active and engaged in the community. The OFAW seeks to implement the vision for South Australia to be a 'healthy, connected, equitable, and sustainable community, which takes a whole of life approach that fosters many years of living well, and supports us to die with dignity in line with our wishes.'⁴¹⁷

2.1.5 The *AAS Act* provides a critical framework for the diverse and essential functions of the OFAW and enshrines its state-wide responsibility to lead government ageing policy.

⁴¹¹ *AAS Act* s 7.

⁴¹² Government of South Australia, SA Health, *Office for Ageing Well* (Web Page, 7 March 2022) <<https://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/about+us/departm+ent+for+health+and+wellbeing/office+for+ageing+well>>.

⁴¹³ Ibid.

⁴¹⁴ Ibid.

⁴¹⁵ *AAS Act* s 9.

⁴¹⁶ Office for Ageing Well, *South Australia's Plan for Ageing Well 2020–2025* (SA Health Document, 2020) 12.

⁴¹⁷ Ibid 23.

2.1.6 The OFAW informed SALRI that a large part of their role is assisting the development of State Government policies and strategies, to ensure that the rights and interests of older persons are represented and that the language used to describe older persons is appropriate.⁴¹⁸

2.1.7 Other aspects of their role include developing and implementing programs or services that will benefit older persons,⁴¹⁹ researching matters that affect the older persons and compiling and disseminating such information.⁴²⁰

2.1.8 These important legislative mandates are supported by a range of strategic documents that guide the work of the Office for Ageing Well and underpin its effective operation. These include:

- South Australia's Plan for Ageing Well 2020–2025;
- Strategy to Safeguard the Rights of Older South Australians;
- Age Friendly SA Strategy;
- Age of Opportunity: A Policy Framework for the Development of an Ageing Well Industry for South Australia;
- South Australian Charter of the Rights and Freedoms of Older People.⁴²¹

2.1.9 The legislative mandates are also supported by a range of activities and initiatives run by or overseen by the Office for Ageing Well including:

- Seniors Card Program;
- Retirement Villages Unit;
- Aged Care Assessment Program;
- State Ageing Plan;
- Community Grants;
- Aged Care Strategy Unit.⁴²²

2.1.10 The OFAW has actively contributed to SALRI's Review.

2.2 Legislative History

2.2.1 The OFAW was first established in 1995 as the Office for the Ageing through the *Office for the Ageing Act 1995* (SA). The Act repealed the *Commissioner for the Ageing Act 1984* (SA) and restructured the Office of the Commissioner for the Ageing. Under the new structure, a Director,

⁴¹⁸ See in particular *AAS Act* (SA) ss 9(1)(a), 9(1)(c), 9(1)(d).

⁴¹⁹ Ibid s 9(1)(b).

⁴²⁰ Ibid ss 9(1)(e)–(g).

⁴²¹ Government of South Australia, SA Health, *Office for Ageing Well* (Web Page, 7 March 2022) <<https://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/about+us/departm+ent+for+health+and+wellbeing/office+for+ageing+well>>.

⁴²² Ibid.

reporting to the Minister for Ageing, would be appointed to lead the Office instead of a Commissioner and an Advisory Board on Ageing was introduced.⁴²³

2.2.2 The *Office for the Ageing Act 1995* (SA) was introduced to reform the government's ability to carry out its responsibility for older persons. As outlined by the Minister for the Environment and Natural Resources, the Hon David Wotton, in the Second Reading Speech, the primary purpose of the Office for the Ageing Bill was to:

[E]nsure that Government policies, strategies and programs provide maximum benefit to older persons; and promote and support safe, healthy, contributive, and satisfying roles for older people in the community.⁴²⁴

2.2.3 Following on from this, the Minister stated that in order to achieve this purpose the main objectives and functions of the Office for the Ageing would be:

[P]roviding the strategic planning and policy development required to lead Government public policy for older persons' and 'consulting with organisations of older people, service providers, community organisations, universities and other relevant groups in order to ensure that their views are heard and incorporated into Government policy.'⁴²⁵

2.2.4 While the *Office for the Ageing Act 1995* (SA) provided the Office for the Ageing with several new and expanded functions, many of the former objectives and functions of the Commissioner for the Ageing were retained as objectives and functions of the Office for the Ageing. This included functions such as advising the government about the development and implementation of programs and services for older people,⁴²⁶ and consulting with older people to promote their interests.⁴²⁷ Their objectives included understanding the issues affecting older people and creating social structures in which they are able to realise their full potential.⁴²⁸ In line with the objectives and functions outlined in Minister Wotton's Second Reading Speech, the sole new function given to the *Office for the Ageing Act 1995* (SA) was:

[T]o assist in the development and co-ordination of State government policies and strategies affecting the ageing and for that purpose to consult with the ageing, providers of services to the ageing, organisations for the benefit of or representing the interests of the ageing and other relevant persons.⁴²⁹

2.2.5 Since its commencement, the *Office for the Ageing Act 1995* (SA) has been amended several times. A key amendment in 2015 abolished the Advisory Board on Ageing. In 2018, the Act was significantly amended by the *Ageing (Adult Safeguarding) Amendment Act 2018* (SA). As a result of these major amendments, the *Office for the Ageing Act 1995* (SA) is now known as the *AAS Act*.

2.2.6 The then Government introduced the *Ageing (Adult Safeguarding) Amendment Act 2018* (SA) as an election priority commitment following concern over the abuse of older residents at Oakden

⁴²³ South Australia, *Parliamentary Debates*, House of Assembly, Estimates Committee A, 22 June 2015, 106 (David Wotton).

⁴²⁴ South Australia, *Parliamentary Debates*, House of Assembly, 26 October 1995, 446 (David Wotton) 446.

⁴²⁵ Ibid.

⁴²⁶ *AAS Act* s 9(1)(a).

⁴²⁷ Ibid s 9(1)(n).

⁴²⁸ Ibid ss 8(c), 8(f).

⁴²⁹ South Australia, *Parliamentary Debates*, House of Assembly, 26 October 1995, 446 (David Wotton).

Older Persons Mental Health Service⁴³⁰ and several prominent wider reports such as the *Closing the Gaps* Report,⁴³¹ the ALRC's *Elder Abuse* Report⁴³² and the Final Report of the South Australian Joint Committee on Matters Relating to Elder Abuse,⁴³³ which all highlighted 'gaps' in the adult protection system and called for the introduction of state-based adult safeguarding laws.

2.2.7 The recommendations of the *Closing the Gaps* Report and others from that period typically noted two options for reform to fill the gaps in existing adult safeguarding systems. These options were either to expand the role and powers of existing agencies such as the Office of the Public Advocate ('OPA'),⁴³⁴ or to establish a new unit within a Government department. The South Australian Government selected the second option and specifically placed the new ASU within the Office for the Ageing, situated within the Department for Health and Wellbeing, for a number of reasons. The option of extending the OPA's powers was discarded given concerns that an actual or perceived conflict of interest would arise in cases where the OPA is acting as both an investigator and an advocate.⁴³⁵

2.2.8 Additionally, it was envisaged that the new ASU would be able to leverage and build on the Office for the Ageing's existing expertise and networks, and raise community awareness about elder abuse and the rights of older people, particularly since one of the key functions of the ASU would be awareness raising.⁴³⁶ It was also argued that the ASU's other key functions of coordination, monitoring and investigation would complement and support the OFAW's existing investigation and mediation functions under its administration of the *Retirement Villages Act* and its existing roles in administering the state-wide aged-care assessment program and advising on aged-care reform.⁴³⁷

2.2.9 In addition to establishing the ASU, the *Ageing (Adult Safeguarding) Amendment Act 2018* (SA) changed the name of the Office of the Ageing to the Office for Ageing Well and revised its objectives and functions. As explained by one MP, the name change reflected the new Government's

⁴³⁰ Bruce Lander, Independent Commissioner Against Corruption, *Oakden: A Shameful Chapter in South Australia's History* (Report, 2020).

⁴³¹ South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People* (Report, October 2011).

⁴³² Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017).

⁴³³ Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017).

⁴³⁴ There were concerns of policy and practice as to the suitability of the Public Advocate also being responsible for safeguarding vulnerable adults. See Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 384–6 [14.43]–[14.50]. A principal concern, also noted to SALRI, was that the OPA would have a conflict of interest in assuming such an additional major role: at 386 [14.49].

⁴³⁵ 'Whereas OPA is a government body, it is a statutorily independent body and performs a very important role in delivering an independent advocacy role. To add to the powers of OPA by conferring upon it the power to coordinate and lead an intervention or multi-agency response, would have a detrimental effect on the ability of OPA to act as an independent advocate for an older person within that process': South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People* (Report, October 2011) 26.

⁴³⁶ South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1716, 1723–4 (Stephen Wade, Minister for Health and Wellbeing).

⁴³⁷ *Ibid* 1724.

‘commitment to combating ageism by challenging the way ageing is framed in the language and structure of the services our government delivers’.⁴³⁸

2.2.10 The objectives and functions of the OFAW on the other hand were updated with the ‘intention of renewing the vigour of the Office to carry out its objectives’.⁴³⁹ The new objective added to s 8(a) of the *AAS Act* states that the OFAW has a role in ‘supporting South Australians of all ages to age well, unencumbered by stigma and discrimination’.⁴⁴⁰ The other objectives in sections 8(b)–(f), remained unchanged and mirror those in the *Office for the Ageing Act 1995* (SA). Another new function of the OFAW following the establishment of the ASU under the *Ageing (Adult Safeguarding) Amendment Act 2018* (SA) was to support the functions of the ASU.

2.3 Objectives, Functions and Operation of the OFAW

2.3.1 The current objectives of the OFAW are outlined in s 8 of the *AAS Act*:

- (a) supporting South Australians of all ages to age well, unencumbered by stigma and discrimination; and
- (b) achieving proper integration of ageing persons within the community thus ensuring that the skills and experience of the ageing are not lost to the community through social alienation; and
- (c) creating social structures in which ageing persons are able to realise their full potential as individuals and as members of the community; and
- (d) creating a social ethos in which ageing persons are accorded the dignity, appreciation and respect that properly belong to them; and
- (e) ensuring that the multicultural nature of the community is reflected in the planning and implementation of programs and services relevant to ageing persons; and
- (f) achieving a proper understanding within the community of the problems affecting ageing persons and other vulnerable adults and ameliorating those problems so far as it is practicable to do so by modification of social structures and attitudes.

2.3.2 As outlined above, many of these objectives have remained largely unchanged since the establishment of the Office for the Ageing by the original 1995 Act. Additionally, these objectives were largely carried over from the repealed *Commissioner for the Ageing Act 1984* (SA).

2.3.3 The functions of the OFAW are outlined in a detailed list under s 9 of the *AAS Act*. Like the objectives of the OFAW, most of the functions of the OFAW have remained largely unchanged since the Office’s inception and were carried over from the repealed *Commissioner for the Ageing Act 1984* (SA).

⁴³⁸ South Australia, *Parliamentary Debates*, House of Assembly, 18 November 2018, 3545 (Paula Leuthen).

⁴³⁹ South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3591 (Josh Teague).

⁴⁴⁰ Cf *Office for the Ageing Act 1995* (SA) s 4, as at 31 January 2019.

2.3.4 Since the commencement of the *Ageing (Adult Safeguarding) Amendment Act 2018* (SA), the OFAW has continued to build on its previous work in leading programs and initiatives to help South Australians to age well and remain active and engaged in the community. It is significant that this expertise and role of the Office received positive feedback in SALRI's consultation.⁴⁴¹

2.3.5 Following the introduction of the 2020 *South Australia's Plan for Ageing Well 2020–2025*, the Ageing Policy Unit of the OFAW has implemented the Plan's strategic priorities by contributing towards a number of ageing strategic projects.⁴⁴² For example, in 2021, the OFAW partnered with ACH and Flinders University on the Re-Imagining Volunteering Project, which focuses on addressing the barriers faced by older persons in relation to volunteering.⁴⁴³ Other strategic projects that the OFAW have contributed towards in the past few years have focused on ensuring that government services are able to provide age friendly customer service, reducing social isolation caused by the COVID-19 pandemic and supporting older people to develop digital skills.⁴⁴⁴ Additionally, the Ageing Policy Unit of the OFAW has continued to consult with older South Australians, provide community grants and runs annual Stop Elder Abuse campaigns.⁴⁴⁵

2.3.6 In terms of supporting the ASU, the OFAW has undertaken a number of actions to fulfil this legislative mandate. First, following the commencement of the *Ageing (Adult Safeguarding) Amendment Act 2018* (SA), responsibility for the South Australian Elder Abuse Prevention Phone Line, initially trialled by ARAS and funded by the South Australian Government through the OFAW, shifted to the ASU from its commencement in October 2019.⁴⁴⁶ Secondly, the OFAW consulted with a broad range of parties including older persons, persons with disability and mental illness and their families to help produce the following key items to support the ASU's operations; namely the ASU's *Code of Practice*; the *Adult Safeguarding Regulations 2019* (SA); and the *Charter of the Rights and Freedoms of Vulnerable Adults* under the *AAS Act*.⁴⁴⁷

2.3.7 In light of the ASU's imminent expansion in scope in October 2022,⁴⁴⁸ the OFAW has worked in partnership with other organisations and the community to raise awareness and understanding of the ASU and its work.⁴⁴⁹ The OFAW's annual 'Stop Elder Abuse' campaigns are an example of its awareness raising efforts as in addition to raising greater community understanding of elder abuse it also promotes the ASU as a vehicle to make reports of abuse.⁴⁵⁰

⁴⁴¹ See below Part 2.5.

⁴⁴² Department for Health and Wellbeing, *2020–21 Annual Report* (Report, 30 September 2021) 52.

⁴⁴³ Ibid.

⁴⁴⁴ Department for Health and Wellbeing, *2018–19 Annual Report* (Report, 30 September 2019) 53–4; Department for Health and Wellbeing, *2019–20 Annual Report* (Report, 30 September 2020) 46.

⁴⁴⁵ Department for Health and Wellbeing, *2018–19 Annual Report* (Report, 30 September 2019) 54; Department for Health and Wellbeing, *2019–20 Annual Report* (Report, 30 September 2020) 47–8; Department for Health and Wellbeing, *2020–21 Annual Report* (Report, 30 September 2021) 53–4.

⁴⁴⁶ Department for Health and Wellbeing, *2018–19 Annual Report* (Report, 30 September 2019) 53.

⁴⁴⁷ Ibid.

⁴⁴⁸ Department for Health and Wellbeing, *2019–20 Annual Report* (Report, 30 September 2020) 46; Department for Health and Wellbeing, *2020–21 Annual Report* (Report, 30 September 2021) 52.

⁴⁴⁹ Department for Health and Wellbeing, *2019–20 Annual Report* (Report, 30 September 2020) 47.

⁴⁵⁰ Tetra Tech International Development, *Adult Safeguarding Unit: Year One Evaluation* (Evaluation Report, 2020) 23.

2.4 Issues

2.4.1 Many of the key legislative provisions outlining the objectives and functions of the OFAW have remained largely unchanged over the past 27 years since the Office was first established. There have been drastic changes to the legislative, policy, economic, social and service landscape since then.

2.4.2 The establishment of the ASU has added a new policy unit for the OFAW to manage. The OFAW is intended to support the ASU in exercising their functions and powers under the *AAS Act*⁴⁵¹ as relates to the prevention of abuse and safeguarding the rights of adults who may be vulnerable to abuse.

2.4.3 The shift in services from largely state-based services to Commonwealth-based services, such as in the aged care space, may also impact the ability of the OFAW to perform their functions of consulting and cooperating with other bodies and persons who assist the ageing.⁴⁵²

2.4.4 Some objectives of the OFAW are potentially idealistic and lofty, such as the responsibility to ‘create social structures’.⁴⁵³ Although this could be a goal to strive towards, it might be misleading as to the key functions of the OFAW and ignorant of the impact one agency can make, and the resourcing and other implications ‘creating’ might entail. It may also be unrealistic given the OFAW manages numerous portfolios.

2.4.5 As such, SALRI considers that it is timely, as part of the present review, to consider these provisions in closer detail to determine whether they are truly reflective of the OFAW’s current objectives and functions and fully reflect both the government and the OFAW’s commitment to combating ageist attitudes and contemporary standards in terms of language. Also, as submitted by the OFAW to SALRI, it is important to ensure that the Act will continue to be relevant for future use.

2.4.6 Another issue that was raised in SALRI’s consultation was whether the OFAW’s recent name change, and the concept of ‘ageing well’, is appropriate and matches the Office’s current and future roles. The language used to describe older people in the *AAS Act* was raised as potentially problematic. One of the key goals of the OFAW is to tackle ageism and address how subtle, underlying ageist attitudes and beliefs impact interactions and can negatively affect the way services and care are provided to older persons.⁴⁵⁴

2.4.7 The OFAW provisions in the *AAS Act* use the term ‘ageing persons’, despite the conventional term ‘older persons’ being used in OFAW resources and materials. The ALRC Report on Elder Abuse also uses the term ‘older person’⁴⁵⁵ as does the Australian Institute of Family Studies 2021 prevalence study on elder abuse.⁴⁵⁶ It is important for SALRI to consider what term should be used in the *AAS Act* to refer to older people so as to not increase stigma against older persons.

⁴⁵¹ *AAS Act* s 9(1)(p).

⁴⁵² *Ibid* s 9(1)(l).

⁴⁵³ *Ibid* s 8(c).

⁴⁵⁴ Office for Ageing Well, *South Australia’s Plan for Ageing Well 2020–2025* (SA Health Document, 2020) 41.

⁴⁵⁵ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017).

⁴⁵⁶ Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021).

2.5 Consultation Data Overview

2.5.1 SALRI consulted widely about the functions and objectives of the OFAW to ascertain whether the community, practitioners, and others felt their functions reflected contemporary society and issues, and whether any changes were necessary.

2.5.2 There was wide acknowledgement in SALRI's consultation of the value of the work, especially the educative functions, carried out by the OFAW. SALRI notes that, although the majority of its consultation and survey responses focused on the ASU, those consultees and respondents who referred to the role and expertise of the OFAW did so in overwhelmingly positive terms, especially as to highlighting its role and expertise in responding to elder abuse. Additionally, it appears that many people engaged with the OFAW through their workplace or are community members who have participated in their initiatives.

2.5.3 The general view of survey respondents who had interacted with the OFAW was positive:

Very good experience re advice for my very elderly mother's ACAT a few years ago.

My involvement with the COTA Rainbow Hub has led to many connections with [the] OFAW. I value their support of LGBTIQ+ elders and their general approach to supporting older South Australians.

Attended seminar; involved in co-design project ... Both well-planned and facilitated, and most enjoyable.

2.5.4 The role of the OFAW in supporting community centres and similar projects was also highlighted.

2.5.5 The former Chief Adult Safeguarding Practitioner, Elicia White, noted the OFAW's expertise in addressing elder abuse and community attitudes. ARAS shared this positive view: 'ARAS acknowledges the important work the Office for Ageing Well undertakes in supporting the needs, interests and supports for all South Australians to age well.'

Objectives of the OFAW

2.5.6 With respect to the OFAW's objectives, there was a general consensus across the various submissions and discussions that, while many of the objectives currently outlined in s 8 of the *AAS Act* remain relevant, changes should be made to ensure that the Office's functions continue to remain up to date with community expectations.

2.5.7 The OFAW submitted that ss 8(c) and (d) of the *AAS Act* are not reflective of their current work. This is because the OFAW is not responsible for 'creating social structures' wherein which older people are able to realise their full potential or 'creating a social ethos' of dignity, appreciation and respect for older people. Rather than 'creating' such conditions, the OFAW commonly works with government departments and organisations, communities and individuals to achieve the objectives set out in ss 8(c) and (d) of the *AAS Act*: ensuring that older people are supported to realise their full potential and are afforded dignity, appreciation and respect. The OFAW told SALRI that the use of the term 'creating' is inaccurate, if not misleading.

2.5.8 The OFAW also submitted that s 8(e) should be updated. This provision currently states that one of the OFAW's objectives is 'ensuring that the multicultural nature of the community is reflected in the planning and implementation of programs and services relevant to ageing persons'. While this objective is still relevant, the OFAW suggests that it should be updated to reflect the broader diversity of the South Australian community, which

includes (but is not limited to) Aboriginal or Torres Strait Islander background, sexual preferences and sexual orientation, disability, cultural and heritage beliefs, religious beliefs, culturally and linguistically diverse background, Forgotten Australians and people living in remote communities.

Consequently, the OFAW submitted that the term ‘multicultural’ be replaced with the term ‘diverse’ instead.

2.5.9 Apart from amending its current objectives, a number of submissions recommended the addition of new objectives for the OFAW under s 8 of the *AAS Act*. The OFAW, for example, suggested that the current objectives should be updated to include a provision which recognises the importance of applying a ‘life-course’ approach to ageing in carrying out its functions. The ‘life-course’ approach to ageing is described as a perspective which recognises how various social and structural determinants such as physical and mental health, environmental, socio-economic background, lifelong learning and education, employment, loneliness and isolation throughout a person’s life can impact their specific experience of ageing. The OFAW submits that this approach should be included in its objectives as

it focuses on the contributions people can make at each stage of life while also recognising the breadth of aspirations, challenges and diversity across the South Australian community that must be acknowledged and addressed in systems, strategies and initiatives aimed at supporting South Australians to age well.

2.5.10 The OFAW also noted that this approach is consistent with *South Australia’s Plan for Ageing Well 2020–2025* and national and international best practice.

2.5.11 A survey respondent noted that the OFAW ‘understand the importance of social connection in creating healthy and resilient individuals and communities’ which reflects the proposed life-course approach.

2.5.12 The OFAW also noted that the objectives could be updated to highlight the importance of raising awareness about matters that affect South Australians as they age and providing information to support people in upholding their rights.

2.5.13 COTA (SA)’s submission raised concern about including a ‘life-course’ approach in the OFAW’s objectives on the basis that this would dilute the Office’s focus on older people and in turn, reduce the effectiveness of whole of government responses to the issues and needs of older people.

2.5.14 The OPA on the other hand, suggested that one of the objectives in the *AAS Act* should ‘make reference to the role of OFAW in upholding the rights of older people as equal citizens’ to match developments in the disability sphere. Furthermore, the OPA suggested that the objectives should contain a provision which clearly expresses the OFAW’s aim of eliminating discrimination based on age. Similar views were also expressed by COTA (SA) and the OFAW, as they have both noted the need to clearly express the Office’s role in tackling ageism and ageist attitudes during consultation.

2.5.15 The increasing awareness of the effects and implications of coercive control in an elder abuse⁴⁵⁷ were widely raised to SALRI by various parties such as ARAS and the Victim Support Service. The importance of this theme was acknowledged by Elicia White and Cassie Mason. There was discussion of whether the objectives of the Office in the *AAS Act* should be expanded to promoting the entitlement of older persons to live and make decisions without coercion.

⁴⁵⁷ See below Part 7.3.

Functions of the OFAW

2.5.16 In terms of its functions set out in s 9 of the *AAS Act*, the OFAW submitted that they should be ‘reviewed and streamlined to ensure they remain current, avoid duplication, are not overly prescriptive and enable the OFAW to meet the objectives of the *AAS Act* both now and in the future’.

2.5.17 The OFAW recommended expressly including certain perceived key functions in the *AAS Act* to better reflect their work:

- advocating and influencing (including partnering and collaborating with commonwealth, state and local government, non-government organisations, business, the community and older South Australians to promote age friendly and inclusive environments);
- collaborating and partnering with government, local government, non-government and community organisations, the community and older people;
- undertaking education activities to safeguard older people’s rights and raise awareness of issues affecting older people;
- monitor trends, policy and service impacts and make appropriate representations to the Minister and other relevant persons and bodies;
- leading and contributing to policy, planning, service development, programs and initiatives.

2.5.18 Further, the OFAW asserted that certain functions should be reviewed and updated as ‘they no longer fully reflect the role and functions of the Office’. The relevant subsections include, but are not limited to ss 9(c), (h) and (k) of the *AAS Act*.

2.5.19 Section 9(c) currently places a specific and positive obligation on the OFAW to monitor all Commonwealth, state and local legislation and its ‘effect on the ageing’. This is a formidable task. The OFAW proposed a broader and less prescriptive approach by, for example, including a function to ‘monitor trends, policy and service impacts and make appropriate representations as required’.

2.5.20 Under s 9(h) of the *AAS Act*, the OFAW is tasked to ensure that financial and investment advice is available to older persons. This function does not figure in the OFAW’s current operations and may be more appropriate for other State Departments, the Commonwealth or NGOs to undertake instead, or an administrator if appointed for a person with impaired decision-making capacity.

2.5.21 Section 9(k) provides that an OFAW function is to keep under review ‘the special needs of individual groups of the ageing (including Aboriginal peoples, those who suffer from physical or mental disabilities and those who are economically disadvantaged), and to promote various methods by which those needs may be satisfied’. Like its suggestions made in relation to s 8(e) above, the OFAW said this provision should be updated to reflect the broader modern diversity of older South Australians.

2.5.22 Another issue raised during SALRI’s community roundtables and submissions from the OPA and COTA (SA) was whether it is appropriate for the ASU to be situated in the OFAW, particularly in light of the ASU’s scheduled expansion of services to prevent and address the abuse of

all vulnerable adults. This issue is discussed in this Report elsewhere.⁴⁵⁸ With this issue in mind, if the ASU is moved at some stage to another department or placed elsewhere, it may no longer be appropriate for the OFAW to support the ASU in the exercise of its functions and powers. In such a case, s 9(p) of the *AAS Act* would become otiose and would need to be amended.

Language of the AAS Act

2.5.23 The prevailing view amongst those parties in consultation and the survey respondents who commented on the language used in Part 2 of the *AAS Act* was that it needs to be updated in accordance with contemporary community expectations and standards. The use of the phrases ‘ageing person’ or ‘the ageing’ were commonly highlighted by many consultees and respondents as being inappropriate and outdated. Particular concerns raised by the attendees at the Adelaide expert roundtable, Victim Support Service, ARAS, COTA (SA) and the OFAW were that the impersonal nature of this language can reinforce negative stereotypes about ageing as it depicts older people as passive members of society and fails to capture the diverse nature and contributions of older South Australians.⁴⁵⁹

2.5.24 While alternate views in terms of preferred language were expressed by Speech Pathology Australia, a community session at the Multicultural Communities Council of South Australia and in survey and other responses, the term ‘older people’ was the most preferred language to refer to older South Australians.⁴⁶⁰ It was also recommended by the OFAW on the basis that it is consistent with language used at the national level.

2.5.25 In response to SALRI’s survey question, ‘What is a suitable term to refer to adults aged over 65?’, 82.2% of people preferred the term ‘older person’ to the term ‘ageing’. One respondent went as far as to say that “the aging” sounds like “the decaying” or “the rotting”. It completely lacks personhood.’

2.5.26 Another survey respondent said:

We appreciate that the term ‘the ageing’ can promote a whole of community thinking as ‘we all age’, and is less likely to encourage an ‘us and them’ thinking. However, we wonder if a term could be term identified that elevates the status of older people within the community, and speaks to the respect, dignity and autonomy that older people have a right to as everyone else — the term ‘elder’ in Indigenous and other diverse cultural communities is an example of such a word. It is more than a chronological description, but speaks to the life lived.

2.5.27 Other terms in Part 2 of the *AAS Act* said to be outdated in consultation included, ‘Aboriginal peoples’, ‘those who suffer from physical or mental disabilities’ and ‘consult’. ARAS, for instance, suggested that the term ‘First Nations people’ could be used instead of ‘Aboriginal peoples’.⁴⁶¹

⁴⁵⁸ SALRI acknowledges that there are differing views on this issue, but considers at this stage it is premature and unnecessary to shift the ASU from the OFAW. Many parties said what matters is not where the ASU is located, but rather its expertise and operation. The ASU has been in operation for only three years and taking the pragmatic view of one consultee, this is not a ‘die in the ditch’ issue. See below Part 3.4.

⁴⁵⁹ Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 12. See also Glossary.

⁴⁶⁰ See also Glossary.

⁴⁶¹ However, SALRI notes that the term Aboriginal is widely used within South Australia and was the term favoured by most Elders and Aboriginal community members SALRI spoke to. SALRI expresses no particular view on this

That said, ARAS noted that ‘further consultation with Indigenous communities to gain clarification is needed’. In relation to the term ‘consult’, Speech Pathology Australia submitted that the term ‘co-design’ is preferred because it ‘actively involves stakeholders in the design, development and implementation process’ and is thus, better aligned with the objectives of the OFAW.⁴⁶²

2.5.28 COTA (SA) observed that a wider review and focus of the OFAW is appropriate beyond the present review:

While this is ostensibly a review of the entire *Ageing and Adult Safeguarding Act 1995*, COTA (SA) believes it is not reasonable given the short timeframes and the narrow stakeholder group targeted for contributions and submissions, to deal properly with the Act beyond the adult safeguarding provisions. We would support a much more comprehensive review of the Act over a longer period and with much broader representation from older South Australians and other stakeholders... the clear and reasonable priority of this review is to examine the legislation and operation of the adult safeguarding provisions. ... While it is important for this review to apply a depth of focus to the functions and operation of the ASU, COTA (SA) urges a separate process to consider the rest of the Act including its purpose and the role and function of the Office for Ageing Well.

The Name of the OFAW

2.5.29 Finally, with respect to the name of the Office itself, some concerns were raised during a community and health practitioner roundtable about whether it will still remain appropriate after the ASU’s remit is expanded to cover all adults. Dementia Australia submitted that the term ‘ageing well’ should be reconsidered on the basis that it can reinforce stigma and stereotypes, as the goal of ‘ageing well’ implies that it is possible to fail at doing so. The Victim Support Service also suggested that the term ‘ageing well’ is not responsive to those who for whatever reason may not age well.

2.6 SALRI’s Observations and Conclusions

2.6.1 Most consultees and respondents who spoke to SALRI about the OFAW (noting that most consultees looked solely at the ASU) referred to the role and expertise of the Office in positive terms, especially as to its expertise and role in responding to elder abuse.

2.6.2 SALRI is of the view that the role and operation of the OFAW under the *AAS Act* should be retained. SALRI reiterates that, although the majority of its consultation and survey responses focused on the ASU, consultees and respondents who referred to the role and expertise of the OFAW did so in overwhelmingly positive terms, especially as to highlighting its role and expertise in responding to elder abuse and community education. Additionally, it appears that many people engaged with the Office through their workplace or are community members who have participated in their initiatives.

Objectives and Functions of the OFAW

2.6.3 SALRI recognises the importance of keeping the relevant law up to date in terms of its application and changing community standards. SALRI recommends that Part 2 of the *AAS Act* should be amended with these principles in mind. In line with the general views expressed in

recommendation as the terminology to be used is solely a question for Aboriginal communities. Any such change needs to be made as part of any comprehensive legislative update and not in isolation.

⁴⁶² This is an involved question and one that may require further consideration as it is of wider application. The distinction and overlap between ‘consultation’ and ‘co-design’ is not simple.

consultation and the survey responses, SALRI suggests that the objectives and functions of the OFAW should be reviewed and updated to better reflect the goals and work performed by the Office.

2.6.4 Rather than making the OFAW responsible for ‘creating social structures’ or ‘creating a social ethos’, SALRI recommends that the term ‘creating’ in sections 8(c) and 8(d) are replaced with ‘promoting’. This is because it avoids the inaccurate inference that the OFAW is somehow responsible for ‘creating’ particular conditions outlined in the *AAS Act* and more accurately describes the role that the OFAW plays in collaborating with government departments and organisations, communities and individuals to ensure that older people are supported to realise their full potential and are afforded dignity, appreciation and respect.⁴⁶³ SALRI notes that it is necessary that this role is also performed with respect to persons with disability by the most suited department.

2.6.5 The diversity among older South Australians should be recognised, as the OFAW interacts with a wide range of persons from diverse communities and should consider the needs of different communities in performing its functions. SALRI is of the view that the term ‘multicultural’ in s 8(e) should be replaced with ‘diverse’ and s 9(k) should be updated to reflect the broader diversity of older South Australians by listing additional groups including, but not limited to, people of Aboriginal or Torres Strait Islander background, people with culturally and linguistically diverse backgrounds, LGBTIQ people and people living in regional, rural and remote communities.

2.6.6 SALRI suggests that the addition of new objectives for the OFAW under s 8 of the *AAS Act* should be considered. In particular, as outlined by various parties, the objectives should expressly mention the OFAW’s role in helping to address ageism and ageist attitudes. This is encouraged as it aligns with its current goals.⁴⁶⁴ SALRI again notes that it is necessary that this role is also performed with respect to persons with disability by the most suitable department.

2.6.7 An objective outlining the Office’s ‘life-course’ approach could also be considered. However, it is worth noting that this approach is disputed by some on the basis that it could dilute the Office’s focus on the specific issues faced by older people.

2.6.8 SALRI also suggests that s 9 of the *AAS Act* should be reviewed and updated as the OFAW observes that relevant functions not yet enumerated should be included in the *AAS Act*, and provisions which no longer reflect the present work of the OFAW should be removed or updated.

2.6.9 If at some stage the ASU be placed outside of the OFAW, s 9(p) of the *AAS Act* would be become otiose and would need to be removed.

2.6.10 Otherwise, SALRI recommends that this section should expressly refer to how the OFAW’s ‘supports’ the ASU in part by providing educational information and running community education initiatives on matters relating to older people. This is because, as noted in discussions at community meetings, the role of the OFAW in supporting the ASU is not widely known or understood. Additionally, this approach is consistent with SALRI’s other recommendations which suggests that the ASU in future should have a greater focus on service provision, responding to reports and individual education while the OFAW assists the ASU in wider education initiatives for elder abuse.⁴⁶⁵

⁴⁶³ See Department for Health and Wellbeing, *2020–21 Annual Report* (Report, 30 September 2020) 52–3.

⁴⁶⁴ See Office for Ageing Well, *South Australia’s Plan for Ageing Well 2020–2025* (SA Health Document, 2020); Australian Centre for Social Innovation, Office for Ageing Well, *Vision for Ageing Well in South Australia* (SA Health Document, 2019).

⁴⁶⁵ See below Part 4.5.

Language in the AAS Act

2.6.11 Further, recognising the power of inclusive and respectful language, SALRI recommends that the outdated language and terminology in Part 2 of the *AAS Act* should be replaced. Terms which should be changed include:

- ‘the ageing’ to ‘older people’.
- ‘those who suffer from physical or mental disabilities’ to ‘people with disability’.

The Name of the OFAW

2.6.12 While misgivings were raised during SALRI’s consultation about the suitability of the OFAW’s name, SALRI is of the view that its name should remain unchanged at this stage. SALRI notes the views of the Victim Support Service and Dementia Australia expressing concern regarding the concept of ‘ageing well’ and the negative association that may arise due to the implication that it is possible to ‘fail’ at ‘ageing well’. However, OFAW’s stated approach is to try to assist everyone to age to the best of their ability — with no set or fixed standard of what this means — rather than imposing a requirement on everyone to age ‘well’ or ‘gracefully’. Further SALRI notes that the OFAW was only relatively recently renamed in 2018. It is both inappropriate and premature at this stage for the Office to be renamed again, particularly when considering the cost and likely confusion involved in yet another name change. SALRI suggests that this and a number of linked issues as to the interaction between the OFAW and the ASU can be considered as part of any future wider review of the operation of the *AAS Act* and the roles and intersection of the OFAW and the ASU.⁴⁶⁶ Such a wider future review can examine in more detail the role and operation of the OFAW.

Charter of the Rights and Freedoms of Vulnerable Adults

2.6.13 SALRI suggests that the entitlement of both older persons and persons with disability to live and make decisions without coercion, undue influence or psychological abuse is an important consideration and should be added to the South Australian *Charter of the Rights and Freedoms of Vulnerable Adults* (potentially under heading ‘Liberty and Security’). It is significant that this Charter extends to the roles of both the OFAW and the ASU. The increasing awareness of the presence, effects and implications of coercive control, undue influence and psychological abuse in the context of both elder abuse and the abuse and exploitation of persons with disability, beyond domestic relationships, were widely raised in consultation to SALRI.⁴⁶⁷

⁴⁶⁶ See Recommendation 1.

⁴⁶⁷ See also Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 92 [8.1]; Parliament of New South Wales, Joint Select Committee on Coercive Control, ‘Coercive Control in Domestic Relationships’ (Report, 2021) 95–96 [5.75]–[5.81]; Evidence to Parliament of New South Wales, Joint Select Committee on Coercive Control, Sydney, 23 February 2021, 46 (Yumi Lee) (see also at: 47–8 (Margaret Duckett)); NSW Ageing and Disability Commission, Submission No 108 to Joint Select Committee on Coercive Control, Parliament of New South Wales, *Coercive Control in Domestic Relationships* (2 February 2021) 2, 6 <<https://www.parliament.nsw.gov.au/ladocs/submissions/70505/Submission%20-%20108.pdf>>. See below Part 7.3.

RECOMMENDATION 2

SALRI recommends that the role and operation of the Office for Ageing Well under the *Ageing and Adult Safeguarding Act 1995* (SA) should be retained.

RECOMMENDATION 3

SALRI recommends that the *Ageing and Adult Safeguarding Act 1995* should be amended in respect to the Office for Ageing Well by:

1. Replacing now outdated language and terminology in ss 8 and 9 with more inclusive and appropriate, respectful language in line with community standards. This may include, but is not limited to, replacing the term ‘ageing’ with ‘older people’ and replacing the phrase ‘those who suffer from physical or mental disabilities’ to ‘people with disability’ (s 9(k)).
2. Reviewing and updating its objectives outlined in s 8 to better reflect the Office’s current work and community expectations by:
 - a. replacing the term ‘creating’ in ss 8(c) and 8(d) with ‘promoting’;
 - b. replacing the term ‘multicultural’ in s 8(e) with ‘diverse’;
 - c. adding a new objective to articulate the Office’s role in combating ageism and ageist attitudes; and
 - d. adding a new objective to emphasise the Office’s life-course approach.
3. Reviewing and updating its functions outlined in s 9 to better reflect the Office’s current work and community expectations by:
 - a. removing functions that are no longer applicable in terms of the Office’s operations such as ss 9(c) and 9(h);
 - b. listing additional groups in s 9(k) to better reflect the diversity of older South Australians including, but not limited to, people of Aboriginal background, culturally and linguistically diverse backgrounds, LGBTIQ communities and people living in regional, rural and remote communities; and
 - c. updating s 9(p) to describe how the Office for Ageing Well supports the Adult Safeguarding Unit’s functions by providing educational information and running community education initiatives on matters relating to older people if the Adult Safeguarding Unit remains situated in the Office for Ageing Well.

RECOMMENDATION 4

SALRI recommends that the entitlement of both older persons and persons with disability to live and make decisions without coercion, undue influence or psychological abuse is an important consideration and should be added to the South Australian *Charter of the Rights and Freedoms of Vulnerable Adults* (potentially under heading ‘Liberty and Security’).

Part 3 – Background to the *Ageing and Adult Safeguarding Act 1995 (SA)*

3.1 Current Law and Background

3.1.1 The need for effective laws and practices to systematically address the abuse of vulnerable adults has been a prominent concern in South Australia, and indeed nationally, over the past decade.⁴⁶⁸

3.1.2 The *Closing the Gaps* Report in 2011 was the first to highlight the need to improve current systems that aim to protect adults who may be vulnerable to abuse in South Australia, with a focus on elder abuse.⁴⁶⁹ However, the authors indicated that the proposed legislative reform could be extended to all vulnerable adults in the community, but this would require further consultation.⁴⁷⁰

3.1.3 The *Closing the Gaps* Report considered the available mechanisms and avenues for recourse for older adults experiencing abuse and found the existing resources to be inadequate.⁴⁷¹ For one, older adults living in residential aged care facilities that do not receive other in-home services are not protected by other bodies.⁴⁷² Secondly, non-government organisations such as the Aged Rights Advocacy Service (ARAS) provide advocacy services, information, and education to older persons who have experienced abuse, but they lack the legislative mandate to intervene in a case to safeguard an older adult.⁴⁷³

3.1.4 Thirdly, no agency other than the South Australia Police ('SAPOL') has legislative authority to intervene in a case of suspected or actual abuse of vulnerable adults,⁴⁷⁴ but the role of SAPOL (and other police agencies)⁴⁷⁵ in this context brings its own challenges. The reluctance, if not

⁴⁶⁸ See for example, South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People* (Report, October 2011) 65, 68; Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 386, Kelly Vincent and David Caudrey, *Safeguarding Task Force* (Report, 31 July 2020) 1; Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' (2014) 36(1) *Sydney Law Review* 99; Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017) Recommendations 4–5, 15–17, 32–3, 52–5; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 130–43 [8.36]–[8.81]; Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *'I Never Thought It Would Happen to Me': When Trust is Broken* (Final Report, September 2018) 71–3 [6.66]–[6.71], 73 Recommendation 19; NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018); Lenny Roth, 'Adult Safeguarding Laws: Reviewing the Proposal for a NSW Ageing and Disability Commissioner' (e-brief issue 3/2019, NSW Parliamentary Research Service, March 2019).

⁴⁶⁹ South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People* (Report, October 2011) 19.

⁴⁷⁰ *Ibid* 13.

⁴⁷¹ See discussion in *ibid* 22.

⁴⁷² Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 381.

⁴⁷³ South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People* (Report, October 2011) 21.

⁴⁷⁴ *Ibid* 60.

⁴⁷⁵ The training and response of the police in NSW to elder abuse (including financial abuse) was described as 'variable' Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in*

unwillingness, of many victims to complain to SAPOL and the acute difficulties in gathering the evidence to progress or substantiate any criminal prosecution is a deterrent for some community members.⁴⁷⁶ Additionally, ‘The role of SAPOL is generally going to be limited to the most serious cases of abuse.’⁴⁷⁷

3.1.5 Finally, elder abuse may not necessarily be criminal behaviour, but manifest through manipulation or taking advantage of another person due to their age.⁴⁷⁸

3.1.6 As Professor Wendy Lacey observed:

The present legal framework therefore provides protective frameworks for serious cases of abuse and for those who are particularly vulnerable due to mental illness or incapacity, but it does not provide a framework for less intrusive methods of intervention, or early intervention, and at a time when serious abuse or neglect could be avoided.⁴⁷⁹

3.1.7 The *Closing the Gaps* Report concluded that elder abuse and the ‘gaps’ it had identified could only be addressed through the adoption of comprehensive new laws aimed at providing safeguards for vulnerable adults ‘who are unable to protect themselves and are vulnerable to abuse’.⁴⁸⁰ It emphasised the need for a ‘consistent, coordinated response’⁴⁸¹ and suggested a number of features to include in any safeguarding legislation⁴⁸² such as clear definitions of ‘abuse’ and ‘vulnerable adult’, powers to investigate abuse and intervene in cases of serious abuse, the existence of a body with the ability to receive reports of abuse and convene adult protection case conferences involving key agencies, and the adoption of a human rights-based approach.⁴⁸³

3.1.8 Professor Lacey reiterated this point in 2014, emphasising that:

Until strategies are backed by legislative reform, vulnerable adults will continue to fall through the cracks of existing protective mechanisms and specialist services. State-based frameworks presently contain a number of significant flaws: there is no dedicated agency with statutorily mandated responsibility to investigate cases of elder abuse, coordinate interagency responses and seek

New South Wales (Report No 44, June 2016) 87 [6.31]. See also South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia’s Response to the Abuse of Vulnerable Older People* (Report, October 2011) 124–5 [8.12]–[818], 141 [8.71]; Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen to Me: When Trust is Broken* (Final Report, September 2018) ii [9], 50 [4.31], Finding 25, 50, 60–5 [6.19]–[6.43].

⁴⁷⁶ South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia’s Response to the Abuse of Vulnerable Older People* (Report, October 2011) 23, 82–4. ‘Anecdotal evidence also indicates ... that it can be very difficult to secure a conviction or to convince the victim that the abuse should be treated as a crime’: at 23.

⁴⁷⁷ Ibid 60.

⁴⁷⁸ South Australia, *Parliamentary Debates*, Legislative Council, 18 October 2017, 1654 (John Darley).

⁴⁷⁹ South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia’s Response to the Abuse of Vulnerable Older People* (Report, October 2011) 22.

⁴⁸⁰ South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia’s Response to the Abuse of Vulnerable Older People* (Report, October 2011) 62.

⁴⁸¹ Ibid 12.

⁴⁸² Ibid 68.

⁴⁸³ Ibid 12.

intervention orders where necessary ... referral services between agencies can provide partial solutions in cases of elder abuse, but do not encourage a multi-disciplinary and multi-agency response in complex cases.⁴⁸⁴

3.1.9 The ALRC has also highlighted the need to ‘fill the gaps’⁴⁸⁵ in relation to the protection of vulnerable adults and recommended:

Adult safeguarding laws in each state and territory should provide for the safeguarding and support of at-risk adults ... Most public advocates and guardians already have a role in investigating abuse, particularly abuse of people with impaired decision-making ability by their guardians, financial administrators or those with powers of attorney. But there are other vulnerable adults who are being abused, many of them older people. The ALRC recommends that these other vulnerable adults should be better protected from abuse.⁴⁸⁶

3.1.10 The various bodies in South Australia that dealt with elder abuse prior to the establishment of the ASU were:

- South Australian Police;
- Legal Services Commission;
- The Public Trustee;
- Aged Care Complaints Commission;
- Aged Rights Advocacy Service;
- Office for the Public Advocate;
- South Australian Civil and Administrative Tribunal (SACAT);
- Domiciliary Care;⁴⁸⁷
- Royal District Nursing Service (RDNS).⁴⁸⁸

3.1.11 For individuals without decision-making capacity, recourse was also available using the *Guardianship and Administration Act 1993* (SA).

⁴⁸⁴ Wendy Lacey, ‘Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia’ (2014) 36(1) *Sydney Law Review* 99, 105, 126.

⁴⁸⁵ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 382–3. See South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia’s Response to the Abuse of Vulnerable Older People* (Report, October 2011); Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017) 32.

⁴⁸⁶ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 375 [14.1]–[14.2]. See also at: Recommendation 14–1, 377, 382–4 [14.33]–[14.40].

⁴⁸⁷ This body no longer exists.

⁴⁸⁸ Office for the Ageing, SA Health, ‘Elder Abuse Responses: Safeguarding the Rights of Older South Australians’, (Discussion Paper, 2017) 6–7.

3.1.12 The ALRC, raising similar points to the *Closing the Gaps* Report, found these existing agencies unsatisfactory to safeguard adults.⁴⁸⁹ The criminal justice system and SAPOL were seen as inadequate as those wanting to make a report about suspected abuse may be reluctant about reporting to a prosecutorial body: they might consider the abuse too trivial to report to police; the abuse might fall short of criminal activity; prosecutions require a high standard of proof; and police officers might not be trained to provide the necessary support to the adult.⁴⁹⁰ Additionally, the police are considered an option of last resort, especially if the consequences of reporting are imprisonment of the abuser or the loss of a relationship that the victim wants to retain.⁴⁹¹ Many victims do want their abuser, especially if a family member, to get into trouble.

3.1.13 Bodies overseeing residential aged care providers do not extend their protections to older adults receiving in-home services, and Public Advocates and Guardians only operate for people with limited decision-making capacity.⁴⁹² This means neither of these bodies are suitable to safeguard all vulnerable adults.

3.1.14 In 2015–16, ARAS and the Office for Ageing (as it was at the time) sought to add another pathway to assist older people by introducing a trial telephone assistance line for elder abuse.⁴⁹³ However, helplines and advocacy services do not have the legislative mandate to investigate concerns, may not have the resources to effectively deal with concerns, and are ‘not in a position to authoritatively coordinate the services of other government agencies’.⁴⁹⁴

3.1.15 A submission to the ALRC by the Law Council of Australia also noted that:

Unless a particular organisation is tasked with the investigation process, there will be no accountability for conducting this work and victims of abuse will continue to fall between the cracks.⁴⁹⁵

3.1.16 In light of these gaps, the ALRC made a recommendation that adult safeguarding laws should be introduced in each state and territory for safeguarding agencies to exercise the role of safeguarding and supporting ‘at-risk adults’.⁴⁹⁶

3.1.17 A 2017 South Australian Parliamentary Report into elder abuse raised similar themes. The Report acknowledged the ‘pain, confusion, humiliation and despair, voiced or unvoiced, of all victims of any type of elder abuse’.⁴⁹⁷

⁴⁸⁹ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 379.

⁴⁹⁰ Ibid 380.

⁴⁹¹ Ibid 378.

⁴⁹² Ibid 381.

⁴⁹³ Office for the Ageing, *Strategy to Safeguard the Rights of Older South Australians 2014–2021* (SA Health Document, 2014) 18.

⁴⁹⁴ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 381.

⁴⁹⁵ Law Council of Australia, Submission No 351 to the Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (6 March 2017) 384.

⁴⁹⁶ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) rec 14-1.

⁴⁹⁷ Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017) 3.

3.1.18 The Report found an ‘investigation gap’⁴⁹⁸ and acknowledged the recommendations of the *Closing the Gaps* Report that preceded it, stating:

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 ... 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.⁴⁹⁹

3.1.19 The recurring theme across these various reports was the absence of a coordinated framework, an investigatory body to deal with issues of elder abuse, and the early intervention mechanisms before abuse escalates into a dangerous level.⁵⁰⁰

3.2 Position in Other Jurisdictions

New South Wales

3.2.1 It was revealed by numerous participants to the 2016 NSW Parliamentary Report in 2016 that an ‘investigation gap’ impedes ‘timely intervention to protect vulnerable adults who are suspected to be experiencing abuse’.⁵⁰¹

3.2.2 Alzheimer’s Australia NSW, for example, argued that existing support services (including the police) are limited in their capacity to satisfactorily resolve complaints of abuse and ‘that older people experiencing abuse currently have poor access to justice’.⁵⁰²

3.2.3 It was recommended that a NSW Public Advocate should be established whose role would include:

- Promoting and protecting the rights of adults with decision-making disabilities to reduce their risk of neglect, exploitation and abuse.
- Investigating allegations of abuse, with the statutory authority to receive reports and investigate instances of financial abuse of people with dementia and other vulnerable adults. Investigations could be initiated of its own accord where appropriate.

⁴⁹⁸ Ibid 32.

⁴⁹⁹ Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017) 15 Recommendations 4–5.

⁵⁰⁰ South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia’s Response to the Abuse of Vulnerable Older People* (Report, October 2011) 60, Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 25 Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017) 11.

⁵⁰¹ Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, ‘Elder Abuse in New South Wales’ (Report No 44, June 2016) 130 [8.36].

⁵⁰² Brendan Moore, Alzheimer’s Australia NSW, Submission No 35 to Legislative Council General Purpose Standing Committee No 2, *Elder Abuse in New South Wales* (22 February 2016) 46.

- Facilitating resolution of abuse, including in instances where it is perpetrated by someone appointed as an enduring power of attorney who fails to act in the best interests of the person with dementia.⁵⁰³

3.2.4 The NSW Ombudsman heard persuasive evidence that highlighted ‘an urgent need for an effective, integrated framework and independent lead agency for responding to the abuse and neglect of all vulnerable adults in community settings in NSW’.⁵⁰⁴

3.2.5 Based on evidence from participants, the NSW Ombudsman Report found that:

There is a need for swift action to establish a comprehensive adult safeguarding approach that will both fill the looming gap in relation to adults with disability, and address the longstanding gap in relation to vulnerable older persons.⁵⁰⁵

3.2.6 The NSW Ombudsman for example highlighted the ‘gap’ in adult protection, especially in relation to persons with disability.⁵⁰⁶ The Ombudsman observed:

In July 2016, my office commenced a standing inquiry into the abuse and neglect of adults with disability in community settings, such as their family home. We began the inquiry as we were repeatedly and increasingly contacted about serious matters of alleged abuse and neglect of adults with disability, and because there is currently no other agency that is equipped to perform this role. In particular, there is no other agency that has the powers to investigate allegations that do not reach a criminal threshold, and that can play a lead role to marshal a coordinated interagency response to address the critical issues.⁵⁰⁷

3.2.7 The NSW authorities ultimately established the Ageing and Disability Commissioner on 1 July 2019 with the mandate to ‘better protect older people and adults with disability from abuse, neglect and exploitation from someone they know living in their home or community, and to promote their fundamental human rights’.⁵⁰⁸

3.2.8 The NSW Government recognised that ‘[t]here are significant numbers of people with disability and older people who are abused, neglected or exploited but who do not qualify for help through existing channels or existing safeguards do not go far enough’.⁵⁰⁹

3.2.9 The NSW *Ageing and Disability Commissioner Act 2019* empowers the Commissioner to deal with abuse, neglect and exploitation of older adults and people with a disability either from reports made to the Commission or at the Commissioner’s own initiative.⁵¹⁰

⁵⁰³ Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, ‘Elder Abuse in New South Wales’ (Report No 44, June 2016) 134 [8.49].

⁵⁰⁴ NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018) 2.

⁵⁰⁵ Ibid 3.

⁵⁰⁶ Ibid.

⁵⁰⁷ Ibid (foreword).

⁵⁰⁸ Ageing and Disability Commission, NSW Government, *Who We Are* (Web Page, 23 November 2020) <<https://www.ageingdisabilitycommission.nsw.gov.au/about-us/who-we-are>>.

⁵⁰⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 May 2019, 55 (Gareth Ward, Minister for Families, Communities and Disability Services).

⁵¹⁰ *Ageing and Disability Commissioner Act 2019* (NSW) s 12.

3.2.10 The Principles of the NSW Act also recognise that

adults with disability and older adults may face multiple disadvantages and are potentially more vulnerable to abuse, neglect and exploitation. This may particularly be so if the adult with disability or the older person is a woman, an Aboriginal person or a Torres Strait Islander, from a gay, lesbian, bisexual, transgender or intersex community, from a culturally and linguistically diverse background or living in a regional or remote area.⁵¹¹

3.2.11 The powers of the Commissioner, as described by the then Premier in her media release, are to investigate allegations of abuse through information gathering powers and powers to initiate investigations, provide support to vulnerable adults and their families/carers following investigation, raise community awareness and provide advice on preventing, identifying and responding to potential issues of abuse, neglect or exploitation.⁵¹²

Victoria and Queensland

3.2.12 In Victoria, the Office of the Public Advocate is the primary safeguarding body with advocacy, investigation and guardianship roles for people with cognitive impairment or mental ill health.⁵¹³

3.2.13 The Public Advocate operates under the new *Guardianship and Administration Act 2019* (Vic) that came into effect on 1 July 2019.⁵¹⁴ The objects of the Act promote the human rights and dignity of persons with a disability by having regard to the United Nations *Convention on the Rights of Persons with Disabilities*.⁵¹⁵

3.2.14 The Public Advocate in Victoria has the power to investigate matters referred to it by the Victorian Civil and Administrative Tribunal (‘VCAT’) and to ‘investigate any complaint or allegation that a person is under inappropriate guardianship, is being exploited or abused or is in need of guardianship’.⁵¹⁶

3.2.15 As the Victorian Law Reform Commission has noted about a previous iteration of this power, the Public Advocate is limited to ‘circumstances where a guardianship or administration order might be appropriate. Further, the Public Advocate does not have a comprehensive range of powers to carry out these functions.’⁵¹⁷

3.2.16 In contrast, the Office of the Public Guardian in Queensland is an independent statutory office with greater powers to facilitate safeguarding actions for adults with impaired decision-making

⁵¹¹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 May 2019, 63–55 (Gareth Ward, Minister for Families, Communities and Disability Services).

⁵¹² Lenny Roth, ‘Adult Safeguarding Laws: Reviewing the Proposal for a NSW Ageing and Disability Commissioner’ (e-brief issue 3/2019, NSW Parliamentary Research Service, March 2019).

⁵¹³ Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, ‘Elder Abuse in New South Wales’ (Report No 44, June 2016) 135 [8.52]. See also Evidence to Legislative Council General Purpose Standing Committee No 2, Parliament of NSW, Sydney, 22 February 2016, 59 (John Chesterman, Director of Strategy, Office of the Public Advocate, Victoria).

⁵¹⁴ *Guardianship and Administration Act 2019* (Vic) pt 2.

⁵¹⁵ *Ibid* s 7(1); Office of the Public Advocate (Vic), *2020–2021 Annual Report* (Report, 18 November 2021) 4.

⁵¹⁶ *Guardianship and Administration Act 2019* (Vic) ss 16(1)(g), 16(1)(j).

⁵¹⁷ Victorian Law Reform Commission, *Guardianship* (Report No 24, 31 January 2012) 447.

capacity.⁵¹⁸ The Queensland Public Guardian may investigate any complaint or allegation that an adult is being or has been neglected, exploited or abused; or has inappropriate or inadequate decision-making arrangements.⁵¹⁹

3.2.17 Notably, neither the models in Victoria or Queensland extend to protecting the rights of adults *with decision-making capacity* unlike the models in NSW and SA.

3.3 Introduction to the Adult Safeguarding Unit

3.3.1 The *Office for the Ageing (Adult Safeguarding) Amendment Act 2018* (SA) was the result of a 100-day election commitment of the then State Government.⁵²⁰ The immediate background to the Act was the concern over the Oakden situation.⁵²¹ The legislation was drafted in November 2018⁵²² and the establishment of the ASU was ‘the first of its kind in Australia’.⁵²³

3.3.2 The government chose to create a separate unit within an existing State Government department rather than bestowing powers upon an existing body as they sought to create a body that could ‘implement a multidisciplinary approach and develop a whole-of-government policy’⁵²⁴ and facilitate an ‘approachable process’ for people to have their concerns heard and dealt with.⁵²⁵

3.3.3 The then Minister noted:

In particular, there is no single government agency in South Australia that has a clear statutory role for vulnerable adults who, despite having full decision-making capacity, are experiencing abuse or neglect and are left to navigate complex systems alone. The complex nature of abuse means there is no one-size-fits-all response, with potential responses ranging from a person just needing information, advice and follow-up through to the coordination of a number of services to effectively support the person.⁵²⁶

⁵¹⁸ *Public Guardian Act 2014* (Qld) s 5.

⁵¹⁹ *Ibid* s 19.

⁵²⁰ South Australia, *Parliamentary Debates*, Legislative Council, 20 June 2018, 565 (Stephen Wade, Minister for Health and Wellbeing). The drafting of the Bill was informed by existing research, consultation and work undertaken by the OFAW and other relevant agencies.

⁵²¹ South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1711 (Frank Pangallo); South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1714 (Stephen Wade, Minister for Health and Wellbeing); South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3550 (Fraser Ellis); South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3555 (Vickie Chapman); South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3591–3592 (Joshua Teague). ‘One of the drivers for it being such a priority was the fact that the Oakden case may well have been brought to the attention of the authorities earlier if elder protection legislation was available’: South Australia, *Parliamentary Debates*, Legislative Council, 29 May 2018, 250 (Stephen Wade, Minister for Health and Wellbeing). See also Bruce Lander, Independent Commissioner Against Corruption, *Oakden: A Shameful Chapter in South Australia’s History* (Report, 2020).

⁵²² South Australian Adult Safeguarding Unit, *2019–2020 Annual Report* (Report, 2020) 5.

⁵²³ South Australia, *Parliamentary Debates*, Legislative Council, 20 June 2018, 567 (Stephen Wade, Minister for Health and Wellbeing).

⁵²⁴ Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017) 53.

⁵²⁵ South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3557 (Vickie Chapman).

⁵²⁶ South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1714 (Stephen Wade, Minister for Health and Wellbeing).

3.3.4 The then Minister for Health and Wellbeing explained that the role of the unit was not to set up a substitute police force for elder abuse and more nuanced approach was necessary:

It is very important that we have a body that has the powers to investigate issues and to pursue information, but the advice that is reflected in the community discussion up to this point, and will be reflected in the Bill, is not that we don't need another police force. One of the reasons why we need an investigation agency like this is that older people and other vulnerable adults often feel very uncomfortable calling the police in on a matter that may involve one of their own family members. We need to have an approachable body. We need to have a body that is both approachable and empowered, that actually has the capacity to investigate and pursue matters but that can work in a positive multidisciplinary way to protect vulnerable adults and, if you like, try to restore the relationships. In many of these relationships, people want the abuse, financial or otherwise, to stop, but they don't want to lose the relationship.⁵²⁷

3.3.5 The then Minister aptly described the focus of the ASU:

Where reports of alleged or suspected abuse are received, the unit will be responsible for assessing and investigating these reports and then either referring them on to appropriate persons or bodies, or working in collaboration with other agencies to coordinate a multiagency and multidisciplinary approach to responding to concerns in a way that puts the rights of the vulnerable adult at the centre.⁵²⁸

3.3.6 It is crucial to note that the Bill and the subsequent *AAS Act* were formulated in the policy context of elder abuse, with many calls for reform in this area.⁵²⁹ At the time, elder abuse was 'prominent in the media and public consciousness'⁵³⁰ and the subject of numerous national and state inquiries following revelations about standard of care at the Oakden aged care facility and other aged-care institutions.⁵³¹

3.3.7 The Government recognised that as 'Australia faces the inescapable demographic destiny of an ageing population, the increased risk of elder abuse is also an inescapable reality for many of our older Australians, which is why preventing elder abuse in an ageing world is everybody's business'.⁵³²

3.3.8 Ultimately, the ASU was designed to address gaps in the adult safeguarding landscape such as a lack of coordination driven by a single policy framework; the existence of no single

⁵²⁷ South Australia, *Parliamentary Debates*, Legislative Council, 29 May 2018, 251.

⁵²⁸ South Australia, *Parliamentary Debates*, Legislative Council, 20 June 2018, 566–7 (Stephen Wade, Minister for Health and Wellbeing).

⁵²⁹ See for example, South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People* (Report, October 2011); Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017); Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017); Kelly Vincent and David Caudrey, *Safeguarding Task Force* (Report, 31 July 2020); Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, 'Elder Abuse in New South Wales' (Report No 44, June 2016).

⁵³⁰ South Australia, *Parliamentary Debates*, Legislative Council, 20 June 2018, 565 (Stephen Wade, Minister for Health and Wellbeing). In his Report concerning the State-run Oakden aged care facility, Bruce Lander highlighted: 'The consumers at Oakden were poorly cared for, forgotten and ignored. The Facility itself was grossly substandard. I have made findings of maladministration against five individuals and the public authority responsible for the facility.' Independent Commission Against Corruption, 'Oakden Report Published' (Press Release, 28 February 2018) <<https://www.icac.sa.gov.au/public-statement/28feb2018>>.

⁵³¹ South Australia, *Parliamentary Debates*, Legislative Council, 29 May 2018, 249 (Mark Parnell).

⁵³² South Australia, *Parliamentary Debates*, Legislative Council, 6 September 2018, 1297 (Connie Bonaros).

government agency with a clear statutory role and mandated service response to support and safeguard the rights of vulnerable adults; inefficiencies in the allocation, distribution and provision of complex services to vulnerable adults; discriminatory attitudes towards older people and an insufficient public knowledge about the rights of vulnerable adults; and an insufficient public knowledge of the existence and utility of existing laws and services protecting the rights of vulnerable adults.⁵³³

3.3.9 Particularly, the Government acknowledged that:

No single government agency in South Australia that has a clear statutory role for vulnerable adults who, despite having full decision-making capacity, are experiencing abuse or neglect and are left to navigate complex systems alone.⁵³⁴

3.3.10 The ASU commenced operation on 1 October 2019,⁵³⁵ with statutory responsibility and accountability for responding to reports of abuse or neglect of vulnerable adults and to build on the work already being undertaken in the area by the Office for the Ageing (now the OFAW) in raising community awareness of elder abuse, awareness of the rights of older people, and building age-friendly communities and services.⁵³⁶

3.3.11 A transitional provision applying for three years was inserted into Schedule 1 of the *Office for the Ageing (Adult Safeguarding) Amendment Act 2018* to limit the focus of the ASU to reports of abuse or neglect of adults 65 and over (or Aboriginal people 50 and over).⁵³⁷ Recognising that the ASU was the ‘first of its kind in Australia’⁵³⁸ and that the ASU was a new service with an unknown demand, the transitional provision would ‘allow the unit time to establish appropriate and effective client pathways and procedures’.⁵³⁹

3.3.12 Thus, the ASU’s legal mandate was limited for the first three years, with the intention that the ASU would extend to apply to all adults vulnerable to abuse in October 2022.⁵⁴⁰

Introduction of Disability into the Act

3.3.13 Following greater political discourse and increased awareness about the abuse and neglect of people with disabilities, especially following the death of Ann Marie Smith, a Safeguarding Task Force was established on 21 May 2020 to assess and identify gaps in safeguarding arrangements for people with disability living in South Australia⁵⁴¹ and make recommendations to the State Government for immediate reform.⁵⁴²

⁵³³ Tetra Tech International Development, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 1.

⁵³⁴ South Australia, *Parliamentary Debates*, Legislative Council, 23 Oct 2018, 1712 (Stephen Wade, Minister for Health and Wellbeing).

⁵³⁵ South Australian Adult Safeguarding Unit, *2019–2020 Annual Report* (Report, 2020) 3.

⁵³⁶ South Australia, *Parliamentary Debates*, House of Assembly Estimates Committee B, 25 September 2018, 222 (Stephen Wade, Minister for Health and Wellbeing).

⁵³⁷ *AAS Act* sch 1.

⁵³⁸ South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3545 (Paula Leuthen).

⁵³⁹ Explanatory Memorandum, Office for the Ageing (Adult Safeguarding) Amendment Bill 2018 (SA) 2.

⁵⁴⁰ South Australian Adult Safeguarding Unit, *2019–2020 Annual Report* (Report, 2020) 3.

⁵⁴¹ Kelly Vincent and David Caudrey, *Safeguarding Task Force Report* (Report, 31 July 2020) 3.

⁵⁴² *Ibid* 15.

3.3.14 The *Safeguarding Task Force* recognised a gap for younger adults with a disability and recommended the remit of the ASU should include younger adults at risk of abuse prior to 2022, commencing with people with disability.⁵⁴³

3.3.15 Within a week of the final report being received, the Government placed a notice in *The Gazette* approving the expansion of the scope of the ASU to respond to reports of abuse or neglect of adults living with a disability who may be vulnerable from 1 October 2020.⁵⁴⁴

3.3.16 The Government took ‘swift action, expanding the unit’s legal authority to include adults living with a disability and providing an additional \$3.5 million over four years to support that additional work.’⁵⁴⁵

3.3.17 It is notable that the move to expand the scope to people with a disability was two years ahead of schedule.⁵⁴⁶

Shift in Service Landscape

3.3.18 It is important to note the significant shifts in the service landscape in the aged care and disability sectors from the 2011 *Closing the Gaps* Report, the establishment of the ASU in 2018, and the present day. In brief, the *Closing the Gaps* Report contemplated a largely State based regulatory and oversight framework and predated the involvement of Commonwealth agencies such as the NDIS and Aged Care Quality and Safety Commission. This theme was often raised in SALRI’s consultation by the OFAW and the ASU, and by representative from other government bodies and NGOs.

3.3.19 The *Closing the Gaps* Report intended the proposed adult safeguarding agency to capture all acts of abuse perpetrated against older people.⁵⁴⁷ The Government at the time of the passage of the 2018 Act also indicated that the *AAS Act* would apply ‘no matter where you are, whether you are in a registered or unregistered aged-care facility, whether you are in a respite facility, or in the community’.⁵⁴⁸

3.3.20 However, over the last 10 years there have been substantial changes to the control, funding, and provision of aged care services.

3.3.21 In 2011, the Federal Government expressed its intention to invest \$739 million in the aged care sector and take full responsibility for aged care, including home and community care, as part of its broader scheme to build a National Health and Hospitals Network.⁵⁴⁹

⁵⁴³ Ibid rec 3.

⁵⁴⁴ South Australian Adult Safeguarding Unit, *2019–2020 Annual Report* (Report, 2020) page 3, South Australia, *Parliamentary Debates*, Legislative Council, 11 November 2020, 3241 (John Gardner).

⁵⁴⁵ South Australia, *Parliamentary Debates*, Legislative Council, 9 June 2021, 3718 (Stephen Wade, Minister for Health and Wellbeing).

⁵⁴⁶ South Australian Adult Safeguarding Unit, *2020–2021 Annual Report* (Report, 2021) 3.

⁵⁴⁷ South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia’s Response to the Abuse of Vulnerable Older People* (Report, October 2011) 30.

⁵⁴⁸ South Australia, *Parliamentary Debates*, Legislative Council, 23 Oct 2018, 1723 (Stephen Wade, Minister for Health and Wellbeing).

⁵⁴⁹ Angela Dorizas, *Government News*, ‘Commonwealth Takeover of Aged Care’ (online, 12 April 2010) <<https://www.governmentnews.com.au/commonwealth-takeover-of-aged-care/>>.

3.3.22 A significant change in 2015 saw \$73.7 million being invested to allocate Commonwealth funded Home Care Packages (‘HCPs’) directly to consumers, rather than to providers.⁵⁵⁰ Where previously various home care providers would receive an allocation of packages to offer to eligible consumers, the packages are now directly offered to consumers.⁵⁵¹ The intention was for this to improve service delivery through increased choice for consumers, including the flexibility for individuals to change providers if they wish.⁵⁵²

3.3.23 The South Australian body Domiciliary Care was previously responsible for providing at home services ranging from allied health and restorative services to respite care specifically targeted at those 65 years and over but also potentially younger people living with chronic conditions who cannot access disability services.⁵⁵³ Since the shift to Commonwealth services, many disability services originally provided by Domiciliary Care were transferred to the non-government sector.⁵⁵⁴

3.3.24 Domiciliary Care had previously conducted regular training for staff members on elder abuse and had considerable expertise in this area. When this service was superseded, the service landscape also lost a necessary case management system and now individuals obtain referrals through a service known as My Aged Care.⁵⁵⁵ Domiciliary Care no longer exists.

3.3.25 The landscape shift has seen a significant reduction of case management services within the broader Commonwealth funded aged care service which results in a potential gap that leaves vulnerable adults without sufficient safeguards.⁵⁵⁶ The Victorian Public Advocate also recognised that ‘[t]he 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’.⁵⁵⁷

3.3.26 Similarly, over the last five to ten years the State government has shifted responsibility for funding and regulation of disability services to the Commonwealth National Disability Insurance Scheme (‘NDIS’), though the State remains responsible in some areas such as the screening of workers, the authorisation of restrictive practices, and the Community Visitor Scheme.⁵⁵⁸

3.3.27 The change is similar to that in the aged care sector in that the service landscape shifted from a lump sum payment provided to service providers to an individualised budget for people with a disability to spend on goods and services.⁵⁵⁹ The intention of self-directed funding was to give people

⁵⁵⁰ Australian Government, ‘Budget Measures’ (Budget Paper No 2, 12 May 2015) 147.

⁵⁵¹ Ibid.

⁵⁵² Alex Grove, ‘Aged Care’, *Budget Review 2015–2016 Index*, (Research Paper, May 2015) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201516/Aged#_ftn7>.

⁵⁵³ Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017) 42.

⁵⁵⁴ Ibid 26.

⁵⁵⁵ Ibid 27.

⁵⁵⁶ Office for the Ageing, SA Health, *Elder Abuse Responses: Safeguarding the Rights of Older South Australians* (Consultation Outcomes Report, SA Health, 2018) 6.

⁵⁵⁷ Office of the Public Advocate (Vic), *Line of Sight: Refocussing Victoria’s Adult Safeguarding Laws and Practices* (Report, August 2022) 22.

⁵⁵⁸ Kelly Vincent and David Caudrey, *Safeguarding Task Force Report* (Report, 31 July 2020) 13.

⁵⁵⁹ Luke Buckmaster and Shannon Clark, Parliament of Australia, *The National Disability Insurance Scheme: A Quick Guide* (Research Paper, 8 May 2019)

with disability decision-making power as consumers and control of their budgets.⁵⁶⁰ As the Victorian Public Advocate articulated in their report:

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.⁵⁶¹

3.3.28 It is important to consider whether this shift in service landscape impacts the ability of the ASU to be an effective safeguarding body for all adults vulnerable to abuse. For instance, the shift from State to Commonwealth has diffused the case management model and may impact the ASU's ability to gather information and to coordinate a multi-agency response, so the ASU may not be the 'lead' agency it was intended to be.⁵⁶² The implications of the shift in service model and landscape is further considered in Part 5.

Scope of the ASU

3.3.29 As outlined above, the ASU arose from an identified gap in the service landscape for elder abuse and an elder abuse policy context driven by the 'Protecting Our Vulnerable Adults' election commitment of the government.⁵⁶³

3.3.30 Despite the initial focus being limited to elder abuse, the 'hope was for the unit to not only help those 65 and over, but people under 65 who are experiencing abuse, whether that be financial, physical, or otherwise.'⁵⁶⁴

3.3.31 The ASU commenced its operation with a remit to respond to reports of abuse against adults aged 65 and over, and 50 and over for Aboriginal and Torres Strait Islander peoples.⁵⁶⁵ The scope of the Unit expanded to all adults living with a disability two years ahead of schedule⁵⁶⁶ in order to cover the service gap identified by the Safeguarding Task Force Report.⁵⁶⁷

3.3.32 In October 2022, the remit is intended to expand fully to include all vulnerable adults, however that may be defined in the Act.⁵⁶⁸ There were various views in SALRI's consultation as to whether this is a prudent and appropriate development. However, a recurring concern SALRI heard was that the ASU's remit should not be over-extended so that its expertise and focus is diluted.

<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1819/Quick_Guides/NationalDisabilityInsuranceScheme>.

⁵⁶⁰ Ibid.

⁵⁶¹ Office of the Public Advocate (Vic), *Line of Sight: Refocussing Victoria's Adult Safeguarding Laws and Practices* (Report, August 2022) 22.

⁵⁶² Tetra Tech International Development, *Evaluation Report: Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 4.

⁵⁶³ South Australian Adult Safeguarding Unit, *2019–2020 Annual Report* (Report, 2020) 5.

⁵⁶⁴ South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3550 (Christopher Picton).

⁵⁶⁵ South Australian Adult Safeguarding Unit, *2019–2020 Annual Report* (Report, 2020) 3.

⁵⁶⁶ Ibid 3.

⁵⁶⁷ Ibid 5.

⁵⁶⁸ See below Part 8.

3.4 Issues

Scope of the ASU

3.4.1 The *AAS Act* and the ASU service model were premised on an elder abuse policy response⁵⁶⁹ and have been adapted to provide a service response for adults living with a disability. It is not clear whether the Act and service model can be easily adapted to other cohorts who may be experiencing abuse or neglect as intended in October 2022.

3.4.2 Some concerns about limiting the scope to older people was raised during the drafting of the Bill with the Opposition pointing out that younger people in the community who may need safeguarding, for example those under the age of 65 with dementia, would be unable to access the ASU.⁵⁷⁰

3.4.3 The government at the time sought to ensure that ‘all people regardless of their age, but particularly those who are vulnerable — people with disability — have the appropriate safeguarding arrangements put in place’.⁵⁷¹

3.4.4 Implicitly, the question is raised about whether there are existing services available to respond to the needs of these other vulnerable cohorts.

3.4.5 Nationally, this type of service is limited to older adults or adults with a disability,⁵⁷² or adults with impaired decision-making capacity.⁵⁷³ England has limited their service provision for safeguarding measures to adults with care and support needs who are experiencing abuse,⁵⁷⁴ and in Scotland it is limited to those unable to safeguard themselves, their 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, and are more vulnerable to being harmed than others who are not so affected.⁵⁷⁵

3.4.6 On the one hand, there is an argument that the remit of the ASU should expand in October 2022 as originally intended to properly fill the safeguarding gaps identified by many previous reports and to ensure other adults do not fall through these same cracks.

3.4.7 However, some support was expressed to SALRI to limit the scope of the ASU to elder abuse and/or to retain a limited scope to elder abuse and/or the abuse of persons with disability as was the original apparent intention, due to resourcing and operational limitations or simply to retain a strong focus on addressing the acute issue of elder abuse, the policy context from which the ASU was developed.

⁵⁶⁹ Explanatory Memorandum, Office for the Ageing (Adult Safeguarding) Amendment Bill 2018 (SA) 2.

⁵⁷⁰ South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3549 (Christopher Picton).

⁵⁷¹ South Australian Adult Safeguarding Unit, *2019–2020 Annual Report* (Report, 2020) page 3, South Australia, *Parliamentary Debates*, Legislative Council, 11 November 2020, 3242 (John Gardner).

⁵⁷² *Ageing and Disability Commissioner Act 2019* (NSW).

⁵⁷³ *Guardianship and Administration Act 2019* (Vic) s 7, *Public Guardian Act 2014* (Qld) s 3.

⁵⁷⁴ *Care Act 2014* (UK) c 23, s 42.

⁵⁷⁵ *Adult Support and Protection (Scotland) Act 2007* (Scot) s 3.

The Location of the ASU

3.4.8 The location of the ASU and the perceptions of the independence of its role within both the OFAW and the Department for Health and Wellbeing were raised in the 2018 parliamentary debate.

3.4.9 The Opposition in the Legislative Council proposed an amendment that the ASU 'is, in the performance of functions under this Act, independent of direction or control by the Crown, the Minister, the Chief Executive or any other Minister or officer of the Crown.'⁵⁷⁶ The Hon Kyam Maher MLC noted this sought 'to clarify and make abundantly clear' that the ASU would be independent of both the Minister and the Chief Executive in the performance of its duties, explaining: 'We believe it is important that a unit such as this acts knowing they are not bound by the specific directions of the minister or the department in performing their functions.'⁵⁷⁷

3.4.10 The amendment was opposed by the Government and was defeated. The Minister explained that such an amendment would amount to 'basically a carte blanche [for the ASU] to ignore all government policies'. The Minister noted that the ASU is not an investigatory or watchdog or oversight body⁵⁷⁸ and that the amendment would require the ASU to be set up separately to the Office for the Ageing (now the OFAW) without any clear lines of accountability. It was asserted that it would 'be highly unusual to establish a unit as an independent statutory authority that is independent of the Crown, the Minister, the Chief Executive or any other Minister or officer of the Crown' and it may even diminish the accountability of the ASU and excuse it from complying with a whole range of government policies and procedures.⁵⁷⁹

3.4.11 The then Minister for Health and Wellbeing observed:

Having the adult safeguarding unit as a part of the Department for Health and Wellbeing will facilitate a close working relationship with the department's wide network of support services, ensuring that the unit is able to provide a coordinated and multiagency response to individuals wanting safeguarding support. Rather than a need for the unit to be independent, it is important that the adult safeguarding unit be accountable through the chief executive, the department and the minister to ensure that the chief executive and the minister are kept informed of, and are ultimately accountable for, the actions of the unit. Independence, as is proposed by this amendment, would not facilitate access to support services and networks. It would hamper a seamless response for the individual wanting safeguarding support and is not consistent with the *Closing the Gaps Report*.⁵⁸⁰

⁵⁷⁶ South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1726.

⁵⁷⁷ Ibid.

⁵⁷⁸ Ibid.

⁵⁷⁹ Ibid.

⁵⁸⁰ Ibid. The Hon Mark Parnell did not support the amendment. 'I do not think it is practical or appropriate for it to have the level of independence that would be granted by the Opposition's amendment. That is not to say that the Greens would accept, for one minute, political interference in the work of this body. My understanding would be that any attempt to behave in that way would probably come to light fairly quickly, especially those people who saw themselves as being leant on or being encouraged to perform their duties in a certain way. I do not think the government would get away with it for too long, but I do not think the amendment, as drafted by the opposition, warrants support at this stage': South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1728.

3.4.12 Mr Picton noted that the Parliamentary Joint Elder Abuse Committee had recommended that the ASU be housed within the Public Advocate's office or in the Department of Human Services.⁵⁸¹ Mr Picton elaborated:

I think there was a strong argument for such an amendment to be made, particularly when you look back at the Joint Committee report which recommended having it largely as an independent organisation. This model may not produce that independence that otherwise would be the case if it was part of the Office of the Public Advocate. It is something we will have to reflect on in time. There is a review mechanism as part of this legislation and I hope that in the future the review will look at whether just having this as part of a government department has worked or whether there needs to be an additional level of independence as part of it.⁵⁸²

A Standalone Act?

3.4.13 The Opposition also raised for questioning the location of the ASU's role within what was then the *Office for the Ageing Act 1995* (SA):

Were there no other Bills that were suitable? ... Was consideration given to placing it in another Bill? Stakeholders have raised with the Opposition concerns that by placing this Bill within that Act and the unit under ageing it leaves the possible impression that vulnerable adults are constrained solely to older persons, which we know is not the case. Why not a standalone Act or another Act so that it does not create the impression that it is only aged people who are vulnerable?⁵⁸³

3.4.14 The then Minister for Health and Wellbeing acknowledged the cogency of this question and explained that the Government had chosen to establish the ASU as a function of the new Office for Ageing Well because it would enable the coordination of the various existing responses to elder abuse, such as state-wide policy development, awareness raising (including across culturally and linguistically diverse groups), workforce training and other policy initiatives relating to the rights of older South Australians.⁵⁸⁴

3.5 Consultation Data Overview

3.5.1 The general view of survey respondents who had interacted with the ASU was positive, although some issues were highlighted. One respondent said the ASU practitioner they spoke to when reporting concerns was 'kind and informative' and that they 'took my concerns seriously, listened and understood my concerns, and was able to assist appropriately'.

3.5.2 Other respondents described the ASU as 'helpful and easy to refer to', 'responsive' and 'informed and supportive'.

3.5.3 Some respondents noted less satisfactory experiences. A few responses noted difficulties getting through to the ASU to make a report. Another response noted the process of reporting was long. A lack of feedback following a report was also highlighted. Some respondents also referred to issues in cases involving federally funded aged care providers, and that there is a lack of clarity as to who the appropriate agency is in these cases.

⁵⁸¹ South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3547.

⁵⁸² Ibid 3547–8. SALRI has recommended such a future review occur: See Recommendation 1.

⁵⁸³ Ibid.

⁵⁸⁴ Ibid.

The Role of the ASU

3.5.4 A considerable number of SALRI's consultation and survey responses spoke positively about the role and functions of the ASU and its work to date. As Purple Orange, for example, said: 'We wish to acknowledge the vital importance the Adult Safeguarding Unit plays in providing State-based oversight to safeguarding.' A Mount Gambier practitioner praised the ASU's role in helping resolve their concerns for the welfare of a person with disability vulnerable to abuse. There was near universal support in SALRI's consultation and survey responses for retention of the ASU. The vital nature of its unique and valuable role in safeguarding the rights of adults vulnerable to abuse was repeatedly emphasised to SALRI. Even those parties who were critical of aspects of the *AAS Act* and/or the operation to date of the ASU, or who were unaware of its existence of the ASU, supported the retention of the ASU (albeit with suggested improvements to present law and/or practice).

3.5.5 The increasing workload of the ASU, in the face of the COVID-19 situation and despite a lack of broad community awareness of its role and existence, in its first three years of operation is also notable.⁵⁸⁵

3.5.6 COTA (SA) said: 'The amended provisions of the Act and the establishment of the ASU were important and bold steps to prevent and respond to elder abuse.' Robbi Williams of Purple Orange acknowledged the 'vital importance' of the ASU in providing State-based oversight to safeguarding, adding that since the establishment of the ASU in 2019 there had been a reduction in both funding and scope of the Community Visitor Scheme. Mr Williams noted:

We have witnessed the tragic death of Ann Marie Smith which highlighted the risks of relying on only one avenue for safeguarding those at greater risk. This tragedy also underscored that the NDIS Quality Safeguarding Commission on its own is not an adequate safeguarding measure.

3.5.7 The comments of the Public Advocate of the value of the ASU are significant:

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 ...

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.

The Scope of the ASU

3.5.8 A majority of consultees at the roundtables and regional consultations agreed that the scope of the ASU should be expanded beyond a specified age group, as abuse can occur at any age. There was no broad agreement in the survey with 47.5 percent of respondents of the view that the ASU should be available to all adults regardless of age or disability. Many of these respondents favoured a risk assessment that would place high risk cases (such as older people, people with a disability, and homeless adults) as a priority. Other individual submissions raised that important consideration needs to be given to other groups such as those with dementia or complex communication needs.

3.5.9 There was some support, especially from older individuals and advocacy bodies, for the scope of the ASU to revert to its original narrower focus on older people. There were concerns that services would be less effective to deal with elder abuse if the ASU's remit was expanded. A number

⁵⁸⁵ The breadth of the ASU's work in this time is shown in the Annual Report data found below in Appendix B.

of advocates raised concerns that the broadening of the ASU remit could ‘lose the original intention’ of the ASU. It risked diluting the ASU’s focus and expertise to address reports of elder abuse.

3.5.10 COTA (SA) noted that the ‘dynamics of elder abuse are unique and different from the abuse experienced by other age groups and cohorts and a certain level of expertise is needed to understand the unique needs of older people.’ This was supported by a few survey respondents and other individuals. This indicates that the safeguarding response provided for in the *AAS Act* may not be appropriate for other vulnerable adults.

3.5.11 A recurring concern was that the ASU should not be given too expansive a remit, or it risks been spread too thinly to effectively carry out its core safeguarding role. One survey respondent stated that ‘as an older person, I am deeply concerned that diluting the focus and function of the OFAW will serve no one well, particularly older persons.’

3.5.12 Similar concerns were voiced by groups and service providers reflecting the interests of persons with disability. Some disability rights advocates expressed that people with a disability do not want to be ‘lumped in’ with elder abuse issues and that a distinction between the two groups is required as it would be inappropriate to have a singular safeguarding response to address the needs of both groups. Purple Orange, for example, submitted:

Due diligence [must] be given to ensuring the current expertise and skill set of the Adult Safeguarding Unit staff to address the unique needs of people living with disability and older people are retained following the expansion of the Act to include all adults who may be experiencing abuse in South Australia later this year. To lose this expertise would be to lose the purpose and effectiveness of this Unit.

3.5.13 It was noted by a few submissions that ‘no other place in the world has a similarly wide scope’. There was a concern that ‘people with the strongest voice get what they want’ to the detriment of others.

3.5.14 Only 14 percent of survey respondents felt the scope should be limited to older people and adults with a disability. Of these respondents, some felt it was important to have a specialised service for these groups of people due to their increased vulnerability and others went further to suggest that it should be limited to only older people.

3.5.15 Natalie Wade of Equality Lawyers, whilst recognising the rationale behind the ASU, argued it is inappropriate for the ASU, especially when located within the OFAW, to be responsible for individual responses to reports of both elder abuse and the abuse and neglect of persons with disability. Ms Wade favoured separate and distinct adult protection units with specific expertise and adequate resources to handle the abuse and neglect of persons with disability and instances of elder abuse.⁵⁸⁶ This view was partly supported in SALRI’s expert roundtable and also by health practitioners

⁵⁸⁶ It is worth setting out Ms Wade’s views in full. Ms Wade told SALRI that, in times when there is a community need for it to provide adequate safeguarding measures, she supported the rationale of an Adult Safeguarding Unit, including for persons with disability (providing the relevant human rights and autonomy are respected). However, she argued it is inappropriate for the ASU, especially when located within the OFAW, to be responsible for individual responses to reports of both elder abuse and the abuse and neglect of persons with disability. Ms Wade explained that the knowledge base and expertise to effectively respond to reports of elder abuse and the abuse of persons with disability are distinct and separate and need a separate focus. The issues and concerns that arise are very different. Previous public policy which has treated these matters separately have shown great success and impact. For example, the former State Government had a comprehensive *Disability Justice Plan* that was largely unrelated to elder abuse. Ms Wade added that there are strong arguments of human rights law, policy and

in Mount Gambier who noted the differing knowledge base and expertise involved. They told SALRI it is inappropriate for the ASU to be responsible for individual responses to reports of both elder abuse and the abuse and neglect of persons with disability.

3.5.16 Others in consultation felt the service model was appropriate for both older people and people with a disability as statistically both of these groups experience abuse similarly, within a relationship with the expectation of trust, a duty of care, or a power imbalance.⁵⁸⁷ According to this view, the current model would not be appropriate to respond to adults experiencing other forms of abuse who may benefit from a different type of service response. Indeed, there was a wide view in SALRI's consultation that what mattered was a single ASU, but crucially with the expertise and capability to focus on both elder abuse and disability and to effectively respond to reports of abuse.

3.5.17 Some parties felt extending the remit of the ASU would duplicate services already available for other adults (such as Domestic Violence services) and that 'more awareness and services could be available to help older people and people with disabilities'. One fear was that reports of drug addiction, homelessness, and domestic violence would increasingly be made to ASU and potentially overwhelm the service. Lawyers in Mount Gambier raised that the frequency of vexatious reports may be an inevitability from expanding the scope and must be acknowledged as a risk, but concluded that dealing with this ad hoc is better than limiting the scope.

3.5.18 Some survey responses noted practical implications, with one respondent stating this expansion can only occur if 'staff are adequately trained and resourced to enable this to occur'. This sentiment was echoed by at least 5 other respondents.

The Location of the ASU

3.5.19 Related to their views as to whether the ASU should apply to all adults who may be vulnerable to abuse, including both older persons and persons with disability, a number of parties in consultation expressed misgivings to SALRI about the ASU's location within the OFAW.

3.5.20 For example, Natalie Wade of Equality Lawyers explained that the knowledge base and expertise to effectively respond to reports of elder abuse and the abuse of persons with disability are distinct and need a separate focus. Previous public policy which has treated these matters separately has shown great success and impact. For example, the former State Government had a comprehensive *Disability Justice Plan* that was largely unrelated to elder abuse.

3.5.21 The OPA told SALRI:

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

practice as to why it is misplaced and unhelpful to 'lump together' the response to reports of elder abuse and the abuse of persons with disability. Ms Wade favoured a separate and distinct adult protection unit with specific expertise and adequate resources focussed on the abuse and neglect of persons with disability and for responses to elder abuse to be handled elsewhere.

⁵⁸⁷ Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 17–19, 20, 32; Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 15, 38.

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...

3.5.22 Additionally, questions of independence were raised, given the OFAW is itself part of the Department for Health and Wellbeing.

3.5.23 ARAS expressed its misgivings to SALRI as to the location of the ASU within the OFAW (though accepting the expertise of the Office) and the Department for Health and Wellbeing. ARAS noted that the independence of the ASU may be perceived as questioned if a report of abuse relates to an employee or unit of SA Health. ARAS noted the value of 'clear boundaries' in any such situation.

3.5.24 COTA (SA) questioned whether the ASU should remain within the OFAW:

COTA (SA) recognises that the Office for Ageing Well achieved the establishment of the ASU within very tight timeframes and with a high level of credibility. No doubt the [SALRI] review will now consider whether adult safeguarding should be a continuing function within the Office for Ageing Well for all or part of the service or whether there is a better host for the next stage of the service's development. To this end, we recommend that as part of its review, SALRI considers the need for adult safeguarding policy to be separated from direct responsibility for the Unit so that there is a level of independence and objectivity. It is also important to consider whether it is reasonable for one service to operate across the diverse needs of all vulnerable adults or whether specialisation and particular expertise will be required

3.5.25 A number of parties, including, but not limited to the OFAW and the ASU, supported the retention of the ASU within the OFAW and the Department for Health and Wellbeing, noting the natural alignment and synergy between the OFAW and the ASU. There were also operational and practical considerations supporting this approach. The Director of the OFAW plays a major role in both that Office and the ASU, and administrative resources can be easily deployed from the OFAW to the ASU at times of need, and this direct exchange between the OFAW and the ASU is valuable.

3.5.26 There was acceptance, including by groups representing the interests of older persons and persons with disability, that in an 'an ideal world' for there to be a specialist ASU with a focus on elder abuse and a similar specialist body with a focus on the abuse and exploitation of persons with disability. However, for logistical, operational and resourcing reasons, especially in a smaller jurisdiction like South Australia, it was widely acknowledged that this is unrealistic. The synergy between the work of the OFAW and the ASU was also noted. A common theme was what matters is that the ASU, wherever located, should have the expertise and capability to respond effectively to reports of the abuse of both older persons and persons with disability. The suggestion of the ASU within the OFAW, though perhaps not ideal, was accepted by most parties as practicable and appropriate, at least at this stage. Maggie Rutjens, for example, noted her misgivings as to the ASU's location within the OFAW and said it is critical that the ASU can respond effectively to the abuse of persons with disability, and this is not undermined. She still supported its present location within the OFAW. Ms Rutjens questioned the appropriateness of other proposed locations for the ASU such as DHS, given its imminent provider status, and the OPA given its conflicting scope. She noted it is difficult to identify where the ASU could be placed in preference to the OFAW and reiterated that the paramount issue is that the ASU must be supported by contemporary and relevant legislation to ensure the ASU functions with high level relevance, skillset and ability to effectively respond to both elder abuse and the abuse of persons with disability.

3.5.27 A regular view, especially in various consultation sessions, was what matters is not the location of the ASU, but rather the expertise within the Unit and the effectiveness with which it carries out its various roles, especially in relation to both elder abuse and the abuse of persons with disability.

Accessibility of the ASU

3.5.28 Another concern raised by a number of legal practitioners and service providers such as ARAS was their perception that, on occasion, at least in respect to what they viewed as serious abuse, the ASU has proved too cautious and could have taken a more robust approach and utilised their robust powers under s 19 of the *AAS Act*.

3.5.29 The ASU is based in Adelaide and only operates Monday to Friday from 9am–5pm. Elders and members of Aboriginal community groups, and Aboriginal health agencies, service providers and health practitioners noted their disquiet to SALRI as to the effectiveness and cultural soundness of reporting suspected abuse within Aboriginal communities. It was often noted that it is unlikely members of regional and remote Aboriginal communities will simply call an Adelaide phone number or send an email. The need for enhanced engagement with Aboriginal communities and effective and culturally appropriate options for reporting suspected abuse were raised.⁵⁸⁸

3.5.30 A survey respondent noted that the ASU has not been of real impact for people residing in regional areas to whom the Unit is ‘invisible’. This theme was raised by other parties. SALRI was told by Mount Gambier practitioners that the ASU is not widely known and its role needs to be far better known to service providers and practitioners as well as older persons and persons with disability.

3.5.31 The shift in service landscape was pointed out by the ASU, OFAW and a few other government bodies during SALRI’s consultation. The change in the service landscape from State to Commonwealth based services in areas such as disability and residential aged care were perceived as impeding the ability of the ASU to provide safeguarding functions for all adults, and presents a challenge even now with the ASU’s limited scope to elder abuse and abuse of people with disability. The shift in service landscape becomes particularly problematic when the ASU is actioning a safeguarding response for an adult who receives services from the NDIS or another Commonwealth body. This is further explored in Part 5.

3.5.32 The DHS and the OFAW also highlighted issues with the shift in service landscape. DHS noted that around the time the ASU was established, disability services previously provided by Disability SA through DHS had their funding and responsibilities moved to the NDIS. While the State is still responsible for mainstream services such as services provided in hospital and education, disability specific services are now funded by the Commonwealth.

3.5.33 The consideration of the service landscape is relevant in understanding where the gaps are in the safeguarding landscape for the ASU to fill and whether the ASU can adequately address the concerns of all adults vulnerable to abuse.

3.6 SALRI’s Conclusions and Recommendations

Scope of the ASU

3.6.1 SALRI was informed by a number of parties such as Elicia White and Cassie Mason that the original rationale and purpose of the ASU was to address elder abuse, but in the swift process of formulating the 2018 Act it went beyond this original remit and was extended to cover persons with

⁵⁸⁸ See below Part 11.3.

disability and other ‘vulnerable adults’. The 2018 Act had this expansive scope. Different views were expressed in SALRI’s consultation as to the wisdom of this course of action.

3.6.2 Although the expansion of ASU’s remit was always the apparent intention of the Government,⁵⁸⁹ there were diverse opinions in SALRI’s consultation as to whether the original focus on elder abuse should be retained, and whether this would be lost or diluted through the expansion of the ASU remit in October 2022.

3.6.3 SALRI recognises that though the original policy context of the ASU primarily arose from the safeguarding gaps identified in elder abuse,⁵⁹⁰ there is the risk that limiting the scope to only older people, or older people and adults with a disability, may result in some groups of vulnerable adults ‘falling through the cracks’ as was raised to SALRI in consultation.

3.6.4 It appears that once again that the demand of the ASU is uncertain and will have to be assessed when the remit is expanded. SALRI also recognises that the ASU is still within its formative years and the model being proposed is being pioneered for the first time in Australia. As COTA (SA) noted in their submission, the crucial outcome right now is for the ASU as it currently operates to make ‘important progress toward improved protection of the safety and human rights of older people and other vulnerable adults’.

3.6.5 There is value in expanding the scope to ‘cover all adults and let the experts who work in the safeguarding unit decide whether or not they fit within their scope.’⁵⁹¹ A roundtable attendee argued it might be worthwhile to ‘open up the floodgates’ and see what cases come through to the ASU before taking further and potentially damaging action to limit the scope once again.

3.6.6 SALRI reiterates what the Office of the Public Advocate articulated in their submission: that ‘there is merit in having a single place where people can go for guidance and support.’

3.6.7 However, SALRI recognises that expanding the scope is not without concerns for resourcing and the risk of the ASU becoming a ‘generalist service’ rather than one tailored to the nuances of elder abuse. One potential resolution for this would be to consider subsequent SALRI recommendations introducing a triage model to manage the flow of reports, and a narrower definition of abuse, as a way to mitigate a backlog or inundation of reports.

Other Issues

3.6.8 Other issues also arose during consultation which, though they are operational in nature and outside of the scope of this review, are important to raise.

3.6.9 First, the existing failures in providing regional services, which were raised throughout SALRI’s consultation process, need to be identified and addressed. One deficiency relates to a gap in education and awareness about the ASU and their functions, which was a common theme in SALRI’s

⁵⁸⁹ South Australian Adult Safeguarding Unit, *2020–2021 Annual Report* (Report, 2021) 3, Explanatory Memorandum, Office for the Ageing (Adult Safeguarding) Amendment Bill 2018 (SA) 2.

⁵⁹⁰ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 382–3. See also South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia’s Response to the Abuse of Vulnerable Older People* (Report, October 2011 Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017) 32.

⁵⁹¹ South Australia, *Parliamentary Debates*, Legislative Council, 11 Nov 2020, 3243 (Natalie Cook)

consultations especially in regional areas. Many of SALRI's regional consultations and some survey responses noted the failure of the ASU to fully implement services in regional areas. This issue is covered in further detail in Part 11.3, but is noted here as the expansion of ASU's remit could cause further resourcing and service difficulties.

3.6.10 Secondly, the ASU should continue to adequately train their practitioners to identify and respond to the nuances of an individual's concerns. The report by the Victorian Public Advocate supported the continuation of broad workforce training 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.'⁵⁹²

3.6.11 The OFAW and ASU joint submission particularly noted that the establishment of the ASU and the relevant legislative provisions was a policy response to gaps identified in the elder abuse space. However, when drafting the *AAS Act*, it was recognised that age alone does not make a person vulnerable and there are a range of factors that may contribute to a person being vulnerable to abuse. For this reason, the adult safeguarding provisions of the *AAS Act* were extended beyond elder abuse to capture other adults who may be experiencing abuse and may require support to address and respond to the abuse.

3.6.12 SALRI notes the validity of the view presented in consultation by Ms Natalie Wade of Equality Lawyers, and others, that it is inappropriate for reasons of policy, practice and human rights for the ASU to be responsible for responding both to elder abuse and the abuse and exploitation of persons with disability. It was cogently argued that there are different needs, issues, skill sets and expertise in responding to each category of abuse. However, the general, though not universal, theme in SALRI's consultation was whilst this may well be the case in an 'ideal world', having regard to operational, resourcing and logistical considerations, separate Adult Safeguarding Units are unlikely to be feasible in South Australia. SALRI was often told that what matters most is not what types of abuse the ASU covers, but ensuring that it and its staff have the knowledge, expertise and capability to respond effectively to all types of abuse within its remit, including and perhaps most significantly both elder abuse and the abuse and exploitation of persons with disability, especially with the imminent expansion of the ASU on 1 October 2022 to all 'vulnerable adults'. This view was shared by groups representing both persons with disability and older persons. For context, the NSW Ageing and Disability Commission is responsible for responding to both types of abuse.

3.6.13 SALRI is of the view that, notwithstanding the cogency of Ms Wade's view, the ASU, at this stage, should remain responsible under the *AAS Act* for both reports of elder abuse and the abuse of persons with disability. It is most practicable and realistic to have one ASU covering reports of abuse to vulnerable adults. This issue can be reconsidered as part of any future review.

3.6.14 SALRI would also suggest that the ASU practitioners have the necessary skills and expertise to adequately and effectively address the needs of people with a disability, elder abuse concerns, and other nuances such as cultural and language barriers, and communication needs. It may be that the ASU should include staff with both a disability and/or an elder abuse focus. This might already be the case, as the OFAW noted in their submission that the ASU is largely comprised of experienced allied health practitioners who apply clinical and professional judgement and best practice when assessing concerns and working with adults experiencing abuse. SALRI acknowledges the

⁵⁹² Office of the Public Advocate (Vic), *Line of Sight: Refocussing Victoria's Adult Safeguarding Laws and Practices* (Report, August 2022) 38.

importance for the ASU's expertise to extend more broadly to cultural and language diversity, LGBTIQ issues, as well as age and disability.

3.6.15 The change in service landscape was raised as a potential issue in the provision of services to all adults, and one that perhaps poses some difficulties in the ASU being able to perform their functions, as elaborated on in Part 4. However, the need to ensure that services are available for all adults should be the priority and greater efforts made towards creating a multi-agency approach and forming relationships with State and Commonwealth bodies where necessary.

3.6.16 SALRI cautions against any radical revisions to, or a rewrite of, the *AAS Act*, or the role and operation of the ASU. Any such sweeping changes at this stage are premature and inappropriate. The ASU has only been in operation for three years and most of this period has been marked by the disruption of the COVID-19 pandemic. The generally positive views SALRI received as to the *AAS Act* and the vital role and work of the ASU are significant. The nature and breadth of the ASU's workload, despite the COVID-19 situation and issues in awareness of its role, in its first three years of operation is also notable. A considerable number of SALRI's consultation and survey responses spoke positively about the role and functions of the ASU and its work to date. There was near universal support in SALRI's consultation and survey responses for retention of the ASU under the *AAS Act*. The vital nature of its unique and valuable role in safeguarding the rights of adults vulnerable to abuse was repeatedly emphasised to SALRI. Even those parties who were critical of either aspects of the *AAS Act* and/or the operation to date of the ASU, or who were unaware of its existence of the ASU, supported the retention of the ASU under the *AAS Act* (albeit with suggested improvements to present law and/or practice).

3.6.17 SALRI is therefore of the view that the role and operation of the ASU under the *AAS Act* should be retained. SALRI also considers that a standalone Act to govern the role and operation of the ASU is unnecessary.

3.6.18 SALRI is of the view that, at this stage, the ASU should remain under the OFAW. SALRI acknowledges that there are differing views on this issue. SALRI considers that, at this stage, it is premature and unnecessary to relocate the ASU from the OFAW. There is mutual interest and synergy between the roles and operation of both the OFAW and the ASU. As many parties said to SALRI, what matters is not where the ASU is located, but rather its expertise and operation and capability to effectively perform its vital safeguarding role. There is also no obvious agency to relocate the ASU to.

3.6.19 SALRI suggests that, at this stage, it is unnecessary for the *AAS Act* to include an explicit statement of the independence of the ASU. SALRI considers this question is best left for any future wider review.

3.6.20 Recommendations

RECOMMENDATION 5

SALRI recommends that the role and operation of the Adult Safeguarding Unit under the *Ageing and Adult Safeguarding Act 1995* (SA) should be retained. SALRI considers that a standalone Act to govern the role and operation of the Adult Safeguarding Unit is unnecessary.

RECOMMENDATION 6

SALRI recommends that, at this stage, the Adult Safeguarding Unit should remain under the Office for Ageing Well.

RECOMMENDATION 7

SALRI recommends that, at this stage, it is unnecessary for the *Ageing and Adult Safeguarding Act 1995* (SA) to include an explicit statement of the independence of the Adult Safeguarding Unit.

Part 4 – Purpose and Functions of the ASU

4.1 Background and Principles

4.1.1 The establishment of the ASU in South Australia was a landmark event as it was the first body of its kind in Australia. The *AAS Act* passed with all party support.⁵⁹³ It is notable that, as SALRI was reminded by several parties in consultation, the Act was formulated in considerable haste as a priority ‘100 day’ commitment for the incoming State Government after the 2018 election.⁵⁹⁴

4.1.2 The ASU was established to ‘fill the gap’ in South Australia for vulnerable adults who, despite having full decision-making capacity, experience abuse or neglect and are left to navigate often complex systems alone.⁵⁹⁵ The ASU was expected to act as a lead agency with legislative authority to investigate or follow up suspicions of abuse, intervene, coordinate and compel interagency collaboration regardless of the type of report they receive.⁵⁹⁶

4.1.3 When the ASU commenced operation on 1 October 2019,⁵⁹⁷ its statutory responsibility was to respond to reports of suspected abuse or neglect of vulnerable adults and build on the significant work already being undertaken in the area by the Office for the Ageing (now the OFAW) in raising community awareness of elder abuse, ameliorating the rights of older people, and building age-friendly

⁵⁹³ South Australia, *Parliamentary Debates*, Legislative Council, 6 September 2018, 1297–8 (Connie Bonaros); South Australia, *Parliamentary Debates*, Legislative Council, 19 September 2018, 1417 (Mark Parnell); South Australia, *Parliamentary Debates*, Legislative Council, 18 October 2018, 1654–1655 (John Darley); South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1710 (Kyam Maher) 1710–11; South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1711–14 (Frank Pangallo); South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3544–6 (Paula Luethen); South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3546–50; South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3550–52 (Fraser Ellis); South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3552–5 (Zoe Bettison); South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3555–8 (Vickie Chapman); South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3558–9, 3590–1 (Matthew Cowdrey); South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3591–3593 (Mr Teague); South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3593–4 (Natalie Cook); South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3594–8 (Stephen Patterson); South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3598–602 (Nick McBride); South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3603–4 (Daniel Van Holst Pellekkan).

⁵⁹⁴ SALRI highlights the fact that the *AAS Act* was formulated as a ‘100 day’ priority by the incoming Government. Several parties noted that drafting and legal and operational issues were not necessarily fully addressed or resolved in this process. SALRI notes it intends no criticism of the expertise of Parliamentary Counsel.

⁵⁹⁵ South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1712 (Stephen Wade, Minister for Health and Wellbeing). See further Wendy Lacey et al, University of South Australia, *Prevalence of Elder Abuse in South Australia* (Report, Australia, February 2017); Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017); Australia Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017); Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen to Me: When Trust is Broken* (Final Report, September 2018).

⁵⁹⁶ Office for the Ageing, SA Health, *Elder Abuse Responses: Safeguarding the Rights of Older South Australians* (Consultation Outcomes Report, 2018) 8.

⁵⁹⁷ Adult Safeguarding Unit, *2019–2020 Annual Report* (Report, 2020) 3.

communities and services.⁵⁹⁸ The ASU was intended to work ‘positively’ with the ‘vulnerable adult’ to ‘preserve the relationships that are important to them’.⁵⁹⁹

4.1.4 The rationale for the ASU’s operation was outlined as follows:

[T]he purpose of this unit is twofold: the first is to raise awareness and educate the community about elder abuse and the abuse of vulnerable adults; the second is to receive reports from the community where there is concern that abuse of vulnerable adults is occurring and taking action where it is warranted and necessary.⁶⁰⁰

4.1.5 The *AAS Act* provides that the ‘paramount’ focus of the ASU is to uphold the autonomy of an adult who is the subject of a report, by taking a collaborative, supported approach, with very limited circumstances where the ASU is entitled to act without an individual’s consent. The Minister explained:

This Bill provides for an Adult Safeguarding Unit — an agency that is empowered with the ability to investigate and pursue matters, whose role is to walk alongside a vulnerable adult and their supporters and work together to help them navigate complex systems, understand their options and put in place the support the vulnerable adult wants and needs. The intent is to safeguard vulnerable adults from abuse and to support them to live their lives free from abuse or exploitation. The Bill does this by taking a consistent rights-based approach, which places the vulnerable adult at the centre of any safeguarding measures, actions or interventions. The Bill deliberately sets a high threshold for acting without the consent of the vulnerable adult, that is, that the person is at immediate risk to life or physical safety. The guiding principle is that a vulnerable adult with decision-making capacity who is experiencing abuse has the right to decline support, assistance or other measures designed to safeguard them from abuse.⁶⁰¹

4.1.6 The then Minister’s comments on the ASU’s intended role are illustrative:

It is important to note that the intention of the Adult Safeguarding Unit is to be an individual support agency, to investigate current individual cases of suspected abuse of a vulnerable adult and to walk alongside that person to ensure that they understand their options and receive the support they require through the development of a safeguarding plan. The Unit is not intended to be a watchdog agency nor duplicate the functions of other agencies. It is also not within the remit of the unit to punish perpetrators. Where the circumstances require such steps, the Unit will have the power to refer matters to other appropriate agencies such as the police, the Ombudsman or the Commonwealth Aged Care Complaints Commissioner on a case-by-case basis. Instead, a key role of the unit will be to investigate the circumstances around a particular report of suspected or actual abuse and then work collaboratively with other relevant organisations to support the referral of clients between services or coordinate a multiagency response, multidisciplinary safeguarding plan, as agreed with the vulnerable adult. By adopting such an approach to case management, the Unit

⁵⁹⁸ South Australia, *Parliamentary Debates*, House of Assembly Estimates Committee B, 25 September 2018, 222 (Stephen Wade, Minister for Health and Wellbeing). SALRI heard in consultation acknowledgment of the value of the educative and community work of the OFAW. It is also significant to note the role of ARAS who before the ASU’s establishment ran the Elder Abuse hotline.

⁵⁹⁹ Explanatory Memorandum, Office for the Ageing (Adult Safeguarding) Amendment Bill 2018 (SA) 7.

⁶⁰⁰ South Australia, *Parliamentary Debates*, Legislative Council, 18 October 2017, 1654 (John Darley).

⁶⁰¹ South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1714–15 (Stephen Wade, Minister for Health and Wellbeing).

will be responsible for ensuring that early intervention can occur, ensuring that abuse does not escalate and that serious cases can be responded to in a timely and coordinated manner.⁶⁰²

4.1.7 Thus, the stated function of the ASU was to receive reports of suspected abuse or neglect and to coordinate a multi-agency response,⁶⁰³ and at the same time to focus on ‘early intervention, case coordination and information sharing’.⁶⁰⁴

4.1.8 Section 15 of the *AAS Act* outlines that the functions of the ASU are:

- (a) promoting and advocating for the rights and interests of vulnerable adults in South Australia; and
- (b) promoting participation by vulnerable adults in the making of decisions that affect their lives; and
- (c) promoting and assisting in the development of coordinated strategies for prevention and early intervention of abuse of vulnerable adults; and
- (d) to receive reports relating to the suspected abuse of vulnerable adults; and
- (e) to assess reports relating to the suspected abuse of vulnerable adults; and
- (f) to investigate reports relating to the suspected abuse of vulnerable adults; and
- (g) to coordinate responses to reports relating to the suspected abuse of a vulnerable adult with State authorities and other persons and bodies; and
- (h) to refer reports relating to the suspected abuse of a vulnerable adult to appropriate persons and bodies; and
- (i) to follow up on reports that have been assessed or investigated where it is appropriate to do so; and
- (j) to collate data on matters relating to the abuse of vulnerable adults; and
- (k) to advise Ministers, State authorities and other bodies (including non-Government bodies) on matters relating to the abuse of vulnerable adults at a systemic level; and
- (l) to prepare and publish reports on matters relating to the abuse of vulnerable adults at a systemic level; and
- (m) to prepare and publish reports on issues relating to vulnerable adults that are of public importance; and
- (n) to perform such other functions as may be assigned to the Adult Safeguarding Unit by the Minister or under this or any other Act.⁶⁰⁵

4.1.9 Over half the interested parties consulted by Tetra Tech in their Year One Evaluation of the ASU detailed the role of the ASU as receiving enquiries, making referrals, gathering information, conducting investigations and using their strong powers where needed.⁶⁰⁶ The primary role of the ASU was perceived to be responding to reports of abuse, rather than advocacy or writing reports about systemic abuse or community education.

4.1.10 However, under the *AAS Act* the ASU *is* expected to perform awareness raising and education functions, a fact which was often raised in SALRI’s consultation. Indeed, s 12(k) of the *AAS*

⁶⁰² South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1716 (Stephen Wade, Minister for Health and Wellbeing).

⁶⁰³ South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1727 (Stephen Wade, Minister for Health and Wellbeing).

⁶⁰⁴ South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3544 (Paula Leuthen).

⁶⁰⁵ *AAS Act* s 15(1).

⁶⁰⁶ Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 5.

Act states that awareness raising and community education programs should be a *priority* in the administration and operation of the Act. During the formulation of the Ageing and Adult Safeguarding Amendment Bill 2018 ('the Bill') it was expected that the ASU would build on the existing work of the OFAW, the Department of Human Services, and the Mental Health Commission.⁶⁰⁷

4.1.11 The ASU was purposefully placed within the OFAW to increase accessibility to the existing awareness raising and educational activities run by the OFAW to tackle elder abuse, as well as being able to use the connections and networks with the Department for Health and Wellbeing and other agencies.⁶⁰⁸ The ASU was expected to use trusted networks, community groups, social media and other forms of media to share information about rights and strategies, to stay informed, independent and connected.⁶⁰⁹

4.1.12 This broader, multi-disciplinary approach was crucial for the ASU to be able to play 'a coordination role between state government agencies'.⁶¹⁰ The ASU was expected to undertake discussions with Commonwealth agencies and it was expected that reports would be made to the ASU about adults residing in Commonwealth aged-care facilities.⁶¹¹ It was thought that adopting a multi-agency approach with State bodies and Commonwealth bodies would minimise the duplication of services.

4.1.13 In addition to its annual reports, the ASU can prepare and publish reports on systemic issues or issues of public importance as they relate to vulnerable adults.⁶¹² These may not be the primary function of the ASU, but it provides an avenue for the ASU to raise issues to the Government and wider community that have been encountered in the course of their other functions, if they are not adequately addressed in the Annual Report.⁶¹³

4.2 Position in Other Jurisdictions

Victoria

4.2.1 In Victoria, the Office of the Public Advocate is the primary safeguarding body with advocacy, investigation and guardianship services. This is limited to assisting persons with a cognitive impairment or mental ill health.⁶¹⁴

⁶⁰⁷ South Australia, *Parliamentary Debates*, Legislative Council, 23 Oct 2018, 1716 (Stephen Wade, Minister for Health and Wellbeing).

⁶⁰⁸ Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 2.

⁶⁰⁹ South Australia, *Parliamentary Debates*, Legislative Council, 23 Oct 2018, 1720 (Stephen Wade, Minister for Health and Wellbeing).

⁶¹⁰ South Australia, *Parliamentary Debates*, House of Assembly Estimates Committee B, 25 September 2018, 225 (Stephen Wade, Minister for Health and Wellbeing).

⁶¹¹ *Ibid.* It should be noted that both the service and constitutional landscape leave the State only a limited direct role in this area. Any complaints of abuse in the residential aged care setting are likely to be the province of the Aged Care Quality and Safety Commission.

⁶¹² *AAS Act* ss 15(1)(l)–(m).

⁶¹³ South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1729 (Stephen Wade, Minister for Health and Wellbeing).

⁶¹⁴ Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales 'Elder Abuse in New South Wales' (Report No 44, June 2016) 135 [8.52]. See also Evidence to Legislative Council General Purpose

4.2.2 The Public Advocate operates under the new *Guardianship and Administration Act 2019* (Vic) (*G&A Act*) that came into effect on 1 July 2019.⁶¹⁵ Victoria was the ‘first Australian jurisdiction to introduce a modern guardianship law’⁶¹⁶ and in doing so, extended the powers of the Public Advocate to promote and safeguard the rights and interests of persons with disability.⁶¹⁷ Disability is defined as ‘neurological impairment, intellectual impairment, mental disorder, brain injury, physical disability or dementia’.⁶¹⁸

4.2.3 The new *G&A Act* establishes the Public Advocate to help persons with disability to assist the tribunal, to investigate abuse and to educate the public.⁶¹⁹ The primary objects of the *G&A Act* are to promote the human rights and dignity of persons with a disability. This is to be achieved by having regard to the United Nations *Convention on the Rights of Persons with Disabilities*, and, if a guardianship or administration order is in place, to enable the Tribunal to set safeguards and limitations on the powers of the guardian or administrator and ensure such orders are regularly reviewed, and to provide assistance to the guardians or administrators when making decisions for the adult with impaired decision-making capacity.⁶²⁰

4.2.4 The Victorian Public Advocate has a wide range of functions including advocacy, education, protecting the rights of persons from abuse, neglect and exploitation, investigating aspects of the operation of the *G&A Act* on both a systemic and individual basis, and reporting to the Minister.⁶²¹ The Public Advocate plays a ‘significant role in educating the community about the new framework through targeted information sessions for the public and professionals, and community initiatives.’⁶²² Some of the functions of the Victorian Public Advocate are similar to those of the ASU under the *AAS Act*, however, these functions are perhaps more practicable for the Victorian model as its scope is limited to adults with a disability, meaning resources can be targeted to a specific group of people and issues.

4.2.5 The *G&A Act* makes no reference to safeguarding as a purpose of the Act or a function of the Public Advocate.

New South Wales

4.2.6 A 2016 NSW Parliamentary Report on elder abuse recommended the introduction of a Public Advocate, similar to that operating in Victoria, to ‘promote and protect the rights of vulnerable adults at risk of abuse’.⁶²³

Standing Committee No 2, Parliament of NSW, Sydney, 22 February 2016, 59 (John Chesterman, Director of Strategy, Office of the Public Advocate, Victoria).

⁶¹⁵ *Guardianship and Administration Act 2019* (Vic) pt 2.

⁶¹⁶ This issue was also raised in SALRI’s consultation, but is beyond SALRI’s terms of reference.

⁶¹⁷ Sarah Donnelly et al, HSE National Safeguarding Office and Trigraph, *Adult Safeguarding Legislation and Policy Rapid Realist Literature Review* (Report, May 2017) 30.

⁶¹⁸ *Guardianship and Administration Act 2019* (Vic) s 3.

⁶¹⁹ See generally, NSW Law Reform Commission, *Review of the Guardianship Act 1987* (Report 145, 21 May 2018) 34.

⁶²⁰ *Guardianship and Administration Act 2019* (Vic) ss 7(1)(a)–(b); Office of the Public Advocate (Vic), *2020–2021 Annual Report* (Report, 18 November 2021) 4.

⁶²¹ *Guardianship and Administration Act 2019* (Vic) s 15.

⁶²² NSW Law Reform Commission, *Review of the Guardianship Act 1987* (Report 145, 21 May 2018) 213.

⁶²³ Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, ‘Elder Abuse in New South Wales’ (Report No 44, June 2016) Recommendation 11.

4.2.7 The NSW Parliamentary Report outlined that the functions of the Public Advocate should include promoting and protecting the rights of vulnerable adults at risk of abuse, exploitation and neglect and receiving and investigating complaints about abuse, exploitation and neglect by individuals or organisations.⁶²⁴ This would address the ‘investigation gap’ as to the suspected abuse of vulnerable adults.⁶²⁵

4.2.8 However, the NSW Government adopted a different approach, creating the role of the Ageing and Disability Commissioner through the *Ageing and Disability Commissioner Act 2019* (NSW) (*ADC Act*). As to the role of the Commissioner, the Minister noted that:

The Commissioner will investigate allegations of abuse, neglect and exploitation and will provide support to vulnerable adults and their families/carers following investigations. It will also raise community awareness about abuse, neglect and exploitation, including providing advice on preventing, identifying and responding to potential issues.⁶²⁶

4.2.9 When exercising a function under the *ADC Act*, the Commissioner must have regard to these overarching aims.⁶²⁷ The functions of the Commissioner are listed in s 12 of the *ADC Act* and include:

- (a) to deal with allegations of abuse, neglect and exploitation of adults with disability and older adults, whether on the basis of a report made to the Commissioner or at the Commissioner’s own initiative, including by referring matters to appropriate persons or bodies and by conducting investigations,
- (b) to take further action, following an investigation into an allegation of abuse, neglect or exploitation of an adult with disability or older adult, that the Commissioner considers necessary to protect the adult from abuse, neglect and exploitation, including by making an application to a court or tribunal in respect of the adult,
- (c) to raise awareness and educate the public about matters relating to the abuse, neglect and exploitation of adults with disability and older adults,
- (d) to provide advice and general assistance to the public about matters relating to the abuse, neglect and exploitation of adults with disability and older adults, including referrals to independent advocacy services, where appropriate,
- (e) to inquire into and report on systemic issues relating to the protection and promotion of the rights of adults with disability and older adults or the abuse, neglect or exploitation of adults with disability or older adults,
- (f) to consult with the Board on matters relating to the abuse, neglect and exploitation of adults with disability and older adults that the Commissioner considers appropriate,
- (g) to advise, and make recommendations to, the Minister, at the Commissioner’s own initiative or at the request of the Minister, on matters relating to the abuse, neglect and exploitation of adults with disability and older adults,

⁶²⁴ Ibid 142–3 [8.80].

⁶²⁵ Ibid 130–43 [8.36]–[8.81], Recommendation 11.

⁶²⁶ Lenny Roth, ‘Adult Safeguarding Laws: Reviewing the Proposal for a NSW Ageing and Disability Commissioner’ (e-brief issue 3/2019, NSW Parliamentary Research Service, March 2019) 7.

⁶²⁷ *Ageing and Disability Commissioner Act 2019* (NSW) s 4(2).

(h) to monitor, assess and report on the New South Wales implementation of the National Disability Strategy (NDS).⁶²⁸

4.2.10 It is crucial to note several points of distinction between the *ADC Act* and the *AAS Act* in South Australia. Firstly, the scope of the *ADC Act* is limited to adults with a disability or older adults, whereas the remit of the ASU in South Australia will, from October 2022, include all adults who may be vulnerable to abuse. Secondly, the functions of the NSW Commissioner are more flexible. For example, the *ADC Act* empowers the Commissioner to take any action they consider necessary when dealing with a report, whereas the *AAS Act* is more rigid and prescriptive. The third distinction is that the *ADC Act* clearly outlines the overarching purpose of the Commissioner and explicitly ensures the functions of the Commissioner meet this purpose, whereas the present *AAS Act* does not explicitly state the objective or purpose of the ASU.

4.2.11 Finally, SALRI notes that the *ADC Act* makes no mention of safeguarding as a purpose of either the Act or function of the Commissioner.

Scotland

4.2.12 The *Adult Support and Protection (Scotland) Act 2007* (Scot) ('*ASP Act*') was passed by the Scottish Parliament on 15 February 2007, with the stated purposes of:

[P]rotecting adults from harm; to require the establishment of committees with functions relating to the safeguarding of adults who are at risk of harm; to amend the law relating to incapable adults; to remove an individual's liability for expenses incurred by councils in performing certain functions in relation to the individual's spouse or child; to allow the Scottish Ministers to delegate their functions relating to councils' duty to pay sums for the purposes of securing community care services; to make provision entitling a council to recover expenses incurred in providing social services to persons who are not ordinarily resident in the council's area; to allow the Public Guardian to intervene in court proceedings; to amend the law relating to mentally disordered persons; and for connected purposes.⁶²⁹

4.2.13 The *ASP Act* is underpinned by the general principle that intervention in an adult's affairs should only be exercised where it will provide benefit to the adult which could not reasonably be provided without intervening in the adult's affairs and is, of the range of options likely to fulfil the object of the intervention, the least restrictive to the adult's freedom.⁶³⁰

4.2.14 There is no consolidated list of functions under the *ASP Act* unlike the South Australian *AAS Act*. Most of the functions assigned by the *ASP Act* are to be exercised by local Councils and council officers. These include a duty to make inquiries about a person's well-being, property or financial affairs if the adult is at-risk,⁶³¹ conduct investigations,⁶³² and the duty to consider the importance of providing advocacy and other services.⁶³³ The *ASP Act* also imposes an obligation on each Council to establish an 'Adult Protection Committee' to regulate and oversee the procedures and practices and responsibilities of those with safeguarding functions.⁶³⁴

⁶²⁸ Ibid ss 12(1)(a)–(h).

⁶²⁹ Explanatory Statement, *Adult Support and Protection (Scotland) Act 2007* (Scot). The Scottish adult safeguarding model was urged for adoption in South Australia at SALRI's expert consultation roundtable. See also below Part 5.2.

⁶³⁰ *Adult Support and Protection (Scotland) Act 2007* (Scot) ss 1(a)–(b).

⁶³¹ Ibid s 4.

⁶³² Ibid ss 7–10.

⁶³³ Ibid s 6. SALRI notes that 'other services' is not elaborated upon in the *ASP Act* or in the explanatory statement.

⁶³⁴ Ibid s 42.

4.2.15 The Scottish Act uses the term ‘safeguarding’ but, as in the South Australian *AAS Act*, it is not defined or elaborated upon.

4.2.16 The desirability of the Scottish model was raised at one of SALRI’s Adelaide roundtables. SALRI notes the many benefits to this model, but it and other international models cannot be simply adopted in a South Australian context. As Dr Marsha Scott, Chief Executive Officer of Scottish Women’s Aid, told a NSW review:

As I am so aware that your setting and the landscape of Scotland are very different in many significant ways. I do not wish to presuppose any of the assumptions that you might be bringing to this about why a potential piece of legislation [from Scotland] ... would be a good thing.⁶³⁵

England and Wales

4.2.17 Under the *Care Act 2014* (UK) (*‘Care Act’*), the general duty of a local authority in exercising a function under Part 1 of the *Care Act* is to promote an individual’s wellbeing.⁶³⁶ Wellbeing under the *Care Act* covers many aspects of a person’s life including protection from abuse and neglect, social and economic wellbeing, suitability of living accommodation and domestic, family and personal relationships.⁶³⁷

4.2.18 The Statutory Guidance for the *Care Act* further elaborates that the aims of adult safeguarding are to:

- Prevent harm and reduce the risk of abuse or neglect to adults with care and support needs;
- Stop abuse or neglect wherever possible;
- Safeguard adults in a way that supports them in making choices and having control about how they want to live;
- Promote an approach that concentrates on improving life for the adults concerned;
- Raise public awareness so that communities as a whole, alongside professionals, play their part in preventing, identifying and responding to abuse and neglect;
- Provide information and support in accessible ways to help people understand the different types of abuse, how to stay safe and what to do to raise a concern about the safety or well-being of an adult;
- Address what has caused the abuse or neglect.⁶³⁸

4.2.19 The *Care Act* is comprehensive in the functions and duties it imposes on English local authorities to maintain and improve the care and wellbeing of adults generally. The legislation is not confined to instances of abuse or neglect. The expansive functions of an English local authority include

⁶³⁵ Evidence to Joint Select Committee on Coercive Control, Parliament of NSW Sydney, 30 March 2021, 1 (Marsha Scott).

⁶³⁶ *Care Act 2014* (UK) s 1.

⁶³⁷ *Ibid* ss 1(2)(a)–(i).

⁶³⁸ Department of Health and Social Care, *Care and Support Statutory Guidance* (UK Government Guidelines, 16 June 2022) [14.11] <<https://www.gov.uk/government/publications/care-act-statutory-guidance/care-and-support-statutory-guidance#safeguarding-1>>.

preventing or delaying the need for care and support,⁶³⁹ promoting integration of care and support with health services,⁶⁴⁰ providing information and advice to people in the area about care and support of adults and support for carers,⁶⁴¹ and promoting diversity and quality in the provision of services.⁶⁴²

4.2.20 Specific safeguarding provisions apply where a local authority has reasonable cause to suspect that an adult in its area (whether or not ordinarily resident there) has:

- a) needs for care and support (whether or not the authority is meeting any of those needs), and
- b) the person is experiencing, or is at risk of, abuse or neglect, and
- c) as a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it.⁶⁴³

4.2.21 The local authority must make (or cause to be made) whatever enquiries it thinks necessary to decide if any action should be taken and if so, what and by whom.⁶⁴⁴ The model in England is distinct from the South Australian model as the *Care Act* places safeguarding responsibilities on ‘all staff within health services’ and is intertwined with a duty of care owed to patients and colleagues. In contrast, the *AAS Act* contains no specific duty of care to safeguard vulnerable people and the ASU is independent of the health system.⁶⁴⁵

4.2.22 In England, to assist with safeguarding an adult, local authorities must also establish a Safeguarding Adult Board for its area who works with the at-risk adult with the aim to help and protect adults in that area.⁶⁴⁶

4.2.23 The *Care Act* refers to safeguarding of adults at risk of abuse or neglect, but does not define the term or elaborate on what functions would be ‘safeguarding’ functions. However, the Statutory Guidance for the *Care Act* defines ‘adult safeguarding’ as:

Protecting an adult’s right to live in safety, free from abuse and neglect. It is about people and organisations working together to prevent and stop both the risks and experience of abuse or neglect, while at the same time making sure that the adult’s wellbeing is promoted including, where appropriate, having regard to their views, wishes, feelings and beliefs in deciding on any action. This must recognise that adults sometimes have complex interpersonal relationships and may be ambivalent, unclear or unrealistic about their personal circumstances.⁶⁴⁷

4.2.24 The above definition imports a strong human rights approach which places the wishes and concerns of the vulnerable adult at the forefront, alongside considerations of their personal circumstances.

⁶³⁹ *Care Act 2014* (UK) s 2.

⁶⁴⁰ *Ibid* s 3.

⁶⁴¹ *Ibid* s 4.

⁶⁴² *Ibid*.

⁶⁴³ *Ibid* ss 42(1)(a)–(c).

⁶⁴⁴ *Ibid* s 42(2).

⁶⁴⁵ There was some unease in SALRI’s consultation on this point. See also above Part 3.5.

⁶⁴⁶ *Care Act 2014* (UK) ss 43(1)–(2).

⁶⁴⁷ Department of Health and Social Care, *Care and Support Statutory Guidance* (UK Government Guidelines, 16 June 2022) [14.7] <<https://www.gov.uk/government/publications/care-act-statutory-guidance/care-and-support-statutory-guidance#safeguarding-1>>.

4.3 Issues

4.3.1 The obvious deficiency in the *AAS Act* (as often pointed out to SALRI in consultation) is the surprising absence of the term ‘safeguarding’ as a function, objective, or action available to the ASU. The absence of any definition or explanation of ‘safeguarding’ is inconsistent with naming the agency the Adult Safeguarding Unit and the fact that safeguarding is seen as integral to the ASU’s rationale and operation. There are abundant references to the term ‘safeguarding’ in the Parliamentary Debates leading up to the *AAS Act* and in the Act itself, but it is left undefined within the *AAS Act* or any related instruments. The phrases ‘safeguarding plans’ and ‘safeguarding action’ are liberally used in the Code of Practice, but there is no attempt at defining what this means.

4.3.2 There is also no express mention in the *AAS Act* about the overarching purpose or objective of the ASU. This absence exacerbates the gap in knowing how the ASU is intended to operate in the wider adult safeguarding service landscape, what their role is in relation to existing bodies, and what their key objectives are.

4.3.3 The ASU’s expansive statutory functions range from advocacy to the early prevention of abuse, to responding to reports of abuse. One concern as often raised to SALRI was whether the ASU can effectively discharge all these functions and responsibilities and whether all of these functions are best suited to the ASU.⁶⁴⁸ Another question was whether there is a duplication of existing services.⁶⁴⁹ These two issues are intertwined, as having too many functions can impede the ability of the ASU to successfully provide its unique and effective services, and the duplication of existing functions is likely to result in inefficiencies and a waste of resources which may be better expended elsewhere.

4.3.4 For example, the ASU has the legislative function to focus on the prevention and early intervention of abuse.⁶⁵⁰ This is further reflected in the principles underlying the ASU which states that the safeguarding of vulnerable adults is achieved through ‘preventing abuse in the first place’ and therefore awareness raising and community education programs are a priority.⁶⁵¹

4.3.5 ASU staff commented that they were able to dedicate ‘significant attention to awareness raising before the ASU commenced operation because their function of responding to reports of abuse had not commenced yet.’⁶⁵² Although the ASU initially delivered tailored presentations to service providers, organisations and the community, this engagement dropped in 2020 because of COVID-19 and ‘increasing client work’.⁶⁵³ As the ASU’s role of responding to reports of abuse increased, fewer

⁶⁴⁸ A consistent concern held by older persons, groups such as ARAS and COTA (SA) and practitioners and agencies who work with older persons was that the focus and expertise on elder abuse may be undermined if the ASU has too many functions and responsibilities. Similarly, the disability sector and disability community were concerned that the ability to respond to the abuse and exploitation of persons with disability may be undermined if the ASU has too many functions and responsibilities.

⁶⁴⁹ This was again a consistent theme raised to SALRI in consultation. A number of community groups and service providers pointed out that they already provide services similar to some of the ASU’s sated functions. Indeed, the OFAW arguably already performs some of the community and education functions of the ASU.

⁶⁵⁰ Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 4; South Australian Adult Safeguarding Unit, *2019–2020 Annual Report* (Report, 2020) 6.

⁶⁵¹ *AAS Acts* 12(k).

⁶⁵² Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 4; South Australian Adult Safeguarding Unit, *2019–2020 Annual Report* (Report, 2020) 23.

⁶⁵³ *Ibid.*

resources were spent on raising awareness about preventing abuse and more resources were dedicated to responding to reports.⁶⁵⁴

4.3.6 During the passage of the *AAS Act*, it was anticipated that the resources of the ASU would be most appropriately used to investigate and respond to a report of abuse about a vulnerable adult.⁶⁵⁵ The Minister's Second Reading Speech makes it clear that the role of the ASU was to include a safeguarding and case coordination response.⁶⁵⁶

4.3.7 SALRI suggests that the ASU juggling too many functions may come at the likely cost of efficiency and service provision (a point also often made in consultation). The Tetra Tech report noted that, at times, the ASU case allocation system could become somewhat backlogged, demonstrating that the internal case allocation process was not yet fully optimised.⁶⁵⁷ Even at this early stage there were concerns about how the ASU would cope when their scope was further expanded.⁶⁵⁸ This concern is now intensified with the ASU's expanded remit to include adults with disability, and further imminent expansion to cover all vulnerable adults. This poses two further issues: first, whether the expanded remit of the ASU will result in a significant backlog of reports to the detriment of the quality of the services provided by the ASU; and second, whether the ASU will be able to adequately perform all of its functions, including collating data, assessing reports and promoting and advocating for the rights and interests of vulnerable adults, if responding to reports of abuse overwhelms their resources.

4.3.8 The duplication of services expected to be carried out by the ASU was highlighted in SALRI's discussions with the ASU, Cassie Mason, Elicia White and many other interested parties. There are already other established services and agencies available to respond to the needs of other vulnerable cohorts in areas of family and domestic violence, mental illness, homelessness, or advocacy bodies for older persons and persons with disability. As one person at a SALRI roundtable bluntly but aptly pointed out, 'the ASU cannot be all things for all people'. Rather, the true gap the ASU was intended to fill was for a 'dedicated agency with statutorily mandated responsibility to investigate cases of elder abuse, coordinate interagency responses and seek intervention orders where necessary'.⁶⁵⁹ The Tetra Tech Year One Evaluation consultation produced mixed views on the question of whether the ASU duplicated services. Over half the respondents said it did not, but about a third of respondents stated that it did.⁶⁶⁰ The multi-agency response and coordination with other agencies is important as it was intended to prevent the ASU from 'replacing existing legislation or duplicating efforts of existing legislation'.⁶⁶¹

⁶⁵⁴ Ibid 2.

⁶⁵⁵ South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1729 (Stephen Wade, Minister for Health and Wellbeing).

⁶⁵⁶ South Australia, *Parliamentary Debates*, House of Assembly, 25 October 2018, 3158 (Stephen Wade, Minister for Health and Wellbeing).

⁶⁵⁷ Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 21.

⁶⁵⁸ Ibid.

⁶⁵⁹ Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' (2014) 36(1) *Sydney Law Review* 99, 105.

⁶⁶⁰ Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 6.

⁶⁶¹ South Australia, *Parliamentary Debates*, Legislative Council, 20 June 2018, 565 (Stephen Wade, Minister for Health and Wellbeing).

4.3.9 A linked concern identified by parties including ARAS and Wendy Lacey was that the ASU was solely comprised of social workers. It was suggested that, without doubting the expertise and commitment of the ASU's staff, there will be situations where the presence, expertise and input of a lawyer and/or an investigator will be necessary. This was especially identified where the ASU may need to exercise its more robust powers under s 19 of the *AAS Act*, as well as in complex cases where it is unclear if the ASU is the correct agency to deal with the report. The use of lawyers in these cases would also free the services of social workers for the matters in which their skills and expertise are essential.⁶⁶²

Definitions of Safeguarding

4.3.10 In the absence of a clear definition of safeguarding in South Australia or the other jurisdictions discussed above, it is helpful to review other definitions of safeguarding and assess how this could inform a definition of 'safeguarding' in the *AAS Act*, should a definition be adopted.

4.3.11 First, 'adult safeguarding' and 'adult protection' are distinguishable, with safeguarding conceptualised as including both macro level and micro-level activities to prevent abuse and/or harm in the community at large and for the individual.⁶⁶³

4.3.12 The independent regulator of health and adult social care in England, the Care Quality Commission, defines adult safeguarding as 'protecting people's health, wellbeing and human rights, and enabling them to live free from harm, abuse and neglect. It's fundamental to high-quality health and social care.'⁶⁶⁴ The ALRC suggested that the primary objective of adult safeguarding laws should be to 'support and protect at-risk adults'.⁶⁶⁵

4.3.13 The Isle of Wight Safeguarding Adults Board defines safeguarding as 'a range of activities aimed at upholding an adult's fundamental right to be safe at the same time as respecting people's rights to make choices. Safeguarding involves empowerment, protection and justice'.⁶⁶⁶

4.3.14 The Independent Review into the death of Ann Marie Smith considered safeguarding to be a 'continuum starting with participant capacity through to the planning process and corrective regulation in the form of monitoring and responding to complaints and incidents'.⁶⁶⁷

⁶⁶² One suggestion to SALRI was the 'outposting' of lawyers from the Crown Solicitor's Office to the ASU. The ASU advised SALRI it already utilises legal advice and support when carrying out its role and functions. For example, an outposted solicitor from the Crown Solicitor's Office meets with the Director and Chief Adult Safeguarding Practitioner monthly to discuss relevant cases. The ASU also seeks advice from the Crown Solicitor's Office on an *ad hoc* basis as required.

⁶⁶³ Sarah Donnelly et al, HSE National Safeguarding Office and Trigraph, *Adult Safeguarding Legislation and Policy Rapid Realist Literature Review* (Report, May 2017) 17.

⁶⁶⁴ Care Quality Commission, *Safeguarding People* (Web Page, May 2022) <<https://www.cqc.org.uk/what-we-do/how-we-do-our-job/safeguarding-people>>.

⁶⁶⁵ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 403.

⁶⁶⁶ Isle of Wight Safeguarding Council, *Safeguarding Adults Board*, 'Introduction' (Web Page, <<https://www.iow.gov.uk/Residents/Care-and-support/Adults-Services/Safeguarding-Adults-Board/Introduction2#:~:text=The%20Isle%20of%20Wight%20Safeguarding,across%20the%20Isle%20of%20Wight.&text=The%20primary%20purpose%20of%20the,with%20care%20and%20support%20needs>>).

⁶⁶⁷ Alan Robertson, *Independent Review of the Adequacy of the Regulation of the Supports and Services Provided to Ms Ann-Marie Smith, An NDIS Participant, Who Died on 6 April 2020* (Report, 31 August 2020) 44.

4.3.15 The Scotland International Development Alliance defines safeguarding as promoting the ‘safety and welfare of people involved in the delivery or receipt of humanitarian aid and development assistance, protecting them from harm, including all forms of exploitation, abuse and harassment.’⁶⁶⁸

4.3.16 In England, ‘adult safeguarding’ means working with adults with care and support needs who may be in vulnerable circumstances and at risk of abuse or neglect. The role of local authorities is to locate these risks and take steps to keep adults safe from abuse or neglect.⁶⁶⁹

4.3.17 SALRI notes that the common theme between these definitions is recognition of the balance between support and protection. Although an adult may require additional protection, they should be supported to make decisions of their choosing and in most circumstances their wishes should be respected. The ALRC perceptively noted that ‘that autonomy and safeguarding are not mutually inconsistent, as safeguarding responses also act to support and promote the autonomy of older people’.⁶⁷⁰ SALRI shares this view and has followed this approach in this Report.

4.4 Consultation Data Overview

4.4.1 In SALRI’s consultation through the Adelaide roundtables, various focus groups, regional consultation sessions, meetings and an online survey, SALRI asked about the purpose and utility of the ASU and whether their current functions were appropriate.

Purpose of the ASU

4.4.2 The prevailing view in consultation was that the ASU should not duplicate other services but should complement existing services. There was no consensus among consultees as to what the key function of the ASU should be. Most consultees found that the overarching purpose of the ASU should be about safeguarding an adult’s rights, and almost all consultees expressed surprise or concern that ‘safeguarding’ is not included, nor defined, in the *AAS Act*. At the expert roundtable, one person emphasised the importance of clearly setting out the purpose and overarching function of the ASU in the *AAS Act* as this would guide the operation and scope of the ASU. Other parties shared this view.

4.4.3 COTA (SA) cogently highlighted to SALRI the omission from the *AAS Act* of what it viewed as the vital premise of safeguarding. It argued:

With the benefit of hindsight, one of the shortcomings of the provisions for the ASU is that while the principles and functions are articulated, the purpose is not. The safeguarding of older South Australians at risk of abuse will be achieved through the operation of a ‘safeguarding system’. It is not clear what the system of safeguarding is in South Australia, what the other elements are and what the place of the ASU is within this system. It is also not clear how effective these other elements are or how well the system operates as a whole ... the absence of a definition of safeguarding, including examples of safeguarding and recognition that it is an action of both the Office for Ageing Well and the ASU is problematic. If there is no legislative impetus nor clear

⁶⁶⁸ Scotland’s International Development Alliance, *Understanding Safeguarding* (Web Page) <<https://www.intdevalliance.scot/how-we-help/safeguarding/safeguarding-context/understanding-safeguarding>>.

⁶⁶⁹ Department of Health and Social Care, *Care and Support Statutory Guidance* (UK Government Guidelines, 16 June 2022) [3.53] <<https://www.gov.uk/government/publications/care-act-statutory-guidance/care-and-support-statutory-guidance#safeguarding-1>>.

⁶⁷⁰ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 20 [1.17].

understanding of what safeguarding is, it is difficult to deliver an outcome for the person seeking safety.

4.4.4 COTA (SA) also suggested that the State Government should establish both external and independent oversight of adult safeguarding policy, the safeguarding system and of the continuing development of the ASU. This should include a suitable external committee.⁶⁷¹

4.4.5 Most consultees agreed that the ASU should adopt a ‘no wrong door’ approach and work with the adult to safeguard their rights. Some suggested that education was a crucial part of the ASU’s function while others, especially advocacy and policy bodies, argued that these services already exist, and the distinctive function of the ASU is their ability to respond to reports of abuse and to take action. A social worker at the health practitioner’s roundtable explained to SALRI that she found the utility of the ASU was their investigatory powers, which other government bodies do not possess. Attendees at SALRI’s community roundtable stated that the purpose of the ASU should be the removal of abuse from a person’s life.

4.4.6 Health practitioners at SALRI’s roundtable expressed that the main functions of the ASU should be to ensure that anyone can make a call and get advice, ensure anyone can make a report of abuse, and to forward serious cases involving impaired decision-making capacity to the Tribunal. The consultees added that the ASU inevitably has some crossover with the Office of the Public Advocate (‘OPA’) regarding who makes a decision for the vulnerable adult, but the ASU retains an important role in specific cases where an adult with impaired decision-making capacity is facing coercion or abuse.

4.4.7 At SALRI’s NGO consultation roundtable, some attendees expressed that the ‘broad and muddled’ objectives of the ASU have resulted in its failure to fully meet its stated objectives.

4.4.8 Various lawyers were unimpressed that the ASU does not take a more interventionist approach or use their investigatory powers where necessary. One lawyer even described the ASU as a ‘toothless tiger’. Indeed, some lawyers, notably in Port Pirie and Mr Norcock and Mr Westley, were critical of what they perceived as the overly cautious approach of the ASU and its perceived reluctance to exercise its robust powers under s 19 of the *AAS Act*. Several lawyers questioned whether the ASU was worthwhile at all and criticised it for not being particularly effective. However, the ASU highlighted that a need for the s 19 powers had not arisen as ‘the ASU prefers to seek voluntary cooperation wherever possible’ and that advising the person in question of the existence of the powers ‘is enough to encourage the person to engage voluntarily with the Unit’.

4.4.9 There were criticisms that the ASU was a ‘political safeguard’ for Members of Parliament. SALRI was told the utility of the ASU would be enhanced if it was to be an effective independent advocate, to provide information, advocacy, assistance, intervention orders,⁶⁷² and to escalate the level of intervention depending on that person’s circumstance.

4.4.10 Some parties, including Carer and Community Support, questioned whether the ASU could take a stronger advocacy role and whether their ‘advocacy and prevention functions could be more focused so that it plays a stronger role in identifying intervention points and emerging issues.’ Carer and Community Support argued that the functions of the ASU should continue to include advocacy, prevention and response/intervention and advising policy makers and service providers of

⁶⁷¹ This suggestion was not raised by other parties. There appears a risk of an additional layer of bureaucracy and management with such a role. Given the relatively recent establishment of the ASU, this question to SALRI is preferably dealt with as part of any future wider review. See also Recommendation 1.

⁶⁷² This is an interesting suggestion. See below Part 10.6.

gaps in policy and services that the ASU identify/observe in the course of its function when responding to reports of abuse. Some of these views were at odds with other consultees who viewed that advocacy and education functions of the ASU were duplicating services provided by other agencies, as discussed below.

4.4.11 The majority of respondents to SALRI's survey agreed that the existing principles of the ASU are sufficient. A few responses highlighted that the ASU could better consider the religious and cultural context in which abuse may occur. Other responses highlighted the importance of promoting autonomy as a key purpose of the ASU.

Definition of Safeguarding

4.4.12 There was unanimous agreement that safeguarding should be included in the *AAS Act* as one of the key functions, if not the primary function, of the ASU. Despite agreement on this point, there was no consensus on how 'safeguarding' should be defined. However, most parties agreed that it should uphold the principles of autonomy, the right to self-determination and the right to make decisions as already expressed in the general principles of the *AAS Act*.⁶⁷³ The OFAW and ASU submitted that 'enshrining a safeguarding function in legislation will ensure there is no question that this forms part of the core functions of the Adult Safeguarding Unit.' The OFAW and ASU expressly supported the inclusion of safeguarding as a legislative function of the ASU and defined this as the ability to 'identify and implement actions directed at protecting the person from abuse'.⁶⁷⁴

4.4.13 The OPA advised in its submission that '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 Office for Ageing Well made a similar recommendation to keep the definition of 'safeguarding' broad 'so as not to limit the capacity of the Adult Safeguarding Unit to take appropriate actions that are tailored to the person's unique circumstances.' If further guidance on the definition is required, this could be provided through Regulations or the ASU Code of Practice.

4.4.14 The Port Pirie and Port Augusta consultation, including with Uniting Country SA, highlighted the importance of safeguarding to the role and rationale of the ASU and supported its explicit inclusion in the *AAS Act*.

4.4.15 Dementia Australia's submission to SALRI included a quote from a former carer who said that 'we should support the person to live an active life in the manner they prefer'. Health practitioners at the Adelaide consultation roundtable said the concept of safeguarding should be preventative rather than reactive.

4.4.16 The OFAW outlined a few key concepts that they considered should be reflected in any statutory definition of safeguarding, including:

- Where a person has capacity, their right to decline support, assistance or other measures designed to safeguard them from abuse must be paramount;

⁶⁷³ *AAS Act* s 12.

⁶⁷⁴ This pithy definition of 'safeguarding' should be contrasted with the more voluminous English official guidance as to 'safeguarding'. It could be that such a definition of safeguarding appears in the *AAS Act* and the more detailed definition appears in the Code of Practice. SALRI has recommended that any incidental or consequential changes should be made to the Code of Practice arising from SALRI's recommendations for amendments to the *AAS Act*. See below Part 12.2.

- The response must place the individual at the centre of all decision-making and actions;
- The safeguarding response must be flexible and allow ASU practitioners to exercise professional judgement to assess the most appropriate response for the person's unique circumstances;
- Implementation of a safeguarding response should not be mandatory;
- The features of the safeguarding response should not be restrictive or narrowly defined so that ASU practitioners are able to flexibly tailor the safeguarding response to the needs of the individual, having regard to the person's wishes and needs, the services and supports that are available, and the particular circumstances of the case.

4.4.17 SALRI recognises there are some complexities with the use of the word 'safeguarding'. It can mean different things to different people. SALRI conducted a community session with the Multicultural Communities Council of South Australia where attendees revealed a preference for the word 'protection' over the word 'safeguarding' as it sounds less legal. Some attendees were confused and concerned about the perception of the word 'safeguarding' as it does not directly translate into other languages and may be negatively associated with the word 'guarding'. One attendee associated the word 'safeguarding' with security guards. However, the consultees in the multicultural focus group could not find a more suitable term than 'safeguarding'.

Functions of the ASU

4.4.18 SALRI's community roundtable suggested that, due to the ASU's restricted capacity, the addition of extra functions could overwhelm the ASU's resources and could impair their provision of services. Cassie Mason, the Director of the OFAW, noted that the ASU has a current backlog of cases awaiting allocation. Some survey responses indicated they received limited assistance from the ASU as the process was often too long. The OFAW and ASU joint submission explained that the process of assessing reports and assisting the person in resolving a matter is 'resource intensive and often involves working with the person experiencing the abuse and those who are helping to safeguard them over a number of weeks or months.'

4.4.19 Carer and Community Support acknowledged that the breadth of the ASU's function has the potential to spread available resources too thin and result in the duplication of services.

Duplication of Functions

4.4.20 The OFAW and ASU joint submission recommended that s 15 of the *AAS Act* in its entirety should be amended to make expressly clear that it is not the role of the ASU to 'cover the field' or duplicate existing services where another service is more appropriately placed to respond to and support the adult experiencing abuse. They highlighted that a range of State authorities, organisations, persons, and bodies duplicate some of the ASU's functions such as the prevention and early intervention of abuse, advocating for the rights and interests of 'vulnerable adults', and advising Ministers, State authorities and other bodies and preparing and publishing reports.

4.4.21 At SALRI's NGO roundtable many attendees agreed that the main functions of the ASU are 'incompatible' and suggested that these objectives should be split across different agencies. At this session it was agreed that there are existing bodies including ARAS who perform an extensive education and advocacy role, and the ASU retaining these functions would result in a duplication of existing services.

4.4.22 The OFAW and ASU joint submission raised its concerns that when the scope of the ASU expands to cover all adults vulnerable to abuse ‘there is a significant risk that services may be duplicated’. The submission cogently identified existing services that the ASU may duplicate such as:

Information helplines, law enforcement, statutory investigatory and regulatory bodies, safety hubs and accommodation, crisis counselling, financial counselling, legal and advocacy support services, short-term home care, national disability insurance scheme, migrant support programs including accommodation, safety response, material assistance, refugee health services, health promotion, clinical services and therapeutic counselling.

4.4.23 Further duplication may arise with ARAS’s Abuse Prevention Program funded by the Australian Government and their program providing education, information and advocacy for older people.

4.4.24 The ASU told SALRI that their function of ‘promoting and advocating for the rights and interests of vulnerable adults in South Australia’ is more suitable for the OFAW. SALRI notes that a regular concern of the disability sector and disability community, and a number of health practitioners and service providers, was that the ASU may focus on elder abuse to the detriment of its role to address the abuse and exploitation of persons with disability. The OFAW may be unable by virtue of its role to advocate for the rights and interests of persons of disability so this significant role will need to be carried out elsewhere.

4.4.25 The DHS is one body that provides disability services particularly to assist people with disability to live as independently as possible.

4.4.26 Disability advocacy bodies such as DACSSA and Purple Orange advised SALRI that such organisations may be able to play a role in advocating and influencing for people with disability and might be able to play a role in community education alongside the ASU, subject to resourcing limitations.

Education Function

4.4.27 The question of whether the functions of education, and prevention and early intervention of abuse should be retained by the ASU gathered differing opinions during SALRI’s consultations.

4.4.28 The OFAW and ASU joint submission indicated that the educational role of awareness raising and running educational campaigns is not an appropriate function for the ASU. Rather, the ASU’s primary focus is operational in nature and their priority is to respond to reports and enquiries made by the community relating to concerns that an adult is experiencing abuse. The OFAW noted that there are other government organisations and agencies who can perform the educational role. The OFAW runs numerous campaigns and activities targeted towards elder abuse and helping older people through education and awareness raising, often working in partnership with the ASU. For other adults, other government agencies (such as the Department for Human Services for persons with disability) are best placed to perform this education role.

4.4.29 The joint submission concluded by stating that it is crucial for the ASU to retain a strong focus on their service provision and to direct their resources and expertise to responding to reports of suspected abuse. It was recommended that s 12(k) be discarded from the principles of the ASU and the ASU’s functions for prevention and early intervention be removed, as these are more appropriately situated within other Government departments or funded agencies with the responsibilities for education, awareness raising, and research functions.

4.4.30 Lawyers in Mount Gambier suggested that community education is not a necessary function of the ASU and that its resources are better allocated to responding to abuse, providing individual advice to adults who make a report, and advertising the existence of the service. Similarly, lawyers at the Adelaide legal session emphasised that there needs to be greater information and awareness about the existence and purpose of the ASU and for the ASU to be willing to take an active role in promoting their agency. Indeed, this proved a recurring theme in SALRI's consultation in both Adelaide and especially in regional South Australia.

4.4.31 Many individuals and community groups consulted by SALRI, even in the health and legal professions, had never heard of the ASU through any form of advertisement and were unaware about how to make a report to them.⁶⁷⁵ It was often acknowledged in regional consultation that this problem is not confined to the ASU. As one regional lawyer told SALRI: 'in the country we are always the last to find out about anything.' The disruption caused by COVID-19 over the last 30 months was also noted. The ASU's own efforts to promote its role are significant.⁶⁷⁶

4.4.32 Of the 183 survey respondents, 54% had heard about the ASU while the other 46% had never heard of the ASU. SALRI notes that, considering the respondents were an even mix of community members and healthcare workers, there is a clear need for more education about the existence and functions of the ASU. Most of the respondents who knew about the ASU had heard about them through their profession in allied health or other work, and primarily engaged with them by referring cases or asking for advice.

Multi Agency Response

4.4.33 A statutory function of the ASU is to refer reports relating to the suspected abuse of a vulnerable adult to appropriate persons and bodies.⁶⁷⁷ Further, s 15(1)(g) of the *AAS Act* provides that a function of the ASU is to coordinate responses to reports relating to the suspected abuse of a vulnerable adult with State authorities and other persons and bodies.

4.4.34 One attendee at SALRI's community roundtable viewed the ASU as a 'call centre' and intelligence agency that has the power to funnel out their tasks. One person said there was a community expectation that the reporter will get feedback.

4.4.35 The ASU told SALRI at some length that it finds the referral function particularly problematic in practice. Their submission explained that the ASU was set up to fill the gaps in the adult safeguarding responses in South Australia and there are no other services in the community equipped to respond in the same way. Therefore, in many cases of suspected abuse there are few (if any) agencies, persons or bodies who can be directly involved in a safeguarding response, and therefore a multi-agency and multi-disciplinary response is not required or even feasible. Accordingly, the OFAW suggested removing subsection 12(h) from the *AAS Act* and for it to be replaced by a principle recognising that effective safeguarding responses should be tailored to the particular needs and circumstances of the individual in line with their wishes.

⁶⁷⁵ Amongst the various parties who had never heard of the ASU were a lawyer in Child Protection at the Crown Solicitor's Office, a family lawyer and leading service providers.

⁶⁷⁶ SALRI also notes that various efforts were made by the ASU after its establishment to promote its role in regional communities. See also Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 23.

⁶⁷⁷ *AAS Act* s 15(1)(h).

4.4.36 ARAS considered that the ASU could better achieve their referral functions by increasing partnerships with other agencies and community service providers that have specialist knowledge and expertise in providing person-centred care and safeguards.

4.4.37 Social workers across the local health network thought that NGOs should receive referrals from the ASU given the growing number of private disability and aged care providers. However, many of the NGOs at SALRI's roundtable and meetings noted that they often do not have the same resources (financial or otherwise) as government organisations. Therefore, NGOs may not be suitable to be a referral or coordination body unlike State based agencies unless they are empowered and adequately resourced to handle an additional workload.

4.4.38 The OFAW and ASU joint submission emphasised that due to the significant shifts in the service landscape over recent years resulting in many aged care and disability services switching from State based providers to Commonwealth based providers, the model of case coordination envisioned for the ASU is no longer viable. For example, non-government and private providers are funded or contracted to provide specified services for an adult, distinct from a holistic case management response or a 'safeguarding' response. In other cases where the service provider is the cause of mistreatment or abuse of a My Aged Care recipient or a NDIS service provider, the Aged Care Quality and Safety Commission or NDIA is often the appropriate body to lead or coordinate the response. The joint submission explained that the shift from State to Commonwealth-controlled services has impacted the ASU's ability to coordinate a response with other agencies in some cases.

4.4.39 The OFAW sought to draw a distinction between the terms 'case management' and 'case coordination' which are often used interchangeably, but import different obligations for the ASU:

Case coordination is a time limited activity whereby a lead agency (such as the Adult Safeguarding Unit) coordinates the services being provided by multiple services, persons and bodies for the purpose of removing or mitigating the factors contributing to the abuse the person is experiencing.

Case management is a holistic process whereby an agency, person or body is responsible for assessing, planning and managing the options and services to be provided to a person to meet their needs, usually on a longer-term basis.

4.4.40 The OFAW suggested greater legislative clarity as to the type of 'coordination' intended by s 15(1)(g) 'to make it clear that the ASU does not undertake case management activities, but may undertake or support short-term case coordination activities to safeguard a person from abuse where it determines that it is the best placed agency to do so.

Research and Report Making Functions

4.4.41 The OFAW described the ASU as primarily a service delivery body and stated it should not be the ASU's role to have an extensive research function as implied by s 15(1)(m), but rather they should support and collaborate with other State authorities and institutions in relation to this reporting and research function. For example, a function of the OFAW is to commission research into matters affecting older persons⁶⁷⁸ which will be augmented by the introduction of the OFAW Research Strategy for Ageing Well later in 2022. The OFAW and ASU joint submission stated that removing the function of preparing and publishing reports on matters of public importance will 'provide an appropriate basis for the Adult Safeguarding Unit to participate in research projects and forums relevant to its role and

⁶⁷⁸ Ibid s 9(e).

functions, while not creating a community expectation that the Adult Safeguarding Unit will be responsible for leading and disseminating research (which is outside its remit).⁷

4.5 SALRI's Conclusions and Recommendations

Purpose of the ASU

4.5.1 The ASU was established to break down barriers to access effective safeguarding measures and to fill the absence of a centralised body empowered to receive and act on reports of suspected or actual abuse of older adults.⁶⁷⁹ SALRI's consultation has similarly revealed that the ability to assess and investigate reports of abuse is seen as a unique, valuable and pivotal aspect of the ASU. This premise has been widely supported over the last decade by individuals and organisations that argued for the establishment of a body like the ASU to fill the gap in the adult safeguarding context.⁶⁸⁰ The concept of having 'an agency in Victoria to be given the clear statutory function of safeguarding and supporting at-risk adults' is a cornerstone recommendation by the Victorian Public Advocate.⁶⁸¹

4.5.2 Ultimately, the core role of the ASU is to 'walk alongside' the vulnerable adult to help them to navigate the complex systems, understand their options and put in place the support that the vulnerable adult wants and needs.⁶⁸² This is a telling point given the wide range of both State and Federal agencies, and Government and non-Government bodies involved in this area. SALRI notes the view of one Port Pirie service provider that, as even experts struggle to understand the 'bewildering array' of agencies dealing with elder abuse and the abuse of persons with disability, 'what hope does the ordinary person have, especially someone with disability or low literacy' to find the right agency to contact, let alone how to manage and navigate what can be a complex and bureaucratic system. The *Safeguarding Task Force* Report said of the NDIS and the NDIA (though these comments are equally apt in the aged care context):

Both are bureaucratic behemoths, ill-suited to managing individual idiosyncratic concerns. The citizen feels very small when dealing with these large agencies no matter how hard they try to be user friendly.⁶⁸³

4.5.3 Despite these aims, a significant oversight of the *AAS Act* is that the purpose of the ASU is not outlined. The adult safeguarding system in South Australia is unclear about the role of each agency or body within the safeguarding system and the interaction of the ASU within that system.⁶⁸⁴

⁶⁷⁹ South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1712 (Stephen Wade, Minister for Health and Wellbeing). See further generally Wendy Lacey et al, *Prevalence of Elder Abuse in South* (Report, University of South Australia, Australia, February 2017); Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017); Australia Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017).

⁶⁸⁰ See for example South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People* (Report, October 2011) 65, 68; Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 386, Kelly Vincent and David Caudrey, *Safeguarding Task Force* (Report, 31 July 2020) 1.

⁶⁸¹ Office of the Public Advocate (Vic), *Line of Sight: Refocussing Victoria's Adult Safeguarding Laws and Practices* (Report, August 2022) 70.

⁶⁸² South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1723 (Stephen Wade, Minister for Health and Wellbeing).

⁶⁸³ Kelly Vincent and David Caudrey, *Safeguarding Task Force* (Report, 31 July 2020) 20.

⁶⁸⁴ These issues are explored further in Parts 3 and 5.

Although the term ‘safeguarding’ is used in the *AAS Act*, there is no attempt to define what safeguarding means or how it will look or operate in practice.

4.5.4 Almost every individual or group SALRI spoke with found the absence of a definition of ‘safeguarding’ in the *AAS Act* problematic, if not puzzling. The concept of safeguarding an adult who may be vulnerable to abuse is integral to the rationale and operation of the ASU. COTA (SA) articulated that without a definition of ‘safeguarding’ there is no formal guidance for the functions of the ASU. SALRI finds this argument compelling. SALRI suggests that safeguarding should be explicitly incorporated into the *AAS Act* as the primary function of the ASU to clarify and emphasise that this involves protecting and upholding the rights and wishes of the adults who may be vulnerable to abuse and to protect that adult from abuse, neglect or exploitation. However, it should be clear that the role of the ASU is not to address underlying factors of vulnerability or to protect an adult from all forms of potential abuse, but rather to address the specific instance of abuse being reported. It is imperative to note that the principles of the ASU expressly state that safeguarding measures should be the least interventionist and least intrusive possible⁶⁸⁵ and SALRI largely agrees with this principle.

4.5.5 It is also inappropriate for the principle of awareness raising and community education to be retained in section 12(k). The ASU should still be able to support the functions of other government bodies and organisations in exercising those functions, but not have a lead role in this area.

4.5.6 SALRI notes the validity of the view of Natalie Wade and others that it is inappropriate for reasons of policy, practice and human rights for the ASU to be responsible for responding both to elder abuse and the abuse and exploitation of persons with disability. It was cogently argued that there are different needs, issues, skill sets and expertise in responding to each category of abuse. However, the general, though not universal, theme in SALRI’s consultation was whilst this may well be the case in an ‘ideal world’, having regard to operational, resourcing and logistical considerations, separate ASU bodies are unlikely in South Australia.

4.5.7 Therefore, in addition to adding safeguarding into the *AAS Act* as an overarching purpose of the ASU, SALRI considers that, at this stage, the ASU should retain the responsibility under the *AAS Act* for responding to reports of the suspected abuse of all adults who may be vulnerable to abuse.

Definition of Safeguarding

4.5.8 Not only does safeguarding need to be expressly stated as a core purpose of the ASU in the *AAS Act*, but there needs to be a simple and clear definition of what safeguarding means and emphasis that in exercising the functions in s 15, the safeguarding purpose of the *AAS Act* is being achieved. More detailed guidance can be provided in the Code of Practice. The definition employed by the Care Quality Commission⁶⁸⁶ is viewed by SALRI as a suitable starting point, subject to relevant amendments to better reflect the operation of the *AAS Act* overall. The operation of ‘safeguarding’ in practice and what actions would constitute ‘safeguarding’ are elaborated upon in elsewhere in this Report.⁶⁸⁷

⁶⁸⁵ *AAS Act* s 12(j).

⁶⁸⁶ ‘This definition is ‘protecting people’s health, wellbeing and human rights, and enabling them to live free from harm, abuse and neglect’: Care Quality Commission, *Safeguarding People* (Web Page, May 2022) <<https://www.cqc.org.uk/what-we-do/how-we-do-our-job/safeguarding-people>>.

⁶⁸⁷ See below Part 5.1.

Functions of the ASU

4.5.9 The OFAW and ASU joint submission emphasised that the ASU needs to retain their strong focus on service provision and to direct their resources and expertise to respond to reports of suspected abuse of vulnerable adults. This theme was widely reiterated in SALRI's consultation. SALRI recognises that the ASU is unique in their ability to receive reports of suspected abuse of an adult. They also possess unique powers that allow them to comprehensively assess the circumstance of suspected abuse and assist the adult who might be experiencing abuse to better safeguard themselves.

4.5.10 SALRI therefore recommends that less focus and importance should be placed on the ASU functions already exercised by other government bodies or NGOs, such as community education, developing strategies for early intervention of abuse or taking a lead role in advocating for the rights of adults who may be vulnerable to abuse. SALRI recommends that s 15(1)(a) be removed from the present act as this function is already being exercised by other bodies such as the OFAW, DACSSA, ARAS, and other NGO and advocacy groups.

4.5.11 SALRI acknowledges the importance of early intervention, but considers that the ASU should play a supporting role in achieving this. SALRI therefore recommends that the term 'promoting' be removed from s 15(1)(c) of the *AAS Act*.

4.5.12 The retention of the other functions, namely coordinating responses to reports of suspected abuse and referring reports to appropriate bodies and agencies allow the ASU to be the lead agency in the safeguarding sphere. The ASU was always intended to receive reports of suspected abuse and to coordinate a multi-agency response through collaboration alongside other agencies and organisation.⁶⁸⁸ It was made clear in the parliamentary debates that the ASU was to work alongside other relevant bodies and both State and Commonwealth government agencies, NGO's and communities to formulate an appropriate response to safeguard the adult, rather than duplicating services and efforts.⁶⁸⁹ For example, SALRI recognises that the OFAW has the expertise and resources available to undertake awareness raising work around elder abuse and has supported ASU's promotional activities.⁶⁹⁰

4.5.13 SALRI acknowledges the efforts of the ASU in putting together an Implementation Working Group and Advisory Group comprised of key bodies in the government sector that may work directly with vulnerable adults or at a more strategic level within the ageing and other key service sectors.⁶⁹¹ SALRI also recognises, as noted in consultation by Cassie Mason and Elicia White, that there might not be clear guidance as to which State and Commonwealth bodies, or even NGO's, will be willing to collaborate and assume the follow up after a referral from the ASU.⁶⁹² It is vital for the ASU to continue to develop their connections with other organisations and agencies and utilise these links to coordinate a response where available or appropriate, or refer to these bodies and agencies to provide information, ongoing education or advocacy assistance.

⁶⁸⁸ South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1727 (Stephen Wade, Minister for Health and Wellbeing).

⁶⁸⁹ Explanatory Memorandum, Office for the Ageing (Adult Safeguarding) Amendment Bill 2018 (SA) 7.

⁶⁹⁰ Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 23.

⁶⁹¹ Ibid 19.

⁶⁹² This could be a 'warm' or formal referral. See below Part 5.1.

4.5.14 Many government stakeholders who participated in the Tetra Tech Year One Evaluation suggested that they had a good working relationship with the ASU and felt the ASU was consultative in their approach, accessible, and responsive to requests.⁶⁹³ The value of working collaboratively with other organisations and making the ASU more widely known in the adult safeguarding landscape (especially regionally) will make the ASU's role more efficient and effective as they will be able to refer reports to other more suitable bodies and agencies if it is outside the scope of the ASU, and be able to utilise the resources of other organisations for education or advocacy where appropriate.

4.5.15 Another way the ASU is able to 'lead the response of multiple agencies' is through Memoranda of Administrative Agreements ('MOAA') between the ASU and key organisations.⁶⁹⁴ MOAA have been created between ASU and bodies like the OPA and the Legal Services Commission to facilitate information sharing arrangements and support a 'multi-agency approach'.⁶⁹⁵ It is understood that MOAA are already in place between ASU and some State organisations, but the expectations and processes of each organisation may vary so it will be necessary to have a clear outline of how information sharing and collaboration will look between each agency.

4.5.16 Education is clearly a necessity in the early prevention and mitigation of the abuse of both older persons and persons with disability. The Tetra Tech Evaluation recommended the ASU should place an increased focus on awareness raising and abuse prevention activities by undertaking strategic and stakeholder engagement planning.⁶⁹⁶ While the importance of educating the community about abuse is supported, SALRI was told that ARAS and other NGOs and government bodies can adequately provide advocacy and education services. SALRI's consultation and research suggests that wider community education should not be the role of the ASU.

4.5.17 This is not to diminish the significant contribution the ASU can and should have to inform policy and practice development. The OPA identified that 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. The ASU is uniquely positioned 'on the front line' in terms of understanding the most prevalent forms of abuse and the nature of the abuse suffered by adults who make a report to the ASU.⁶⁹⁷ Additionally, the ASU can provide educational material to individuals when a report is made and this interaction between the ASU and those that contact the ASU can be seen as a form of awareness raising in itself. This role should not be undermined: 'Each call or email to the ASU provides an opportunity to increase awareness about elder abuse services that are available to mitigate and respond to it.'⁶⁹⁸ The ASU's role in some situations may involve linking the individual with a more appropriate service and, in the process, educating them about the role of the ASU. In the absence of providing this information, there is a risk that people may fall through the gaps or receive an inadequate response because they do not know where to go. Individual education is critical, but, as the Code of

⁶⁹³ Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 20.

⁶⁹⁴ Ibid 2.

⁶⁹⁵ South Australian Adult Safeguarding Unit, *2019–2020 Annual Report* (Report, 2020) 6.

⁶⁹⁶ Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 30.

⁶⁹⁷ South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3548 (Vickie Chapman, Attorney-General).

⁶⁹⁸ Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 23.

Practice recognises, these services need to be tailored to each person's communication needs, cultural background, language, identity, spirituality, traditions and beliefs.⁶⁹⁹

4.5.18 SALRI recommends the retention of the education function, but with a modified focus:⁷⁰⁰

[A]wareness raising about the ASU and elder abuse was seen by several stakeholders to contribute to early intervention and prevention of abuse by encouraging reports and referrals and deterring abusers.⁷⁰¹

4.5.19 Increasing awareness of the existence of a body like the ASU with strong legislative powers to identify and respond to abuse may also be seen as a deterrent to potential perpetrators of abuse.⁷⁰² The previous efforts of the ASU in education and awareness raising is notable, with community feedback about the ASU's awareness raising activities being overwhelmingly positive, resulting in an increased awareness for the ASU directly corresponding to an increased willingness of people to contact the ASU.⁷⁰³ Since the COVID-19 pandemic and the increased caseload from the ASU's reporting functions, the education initiatives have seemingly fallen to the wayside. It is important for the ASU to continue educating government bodies and health and legal professionals in particular about the role and service of the ASU and how reports can be made. A prominent theme in SALRI's consultation, especially in regional areas, was that many key health practitioners, social workers and other parties in the disability and aged care sectors were unaware of the ASU's existence or of its functions. Several stakeholders in the Tetra Tech Report also said that with increased awareness about how to spot abuse and how they can work together with the ASU, the easier it would be for them to raise concerns at an earlier stage.⁷⁰⁴

4.5.20 If the ASU is able to increase their collaboration with other agencies and services, their knowledge and expertise on recognising and stopping abuse can become more widespread. The ASU indicated in the Tetra Tech Report that they could be doing more for awareness raising in the sector and the community, but noted that this was dependent on resource availability and finding an approach that added value.⁷⁰⁵ An alternative means to achieve this goal without relying on additional resourcing could be for the ASU to utilise their existing services and to develop relationships with key advocacy and government bodies who already have functions of education and awareness raising, and support their activities instead of attempting to perform all of their functions independently.

4.5.21 A number of parties told SALRI of the benefits of data collection and information sharing by the ASU. Data collection is an important function of the ASU and will be especially useful in coordinating an approach with other agencies to create an improved and more connected adult safeguarding landscape in South Australia. The ASU's Annual Reports indicate that the ASU collects important information about the number of reports made, statistics about the location of the caller

⁶⁹⁹ Office for Ageing Well, Government of South Australia, *South Australian Adult Safeguarding Unit Code of Practice* (2019).

⁷⁰⁰ This is not general education about elder abuse or the abuse of persons with disability, but rather the promotion of the ASU and its role and processes.

⁷⁰¹ Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 23.

⁷⁰² Ibid.

⁷⁰³ Ibid 24.

⁷⁰⁴ Ibid 23.

⁷⁰⁵ Ibid 24.

and their relationship to the adult who may be vulnerable to abuse, and what the ‘vulnerabilities’ of that adult are.⁷⁰⁶

4.5.22 Through the sharing of information, the ASU will not only be able to highlight the prevalence of elder and other abuse in South Australia,⁷⁰⁷ but also share data with government bodies and NGOs so each body can better assist with safeguarding the rights of adults.

4.5.23 The Tetra Tech Year One Evaluation of the ASU recommended that the ASU better capture data and information on client and referrer pathways and outcomes to better assess the effectiveness of service delivery and engagement with key organisations, as well as enable communication of outcomes achieved.⁷⁰⁸ SALRI agrees with this recommendation. The data from the ASU’s Annual Reports indicate that, in many areas, information about the caller or the person who is vulnerable to abuse is not recorded, which creates gaps in understanding who needs protecting and where information about the ASU and abuse prevention needs to be disseminated.⁷⁰⁹

4.5.24 SALRI notes that the crucial intended ‘core’ role of the ASU is to safeguard vulnerable adults. The wide, though not necessarily universal, view in consultation was that safeguarding the rights of vulnerable adults should be the ASU’s focus and the *AAS Act* should reflect this. There is a real risk if the ASU is spread too thinly by its diverse statutory functions that it will be distracted from its central role.

4.5.25 SALRI is of the view that the crucial definition of ‘safeguarding’ in the *AAS Act* as suggested above by SALRI would be usefully supplemented by appropriate further guidance as to the aims of safeguarding. Such direction is best placed in the Code of Practice. SALRI notes the cogent and helpful nature of such guidelines from the UK Statutory Guidance to the *Care Act* and suggests that this formulation (with adaptation to reflect the South Australian context) should be adopted in South Australia and added to the Code of Practice.

4.5.26 SALRI notes that resourcing and resource allocation are likely to contribute to the difficulties for the ASU in effectively carrying out all of its functions under the *AAS Act*. For instance, the ASU had five staff at the commencement of the *AAS Act* in October 2019 and in the second year of its operation, this increased to 13 staff.⁷¹⁰ The imminent expansion of the scope of the ASU to all adults vulnerable to abuse is likely to necessitate greater staff and resources. This concern was raised to SALRI by various parties. It was highlighted that the ASU must be equipped and funded to carry out its crucial role. SALRI notes that this is beyond the scope of this review and is a matter for Government.

⁷⁰⁶ This data is reproduced in Appendix B.

⁷⁰⁷ Explanatory Memorandum, Office for the Ageing (Adult Safeguarding) Amendment Bill 2018 (SA) 7.

⁷⁰⁸ Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 29.

⁷⁰⁹ This Data is reproduced in Appendix B. In particular, there are gaps in recording information about the gender of those experiencing abuse, the location of the person experiencing abuse, age of the person experiencing abuse, type of disability suffered (if any) and who the alleged perpetrators were.

⁷¹⁰ South Australian Adult Safeguarding Unit, *2020–2021 Annual Report* (Report, 2021) 9.

RECOMMENDATION 8

SALRI recommends that, at this stage, the Adult Safeguarding Unit should retain the responsibility under the *Ageing and Adult Safeguarding Act 1995* (SA) for responding to reports of the suspected abuse of all adults who may be vulnerable to abuse.

RECOMMENDATION 9

SALRI recommends that ‘safeguarding’ should be included in the *Ageing and Adult Safeguarding Act 1995* (SA) as the primary purpose of the Adult Safeguarding Unit. This will reflect that the key focus of the Adult Safeguarding Unit is to safeguard adults who may be vulnerable to abuse. The definition should draw upon the phraseology in the *Care Act 2014* (UK) and be taken to mean protecting people’s health, wellbeing and human rights, and enabling them to live free from abuse.

RECOMMENDATION 10

SALRI recommends that the functions of the Adult Safeguarding Unit should be amended in the *Ageing and Adult Safeguarding Act 1995* (SA) to reflect that their primary focus is to respond to reports of abuse. For other functions such as advocacy or community education, the Adult Safeguarding Unit should not be leading the response, but rather should support other organisations and agencies in performing these functions. This can be achieved by:

1. Removing s 15(1)(a) from the *Ageing and Adult Safeguarding Act 1995* (SA).
2. Removing the words ‘promoting and’ in s 15(1)(c).
3. Retaining the education function of the Adult Safeguarding Unit, but ensuring that the education is directed towards educating individuals who may make reports, educating the adult who may be vulnerable to abuse and educating the general public and others on the existence, role, and functions of the Unit.

RECOMMENDATION 11

SALRI recommends that the concept of safeguarding should be supplemented by appropriate guidance in the Code of Practice about the aims of safeguarding. SALRI further recommends that the following formulation (slightly adapted from the Statutory Guidance to the *Care Act 2014* (UK)) should be added to the Code of Practice:

- prevent harm and reduce the risk of abuse or neglect to adults with care and support needs;
- stop abuse or neglect wherever possible;
- safeguard adults in a way that supports them in making choices and having control about how they want to live;
- promote an approach that concentrates on improving life for the adults concerned;
- support public awareness campaigns so that communities as a whole, alongside professionals, play their part in preventing, identifying and responding to abuse and neglect;

- provide information and support in accessible ways to help people understand the different types of abuse, how to stay safe and what to do to raise a concern about the safety or well-being of an adult; and
- address what has caused the abuse or neglect, where practicable.

Part 5 – ASU Processes and Operational Practice

5.1 Background and Current Position

5.1.1 The ASU is established under the *AAS Act* as a body empowered with the ‘statutory responsibility and authority’ to respond to reports of abuse or neglect of vulnerable adults.⁷¹¹ The ASU is vested with wide powers of investigation and is authorised to seek orders with considerable effects and implications in the Magistrates Court. The importance of the role and powers of the ASU was almost universally acknowledged in SALRI’s consultation and research.⁷¹² However, SALRI also received many suggestions about how the ASU might be able to better perform their crucial safeguarding role through changes to their processes in practice.

5.1.2 There was a distinct perception during SALRI’s consultation, notably from the ASU and parties such as Cassie Mason and Elicia White, that at least some of the processes currently set out in the *AAS Act* are counter-intuitive and unduly prescriptive, and may even frustrate, as opposed to facilitate, the effective performance of the ASU’s safeguarding role. There was also a perception that some of the processes in the *AAS Act* relating to the ASU do not reflect recent and ongoing developments and changes, especially relating to the service landscape. Throughout SALRI’s consultation there was support for greater flexibility in the legislation to allow the ASU practitioners to use their clinical judgment for each individual case.

5.1.3 A report of suspected abuse can be made to the ASU through the Adult Safeguarding Unit Phone Line, sending an email to the ASU, calling an interpreter to direct them towards the Phone Line,⁷¹³ or any other means the person reporting thinks fit.⁷¹⁴ Any person can make a report to the ASU if they suspect that a vulnerable adult is at risk of abuse,⁷¹⁵ but there is no mandatory obligation on any person to make a report.⁷¹⁶ A report is not classified as a report under the *AAS Act* if it is an instance of historical abuse⁷¹⁷ or where there is no ongoing risk of abuse.⁷¹⁸ Calls can also be made anonymously if the reporter wishes. When making a report the caller will be asked about the vulnerabilities of that

⁷¹¹ South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1715 (Stephen Wade, Minister for Health and Wellbeing).

⁷¹² Even those parties who expressed misgivings about aspects of the *AAS Act* and/or the role and performance of the ASU highlighted to SALRI their full support for the importance of the role and powers of the ASU. See also above Part 3.5.

⁷¹³ Office for Ageing Well, Government of South Australia, *South Australian Adult Safeguarding Unit Code of Practice* (2019) 8. SALRI notes that the ASU only operates from Monday to Friday from 9am–5pm. The ASU is based in Adelaide. There was often disquiet voiced to SALRI in regional and rural communities as to the ASU’s perceived lack of a presence or profile outside Adelaide and suggestions were made for the ASU to enhance awareness in such communities of its role and how to make reports. Elders and members of Aboriginal communities, Aboriginal health agencies and service providers, and Aboriginal health practitioners also noted their disquiet to SALRI as to the effectiveness and cultural soundness of reporting suspected abuse within Aboriginal communities. It was often noted that it is unlikely members of Aboriginal communities will simply call an Adelaide phone number or send an email. See further below Part 11.3.

⁷¹⁴ *AAS Act* s 22(4)(b).

⁷¹⁵ *Ibid* s 22(1).

⁷¹⁶ *Ibid* s 22(4)(a). The question of mandatory reporting was raised by several parties to SALRI as part of the EPA reference. SALRI does not support mandatory reporting in light of the many issues of policy and practice it raises. See Recommendation 12.

⁷¹⁷ *AAS Act* s 22(3)(a).

⁷¹⁸ *Ibid* s 22(3)(b).

adult suspected of being abused, the reasons for the caller's suspicion, how the person can be contacted and any special considerations, their date of birth, name, and any other information required.⁷¹⁹

5.1.4 The ASU has a mandatory statutory obligation to assess every report that is received⁷²⁰ in any manner that the Director thinks fit.⁷²¹ A mandatory assessment and voluntary reporting system was preferred to a mandatory reporting system to acknowledge and uphold an adult's decision-making autonomy, as distinct from the child protection system.⁷²² Mandatory reporting was viewed as paternalistic and a barrier to help-seeking behaviour.⁷²³ The *AAS Act* emphasises the autonomy of adults and acknowledges that an adult should be able to make decisions that might be considered wrong, rash or inappropriate by others.⁷²⁴

5.1.5 During an assessment, the Director has the power to request in writing information from a specified person or body, to be provided within a specified time period and in a specified form.⁷²⁵ The failure or refusal to comply with such a written notice carries a maximum penalty of \$10,000.⁷²⁶ During an assessment, the *AAS Act* facilitates information sharing between the ASU and other State authorities, and other persons or bodies (like non-government service providers) specified in the *Ageing and Adult Safeguarding Regulations 1995* (SA) ('Regulations').⁷²⁷ The Regulations specify that SACAT falls within the information sharing provisions.⁷²⁸ These powers, consistent with the recommendations of the 2011 *Closing the Gaps* Report,⁷²⁹ permit any person or body to provide prescribed information⁷³⁰ if they believe it would assist the recipient of the information to perform official functions or manage the risk to a vulnerable adult.⁷³¹ This information can also be voluntarily provided.⁷³² The Regulations specify that if the information is shared to or from a State authority, they may only provide, or be provided with, information or documents to the extent that the information or documents relate to a matter, or part of a matter, formally referred.⁷³³ The Regulations clarify that prescribed information and documents also includes information or documents relating to an order made by SACAT in respect of a vulnerable adult or class of vulnerable adults,⁷³⁴ and information or documents that may reduce a

⁷¹⁹ Office for Ageing Well, Government of South Australia, *South Australian Adult Safeguarding Unit Code of Practice* (2019) 10. SALRI notes that the ASU's Code of Practice is being reviewed to better reflect current practice.

⁷²⁰ *AAS Act* s 23(1).

⁷²¹ *Ibid* s 23(2).

⁷²² Explanatory Memorandum, Office for the Ageing (Adult Safeguarding) Amendment Bill 2018 (SA) 13.

⁷²³ Office for the Ageing, SA Health, *Elder Abuse Responses: Safeguarding the Rights of Older South Australians* (Consultation Outcomes Report, 2018) 8.

⁷²⁴ *AAS Act* s 12(e). See below Part 7.5.

⁷²⁵ *Ibid* s 23(6).

⁷²⁶ *Ibid* s 23(7).

⁷²⁷ Explanatory Memorandum, Office for the Ageing (Adult Safeguarding) Amendment Bill 2018 (SA) 25.

⁷²⁸ *Ageing and Adult Safeguarding Adults 2019* (SA) reg 10(1).

⁷²⁹ South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People* (Report, October 2011) 27.

⁷³⁰ As defined in *AAS Act* s 43(6).

⁷³¹ *Ibid* s 43(2).

⁷³² *Ibid* s 43(5).

⁷³³ *Ageing and Adult Safeguarding Regulations 2019* (SA) reg 10(2).

⁷³⁴ *Ageing and Adult Safeguarding Adults 2019 Regulations* (SA) reg 10(4)(a).

risk to the health or safety of a person or body performing official functions in relation to a vulnerable adult or class of vulnerable adults.⁷³⁵

5.1.6 Once the assessment is conducted, priority is given according to the risk factors identified within the assessment.⁷³⁶ The categories of the tiered response system are:

- Immediate action — immediate action is required
- High Priority (action within two business days) — where the vulnerable adult is at a serious or imminent risk of a criminal act, safety or health/welfare, significant financial abuse
- Medium priority (action within 10 business days) — for all other reports requiring contact with the vulnerable adult
- Low priority (action within four weeks) — where consent to investigate or refer was not provided (unless there is an exception to consent).⁷³⁷

ASU Principles

5.1.7 The ASU processes are underpinned by certain principles that implement a rights-based approach, placing the vulnerable adult at the centre of any action.⁷³⁸

5.1.8 The explanatory memorandum describes that:

In line with the recommendation in the *Closing the Gaps* Report, the principles, which are set out explicitly to underpin the implementation of the Act and the operation of the Adult Safeguarding Unit, are intended to ensure that whatever measures are adopted in an effort to support and safeguard a vulnerable adult, are premised on respecting the rights of that person to autonomy, dignity and self-determination.⁷³⁹

5.1.9 The principles consolidate the importance of respecting an adult's autonomy by ensuring that 'vulnerable adults' are treated with respect for their dignity, autonomy and right to self-determination,⁷⁴⁰ and that the primary consideration is the autonomy of the adult.⁷⁴¹ The 'vulnerable adult' has the right to decline support or assistance⁷⁴² and any action taken by the ASU must be informed by the wishes of the adult in question.⁷⁴³

⁷³⁵ Ibid reg 10(4)(b).

⁷³⁶ Office for Ageing Well, Government of South Australia, *South Australian Adult Safeguarding Unit Code of Practice* (2019) 11.

⁷³⁷ Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 14. The ASU told SALRI this is currently being phased out.

⁷³⁸ Explanatory Memorandum, Office for the Ageing (Adult Safeguarding) Amendment Bill 2018 (SA) 5.

⁷³⁹ Ibid.

⁷⁴⁰ *AAS Act* s 12(a).

⁷⁴¹ Ibid s 12(c).

⁷⁴² Ibid s 12(f).

⁷⁴³ Ibid s 12(g).

Post-Assessment

5.1.10 It is essential that the ASU should not take an action in respect of a report under the *AAS Act* unless the adult who is the subject of the report consents to the action being taken.⁷⁴⁴ Consent is paramount and this is reflected in the principles of the *AAS Act*,⁷⁴⁵ though the requirement for seeking and obtaining consent does not apply to the assessment process.⁷⁴⁶ It is presumed that an adult has decision-making capacity unless there is evidence to the contrary,⁷⁴⁷ meaning the ASU need not undertake a formal assessment of capacity at any stage of responding to a report (though in many circumstances such an assessment or consideration will be prudent).⁷⁴⁸ The only instances where the ASU can take action without first obtaining the consent of a vulnerable adult is in limited circumstances of imminent risk of serious harm,⁷⁴⁹ where the Director approves,⁷⁵⁰ or if it is authorised by an order of the Magistrates Court.⁷⁵¹

5.1.11 Once an assessment is completed the Director must cause one of the three following actions to be undertaken:

- (a) an investigation into the matter must be carried out under s 26;
- (b) the matter must be referred to an appropriate State authority or other person or body under s 25;
- (c) if the Director is satisfied that—
 - i) the matter has previously been dealt with under this or any other Act and there is no reason to re-examine the matter; or
 - ii) the report is trivial, vexatious or frivolous; or
 - iii) there is good reason why no action should be taken in respect of the matter

the Director may decline to take further action.⁷⁵²

5.1.12 It was expected that a majority of reports will be formally investigated or formally referred, but the option to take no further action was included to deal with vexatious or irrelevant reports or where there are adequate safeguards already in place.⁷⁵³ The Regulations can make further provisions relating to an assessment,⁷⁵⁴ though this has not been done to date.

5.1.13 The ASU must keep a record of every action taken under s 23 of the *AAS Act* and include statistical information relating to an action taken under s 23 in their Annual Report.⁷⁵⁵ Making a record

⁷⁴⁴ *AAS Act* s 24(1).

⁷⁴⁵ Particularly ss 12(a)–(d).

⁷⁴⁶ *AAS Act* s 24(2).

⁷⁴⁷ *Ibid* s 12(b). See further below Part 6.2.

⁷⁴⁸ This is especially where there is a reasonable doubt as to the individual's decision-making capacity and/or there is a risk of undue influence or coercion. See further below Part 6.10.

⁷⁴⁹ Such as those in *AAS Act* ss 24(4)(a)(i)–(v). See Parts 6.10 and 7 for a more detailed discussion on consent and capacity.

⁷⁵⁰ *AAS Act* s 24(4)(b).

⁷⁵¹ SALRI is suggesting that this power would be preferably handled by SACAT. See Recommendation 33.

⁷⁵² *Ibid* s 23(3)(a)–(c).

⁷⁵³ Explanatory Memorandum, Office for the Ageing (Adult Safeguarding) Amendment Bill 2018 (SA) 14.

⁷⁵⁴ *AAS Act* s 23(5).

⁷⁵⁵ *Ibid* ss 23(4)(a)–(b).

of the report enables the ASU to collect information that will ‘assist with identifying systemic abuse’.⁷⁵⁶ In instances where multiple, separate reports are made in relation to one location or organisation, a detailed and comprehensive system of record keeping is likely to prove valuable.⁷⁵⁷ The ASU records data about their reports and calls and presents this information in their Annual Report, but there are still areas where insufficient data is captured.⁷⁵⁸

Formal Investigation

5.1.14 Section 26 of the *AAS Act* provides that the Director can cause an investigation to be carried out if a report is made under section 22 and the Director reasonably suspects that the adult may be at risk of abuse, or in any other circumstances the Director thinks appropriate.⁷⁵⁹ The guidance in the *AAS Act* is very limited as to what amounts to an investigation and merely states that an investigation must be carried out according to the requirements set out in the Regulations.⁷⁶⁰ The Regulations provide no further guidance.

5.1.15 The Code of Practice outlines that the real purpose of the investigation is to ‘better understand the situation’ and to:

- establish facts about the incident or allegation
- understand the person’s current or future safety or wellbeing,
- better understand the vulnerable adult’s perspective
- better understand if the vulnerable adult has been harmed or is likely to be harmed
- explore the risk factors contributing to abuse
- consider any safeguarding actions that may assist the person (including referring the person to an appropriate organisation, meeting with the person and their family to provide education and information).⁷⁶¹

5.1.16 The investigation is guided by the central principles of respecting the self-determination of the adult, acting with the consent of an adult with decision-making capacity, and conducting an impartial and fair investigation with the wellbeing of the vulnerable adult at the centre of the investigation.⁷⁶² Investigations can involve the person at risk, family members, other individuals, or other organisations depending on what is necessary for the case.⁷⁶³ The ASU would typically opt for an investigation where abuse is suspected and further information is necessary to better understand an

⁷⁵⁶ Office for Ageing Well, Government of South Australia, *South Australian Adult Safeguarding Unit Code of Practice* (2019) 8.

⁷⁵⁷ Ibid.

⁷⁵⁸ See below Appendix B. However, SALRI notes marked improvements in ASU’s information gathering and data collection from their first year of operation to now.

⁷⁵⁹ *AAS Act* ss 26(1)(a)–(b).

⁷⁶⁰ Ibid s 26(2).

⁷⁶¹ Office for Ageing Well, Government of South Australia, *South Australian Adult Safeguarding Unit Code of Practice* (2019) 20; Adult Safeguarding Unit, *2019–2020 Annual Report* (Report, 2020) 14.

⁷⁶² Office for Ageing Well, Government of South Australia, *South Australian Adult Safeguarding Unit Code of Practice* (2019) 20.

⁷⁶³ Ibid 21.

individual's situation to determine what safeguarding supports may be appropriate⁷⁶⁴ Unless one of the exceptions applies, the consent of the adult to whom the report relates is required before an investigation can be undertaken. As such, the first step of the investigation is generally to meet the adult, explain the role of the ASU and to ascertain the person's wellbeing and the circumstances surrounding the abuse and the wishes of the adult.⁷⁶⁵ At this point, consent is required to take further action.⁷⁶⁶ The ASU should ask the adult how they would like the matter to be dealt with, as 'many victims are fond of the perpetrators of their abuse and do not want them to get into trouble; they merely want the abuse to stop'⁷⁶⁷ (a theme that was often reiterated to SALRI in consultation and reflects wider research).⁷⁶⁸

5.1.17 Special investigation powers are granted to authorised officers. The Director is automatically an authorised officer⁷⁶⁹ and other authorised officers are approved by the Director.⁷⁷⁰ An authorised officer carries an identity card that must be available for inspection upon request of someone against whom they wish to exercise their powers under the *AAS Act*.⁷⁷¹ The authorisation can be varied or revoked by the Director on any grounds the Director thinks fit.⁷⁷² Authorised officers were provided with these wide powers to 'enable them to effectively investigate reports of serious abuse, such as the power to require a person to answer questions and produce documents'.⁷⁷³

5.1.18 The powers of an authorised officer are comprehensive and include powers of entry into premises (with or without the use of reasonable force), inspection of premises, the power to compel information from a person, and request books or accounts or other records to be produced if they relate to the adult at the subject of the report.⁷⁷⁴ These powers are slightly beyond the 'limited coercive information-gathering powers' suggested by the ALRC. However, the high threshold to use these powers accords with the ALRC's recommendation 14-6,⁷⁷⁵ as authorised officers under the *AAS Act* must suspect *serious abuse* before using these powers.⁷⁷⁶ It was expected that a definition of 'serious

⁷⁶⁴ Adult Safeguarding Unit, *2019–2020 Annual Report* (Report, 2020) 14.

⁷⁶⁵ *Ibid.*

⁷⁶⁶ *AAS Act* s 24(1).

⁷⁶⁷ South Australia, *Parliamentary Debates*, Legislative Council, 18 October 2017, 1654 (John Darley).

⁷⁶⁸ See, eg, Rosslyn Monro, 'Elder Abuse and Legal Remedies: Practical Realities?' (2002) 81 (Spring) *Reform* 42; Natalia Wuth, 'Enduring Powers of Attorney: With Limited Remedies: It's Time to Face the Facts' [2013] 7 *Elder Law Review* 1–30; Kelly Purser et al, 'Alleged Financial Abuse of Those Under an Enduring Power of Attorney: An Exploratory Study' (2018) 48(4) *British Journal of Social Work* 887, 895; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, 'Elder Abuse in New South Wales' (Report No 44, June 2016) 121–2 [8.1]–[8.4].

⁷⁶⁹ *AAS Act* s 18(1)(a).

⁷⁷⁰ *Ibid* s 18(1)(b). SALRI understands that the ASU staff are designated as 'authorised officers'.

⁷⁷¹ *Ibid* ss 18(3)–(4).

⁷⁷² *Ibid* s 18(5).

⁷⁷³ South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1715 (Stephen Wade, Minister for Health and Wellbeing).

⁷⁷⁴ *AAS Act* s 19(1)(a)–(j).

⁷⁷⁵ Explanatory Memorandum, Office for the Ageing (Adult Safeguarding) Amendment Bill 2018 (SA) 9; Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) Recommendation 14-6 states that 'adult safeguarding laws should provide the responsible agency with necessary information-gathering powers which should be exercised when they have 'reasonable grounds' to suspect there is 'serious abuse' of the at-risk adult, only to the extent that it is necessary to safeguard and support the at-risk adult'.

⁷⁷⁶ *AAS Act* s 19(1).

abuse’ would be included in the Code of Practice⁷⁷⁷ though this has not been defined in the *AAS Act*, Regulations or the Code of Practice to date. This perhaps surprising omission was the subject of regular observation in SALRI’s consultation.

5.1.19 Reasonable force may only be used, in most circumstances, by the authority of a warrant issued by a Magistrate⁷⁷⁸ to provide ‘some assurance against its inappropriate use’.⁷⁷⁹ It was expected that in practice, similar to the child protection system, SAPOL would accompany the authorised officer⁷⁸⁰ to ensure the safety of ASU practitioners and others involved. It was also expected that the circumstances in which it would be appropriate to use the s 19 powers would be detailed by the Regulations and Code of Practice for clear reporting and accountability guidelines.⁷⁸¹ No further guidance about the use of s 19 powers has been provided at this stage.

5.1.20 The s 42 information gathering powers enable an authorised officer to compel the provision of information or documents for the performance or function under the *AAS Act* at any point.⁷⁸² This power was endorsed by both the ALRC and the 2011 *Closing the Gaps* Report.⁷⁸³

5.1.21 The Minister’s Second Reading Speech as to the nature of the ASU’s powers elaborated:

Sections 18 and 19 of the Bill empower authorised officers, who include the Director and certain employees of the Adult Safeguarding Unit, with a range of coercive information-gathering powers to enable them to effectively investigate reports of serious abuse, such as the power to require a person to answer questions and produce documents.

Part 4, division 6 of the Bill provides for the Director of the Adult Safeguarding Unit to apply to the court for an order in circumstances when the Director reasonably suspects that a vulnerable adult is at risk of abuse. This includes interim orders. Such orders include authorising or requiring that a vulnerable adult undergo an examination or assessment; or requiring a person to do or refrain from doing something in relation to a vulnerable adult.⁷⁸⁴

5.1.22 If during an investigation the ASU discovers that a criminal offence has been, or is likely to be, committed against a person reported to be experiencing abuse, the Code of Practice states that the matter will be referred to SAPOL without that adult’s consent.⁷⁸⁵

5.1.23 It is significant that, to date, SALRI understands the ASU has not had occasion to exercise its wide powers under s 19 of the *AAS Act*.⁷⁸⁶

⁷⁷⁷ Explanatory Memorandum, Office for the Ageing (Adult Safeguarding) Amendment Bill 2018 (SA) 9.

⁷⁷⁸ *AAS Act* s 19(2)(a). SALRI proposes that this power is better dealt with at SACAT. See also Recommendation 33.

⁷⁷⁹ Explanatory Memorandum, Office for the Ageing (Adult Safeguarding) Amendment Bill 2018 (SA) 9.

⁷⁸⁰ Ibid.

⁷⁸¹ Ibid 9.

⁷⁸² Ibid 24.

⁷⁸³ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017); South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia’s Response to the Abuse of Vulnerable Older People* (Report, October 2011).

⁷⁸⁴ South Australia, *Parliamentary Debates*, Legislative Council, 20 June 2018, 565 (Stephen Wade, Minister for Health and Wellbeing).

⁷⁸⁵ Office for Ageing Well, Government of South Australia, *South Australian Adult Safeguarding Unit Code of Practice* (2019) 23.

⁷⁸⁶ See below Part 5.4.

Formal Referral

5.1.24 The *AAS Act* was originally intended to enable the ASU to refer reports to other agencies such as SAPOL, the Ombudsman, Commonwealth Aged Care Complaints Commissioner and other bodies as required and on a ‘case-by-case’ basis.⁷⁸⁷ The *AAS Act* currently allows the Director to make a formal referral to a State authority other than the ASU or a specified person or body other than a State authority.⁷⁸⁸ A State authority is a person who holds an office established by an Act, a public sector agency, SAPOL, a local council constituted under the *Local Government Act 1999* (SA), an incorporated or unincorporated body established for a public purpose by or under an Act, or any other person or body declared by the Regulations to be a State authority.⁷⁸⁹ The Regulations specify that each court and tribunal established under an Act in the State, and the Legal Services Commission are state authorities.⁷⁹⁰ The ASU’s Standard Operating Procedures add that the ASU can make referrals to the Aged Care Quality and Safety Commission for concerns about the misconduct of an Aged Care service provider, NDIS Quality and Safeguards Commission for misconduct of an NDIS-funded provider and SAPOL for suspicion or knowledge of criminal activity.⁷⁹¹

5.1.25 If a matter is referred, the State authority, person or body to whom the Director refers a matter, must indicate to the Director whether or not they will refuse the referral.⁷⁹²

5.1.26 If the referral is accepted by a person or body other than a State authority they must as soon as reasonably practicable provide a report in relation to the matter to the Director of the ASU.⁷⁹³ Under the Regulations, referrals to State authorities do not require a report unless the Director requests it.⁷⁹⁴ There is no set timeframe to deal with a referred report, but it must be ‘reasonable’.⁷⁹⁵

5.1.27 A matter can be referred to more than one State authority, person or body and nothing prevents the ASU from taking action in relation to a matter if it is referred under section 25.⁷⁹⁶

5.1.28 If an organisation refuses to accept a formal referral (as they are perfectly entitled to do), the ASU can consider referring the matter to another organisation for a response, referring the matter to another organisation for an interim response, or escalating the matter if required.⁷⁹⁷

5.1.29 The person or body to whom the ASU makes a formal referral can refuse the referral on one or more of the following grounds within five business days of receiving the referral:⁷⁹⁸

- Lack of resources or capacity to accept the referral at the relevant time

⁷⁸⁷ South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1716 (Stephen Wade, Minister for Health and Wellbeing).

⁷⁸⁸ *AAS Act* ss 25(1)(a)–(b).

⁷⁸⁹ *Ibid* s 2 (definition of ‘State Authority’).

⁷⁹⁰ *Ageing and Adult Safeguarding Adults Regulations 2019* (SA) reg 4.

⁷⁹¹ Adult Safeguarding Unit, Government of South Australia, *Standard Operating Procedures* (August 2019).

⁷⁹² *Ageing and Adult Safeguarding Adults Regulations 2019* (SA) reg 9(3).

⁷⁹³ *AAS Act* s 25(4).

⁷⁹⁴ *Ageing and Adult Safeguarding Adults Regulations 2019* (SA) reg 9(4).

⁷⁹⁵ *AAS Act* s 25(3).

⁷⁹⁶ *Ibid* ss 25(2)(a)–(b).

⁷⁹⁷ Office for Ageing Well, Government of South Australia, *South Australian Adult Safeguarding Unit Code of Practice* (2019) 18.

⁷⁹⁸ *Ageing and Adult Safeguarding Regulations 2019* (SA) reg 9(3).

- Referral is inappropriate having regard to the services provided by the State authority, person or body
- The Director, after consultation with the State authority, person or body, agrees to the refusal.⁷⁹⁹

5.1.30 The ASU has additional mechanisms to report professional misconduct to the Ombudsman or the Health and Community Services Complaints Commissioner.⁸⁰⁰ These referrals are available at any point, whether or not an investigation is pending.

No Further Action

5.1.31 No further action is taken in circumstances where the ASU discovers after a comprehensive assessment that there are already safeguarding supports in place, the case was previously dealt with, no consent is given for further action, or consent is withdrawn.⁸⁰¹ The ASU told SALRI its current practice where the ASU takes no further action, the caller is generally advised of this and where practicable and appropriate, given details of more appropriate organisations to liaise with. For example, where there was no abuse, but there is family conflict and breakdown in communication, the ASU referred the caller to family counselling or family dispute resolution services.⁸⁰²

Other Powers

5.1.32 At any point, the Director of the ASU can apply to the Magistrates Court for an order when the Director reasonably suspects that a vulnerable adult is at risk of abuse and the order is necessary to protect that person from the abuse.⁸⁰³ This is a power of last resort when the ASU needs formal backing to act decisively in the few cases where SAPOL is unable to intervene, but the abuse is serious enough to warrant ASU action.⁸⁰⁴ SALRI understands that this power is also yet to be exercised in practice.

Review of Decision

5.1.33 The statutory right to review in Part 5 of the *AAS Act* ensures that the ASU is acting appropriately in all its functions, including responding to reports of abuse, and acts as a ‘checks and balances’ system.⁸⁰⁵ The review process ensures that the concerns of the person making the report are ‘raised, investigated, and remedied’.⁸⁰⁶ This review process is intended to include decisions not to further investigate a report of suspected abuse.⁸⁰⁷

5.1.34 If a person aggrieved by a decision of the ASU seeks to review a decision, the application for review must be made in a manner prescribed by the Chief Executive (of the Department for Health

⁷⁹⁹ Ibid reg 9(2).

⁸⁰⁰ Office for Ageing Well, Government of South Australia, *South Australian Adult Safeguarding Unit Code of Practice* (2019) 29, *AAS Act* ss 27–30.

⁸⁰¹ Adult Safeguarding Unit, *2020–2021 Annual Report* (Report, 2021) 26.

⁸⁰² Ibid 27. SALRI was informed that this is not uncommon in practice.

⁸⁰³ *AAS Act* s 31(1).

⁸⁰⁴ Explanatory Memorandum, Office for the Ageing (Adult Safeguarding) Amendment Bill 2018 (SA) 19.

⁸⁰⁵ South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1717 (Stephen Wade, Minister for Health and Wellbeing).

⁸⁰⁶ South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3557 (Vickie Chapman, Attorney-General).

⁸⁰⁷ Explanatory Memorandum, Office for the Ageing (Adult Safeguarding) Amendment Bill 2018 (SA) 22.

and Wellbeing), within 30 days of the notice of the decision.⁸⁰⁸ The first internal review is conducted by the Chief Executive who may confirm, vary, or reverse the decision under review.⁸⁰⁹ Upon completion of the review, the Chief Executive must give written notice of the determination.⁸¹⁰

5.1.35 If the person is dissatisfied with the internal review and the report is made about a suspicion of serious abuse, the person can apply to the Ombudsman for review of a decision.⁸¹¹ The application is made in a manner and form determined by the Ombudsman and must be made within 30 days of the notice of the determination.⁸¹² The Ombudsman may refuse to conduct a review if they consider the application is unreasonable, trivial, or vexatious.⁸¹³

Protections

5.1.36 In debating the Bill, many MPs raised the importance of having safeguards built in for whistle-blowers, hoping it would ‘empower and encourage workers and other who are or were witness or privy to the abuse to come forward with impunity’.⁸¹⁴ The ALRC also recommended protection for those who make reports.⁸¹⁵

5.1.37 Anyone who provides information or a document under the *AAS Act* has the same protection, privileges, and immunities as a witness in proceedings before the Supreme Court.⁸¹⁶ No liability attaches to the Director or any other person for any act or omission in the exercise or purported exercise of powers or functions under the *AAS Act* or any other Act, provided those actions are in good faith.⁸¹⁷

Miscellaneous Sections

5.1.38 It is impermissible to prevent, obstruct or hinder another person from making a report.⁸¹⁸ A person also cannot, without reasonable excuse, hinder or obstruct the Director, an authorised officer, or a member of the ASU in the performance or exercise of their function.⁸¹⁹

5.1.39 Under the *AAS Act*, a person must not make a statement knowing it is false or misleading.⁸²⁰

5.1.40 A person engaged or formerly engaged in administering the *AAS Act* must not divulge or communicate personal information obtained (whether by that person or otherwise) in the course of official duties unless authorised under the *AAS Act* or any other Act or law, with the consent of the

⁸⁰⁸ *AAS Act* ss 38(2)(a)–(b).

⁸⁰⁹ *Ibid* s 38(3).

⁸¹⁰ *Ibid* s 38(4).

⁸¹¹ *Ibid* ss 40(1)(a)–(b).

⁸¹² *Ibid* ss 38(2)(a)–(b).

⁸¹³ *Ibid* s 38(3).

⁸¹⁴ South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1711 (Stephen Wade, Minister for Health and Wellbeing).

⁸¹⁵ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) Recommendation 14-7.

⁸¹⁶ *AAS Act* s 51(5).

⁸¹⁷ *Ibid* s 51(1).

⁸¹⁸ *Ibid* ss 46(a)–(b).

⁸¹⁹ *Ibid* s 47.

⁸²⁰ *Ibid* s 48.

person to whom the information relates or in a few other limited circumstances.⁸²¹ The Regulations provide that information obtained in the course of the administration of the Act may be disclosed by a person in accordance with the written authorisation of the Director.⁸²²

5.2 Position in Other jurisdictions

New South Wales

5.2.1 NSW contemplated the role of their safeguarding body as

providing a central point of contact to receive complaints or allegations and refer them to the appropriate agency. In cases where there is no other avenue to pursue investigations, the Public Advocate would lead the investigation.⁸²³

5.2.2 The NSW Ageing and Disability Commission was introduced in 2019 as the State's primary safeguarding body. The NSW model, similar to that of the ASU, is responsible for responding to the suspected abuse of both older persons and persons with disability. The *Ageing and Disability Commissioner Act 2019* (NSW) ('ADC Act') does not impose a mandatory reporting system or duty of reporting, but a report can be made if the person has 'reasonable grounds' to believe an adult is subject to, or at risk of, abuse, neglect or exploitation or the circumstances will lead to such a result.⁸²⁴ The NSW threshold for reporting is slightly higher than the 'suspicion' needed to make a report under the *AAS Act*. The Commissioner can also initiate investigations on their own motion.⁸²⁵

5.2.3 Once a report is made, the NSW Commissioner *may* conduct an investigation, make a referral or decline to take action.⁸²⁶ The flexibility of the *ADC Act* contrasts with the mandated assessment and prescribed three actions that the ASU can take after an assessment under the *AAS Act* in South Australia.⁸²⁷ The NSW Commissioner has the ability to make preliminary inquiries to decide how to deal with a report, may request further information from the person making the report and can refer to the report or part of the report to another person or body.⁸²⁸

5.2.4 The NSW Commissioner is required to refer information to certain bodies such as the Health Care Complaints Commission, Aged Care Quality and Safety Commission, NDIS Quality and Safeguards Commission, the Children's Guardian or any other person or body described by the Regulations if they are of the opinion that the report or part of the report constitutes a complaint that may be made to one of these bodies.⁸²⁹ The Commissioner is also required to report certain matters to

⁸²¹ *Ageing and Adult Safeguarding Regulations 2019* (SA) regs 49(1)(a)–(f).

⁸²² *Ibid* reg 11.

⁸²³ NSW Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 217.

⁸²⁴ *Ageing and Disability Commissioner Act 2019* (NSW) ss 13(1)(a)–(b).

⁸²⁵ *Ibid* ss 12(1), 13(6).

⁸²⁶ *Ibid* ss 13(5)(a)–(c).

⁸²⁷ See *AAS Act* ss 23(3)(a)–(c).

⁸²⁸ *Ageing and Disability Commissioner Act 2019* (NSW) ss 13(6)–(7).

⁸²⁹ *Ibid* ss 13(8)(a)–(d).

police where information in the report may provide evidence of an offence.⁸³⁰ The Director of the ASU has similar duties in the *AAS Act*, but these are optional rather than obligatory.

5.2.5 The *ADC Act* gives the Commissioner broad powers to exchange information with relevant agencies where it would assist the Commissioner in exercising their functions or would help to provide a service to an adult with a disability or older adult.⁸³¹ Relevant agencies include government sector agencies, the NSW Civil and Administrative Tribunal, public or private health facilities and public hospitals.⁸³²

5.2.6 Protections for the identity of people who make reports are provided for under the *ADC Act*⁸³³ as well as protections for employees or contractors who assist the Commissioner against detrimental action by their employer.⁸³⁴

5.2.7 The Commissioner's unique powers of investigation include compelling attendance at meetings and requiring a person to produce any document or thing that is relevant to the investigation.⁸³⁵ Failure to comply with this request in an appropriate way may incur a penalty.⁸³⁶ The Commissioner can also apply for a search warrant if there are reasonable grounds.⁸³⁷ There are wide powers attached to a search:

A search warrant can authorise the Commissioner, or a member of the Commissioner's staff named in the warrant, to enter, examine and inspect the premises; to take photographs, films, audio, video or other recordings; to require documents to be produced for inspection; to examine, inspect, copy or take notes from documents; to remove documents and things to inspect them further; to require the owner or occupier of the premises to provide assistance or facilities that are reasonably necessary for the investigation; and to require any person on the premises to answer questions or provide information.⁸³⁸

5.2.8 Some submissions to the NSW Law Reform Commission opposed a safeguarding body having such powers of entry and search and asserted this should remain the domain of the police.⁸³⁹ The ALRC shared this view.⁸⁴⁰ However, the NSW Law Reform Commission considered that the search and seizure power would help 'identify and prevent the exploitation of vulnerable people in the community' and viewed these powers as a 'significant benefit'.⁸⁴¹

⁸³⁰ Ibid s 13(9).

⁸³¹ Ibid ss 14(1), 14(3).

⁸³² Ibid ss 14(8)(a)–(f).

⁸³³ Ibid s 15.

⁸³⁴ Ibid s 16.

⁸³⁵ Ibid ss 16(1)(a)–(b).

⁸³⁶ Ibid s 16(2).

⁸³⁷ Ibid s 17(1).

⁸³⁸ New South Wales, *Parliamentary Debates*, Legislative Council, 9 May 2019, 66 (Damien Tudehorpe, Minister for Finance and Small Business); *Ageing and Disability Commissioner Act 2019* (NSW) ss 17(2)(a)–(h).

⁸³⁹ NSW Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 218.

⁸⁴⁰ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Discussion Paper No 83, December 2016) 72 [3.42].

⁸⁴¹ NSW Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 218.

5.2.9 These investigative powers are common to Public Guardians and Advocates in other states and territories like Western Australia, the ACT, Queensland and Tasmania.⁸⁴² These bodies can conduct investigations by receiving a report or of their own initiative.⁸⁴³

Victoria

5.2.10 In Victoria, the Office for the Public Advocate is an independent statutory office empowered with a range of functions under the *Guardianship and Administration Act 2019* (Vic) (*G&A Act*) and other legislation. The Public Advocate is empowered to advocate, investigate and provide guardianship services for people with cognitive impairment or mental ill-health.⁸⁴⁴

5.2.11 The role of the Public Advocate must be distinguished from the ASU in that the former is not a safeguarding body available to adults *with* decision-making capacity, unlike the agencies in NSW and Scotland. However, the Victorian Public Advocate is able to investigate any complaint or allegation that a person is under inappropriate guardianship, is being exploited or abused, or is in need of guardianship.⁸⁴⁵ In order to perform an investigation, the Public Advocate can engage an auditor⁸⁴⁶ or require a person, government department, public authority, service provider, institution or welfare organisation to provide information.⁸⁴⁷

5.2.12 The Public Advocate has additional powers of inspection to enter premises on which an institution is situated and inspect the premises, see any person who resides at the premises, make enquiries about the admission, care, detention, treatment or control of any such person, and inspect documents (excluding medical records or personnel records unless the person consents).⁸⁴⁸ An institution includes a disability service provider, residential treatment facility, public hospital, and mental health service provider, among others.⁸⁴⁹

5.2.13 The Public Advocate can delegate one or more of their powers or duties under the *G&A Act* (aside from the power of delegation), any or all of their duties as a guardian, or power of attorney to a Public Advocate employee.⁸⁵⁰ They may also delegate the guardian duties to an individual or organisation with the approval of VCAT.⁸⁵¹ In contrast, the ASU Director is unable to delegate powers assigned to them under the *AAS Act*.

5.2.14 The Public Advocate, Acting Public Advocate and employees of the Public Advocate are bound by confidentiality provisions applying to any person, information relating to the affairs of an individual acquired in the exercise of a power, and the carrying out of a function or the performance of a duty under the *G&A Act* which may identify the individual.⁸⁵² Exceptions to confidentiality are

⁸⁴² Ibid 216.

⁸⁴³ Ibid 217.

⁸⁴⁴ Ibid 135.

⁸⁴⁵ *Guardianship and Administration Act 2019* (Vic) s 16(1)(g).

⁸⁴⁶ Ibid s 16(1)(h).

⁸⁴⁷ Ibid s 16(1)(i).

⁸⁴⁸ Ibid ss 17(1)(a)–(d).

⁸⁴⁹ Ibid ss 17(7) (a)–(d).

⁸⁵⁰ Ibid ss 19(1)(a)–(c).

⁸⁵¹ Ibid s 19(2).

⁸⁵² Ibid s 20(2).

limited to a few instances including where it is necessary for the performance of a duty or function under the Act or for a criminal proceeding.⁸⁵³

5.2.15 Victoria ‘is at the other end of the spectrum’ to Scotland with respect to legislative provisions for intervention in cases of abuse or neglect because powers of access and removal are vested only in the police.⁸⁵⁴ Scotland’s approach is considered below.

Scotland

5.2.16 The Scottish safeguarding legislation protects all adults at risk of harm or abuse⁸⁵⁵ with limited specifications about who is at risk.⁸⁵⁶ The Scottish approach was submitted at the SALRI expert Adelaide roundtable as desirable in the South Australian context.

5.2.17 Under the *Adults Support and Protection (Scotland) Act 2007* (Scot) (*‘ASPA Act’*), the duty falls upon the local Council⁸⁵⁷ to make inquiries about a person’s well-being, property or financial affairs if it knows or believes that a person is an adult at risk and needs intervention to protect them.⁸⁵⁸ During the course of an inquiry, all other Councils, the Public Guardian, and the relevant Health Board must cooperate with the Council conducting the inquiry.⁸⁵⁹ If the Council decides intervention is needed, they have a duty to consider the provision of other appropriate services, including independent advocacy.⁸⁶⁰

5.2.18 The *ASPA Act* contains a wider range of powers and duties that distinguish between initial inquiries and comprehensive investigations. Scotland has three types of ‘Protection Orders’ that authorise the Council officer to take stronger action in cases of suspected ‘serious harm’.⁸⁶¹

5.2.19 During the course of an inquiry, the Council officer has the power of entry⁸⁶² and may interview any adult found at the place being visited.⁸⁶³ If the officer is a health professional, they may conduct a private medical examination with the adult’s consent.⁸⁶⁴ The officer can also require any person holding health, financial or other records relating to the adult at risk to provide records or copies of those documents, and this request can be made at any time.⁸⁶⁵

⁸⁵³ Ibid.

⁸⁵⁴ Sarah Donnelly et al, HSE National Safeguarding Office and Trigraph, *Adult Safeguarding Legislation and Policy Rapid Realist Literature Review* (Report, 2017) 73.

⁸⁵⁵ Ibid 21.

⁸⁵⁶ See *Guardianship and Administration Act 2019* (Vic) s 3(1) definition which includes adults who are unable to safeguard their own well-being, 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.

⁸⁵⁷ It should be noted that in both England and Scotland, the local council or authority has wide roles and responsibilities.

⁸⁵⁸ *Adults Support and Protection (Scotland) Act 2007* (Scot) s 4.

⁸⁵⁹ Ibid ss 5(1)(a)–(g).

⁸⁶⁰ Ibid s 6.

⁸⁶¹ Lorna Montgomery et al, ‘Implications of Divergences in Adult Protection Legislation’ (2016) 18(3) *Journal of Adult Protection* 149. The various ‘protection orders’ are assessment orders, removal orders, and banning orders.

⁸⁶² *Adults Support and Protection (Scotland) Act 2007* (Scot) ss 7(1)–(2).

⁸⁶³ Ibid s 8(1).

⁸⁶⁴ Ibid ss 9(1)–(2).

⁸⁶⁵ Ibid ss 10(1)–(2).

5.2.20 The Council officer may apply to the Sheriff for an assessment order authoring the officer to take a specified person from a place being visited to interview them or conduct a medical examination if the council thinks the adult is at risk and they need protection.⁸⁶⁶ The assessment order expires after seven days.⁸⁶⁷

5.2.21 In cases where there is a risk of serious harm, an officer can apply for a removal order to remove the specified adult from a specified place if they think it will protect that adult from harm.⁸⁶⁸ The order expires after seven days.⁸⁶⁹ Under this removal order, and if a warrant is in place,⁸⁷⁰ the Council officer may enter a place to remove the adult at risk.⁸⁷¹ In cases where there is a risk of serious harm or to better protect the property of an adult at risk, an officer can also apply for a banning order to ban a person from being in a specified place⁸⁷² or impose other conditions or prohibitions.⁸⁷³ The Sheriff, in granting either a banning order or temporary banning order, can attach a power of arrest⁸⁷⁴ and the police must be notified of such an addition to the banning order.⁸⁷⁵

5.2.22 None of the three Protection orders should be made if the Sheriff knows that the affected adult has refused to consent to the granting of the order.⁸⁷⁶ Similarly, a person must not take any action for the purposes of carrying out or enforcing a protection order if the person knows that the affected adult at risk has declined to consent to the action.⁸⁷⁷ An exception applies if the Sheriff or person enforcing a protection order reasonably believes the affected adult at risk has been unduly pressured to refuse consent or there are no steps which could reasonably be taken with the adult's consent which would protect the adult from the harm which the order or action is intended to prevent.⁸⁷⁸

5.2.23 It has been found that the *ASPA Act* has had an overall positive effect on safeguarding practice in Scotland as it 'provided a stronger legal basis to investigate where access has been refused or made difficult. Second it has reached some people who clearly would not have met the criteria under mental health and adults with incapacity legislation but who might be at risk of harm.'⁸⁷⁹

England

5.2.24 The *Care Act 2014 (UK)* ('*Care Act*') aims to improve a person's independence and wellbeing. It makes clear that local authorities must provide or arrange services that help prevent people developing needs for care and support or delay people deteriorating such that they would need ongoing

⁸⁶⁶ Ibid ss 11(1)–(2).

⁸⁶⁷ Ibid s 11(3).

⁸⁶⁸ Ibid ss 14(1)(a)–(b).

⁸⁶⁹ Ibid s 14(2).

⁸⁷⁰ Ibid ss 37(1)(a)–(b).

⁸⁷¹ Ibid ss 16(1)–(2).

⁸⁷² Ibid s 19(1).

⁸⁷³ Ibid s 19(2).

⁸⁷⁴ Ibid s 25(1).

⁸⁷⁵ Ibid s 27(1).

⁸⁷⁶ Ibid s 35(1).

⁸⁷⁷ Ibid s 35(2).

⁸⁷⁸ Ibid s 35(3).

⁸⁷⁹ Martin Campbell et al, 'What Difference Does the *Adult Support and Protection (Scotland) Act 2007* Make to Social Work Service Practitioners' Safeguarding Practice?' (2012) 14(4) *Journal of Adult Protection* 204.

care and support.⁸⁸⁰ Chapter 14 of the *Care and Support Statutory Guidance* issued under the *Care Act* sets out adult safeguarding duties and extends safeguarding duties beyond local authorities to the NHS and Police.⁸⁸¹ The *Care Act* convenes providers and commissioners of NHS services in a particular area alongside local authorities and other local partners to collectively plan health and care services to meet the needs of their local population.⁸⁸²

5.2.25 An assessment is conducted by a local authority to decide whether a person needs care and support and to gain a full picture of the wishes and needs of the adult.⁸⁸³ In England, safeguarding is aimed at people with care and support needs who may be in vulnerable circumstances and at risk of abuse or neglect.

5.2.26 The *Care Act* imposes a duty on English local authorities to undertake enquiries when they consider an adult with care and support needs may be at risk of abuse or neglect.⁸⁸⁴ The purpose of the enquiry is to establish with the individual and/or their representatives, what, if any, action is required in relation to the situation; and to establish who should take such action. The duty of the local authorities supplements the existing obligations on other organisations to look after the people in their care effectively, or, in the case of the police, to prevent and respond to criminal activity.⁸⁸⁵

5.2.27 Rather than having one specific ASU type body responsible for adult safeguarding, the professional or individual best placed to lead an enquiry, as well as the nature and timing of any intervention, will be chosen by the local authority to suit circumstances of a particular case.⁸⁸⁶ The English High Court has stated that the duty of a local authority is not satisfied by simply referring an individual to another agency, ‘rather, it requires the local authority and a relevant partner to engage “in good faith discussions” with a view to attempting to agree how an adult’s needs for support might be met.’⁸⁸⁷

5.2.28 The local authority must set up an Adult Safeguarding Board in each local authority who will develop adult safeguarding policy, protocols and practitioner guidance to help adults with care and support needs who are experiencing or at risk of abuse and neglect and are unable to protect

⁸⁸⁰ Department of Health and Social Care, UK Government, *Care Act Factsheets* (Factsheet, 19 April 2016) <<https://www.gov.uk/government/publications/care-act-2014-part-1-factsheets/care-act-factsheets#factsheet-1-general-responsibilities-of-local-authorities-prevention-information-and-advice-and-shaping-the-market-of-care-and-support-services>>.

⁸⁸¹ Sarah Donnelly et al, HSE National Safeguarding Office and Trigraph, *Adult Safeguarding Legislation and Policy Rapid Realist Literature Review* (Report, 2017) 99.

⁸⁸² The King’s Fund, *The Health and Care Act: Six Key Questions* (online, 17 May 2022) <<https://www.kingsfund.org.uk/publications/health-and-care-act-key-questions>>.

⁸⁸³ Department of Health and Social Care, UK Government, *Care Act Factsheets* (Factsheet, 19 April 2016) <<https://www.gov.uk/government/publications/care-act-2014-part-1-factsheets/care-act-factsheets#factsheet-1-general-responsibilities-of-local-authorities-prevention-information-and-advice-and-shaping-the-market-of-care-and-support-services>>.

⁸⁸⁴ *Care Act 2014* (UK) s 42(2).

⁸⁸⁵ Department of Health and Social Care, UK Government, *Care Act Factsheets* (Factsheet, 19 April 2016) <<https://www.gov.uk/government/publications/care-act-2014-part-1-factsheets/care-act-factsheets#factsheet-1-general-responsibilities-of-local-authorities-prevention-information-and-advice-and-shaping-the-market-of-care-and-support-services>>.

⁸⁸⁶ Sarah Donnelly et al, HSE National Safeguarding Office and Trigraph, *Adult Safeguarding Legislation and Policy Rapid Realist Literature Review* (Report, 2017) 99.

⁸⁸⁷ *R (Taylor) v Secretary of State for Justice* [2015] EWHC 3245 (Admin) [34].

themselves.⁸⁸⁸ The local authority can also arrange an independent advocate to support an adult who is struggling with being the subject of an adult safeguarding review.⁸⁸⁹

Wales

5.2.29 Part 7 of the *Social Services and Well-being (Wales) Act 2014* (Wales) ('SSW Act') Act provides that if the local authority has reasonable cause to suspect that a person within its area is an adult at risk,⁸⁹⁰ then the local authority must make, or cause to be made, an enquiry to decide whether action should be taken.⁸⁹¹ The local authority must provide the conclusions of their enquiries and cause these to be recorded as part of the adult's care and support plan.⁸⁹²

5.2.30 Under s 127(2), an authorised officer under the *SSW Act* can apply for an 'adult protection and support order' which enables the officer to speak in private with the adult suspected of being at risk of abuse, ascertain whether that person is making decisions freely, assess whether the person is an adult at risk and to determine what action, if any, should be taken.⁸⁹³ When such an order is in place, the authorised officer, a police constable and any other person accompanying the officer can enter the premises for the purposes in s 127(2).⁸⁹⁴ A constable may use reasonable force (for example, to gain access to the premises where the adult at risk lives) if such force is necessary to enable the purposes of the order to be fulfilled.⁸⁹⁵

5.2.31 Unlike the *AAS Act* in South Australia, a relevant partner of a local authority in Wales has a duty to report an adult at risk if they suspect that a person is an adult at risk and appears to be within the authority's area.⁸⁹⁶ A relevant partner includes the police, the Local Health Board and an NHS trust providing services in that area, among others.⁸⁹⁷

British Columbia

5.2.32 Part 3 of the *Adult Guardianship Act* RSBC 1996 c 6 ('AGA') is directed towards the provision of support and assistance for adults who are abused or neglected and who are unable to seek support and assistance due to their physical restraints, physical handicap, illness, disease, injury or other condition that affects their ability to make decisions about the abuse or neglect.⁸⁹⁸ The adult can be living in the community, care facility, or any other place except a correctional centre.⁸⁹⁹ The designated agency must determine if the adult needs support and assistance once a report is received.⁹⁰⁰

⁸⁸⁸ *Care Act 2014* (UK) s 43(2).

⁸⁸⁹ *Care Act 2014* (UK) ss 44(1)(a)–(b).

⁸⁹⁰ According to the definition in *Social Services and Well-being (Wales) Act 2014* (Wales) s 126(1).

⁸⁹¹ *Ibid* ss 126(2)(a)–(b).

⁸⁹² *Ibid* s 54.

⁸⁹³ *Ibid* ss 127(2)(a)–(c).

⁸⁹⁴ *Ibid* s 127(3).

⁸⁹⁵ *Ibid* s 127(7).

⁸⁹⁶ *Ibid* ss 128(1)–(3).

⁸⁹⁷ *Ibid* s 162(4).

⁸⁹⁸ *Adult Guardianship Act British Columbia* RSBC 1996 c 6 ss 44(a)–(c).

⁸⁹⁹ *Ibid* s 45(1).

⁹⁰⁰ *Ibid* s 47(1).

5.2.33 Reporting is not mandatory, but any person with information indicating that an adult is being abused or neglected or is unable to seek assistance and support for one of the reasons listed in s 44 may report the circumstances to the designated agency.⁹⁰¹ A designated agency is a public body, organisation, or the Public Guardian and Trustee.⁹⁰² The person who makes a report is protected from any action (unless the report is made falsely and maliciously)⁹⁰³ and is also protected from discrimination and threats to employment.⁹⁰⁴

5.2.34 If an investigation is the chosen action, the designated agency must make every reasonable effort to interview the adult.⁹⁰⁵ They may also interview any individual who may assist the investigation⁹⁰⁶ and obtain information from health care providers, anyone managing the adult's financial affairs, and any agency that provides or has provided health or social services to the adult.⁹⁰⁷ In the course of an investigation, the agency may also apply to the court for an order to enter premises to investigate.⁹⁰⁸

5.2.35 These investigation powers are 'rarely used' but can be a persuasive tool to prompt a person to act.⁹⁰⁹ If no support or assistance is needed the designated agency can take no further action and may advise the Public Guardian and Trustee.⁹¹⁰ If action is necessary, the designated agency may carry out one or more of the following actions:

- (a) refer the adult to available health care, social, legal, accommodation or other services;
- (b) assist the adult in obtaining those services;
- (c) inform the Public Guardian and Trustee;
- (d) investigate to determine if the adult is abused or neglected and is unable, for any of the reasons mentioned in s 44, to seek support and assistance.⁹¹¹

5.2.36 There is a duty upon the designated agency to make a report to the police if they believe an offence has been committed.⁹¹²

5.2.37 Once an investigation is complete, the designated agency may do one or more of the following:

- (a) take no further action;
- (b) refer the adult to available health care, social, legal, accommodation or other services;
- (c) report the case to the Public Guardian and Trustee or another agency;
- (d) [Repealed 2007-34-10.]

⁹⁰¹ Ibid s 46(1).

⁹⁰² Ibid s 1 (definition of 'designated agency').

⁹⁰³ Ibid s 46(3).

⁹⁰⁴ Ibid s 46(4).

⁹⁰⁵ Ibid s 48(1).

⁹⁰⁶ Ibid s 48(2)(a).

⁹⁰⁷ Ibid ss 48(2)(b)(i)–(iii).

⁹⁰⁸ Ibid s 49(1).

⁹⁰⁹ Explanatory Memorandum, Office for the Ageing (Adult Safeguarding) Amendment Bill 2018 (SA) 9.

⁹¹⁰ *Adult Guardianship Act British Columbia RSBC 1996 c 6 s 47(2)(a)–(b).*

⁹¹¹ Ibid s 47(3)(a)–(d).

⁹¹² Ibid s 50.

- (e) apply to the court for an interim order requiring a person
 - i. 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,
 - ii. not to visit, communicate with, harass or interfere with the adult,
 - iii. not to have any contact or association with the adult or the adult's financial affairs, or
 - iv. to comply with any other restriction of relations with the adult,
 for a period of up to 90 days;
- (f) apply to the court for an order under Part 7 of the *Family Law Act* for the support of the adult;
- (g) prepare a support and assistance plan that specifies any services needed by the adult, including health care, accommodation, social, legal or financial services.⁹¹³

5.2.38 In contrast to the *AAS Act*, the *AGA* expressly lists numerous options that the designated agency can take after completing an investigation. They can prepare a support and assistance plan for an adult,⁹¹⁴ but the adult can choose whether or not to accept those services, providing they have capacity.⁹¹⁵ The designated agency can even provide ‘emergency assistance’ and use its powers of entry without a warrant, removal of the adult from the premises to a safe place, or other emergency measures if the adult is being abused or neglected, the adult is incapable of giving or refusing consent, and it is necessary to act without delay in order to preserve the adult’s life.⁹¹⁶

5.3 Issues

ASU Processes vs Operational Practice

5.3.1 The importance of the role and powers of the ASU attracted near unanimous support in SALRI’s consultation. However, SALRI also received many suggestions about how the ASU might be able to better perform their crucial safeguarding role. There was a clear perception in SALRI’s consultation, notably from the ASU, that at least some of the processes currently set out in the *AAS Act* are unhelpful and unduly prescriptive and may even frustrate, as opposed to facilitate, the effective performance of the ASU’s safeguarding role. Throughout SALRI’s consultation there was support for greater flexibility in the *AAS Act* to allow ASU practitioners to use their clinical judgment to handle each case. There was also the perception that some of the processes relating to the ASU under the *AAS Act* do not reflect best practice. There is a tension and disconnect, as SALRI was often told during consultation, between the processes and procedures of the *AAS Act* and the current operational practices of the ASU. The disconnect is especially evident in exercising its functions of responding to reports of abuse, the inability to account for safeguarding actions typically taken, and difficulties navigating the changing service landscape.

5.3.2 For instance, the rigidity of the present *AAS Act* impedes the ASU’s ability to effectively perform its duties. The *AAS Act* provides the ASU three options following an assessment: to

⁹¹³ Ibid s 51.

⁹¹⁴ Ibid s 53(1).

⁹¹⁵ Ibid s 53(4). If the person does not have capacity the designated agency may ask the Public Guardian and Trustee to arrange for an assessment of whether the adult is capable according to s 53(5).

⁹¹⁶ Ibid ss 59(1)–(2).

investigate the matter further, make a formal referral or take no further action. These three legislative options are unduly restrictive. In reality, the ASU undertakes a plethora of other worthwhile actions such as providing advice or information to callers or the adult who may be vulnerable to abuse, making informal referrals to other organisations or agencies, and assisting a person to go to SACAT. These actions are not adequately captured or provided for in the *AAS Act*. Therefore, the ASU is compelled to record these actions as either ‘investigation’ or ‘no further action’, although this is strictly inaccurate. The need for increased flexibility in the *AAS Act* will better reflect operational practice and better accommodate for each person’s wishes and circumstances.⁹¹⁷ SALRI was told that a more flexible process with more options for the ASU may more accurately reflect the work of the ASU and capture how adults are being safeguarded in practice.

5.3.3 Other processes supposedly undertaken by the ASU are simply not used in practice, due to a change in processes over the last three years. For example, the Code of Practice details that, after assessing a report and obtaining consent from the adult at the subject of the report, the ASU will work with the person who may be experiencing abuse and other relevant people or organisations to develop a safeguarding plan.⁹¹⁸ This safeguarding plan is then to be monitored, reviewed, and closed when appropriate.⁹¹⁹

5.3.4 However, in practice, the ASU has informed SALRI that there are various reasons why a safeguarding plan may not be appropriate. For instance, the circumstances of the adult experiencing abuse may be too volatile or change too rapidly to develop concrete and fit for purpose safeguarding plans. Another difficulty is that, in the changing service landscape, case management is not dealt with holistically by a central body or person, but various agencies and service providers who play a different role in the adult’s life. In some circumstances, a safeguarding plan is not appropriate because these other agencies might be unable to assist.

5.3.5 Another example of where the *AAS Act* fails to reflect the ASU’s operational practice is the use of ‘warm referral’⁹²⁰ (as ASU practitioners put it to SALRI) processes rather than the formal referral processes under s 25. During the ASU’s second year of operation, the formal referral process was only used twice according to the Annual Report.⁹²¹ SALRI was informed by ASU and other agencies that deal with the ASU that warm referrals tend to encourage a willingness to collaborate and build trust in the ASU⁹²² rather than making agencies wary of ASU employing the formal referral processes to pass on cases they do not wish to deal with.

5.3.6 While in some areas there is need for greater flexibility, in other areas, the *AAS Act* is not detailed enough. There were concerns raised by ASU staff in the Tetra Tech Year One Evaluation of

⁹¹⁷ Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 6.

⁹¹⁸ Office for Ageing Well, Government of South Australia, *South Australian Adult Safeguarding Unit Code of Practice* (2019) 28.

⁹¹⁹ Ibid.

⁹²⁰ ‘Warm referrals’ refer to a collaborative approach of referring cases between the ASU and other organisations. Rather than a written request compelling another organisation to take a referral, the ASU speaks with the agency and discusses whether it would be appropriate for that agency to handle the case. The Code of Practice and these processes are currently being reviewed.

⁹²¹ South Australian Adult Safeguarding Unit, *2020–2021 Annual Report* (Report, 2021) 25. Stakeholders were pleased with a more informal approach.

⁹²² Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 18.

the ASU that the *AAS Act* is ‘clunky’ and ‘lacking in detail’, especially in areas like undertaking investigations and the process between assessment to referral.⁹²³ The investigation process in s 26 lacks specificity as to what an investigation entails and what, if any, processes the Director must follow when conducting an investigation. The *AAS Act* does not include time frames for actions, such as the timeframe for an assessment to be conducted, to conclude an investigation, or for internal and external reviews.⁹²⁴ It was originally anticipated that this legislative gap would be picked up by the Regulations and Code of Practice and be informed by practice, as it is ‘highly likely that there will be different time frames for different elements of the responses’.⁹²⁵

5.3.7 To date there have been no additional specifications about time frames. Instead, the Standard Operating Procedures have a model to prioritise cases by their urgency and an estimate of time it should take to resolve the matter. These time frames were generally met by the ASU and there was an option to fast-track cases to the Chief Adult Safeguarding Practitioner where needed.⁹²⁶ However, there is a question of whether there needs to be more specific time frames in the Act and/or supporting instruments.

5.3.8 With respect to the process of responding to reports, the *AAS Act* should provide more clarity about the actions, such as investigation, that may be taken, while also providing for overall flexibility, to allow the ASU to use best practice and the clinical judgement of its staff to take appropriate action.

Importance of Safeguarding Functions

5.3.9 There was broad support in SALRI’s consultation for the ASU’s primary focus to be on safeguarding and for the *AAS Act* to have greater clarity and detail about this safeguarding role. The ASU has the responsibility to respond to reports of abuse or neglect of adults who may be vulnerable to abuse ‘in accordance with their needs, wishes and circumstances’.⁹²⁷ In order to increase the flexibility of the ASU’s process and to reflect the safeguarding purpose of the ASU, it was often raised to SALRI that safeguarding functions should be included as an action to be taken after an assessment or investigation. There is currently no definition of ‘safeguarding’ in the *AAS Act*, nor is there any explanation of what would constitute a safeguarding action or function. SALRI was informed during consultation that this was a massive oversight. In the previous Part, SALRI proposed a definition for safeguarding.⁹²⁸ If that recommendation is adopted, it is crucial to consider what action would constitute ‘safeguarding’ in practice.

Investigation vs Assessment

5.3.10 The *AAS Act* does not account for current operational practices in the way assessments are undertaken, and how this impacts an investigation. Following the Tetra Tech recommendations,

⁹²³ Ibid 6.

⁹²⁴ Office for Ageing Well, Government of South Australia, *South Australian Adult Safeguarding Unit Code of Practice* (2019) 23.

⁹²⁵ South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1729 (Stephen Wade, Minister for Health and Wellbeing).

⁹²⁶ Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 15.

⁹²⁷ Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 1.

⁹²⁸ See above Part 4.5 (‘Definition of Safeguarding’).

the ASU currently implements a comprehensive assessment process undertaken without the person's consent⁹²⁹ to be adequately informed about the adult's circumstances and to determine the best action to take to safeguard the adult. When a report is made, it is expected that the caller will be asked about what the vulnerabilities of the adult in question are, the reasons for the caller's suspicion, how the adult can be contacted and any other information required.⁹³⁰ The ASU's current information gathering process may also involve other persons and bodies who may hold relevant information and/or visiting the adult who is the subject of the report to speak with them. In serious cases, the ability to obtain more information has proved beneficial to inform the best type of safeguarding approach for the situation.⁹³¹

5.3.11 If the purpose of an investigation is to establish facts about an incident or allegation and to understand the adult's current and future safety, but the assessment process allows the ASU to gather essentially all the necessary information without the consent of the adult, the utility of an investigation is doubtful. The ASU has previously criticised the *AAS Act* for containing 'multiple requirements for undertaking similar functions'.⁹³² This leads to problems in practice too.

5.3.12 Case notes revealed that the ASU undertook home visits as part of investigations, which were useful in gaining contextual information and developing rapport with clients.⁹³³ It is unclear whether these home visits were conducted under the s 26 investigation powers, or under the s 23 assessment process and merely deemed an 'investigation' for the purposes of the Annual Report. This confusion is exacerbated by the fact that home visits can be conducted as part of an assessment or during an investigation. There are also inconsistencies in that during an assessment, information can be requested without consent, but consent is required once a formal s 26 investigation is underway.⁹³⁴ This raises the need for a clear distinction between an assessment and an investigation.

Investigation Powers

5.3.13 The strong investigatory powers in s 19 are 'yet to be used for investigation purposes' as ASU staff have considered that there were 'other ways to appropriately safeguard vulnerable adults'⁹³⁵ and that there have been 'no incidences where the use of these powers has been considered the most appropriate action'.⁹³⁶ The ASU explained in the Tetra Tech report that when the reports go past the assessment stage to an investigation stage there are often 'complex family dynamics' and staff preferred to utilise their social work experience to undertake investigations, make client contact, develop

⁹²⁹ South Australian Adult Safeguarding Unit, *2020–2021 Annual Report* (Report, 2021) 21.

⁹³⁰ Office for Ageing Well, Government of South Australia, *South Australian Adult Safeguarding Unit Code of Practice* (2019) 10.

⁹³¹ South Australian Adult Safeguarding Unit, *2020–2021 Annual Report* (Report, 2021) 23.

⁹³² Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 12.

⁹³³ Ibid 16.

⁹³⁴ Ibid 12.

⁹³⁵ Ibid 16.

⁹³⁶ South Australian Adult Safeguarding Unit, *2019–2020 Annual Report* (Report, 2020) 15. This approach struck a number of parties in SALRI's consultation such as ARAS and the Port Pirie lawyers and some survey responses as unduly cautious on at least some occasions and that the ASU should be more willing to utilise these powers. ARAS said there were a 'handful' of cases of potential significant abuse as warranting intervention it has referred to the ASU where the ASU it thought had failed to utilise its wide powers when it arguably should have.

safeguarding plans and complete investigation reports.⁹³⁷ During the first year of its operation, the ASU found that older people wanted the support of the ASU to stop the abuse rather than to undertake any formal action or intervention.⁹³⁸ The ASU staff found it more effective to build trust and rapport with vulnerable adults to gather critical information, and thought that the use of the s 19 powers during an investigation may ‘adversely impact their efforts to build trust and rapport’.⁹³⁹

5.3.14 The intended purpose of the investigation powers in the *AAS Act* is to allow authorised officers to enter premises and compel information and documents, and to enable the ASU to form a view about what support the person needs to stay safe. The purpose of an investigation in the *AAS Act* should not be conflated with an investigation to punish people or to monitor and enforce standards like a regulatory body would.⁹⁴⁰ It was stated that ‘we don’t need another police force’.⁹⁴¹

5.3.15 Stakeholders consulted by Tetra Tech in the Year One Evaluation of the ASU were ‘particularly pleased’ that the ASU was vested with strong investigatory powers, especially as other key parties in the sector did not have access to such powers without seeking court orders.⁹⁴² One respondent noted the value of these powers giving the ASU the perception of a ‘watchdog’.⁹⁴³ The Tetra Tech consultations held mixed views from external stakeholders as to how the ASU should strike the balance between respecting the autonomy of the vulnerable adult and taking an interventionist approach to protect them from abuse or neglect.⁹⁴⁴ A general view relayed to Tetra Tech in the Year One Evaluation was that the ASU should employ their ‘strong and unique powers’, referring to the investigatory powers in s 19, more often.⁹⁴⁵

5.3.16 It is also problematic that the *AAS Act* is silent on what happens after an investigation is undertaken, especially where personal or private information is collected about an individual. This raises the question about whether the ASU should be provided with some formal direction on what they can do with this information and have options under the *AAS Act* to take subsequent actions.

⁹³⁷ Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 16.

⁹³⁸ South Australian Adult Safeguarding Unit, *2019–2020 Annual Report* (Report, 2020) 14. SALRI was also told by many practitioners and service providers that this preference by apparent victims of abuse is widespread. This reflects wider research. See, eg, Rosslyn Monro, ‘Elder Abuse and Legal Remedies: Practical Realities?’ (2002) 81 (Spring) *Reform* 42; Natalia Wuth, ‘Enduring Powers of Attorney: With Limited Remedies: It’s Time to Face the Facts’ [2013] 7 *Elder Law Review* 1–30; Kelly Purser et al, ‘Alleged Financial Abuse of Those Under an Enduring Power of Attorney: An Exploratory Study’ (2018) 48(4) *British Journal of Social Work* 887, 895; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, ‘Elder Abuse in New South Wales’ (Report No 44, June 2016) 121–2 [8.1]–[8.4].

⁹³⁹ Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 16; South Australian Adult Safeguarding Unit, *2019–2020 Annual Report* (Report, 2020) 14.

⁹⁴⁰ South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1728 (Stephen Wade, Minister for Health and Wellbeing).

⁹⁴¹ South Australia, *Parliamentary Debates*, Legislative Council, 20 June 2018, 565 (Stephen Wade, Minister for Health and Wellbeing).

⁹⁴² Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 6.

⁹⁴³ Ibid.

⁹⁴⁴ SALRI also received diverging opinions on this subject.

⁹⁴⁵ Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 13.

Information Sharing and the Service Landscape

5.3.17 Over 2020—2021 the ASU increased their information sharing as the processes became more established.⁹⁴⁶ The Information Sharing Provisions are a ‘key value add to the ASU’ according to both staff and external stakeholders.⁹⁴⁷ It is recognised that the information sharing was made simpler where an MOAA existed, but stakeholders told Tetra Tech they were less ‘clear and comfortable about information sharing provisions between State and Commonwealth governments’ and this was identified as a key gap.⁹⁴⁸ This makes apparent the impact of shifting the responsibility of aged care and disability services to the Commonwealth, as described in Part 3. There was also a gap identified in the investigation powers being inadequate to obtain information from banks and other financial institutions.⁹⁴⁹

5.4 Consultation Data Overview

Increasing Flexibility in the AAS Act

5.4.1 There was universal support across SALRI’s consultation and the survey responses for the current service model being made more flexible. It was said this would better reflect operational demands, more accurately represent the operational practice of the ASU and permit the ASU to use best practice and clinical judgement when assessing reports and determining the most appropriate response. Additional flexibility in the *AAS Act* would allow for supports to be tailored and adapted to a person’s individual needs and to reflect the ‘complexity of decision-making’ as Speech Pathology Australia observed. Social workers across rural local health networks noted, in their experience, that more prescriptive legislation inhibits responsiveness to rural and remote areas. They did not want the rigidity of the current *AAS Act* to limit options or opportunities in regional, rural or remote South Australia. Other parties, especially in regional and rural communities, shared this view.

Triage Model

5.4.2 A new model to improve the current process of responding to reports of abuse, by increasing the ASU’s referral functions and positioning the ASU as a central agency for adult safeguarding, was proposed and widely discussed during SALRI’s consultation. The prevailing view in SALRI’s consultation was for the ASU to act as a central agency and have more flexible processes for referring reports to appropriate agencies where suitable. The model was positively regarded by the overwhelming majority of attendees and participants, with some consultees expressing their surprise to SALRI that such a model did not already exist.

5.4.3 There was broad support in SALRI’s consultation for the premise that ASU should have a ‘no wrong door’ approach and should be able to redirect people with queries or reports who might not know where else to go, and ensure that these people are directed to the right place(s).⁹⁵⁰ The Office of the Public Advocate observed that while other services are available to assist adults who may be at risk of abuse, such as 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

⁹⁴⁶ South Australian Adult Safeguarding Unit, *2020–2021 Annual Report* (Report, 2021) 9.

⁹⁴⁷ Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 17.

⁹⁴⁸ Ibid.

⁹⁴⁹ Ibid 16.

⁹⁵⁰ A simple example given was if the ASU received a call about a one-off assault committed on an older person by a stranger, that call should be referred to SAPOL for appropriate action.

information or make a report. This does not necessarily mean the ASU will be the primary responder in every case.’ SALRI endorses this approach. Some parties suggested a priority system for dealing with cases so that reports would be classified by their level of risk.

5.4.4 Tony Van Vugt, a community advocate, suggested to SALRI that if a referral is made to another agency or organisation, the ASU should facilitate the referral by providing details of the case where permissible and ensuring the reporter or adult at the centre of the report receives ‘direct assistance’. Maggie Rutjens stated that the ‘strength of triaging is in sharing expertise and knowledge’ and noted that the onus should be on the ASU to direct the person where to go so as to not compound the referral fatigue of the callers. Others suggested to SALRI that the triage approach would minimise further trauma for those who have experienced abuse and prevent them having to recount their experiences repeatedly to multiple service providers. Ms Rutjens noted that triaging and warm referrals are only sustainable and effective for as long as community organisations are adequately funded and that at present, this is a huge barrier to advocacy services responding to matters in collaboration with the ASU.

5.4.5 Many health practitioners, lawyers and community members raised the importance of identifying the role of each body, agency and organisation in South Australia to better understand how the wider safeguarding landscape operates.⁹⁵¹ There was a significant concern expressed to SALRI about the overlap between the roles of the Disability Rights Commissioner, NDIS Quality and Safeguards Commission, Aged Care Quality and Safety Commission and the ASU.⁹⁵² The shift in the service landscape from State-based providers to largely Commonwealth controlled services in both disability and residential aged care increases the importance of inter-agency collaboration. A social worker responded to SALRI’s survey recalling difficulties with using the ASU, specifically in ascertaining the role of the service provider for an older person and ‘navigat[ing] our responsibilities as a Commonwealth Aged Care Provider with this state body’. The respondent suggested that this area needs greater clarification for all parties involved for the most effective response to be directed to the right place. Other practitioners expressed similar views.

5.4.6 The Office for Ageing Well told SALRI that, for example, via My Aged Care, the Commonwealth is now responsible for funding and regulating aged care services across South Australia (and nationally). This model continues to evolve, and it is expected that the ongoing national aged care reforms will result in future changes to Commonwealth/State service delivery arrangements. Similarly, the responsibility for service delivery for adults aged under 65 with disability has transitioned from a State-based responsibility to primarily a Commonwealth responsibility under the NDIS.⁹⁵³ Additionally, under the current framework, concerns or complaints relating to My Aged Care

⁹⁵¹ This theme was often highlighted in SALRI’s consultation. This is a telling point given the wide range of both State and Commonwealth agencies and Government and non-Government bodies involved in this area. One Port Pirie service provider noted that, given even experts struggle to understand the ‘bewildering array’ of organisations and agencies dealing with elder abuse and the abuse of persons with disability, ‘what hope does the ordinary person have, especially someone with disability or low literacy of knowing where to go’. Purple Orange emphasised this point as well. See also Kelly Vincent and David Caudrey, *Safeguarding Task Force Report* (Report, 31 July 2020) 20.

⁹⁵² Additional complications arise where a report of abuse may involve both Commonwealth and State regulated bodies. This is far from a unique event. See further below Part 10.2.

⁹⁵³ The NDIS does not cover all persons with disability and many people remain outside the NDIS. Maggie Rutjens noted that some of the reasons people are not NDIS participants such as eligibility criteria, barriers to identifying with disability, barriers accessing evidence for testing NDIS eligibility and those with a form of disability, impairment or health condition from whom the NDIS does not recognise as relevant to the NDIS. Purple Orange advised SALRI: ‘While an estimated 4.4 million Australians live with disability, just over 518,000 (or 12%) are on

service provision (including allegations that a service provider is responsible for harming a My Aged Care recipient) are the responsibility of the Aged Care Quality and Safety Commission. Similarly concerns or complaints relating to NDIS service provision (including allegations that a service provider is responsible for harming a NDIS recipient) are managed by the NDIS Quality and Safeguards Commission ('NDIS QSC'). These Commissions may often be the appropriate body to lead or coordinate the response for the person who is experiencing abuse or mistreatment carried out by an aged care or disability service provider, and be best placed to undertake a safeguarding response.

5.4.7 Cassie Mason told SALRI that the suggested triage system may enhance the ASU's role and increase the ease of referrals, making the ASU more suitable to deal with a broader range of issues as they would be assisted by better relationships, for example with disability organisations. However, she noted the triage model would be ineffective if there are no suitable bodies to refer to. Additionally, the OFAW suggested the increased ease and availability of referral pathways in the suggested triage system will assist where the expansion of the ASU's scope to all vulnerable adults may capture cases of domestic and family violence, for which other tailored services already exist. SALRI's regional consultation supported this triage model in regional areas if the ASU is able to 'tap into the existing resources', as long as this does not replace the efforts of the ASU in visiting regional SA and conducting assessments.

5.4.8 Elicia White, the former Chief Adult Safeguarding Practitioner, drew attention to an issue with the existing referral pathways. She noted that each organisation has its own standards and ways of accepting referrals, and that the ASU would need flexibility from whichever bodies will be accepting referrals. This is made more difficult as each agency has their own way of working with adults.⁹⁵⁴ Another problem raised to SALRI is simply what to do where there is no suitable or existing agency for the ASU to refer to for a particular report or query. However, many attendees at the SALRI's expert roundtable supported the triage model as it would assist the ASU to build these connections and support people to be referred to other services. Some suggested that, in the instance no other body is appropriate, the ASU would have to deal with the case.

5.4.9 Various parties expressed a note of concern to SALRI about the ASU forming a 'habit' of distorting the triage system by routinely referring out cases inappropriately or disproportionately. Another concern was raised by several parties and practitioners that, in instances where a report of the suspected abuse of an older person or a person with disability relates to both Commonwealth and State agencies, the ASU cannot simply refer the report to the Commonwealth agency and ignore the State aspect. An attendee at the Adelaide NGO roundtable said that 'if there are too many referrals, nothing gets done'. Maggie Rutjens indicated that because of the demand placed on the ASU and advocacy agencies like ARAS and DACSSA, as well as other community-based agencies, the warm referral process and referring matters in collaboration can be undermined as there is no actual capacity of services to respond.

the NDIS, according to the latest quarterly report.' These statistics are useful in the context of the AAS Act, Purple Orange noted, when considering where the responsibility lies between Commonwealth and State-based services and how many participants living with disability require safeguarding oversight separately to the NDIS Quality and Safeguards Commission processes.

⁹⁵⁴ For example, ARAS assists people where they make first contact and have given consent. ARAS cannot act without the consent of the adult seeking help and cannot act on a report made on the behalf of someone else.

5.4.10 Another issue widely raised to SALRI was the need for ASU staff, in their interaction with an adult vulnerable to abuse, to be alive to the presence of psychological abuse and its effect and implications on both that individual's capacity and consent, and to be satisfied that the individual is making a free and voluntary decision.⁹⁵⁵

Reporting Process and Response

5.4.11 There was wide support for the retention of the mandatory assessment, with some parties and practitioners pointing to publicised failures at the Department for Child Protection where multiple reports have been made and no action taken. SALRI's session with the disability community expressed strong support for the current mandatory assessment, as it combats the institutionalised discrimination and distrust in government bodies that persons with disability often experience. It was suggested that the mandatory response helps instill trust in the ASU.

5.4.12 There was some support in SALRI's present consultation, though very limited, for a mandatory reporting system, whether generally or for certain roles and occupations. Some lawyers such as Mr Westley and Mr Norcock favoured this idea as it would place an obligation on lawyers to report unscrupulous activity or concerns over the welfare of a client and also offer them protections for reporting. Several parties drew on the child protection context. However, the suggestion of mandated reporting of the abuse of older persons and/or persons with disability was not supported by most other parties. The professional, practical and logistical implications were noted to SALRI, as was its 'patronising' effect on the autonomy of older persons and persons with disability.⁹⁵⁶ At SALRI's health practitioners roundtable some attendees noted that mandatory reporting might be suitable if the ASU was focused only on adults with impaired decision-making capacity, but would not be suitable otherwise.

5.4.13 SALRI has previously considered at some length the question of mandatory reporting of financial and other abuse.⁹⁵⁷ Mandatory reporting of financial abuse of vulnerable adults prompted much debate in SALRI's EPA consultation and no consensus emerged.⁹⁵⁸ There was a stark division in opinion (sometimes even at the same consultation meeting) amongst legal and health practitioners and interested parties. Dr John Brayley, the Chief Psychiatrist, saw a case for mandatory reporting of the suspected abuse (including financial abuse) of a vulnerable adult. Some parties supported a general requirement to report suspected financial abuse of older persons or persons with disability, viewing it as necessary measure to protect vulnerable individuals and as a logical extension of the existing duty of reporting suspected child abuse. Some opposed any such requirement and viewed it as impracticable, if not unworkable.⁹⁵⁹ Others supported an intermediate approach, requiring certain occupations (such as banks) to report such suspected financial abuse.

⁹⁵⁵ See Parts 6 and 7, Recommendations 25 and 30.

⁹⁵⁶ It was noted that older people and adults with disability should not be compared with young children.

⁹⁵⁷ Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Powers of Enduring Attorney in South Australia* (Report No 15, December 2020) 245–9 [6.3.28]–[6.3.43], 249–53 [6.3.46]–[6.3.73], 257–60 [6.3.100]–[6.3.115], Recommendation 92.

⁹⁵⁸ Ibid 249–53 [6.3.46]–[6.3.73].

⁹⁵⁹ It was noted that the resources and processes are simply not in place to effectively respond to such reports and any such system would simply be ineffective and 'swamped and overloaded', drawing on the situation said to exist with existing child abuse reporting notifications.

Assessment vs Investigation Process

5.4.14 The South Australian Ombudsman, during a recent external review of an ASU decision, both found little distinction between an assessment and an investigation in terms of their utility, as both appear to be used to obtain information about a case.

5.4.15 The assessment process in s 23 of the *AAS Act* has some guidance as to what is required but the investigation process in s 26 is silent as to the manner in which an investigation will be conducted. The lack of clarity prevents an adult from identifying ‘when one process has ended and another begins’. The Ombudsman suggested the Director’s power under s 23 to require a person to produce a written statement of information or answer specified questions appears to be one which would be more appropriately conferred only once an investigation has commenced. It is also noted that the requirement in s 23(4) to document all actions taken during an assessment is not replicated for the investigation process which may impact the ‘efficiency of a subsequent internal and external review under sections 38 and 40 respectively’.

5.4.16 The OFAW submission clarified that part of the assessment process may include seeking relevant information verbally from other organisations and persons involved with the person at the subject of the report and making an announced or unannounced visit to the person’s home or other relevant location to speak with the adult who may be vulnerable to abuse. At present, s 23 of the *AAS Act* does not expressly provide for these actions to be undertaken by the ASU (however, it does not prohibit them either). SALRI considers it could be valuable for s 23 of the *AAS Act* to be amended to take these actions as part of an assessment.

5.4.17 The Ombudsman also raised that there is no requirement for a person to be notified about the outcome of an assessment, which may impact on a person’s right to apply for an internal or external review of any decisions made. Although it might not be appropriate to notify the alleged perpetrator, the person experiencing abuse, or the reporter about the outcome of the assessment, the OPA thought that there may be some benefit in introducing a provision to the *AAS Act* requiring that any person notified of the ASU undertaking an assessment be notified of its outcome.

Powers of Investigation

5.4.18 There were divergent views in consultation on the question of whether the ASU should utilise their s 19 investigative powers more frequently. Some parties, particularly NGOs and advocacy bodies for older people and disability rights groups, noted that the ASU appears reluctant to use their strong powers of investigation on occasion, but paradoxically may often do more harm than good by taking alternative measures that are more likely to be long term or even lifelong, such as seeking a guardianship or administrative order for an adult who lacks decision-making capacity.

5.4.19 The ASU advised SALRI that a situation has yet to arise where it had concluded it necessary to exercise its robust powers under s 19 of the *AAS Act*:

The primary reason that the statutory powers of investigation have not been exercised to date is because, before exercising powers, an authorised officer will always seek the voluntary cooperation of the relevant adult, family member, or other person of interest and will only consider exercising formal powers if the person does not cooperate or it is not reasonably practicable to seek their cooperation ... In cases where a practitioner is experiencing some opposition from a person of

concern, the act of advising the person that the powers exist and may be exercised is enough to encourage the person to engage voluntarily with the Unit.⁹⁶⁰

5.4.20 One attendee at the NGO Adelaide roundtable asked ‘what is stopping [the ASU] from investigating?’ Some consultees questioned the rationale and utility of the ASU without the use of these powers and that, as a regional lawyer stated, ‘if the ASU does not take an interventionist approach, which body will and can take action on those findings?’ Many parties told SALRI that the ASU is unique for its investigative powers, and even though this may appear at odds with a rights-based approach, it may well help safeguard the person. However, a few consultees favoured a fully human rights centred approach and found that, regardless of the urgency or severity of a situation and the risk of harm, the adult’s autonomy should be conclusive and these powers should not be used. This was a minority view. The broad theme relayed to SALRI from legal and health practitioners, service providers, representative groups and community members was that the wide ASU powers in the *AAS Act*, even if not utilised to date, are appropriate and necessary for the ASU to properly exercise its vital function of safeguarding the rights of adults who may be vulnerable to abuse, especially in more serious and/or urgent cases.

5.4.21 ARAS aptly coined it a ‘delicate balance’ between a strong rights-based approach, upholding the dignity and autonomy of an adult, and a ‘paternalistic approach’ in protecting and safeguarding an adult who may be vulnerable to abuse. However, ARAS highlighted its concerns about the serious physical or financial abuse of adults vulnerable to abuse and suggested in such cases it may well be appropriate for the ASU to exercise these powers. They welcomed, for example, a stronger approach in certain circumstances such as using the strong intelligence gathering powers to obtain information from organisations and make inquiries in order to further evaluate a situation, or otherwise build evidence to protect the at-risk older adult from harm.

5.4.22 The other concern raised by the ASU practitioners was the lingering question of: ‘What do we do after an investigation?’ The *AAS Act* is silent about this which highlights the need to add multiple pathways after an investigation is conducted, such as being able to go to SAPOL, or providing information to the person making the report. The Code of Practice provides that if during an investigation an offence has been or is likely to be committed against a person reported to be experiencing abuse, the ASU should refer the allegation to police without obtaining the victim’s consent.⁹⁶¹ The OFAW considered that this point needs to be included in the *AAS Act* as an express option, alongside safeguarding functions or other actions that the ASU considers appropriate. SALRI agrees with this suggestion. It will bring greater clarity to functions and processes of the ASU.

Information Sharing

5.4.23 The information sharing provisions in the *AAS Act* were widely appreciated and were often commended in consultation for their ease of use and effectiveness. Current ASU practitioners told SALRI that the information sharing provisions are a valuable and a unique aspect of the ASU. There was strong support for the retention of these provisions in the *AAS Act* to allow the ASU to gather information from a range of sources when assessing and responding to suspected abuse.

⁹⁶⁰ Several parties such as ARAS and legal practitioners expressed the view to SALRI that, on occasion, at least in respect to what they viewed as serious abuse, the ASU has proved too cautious and could have taken a more robust approach and utilised these powers.

⁹⁶¹ Office for Ageing Well, Government of South Australia, *South Australian Adult Safeguarding Unit Code of Practice* (2019) 23.

5.4.24 The information gathering provisions that do not require the consent of the adult who may be vulnerable to abuse was viewed as particularly critical at the assessment stage. They allow the ASU to determine the most appropriate action following assessment, to gather information about the risks for staff and the person, as well as any information relevant to the concerns such as current support, decision-making capacity and legal orders.

5.4.25 One concern pointed out to SALRI by Government employees was that the ASU's information sharing arrangements operate at a State level and the Commonwealth's rules restrict the ability of relevant federal agencies to share such information at a State level.

Safeguarding

5.4.26 There was virtually unanimous and strong support to SALRI for safeguarding to be defined in the *AAS Act*.⁹⁶² SALRI's consultation revealed that assessment and investigation are important functions but are not in and of themselves enough to provide adequate safeguarding measures. Safeguarding responses need to lead to outcomes to increase safety, reduce risk, prevent abuse and stop the abuse. The OFAW and ASU joint submission emphasised the importance of safeguarding functions in the role of the ASU and stated that in practice these safeguarding responses are developed through using 'professional and clinical judgement to tailor the response to the needs, circumstances and wishes of the individual'.

5.4.27 All consultees agreed that, to allow for greater flexibility in the *AAS Act*, safeguarding should be an action included in the ASU process of responding to reports. Other submissions to SALRI raised that the safeguarding response also needs to be accessible to all people,⁹⁶³ with a minimum of ensuring that adults are supported in whatever way necessary to give or withdraw their consent, and whatever actions are taken are communicated to the person in their chosen modality.

5.4.28 When asked what actions would constitute 'safeguarding actions', a wide range of answers were provided to SALRI in consultation.

5.4.29 Dementia Australia in their submission to SALRI suggested that a safeguarding response may involve exploring the person's support network beyond their carer supports, understanding the person's history, knowing what the barriers to accepting assistance could be, providing them with the necessary information in an accessible way, and maintaining a discussion with the person, either directly through the ASU, a trusted health practitioner or another specialist agency.

5.4.30 Safeguarding plans were recognised as a valuable safeguarding resource. The OPA suggested that the value of including a safeguarding plan within the suite of actions available to the ASU may 'better reflect the actual operation of the Unit and could strengthen this important component of their work'. The OFAW noted safeguarding plans should aim towards reducing the risk of future abuse and be developed in accordance with the person's wishes. It was said that these can be formal or informal and develop a range of safeguarding outcomes, including new or additional aged care and NDIS supports being provided to the adult; the adult or person of concern moving to alternative accommodation; supports being provided to safeguard the adult's financial or legal affairs by changing EPAs or Advance Care Directives; or the appointment of a guardian or administrator.

5.4.31 Education was repeatedly raised, notably by the ASU, health practitioners and service providers, to SALRI as a crucial aspect of safeguarding. SALRI was told that education to the individual

⁹⁶² A definition of safeguarding is proposed in part 4.5 ('Definition of Safeguarding').

⁹⁶³ For example, the Speech Pathology Association highlighted that communication access is rarely thought about in relation to safeguarding, or decision-making processes.

concerned can prove very effective. It was observed that, even if the apparent victim initially appears disinterested, such individual education may prove effective at some later stage. Attendees at the Multicultural Communities Council of South Australia's session suggested that the ASU must be able to help with initial consultation and inform the reporter or adult being safeguarded about the resources provided by, or through, the ASU. There is great importance in 'making sure your voice is heard'. As one ASU practitioner stated, the value of providing educational material is 'not to be underestimated'. ARAS submitted the view that in the case where an individual does not consent to intervention, proceeding with a 'soft touch' approach is best where there is an education focus. Health practitioners in Mount Gambier suggested that, in instances where an adult might be unaware that an action might be abuse, the role of the ASU is to provide the adult with information about the circumstance, the possible outcomes and issues, so the adult can make an 'informed decision' about the action they want to take.

5.4.32 Many survey respondents and consultees noted that safeguarding actions include low-level interventions that can be properly taken without the consent of the adult who may be vulnerable to abuse, such as providing educational material, following up with the reporter or vulnerable adult, or providing numbers for referrals. These options empower the adult so they can make an 'informed decision' to decline further assistance. In the event that the adult changes their mind and seeks to engage with the ASU in future, they will have the requisite information and resources to be in a position to do so. The disability community group discussion emphasised that often providing a contact number is not enough, as it might leave potentially vulnerable people with the lingering question of 'what do I say'? Especially for people with disability, face-to-face interactions and in-person assistance was encouraged.

5.4.33 Another safeguarding measure considered to be 'best practice' by many parties during SALRI's consultation, notably by practitioners and service providers, was ensuring reports are followed up, whether this is with the reporter or the adult who may be experiencing abuse. However, it was noted this is perhaps 'idealistic' due to resource and staffing limitations.⁹⁶⁴ The disability community focus group said a follow up is important as the effort involved in keeping in touch with the reporter or the vulnerable adult, if circumstances permit, helps to build confidence in the safeguarding role of the ASU. This duty extends to closing the loop, where appropriate, for reports that have been referred to or from the ASU. A registered nurse who responded to the survey criticised the ASU for failing to provide feedback on any action taken once a report was made, and felt that for 'providers who are involved in the case management of the client there is a need to ensure that concerns about clients who are living in at risk situations are jointly managed.' Cassie Mason and the ASU noted the resource implications of a compulsory follow up and that it also may be unnecessary or unhelpful in some circumstances and may be inflammatory or risky in other circumstances. The ASU suggested that the follow up requirement should not be mandatory, but an available option where circumstances permit, and where it may be of use.

5.4.34 Dispute resolution and mediation was raised by a number of parties as another safeguarding option. The value of mediation was highlighted to SALRI by a group of researchers from the University of South Australia, citing the Eldercaring program.⁹⁶⁵ The OPA noted that dispute

⁹⁶⁴ As expressed by Elicia White, former ASU Chief Adult Safeguarding Practitioner.

⁹⁶⁵ SALRI was informed as to the following work: 'We have been working diligently with a group of stakeholders in Australia, including Relationships Australia and on bringing Eldercaring Coordination to Australia ... conflict within a family can have enormous effects on the health, well-being, and even capacity of an older adult.'

resolution would be a useful tool to have after assessment of a report to resolve issues at an early stage and work with the adult to preserve relationships. Elicia White noted to SALRI that the ASU has not undertaken any mediation to date and where this service is required, the ASU usually refer to Relationships SA or the Office of the Public Advocate. Ms White noted that: 'It is my experience, however, that by the time matters come to the ASU, the conflict is too far entrenched and people do not agree to attend.' A number of service providers who work with vulnerable communities also noted to SALRI that mediation is within the suite of services they have already used or considered before a referral is made to the ASU.

5.4.35 A theme, notably from legal practitioners and organisations representing both the disability community and older persons, was the need for the ASU to take more robust and interventionist safeguarding measures, at least in serious cases of physical or financial abuse.⁹⁶⁶ Another strong, though not universal, theme in SALRI's consultation was that such active measures in serious cases of physical or financial abuse could be taken without the consent of the apparent victim.⁹⁶⁷ The options open to the Director under Division 6 of the *AAS Act* to seek a variety of orders and measures from the Magistrates Court were noted.⁹⁶⁸ Such measures could include an order to stop the sale of a house belonging to an older person that had been obtained or procured by abuse, the removal of the abusive party from the apparent victim's home, requiring the suspected abuser to refrain from certain actions or to prevent someone from acting as an attorney under an EPA. An intervention order could also be sought.⁹⁶⁹

5.4.36 DHS identified that a safeguarding measure should include reporting to the police for high levels of abuse and referrals to appropriate services. Other parties shared this view.

5.4.37 Facilitating a case conference or reaching out to various organisations using the multi-agency approach were seen as valuable options by some parties. In one instance, a health practitioner working with a disability advocacy service who has previously made a report to the ASU noted that the ASU helped the vulnerable adult by finding her a new living situation and helping to prepare a SACAT application. In another instance, the ASU did not resolve the issue, but were useful in

Eldercaring Coordination was developed as a court ordered dispute resolution process developed specifically for families in conflict regarding the care and safety of an aging loved one. Some accountability is optimal since these family members have often been enmeshed in conflict for many years and would have difficulty agreeing on a meeting date, let alone that the sky is blue. Guidelines on Eldercaring Coordination were developed through the collaboration of 20 US/Canadian organizations and 20 statewide entities in Florida convened by the Association for Conflict Resolution (ACR) and the Florida Chapter of the Association of Family and Conciliation Courts (FLAFCC). The Elder Justice Initiative on Eldercaring Coordination has continued to provide education and support for programs initiated or pending throughout the US, Canada and now Australia.' SALRI acknowledges that mediation may well be an effective response, but it is not a universal solution. Elicia White noted that the ASU has had mediation facilities since its establishment, but these have 'only been used a handful of times'. The Western Australian Committee heard in evidence that mediation is successful in elder abuse situations on a '50-50' basis: Evidence to Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen to Me: When Trust is Broken*, Perth, 18 March 2018, 9 (Franca Ottolini, Northern Suburbs Community Legal Centre). See also Law Reform Committee, Parliament of Victoria, 'Inquiry into Powers of Attorney' (Final Report, Parliamentary Paper No 352, August 2010) 200–1; Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, July 2021) 88–9.

⁹⁶⁶ Though Elicia White, Cassie Mason and others cautioned against too ready a recourse to such measures and to respect the dignity of adults and the importance of supported decision-making.

⁹⁶⁷ Cf *AAS Act* s 24. See further below Part 7.6.

⁹⁶⁸ *AAS Act* s 33.

⁹⁶⁹ The utility of an intervention order was also raised by several parties, notably ARAS. Such an order could protect an older person or person with disability from the abuse or exploitation of a 'befriending' neighbour or 'friend'. Such an order may also allow limited contact with an abusive family member, but only on a carefully defined basis. See below Part 10.6.

facilitating a case conference. The outcome was that the individual was removed from her house where she was suffering abuse and neglect.

5.4.38 The OFAW and ASU joint submission ultimately supported a range of safeguarding functions that can cater to differing circumstances and needs and enable the ASU to exercise clinical and professional judgment in determining the most appropriate response to reflect any individual situation. The submission recommended that the range of available safeguarding options should include (but not be limited to):

- Referring the matter and/or investigating the matter themselves; and/or
- Providing information and advice and/or supporting a person to engage with formal support services (including in home supports); and/or
- Supporting a person to engage with informal supports; and/or
- Supporting the person to directly address their concerns with the person carrying out the abuse while seeking to preserve relationships that are important to them and developing a safeguarding plan; and / or
- Coordinating a response where more than service is involved in providing advocacy; and / or
- Any other actions directed at upholding a person's rights and addressing the abuse (that is, a safeguarding response.
- In appropriate cases, taking no further action.

5.4.39 A question that was raised was whether it would be helpful to list these options in the *AAS Act* or if they are better left to the Regulations or Code of Practice.

5.4.40 Adelaide lawyers suggested a list of safeguarding processes are necessary and for the safeguarding action to correspond to the level of risk of a report.

Delegation of Director's Functions

5.4.41 SALRI was told that it is problematic that the *AAS Act* does not allow the Director of the ASU to delegate any of their functions. Cassie Mason, Elicia White and the ASU highlighted the inability for the Director to delegate their decision-making powers under the *AAS Act* as unduly rigid and unhelpful on an operational basis. It was noted that 'low priority and routine tasks' could be properly delegated to the Chief Adult Safeguarding Practitioner or other appropriate staff members. This would also help free up resources, reduce delays in responding to reports, and increase the flow of incoming cases to be dealt with more expediently, therefore enabling greater caseloads. SALRI agrees that the *AAS Act* is unnecessarily constrained in this regard.

Internal/External Review

5.4.42 The Ombudsman raised concerns and problems with the current review process, which impact the ability of the Ombudsman to perform their duties in external reviews.

5.4.43 During the internal review phase, s 38(4) requires the Chief Executive to provide written notice of an internal review determination to an applicant. However, there is no requirement to provide any reasons for that determination. The Ombudsman noted to SALRI that where an applicant is not provided the reasons for a determination, this 'arguably impacts on their ability to make an informed decision as to whether an external review ought to be pursued', as well as raising questions about the transparency and accountability of the ASU.

5.4.44 The Ombudsman added:

Whilst the extent to which reasons can be provided will be limited by the confidentiality provision in the Act and the nature of the information, it should be made clear that reasons for a determination should be provided where possible. This would also ensure consistency across the internal and external review processes, the latter requiring reasons for a determination to be given. Noting that applicants may not be overly familiar with the provisions of the Act, it is suggested that an internal review determination include a section advising the applicant of their further external review rights.

5.4.45 The second issue raised with the internal review provisions was that they contain no timeframe for the internal review to be conducted. The Ombudsman recognised the difficulty of setting one timeframe to apply to all internal reviews, ‘however, this is far outweighed by the need to preserve an applicant’s further review rights.’ The Ombudsman suggested a timeframe be introduced to the *AAS Act* and for the Act to stipulate that a failure to make a determination within that timeframe is to be taken to amount to a determination that the decisions under review have been confirmed.

5.4.46 Regarding the external review process, s 40(1) states that if a person is dissatisfied with an internal review determination, and the determination relates to circumstances in which a vulnerable adult is or is suspected of being at risk of serious abuse, the person may apply to the Ombudsman for an external review. A recent external review of an ASU decision by the Ombudsman was provided to SALRI which demonstrated that the operation of the ASU provision is unclear in circumstances where the adult vulnerable to abuse has died since applying for review. The Ombudsman proposed that s 40(1) should be amended to enable the Ombudsman to conduct or continue an external review if it is considered to be in the public interest.

5.4.47 Section 40(8) additionally requires the Ombudsman to notify the applicant, the Chief Executive and the ASU of an external review determination. The Ombudsman suggested that the adult vulnerable to abuse should also be given a copy of the Ombudsman’s determination and reasons to ensure consistency with the South Australian *Charter of the Rights and Freedoms of Vulnerable Adults*.

Confidentiality

5.4.48 The Ombudsman suggested that, much like the confidentiality provisions provided in the *Children and Young Person (Safety) Act 2017* (SA), an additional confidentiality provision should be included in the *AAS Act* to protect the identity of a person who makes a report to the ASU under s 22, unless that person consents to the disclosure of their identity. These confidentiality provisions were reiterated in the report by the Victorian Public Advocate which encouraged that ‘callers should be protected from any adverse consequences of making such a report.’⁹⁷⁰

5.4.49 SALRI notes that protecting the reporter is particularly important given that the reporting of suspected abuse is voluntary, and there should be encouragement to report abuse to the ASU.

5.5 SALRI’s Observations and Conclusions

5.5.1 SALRI notes that the recommendations made below with respect to the processes and operational practices of the ASU cannot operate in isolation. A common theme in SALRI’s

⁹⁷⁰ Office of the Public Advocate (Vic), *Line of Sight: Refocussing Victoria’s Adult Safeguarding Laws and Practices* (Report, August 2022) 48.

consultation was that there is no ‘one size fits all’ approach to safeguarding the rights of adults vulnerable to abuse. Ultimately, ‘neither the Bill nor the safeguarding unit itself is going to stop abuse’.⁹⁷¹ There is a need for a wider systematic approach as SALRI was often reminded.⁹⁷² It comes down to the community taking an active role in changing social perceptions and norms to call out wrong behaviour and to report it to the relevant authorities when necessary.

Triage Model

5.5.2 The OFAW declared that it is essential for the legislation to be ‘contemporary, flexible and enabling’ and drafted with ‘future proofing’ in mind, to ensure it remains relevant for both current and future generations of South Australians.

5.5.3 As was the original intention for the ASU, SALRI recognises the need for a ‘no wrong door response’⁹⁷³ in the adult safeguarding context. The recent report by the Victorian Public Advocate identified the absence of a ‘central point for service providers and the public to report concerns about abuse, neglect or exploitation of an at-risk adult’ to help fill the gaps in the safeguarding system.⁹⁷⁴

5.5.4 The ASU should act as the central point of contact to either deal with a report themselves or to refer it, whether formally or not, to a more suited agency. Many parties agreed, arguing there is ‘merit in having a single place where people can go for guidance and support’ and that this corresponds with the original intention for the ASU.⁹⁷⁵ It is recognised that ‘it is very difficult for third parties who are concerned about an at-risk adult experiencing abuse to know where to go for help’.⁹⁷⁶ SALRI’s suggested new triage model, formulated during the consultation process, serves to expedite cases, reduce the backlog of cases and provide a clear point of contact for the community to raise their concerns.⁹⁷⁷ SALRI’s consultation revealed considerable support for the introduction of a triage model for the ASU to be underpinned by the *AAS Act*, the Regulations and Code of Practice. The Victorian Public Advocate added that:

[T]he role of an adult safeguarding agency is likely to include coordinating legal, medical and other ‘mainstream’ services needed by the client. 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.⁹⁷⁸

5.5.5 SALRI proposes that the first step of the process would be for the ASU to fully utilise their assessment phase, gathering ‘as much information as possible’ to best determine what action they

⁹⁷¹ South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3594 (Natalie Cook).

⁹⁷² See also above Part 1.6 (‘A Wider Approach’).

⁹⁷³ South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3555 (Vickie Chapman, Attorney-General).

⁹⁷⁴ Office of the Public Advocate (Vic), *Line of Sight: Refocussing Victoria’s Adult Safeguarding Laws and Practices* (Report, August 2022) 13.

⁹⁷⁵ Office for the Ageing, SA Health, *Elder Abuse Responses: Safeguarding the Rights of Older South Australians* (Consultation Outcomes Report, 2018) 8.

⁹⁷⁶ Office of the Public Advocate (Vic), *Line of Sight: Refocussing Victoria’s Adult Safeguarding Laws and Practices* (Report, August 2022) 48.

⁹⁷⁷ South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3591 (Matthew Cowdrey).

⁹⁷⁸ Office of the Public Advocate (Vic), *Line of Sight: Refocussing Victoria’s Adult Safeguarding Laws and Practices* (Report, August 2022) 44.

should follow.⁹⁷⁹ A submission to the ALRC by the Law Council of Australia noted that ‘without proper investigation it is often impossible to identify or respond to individual allegations of abuse’.⁹⁸⁰ Currently, the assessment phase involves a comprehensive information gathering process to ascertain if abuse has occurred or there is a risk of abuse occurring, and to understand the situation and needs of the adult who may be vulnerable to abuse. The ASU should continue to make this assessment phase comprehensive to identify the best course of action to take once an assessment is complete. It is noted that the depth of assessment required will vary from case to case.

5.5.6 Although the *AAS Act* does not specify how assessments should be undertaken, the ASU operating guidelines and internal processes provide some guidance on what should be taken into consideration in assessing any report of abuse,⁹⁸¹ including the type of abuse, indicators of abuse, likelihood of the abuse reoccurring; impact of the abuse; severity of risk; risk factors for the adult (why the adult is considered vulnerable); and any safeguards already in place.⁹⁸² This mechanism for the operation of a triage model will assist in determining the urgency of a report and which organisation or agency is best situated to help.

5.5.7 Under the *AAS Act*, currently once the ASU completes an assessment, they must either investigate the matter, refer the matter, or take no further action. SALRI is of the view that these options are unduly narrow and prescriptive in nature and do not reflect the breadth of actions that the ASU takes in practice. SALRI finds it is necessary for greater flexibility to exist in the *AAS Act* to provide for more options once the ASU concludes the assessment process. A range of actions should be included such as the option to refer out cases to other organisations and agencies using formal or informal means, provide educational material, coordinate a case conference, and put in place safeguards for the adult according to each individual case. Providing advice to callers was repeatedly raised in SALRI’s consultation as one of the strongest aspects of ASU’s functions, but it is currently not adequately captured in the *AAS Act*.

5.5.8 Furthermore, the *AAS Act* was originally intended to enable the ASU to refer matters to other appropriate agencies such as SAPOL, the Ombudsman, the Commonwealth Aged Care Complaints Commissioner, and other bodies as required and on a ‘case-by-case’ basis.⁹⁸³ The NSW Ageing and Disability Commission has an express requirement to refer information to certain bodies such as the Health Care Complaints Commission, Aged Care Quality and Safety Commission and NDIS Quality and Safeguards Commission. The OFAW supported adding such a provision to the *AAS Act*.

5.5.9 The ease of referrals to various organisations and bodies is integral to this model. As the OPA aptly summarised:

[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

⁹⁷⁹ Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 12.

⁹⁸⁰ Law Council of Australia, Submission No 351 to the Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (6 March 2017) 384.

⁹⁸¹ Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 11.

⁹⁸² Adult Safeguarding Unit, Department for Health and Wellbeing, *Standard Operating Procedures* (July 2019).

⁹⁸³ South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1716 (Stephen Wade, Minister for Health and Wellbeing).

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 would take an active role in providing information about the matter to the referral body to ensure referral fatigue and the trauma of recounting the instance of abuse is reduced.

5.5.10 SALRI considers that the ASU should have the power to refer reports to organisations and agencies for other reasons (such as providing educational material or increasing community connections) which s 25 does not adequately capture. In this way, coordinating a multi-agency response and collaborating with other government bodies was considered during the development of the 2018 Amendment Act setting up the ASU as the ‘optimal response’.¹⁸ SALRI’s proposed model, which received strong support in both Adelaide and regional consultation, will help to ensure that an adult receives the support they seek. SALRI also recognises that establishing effective protocols for working with other organisations and services is critical to strengthening effective referral pathways.⁹⁸⁴ SALRI emphasises that the referral process is not a ‘means for evading responsibilities’⁹⁸⁵ but rather a way for the vulnerable adult to receive the most targeted, personalised service that suits their circumstances. It will be necessary for the ASU to be able to follow up the matter as they see fit (which may well include follow up contact).

5.5.11 The option to ‘monitor an issue’ also provides the ASU the option to follow up on a referral or report made to the ASU if no action was taken at first instance.⁹⁸⁶ This importance of following up with the reporter was also raised by many parties, notably service providers, the disability sector and community and health practitioners as an issue of key importance to increase trust in the ASU and to increase transparency and accountability. SALRI accepts that there are instances where a mandatory follow up could be unsuitable like where it would endanger the adult in question, as informed by ASU practitioners. Disability service providers and health practitioners in Mount Gambier supported having a follow up, but recognised that the level of follow up and other interventions required will depend on how serious the abuse is. They suggested a tiered approach. SALRI was told it is operational best practice for the ASU to follow up with the person who made the report, the vulnerable adult, with organisations who have referred a matter to the ASU or bodies to whom the ASU has referred a matter. The follow up is necessary in order to close the feedback loop and implement a clear line of communication. The Tetra Tech review also proposed that the ASU should establish protocols for closing information and feedback loops to build and maintain effective key stakeholder relationships.⁹⁸⁷

5.5.12 SALRI recognises the importance of being able to refer reports to other agencies where appropriate. Conversely, it is important for the ASU to retain the ability to follow up on what happened to a referral, how the matter was dealt with by the agency, to talk to the vulnerable adult and any other person or organisation to ensure that appropriate action has been taken or if further support is

⁹⁸⁴ Office for the Ageing, SA Health, *Elder Abuse Responses: Safeguarding the Rights of Older South Australians* (Consultation Outcomes Report, 2018) 8.

⁹⁸⁵ Explanatory Memorandum, Office for the Ageing (Adult Safeguarding) Amendment Bill 2018 (SA) 16.

⁹⁸⁶ SALRI notes this also reflects operational best practice. See above Part 5.4.

⁹⁸⁷ Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 29.

required,⁹⁸⁸ and to ensure the vulnerable adult has been adequately assisted as to the matter.⁹⁸⁹ There is no current requirement to inform the caller about the outcome of a report, but the ASU can choose to do this. One problem the ASU may face in closing the loop is obtaining the consent of the person at risk before information is shared. This is likely where the adult has capacity and has declined further action or does not want others to know what action is being taken.⁹⁹⁰ However, many consultees recognised that advising callers of outcomes is important to maintain community confidence and reinforce that those concerns are taken seriously by the ASU. The appropriateness of notifying the alleged perpetrator, the person experiencing abuse, the organisation who referred to the matter to the ASU, or the reporter about the outcome of the assessment will vary from case to case. SALRI suggests there is benefit in including a broad follow-up/monitoring function following an assessment to include bodies who have referred cases to the ASU, or to advise the person who made the report, unless it places the vulnerable adult at risk, or it would be inappropriate in the circumstances. There is also value in a separate provision for the reporter notified about the outcome of an assessment to inform a person's review rights.

5.5.13 In addition to the range of safeguarding measures available to the ASU the *AAS Act* should be able to take no further action as there will obviously be circumstances where the matter is appropriately being managed or is being dealt with already. In such a case, there is 'no ongoing role' for the ASU.

5.5.14 A shortcoming of the proposed triage model is the reliance upon the ASU gathering adequate information in the assessment process to effectively decide who is best to deal with the report. Anonymous calls may be problematic. SALRI recognises there may be instances where a report is received and the ASU is unable to deal with the report or refer it to another agency.⁹⁹¹ In NSW, it was expected that in cases 'where there is no other avenue to pursue investigations, the safeguarding agency would lead the investigation'.⁹⁹² Although the 'ASU cannot help everybody'⁹⁹³ and was intended to fill a particular service gap, it is expected that a majority of cases will be appropriately handled.

5.5.15 It is also critical for the ASU to establish clear guidelines or protocols on the areas of overlap or the distinct roles of the Disability Rights Commissioner, NDIS Quality and Safeguards Commission, Aged Care Quality and Safety Commission and the ASU. The changes in the service landscape from a State based system to Commonwealth provided services leads to potential barriers in the ability of the ASU to obtain information from these organisations or use the information sharing guidelines. However, through consultations with those agencies and memorandums of agreements to

⁹⁸⁸ Office for the Ageing, SA Health, *Elder Abuse Responses: Safeguarding the Rights of Older South Australians* (Discussion Paper, 2017) 8.

⁹⁸⁹ South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1716 (Stephen Wade, Minister for Health and Wellbeing).

⁹⁹⁰ Office for Ageing Well, Government of South Australia, *South Australian Adult Safeguarding Unit Code of Practice* (2019) 12.

⁹⁹¹ SALRI notes that, for example, if its proposed recommendation as to the definition of abuse be accepted, reports of abuse outside that definition would fall outside the ASU's remit. See below Part 9.6.

⁹⁹² NSW Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 217.

⁹⁹³ Several parties disagreed with this proposition, notably at SALRI's Adelaide expert roundtable. However, SALRI is of the view that it is impracticable and unrealistic for the ASU to somehow assume responsibility for the abuse of all adults and its focus should be on those adults vulnerable to abuse who fall within the definitions proposed by SALRI, reflecting its original intended rationale.

share information, the ASU can continue to develop relationships and collaboratively work towards a safeguarding response.

5.5.16 The report by the Victorian Public Advocate highlighted the challenges and changes with the transition from state to federal funding for services in disability and aged care sectors but found it ‘imperative’ for Victorians not covered under the federal safeguarding arrangements to be protected by Victorian safeguards and ‘that the interface between the Victorian and Australian safeguards operates effectively.’⁹⁹⁴

5.5.17 Based on its research and consultation, SALRI recommends that s 23 of the *AAS Act* be amended to provide greater flexibility for ASU practitioners to take any appropriate safeguarding action(s) they consider necessary in the circumstances when responding to a report of suspected abuse. To provide greater clarity and certainty to ASU practitioners, the following should be provided as options for the ASU following an assessment of a report of suspected abuse:

- (a) Providing information or advice to the reporter or other person(s) involved in the ongoing care or support of the adult (can be done without consent);
- (b) Supporting a person to engage with informal supports;
- (c) Monitoring the issue;
- (d) Investigating the matter (as in the current legislation);
- (e) Referring the matter (as in the current legislation);
- (f) Report the matter to a more appropriate safeguarding body;⁹⁹⁵
- (g) Any other safeguarding action the ASU considers appropriate in the circumstances;
- (h) If no other action is suitable, take no further action (as in the current legislation).

These options could be provided for in either the *Ageing and Adult Safeguarding Regulations 2019* (SA) or the Code of Practice.

5.5.18 SALRI further suggests that a provision be introduced to the *AAS Act* mandating the reporter to be notified about the outcome of an assessment, to better inform a person’s review rights. However, SALRI recognises that there may be instances where advising the reporter of the outcome of an assessment is not always suitable such as where it may place an adult who is the subject of the report or another person at risk. It is therefore advisable that a reporter should only be notified about the outcome of an assessment where it is safe, practicable, and appropriate to do so.

Safeguarding Actions

5.5.19 As stated in the Safeguarding Task Force Report, there is no ‘silver bullet’ to solve every person’s circumstance and safeguarding issues.⁹⁹⁶ As a recent report by the Public Advocate highlights:

⁹⁹⁴ Office of the Public Advocate (Vic), *Line of Sight: Refocussing Victoria’s Adult Safeguarding Laws and Practices* (Report, August 2022) 8.

⁹⁹⁵ This would be intended to capture making a report to the NDIS Quality and Safeguards Commission, Aged Care Quality and Safety Commission and other similar bodies where the report falls within their remit.

⁹⁹⁶ Kelly Vincent and David Caudrey, *Safeguarding Task Force* (Report, 31 July 2020) 21.

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?⁹⁹⁷

5.5.20 There was near universal agreement that there should be greater flexibility in the *AAS Act* (supported by the Regulations and Code of Practice) and that safeguarding should be an action explicitly included in the process of ASU responding to reports and making these safeguarding responses accessible. It is unnecessary and unhelpful to prescribe every conceivable type of safeguarding action in the *AAS Act*.⁹⁹⁸ However, it is crucial that examples of safeguarding actions should be detailed in the Regulations, Code of Practice, or Standard Operating Procedures to guide and assist ASU practitioners. SALRI notes that, although a question of legislative drafting, it is unnecessary to add safeguarding actions as examples in the *AAS Act*.

5.5.21 Many survey respondents and consultees noted that safeguarding actions include low-level interventions that can be properly taken without the consent of the adult who may be vulnerable to abuse, such as providing educational material, following up with the reporters or vulnerable adult, or providing numbers for referrals. This is consistent with the principles of the *AAS Act* which direct that safeguarding measures should be least interventionist and least intrusive to the adult in question.⁹⁹⁹

5.5.22 Providing information, advice, and informational material was supported as a key safeguarding function by a range of people during SALRI's consultations, including the OFAW and ASU. This approach will enable adults to make an informed decision about what action they want the ASU to take, if any, and provide them with resources and information for future use if needed. According to the 2021–2022 ASU Annual Report data¹⁰⁰⁰ of the 76 reports requiring safeguarding that have been closed, information and education were provided in more than half the cases.¹⁰⁰¹ SALRI considers this should be expressly included as a safeguarding response following an assessment.

5.5.23 Having other softer mechanisms in place is crucial because in many relevant relationships, especially with respect to elder abuse, 'people want the abuse ... to stop, but they don't want to lose the relationship'.¹⁰⁰² There needs to be a considerate and tactical approach in dealing with what can be traumatic or tense situations. A high volume of the reports that the ASU receives relates to unintentional or unwitting abuse (such as abuse attributed to confusion or misunderstanding) so even where an investigation has been conducted, the 'focus remains on preserving family relationships'.¹⁰⁰³

⁹⁹⁷ Office of the Public Advocate (Vic), *Line of Sight: Refocussing Victoria's Adult Safeguarding Laws and Practices* (Report, August 2022) 101.

⁹⁹⁸ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 404.

⁹⁹⁹ *AAS Act* s 12(j).

¹⁰⁰⁰ Provisional data was provided to SALRI by the ASU ahead of their official Annual Report in October 2022.

¹⁰⁰¹ See below Appendix B: particularly Safeguarding Response 2021–2022 table. The percentage of cases where information and education were provided is 61.8%.

¹⁰⁰² South Australia, *Parliamentary Debates*, Legislative Council, 29 May 2018, 251 (Mark Parnell). See also, eg, Rosslyn Monro, 'Elder Abuse and Legal Remedies: Practical Realities?' (2002) 81 (Spring) *Reform* 42; Natalia Wuth, 'Enduring Powers of Attorney: With Limited Remedies: It's Time to Face the Facts' [2013] 7 *Elder Law Review* 1–30; Kelly Purser et al, 'Alleged Financial Abuse of Those Under an Enduring Power of Attorney: An Exploratory Study' (2018) 48(4) *British Journal of Social Work* 887, 895; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, 'Elder Abuse in New South Wales' (Report No 44, June 2016) 121–2 [8.1]–[8.4].

¹⁰⁰³ Adult Safeguarding Unit, *2020–2021 Annual Report* (Report, 2021) 21.

This ‘softer’ approach has also been viewed as more appropriate to balance the need to safeguard vulnerable adults while respecting their right to autonomy.¹⁰⁰⁴ The ASU could monitor the report and, according to best practice, follow up the matter with the adult within a negotiated timeframe in circumstances where the adult initially refused assistance.¹⁰⁰⁵

5.5.24 Mediation was considered by a number of older persons in the community to be a useful early intervention tool to facilitate family conversations, prevent the possible escalation of abuse¹⁰⁰⁶ and also maintain relationships if the adult so desires.¹⁰⁰⁷ The role and value of ADR such as mediation (potentially through SACAT) was raised in both the current reference and SALRI’s EPA reference¹⁰⁰⁸ in having a role in resolving at least some disputes (especially involving friction within a family). There are already established processes and expertise which can be drawn upon, noting the effective approach adopted to dispute resolution involving ACDs under the *ACD Act* by the Office of the Public Advocate.¹⁰⁰⁹

5.5.25 One potential service brought to SALRI’s attention during consultation is Eldercaring Coordination, a dispute resolution process aimed at family conflicts that is used in some States in the United States.¹⁰¹⁰

5.5.26 The 2021 AIFS study revealed that ‘some participants described how engaging in mediation, counselling or obtaining legal advice or support was an effective response to the abuse’¹⁰¹¹ while others found it ineffective in circumstances where the perpetrator does not listen, it did not resolve the pertinent issues, legal action was ignored or not understood by the perpetrator or restraining orders were flouted and did not prevent the perpetrator from reoffending.¹⁰¹²

5.5.27 SALRI recognises that such mediation is not a universal solution.¹⁰¹³ ARAS and other service providers noted the real risk of victimisation by compelling the victim of often serious criminal

¹⁰⁰⁴ Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 26.

¹⁰⁰⁵ Office for Ageing Well, Government of South Australia, *South Australian Adult Safeguarding Unit Code of Practice* (2019) 20.

¹⁰⁰⁶ Office for the Ageing, SA Health, *Elder Abuse Responses: Safeguarding the Rights of Older South Australians* (Consultation Outcomes Report, 2018) 4.

¹⁰⁰⁷ Office for the Ageing, SA Health, *Elder Abuse Responses: Safeguarding the Rights of Older South Australians*, (Discussion Paper, 2017) 10.

¹⁰⁰⁸ Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 323–4 [7.6.11]–[7.6.19], 369 [7.6.55]. See also Law Reform Committee Parliament of Victoria, ‘Inquiry into Powers of Attorney’ (Final Report, Parliamentary Paper No 352, August 2010) 200–1.

¹⁰⁰⁹ Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 323–4 [7.6.11]–[7.6.18].

¹⁰¹⁰ SALRI notes the input of a group of researchers based at the University of South Australia who are working towards establishing a pilot program for Eldercaring Coordination with Relationships SA.

¹⁰¹¹ Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, July 2021) 88.

¹⁰¹² Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 88–9.

¹⁰¹³ Elicia White noted that the ASU has had mediation facilities since its establishment, but these have ‘only been used a handful of times’. The Western Australian Committee heard in evidence that mediation is successful in elder abuse situations on a ‘50-50’ basis: Evidence to Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen to Me: When Trust is Broken*, Perth, 18 March 2018,

conduct (which can include sexual or physical abuse) to somehow ‘mediate’ with their abuser. SALRI agrees. How mediation works with a history of coercive control or gaslighting is also problematic.¹⁰¹⁴

5.5.28 SALRI does not oppose mediation in relation to cases involving suggestions of the abuse of older persons or persons with disability. However, it needs to be carefully approached and all necessary steps taken to address the power imbalances stemming from the relationship between the victim and perpetrator. The views of the victim must be respected. Any detailed examination of the role and use of mediation is beyond the scope of this Report. However, SALRI encourages that mediation be included within the suite of safeguarding actions available to the ASU to be utilised in appropriate circumstances.

5.5.29 Safeguarding plans may also be a useful tool in safeguarding where the adult or their support system requires more guidance. It was anticipated that a safeguarding plan would help resolve the issues identified during the assessment or investigation by helping all parties to understand the individual’s wishes and preferences¹⁰¹⁵ and to ‘map out actions to assist in safeguarding their rights and to reduce the risk of future abuse’.¹⁰¹⁶ The Code of Practice suggests that where a report is made, the ASU can work alongside the adult to find out more about the situation and develop a plan for how to reduce or stop the abuse, and prevent the likelihood of future abuse.¹⁰¹⁷ It was expected that a safeguarding plan be established with the active engagement of family and friends of the vulnerable adult.¹⁰¹⁸ Safeguarding plans can be informal or formal in nature and are guided by the adult in question. They include actions like changing banking details, setting up direct debit arrangements, supporting adults to make an EPA, increasing formal support, and assisting the adult to speak with SAPOL or family violence services.¹⁰¹⁹ Some plans can also detail actions to be taken by the ASU or other organisations, include contingency, support or actions plans and review timeframes in which actions should be taken and goals or outcomes sought by the adult.¹⁰²⁰ The plan is then provided to the adult vulnerable to abuse and they will be asked to indicate their agreement that the plan can be amended during the course of the ASU assistance.¹⁰²¹ SALRI finds this approach promising where a vulnerable adult has various support systems in place that require co-ordination to appropriately safeguard the adult.

5.5.30 It was always expected that the ASU would work with other relevant organisations and agencies. One potential safeguarding action, as suggested in the Bill’s explanatory memorandum and

9 (Franca Ottolini, Northern Suburbs Community Legal Centre). See also Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, July 2021) 88–9.

¹⁰¹⁴ Joan Braun, “Elder Guardianship Mediation: Threat or Benefit to Abuse Victims?” (2012) 7 *International Perspectives on Victimology* 27.

¹⁰¹⁵ Office for Ageing Well, Government of South Australia, *South Australian Adult Safeguarding Unit Code of Practice* (2019) 21.

¹⁰¹⁶ Ibid 25.

¹⁰¹⁷ Ibid 8.

¹⁰¹⁸ South Australia, *Parliamentary Debates*, Legislative Council, 23 October 2018, 1722 (Stephen Wade, Minister for Health and Wellbeing).

¹⁰¹⁹ South Australian Adult Safeguarding Unit, *2020–2021 Annual Report* (Report, 2021) 27.

¹⁰²⁰ Office for Ageing Well, Government of South Australia, *South Australian Adult Safeguarding Unit Code of Practice* (2019) 25.

¹⁰²¹ Ibid.

raised by several parties, is convening a safeguarding case conference involving key agencies and organisations.¹⁰²²

5.5.31 The coordination of an ‘inter agency safeguarding meeting’ or a case conference includes the relevant persons and organisations involved in the adult’s life meeting to understand the situation, formulate a response, and monitor progress of the actions taken is also helpful to inform a safeguarding plan.¹⁰²³ This is consistent with the findings of the *Closing the Gaps* Report¹⁰²⁴ and with the underlying principles of the ASU that state the best approach to safeguarding vulnerable adults is through coordinating a multi-agency and multi-disciplinary response.¹⁰²⁵ It was expected that where a safeguarding plan is created, the case should be reviewed at least once every three months (or as required) to determine the efficacy and suitability of the plan.¹⁰²⁶ The OFAW advised SALRI that there are circumstances where a safeguarding plan is inappropriate, such as where the circumstances of the adult experiencing abuse are too volatile and fluctuating to develop a ‘concrete and fit for purpose safeguarding plan’. Conversely, there will be circumstances where a safeguarding plan will prove effective, such as where the ASU is coordinating a multi-agency and/or multi-disciplinary response or where a formal record of the action is required (such as where the person carrying out the abuse agrees to certain actions).

5.5.32 Other actions available to the ASU as recommended by the ALRC include:

- Reporting to police when appropriate and having the capacity to work with police, noting that the body is not intended to prosecute offenders or replace the criminal justice system
- Help[ing] an at-risk adult apply for an apprehended violence order¹⁰²⁷
- Find[ing] a way to have the abusive party removed if they have no right to live there, or help the at-risk person find other accommodation, especially keeping in mind situations of family abuse or violence.¹⁰²⁸

5.5.33 SALRI was informed by the ASU and health practitioners during consultation that the ASU has assisted people to go to SACAT to create guardianship or administration orders as a safeguarding function. The recent report by the Victorian Public Advocate found that:

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.¹⁰²⁹

¹⁰²² Explanatory Memorandum, Office for the Ageing (Adult Safeguarding) Amendment Bill 2018 (SA) 7.

¹⁰²³ Office for Ageing Well, Government of South Australia, *South Australian Adult Safeguarding Unit Code of Practice* (2019) 26.

¹⁰²⁴ South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia’s Response to the Abuse of Vulnerable Older People* (Report, October 2011) 12.

¹⁰²⁵ *AAS Act* s 12(h).

¹⁰²⁶ Office for Ageing Well, Government of South Australia, *South Australian Adult Safeguarding Unit Code of Practice* (2019) 26.

¹⁰²⁷ See below Part 10.6.

¹⁰²⁸ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 405.

¹⁰²⁹ Office of the Public Advocate (Vic), *Line of Sight: Refocussing Victoria’s Adult Safeguarding Laws and Practices* (Report, August 2022) 6.

5.5.34 It is notable that the ASU has no available data in annual reports or elsewhere about how many reports are brought to SACAT's attention each year. It is advisable that this information be recorded moving forward. SALRI does not consider these SACAT applications should be expressly included in the *AAS Act* as a function of the ASU as it might foster a mistaken belief that the ASU is an advocacy body to assist adults with impaired decision-making capacity, which they are not. There are existing bodies that can perform this advocacy function.

5.5.35 SALRI recognises the importance of ensuring that these safeguarding mechanisms are developed to account for the needs of CALD groups, Aboriginal communities, persons with disability and those with complex communication needs as raised by the Speech Pathology Association, the South Australian Council on Intellectual Disability, and others. In order to achieve this, it will be necessary for ASU practitioners to have adequate training and allocated resources to better understand the circumstances, background and needs of the individual. Working collaboratively with other agencies, community groups, and individuals will also help the understanding of certain groups and achieve a respectful and effective response. Cassie Mason additionally highlighted the importance in addressing social isolation and cultural issues when undertaking a safeguarding measure. This is further discussed in Part 11.

5.5.36 A particular concern raised to SALRI by groups representing older persons (especially COTA (SA) and ARAS) and persons with disability was the need to ensure that the capability and expertise of the ASU is not diminished or eroded in relation to responding to either elder abuse or the abuse and exploitation of persons with disability. There were some legitimate concerns about the ASU potentially 'wearing too many hats' and having the responsibility for both elder abuse and the abuse and exploitation of persons with disability. However, the general, though not universal, theme in consultation was the pragmatic acknowledgement that the ASU should retain both roles, but that it is crucial that the ASU staff have the expertise and knowledge base to effectively respond to both elder abuse and the abuse and exploitation of persons with disability and be able to carry out their vital safeguarding role to both classes of adults.

5.5.37 SALRI agrees with the Victorian Public Advocate in that '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.'¹⁰³⁰

5.5.38 SALRI recommends that safeguarding be added as an action that can be taken after an assessment is made under s 23 and after an investigation is carried out under s 26.

5.5.39 SALRI further recommends that the Code of Practice detail what types of actions can constitute this safeguarding function.

Voluntary Reporting and Mandatory Response

5.5.40 Based on SALRI's consultation it is clear that both ASU practitioners and interested parties, practitioners and agencies who work alongside the ASU, as well as community members, favour the mandatory response function of the ASU. This mandatory response function is not incorporated into the NSW model, but a similar duty is placed on local authorities in the UK.¹⁰³¹ Many

¹⁰³⁰ Office of the Public Advocate (Vic), *Line of Sight: Refocussing Victoria's Adult Safeguarding Laws and Practices* (Report, August 2022) 101.

¹⁰³¹ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 405. See above Part 5.2.

parties raised that the mandatory response inspires confidence in the community that a report they make will be duly heard and given proper consideration.¹⁰³² A mandatory assessment is the optimal response to a report even with the proposed triage system as it is necessary to evaluate the substance of the report and determine which organisation would be best placed to deal with the situation, or what action should be taken by the ASU once the assessment is concluded.

5.5.41 A 2009 study concluded that the mandatory reporting of financial elder abuse is ‘intuitively appealing, but is practically difficult and possibly harmful’ and there is no ‘good evidence’ in support.¹⁰³³ Indeed, there is a ‘serious concern’ it may cause more harm than good.¹⁰³⁴ Similarly, the ALRC found a division of opinion in its consultation as to the suggestion of mandated reporting of elder abuse.¹⁰³⁵ Parties such as State Trustees Victoria, National Seniors, Relationships Australia and the Legal Services Commission raised significant concerns with the idea.¹⁰³⁶

5.5.42 The ALRC did note that there is a case for mandating reporting of serious abuse of vulnerable individuals by specific professionals.¹⁰³⁷ In its POA Report, SALRI noted that, although it did not support mandatory reporting, this should not discourage voluntary reporting to the ASU by parties such as the banking sector. Most banks and other financial institutions now have established internal procedures to try to identify the signs of financial elder abuse that may occur even where a valid EPA exists for a customer.¹⁰³⁸

5.5.43 SALRI was aware of the formidable operational implications and noted the suggestion of mandatory reporting raises complex and unresolved considerations of policy and practice. It was significant that there was no consensus in SALRI’s EPA consultation and key agencies and interested parties such as the ASU did not support the proposal.¹⁰³⁹

5.5.44 SALRI adheres to its previous conclusion and reasoning.¹⁰⁴⁰ The question of extending mandatory reporting to the financial and other abuse of vulnerable adults still raises complex issues of policy, practice and privacy and should be left for future and further consideration.

Investigation

5.5.45 The lack of guidance in the *AAS Act* about what an investigation entails was raised in SALRI’s consultation. The Tetra Tech report also noted the brevity of information under s 26 and found it ‘critical’ to provide guidance for ASU staff undertaking investigations.¹⁰⁴¹ SALRI’s consultation highlighted that there is little direction about what the purpose of an investigation is, the

¹⁰³² South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3551 (Christopher Picton).

¹⁰³³ Georgia Lowndes et al, Monash University, *Financial Abuse of Elders: A Review of the Evidence* (Report, 2009) 4.

¹⁰³⁴ *Ibid* 7.

¹⁰³⁵ Australian Law- Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 415 [14.187].

¹⁰³⁶ See *ibid* 415–17 [14.185]–[14.197].

¹⁰³⁷ *Ibid* 415 [14.189].

¹⁰³⁸ Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Powers of Enduring Attorney in South Australia* (Report No 15, December 2020) xxviii n 77

¹⁰³⁹ *Ibid* 259 [6.3.107].

¹⁰⁴⁰ *Ibid* Recommendation 76.

¹⁰⁴¹ Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 16.

distinction between an ‘assessment’ and an ‘investigation’, or what subsequent steps are once an investigation has been undertaken. Indeed, the lack of clarity between an ‘assessment’ and an ‘investigation’ was a recurring theme in consultation.

5.5.46 There is uncertainty as to where an investigation starts and an assessment ends. The utility of an investigation is to gather more information about the circumstances surrounding a report and to determine the best action to take that ensures the safety of the individual. The powers of investigation under s 19 enable authorised officers to collect additional information to better inform themselves of the circumstance surrounding a report.

5.5.47 There was a wide view that the s 19 investigative powers, even though not used to date, are of value and should be retained. The report by the Victorian Public Advocate has also expressed that a ‘safeguarding body needs appropriate functions, powers and resources to investigate instances of possible violence, abuse and neglect of at-risk adults.’¹⁰⁴² Addressing the retention of the s 19 powers, many parties observed that investigative powers could perhaps be utilised more often in practice, where necessary. Other jurisdictions in Australia such as NSW and Victoria, as well as internationally such as Scotland, Wales and British Columbia, have similarly strong powers, with Scotland and Wales going even further to permit ‘protection orders’ and ‘adult protection and support orders’ to be made.

5.5.48 The ASU offers a unique safeguarding response in their ability to access information and talk to the adult who may be vulnerable to abuse through the use of their investigatory powers. The police are not a suitable agency in instances that do not involve clear criminality because ‘the police response will generally be limited to offering referrals to other relevant agencies.’¹⁰⁴³

5.5.49 Despite the s 19 investigation powers not being used to date in South Australia, they can be used as a persuasive tool to obtain information from a person or body, or to examine an adult’s circumstances more thoroughly where necessary. These powers may also prove necessary in an urgent or serious case of abuse. The Regulations or Code of Practice should clarify when an investigation would be appropriate, so that ASU practitioners can be more confident as to when and how to utilise these powers. The s 19 investigative powers can only be used in cases of ‘serious abuse’, but this is not defined in the Regulations or the *AAS Act*, which is unhelpful. SALRI considers that greater clarity in this context is necessary.

5.5.50 SALRI therefore recommends, consistent with its reasoning and findings as to when the ASU should be entitled to intervene without an individual’s consent, serious abuse in s 19 should be clarified to mean serious financial or physical abuse relative to the individual involved.¹⁰⁴⁴ There should also be no requirement of imminence.¹⁰⁴⁵ To confine the use of these powers to imminent, serious abuse may well prove too late and be akin to shutting the stable door after the horse has bolted.

5.5.51 There also needs to be further clarification about the process following an investigation, as the *AAS Act* or Regulations do not provide any guidance on what happens once an investigation is concluded. This was a significant concern raised to SALRI, especially by ASU practitioners. The NSW

¹⁰⁴² Office of the Public Advocate (Vic), *Line of Sight: Refocussing Victoria’s Adult Safeguarding Laws and Practices* (Report, August 2022) 33.

¹⁰⁴³ Ibid 69.

¹⁰⁴⁴ The term ‘serious’ is outcomes-based and should be defined by the impact of the relevant abuse on the individual concerned. See below Part 7.7.

¹⁰⁴⁵ See below Part 7.7.

Ageing and Disability Commissioner is required to report certain matters to police where information in the report may provide evidence of an offence.¹⁰⁴⁶ Similarly in British Columbia, there is a duty upon the designated agency to make a report to the police if they believe an offence has been committed.¹⁰⁴⁷ The OFAW considered that this should be included in the *AAS Act* as an explicit option, alongside safeguarding functions or whatever other actions that the ASU considers appropriate.

5.5.52 SALRI therefore recommends that the *AAS Act* should be amended to include specificity as to the actions that can be taken after an investigation is concluded. One of the options should be an explicit statement in the *AAS Act* that the ASU should refer a matter to SAPOL where they reasonably suspect that an offence has been committed. As part of this referral, any evidence obtained during the ASU's investigation should be permissible and made available to SAPOL. The power to refer to the police is provided for under the s 25 referral powers, but not under s 26 in the investigation powers. This is a potential oversight.

5.5.53 Another action that should be available once an investigation is complete is any safeguarding action that the ASU considers is appropriate in the circumstances. The list of available options should reflect those available to the ASU following an assessment under s 23.

Review Process

5.5.54 The Ombudsman raised specific issues with the internal and external review processes currently available under the *AAS Act*. It is important that the review processes act as an accountability measure not only for the people who perpetrate abuse, but to also ensure the investigation into the abuse is conducted thoroughly and with integrity.¹⁰⁴⁸

5.5.55 The internal review requires the Chief Executive to give written notice of their determination at an internal review but does not require reasons to be provided. Not being provided with the reason for the decision impedes the ability of the adult seeking a review to determine if they have grounds to institute a review with the Ombudsman. Similarly, s 40(8) requires the Ombudsman to provide a copy of the determination, but not the reasons for the decision. SALRI recommends that the reasons for a decision must be provided required once an internal review or external review are concluded. SALRI would also suggest introducing a timeframe within which the internal review must be conducted, to provide greater transparency and accountability.

5.5.56 The issue of conducting or continuing an external review of a decision where the adult in question dies either before or during the review was raised by the Ombudsman as an area of concern. SALRI considers it sensible to remedy the ambiguity of the current legislation and to amend s 40(1) to enable the Ombudsman to conduct or continue an external review process if it is considered to be in the public interest. Therefore, in circumstances where the Ombudsman or another person feels that a situation of serious abuse, or the risk of serious abuse, has not been adequately dealt with by the ASU, the Ombudsman can conduct a review. SALRI supports this proposal.

5.5.57 SALRI suggests that ss 38 and 40 of the *AAS Act* should be amended to ensure that reasons for a decision at review are provided.

¹⁰⁴⁶ *Ageing and Disability Commissioner Act 2019* (NSW) s 13(9).

¹⁰⁴⁷ *Adult Guardianship Act British Columbia* RSBC 1996 c 6 s 50.

¹⁰⁴⁸ Explanatory Memorandum, Office for the Ageing (Adult Safeguarding) Amendment Bill 2018 (SA) 22. The importance of this provision builds from the lessons learned from the Oakden matter, especially the need for increased transparency and accountability.

5.5.58 SALRI also suggests that a time frame be added to s 38 of the *AAS Act* in which the Chief Executive must conduct an internal review of a decision.

5.5.59 SALRI further suggests that s 40(1) of the *AAS Act* be amended to enable the Ombudsman to conduct or continue an external review process if in the public interest.

Information Sharing

5.5.60 The broad information sharing provisions in the *AAS Act* assist the ASU to gain a comprehensive understanding of the circumstances of the adult who is the subject of a report and inform the best course of action to be taken. There was strong support to SALRI for the information sharing provisions in the *AAS Act* to be retained.

5.5.61 The Tetra Tech report suggested that there may be benefit in developing more Memoranda of Agreement with organisations who may have reservations about a blanket information sharing provision.¹⁰⁴⁹ SALRI supports the following suggestion by Tetra Tech:

[The] ASU should also consider establishing relationships and agreements with key federal agencies or bodies that have critical information pertaining to vulnerable adults given the reported challenges with State and Federal information sharing compatibility. This could include exploring approaches for sharing information about a person's finances where there are reports of financial abuse.¹⁰⁵⁰

Delegation

5.5.62 The current assessment process has an inbuilt risk assessment to determine the priority of action from Low–Medium–High with some of the relevant considerations including risks to health, welfare, and financial situations.¹⁰⁵¹ ASU staff have previously suggested an area of improvement would be for low-risk reports, and potentially complex or high-priority reports,¹⁰⁵² to be delegated to the Chief Adult Safeguarding Practitioner (or possibly other ASU staff). For example, the Director's approval is required under s 23(6) if the ASU wants to compel information from a person during the assessment phase. The Tetra Tech report suggested that such delegation would make the assessment process more efficient and result in more timely action.¹⁰⁵³ The Tetra Tech report also suggested that the ASU should consider delegation and automation of approval processes for low-risk reports of abuse and actions to improve efficiency and allow ASU management to focus on strategic matters.

5.5.63 SALRI recommends allowing the delegation of some of the Director's functions. This would promote the effective operation of the ASU and help free up resources, reduce delays in responding to reports and increase the flow of incoming cases to be dealt with more expediently, therefore enabling greater caseloads.

Confidentiality

5.5.64 The Ombudsman suggested that, as with the confidentiality provisions in the *Children and Young Person (Safety) Act 2017* (SA), an additional confidentiality provision should be included in the

¹⁰⁴⁹ Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 17. There is also value in enhanced interaction between the ASU and Commonwealth regulatory bodies.

¹⁰⁵⁰ Ibid.

¹⁰⁵¹ Ibid 11. This priority listing is being phased out by the ASU.

¹⁰⁵² Ibid 7.

¹⁰⁵³ Ibid 16.

AAS Act specifically protecting the identity of a person who makes a report to the ASU under s 22, unless that person consents to the disclosure of their identity. Protecting the reporting process is pivotal, given that reporting is voluntary. The NSW model has protections for the identity of people who make reports are provided for under the *ADC Act*.¹⁰⁵⁴

5.5.65 SALRI recommends a similar amendment should be made to the *AAS Act*, to clarify that the identity of a person who makes the report or is the subject of report should be confidential.

Recording Information

5.5.66 Another issue raised in consultation was the inconsistent record keeping of calls in some areas. For example, Tetra Tech uncovered that the relationship between the caller and the adult vulnerable to abuse are not often recorded on the database and also that age and cultural background are underreported (though this could be as a result of sensitivities in reporting).¹⁰⁵⁵ The ASU Annual Report data over the last three financial years demonstrates that there are still deficiencies in some areas of recording information, such as the location of the person experiencing abuse, the age of the person experiencing abuse, and the type of disability present, if any.¹⁰⁵⁶ While the *AAS Act* is silent on the level of detail required to be recorded for each call, the Standard Operating Procedures and Code of Practice do provide some guidance.¹⁰⁵⁷

5.5.67 The Tetra Tech report found that the ASU were adequately collecting key information in many areas, including the reasons for the reports and the safeguards already in place.¹⁰⁵⁸ One way to improve the recording system, as suggested by Tetra Tech, is to introduce a checklist to set a standard for the minimum amount of information required during an assessment to be recorded in the database.¹⁰⁵⁹ SALRI is of the view that it is crucial for data to be accurately recorded. This may better be achieved if the true operation of the ASU is captured through introducing the safeguarding actions and more flexible pathways in responding to a report of abuse. Parties from the disability sector and community suggested that the ASU needs to carefully record all reports made, even when no action is taken. This way if multiple reports are received where there are continuous reporting records and a demonstrated history of abuse, consistent recording of data will help to monitor situations of potential abuse.¹⁰⁶⁰ SALRI notes the cogency of this proposition.

5.5.68 The ASU must keep a record of every action taken under s 23(4) of the *AAS Act* and include statistical information relating to an action taken under s 23 in their Annual Report.¹⁰⁶¹ The Ombudsman noted that the s 23(4) requirement to document all actions taken during an assessment is not replicated for the investigation process under s 26, which may impact the ‘efficiency of a subsequent internal and external review under sections 38 and 40 respectively’. The requirement to record an action when an investigation is undertaken is crucial for the accuracy of data shared in the

¹⁰⁵⁴ *NSW Ageing and Disability Commissioner Act 2019* (NSW) s 15.

¹⁰⁵⁵ Tetra Tech International Development Pty Ltd, *Adult Safeguarding Unit: Year One Evaluation* (Report, December 2020) 8.

¹⁰⁵⁶ See below Appendix B.

¹⁰⁵⁷ *Ibid* 9.

¹⁰⁵⁸ *Ibid* 10.

¹⁰⁵⁹ *Ibid* 11.

¹⁰⁶⁰ In the focus group the approach suggested was first to acknowledge the situation, then follow up the report with the reporter or vulnerable person with any additional information, make a check-up call within a few months, and provide opinions/strategies to help the person learn their and manage own safeguards.

¹⁰⁶¹ *AAS Act* (SA) ss 23(4)(a)–(b).

ASU Annual Report and with other organisations, and to better understand ASU's operational practices.

5.5.69 SALRI recommends that this requirement be replicated in s 26 the *AAS Act* to ensure that actions taken by the ASU are adequately recorded.

Other Issues

5.5.70 The OFAW suggested that s 23 of the *AAS Act* should be amended to make it clear that the ASU can seek verbal information and speak with a vulnerable adult as part of an assessment. This is an eminently sensible course of action, but SALRI considers this action is already caught within the broad scope of s 23(2) where the Director can use any method of information gathering they see fit, including seeking verbal information.

5.5.71 Recommendations

RECOMMENDATION 12

SALRI notes the suggestion of mandatory reporting under the *Ageing and Adult Safeguarding Act 1995* (SA) of the suspected abuse of an older person or a person with disability is beyond the scope of this reference as it raises complex practice, privacy and policy implications and requires further consideration and consultation. SALRI therefore recommends, at this stage, against the imposition of mandatory reporting of the suspected abuse (including the abuse of an older person or a person with disability).

RECOMMENDATION 13

SALRI recommends that s 23 of the *Ageing and Adult Safeguarding Act 1995* (SA) should be amended to increase flexibility and better reflect the work of the Adult Safeguarding Unit. This should include a statement that, following an assessment under this section, the Adult Safeguarding Unit must take any safeguarding action(s) that the Director (or their delegate) considers appropriate in the circumstances or, if no safeguarding action is required, take no further action (for the reasons currently detailed in ss 23(3)(c)(i)–(iii)).

SALRI considers that a list of possible safeguarding actions should be included in the Code of Practice or Regulations, including:

1. Providing information or advice to the reporter, or other person(s) involved in the ongoing care or support of the adult (with such education to be able to be provided without consent of the individual).
2. Supporting a person to engage with alternative formal or informal supports.
3. Monitoring the issue (with basic monitoring to be able to occur without consent of the individual).
4. Investigating the matter (as in the current Act).
5. Referring the matter (as in the current Act).
6. Reporting the matter to a more appropriate body or agency.

7. Any other safeguarding action the Adult Safeguarding Unit considers appropriate in the circumstances.

RECOMMENDATION 14

SALRI recommends that a provision be inserted into s 23 of the *Ageing and Adult Safeguarding Act 1995* (SA) mandating that, where safe, practicable and appropriate, the reporter or the body or person who made a referral to the Adult Safeguarding Unit be notified about the outcome of an assessment.

RECOMMENDATION 15

SALRI recommends that ‘safeguarding’ should be explicitly included in the *Ageing and Adult Safeguarding Act 1995* (SA) as an action that the Adult Safeguarding Unit can take following an investigation commenced under s 26. Section 26 should include an explicit power to refer a matter to SAPOL during the process of, or at the conclusion of, an investigation.

RECOMMENDATION 16

SALRI recommends that the practitioners in the Adult Safeguarding Unit should have the knowledge, expertise (including cultural awareness training and disability inclusion training) and capability to respond effectively to both elder abuse and the abuse and exploitation of persons with disability. SALRI further recommends that the Adult Safeguarding Unit practitioners have the necessary qualifications and expertise to understand the nuances of barriers and issues relating to Aboriginal communities, CALD backgrounds, elder abuse, disability issues and complex communication needs.

RECOMMENDATION 17

SALRI recommends that further guidance should be provided for the use of and investigation and investigation powers under sections 18, 19 and 26 of the *Ageing and Adult Safeguarding Act 1995* (SA), namely that:

1. The Code of Practice or Regulations should detail circumstances in which an investigation would be appropriate.
2. The Code of Practice or Regulations should include a definition of ‘serious abuse’.¹⁰⁶²
3. The *Ageing and Adult Safeguarding Act 1995* (SA) should specify the actions that the Adult Safeguarding Unit can take once an investigation is complete. These should include safeguarding actions, referrals to police, and any other actions approved by the Director (or their delegate).
4. Section 23(4) should be replicated in s 26 to ensure that actions taken by the Adult Safeguarding Unit during an investigation are adequately recorded.

¹⁰⁶² In the interests of consistency, SALRI suggests that this definition, as with those recommended in recommendations 29–31, focus on the subjective impact on the abuse on the particular adult, rather than impose an objective standard or be guided solely by the nature and criminality of the act.

RECOMMENDATION 18

SALRI recommends the internal and external review provisions in the *Ageing and Adult Safeguarding Act 1995* should be amended as follows:

1. Adding a time frame into s 38 of the *Ageing and Adult Safeguarding Act 1995* (SA) within which the Chief Executive must conduct an internal review of a decision.
2. Amending s 38 and s 40 of the *Ageing and Adult Safeguarding Act 1995* (SA) to ensure that reasons for a decision at review are provided by the decision-maker.
3. Amending s 40(1) of the *Ageing and Adult Safeguarding Act 1995* (SA) to enable the Ombudsman to conduct or continue an external review process if in the public interest.

RECOMMENDATION 19

SALRI recommends that the *Ageing and Adult Safeguarding Act 1995* (SA) should be amended to allow the Director of the Adult Safeguarding Unit to delegate their functions to the Chief Adult Safeguarding Practitioner or other practitioner(s) where appropriate.

RECOMMENDATION 20

SALRI recommends that s 49 of the *Ageing and Adult Safeguarding Act 1995* (SA) should be amended to clarify that the identity of a person who makes a report of abuse is confidential, unless the person making the report has given consent for their identity to be revealed for a particular purpose, or identifying them is otherwise necessary such as where a report has been referred to police.

Part 6 - Decision-Making Capacity

6.1 Background

6.1.1 The definition and assessment of decision-making capacity, as in a number of SALRI's recent references,¹⁰⁶³ proved a recurring theme in SALRI's consultation. Decision-making capacity is integral to the operation of the *AAS Act* and the role of the ASU. A lack of decision-making capacity is one of the few instances in which the ASU is entitled to intervene without an individual's consent.¹⁰⁶⁴ Indeed, the ASU informed SALRI that a lack of decision-making capacity is the only situation to date in which it has taken an 'interventionist' approach and referred the individual said to be experiencing abuse to SACAT for a potential order of administration and/or guardianship.

6.1.2 Decision-making capacity refers to a person's ability to make their own decisions. These decisions may fall within various categories, such as finances, health/medical, accommodation or lifestyle. The *AAS Act*, reflecting wider social and legal trends, places a strong value on a person's autonomy and freedom to make decisions. Consequently, when laws interfere with a person's ability to exercise this autonomy in decision-making, it is important to ensure this interference is reasonable and necessary.

6.1.3 Capacity has been noted as an 'extremely complex concept'.¹⁰⁶⁵ Decision-making capacity forms an important part of the ASU's procedure once a report is received and an investigation is undertaken. Under the *AAS Act*, if the ASU identifies a case of abuse, an adult with decision-making capacity has the right to refuse further action.¹⁰⁶⁶ Upon this refusal, in most cases the ASU must close the case, without further action.¹⁰⁶⁷ This highlights the paramount focus of consent to the ASU's process and role under the Act. As a result, the status of an adult's decision-making capacity will dictate whether or not the ASU proceeds with a complaint or report of suspected abuse under the *AAS Act*.

6.1.4 In very limited circumstances, the *AAS Act* enables the ASU to act, despite an adult's refusal to pursue a report, which effectively overrides their consent.¹⁰⁶⁸ This highlights the tensions between two differing approaches the ASU may take — an interventionist or a protectionist approach. Both these approaches must be considered in light of the prevailing need to safeguard adults who may be vulnerable to abuse and to promote their autonomy.

6.1.5 This Part will outline the law concerning decision-making capacity and its practical implications, including its assessment and its relationship to consent. Given this is a statutory review, SALRI considered whether the current definition of 'impaired decision-making capacity' in the *AAS Act* remains appropriate. Further, SALRI also explored the practical and operational implications of

¹⁰⁶³ See, eg, See Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 121–75.

¹⁰⁶⁴ *AAS Act* s 24.

¹⁰⁶⁵ Victorian Law Reform Committee, Parliament of Victoria, 'Inquiry into Powers of Attorney' (Final Report, Parliamentary Paper No 352, August 2010) 108. See also at: xlv.

¹⁰⁶⁶ *AAS Act* s 24(1).

¹⁰⁶⁷ See *ibid* s 24(1).

¹⁰⁶⁸ *Ibid* s 24(4).

decision-making capacity; an issue often raised in consultation. SALRI specifically examined whether any changes to present law and/or practice are needed to better address the situations where the line between valid consent and coercion becomes blurred. This was often highlighted to SALRI in consultation as a real issue in practice, especially with better understandings of the effects of coercive control. The impact of coercion on consent is further explored in the following Part.

6.1.6 In its previous references, SALRI has engaged comprehensively with the law, policy and practice relating to decision-making capacity.¹⁰⁶⁹ SALRI recognises that there is an intersection between legal and medical/clinical understanding and practice of capacity. As a result, a discussion of capacity cannot be limited to a single discipline-specific lens.

6.1.7 There are six general guiding principles which govern the definition and assessment of capacity. These are:¹⁰⁷⁰

1. Presume the individual has capacity.¹⁰⁷¹ An appropriate balance between the autonomy and the best interests of the individual must be achieved.¹⁰⁷² This is a shift away from the traditional paternalistic view of autonomy, in which capacity was perceived as a binary concept, to one which acknowledges the importance of maintaining the individual's autonomy and decision-making capacity. Under this model, steps must be taken to enhance a person's capacity, so that it may be retained for as long as possible. Cultural literacy is also important in the application of this principle. An individual's culture, language, religion and ethnicity may dictate views on autonomy and the process of decision-making.¹⁰⁷³

2. 'Capacity is decision-specific'.¹⁰⁷⁴ Its assessment is tailored to the specific decision. It is critical to note capacity is also *time-specific*, meaning the assessment must question whether the individual has decision-making capacity *at the time of the assessment*.¹⁰⁷⁵

3. One must not assume an individual lacks capacity due to their appearance. This refers to the way in which an individual presents themselves, behaves and communicates.¹⁰⁷⁶ This includes impairments such as Parkinson's Disease, Autism, Attention Deficit Hyperactive Disorder or Multiple Sclerosis.¹⁰⁷⁷

¹⁰⁶⁹ Most recently, SALRI examined the role and operation of Enduring Powers of Attorney in South Australia. A prominent theme raised in the Report concerned the definition and assessment of decision-making capacity. Ancillary issues raised related to fluctuating capacity and its practical implications. In addition, SALRI concluded that decision-making capacity must be addressed at two distinct time points — upon the execution of the legal document and its subsequent activation following alleged loss of capacity.

¹⁰⁷⁰ Communities and Justice, Government of NSW, *Capacity Toolkit* (Web Page, 2008) 11–12 <https://www.justice.nsw.gov.au/diversityservices/Pages/divserv/ds_capacity_tool/ds_capacity_tool.aspx>.

¹⁰⁷¹ This premise was reiterated to SALRI in consultation by Dr Chris Moy of the AMA(SA).

¹⁰⁷² Communities and Justice, Government of NSW, *Capacity Toolkit* (Web Page, 2008) 29 <https://www.justice.nsw.gov.au/diversityservices/Pages/divserv/ds_capacity_tool/ds_capacity_tool.aspx>.

¹⁰⁷³ Ibid 28.

¹⁰⁷⁴ Ibid 32.

¹⁰⁷⁵ Ibid.

¹⁰⁷⁶ Ibid 34. See also Sylvia Villios et al, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (South Australian Law Reform Institute, 2020) 166 [4.5.75].

¹⁰⁷⁷ Communities and Justice, Government of NSW, *Capacity Toolkit* (Web Page, 2008) 32 <https://www.justice.nsw.gov.au/diversityservices/Pages/divserv/ds_capacity_tool/ds_capacity_tool.aspx>.

4. The decision-making ability of the individual is assessed, not the merits of their final decision. The Toolkit notes '[t]he right to make a decision includes the right to take risks and to make decisions with which others disagree. This is known as dignity of risk.'¹⁰⁷⁸

5. The individual's privacy must be respected; and

6. The use of substitute decision-making is a 'last resort'.¹⁰⁷⁹ The assessment must consider appropriate measures to assist the individual in maintaining their decision-making capacity.¹⁰⁸⁰ Measures include the use of an interpreter, an advocate or a communication aid.¹⁰⁸¹

6.1.8 The assessment of capacity is the primary means of protecting the adult's interests and rights. This is achieved by presuming an adult has capacity and, when their capacity is questioned, undertaking an assessment in a way which promotes and supports their autonomy. In light of the contextual nature of capacity, SALRI has found it is a relevant factor in two circumstances:

1. In order to investigate or refer a matter, the ASU must obtain consent; and
2. Where the capacity of an adult is questionable, further action should be taken to seek an assessment.

6.1.9 The first factor is largely undertaken without any issues. It must be emphasised that in order to consent, a person must have decision-making capacity. However, the second factor requires the ASU to identify a possible ground(s) which questions whether the adult has impaired decision-making capacity. Further, the impact of psychological abuse and coercion on consent and the qualification/training of those working in the ASU are material to this second factor.

6.1.10 Decision-making capacity plays an important role in many areas of law, medicine and public policy. As a result, it continues to be a recurring theme, relevant to many areas of potential law reform (as pointed out to SALRI in consultation by ARAS and others).

6.2 The Definition of Decision-Making Capacity

The Legislative Definition

6.2.1 The *AAS Act* refers to 'impaired decision-making capacity'. This legislative definition is derived from the common law (in both succession law¹⁰⁸² — financial decision-making capacity and medical law — medical decision-making capacity).

6.2.2 Under s 5(1) of the *AAS Act*, all adults are presumed to have decision-making capacity, unless there is evidence to suggest otherwise.

¹⁰⁷⁸ Ibid 36.

¹⁰⁷⁹ Ibid 42.

¹⁰⁸⁰ Ibid.

¹⁰⁸¹ Ibid 42.

¹⁰⁸² See *Banks v Goodfellow* (1870) LR 5 QB 549; *Gibbons v Wright* (1949) 38 CLR 313.

6.2.3 Section 5(2) *AAS Act* proceeds to define ‘impaired decision-making capacity’:

... a person will be taken to have impaired decision-making capacity in respect of a **particular decision** if—

(a) the person is not capable of—

- (i) **understanding** any information that may be **relevant to the decision** (including information relating to the consequences of making a particular decision); or
- (ii) **retaining** such information; or
- (iii) **using** such information in the **course of making the decision**; or
- (iv) **communicating** his or her decision in **any manner**; or

(b) if the person has given an advance care directive in which the person sets out when they are to be considered to have impaired decision-making capacity (however described) in respect of a decision of the relevant kind — if the person has impaired decision-making capacity as so set out.

6.2.4 Importantly, a person will not lack capacity because they:

- Do not understand the specific details of the information (for example, matters of a technical or trivial nature);¹⁰⁸³
- Can only retain or remember the information for a limited time;¹⁰⁸⁴
- May fluctuate between having capacity and losing capacity;¹⁰⁸⁵ and
- Makes a decision which has a negative outcome for them.¹⁰⁸⁶

6.2.5 A number of key points can be made about capacity. First, capacity is decision-specific, which means it is determined based on the particular decision to be made. Secondly, it is a person’s right to make mistakes or choices that others may not agree with.¹⁰⁸⁷ The determination of capacity is not a value-based judgement. As a senior geriatrician told SALRI: ‘It’s a reasoned decision, not a reasonable decision.’ Thirdly, the presence of a disability, mental illness, cognitive impairment or neurodegenerative disorder does not mean the individual lacks capacity and are unable make their own decisions. Where a person may require assistance in making a decision, a supported decision-making approach is preferred.

6.2.6 These key points are entirely consistent with the guiding principles underpinning the assessment and understanding of decision-making capacity.

¹⁰⁸³ *AAS Act* s 5(3)(a).

¹⁰⁸⁴ *Ibid* s 5(3)(b).

¹⁰⁸⁵ *Ibid* s 5(3)(c).

¹⁰⁸⁶ *Ibid* s 5(3)(d).

¹⁰⁸⁷ An example commonly presented to SALRI in consultation by regional lawyers was the ‘gold-digger’ scenario. See below Part 7.5.

Common Law Definition

6.2.7 There is a common law presumption that all adults have the capacity to make their own decisions unless there is evidence to the contrary.¹⁰⁸⁸ This serves to emphasise the importance of autonomy and independence in decision-making (themes which are reinforced in the *AAS Act*).

6.2.8 The common law principles concerning the definition and nature of capacity are largely consistent, despite minor differences in their articulation. This is solely attributed to the context in which these principles apply. For example, the common law recognises that capacity is ‘decision-specific’. This may be conveyed in terms of requiring an adult to understand the nature, purpose and effect of the particular decision.¹⁰⁸⁹ Alternatively, within the context of executing a legal instrument, such as an EPA, the question of capacity must be determined ‘by reference to the transaction in which the person proposes to engage’.¹⁰⁹⁰ Capacity has also been described as ‘issue-specific’.¹⁰⁹¹ The underlying premise of the definition remains consistent across various realms of decision-making.

6.2.9 As a result, the common law test does not enforce a fixed standard of capacity to be applied to all decision-making. This flexibility is intentional, in order to fulfil the guiding principles underpinning our modern understanding of capacity. Further, the level of capacity required to undertake one task, such as completing a cash transaction, will differ to that required to determine whether to invest in the share market.¹⁰⁹² This same logic applies to any decision-making scenario, whether it be simple or complex decisions relating to medical treatment, pursuing a legal action or entering into a contract or other transaction.

6.2.10 Finally, the fluctuating nature of capacity has been recognised by the common law. Importantly, it does not preclude a person from being deemed to have decision-making capacity.¹⁰⁹³ This is also reiterated within the definition in the *AAS Act*.

6.3 Issues

The Legislative Definition of ‘Impaired Decision-Making Capacity’

6.3.1 Capacity is a nuanced term. It is not binary — it is not the case that the person will either have capacity or not. Thus, a person may have capacity in one respect (such as buying weekly groceries

¹⁰⁸⁸ In the context of medical decision-making, see *Re B* [2002] 2 All ER 449; *Re T* [1992] 4 All ER 649; *Re MB* [1997] EWCA Civ 3093. In the context of financial decision-making, see *Attorney-General v Parnter* (1792) 29 ER 632; *Borthwick v Carruthers* (1787) 99 ER 1300; *Dalle-Molle v Manos* (2004) 88 SASR 193, 198; *Gibbons v Wright* (1954) 91 CLR 423, 437.

¹⁰⁸⁹ *Re C* [1994] 1 All ER 819.

¹⁰⁹⁰ *Dalle-Molle v Manos* (2004) 88 SASR 193, 198. See also *Gibbons v Wright* (1954) 91 CLR 423, 437.

¹⁰⁹¹ *Dalle-Molle v Manos* (2004) 88 SASR 193, 198.

¹⁰⁹² Another example previously given to SALRI is that it should also not be overlooked that someone may be incapable in one respect (such as to make important financial decisions like selling a house) but not others (such as buying a packet of cigarettes each day or week). See Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 134 [4.4.11]. This highlights that the exercise of basic and complex skills require different thresholds of capacity.

¹⁰⁹³ In the context of testamentary capacity, see *Hoffmann v Waters* [2007] SASC 273, in which Debelle J recognised that an individual is deemed to have capacity during a lucid interval. The status of an individual’s capacity during a lucid interval remains unclear in light of *Gibbons v Wright*. The High Court in *Gibbons v Wright* confirmed that an individual does not regain capacity during a lucid interval: (1954) 91 CLR 423, 440. This is problematic, in light of the widespread understanding that capacity can fluctuate.

and medication), but not in another circumstance (such as selling a house). Importantly, the presence of a disability, mental illness, cognitive impairment or neurodegenerative disorder does not mean the individual lacks capacity. This outdated position is consistent with a paternalistic view of mental impairments and the ‘medical theory of mind being one and indivisible’.¹⁰⁹⁴

6.3.2 SALRI is of the view that the current definition contained within the *AAS Act* remains sound and fit for purpose. It is consistent with other legislative definitions in South Australian Acts,¹⁰⁹⁵ including the *Advance Care Directives Act 2013* (SA)¹⁰⁹⁶ and the *Mental Health Act 2009* (SA).¹⁰⁹⁷ Most notably, it includes a statutory presumption of capacity.¹⁰⁹⁸

6.3.3 The definition also remains consistent with the South Australian *Charter of the Rights and Freedoms of Vulnerable Adults* (‘Charter’), which is an instrument created under the *AAS Act*.¹⁰⁹⁹ Under the Charter, vulnerable adults have the ‘right to live autonomous and self-determined lives, to take risks and be supported to make their own decision/choices.’¹¹⁰⁰ The principles relevant to the operation of the ASU also reinforce the presumption of capacity,¹¹⁰¹ namely the need to safeguard autonomy and independence in decision-making¹¹⁰² and the right to take risks or make mistakes.¹¹⁰³

6.3.4 SALRI has considered the current definition in the *AAS Act*. Two possible options were explored — reforms to make the definition more prescriptive or proscriptive.

6.3.5 The motivation underlying the argument for a more prescriptive definition is based on a need to provide more guidance for the assessment of capacity. Given capacity is nuanced, decision- and context-specific, those responsible for its assessment may benefit from more detail and clearer provisions.

6.3.6 However, a more prescriptive definition may be problematic. SALRI’s consultation revealed a core tenet of the definition is its deliberate ambiguity, which enables a clinician or other relevant practitioner to exercise professional judgement when assessing capacity.¹¹⁰⁴ This flexibility recognises that capacity is both a legal and medical/clinical construct. If it is too prescriptive in relation to dictating a process for its assessment, it cannot account for the varying approaches adopted by medical specialists and health practitioners.

6.3.7 In contrast, a broader definition will continue the uncertainty associated with decision-making capacity. The definition cannot be applied too broadly, as it results in a risk of re-visiting past false assumptions relating to disability, mental illness and capacity. The guidelines serve to represent the dynamic nature of capacity, whilst also setting boundaries to rebut outdated understandings of

¹⁰⁹⁴ Danuta Mendelson, ‘Assessment of Competency: A Primer’ (2006) 14(2) *Journal of Law and Medicine* 156, 161.

¹⁰⁹⁵ SALRI’s consultation revealed many parties disliked the definition of ‘mental incapacity’, contained within the *Guardianship and Administration Act 1993* (SA) s 3.

¹⁰⁹⁶ *Advance Care Directives Act 2013* (SA) s 7.

¹⁰⁹⁷ *Mental Health Act 2009* (SA) s 5A.

¹⁰⁹⁸ *AAS Act* s 5(1).

¹⁰⁹⁹ *Ibid* s 20.

¹¹⁰⁰ Adult Safeguarding Unit, SA Health, *South Australian Charter of the Rights and Freedoms of Vulnerable Adults* (Charter, 2020).

¹¹⁰¹ *AAS Act* s 12(b).

¹¹⁰² *Ibid* ss 12(d), (f)–(g).

¹¹⁰³ *Ibid* s 12(e).

¹¹⁰⁴ This premise received unanimous support at a medical roundtable discussion with geriatricians.

capacity. For example, appearance or eccentricity is not an indicator of incapacity, nor is the presence of a disability or mental illness.

6.3.8 The international landscape of decision-making has shifted from a substitute to supported decision-making model.¹¹⁰⁵ The Committee on the Rights of Persons with Disabilities described the supported decision-making regime as one which

comprises various support options which give primacy to a person's will and preferences and respect human rights norms. It should provide protection for all rights, including those related to autonomy ... and rights related to freedom from abuse and ill-treatment (right to life, right to physical integrity, etc).¹¹⁰⁶

6.3.9 It is described as a 'less restrictive alternative',¹¹⁰⁷ as opposed to substitute decision-making. The translation of supported decision-making into practice must be considered further, to ensure necessary provisions and resources are available to facilitate the operation of this model.¹¹⁰⁸ There was widespread agreement in SALRI's consultation for the endorsement and introduction of supported decision-making into the *AAS Act*.

6.4 Consultation Data Overview

The Definition of Impaired Decision-Making Capacity and Supported Decision-Making

6.4.1 It is significant that SALRI's consultation revealed considerable support for the retention of the current definition of impaired decision-making capacity under the *AAS Act*. However, the introduction of an additional toolkit or guidelines to assess capacity was also supported by many consultees.¹¹⁰⁹

6.4.2 The significance of a presumption of capacity and its operation in practice was emphasised by Speech Pathology Australia:

Within society, negative stereotypes and misconceptions frequently prevail that a communication difficulty, and ageing, are synonymous with a loss of capacity and competence. This misconception can be dangerous within decision-making, as many people are denied opportunities, particularly those with complex communication needs, as it is assumed that they are not able to make autonomous choices, simply because they cannot communicate their choice.

6.4.3 Dr Chris Moy of the AMA(SA) emphasised that the presumption of capacity must always be respected. Dr Moy also noted that the introduction of a risk assessment matrix could assist the

¹¹⁰⁵ See Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014): Article 12: Equal Recognition Before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014) [3]. For a discussion on supported decision-making, see Sylvia Villios and Olga C Pandos, 'A Review of Advance Care Directives and Enduring Powers of Attorney in South Australia: Preserving Autonomy and Preventing Abuse' (2022) *Adelaide Law Review* (forthcoming) Pt 3C.

¹¹⁰⁶ Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014): Article 12: Equal Recognition Before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014) [29].

¹¹⁰⁷ See Matthé Scholten et al, 'Combining Supported Decision-Making with Competence Assessment: A Way to Protect Persons with Impaired Decision-Making Capacity against Undue Influence' (2021) 21(11) *The American Journal of Bioethics* 45, 45.

¹¹⁰⁸ In particular, the use of microboards has been raised during SALRI's consultation. Microboards offer one means of practically implementing supported decision-making. Their utility in relation to long-term care of a person, who remains central to all decision-making will be raised further in SALRI's Review of the *Mental Health Act*. See below Part 12.3.

¹¹⁰⁹ See Part 6.6.

ASU, particularly in cases where intervention to override the consent of an adult may be required. The risk assessment could address the type/nature of risk, urgency and imminence. It is in this context of a risk assessment that fluctuating capacity would be a key consideration.

6.4.4 In SALRI's expert roundtable discussion, one attendee described the present law as 'too binary', at odds with capacity as a fluid concept, whereby it may fluctuate. They noted that with the right support, capacity can be increased. Guiding principles could assist in addressing these concerns. Another attendee noted that the statutory definition should reflect the principles of capacity — it does not need to define how to assess capacity. The approach seen in the UK through the *Mental Capacity Act 2005* (UK) was said to be instructive.

6.4.5 SALRI's consultation reinforced the importance and role of the guiding principles in the understanding and assessment of capacity. For example, Speech Pathology Australia noted that '[c]ommunication ability alone does not determine capacity'. These guiding principles form the necessary foundation for any discipline's approach relating to the definition of capacity.

6.4.6 In consultation with geriatricians, there was agreement that the legislative definition is 'sufficiently ambiguous', enabling professional judgement and discretion to be exercised. This reinforces the concerns raised in the argument for a more prescriptive legislative definition. In relation to the absence of a process of capacity assessment contained within the law, Speech Pathology Australia noted:

[T]his is a critical process to get right, potentially requiring the assessment of both cognitive and language skills by skilled psychologists and speech pathologists respectively. It is vital that those involved know about different levels of decisions, what the person's strengths are and where they would particularly benefit from support, both in regard to, and outside of their communication needs.

6.4.7 Legal practitioners working within succession law noted that the present definition rightly reflects the need to make an evaluative decision. As a result, the level of capacity should be based on evaluative decision-making ability. Although legal practitioners are able to assess legal capacity, they acknowledged the role and purpose of clinical capacity assessments.

6.4.8 The interdisciplinary nature of capacity and its assessment means its definition is inherently flexible and adaptable to cater for varying perceptions and applications.

6.4.9 The Law Society of South Australia reiterated that:

The distinction between different types of capacity (legal, mental, testamentary) needs to be clearly understood. This is important, as using the word 'capacity' without context risks conflating disparate concepts that capacity to understand the nature and effect of decisions is different from the human-rights principle of agency and autonomy.

6.4.10 As a result, the Law Society suggested:

[A]ny law reform in this area must acknowledge both assisted (being supported) decision-making at one end of the capacity-continuum, as well as substituted decision-making at the other end. A careful balance must be struck between empowering and supporting the individual to enable them to make decisions, and the 'paternalism of acting in the [person's] best interests' when the [person] cannot do so.

6.4.11 SALRI notes that this Review provides an opportunity for legislative endorsement of a supported decision-making model, consistent with international human rights principles and laws. This was advocated by the Office of the Public Advocate (‘OPA’), who submitted that ‘[t]he right to supported decision-making could be included in the [44S] 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.’ In its submission to SALRI, the South Australian Council on Intellectual Disability relayed that ‘[p]eople with intellectual disability told us that they want to be a part of the conversations that involve their lives.’

6.4.12 The OPA noted ‘decision-making capacity within the [44S] Act reflects current standards in relation to providing consent, in particular, that capacity is presumed and is decision specific.’ The OPA further suggested ‘that access to supported decision-making when consenting to action by the Adult Safeguarding Unit be included as a requirement in the Act.’ The OPA added that a greater emphasis on supported decision-making could be incorporated within the legislative definition and/or as a requirement to fulfil, prior to the ASU taking action. In a situation where an adult is suspected to be involved in a coercive relationship, supported decision-making should be undertaken with an independent person who is not involved in the suspected abuse. This person should have a rapport with the concerned adult.

6.4.13 COTA (SA) acknowledged a ‘rights-based approach to capacity gives older people agency and autonomy’. They noted the ‘differences and criticisms of the ASU in terms of understanding and responding, including of the relative priority of some of the principles in [section] 12 over provisions elsewhere in the Act.’ This could be addressed through the introduction of a State Capacity Toolkit or Assessment Guideline to assist in education and understanding of capacity.¹¹¹⁰

The Implications of Fluctuating Capacity

6.4.14 The presence of fluctuating capacity is relevant to the ASU’s ability to obtain consent. The OFAW noted that, where an adult has fluctuating capacity, reliance is placed on the ASU practitioner’s clinical and professional judgement and compliance with the Code of Practice. As part of this practice, the ASU will support the adult to make decisions, facilitating a supported decision-making model. The Code of Conduct outlines the following ways in which the ASU may support an adult when making a decision:

- using the most appropriate method of communication for the person, such as non-verbal communication, visual aids, and communication aids;
- providing information in an accessible way, such as offering an interpreter;
- finding a suitable location or better time of day;
- giving appropriate time to consider a decision;
- suggesting or assisting the person to get treatment for a medical condition that may affect their decision-making;
- supporting the person to resolve, or to get help in resolving, underlying personal or social issues that are causing them stress, and may affect their decision-making;

¹¹¹⁰ See below Part 6.6.

- helping the person find someone to support them to make choices or express their view, which could include a family member, friend or independent advocate;
- helping the person to access a program or support, which may improve their capacity to make decisions;
- giving the person relevant information about the decision and its consequences.¹¹¹¹

6.4.15 It is in this context that the ASU advocates for and enforces a supported decision-making model, where the rights of the vulnerable adult are carefully balanced. As a result, the adult's autonomy should be safeguarded by this approach, which reinforces the 'principle that a person should be allowed to make their own decisions about their own affairs to the extent that they are able and be supported to make such decisions for as long as they can.'

6.4.16 Consistent with this view, ARAS told SALRI:

Impaired decision-making capacity is not a defining factor and the wishes or known wishes of the older adult should be respected and taken into account at all times. In situations where a person has fluctuating capacity, the responsibility resides with the Adult Safeguarding Unit to meet with the older adult at a time when they have most capacity and insight to obtain their consent. The Act can protect a person's autonomy by seeking consent at every stage of the process and before the practitioner acts, regardless of their capacity. Furthermore, the older adult always has the right to refuse a service. However, ARAS cannot emphasise enough that the older adult has the right to be not only informed and supported throughout the investigation, but also to participate in the decision-making process.

6.4.17 Dementia Australia emphasised that adults living with dementia have a right to autonomy and the mere presence of dementia does not mean they have lost decision-making capacity. Due to the nature of dementia, fluctuating capacity is not uncommon.¹¹¹² When dealing with an adult who has fluctuating capacity, it must be understood that fatigue, medication, delirium, illness or sundowning¹¹¹³ may impact their ability to make a decision at a specific point in time. This highlights the 'situation-specific' nature of capacity. An adult with dementia is still capable of making meaningful decisions.

6.4.18 In relation to ways in which an adult with fluctuating capacity may be better safeguarded, Dementia Australia endorsed a human rights-based approach to the ASU's practice. They noted a non-interventionist model, which safeguards adults with dementia, requires 'rigorous governance, procedures, staff education and, where appropriate, clinical oversight'. Further, 'dementia-informed practice' may overcome practical implications due to fluctuating capacity. Such practices may include:

- Ensuring ASU staff are equipped to assess capacity or understand when to engage a relevant specialist;

¹¹¹¹ SALRI notes the cogency of this guidance. Fluctuating capacity is a difficult issue in practice.

¹¹¹² See also *ibid* 143 [4.4.60].

¹¹¹³ Dementia Australia states: 'People with dementia may become more confused, restless or insecure late in the afternoon or early evening. It can be worse after a move or a change in their routine. They may become more demanding, restless, upset, suspicious, disoriented and even see, hear or believe things that aren't real, especially at night. Attention span and concentration can become even more limited. Some people may become more impulsive, responding to their own ideas of reality that may place them at risk.' Dementia Australia, *Information, 'Sundowning'* (Web Page, 2022) <<https://www.dementia.org.au/about-dementia/carers/behaviour-changes/sundowning>>.

- Integrating capacity assessment tools into the information gathering process in an unobtrusive way;
- Having a sensitive and respectful response to individuals that present with impaired meta-cognition (reduced ability to recognise one's own impairment);
- Scheduling interactions at a time preferred by the person living with dementia (many people report better cognition in the morning);
- Communicating clearly and asking the person to repeat the information in their own words;
- Supplying the person with a written record of the discussion and decision (when safe to do so);
- Providing routine follow-up to all individuals who refuse assistance, to ensure no-one falls through the cracks;
- When appropriate, engaging with the person's supported decision-maker or another person nominated by the person living with dementia;
- Permitting ASU employees to direct people to the National Dementia Helpline for information and support.

6.4.19 In conjunction with these practices, Dementia Australia advocated for all ASU employees to undertake comprehensive dementia education, such as the 'nationally accredited Dementia Essentials program. Staff in client-facing roles must maintain their skills with annual continuing professional development on dementia-related issues.'

6.4.20 In SALRI's disability community group discussion, one attendee noted that follow-up is an important measure in dealing with fluctuating capacity.¹¹¹⁴

6.4.21 The rural health social workers suggested:

The [44S] Act should facilitate the least restriction for clients with limited or impaired decision-making capacity. Decisions should ensure the safety of clients and also encourage their opportunities to remain connected to personal networks, where appropriate. The ASU should work in partnership with the OPA when required and if placement and special powers are needed.

6.4.22 The South Australian Council of Intellectual Disability acknowledged that, consistent with a least restrictive, rights-based approach, fluctuating capacity can significantly impact the consent process. As a result:

People with intellectual disability said they want to make sure that they can change their minds about consent, and that fluctuating capacity should not affect their choice. Again, ensuring open, understanding and appropriate conversations with the person and the important people in their life is essential in getting to know the person and how their fluctuating capacity might impact in them giving consent. Similar guidelines in acting without consent should be applied here.

6.4.23 According to the South Australian Council of Intellectual Disability, one of the most powerful safeguards of autonomy is that the ASU ensures they empower adults, by facilitating support

¹¹¹⁴ See also above Part 5.5.

— whether it be access to services or in the decision-making process. This ‘humanistic, empowerment approach’ would significantly assist those engaging with the ASU.

6.4.24 Speech Pathology Australia observed to SALRI that:

A person may require ongoing adjustments to ensure their participation in the process, e.g., vocabulary in their communication system may need to be updated and specifically taught. It may be that full informed consent is not possible without support at one particular point, however it is still possible to gain ascent from the person with disability or older person that an action is permissible, or they are happy with a particular choice. This would be determined by the person’s capacity at that time.

6.4.25 As a result, participation should be an ongoing process. Speech Pathology Australia deemed it inappropriate to assess capacity at the beginning of a case, as this merely represents a ‘single timepoint’. Rather, an ongoing evaluation of capacity may be required in some instances. They added:

[I]f there are concerns regarding fluctuating capacity, perhaps [evaluation should be done] at different time points when significant decisions need to be made or consent obtained. It is also vital that any assessments conducted that influence the process of decision-making or obtaining consent are communication accessible and reflect the communication needs of the older person, or person with disability.

6.4.26 Professor Joseph Ibrahim also supported the need to re-visit capacity and consent during a vulnerable adult’s engagement with the ASU. ARAS also highlighted to SALRI that, regardless of a person’s capacity, their autonomy can be protected by seeking consent at every stage of the ASU process and prior to taking action.

6.4.27 With respect to the protection of autonomy, Speech Pathology Australia proposed the implementation of a supported decision-making framework, which can be developed in conjunction with the *AAS Act*. They noted that ‘communication must be the cornerstone of this framework’, as communication access ‘is rarely thought about in relation to safeguarding, or decision-making processes.’ Reference to a culture shift was also raised, to promote a society in which

older persons and people with disability have the right to autonomy, and the expectation is that everyone can make their own decisions, some people may just need more supports to do so. Decision-making is complex and nuanced — there may be a continuum of being able to make a decision at a particular level, in certain contexts, but there is a need for increased supports for other types of decisions or situations, eg, being able to express a preference at home with known communication partners but requiring support to do this in a food court in the community.

6.4.28 It was noted that this requires adequate time and resourcing to practically implement a supported decision-making framework.

6.4.29 There was agreement during SALRI’s roundtable discussion with allied health professionals in Port Augusta that a supported decision-making model should be implemented, as opposed to substitute decision-making. Further, it was agreed that supported decision-making should be mandated. Some concerns were raised in relation to the nominated support person. For example, in the context of Aboriginal communities, identifying an appropriate support person may be difficult.

6.4.30 For adults living with fluctuating capacity, the legislative definition could be strengthened to endorse a supported decision-making framework. It is within this framework that an adult’s ability to use relevant information and weigh up the consequences of each decision, can be best ascertained. Secondary to this is the ability to safeguard the adult, by ensuring their autonomy is retained for as long as possible.

6.5 SALRI's Observations and Conclusions

6.5.1 SALRI recognises that decision-making capacity is a complex construct, drawing upon various disciplines including the law, medicine, psychology and neuropsychology. It is not surprising that it has proved a recurring theme in both SALRI's present and previous references. The legislative definition of decision-making capacity must retain a degree of flexibility and ambiguity, most notably in relation to its assessment. The assessment of capacity cannot be confined to medical or health practitioners. SALRI acknowledges that the assessment of decision-making capacity varies according to specific professions and disciplines. As a result, a definition which is too rigid and prescriptive will place limitations on the ability of a professional practitioner (whether a lawyer or a medical or other health practitioner) to exercise clinical judgement and discretion. It is an area where trust and reliance must be placed upon the clinical acumen and expertise of the practitioners undertaking capacity assessments. This point was noted by many parties in SALRI's consultation, notably Dr Chris Moy of the AMA(SA), Cassie Mason, Elicia White and various health and legal practitioners in both Adelaide and regionally. SALRI concurs with this approach.

6.5.2 SALRI supports the current definition of decision-making capacity under the *AAS Act*. It is sound and is consistent with other legislative definitions and is premised upon the four steps of understanding information, the ability to retain it and use it in the course of making a decision and communicating a decision, by any means appropriate. Further, the factors contained within s 5(3) of the *AAS Act* are consistent with the guiding principles of capacity. Importantly, it recognises fluctuating capacity, which in practice, introduces a number of considerations.

6.5.3 SALRI acknowledges the importance of supported decision-making and agrees that this approach should be endorsed in practice. Additional principles may be incorporated to reinforce that the presence of a support person to assist in decision-making does not mean the adult lacks capacity.¹¹¹⁵ This could be incorporated into s 5(3) *AAS Act*, to include:

A person will not be taken to be incapable of using information merely because the person relies on a support person to assist in the decision-making process.

6.5.4 Alternatively, supported decision-making can be addressed within the principles and/or functions of the ASU. SALRI suggests that a supported decision-making approach could be endorsed within the legislative definition of capacity, by recognising the least restrictive means must be applied prior to making a determination of incapacity.

6.5.5 A supported decision-making model serves as a significant measure to promote the autonomy of an adult, particularly where they experience fluctuating capacity. It is a means to ensure an adult can retain their decision-making capacity for as long as possible. In addition, it may also contribute to an adult's ability to regain their decision-making autonomy.

6.5.6 Recommendation

RECOMMENDATION 21

SALRI recommends that the current definition of 'impaired decision-making capacity' in s 5 of the *Ageing and Adult Safeguarding Act 1995* (SA) should be retained and no changes are necessary.

¹¹¹⁵ These issues will also be considered in SALRI's current review of the *Mental Health Act*.

6.6 Capacity Assessment, Guidelines and Toolkits

6.6.1 The benefit of a toolkit or guidelines for capacity assessment in the adult safeguarding context was raised by various parties in both Adelaide and regionally. The creation of toolkits or guidelines to inform and assist capacity assessment has been a useful educative and accessible tool. Various Australian jurisdictions have introduced a capacity toolkit or guidelines. In South Australia, the Law Society of South Australia has produced Client Capacity Guidelines.¹¹¹⁶ Although these Guidelines were formulated for the use of a legal practitioner, they advocate for and promote the same guiding principles. The Guidelines also note:

A ‘decision specific’ approach also recognises that decision-making includes a capacity to identify, understand and retain information relevant to:

- (a) contemplated decisions, including the implications of any such decision;
- (b) use of that information for the purpose of making a decision; and
- (c) weighing up information to balance risks and needs.¹¹¹⁷

6.6.2 In the context of the capacity of an adult engaging with the ASU, of particular relevance is the use of information in the course of making a decision. In order to provide valid consent, the adult should exercise their evaluative judgement in using the relevant information and considering the consequences of the available options.

6.6.3 SALRI considers that the objects and principles set out in Part 2 of the *ACD Act*, reflect best practice in capacity assessment. Importantly, these principles promote a supported decision-making approach, ensuring that the adult is empowered to continue to make decisions (with support) for as long as possible, including periods of fluctuating capacity.¹¹¹⁸

6.6.4 In jurisdictions outside South Australia, there are various consistent features, including the presumption of capacity, the preservation of autonomy, the utility of capacity assessments undertaken by medical or health professionals and the identification of guiding capacity principles. Of these, the NSW Capacity Toolkit and the Queensland Capacity Guidelines will be discussed.

New South Wales

6.6.5 The most established resource is the Capacity Toolkit provided by the NSW Attorney General’s Department in 2008. This resource was designed to be used by any person, such as a legal practitioner, an advocate, family member or friend or a health professional when called upon to assess the capacity of an individual.¹¹¹⁹ The six guiding principles are summarised above at [6.1.7].

6.6.6 The Toolkit notes that a capacity assessment should be considered when a specific ‘trigger’ is identified.¹¹²⁰ These ‘triggers’ serve as potential indicia of incapacity. Triggers include, but are not

¹¹¹⁶ See Law Society of South Australia Client Capacity Committee, *Client Capacity: Statement of Principles with Guidelines* (Guidelines, May 2021)

<https://www.lawsocietysa.asn.au/Public/Publications/Guidelines/Client_Capacity_Guidelines.aspx>.

¹¹¹⁷ Ibid 11 [29].

¹¹¹⁸ See also NSW Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 19–21 [3.25]–[3.32].

¹¹¹⁹ Communities and Justice, Government of NSW, *Capacity Toolkit* (Web Page, 2008) 11–12

<https://www.justice.nsw.gov.au/diversityservices/Pages/divserv/ds_capacity_tool/ds_capacity_tool.aspx>.

¹¹²⁰ Ibid 50.

limited to, clear memory issues, a loss of language ability (for example, word finding difficulties or aphasia caused by stroke), persistent confusion or changes in personality.¹¹²¹

6.6.7 In relation to completing an assessment, the Toolkit informs users of some important considerations. Persons who are culturally and linguistically diverse may require an interpreter and the assessment must be adapted to acknowledge different perceptions of decision-making and their process.¹¹²² The Toolkit advises the use of open-ended questions.¹¹²³

6.6.8 Finally, the Toolkit supports the input of medical and other health practitioners to provide additional assessments or second opinions. It is noted that a general practitioner, psychiatrist, geriatrician, neuropsychologist or clinical psychologist could undertake the assessment.¹¹²⁴

6.6.9 The Capacity Toolkit provides a sound starting point¹¹²⁵ and attempts to clarify any uncertainty relating to decision-making capacity, by presenting information in simple language.

6.6.10 In consultation, SALRI was told that some geriatricians use the NSW Capacity Toolkit or an equivalent tool as a resource to inform their patient and family members.

Queensland

6.6.11 The Queensland Capacity Assessment Guidelines outline the guiding principles when assessing capacity, the applicable legal tests, offer practical guidance and provide relevant checklists for capacity assessment depending on the type of decision.¹¹²⁶

6.6.12 The Guidelines were designed for Queensland's guardianship laws. However, much like South Australia's guidelines for legal practitioners, the underlying principles of capacity and its assessment are applicable to all decision-making. It characterises two tests of capacity, based on the type of decision. Personal matters, which broadly relate to someone's care or welfare, are subject to the 'general test of capacity'.¹¹²⁷ This test sets out three criteria — understanding the nature and effect of the specific decision, making a decision freely and voluntarily and communicating the decision.¹¹²⁸

6.6.13 The Queensland Guidelines offer both an educative and practical resource for any party who may undertake a capacity assessment. It can be used by general members of the community or health practitioners. It may also serve as a tool for a practitioner to use when engaging with a person whose capacity is questioned, and their friends/family or carer.

¹¹²¹ Ibid 50–1.

¹¹²² Ibid 64.

¹¹²³ Ibid 68.

¹¹²⁴ Ibid 56.

¹¹²⁵ See also, eg, British Medical Association and the Law Society of England, *Assessment of Mental Capacity: Guidance for Doctors and Lawyers* (BMJ Books, 2nd ed, 2004); Law Society of South Australia Client Capacity Committee, *Client Capacity: Statement of Principles with Guidelines* (Guidelines, May 2021) 6 <https://www.lawsocietysa.asn.au/Public/Publications/Guidelines/Client_Capacity_Guidelines.aspx>.

¹¹²⁶ Queensland Government, *Guidelines for Assessing Decision-Making Capacity* (Guidelines, 2020) <<https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/power-of-attorney-and-making-decisions-for-others/capacity-guidelines>>.

¹¹²⁷ Ibid 15.

¹¹²⁸ Ibid.

6.7 Issues

The Importance of Capacity Assessments

6.7.1 The assessment of capacity has transformed into an inter-disciplinary exercise requiring collaboration, in which the role and opinion of the medical/health professional forms a significant part of the assessment. Modern values and expectations, and medical/legal knowledge and practice, must inform the test for capacity and its assessment. ‘The law of mental capacity is incomplete if it does not properly incorporate medical expertise and practice’.¹¹²⁹

6.7.2 The assessment of capacity will differ according to the specific profession involved. In a medical or health context, capacity is assessed through the application of testing materials, functional competence assessments, clinical interviews and more. This highlights the importance of the human rights approach to capacity assessment. Advancements in capacity assessment promote autonomy and the significance attached to a determination of incapacity. A capacity test which upholds fundamental human rights must recognise the modern advancements in medicine and neuroscience.

6.7.3 The capacity assessment should consider cultural and linguistic differences. Most notably, definitions of ‘support’ in decision-making, ‘coercion’, ‘influence’ and ‘autonomy’ may be informed by values, norms, culture, religion and language. The need to develop culturally appropriate tools to assess capacity was raised by SALRI in its previous POA Report.¹¹³⁰ This remains an area requiring further consideration.¹¹³¹

6.7.4 The nature of assessment and diagnosis has changed and improved over time. As explained by Kelly Purser, modern capacity assessments are multi-disciplinary, as legal practitioners rely on medical and/or health input and clinical capacity assessments.¹¹³² This is deemed necessary because ‘mentally disabling conditions, such as dementia, are increasing and each profession has their own specific skill set, neither of which, independently, is enough to satisfactorily assess complex cases where legal capacity is in question’.¹¹³³ This means a shift away from the need to reconcile legal and medical roles. Rather, a symbiotic relationship, where the legal and medical roles are defined and can work together to ensure capacity is properly assessed, can be supported.

6.7.5 A further challenge identified by Purser is the potentially detrimental effect of professional misunderstandings pertaining to the distinct legal and medical roles.¹¹³⁴ This misunderstanding extends

¹¹²⁹ Kenneth Shulman et al, ‘*Banks v Goodfellow* (1870): Time to Update the Test for Testamentary Capacity’ (2017) 95(1) *Canadian Bar Review* 251, 253, quoting Arthur Fish, ‘Cognitive Neuroscience and the Solicitor’s Approach to Mental Incapacity’ (2010) in The Law Society of Upper Canada (eds), *Special Lectures 2010: A Medical-Legal Approach to Estate Planning and Decision Making for Older Clients* (Toronto: Irwin Law, 2011) 133.

¹¹³⁰ See Part 9 Vulnerable Populations, in particular [9.1.52]–[9.1.63] and [9.1.76]–[9.1.81] of Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Powers of Enduring Attorney in South Australia* (Report No 15, December 2020).

¹¹³¹ Dr Tracey Westerman, a clinical psychologist, is widely known for her work in Aboriginal mental health, cultural competency and suicide prevention. Dr Westerman has developed culturally appropriate assessment tools, which have subsequently been statistically, scientifically and culturally validated for use by Indigenous Psychological Services. See Indigenous Psychological Services, *Products and Tests* (Web Page, 2022) <<https://indigenouspsychservices.com.au/products-tests/>>.

¹¹³² Kelly Purser, ‘Assessing Testamentary Capacity in the 21st Century: Is *Banks v Goodfellow* Still Relevant?’ (2015) 38(3) *University of New South Wales Law Journal* 854, 855.

¹¹³³ Ibid.

¹¹³⁴ Ibid.

to the role of each profession, including distinct medical specialties and the specific assessment undertaken.¹¹³⁵ It was emphasised:

This misunderstanding is further amplified by miscommunication between the professions, both of which can have a negative impact on the assessment, and the autonomy of the individual who is being assessed. This is concerning, especially in practice where such a misinterpretation can have the greatest impact.¹¹³⁶

6.7.6 There have been major advances in medical understanding of psychiatric, psychological and other impairments which may lead to incapacity.¹¹³⁷ The need for clinical capacity assessments is arguably more important in circumstances where intervention may be exercised to override the choice of an adult who has decision-making capacity.

A Human Rights-Based Approach to Capacity Assessment

6.7.7 The determination that an individual does not have mental capacity has ‘profound and highly personal impacts’ on a person’s life, and the law relating to capacity assessment must ensure that the concepts of dignity and freedoms are fully upheld.¹¹³⁸ There is a fine line between protecting potentially vulnerable individuals and an excessive paternalism that may unduly restrict free choice.¹¹³⁹

6.7.8 A finding of incapacity is a major event that undermines an individual’s autonomy. As a result, the law presumes an individual is capable of making decisions based on their will and preferences. The concept of autonomy underpins the human rights-based approach to assessment of capacity. Beauchamp and Childress observe that ‘[t]o respect autonomous agents is to acknowledge their right to hold views, to make choices, and to take actions based on their values and beliefs’.¹¹⁴⁰ When an individual is deemed legally incapacitated, they are deprived of the freedom to act as autonomous agents.

6.7.9 Human rights law dictates that all individuals are equal before the law and all individuals, regardless of age, race, capacity or incapacity are to be equally treated. In contemporary society, liberalism is reflected through individual freedom and self-governance, when a person is deemed incapacitated (and thus unable to exercise self-governance), significant restrictions are imposed upon individual freedom.¹¹⁴¹

¹¹³⁵ Ibid.

¹¹³⁶ Ibid.

¹¹³⁷ See Carmelle Peisah, ‘Reflections on Changes in Defining Testamentary Capacity’ (2005) 17(4) *International Psychogeriatrics* 709; Kenneth Shulman et al, ‘*Banks v Goodfellow* (1870): Time to Update the Test for Testamentary Capacity’ (2017) 95(1) *Canadian Bar Review* 251, 261. The relevance of dementia to the test for capacity ‘is especially significant as dementia is one of the main mentally disabling conditions confronting modern society with the incidences of dementia expected to increase fourfold by 2050’: Kelly Purser, ‘Assessing Testamentary Capacity in the 21st Century: Is *Banks v Goodfellow* Still Relevant?’ (2015) 38(3) *University of New South Wales Law Journal* 854.

¹¹³⁸ Michael Kirby, ‘Book Review: Who Can Decide? The Six Step Capacity Assessment Process’ (2003) 2 *Elder Law Review* 10.

¹¹³⁹ Grant Gillett, ‘Taking the Moral Measure of Mental Capacity: Interpretation and Implementation’ (2017) 24(4) *Journal of Law and Medicine* 767, 768.

¹¹⁴⁰ Tom Beauchamp and James Childress, *Principles of Biomedical Ethics* (Oxford University Press, 7th ed, 2013) 106.

¹¹⁴¹ Nina A Kohn, ‘A Civil Rights Approach to Elder Law’ in Israel Doron and Ann Soden (eds), *Beyond Elder Law: New Directions in Law and Ageing* (Springer, 2010) 19, 21.

6.7.10 Article 12(2) of the UN *Convention on the Rights of Persons with Disabilities* notes that ‘persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life’.¹¹⁴² This is underpinned by the notions of individual autonomy and freedom to make choices.¹¹⁴³ The mere existence of a disability or impairment does not translate to legal incapacity. As the Committee on the Rights of Persons with Disabilities has observed: ‘[l]egal capacity is indispensable for the exercise of civil, political, economic, social and cultural rights’.¹¹⁴⁴ Therefore, the removal of legal capacity may undermine fundamental human rights.

6.7.11 The Committee also distinguished between the concepts of ‘legal capacity’ and ‘mental capacity’. Legal capacity refers to the ‘ability to hold rights and duties ... and to exercise those rights and duties’.¹¹⁴⁵ In contrast, mental capacity refers to decision-making ability.¹¹⁴⁶ The Committee concluded that ‘perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity’.¹¹⁴⁷ These concepts are often conflated. A person who is deemed to have impairment in decision-making ability, secondary to a disability such as a cognitive impairment, is automatically deprived of their legal capacity to make decisions.¹¹⁴⁸ The Committee further noted two problems associated with the functional test for capacity, which is premised on an understanding of the nature and consequences of a decision. First, this test is potentially applied in a discriminatory manner to persons with a disability.¹¹⁴⁹ This is underpinned by inherent assumptions regarding the relationship between an impairment and incapacity. Secondly, it relies on the ability of the assessor to understand the ‘inner-workings of the human mind’.¹¹⁵⁰ If this assessment is properly undertaken by suitable and qualified practitioners, an accurate determination of capacity can be achieved.

6.7.12 The human rights-based approach highlights the importance of undertaking a capacity assessment consistently and carefully. It is vital to note that the diagnosis of a mental illness, cognitive impairment or a neurodegenerative disorder does not necessarily render an individual legally incapacitated. The assessment of capacity is crucial. In the absence of adequate and evidence-based capacity assessments, an individual’s human rights may be impacted. The finding of incapacity is a significant outcome when modern law and practice places a high premium on individual autonomy.

6.8 Consultation Data Overview

6.8.1 The assessment of capacity is largely reliant on the professional qualifications and training of the assessor. The approach and specific assessment tool used varies between health professionals. As noted by Professor Ibrahim, capacity is ‘understood through the lens of a profession’.

¹¹⁴² *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 12(2).

¹¹⁴³ Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) Article 12: Equal Recognition Before The Law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014).

¹¹⁴⁴ *Ibid* 2.

¹¹⁴⁵ *Ibid* 3.

¹¹⁴⁶ *Ibid*.

¹¹⁴⁷ *Ibid*.

¹¹⁴⁸ *Ibid*.

¹¹⁴⁹ *Ibid* 4.

¹¹⁵⁰ *Ibid*.

6.8.2 The issues relating to capacity assessment overlap with the definition of capacity in the *AAS Act*. SALRI's consultation revealed some support to add an approach outlining how to assess capacity within the legislative definition. SALRI acknowledges that greater guidance, training, education and understanding relating to capacity assessment is necessary and important. However, this can be better addressed through mandatory training and ongoing professional development for the various disciplines and occupations involved in capacity assessment. In conjunction with this, SALRI supports the introduction of a South Australian Capacity Toolkit or Guidelines, as implemented in NSW or Queensland. Consultees generally agreed this would be 'very helpful' to serve as a basic protocol for any interested person to use.¹¹⁵¹

6.8.3 During SALRI's regional consultation in Port Augusta, a roundtable with allied health professionals revealed wide support for capacity assessment guidelines. It was noted that these guidelines would assist in understanding conflicting assessment outcomes from varying disciplines (for example, a psychiatrist and a geriatrician). One attendee noted the 'guidelines need to be culturally supportive and aware [and] as person-centred as possible.'

6.8.4 In SALRI's roundtable discussion with lawyers in Mount Gambier, it was observed that guiding principles were important in maintaining the dignity of the adult. In addition, there was support for the guiding principles contained within the *Voluntary Assisted Dying Act 2021* (SA). The Mount Gambier health practitioners shared this view. Under s 8 of this Act, a person exercising functions or powers under the law must have regard to a number of principles. For example, these include equality, respect for autonomy, a right to be supported in decision-making, entitlement to genuine choices, protection from abuse and respect for culture, beliefs, values and personal characteristics.¹¹⁵²

Capacity Assessment Approach

6.8.5 In consultation with a group of geriatricians, it was noted that medical/clinical capacity assessments are necessary in some circumstances. The need for rules dictating who can assess capacity was raised.¹¹⁵³ For example, a GP was seen as well placed to assess capacity due to their rapport with a patient and ability to acknowledge when a referral to a medical specialist is required. A current barrier identified was the lack of any Medicare rebate available for capacity assessment. Barriers to seeking a clinical capacity assessment should be addressed, to improve accessibility (both financially and shortening wait times). This was also reiterated in a roundtable with allied health professionals in Port Augusta — where SALRI was informed the wait time to see a specialist was 8 to 12 months. Residents living in regional and rural communities have only limited choices for GPs or specialists (who generally visit once a month for a period of one week). As a result, an adult who requires a capacity assessment may only meet their assessor once. The lack of rapport and understanding of their history was concerning for the Port Augusta attendees. One attendee noted a possible solution was 'getting training out to staff on how to assess capacity. Knowing the clients you work with long term helps and having knowledge of the guidelines would help in writing reports so you know what to look for.'

6.8.6 In discussion with health professionals in Port Augusta, it was emphasised that a capacity assessment should not be undertaken via telehealth or over the phone. It should be undertaken in

¹¹⁵¹ This was also supported in consultation with geriatricians.

¹¹⁵² *Voluntary Assisted Dying Act 2021* (SA) ss 8(1)(a)–(c), (h)–(j).

¹¹⁵³ This point was discussed in detail in SALRI's Report on EPAs.

person if possible. This has particular application for regional and rural communities, where access to medical professionals is problematic.

6.8.7 During SALRI's discussion with various medical and legal practitioners, there was concern regarding the ability of a social worker to effectively resolve issues concerning decision-making capacity.¹¹⁵⁴ In the context of a legal practitioner's ability to assess capacity, there were views that a clinical capacity assessment from a medical professional is necessary when dealing with a client who has fluctuating capacity. Similarly, regional health professionals, consisting of medical practitioners and nurses questioned whether the final determination of capacity should rest with social workers. The ASU in accordance with the *AAS Act* presumes an adult has decision-making capacity. Most ASU staff are social workers and currently, the ASU is tasked with the assessment of decision-making capacity, if required. SALRI was informed where an adult has fluctuating capacity, a medical/clinical assessment is generally sought, in preparation for a SACAT hearing.

6.8.8 In relation to the importance of medical assessments, these include a clinical interview, which enables the clinician to obtain relevant collateral information and history of the person. This places the clinician in the optimum position, in conjunction with their training and expertise, to ascertain whether coercion or undue influence is present.¹¹⁵⁵ A legal roundtable with succession lawyers also expressed support for a clinical capacity assessment, which could be undertaken by a GP. It was agreed that a clinical assessment is particularly important in the context of financial abuse.

6.8.9 During SALRI's NGO roundtable discussion, an independent medical/clinical assessment of capacity was also recommended in cases of fluctuating capacity. Rural health social workers reiterated that, in the context of fluctuating capacity, '[t]here needs to be a clinical decision made about the process of obtaining consent in line with the risk to the individual client.'

6.8.10 Professor Ibrahim raised the contextual nature of capacity assessments. Their reliability may depend on the extent of the clinician's full understanding of the individual's extenuating circumstances. In addition, the clinician must be able to approach an assessment without pre-conceived ideas or assumptions relating to the person's capacity. In this context, Professor Ibrahim noted the 'paradigm [the context in which the capacity assessment is sought, such as aged care] dictates assessment.' Adequate training and experience should ensure the clinician does not 'retrofit the domains to their judgement'. In the context of a person's engagement with the ASU, Professor Ibrahim noted that, if a capacity assessment is sought, the ASU should ensure the vulnerable adult understands what they are consenting to or refusing. This requires an understanding of the consequences of each decision. For example, relevant questions could include: do you understand the consequences of consenting to the ASU investigation and the possible outcomes of that investigation?

6.8.11 COTA (SA) raised a number of factors that are of particular relevance to capacity assessment. First, they warned of the harm associated with benevolent ageism, which in practice, overrides the agency and self-determination for a person's 'own good and protection'. In the context of an assessment, this indicates the need to preserve a person's decision-making autonomy. Secondly, further consideration is needed to determine whether the current rights-based approach delivers practical outcomes for those adults safeguarded under the *AAS Act*. These practical outcomes may take the form of safeguarding practices that are less restrictive, such as follow-up and access to

¹¹⁵⁴ A survey respondent noted that, when dealing with decision-making capacity, the person should be offered support from professionals registered with the Australian Health Practitioner Regulation Agency.

¹¹⁵⁵ This point was reinforced during SALRI's medical consultation.

support(s). Thirdly, COTA (SA) asked whether decision-making capacity and consent could be considered within a framework of risk-based intervention. COTA (SA) explained:

In this model, real cases are analysed to identify the predictors of serious risk of harm and the model would become part of the ASU's operating procedures to guide officers to determine whether intervention is required. An ongoing review of cases through an independent committee, and the interrogation of emerging best practice in other jurisdictions, would help to evolve and strengthen the approach over time.

6.8.12 This was also raised by Dr Chris Moy of the AMA(SA) so that a risk-based assessment could be incorporated within a capacity assessment and to inform the ASU's decision to intervene.

6.8.13 Alternative avenues to safeguard an adult who may be vulnerable to abuse which are less restrictive were raised by rural health social workers. They noted that a rights-based approach should be adopted, which applies the 'principles of "dignity of risk" when working with clients' with fluctuating capacity. As a result, they 'believe that there are other possible avenues that could be pursued if we had concerns for the safety of a vulnerable adult who has capacity, [such as] engaging in a welfare check.'

6.8.14 Speech Pathology Australia raised concerns relating to the importance of adapting assessments to the needs of the adult:

People with disability in particular are often assumed to have a greater level of cognitive disability than they in fact do. Assessments of their cognitive and communication abilities may be provided, but rarely modified to assess people of diverse abilities, and with no adjustments to account for, or reflect the barriers to communication faced by the individual. For instance, a person with cerebral palsy who is unable to speak, point or indicate 'yes' or 'no' using a conventional gesture cannot complete most formal, standardised tests of intelligence and language. This person is unable to demonstrate their language comprehension, and therefore assumed to be unable to learn or use language, let alone make decisions.

6.8.15 As a result, Speech Pathology Australia argued the communication needs of the adult must be considered at all levels. For example, in the 'evaluation of the person's capacity being modified as necessary to ensure accessibility', ensuring information relating to the decision is communication accessible, and providing necessary communication supports to enable an adult to express their choice.

6.9 SALRI's Observations and Conclusions

6.9.1 There is a common law presumption that all adults have capacity to make their own decisions unless there is evidence to the contrary. Professor Peter Darzins told a Victorian Parliamentary Report: 'In the whole process the emphasis has to be on allowing people to act as though they are capable, and should there be sufficient evidence of lack of capacity then something else needs to be done, rather than the other way around.'¹¹⁵⁶ Further, participants in this Victorian Parliamentary Report emphasised that a presumption of capacity enhances a person's human rights, in particular, the right of 'persons with disabilities [to] enjoy legal capacity on an equal basis with others in all aspects of life' set out in the *International Convention on the Rights of Persons with Disabilities*.¹¹⁵⁷

¹¹⁵⁶ Law Reform Committee, Parliament of Victoria, 'Inquiry into Powers of Attorney' (Final Report, Parliamentary Paper No 352, August 2010) 109.

¹¹⁵⁷ Ibid.

6.9.2 COTA (Vic) warned that ‘unless we start from the notion of the continuing right to make decisions, we can end up with legislation that is too protective and takes away a right too early’.¹¹⁵⁸

6.9.3 SALRI agrees with these observations and emphasises the importance of the presumption of capacity, as Dr Moy and others highlighted. The decision to determine that an adult lacks capacity is significant, even drastic, and can have an ongoing impact on their life, despite the adult regaining capacity. The label, in and of itself, is often difficult to remove. This is particularly the case in older persons, whereby social perceptions of ageing often assume cognitive decline. However, this may not necessarily be the case.

6.9.4 Therefore, the assessment of capacity serves a critical role in ensuring an adult retains their capacity for as long as possible and preserves their decision-making autonomy. SALRI agrees that some cases warrant a medical or clinical capacity assessment to be undertaken by a health professional, including a general practitioner, psychiatrist, geriatrician, psychologist or neuropsychologist. However, SALRI acknowledges the barriers to accessing these assessments, including availability of professionals (especially in regional/rural communities), wait times and cost.

6.9.5 Proper training and education, including ongoing professional development is necessary to ensure capacity assessments are undertaken appropriately. In conjunction with this, SALRI supports the introduction of a South Australian Capacity Toolkit or Guideline, as exists in NSW or Queensland. This would serve as an important educative tool for any member of the community and address varying aspects of capacity, its definition and process for assessment.

6.9.6 It is imperative that the ASU continues to operate under a framework that presumes decision-making capacity and in more complex cases, such as those involving fluctuating capacity or coercion, a medical/clinical capacity assessment is obtained.

6.9.7 Recommendations

RECOMMENDATION 22

1. SALRI recommends that the most suitable department or agency should draft capacity assessment guidelines in South Australia to be utilised as an educative tool for any interested member of the community or medical or other health practitioner. Such guidelines should be concise, written in plain English and easily accessible formats (such as Easy read and videos) to all members of the community and should also be made available in various translated languages.

2. SALRI recommends that such guidelines should specifically address:

- a. Implications of capacity and its assessment for Aboriginal communities and culturally and linguistically diverse communities, noting that such communities should be consulted to facilitate a process of co-design; and
- b. Coercive behaviour, psychological abuse and undue influence, as it relates to free and voluntary decisions. To facilitate this, SALRI recommends that a similar list of ‘red flags’, as observed in the Queensland Capacity Assessment Guidelines, should be

¹¹⁵⁸ See also *ibid* 109 n 517.

adopted. It should be noted that, in undertaking their role/functions, the Adult Safeguarding Unit must be aware of the significance and implications of coercive behaviour, psychological abuse and undue influence, including that such abuse may vitiate consent.¹¹⁵⁹

RECOMMENDATION 23

SALRI recommends that any determination under the *Ageing and Adult Safeguarding Act 1995* (SA) of whether the Adult Safeguarding Unit should override the consent of an adult who may be vulnerable to abuse with decision-making capacity must be made on a case-by-case basis.

RECOMMENDATION 24

1. SALRI recommends that further training and education should be provided to relevant staff of the Adult Safeguarding Unit regarding the assessment of capacity.

2. Further, SALRI recommends that a clinical capacity assessment may be sought in complex cases where it is reasonably suspected the adult's decision-making capacity to reach a voluntary choice is partially or completely subordinated due to the presence of coercive behaviour, psychological abuse or undue influence. This assessment may be undertaken by a psychiatrist, geriatrician, general practitioner, clinical psychologist or neuropsychologist.

6.10 Capacity, Consent and Coercion

6.10.1 The relationship between capacity, consent and coercion proved a prominent issue throughout SALRI's consultation.¹¹⁶⁰ This interplay is raised in the provisions of the *AAS Act* which enable the ASU to override an adult's consent to refuse further action, despite having decision-making capacity.¹¹⁶¹ This may occur under the following limited circumstances, if:

1. The adult's life or physical safety is at immediate risk;¹¹⁶² or
2. The risk of abuse involves an allegation that a serious criminal offence (which is not defined) has been or is likely to be committed;¹¹⁶³ or
3. The adult has impaired decision-making capacity relating to the specific decision requiring consent;¹¹⁶⁴ or

¹¹⁵⁹ There is increasing awareness of the nature and effects of coercive behaviour and psychological abuse, and that such abuse may result in a lack of decision-making capacity and/or render consent invalid owing to a lack of free and voluntary decision. These behaviours are not limited to relationships between domestic partners. These were recurring themes in SALRI's consultation and recent research.

¹¹⁶⁰ For a recent example, see *Moloney v Hayward and Ors* [2022] SASC 79.

¹¹⁶¹ *AAS Act* s 24(1).

¹¹⁶² *Ibid* s 24(4)(a)(i).

¹¹⁶³ *Ibid* s 24(4)(a)(ii).

¹¹⁶⁴ *Ibid* s 24(4)(a)(iii).

4. Following reasonable inquiries, the ASU has not been able to contact the adult.¹¹⁶⁵

6.10.2 The *AAS Act* also enables the introduction of additional circumstances, contained in the Regulations.¹¹⁶⁶

6.10.3 It is important to clarify the relative roles of capacity, consent and coercion:

- **Capacity:** an adult is presumed to have decision-making capacity. They may exercise this capacity under the *AAS Act* by making a decision whether to make or pursue a claim of abuse against their perpetrator or refuse further action.
- **Consent:** in order to provide valid consent, the adult must have decision-making capacity and have given consent freely and voluntarily and without coercion. Consent is expressed or communicated as the decision to pursue a report of abuse, enabling the ASU's intervention.
- **Coercion:** this is an external factor, which may vitiate the voluntariness of the consent provided. However, an adult who is subject to coercive behaviour can still retain full decision-making capacity.

6.10.4 SALRI emphasises that the presence of psychological abuse, gaslighting or coercion does not automatically rebut the presumption that an adult has decision-making capacity. It is a factor that should be considered when the adult is in the course of making a decision. The impact of coercion relates to an adult's ability to freely and voluntarily make a decision whether to consent to ASU intervention. As a result, coercion may be relevant to decision-making capacity where the adult is using information and weighing up the consequences of available options.¹¹⁶⁷

6.10.5 SALRI's medical consultation revealed that an adult must be able to exercise evaluative judgement, whereby they balance the benefits, risks and disadvantages of refusing further action or consenting to intervention. Where the adult is capable of this, consultees favoured the preservation of that adult's autonomy by respecting their decision, despite the possible adverse outcome(s).

6.10.6 There was a consensus amongst the medical practitioners SALRI spoke to that an adult must possess the requisite level of capacity to appreciate they are being coerced and factor this into their decision-making.

6.10.7 A typical example given was that of an older person who is being financially abused by their child, who often pressures or influences them to make certain decisions (such as threatening to not let them see their grandchildren or the threat of being moved to an aged care facility).¹¹⁶⁸ The older person acknowledges the unsatisfactory, abusive situation and the coercive behaviour from their child. However, in refusing to provide consent to intervention, they are able to evaluate the

¹¹⁶⁵ Ibid s 24(4)(a)(iv).

¹¹⁶⁶ Ibid s 24(4)(a)(v); *Ageing and Adult Safeguarding Regulations 2019* (SA). Currently, reg 8 also encompasses circumstances where, the ASU is of the opinion that it is 'necessary or appropriate that action of the relevant kind be taken without first obtaining the consent of the vulnerable adult'. Associate Professor Ben Livings raised this provision as a significant potential means for the ASU to intervene without the apparent victim's consent. SALRI was told this provision does not carry much weight in practice. This Regulation seems at odds with the intention, if not the wording of the *AAS Act* and as such may be ultra vires.

¹¹⁶⁷ *AAS Act* s 5(2).

¹¹⁶⁸ SALRI was often told, notably by lawyers, that this is a regular form of abuse.

outcomes/consequences to justify their decision.¹¹⁶⁹ This reasoned decision may be based upon their dependency, risk of fracturing relationships, risk of social isolation or inability to see family. In this scenario, the older person has made a decision to accept the abuse. SALRI was often told in consultation, notably by both regional and Adelaide lawyers, that this is not uncommon in practice. The adult knows they are the subject of inappropriate and even abusive conduct, but they are able to consider the situation and choose to remain in the unsatisfactory situation. They may consider that the alternative option of losing contact with their grandchildren or being moved to an aged care facility to be worse. Alternatively, the apparent victim may not want to pursue action or any legal proceedings, wishing to ‘preserve their relationship’ with their abusive family member.¹¹⁷⁰ Professor Joseph Ibrahim told SALRI of the ‘shades of coercion’ that arise and that the reasoned response of the older person declining ASU assistance may be ‘I’d rather he stole from me than stole from someone else.’

6.10.8 SALRI notes that an adult’s decision may be influenced by a number of factors, including cultural norms and expectations and varying perceptions of what constitutes coercion. One party in consultation raised the relevance of the approach taken in *Rogers v Whitaker*,¹¹⁷¹ a landmark Australian medical law case. This case concerned a duty to disclose material risks associated with medical procedures to a patient. Although this context is very different to providing consent for the ASU’s intervention, the rationale underpinning the risk disclosure approach can be instructive. It may be relevant during the decision-making process, as the *Rogers v Whitaker* approach is solely focussed on the person and what information may be of significance or value to them.

6.10.9 This person-centred approach emphasises that the impact of coercion on a decision must be made on a case-by-case basis. The act of weighing information, the benefits, risks and disadvantages, will be influenced by the significance or value the adult attaches to each. The ‘valuation of these options and consequences is related to the goals, values and norms a particular [person] considers to be important in [their] life.’¹¹⁷² As a result, the factors formulating an adult’s justification for refusal or consent should indicate what they perceive to be of material relevance to the decision.

6.10.10 The *Rogers v Whitaker* approach is instructive in reinforcing that decision-making ability should not be assessed on the merits of the decision. If the adult is able to reach an informed decision, having regard to the possible outcomes and consequences associated with refusing action or consenting to intervention, this indicates valid consent.¹¹⁷³

¹¹⁶⁹ See, eg, *Adamson v Enever* [2021] QSC 221, 312.

¹¹⁷⁰ See, eg, *DL v A Local Authority* [2012] EWCA Civ 253, [9]. SALRI was told in consultation that this is not uncommon in practice.

¹¹⁷¹ *Rogers v Whitaker* (1992) 175 CLR 479.

¹¹⁷² Ron Berghmans, ‘Capacity and Consent’ (2001) 14(5) *Current Opinion in Psychiatry* 491, 493.

¹¹⁷³ This is consistent with the *AAS Act* in ‘acknowledging the right of all vulnerable adults to take informed risks and to make decisions that others (no matter their experience or background) may regard as wrong, reckless or inappropriate’: at s 12(e). The Act is also explicit that ‘a vulnerable adult with decision-making capacity who is experiencing abuse has the right to decline support, assistance or other measures designed to safeguard them from abuse’: at s 12(f). Where the adult has decision-making capacity and is aware of the circumstances of coercion a decision to remain within what is an unsatisfactory situation, or to refuse assistance from the ASU, is still a valid exercise of their decision-making ability and autonomy. SALRI was often presented with such examples in its consultation.

The United Kingdom: An Instructive Approach?

6.10.11 Where an adult who may be vulnerable to abuse is unable to appreciate the presence of coercion and cannot exercise this evaluative judgement, one may argue this is a circumstance in which the ASU should intervene. This refers to situations where an adult with capacity is deprived of their ability to make their own independent decision due to the coercion of another party. This is often illustrative of elder abuse and has been described as ‘more complex because the abused person appears to have capacity and appears to be prepared to live with the abuse.’¹¹⁷⁴

6.10.12 David Lock QC explored this issue in the United Kingdom, perceptively asking ‘what is the law’s response to people who technically have decision-making capacity, but are in circumstances where they are de facto unable to exercise that capacity?’¹¹⁷⁵ SALRI notes that the UK approach, drawing on a considerable body of case law and commentary against the backdrop of the *European Convention on Human Rights* and international human rights law,¹¹⁷⁶ provides valuable insight into this complex issue of third party interference (such as that observed under the *AAS Act*) in cases where coercion is so pronounced that an adult’s ability to exercise evaluative judgement as part of the decision-making process is undermined or compromised.

6.10.13 The *Mental Capacity Act 2005* (UK) (*MCA*) establishes the ‘statutory framework which governs the position where a person is found to lack capacity in one or more domains.’¹¹⁷⁷ It also serves to ‘clarify a number of legal uncertainties’ and ‘govern decision-making on behalf of adults, both where they lose mental capacity at some point in their lives, for example as a result of dementia or brain injury, and where the incapacitating condition has been present since birth.’¹¹⁷⁸ The Court of Protection, established under the *MCA* also functions as an additional safeguard for people lacking capacity.¹¹⁷⁹ Similar to the Australian position, the *MCA* reinforces the guiding principles of capacity, including the presumption of capacity, its decision-specific nature, and the right to make mistakes.¹¹⁸⁰ A point of difference is specific reference in the *MCA* to the least restrictive principle:

Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.¹¹⁸¹

6.10.14 This highlights that any interference with a person’s rights, including autonomy, must be necessary, proportionate and reasonable. The *MCA* also sets out a diagnostic test for capacity, which is often informed by medical evidence.¹¹⁸² Reliance on medical/clinical capacity assessments enables a more comprehensive, holistic examination of the adult and collateral information (personal and family

¹¹⁷⁴ David Lock, ‘Decision-Making, Mental Capacity and Undue Influence: Action by Public Bodies to Explore the Grey Areas between Capacity and Incapacity’ (2015) 20(1) *Judicial Review* 42.

¹¹⁷⁵ Ibid. See also Michael Dunn, Isabel Clare and Anthony J Holland, ‘To Empower or to Protect? Constructing the Vulnerable Adult in English Law and Public Policy’ (2008) 28(2) *Legal Studies* 234.

¹¹⁷⁶ See, eg, Jillian Craigie, ‘Conceptualising “Undue Influence” in Decision Making Support for People with Mental Disabilities’ (2021) 29 (1) *Medical Law Review* 48; *London Borough of Haringey v CM* [2014] EWCOP B23.

¹¹⁷⁷ *WU v BU* [2021] EWCOP 54, [33].

¹¹⁷⁸ Explanatory Notes, Summary and Background, *Mental Capacity Act 2005* (UK).

¹¹⁷⁹ *Mental Capacity Act 2005* (UK) Pt 2.

¹¹⁸⁰ See *ibid* s 1.

¹¹⁸¹ *Ibid* s 1(6).

¹¹⁸² David Lock, ‘Decision-Making, Mental Capacity and Undue Influence: Action by Public Bodies to Explore the Grey Areas between Capacity and Incapacity’ (2015) 20(1) *Judicial Review* 42.

history, family relationships and dynamics, culture, education and more). SALRI acknowledges the value in seeking medical/clinical capacity assessments, particularly in complex cases, such as those involving fluctuating capacity.

6.10.15 One UK case highlights the complexity of capacity and coercion.

WU v BU (“BU”)

6.10.16 This case is illustrative of an adult who, due to her impaired decision-making capacity, was vulnerable to abuse and coercion. The case concerned BU, a 70-year-old woman with vascular dementia. Her marriage ended when her two daughters were young, leaving her alone to raise them without support from her husband.¹¹⁸³ She was an affluent woman, with significant assets and relied upon professionals for financial advice and management.

6.10.17 BU developed a relationship with NC, after meeting him at his local art gallery. Subsequent to this meeting, NC slowly ingratiated himself in every aspect of BU’s life. NC was a serial offender, with a history of ‘targeting vulnerable individuals for financial gain’.¹¹⁸⁴ He had been convicted and imprisoned for fraud and had allegations of both rape and sexual assault against him.¹¹⁸⁵

6.10.18 Their relationship was characterised as one of coercive control, perpetrated by NC, with significant financial abuse.¹¹⁸⁶ The extent of NC’s control and coercion was evidenced by a number of events/incidents including:

- Establishing a partnership company and maintaining costs using BU’s money;¹¹⁸⁷
- Various gifts given to NC, including an SUV truck;¹¹⁸⁸
- Isolating BU from her family [leaving her] now estranged from her father, daughters and grandchildren;¹¹⁸⁹
- Accompanying BU to medical appointments and controlling the release of information to family;¹¹⁹⁰
- Intervening in professional arrangements with BU’s accountants;¹¹⁹¹
- Taking BU to a different solicitor to override her existing Lasting Power of Attorney and will, in which NC financially benefits;¹¹⁹²

¹¹⁸³ *WU v BU* [2021] EWCOP 54, [1]–[3].

¹¹⁸⁴ *Ibid* [76].

¹¹⁸⁵ *Ibid* [13]–[16].

¹¹⁸⁶ *Ibid* [1], [18]. Indeed, this case can be seen as a textbook case of coercive control in an elder abuse context. See further below Part 7.3.

¹¹⁸⁷ *Ibid* [10].

¹¹⁸⁸ *Ibid* [11].

¹¹⁸⁹ *Ibid* [3].

¹¹⁹⁰ *Ibid* [21]–[22].

¹¹⁹¹ *Ibid* [91].

¹¹⁹² *Ibid* [21]. Under the new arrangement, if NC survived BU he would:

... receive an income equivalent to 50% of the rental yield from the property portfolio which, on his case, is, or was, in the course of being acquired. The other 50% is to be accumulated in an income account which is to be held for the benefit of BU’s grandchildren. Further, NC is to retain absolute control over decisions in relation to

- Moving in to reside with BU in her mortgage-free home;¹¹⁹³
- Directing and controlling her diet;¹¹⁹⁴
- The payment of 300 pounds per week to NC, despite living rent-free in her home;¹¹⁹⁵
- Directing the terms of a civil partnership with BU;
- Managing liquidation of investment portfolios (one of which NC received 200,000 pounds) and coercively sought to liquidate the entire portfolio worth approximately 700,000 pounds;¹¹⁹⁶ and
- Directed at least five property transactions, without BU's knowledge (save for one).¹¹⁹⁷

6.10.19 Through his relationship with BU, which he described as 'romantic, albeit platonic',¹¹⁹⁸ NU 'assumed a degree of incremental control over BU's affairs'.¹¹⁹⁹

6.10.20 For BU, her relationship with NC had become a crucial part of her life, 'pivotal to her emotional wellbeing and happiness'.¹²⁰⁰ In discussions with Roberts J, it was obvious that BU perceived her future happiness was 'bound up in her relationship with NC'.¹²⁰¹ Roberts J acknowledged the complexity of the case, noting:

In circumstances where personal autonomy and life choices are a central aspect of the human rights which this court is bound to uphold and respect, it is only in limited circumstances where it can or should intervene.¹²⁰²

6.10.21 Roberts J had to determine whether BU had the decision-making capacity to maintain contact with NC and enter into a civil partnership or marriage with NC. The safeguarding measures sought by BU's daughter included injunctions to prevent contact between BU and NC and a forced marriage protection order. This injunction is akin to an intervention order most commonly observed within a domestic violence context.¹²⁰³ An order of this nature was found to be necessary to safeguard BU from further abuse, given the circumstances of the case.

6.10.22 BU's vascular dementia was not sufficient to render her decision-making capacity impaired in this context. Rather, the 'corrosive and coercive nature and control' that NC exercised over her was found by Roberts J to have rendered BU incapable of autonomous decision-making.¹²⁰⁴ As

the properties until he reaches the age of 70 years or the grandchildren attain the age of 21. On the earliest of those two events, the properties will be passed to the grandchildren save for one which NC shall be entitled to select and retain for himself: at [24].

¹¹⁹³ Ibid [7], [22].

¹¹⁹⁴ Ibid [22].

¹¹⁹⁵ Ibid [22].

¹¹⁹⁶ Ibid [30].

¹¹⁹⁷ Ibid [32].

¹¹⁹⁸ Ibid [3].

¹¹⁹⁹ Ibid [91].

¹²⁰⁰ Ibid [1].

¹²⁰¹ Ibid [2].

¹²⁰² Ibid.

¹²⁰³ The value of an intervention order in such cases is often overlooked. See below Part 10.6.

¹²⁰⁴ *WU v BU* [2021] EWCOP 54, [89].

previously noted, the ability of the person to appreciate the presence of abuse and coercion and factor this into decision-making will also inform capacity assessment. In this case, BU did not ‘truly understand the nature of their relationship or what a future with NC would hold’ if it continued.¹²⁰⁵ Further, she was ‘blind to future risk as she has been to past risk’,¹²⁰⁶ failing to accept NC’s past history and criminal conduct. It would be a ‘Herculean task’ for BU to gain insight into the reality of her relationship with NC.¹²⁰⁷

6.10.23 In light of these findings, Roberts J concluded that BU lacked capacity to make a decision to maintain her relationship with NC. Consequently, a final order was made that there would be no contact between BU and NC. It was deemed ‘necessary to secure [BU’s] safety and wellbeing’.¹²⁰⁸

6.10.24 In relation to BU’s decision-making capacity to enter into a civil partnership or marriage, Roberts J found that BU did indeed have capacity. However, due to the nature and severity of the coercive control present, it qualified as an appropriate circumstance where the Court could intervene and override BU’s capacity for the protection of a vulnerable adult.¹²⁰⁹ Roberts J acknowledged that she was ‘dealing with the wishes and the future of a woman who has completely lost her personal autonomy as a result of the total subordination of her free will.’¹²¹⁰

6.10.25 Few cases are likely to present such a severe pattern of coercive control as BU. However, it aptly illustrates the circumstances where the coercive control is of such a nature and extent that the individual’s decision-making capacity is significantly compromised.

Application to the Adult Safeguarding Unit

6.10.26 BU highlights a disturbing case of the abuse of an adult who lacked full decision-making capacity. Where the adult’s ability to exercise evaluative judgement is overborne by the coercion and control of a third party, as in BU, this prompts consideration of intervention and safeguarding measures. This is reflected by an inability to acknowledge, understand and appreciate the presence of coercion and abuse. Where an adult lacks this insight, they are unable to properly exercise their decision-making capacity to make a voluntary and free decision. It is important to note Roberts J in BU relied on clinical capacity assessments undertaken by health professionals. The nature of this assessment, both in the UK and Australia,¹²¹¹ incorporates a clinical interview, whereby the clinician develops a rapport to collate and consider collateral information about the adult. This includes education, upbringing, culture, religion, family relationships and dynamics, living standard and more. The clinical interview will form an integral part of the assessment and may identify suspicious and/or coercive behaviour. The extent and impact of this behaviour upon decision-making autonomy also falls within the remit of the clinician’s skills and work.

6.10.27 For cases involving an external pressure, such as coercion or undue influence, its severity must be investigated to ascertain whether the adult is able to weigh the consequences of each decision. This evaluative judgement may result in an adult selecting the ‘lesser of two evils’. However, if their

¹²⁰⁵ Ibid.

¹²⁰⁶ Ibid.

¹²⁰⁷ Ibid [67].

¹²⁰⁸ Ibid [100].

¹²⁰⁹ Ibid [102].

¹²¹⁰ Ibid [104].

¹²¹¹ This emerged in SALRI’s consultation with geriatricians. See above Part 6.4.

choice is a reasoned decision, having regard to the relevant information, their decision-making autonomy must be respected.

6.10.28 In very limited circumstances, where the coercion is so significant that it renders the adult completely subordinated, this justifies the ASU's intervention to proceed without the victim's consent. The impact of coercion on consent is explored in the following Part.

6.11 Consultation Data Overview

Adopting a more interventionist approach?

6.11.1 In SALRI's consultation with some health practitioners, a view was expressed that the presumption of capacity must be respected, even if the case may involve suspected coercion. The difficulty in obtaining information regarding whether coercive control is present was acknowledged. The view was that where a case is suspected to involve coercion or psychological manipulation, the ASU should keep a record of the case and follow it up, rather than closing the case.

6.11.2 In discussion with geriatricians, the point was raised that 'coercion can influence consent but it cannot influence capacity. If someone has capacity, then they can choose to consent or not'.

6.11.3 It was noted in SALRI's Adelaide NGO roundtable that where there is a suspected case of coercion, the victim's capacity is then implicated and the situation should be escalated, with focus placed on the abuser and their conduct rather than the victim.

6.11.4 The OFAW reiterated that it is 'critical that the person's rights are upheld, and they are supported to exercise autonomy and make their own choices in response to their situation.' This highlights that the ASU's power to intervene and override an apparent victim's lack of consent should only be exercised with caution and due diligence. Further, alternative least restrictive means could be explored prior to exercising this power. The inclusion of a suite of safeguarding actions could assist in providing alternative, less interventionist actions.

6.12 SALRI's Observations and Conclusions

6.12.1 For adults with decision-making capacity, the presumption of capacity continues to operate, despite the outcome of the decision. This emphasises that a decision which leads to an adverse outcome, such as a decision to continue living with abuse, does not rebut the presumption of capacity. Further investigation is required where it is suspected the degree of coercion is significant, such that it clouds the judgement of the adult when evaluating their options. Where it is evident that an adult is completely subordinated by the coercion of a third party, SALRI is of the view that there will be some situations where the psychological abuse of an adult is of such a nature and extent that they are unable to exercise their decision-making autonomy.

6.12.2 Where an adult is able to exercise evaluative judgement and reach a reasoned decision, their decision should be respected, regardless of the outcome. SALRI accepts these are not simple or straightforward tasks, but are necessary considerations for the ASU in its consideration of questions of capacity.

Part 7 — Consent and Coercion

7.1 Background

7.1.1 An individual’s autonomy and consent are integral to the operation of the *AAS Act*.¹²¹² In very limited circumstances, the *AAS Act* enables the ASU to act, despite a refusal by an adult vulnerable to abuse to pursue a report, which effectively overrides their consent (or at least allows the ASU to proceed without consent).¹²¹³

7.1.2 SALRI specifically examined whether any changes to present law and/or practice are needed to better address the situations in which the line between valid consent and coercion becomes blurred. Whilst there was wide agreement as to the importance of upholding an individual’s autonomy,¹²¹⁴ what proved to be a recurring theme in SALRI’s consultation was the intersection of consent with the presence and implications of psychological abuse, coercion or gaslighting.

7.1.3 In light of the ASU’s reliance on an adult’s consent to pursue a report, a number of issues were raised in SALRI’s consultation and research. Where a person does not consent to action being taken, but the reported abuse is significant, a difficult question arises, namely the need to balance three factors: the autonomy of an adult with capacity who is an apparent victim of abuse; their consent; and the presence of coercion.

7.1.4 SALRI has explored whether free and voluntary consent from an apparent victim can be obtained where there is coercion or psychological abuse. Thus, ‘[i]t is also necessary to consider the extent to which the victim is being coerced by the abuser into making a “choice” not to allow intervention.’¹²¹⁵ It is notable that the *AAS Act* makes no reference to psychological abuse or coercion and its implications. Indeed, this was raised to SALRI more than once, notably by Celia Moodie of the Victim Support Service, as the ‘elephant in the room’.¹²¹⁶

7.1.5 In recent years there has been increasing attention paid by policy makers and legislators¹²¹⁷ to what is known as ‘coercive control’¹²¹⁸ (and the related phenomenon of ‘gaslighting’). This is typically

¹²¹² ‘Except in those cases involving serious and imminent harm, 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’: *AAS Act* s 12(c).

¹²¹³ *Ibid* s 24(4).

¹²¹⁴ There was disagreement though as to the extent to which, if at all, the ASU should be able to act without the consent of an individual. See further below Part 7.6.

¹²¹⁵ Alan Clarke, John Williams and Sarah Wydall, ‘Access to Justice for Victims/Survivors of Elder Abuse: A Qualitative Study’ (2015) 15(2) *Social Policy and Society* 3.

¹²¹⁶ Kathleen Wilder and Sandra Reynolds, ‘Introducing a Framework for Defining Financial Abuse of the Elderly’ (1996) 8(2) *Journal of Elder Abuse* 61; Joan Braun, ‘Elder Guardianship Mediation: Threat or Benefit to Abuse Victims?’ [2012] (7) *International Perspectives on Victimology* 1–34.

¹²¹⁷ See, eg, Parliament of New South Wales, Joint Select Committee on Coercive Control, ‘Coercive Control in Domestic Relationships’ (Report, 2021); Women’s Safety and Justice Taskforce, *Hear Her Voice: Report One, Addressing Coercive Control and Domestic and Family Violence in Queensland* (Report, November 2021).

¹²¹⁸ The term ‘coercive control’ was contemporised by Professor Evan Stark in his book, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007). Yet, researchers from Monash University’s Gender and Family Violence Prevention Centre emphasise that the concept is not new and goes back to at least the 1970s. See Kate Fitz-Gibbon, Sandra Walklate and Silke Meyer, *The Criminalisation of Coercive Control* (Research Brief, 2020). There have been many recent developments in this area, including the proposal and introduction of new crimes. Whether such crimes are warranted is contentious. ‘To be clear; women’s (and others’) experiences of coercive

studied in the context of intimate partner relationships, but has wider application, extending to other vulnerable family members in the context of both elder abuse¹²¹⁹ and the abuse of persons with disability.¹²²⁰

7.1.6 Two prominent forms of the abuse of both older persons¹²²¹ and persons with disability¹²²² are emotional or psychological abuse and financial abuse.¹²²³ A recurring theme in SALRI's consultation (though far less evident in research)¹²²⁴ was that these types of abuse should not be seen in isolation. Rather, it is necessary to look at the combined presence, effects and implications of both psychological and financial abuse upon an apparent victim. A number of parties raised to SALRI that the emotional and psychological abuse of an adult in this context may amount to coercive control, despite the term being typically applied to abuse occurring in a domestic relationship. It was widely noted to SALRI that such emotional or coercive pressure is typically associated with financial abuse.¹²²⁵ They were seen as 'synonymous with each other'.

7.1.7 This Part considers gaslighting, coercion and coercive control, with specific regard to the manipulative nature of such practices and the effects that prolonged exposure to this form of abuse may have on an adult. The connection between this type of psychological abuse and an adult's consent will be further examined and the implications of this are discussed. SALRI considered the burden on

and controlling behaviours are real and carry with them severe consequences for themselves and their children. The harms and long-term effects of this form of intimate partner violence are not in dispute. However, recognition of these experiences notwithstanding, a debate remains concerning whether the criminal law can make a meaningful difference for women living with those experiences': Sandra Walklate and Kate Fitz-Gibbon, 'Why Criminalise Coercive Control? The Complicity of the Criminal Law in Punishing Women Through Furthering the Power of the State' (2021) 10(4) *International Journal for Crime, Justice and Social Democracy* 1, 3.

¹²¹⁹ The 2022 Queensland Report noted that 'there is scope for the offence [of coercive control], if created in Queensland, to extend to any relationship where there is a pattern of behaviour which intends to control, establish power, or cause fear, by one person in an intimate, family or carer relationship against another. This may capture circumstances where an older person is being abused by a family member': Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 86–7.

¹²²⁰ Parties such as Maggie Rutjens and others noted this to SALRI. Ms Rutjens elaborated that that there are barriers to disclosing abuse such as fear of retribution, lack of trust and more. People with disability have reported unintended negative consequences they have experienced in the past as a result of disclosing abuse to different entities such as family, friends, services, police and other bodies. Fears include losing disability support, worsening social isolation, victimisation, reputational damage and more. The historical oppression of people with disability plays a large role too, as people with disability have not been believed and listened to in the past and in some cases, little has changed in their personal circumstances even after disclosing abuse.

¹²²¹ Rae Kaspiew, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, 2016) 5–7, 46–7; Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 20 Finding 9. Indeed, some studies classify psychological abuse as the most common form of elder abuse. See Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 7 [2.9]; Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 2, 11, 30, 33.

¹²²² Family and Community Development Committee, Parliament of Victoria, 'Inquiry into Abuse in Disability Services' (Final Report, Parliamentary Paper No 167, May 2016) 10–12 [1.1.3].

¹²²³ According to Senior Rights Victoria's Annual report, data from 2012–2019 two thirds of clients reported accounts of financial abuse. Senior Rights Victoria, *Seven Years of Elder Abuse Data in Victoria* (Research Report, 2020). See further below Part 9.1.

¹²²⁴ The 2021 AIFS study, for example, only relatively briefly considers concurrence in differing forms of abuse and its implications: at Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 47–9, 52–3.

¹²²⁵ See below Part 7.4.

a victim of abuse to consent to intervention and whether this burden would be more suitably placed elsewhere. SALRI also examined the current high threshold under the *AAS Act* to permit intervention and the community benefits of lowering this standard.

7.1.8 The severity of the coercive behaviour will be a relevant factor to consider when determining whether an apparent victim has provided free and voluntary consent. As a result, under these circumstances, SALRI is of the view that the ASU's decision to proceed without the consent of the apparent victim should be made on a case-by-case basis.

7.2 Defining Gaslighting, Coercion and Undue Influence

Gaslighting

7.2.1 The psychological abuse of an older person or person with disability was often described to SALRI as 'gaslighting'. Gaslighting is a form of coercion and psychological abuse that takes place over a prolonged period of time and consists of small, seemingly insignificant actions or conversations that lead to a reduced sense of autonomy in a person causing them to question their beliefs and actions.

¹²²⁶ Gaslighting can be seen as one form of coercive control.¹²²⁷

7.2.2 A recent Queensland report observed:

Gaslighting was a common theme throughout the submissions received. Gaslighting refers to a form of psychological abuse designed to make victims seem 'crazy' to others and themselves, creating a surreal interpersonal environment. It is said to be rooted in social and gender inequality and used within relationships characterised by power imbalance. This was evident in the relationships described in the many submissions provided by people with lived experience, as highlighted in the following example: '... I still question myself and ask my friends if they think I am crazy.' Gaslighting is an effective means of isolating and manipulating victims into abiding by the perpetrator's demands ... The domestic and family violence literature describes gaslighting as the way perpetrators intentionally 'spin tales' to distort the victim's sense of reality and distort their perceptions of everyday life (and sometimes their entire biographies) in an attempt to redefine the victim's reality.¹²²⁸

7.2.3 It has been noted that gaslighting should be understood as a sociological phenomenon, as

gaslighting is effective when it is rooted in social inequalities, especially gender and sexuality, and executed in power-laden intimate relationships. When perpetrators mobilize gender-based stereotypes, structural inequalities, and institutional vulnerabilities against victims with whom they are in an intimate relationship, gaslighting becomes not only effective, but devastating.¹²²⁹

7.2.4 While this analysis was in the context of gendered, intimate partner relationships, these stereotypes, inequalities and vulnerabilities also exist in a wide variety of relationships involving older

¹²²⁶ Paige Sweet, 'The Sociology of Gaslighting' (2019) 84(5) *American Sociological Review* 851.

¹²²⁷ House Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into Family, Domestic and Sexual Violence* (September 2021) 105 [4.16].

¹²²⁸ Women's Safety and Justice Taskforce, *Hear Her Voice: Report One, Addressing Coercive Control and Domestic and Family Violence in Queensland* (Report, November 2021) vol 2, 19.

¹²²⁹ Paige Sweet, 'The Sociology of Gaslighting' (2019) 84(5) *American Sociological Review* 851, 852.

persons and persons with disability. It is therefore not surprising that gaslighting appears to occur not infrequently in such relationships. This is a theme that was regularly expressed to SALRI.

Coercion and Coercive Control

7.2.5 There has been considerable recent discussion of coercive control,¹²³⁰ typically in an intimate partner context.¹²³¹ However, the application of coercive control is wider and its existence as a form of elder abuse is now apparent.¹²³² As a 2022 Queensland study noted:

In the past decade, a greater understanding has also developed of the different relationships within which abuse of older persons can occur. It is now acknowledged that elder abuse can share many of the same characteristics as family and domestic violence, including elements of coercive control.¹²³³

7.2.6 Coercive control can manifest itself in various ways.¹²³⁴ A recent Commonwealth parliamentary report noted the large variety of ways in which coercive control can manifest and how it presents differently depending on the specific situation.¹²³⁵

7.2.7 Such behaviour is clearly harmful.¹²³⁶ It ‘harms individuals by undermining their autonomy and liberty of the person which can have an extremely damaging effect on the victim’s psychological

¹²³⁰ See, eg, Heather Douglas, ‘Do We Need a Specific Domestic Violence Offence?’ (2015) 39(2) *Melbourne University Law Review* 434; Joint Select Committee on Coercive Control, Parliament of New South Wales, ‘Coercive Control in Domestic Relationships’ (Report, 2021); Women’s Safety and Justice Taskforce, *Hear Her Voice: Report One, Addressing Coercive Control and Domestic and Family Violence in Queensland* (Report, November 2021); House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, ‘Inquiry into Family, Domestic and Sexual Violence’ (Report, September 2021). While coercive control is not currently a specific crime in South Australia, it is in other jurisdictions: see *Domestic Violence Act 2018* (Ireland) s 39; *Serious Crime Act 2015* (UK) s 76; *Family Violence Act 2004* (Tas) s 8. Various Bills have been introduced in South Australia to introduce such a crime. See, eg, Criminal Law Consolidation (Domestic Abuse) Amendment Bill 2020 (SA); Criminal Law Consolidation (Coercive Control Amendment) Bill 2020 (SA); Criminal Law Consolidation (Abusive Behaviour) Amendment Bill 2021 (SA). See further South Australia, *Parliamentary Debates*, Legislative Council, 20 February 2020, 217; South Australia, *Parliamentary Debates*, House of Assembly, 2 December 2020, 3601–3 (Katrine Hildyard); South Australia, *Parliamentary Debates*, House of Assembly, 27 October 2021, 8379–81 (Vickie Chapman, Attorney-General). These Bills did not proceed and lapsed with the 2022 State election.

¹²³¹ Evidence to Parliament of New South Wales, Joint Select Committee on Coercive Control, Sydney, 23 February 2021, 47–8 (Margaret Duckett).

¹²³² The 2022 Queensland Report noted that ‘there is scope for the offence [of coercive control], if created in Queensland, to extend to any relationship where there is a pattern of behaviour which intends to control, establish power, or cause fear, by one person in an intimate, family or carer relationship against another. This may capture circumstances where an older person is being abused by a family member’: Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 86–7.

¹²³³ *Ibid* 10.

¹²³⁴ Joint Select Committee on Coercive Control, Parliament of New South Wales, ‘Coercive Control in Domestic Relationships’ (Report, 2021) 8 [2.4], 11–14; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, ‘Inquiry into Family, Domestic and Sexual Violence’ (Report, September 2021) 102 [4.12]. This point was also made clear to SALRI in discussion by Jean Lee, a London lawyer.

¹²³⁵ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, ‘Inquiry into Family, Domestic and Sexual Violence’ (Report, September 2021) 102 [4.12].

¹²³⁶ Vanessa Bettinson, ‘Criminalising Coercive Control in Domestic Violence Cases: Should Scotland Follow the Path of England and Wales?’ [2016] (3) *Criminal Law Review* 165, 168–9; Joint Select Committee on Coercive Control, Parliament of New South Wales, ‘Coercive Control in Domestic Relationships’ (Report, 2021) 14–17 [2.15]–[2.19]; Women’s Safety and Justice Taskforce, *Hear her Voice: Report One, Addressing Coercive Control and Domestic and Family Violence in Queensland* (Report, November 2021) vol 2, 54–9; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, ‘Inquiry into Family, Domestic and Sexual Violence’ (Report, September 2021) 109 [4.25], 11 [4.43].

wellbeing.’¹²³⁷ It has been found that ‘non-physical control [can] be more injurious [than physical violence] over time, given its more subtle and longer lasting nature’.¹²³⁸

7.2.8 There are various broadly consistent definitions of coercive control. The Australian Women Against Violence Alliance explained to a recent Senate Inquiry that coercive control is ‘an umbrella term that refers to an ongoing pattern of controlling and coercive behaviours that are not exclusively physical but can pervade an individual’s daily life with a devastating impact’.¹²³⁹ The Report noted the

insidious form of violence known as coercive control — a pattern of controlling and manipulative behaviour designed to intimidate, isolate, and control a person ... It is commonly described by victim/survivors as the worst form of abuse they experience and can have more immediate and ongoing impact than physical forms of violence.¹²⁴⁰

7.2.9 The South Australian Attorney General’s Department defines coercive control as:

[A]n insidious form of Domestic Family Violence that involves tactics of emotional and mental abuse which undermine the victim’s autonomy and sense of identity. Coercive and controlling behaviour may include isolating a person from their friends and family, controlling finances...¹²⁴¹

7.2.10 A recent NSW Parliamentary report similarly observed:

Coercive control is a form of domestic abuse. Perpetrators aim to take away their partner’s autonomy and freedom. They do this by using a gradual escalation of tactics like isolating their partner from their family and friends, humiliating them and putting them down, controlling and tracking their movements, and taking away their ability to make decisions about things like what they wear and how they spend their money.¹²⁴²

7.2.11 The Youth Affairs Council of South Australia (YACSA) suggested that coercion can be defined as:

[A] tactical pattern of behaviours that are designed by the perpetrator to control, intimidate, create dependency, and render the victim powerless. The perpetrator will use a range of tactics to leverage the emotional investment the victim has in the relationship to introduce rules and regulations that only apply to the victim, as well as penalties for non-compliance.¹²⁴³

¹²³⁷ Vanessa Bettinson, ‘Criminalising Coercive Control in Domestic Violence Cases: Should Scotland Follow the Path of England and Wales?’ [2016] (3) *Criminal Law Review* 165, 168.

¹²³⁸ Joint Select Committee on Coercive Control, Parliament of New South Wales, ‘Coercive Control in Domestic Relationships’ (Report, 2021) 2 [1.6], quoting Professor Patricia Easta. Victims ‘often describe it as more harmful and long-lasting than physical abuse’: at 15 [2.15].

¹²³⁹ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, ‘Inquiry into Family, Domestic and Sexual Violence’ (Report, September 2021) 104 [4.10].

¹²⁴⁰ Ibid 103–4 [4.4]–[4.5].

¹²⁴¹ Attorney General’s Department, Government of South Australia, *Implementation Considerations should Coercive Control be Criminalised in South Australia* (Discussion Paper, 2021).

¹²⁴² Joint Select Committee on Coercive Control, Parliament of New South Wales, ‘Coercive Control in Domestic Relationships’ (Report, 2021) vi.

¹²⁴³ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, ‘Inquiry into Family, Domestic and Sexual Violence’ (Report, September 2021) 104–5 [4.11].

7.2.12 Women's Safety NSW described coercive control as:

[T]he use by one person of controlling and manipulative behaviours such as isolation, emotional manipulation, surveillance, psychological abuse and financial restriction against another person over a period of time for the purpose of establishing and maintaining control. In relationships characterised by coercive control, abusers use tactics of fear and intimidation to exert power over their victim, undermining their independence and self-worth.¹²⁴⁴

7.2.13 A recurring theme highlighted to SALRI in consultation was the significant incidence and implications of coercive control, perpetrated by family members and others close to the victim, in the context of both elder abuse and the abuse of persons with disability. This theme is also emerging in recent research.¹²⁴⁵ As one author has noted:

During the last decade social science research has begun to articulate the experiences of victim/survivors of domestic violence and/or abuse and the harm they suffer. There is an increasing understanding that perpetrators employ a range of behaviours over a period of time that undermines the victim's autonomy and his or her capacity to make decisions ... domestic violence and/or abuse reduces options available to the victim but also involves the perpetrator subjecting the remaining options to arbitrary control.¹²⁴⁶ The perpetrator may use a combination of physical and non-physical, criminal and non-criminal tactics amounting to a pattern of behaviour that regulates all aspects of the victim's life, with refusals to cooperate leading to punishment. As the victim seeks to avoid repercussions, the perpetrator's rules become internalised by the victim enabling the perpetrator to ensure compliance by use of less and less punishing behaviour. This can be achieved through a gesture or a look or words that have significance to the [parties] but not to the outside world.¹²⁴⁷

7.2.14 The difficulty in identifying coercive control and assessing its effects were often raised to SALRI.¹²⁴⁸ It will depend on the individual and their unique circumstances. This reinforces that '[v]ictims from different age and cultural groups can be abused and controlled in different ways.'¹²⁴⁹

7.2.15 To separate what is and is not coercive control is not simple. As one study noted:

Additionally, the demarcation between coercive and controlling behaviours on the [one] hand and voluntary choices in a relationship on the other hand may be difficult to determine. For example, one indicator of coercive control may be that one individual controls the finances of the

¹²⁴⁴ Ibid 104 [4.10].

¹²⁴⁵ See, eg, Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 86–7.

¹²⁴⁶ See also Victor Tadros, 'The Distinctiveness of Domestic Abuse: A Freedom Based Account' (2005) 65(3) *Louisiana Law Review* 989.

¹²⁴⁷ Vanessa Bettinson, 'Criminalising Coercive Control in Domestic Violence Cases: Should Scotland Follow the Path of England and Wales?' [2016] (3) *Criminal Law Review* 165, 167–8.

¹²⁴⁸ Coercive control is a typical feature of abusive relationships, but it can be missed by the police and others. One review identifies the need to change police and other practice by encouraging the early recognition of coercive control as an ongoing pattern of abuse: Her Majesty's Inspectorate of Constabulary, *Everyone's Business: Improving the Police Response to Domestic Abuse* (Report, 2014). See also Mark Rhys Kebbell, 'Risk Assessment for Intimate Partner Violence: How Can the Police Assess Risk?' (2019) 25(8) *Psychology, Crime and Law* 829.

¹²⁴⁹ Joint Select Committee on Coercive Control, Parliament of New South Wales, 'Coercive Control in Domestic Relationships' (Report. 2021) 14 [2.11].

household. In some relationships, this could be indicative of a pattern of oppression or exploitation, whereas in others it could indicate a consensual position between the individuals.¹²⁵⁰

7.2.16 There is a need, as Jean Lee (a London lawyer) and others told SALRI, for careful, individual and nuanced factual analysis of the presence of coercive control and its extent and effect. As one author notes:

While it is relatively easy to explain the concept of coercive control in theory, it is not possible to undertake a ‘one size fits all’ factual analysis because each case will involve an individualized package of behaviours developed through a process of trial and error for the particular victim by the person who knows her most intimately. These behaviours may be subtle and readily understood only by the victim and perpetrator as, for example, when they are designed to exploit fears that are personal to the individual victim or consist of ‘gestures, phrases and looks that have meaning only to those within the relationship.’¹²⁵¹

7.2.17 A recent Queensland report found that ‘it can be difficult to distinguish coercive control from genuine care, particularly where behaviour is viewed in isolation or where well-intentioned concerns becomes overbearing behaviour’.¹²⁵² The specific circumstances of the adult vulnerable to abuse, in particular isolation and dependence on others, can magnify the effects of coercive control and gaslighting.¹²⁵³

7.2.18 SALRI notes the ongoing discussion as to whether coercive control should be made a specific crime, and whether this should extend beyond the intimate partner situation to other family

¹²⁵⁰ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, ‘Inquiry into Family, Domestic and Sexual Violence’ (Report, September 2021) 106 [4.18].

¹²⁵¹ Vanessa Bettinson and Charlotte Bishop, ‘Is the Creation of a Discrete Offence of Coercive Control Necessary to Combat Domestic Violence?’ (2015) 66(2) *Northern Ireland Law Quarterly* 179. See also Julie Tolmie, ‘Coercive Control: To Criminalise or not to Criminalise?’ (2018) 18(1) *Criminology and Criminal Justice* 50; Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007) 206–9.

¹²⁵² Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 55.

¹²⁵³ This may well be more prevalent in regional and rural areas where access to support services is limited. See also below Part 11.3.

relationships.¹²⁵⁴ This is a complex area.¹²⁵⁵ There are views both in favour of¹²⁵⁶ and against¹²⁵⁷ such a crime.

7.2.19 What is clear (though often overlooked) is that such a crime may extend beyond domestic partners and also that both older persons¹²⁵⁸ and persons with disability are subjected to such conduct. For example, the Older Women's Network of NSW have described how older women often experience coercive control outside intimate partner relationships:

[W]omen's experience of coercive control is not limited to intimate partner relationships. If we are to protect women from domestic and family violence and abuse, we need to look at her entire lifespan and that includes the time when she is older. Women say they become invisible when they

¹²⁵⁴ Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 86–7; Joint Select Committee on Coercive Control, Parliament of New South Wales, 'Coercive Control in Domestic Relationships' (Report, 2021) 95–6 [5.75]–[5.81]. 'The Inquiry heard evidence that, to avoid the risks of over-criminalisation, the offence should be limited to intimate partner relationships. However, other participants expressed opposing views. This issue requires further consideration': at 96 [5.81].

¹²⁵⁵ Heather Douglas, 'Do We Need a Specific Domestic Violence Offence?' (2015) 39(2) *Melbourne University Law Review* 434; Vanessa Bettinson and Charlotte Bishop, 'Is the Creation of a Discrete Offence of Coercive Control Necessary to Combat Domestic Violence?' (2015) 66(2) *Northern Ireland Law Quarterly* 179. The comments of a 2022 Queensland Report are germane. 'It can be difficult to distinguish coercive control from genuine care, particularly where behaviour is viewed in isolation or where well-intentioned concerns becomes overbearing behaviour. Circumstances of vulnerability and dependence can create particularly apt conditions under which coercive control may be perpetrated. In addition, individual acts of coercive control rarely satisfy the elements of an existing criminal offence. This makes coercive control not only difficult to detect, but difficult to respond to': Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 55.

¹²⁵⁶ See, eg, Marilyn McMahon and Paul McGorrey, 'Criminalising Emotional Abuse, Intimidation and Economic Abuse in the Context of Family Violence: the Tasmanian Experience' (2016) 35(2) *University of Tasmania Law Review* 1; Joint Select Committee on Coercive Control, Parliament of New South Wales, 'Coercive Control in Domestic Relationships' (Report, 2021); Women's Safety and Justice Taskforce, *Hear her Voice: Report One, Addressing Coercive Control and Domestic and Family Violence in Queensland* (Report, November 2021); Paul McGorrey and Marilyn McMahon, 'Prosecuting Controlling or Coercive Behaviour in England and Wales: Media Reports of a Novel Offence' (2021) 21(4) *Criminology and Criminal Justice* 566.

¹²⁵⁷ See, eg, Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response* (ALRC Report No 114, NSWLRC Report No 128, October 2010) 587 [13.85], 592–3 [13.107]–[13.111]; Sandra Walklate, Kate Fitz-Gibbon and Jude McCulloch, 'Is More Law the Answer? Seeking Justice for Victims of Intimate Partner Violence through the Reform of Legal Categories' (2018) 18 (1) *Criminology and Criminal Justice* 115; Heather Douglas, 'Do We Need an Offence of Coercive Control?' (2018) 144 *Precedent* 18; Julie Tolmie, 'Coercive Control: To Criminalise or not to Criminalise?' (2018) 18(1) *Criminology and Criminal Justice* 50; Chelsea Watego et al, 'Carceral Feminism and Coercive Control: When Indigenous Women Aren't Seen As Ideal Victims, Witnesses Or Women', *The Conversation* (online, 25 May 2021) <<https://theconversation.com/carceral-feminism-and-coercive-control-when-indigenous-women-arent-seen-as-ideal-victims-witnesses-or-women-161091>>.

SALRI notes the concerns of Associate Professor Kate Fitz-Gibbon, Director of the Monash Gender and Family Violence Prevention Centre to a Commonwealth Parliamentary inquiry about the potential impact of any such offence on marginalised communities, such as Aboriginal communities: Evidence to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, Canberra, 13 November 2020, 35. SALRI has also heard such concerns from agencies working with Aboriginal communities. Associate Professor Fitz-Gibbon earlier told the committee: 'As yet, there is no evidence which shows that introducing a standalone offence of coercive control increases women's safety outcomes and improves their access to justice. We do have a really significant body of research which points to the ways in which the justice system fails to respond adequately to women's experiences of violence and fails to provide justice and, in some cases, actually further traumatises women who come within the confines of the criminal justice system. So we really believe that there's quite significant work to be done before Australia is ready to have an offence of coercive control': Evidence to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, Canberra, 8 September 2020, 10.

¹²⁵⁸ Evidence to Joint Committee on Coercive Control, Parliament of New South Wales, Sydney, 23 February 2021, 36–37, 39 (Kathryn McKenzie).

grow older. Just looking at the statistics of violence against women proves this. Older women are not there in the statistics. They are excluded. Not because they do not experience violence against women but because types of violence they face are classified as elder abuse. So, for older women, gender-based violence and elder abuse often form a double jeopardy. Older women sit at the intersection of ageism and sexism. The invisibility of older women in gender-based violence, especially domestic and sexual violence, illustrates the conventional social norms that only younger women are susceptible to these forms of violence. Apart from the invisibility of older women in the stats on violence, we just need to look at the submissions to this Committee on coercive control. How many submissions actually considered the fact that older women experience coercive control and that this coercive control may be perpetrated by others in a domestic relationship beyond that of an intimate partner.¹²⁵⁹

7.2.20 The NSW Ageing and Disability Commission noted that coercive control ‘has been a significant feature of reports to the Commission about adults with disability and older people ... Coercive and controlling behaviours feature in reports about both adults with disability and older people.’¹²⁶⁰ The evidence to the NSW Parliamentary Report of Kathryn McKenzie, Director, Operations, NSW Ageing and Disability Commission was telling:

From the outset, a significant proportion of the reports that we have received have involved coercive control of adults with disability and older people and overwhelmingly the reports to the Ageing and Disability Commission involve women, so women with disability and older women ... Most of the matters that we have received and that involve coercive control involve family members and relatives, as well as spouses and partners ... the impact of coercive control on the adults with disability and older people that we have worked with in relation to the reports that we have received, can be absolutely devastating, as it is for many of the other women that you are hearing evidence about. But for adults with disability, or women with disability and older women, there are additional factors that add to the impact on them of coercive control. Primarily the pre-existing reliance that many of them have on support from others and the very real difficulty of them being able to change the situation without additional assistance or to be able to get help ... the behaviours in some cases, coercive and controlling behaviours, have been happening for some time at the time that we have received the report. What we have found is that in some cases the behaviours have been very hidden and the individual themselves is quite hidden. In other cases, what we have recognised is that the behaviours have been accepted and it has not been recognised for what it is, which is coercive control. Part of the reason that they have not been recognised is that the additional factors involved in these cases is that the existence of a disability and perceived frailty of the individuals, the women involved, very much clouds the ability for external parties to adequately recognise coercive control, as distinct from care that is being provided to the individuals, so we see a failure to recognise these matters for what they are.¹²⁶¹

¹²⁵⁹ Evidence to Joint Committee on Coercive Control, Parliament of New South Wales, Sydney, 23 February 2021, 46 (Yumi Lee, Manager, Older Women’s Network New South Wales). See also Evidence to Joint Committee on Coercive Control, Parliament of New South Wales, Sydney, 23 February 2021, 47–8 (Margaret Duckett, Board Chair and President, Seniors Rights Service).

¹²⁶⁰ Ageing and Disability Commission, Submission No 108 to the Joint Select Committee on Coercive Control, Parliament of New South Wales, *Coercive Control in Domestic Relationships* (2 February 2021) 7–8 <<https://www.parliament.nsw.gov.au/ladocs/submissions/70505/Submission%20-%20108.pdf>>.

¹²⁶¹ Evidence to Joint Committee on Coercive Control, Parliament of New South Wales, Sydney, 23 February 2021, 36 (Kathryn McKenzie).

7.2.21 The NSW Parliamentary Report heard from a variety of parties¹²⁶² that any offence of coercive control should be broader, and apply beyond intimate partners to all ‘domestic relationships’ currently captured in the relevant NSW Act to partners, ex-partners, people living in the same household, relatives, and Aboriginal kinship connections.¹²⁶³ Multicultural, disability and older people’s advocacy groups submitted that a tightly defined offence could exclude victims from communities that may be vulnerable.¹²⁶⁴ The Older Women’s Network of NSW argued that older women often experience coercive control outside intimate partner relationships, and ‘the fear, anxiety, trauma and stress caused is no less than that experienced by younger women at the hands of their intimate partner’.¹²⁶⁵ The NSW Ageing and Disability Commission stated that women with disability and older women regularly experience coercive control in family relationships, making the following cogent point:

It should not be that if you are subject to coercive control by an intimate partner ... that is recognised as being an offence and you have access to protections. But if you are subject to those exact same behaviours in your home by a family member or other party, you do not.¹²⁶⁶

7.2.22 This is a difficult question. The NSW Parliamentary Report heard conflicting views. It ultimately observed:

The Inquiry heard evidence that, to avoid the risks of over-criminalisation, the offence should be limited to intimate partner relationships. However, other participants expressed opposing views. This issue requires further consideration.¹²⁶⁷

Undue Influence¹²⁶⁸

7.2.23 SALRI notes that the issues raised in both consultation and research as to gaslighting and coercive control are not new concerns. Undue influence, which can be described as a type of coercive behaviour, if present, can result in the validity of consent being invalidated or undermined. It has long been recognised by the courts, at least at equity.¹²⁶⁹ However, finding a clear definition of undue influence has proved challenging:

¹²⁶² Joint Select Committee on Coercive Control, Parliament of New South Wales, ‘Coercive Control in Domestic Relationships’ (Report, 2021) 95 n 363. These parties included the Royal Australian and New Zealand College of Psychiatrists, the Office of the Director of Public Prosecutions (NSW), Seniors Rights Service, Professor Heather Douglas, Centre for Women’s Economic Safety, No to Violence and Domestic Violence NSW.

¹²⁶³ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 5.

¹²⁶⁴ Joint Select Committee on Coercive Control, Parliament of New South Wales, ‘Coercive Control in Domestic Relationships’ (Report, 2021) 95 [5.76].

¹²⁶⁵ Evidence to Joint Committee on Coercive Control, Parliament of New South Wales, Sydney, 23 February 2021, 46 (Yumi Lee). See also Evidence to Joint Committee on Coercive Control, Parliament of New South Wales, Sydney, 23 February 2021, 47–8 (Margaret Duckett).

¹²⁶⁶ Joint Select Committee on Coercive Control, Parliament of New South Wales, ‘Coercive Control in Domestic Relationships’ (Report, 2021) 95–6 [5.77].

¹²⁶⁷ *Ibid* 96 [5.81]. See also at: 95–6 [5.75]–[5.81].

¹²⁶⁸ See above Glossary. See also Michaela Estelle Okninski, ‘Meaningful Protection or Unacceptable Risk: A Critical Analysis of Undue Influence as a Safeguard in Proposed Voluntary Assisted Dying Legislation in South Australia’ (PhD Thesis, University of Adelaide, 2022).

¹²⁶⁹ See for example, *Hall v Hall* [1868] LR 1 P & D 481; *Wingrove v Wingrove* (1885) 11 PD 81.

No Court has ever attempted to define undue influence. One reason for the difficulty in defining undue influence is that the label ‘undue influence’ has been used to mean different things.¹²⁷⁰

7.2.24 The law, reflected in the principles of the *AAS Act*, prioritises and seeks to enhance the decision-making capacity and autonomy of adults. However, for such decisions to be binding at law they must be voluntarily made — that is, they must be free from unacceptable external pressure.¹²⁷¹ Undue influence is a form of unacceptable external pressure.

7.2.25 Although undue influence has been expressed in a variety of different ways, it was initially solely recognised by the jurisdiction of equity and is a ground to challenge the validity of a contract, transfer of property, gift, will, or consent to, or refusal of, medical treatment as the case may be. However, in these separate areas of law, undue influence has distinct meanings which have been shaped by the nature of the law, the interest being protected, and the surrounding judicial narrative.

7.2.26 The courts have recognised that in relationships where fiduciary-like obligations are owed, there is a significant risk that consent was not voluntarily given.¹²⁷² As a matter of policy, undue influence is presumed unless it can be successfully rebutted.¹²⁷³ This was best explained by Dixon J in *Johnson v Buttress*¹²⁷⁴ where his Honour observed that the

burden is imposed upon one of the parties to certain well-known relations as soon as it appears that the relation existed and that he has obtained a substantial benefit from the other ... [however] the doctrine which throws upon the recipient the burden of justifying the transaction is confined to no fixed category. It rests upon a principle. It applies whenever one party occupies or assumes towards another a position naturally involving an ascendancy or influence over the other, or a dependence or trust on his part ... *the relations between him and the donor are so close as to make it difficult to disentangle the inducements which led to the transaction. These considerations combine with reasons of policy to supply a firm foundation for the presumption against a voluntary disposition in his favour.*¹²⁷⁵

7.2.27 Hodges J in *Union Bank of Australia v Whitelan*¹²⁷⁶ describes undue influence as ‘acts [that] are not, in the fullest sense of the word ... free, voluntary acts’. In *Spong v Spong*, Rich J distilled the key question for consideration before the court as being ‘whether the person parting with property by way of gift, or entering into a contract, had a full and free opportunity of judging for himself’.¹²⁷⁷ On a similar note, Dixon J in *Johnson v Buttress* espoused that it must be the ‘independent and well understood act of a man in a position to exercise free judgment’. Gillard J in *Union Fidelity Trustee Co. Of Australia Limited v Gibson*¹²⁷⁸ framed the issue for consideration as being whether the act was ‘pure, voluntary and well understood’.¹²⁷⁹

¹²⁷⁰ *Thorne v Kennedy* (2017) 350 ALR 1, 10 (Keifel CJ, Bell, Gageler, Keane and Edelman JJ).

¹²⁷¹ Reference to the ‘law’ in this Part means common law, equity and probate unless otherwise expressly indicated. These are the areas of law where undue influence is applied.

¹²⁷² See *Spong v Spong* (1914) 18 CLR 544, 549 (Griffiths CJ).

¹²⁷³ *Royal Bank of Scotland Plc v Etridge (No 2)* 1998 WL 1043594, [5]–[7] (Stuart-Smith, Millett, Morritt LLJ).

¹²⁷⁴ (1936) 56 CLR 113.

¹²⁷⁵ *Ibid* [134]–[135] (Dixon J) (emphasis added); see also *Union Fidelity Trustee Co of Australia v Gibson* [1971] VR 573.

¹²⁷⁶ [1906] VLR 711, 712 (Hodges J).

¹²⁷⁷ *Spong v Spong* (1914) 18 CLR 544–552 (Rich J).

¹²⁷⁸ [1971] VR 573.

¹²⁷⁹ *Union Fidelity Trustee Co of Australia v Gibson* [1971] VR 573, 574 (Gillard J); see also *Johnson v Buttress* (1936) 56 CLR 113.

7.2.28 Therefore, although it has been framed in a variety of ways, the theme that emerges in the authorities is that *not* acting voluntarily, having freedom of will or exercising an independent judgment are quintessential elements of undue influence. Undue influence is thus defined by an absence of certain decision-making characteristics and if it has been established that free will was overborne, then this will likely constitute undue influence. What makes influence ‘undue’ has been judicially characterised as a question of fact and degree, determined on a case-by-case basis.

7.2.29 In *Thorne*,¹²⁸⁰ Edelman J, delivering judgment for the majority, explained that

pressure can deprive a person of free choice in this sense where it causes the person substantially to subordinate his or her will to that of the other party. It is not necessary for a conclusion that a person’s free will has been substantially subordinated to find that the party seeking relief was reduced entirely to an automaton or that the person became a ‘mere channel through which the will of the defendant operated.’ Questions of degree are involved. But, at the very least, the judgmental capacity of the party seeking relief must be ‘markedly sub-standard’ as a result of the effect upon the person’s mind of the will of another.¹²⁸¹

7.2.30 Therefore, whilst the majority clarified this threshold issue — and seemingly lowered it — the High Court reiterated that the vital question as to whether the influenced person’s judgmental capacity has become ‘markedly sub-standard’ can only be resolved upon close examination of the facts of each individual case, for which there is no clear answer.

7.2.31 The courts have been steadfast regarding the distinction between mere influence or dominance of the mind and undue influence.¹²⁸² Indeed, influence alone is not grounds to invite the courts’ intervention and is viewed as an acceptable element of human interactions.¹²⁸³ This is where the doctrine of undue influence departs significantly from ordinary influence familiar to the English language; however, there is no clear test available to draw a clear dividing line between the two. As observed by Porter J in *Mutual Finance Ltd v John Wetton & Sons Ltd*,¹²⁸⁴ ‘how is the line to be ... drawn between those forms of coercion or persuasion [influence] which are permissible and those which the law recognises as unlawful [undue influence] and as a ground of ... invalidity? To this question it is impossible, as the authorities at present stand, to give any definite or confident reply’.¹²⁸⁵

Interrelationship between Undue Influence, Coercion and Lack of Decision-Making Capacity

7.2.32 It is important to address the impact undue influence, coercion and lack of decision-making capacity can have on the validity of a decision, and the interrelationship between these factors. For a decision to be valid at law, it must be voluntary, which requires the decision-maker to exercise their choice freely and voluntarily. If the decision-maker has been subject to external pressure such as undue influence and coercion, the voluntariness of the decision is undermined.

7.2.33 On the other hand, a lack of decision-making capacity can also have the same vitiating effect on the validity of a decision. If the person lacks decision-making capacity in relation to a specific

¹²⁸⁰ (2017) 350 ALR 1.

¹²⁸¹ *Thorne v Kennedy* (2017) 350 ALR 1, 11 (Keifel CJ, Bell, Gageler, Keane and Edelman JJ).

¹²⁸² See, eg, *Watkins v Combes* (1922) 30 CLR 180 193 (Isacacs JJ).

¹²⁸³ See, eg, *Allcard v Skinner* (1889) 36 Ch 35.

¹²⁸⁴ [1937] 2 KB 389, 394–95.

¹²⁸⁵ *Ibid* 394–5.

decision, this decision is equally invalid as in the circumstance where a person's capacity has been completely subordinated due to the presence of undue influence or coercion.

7.2.34 While undue influence arose on many occasions in consultation, SALRI notes that this is a concept with an existing, if somewhat nebulous, definition and that it does not arise in all cases in which an individual has been coerced into making a decision.¹²⁸⁶ In cases where coercion does not amount to undue influence, the individual's decision-making and/or ability to consent to further action being taken by the ASU may still be called into question.¹²⁸⁷

7.3 The Connection to Elder Abuse

7.3.1 The most common forms of elder abuse reported are financial abuse or psychological abuse.¹²⁸⁸ Most cases of elder abuse occur where the perpetrator is in a position where there is a relationship expectant of trust.¹²⁸⁹ Research suggests that intergenerational abuse is common,¹²⁹⁰ with cases of financial abuse the most common form reported. Serious financial crime is one of the most common forms of abuse against older people and people with disability. According to Senior Rights Victoria's Annual report, data from 2012–2019 recorded that two thirds of clients reported accounts of financial abuse.¹²⁹¹

7.3.2 The 2021 AIFS *National Elder Abuse Prevalence Study* found that

of participants who experienced one form of abuse, psychological abuse was the most common single form of abuse (74%, or 56% of those who experienced any form of abuse), followed by neglect (14%, or 11% of those who experienced any form of abuse). For the participants who experienced two or more subtypes of abuse, the most commonly co-occurring types were psychological abuse with: neglect (23% of those who experienced multiple subtypes) physical abuse (20.9% of those who experienced multiple subtypes) financial abuse (20.5% of those who experienced multiple subtypes).¹²⁹²

7.3.3 The Western Australian Parliamentary report highlighted the nature of serious financial abuse and its link to coercive control. The following case study was used to exemplify this:

¹²⁸⁶ This is one reason why SALRI does not recommend the introduction of a statutory equivalent of undue influence be introduced to the *AAS Act*: see further below Part 10.4.

¹²⁸⁷ This may include the ASU choosing to take action without the consent of the adult vulnerable to abuse, despite them having decision-making capacity.

¹²⁸⁸ Rae Kaspiew, Rachel Carson and Helen Rhoades, *Australian Institute of Family Studies, Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, November 2018) 5–7; John Anderson, 'Vulnerability of Elders to Physical Harm and Death: Criminal Law Responses' (2019) 93(8) *Australian Law Journal* 631; Kelly Purser, Tina Cockburn and Elizabeth Ulrick, 'Examining Access to Formal Justice Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney' (2019) 12(1) *Elder Law Review* 1, 9.

¹²⁸⁹ Mark Lachs and Karl Pillemer 'Elder Abuse' (2004) 364(9441) *The Lancet* 1192; Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) Finding 4. This encompasses part of the widely accepted WHO definition of elder abuse, see below Part 9.1.

¹²⁹⁰ Rae Kaspiew, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, 2016) 5.

¹²⁹¹ Senior Rights Victoria, *Seven Years of Elder Abuse Data in Victoria* (Research Report, 2020).

¹²⁹² Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 47–8.

In terms of psychological and emotional abuse, what I see most commonly is threats to isolate an older person from their grandchildren and from their broader family unless they cooperate — if you like, it is a two-pronged approach — with, for example, selling a house or handing over X amount of money to allow someone to put a deposit on a home. So that two-pronged approach of, unless you cooperate with this financial demand, you won't be seeing this person or that person in your life.¹²⁹³

7.3.4 In 2017, the ALRC found that 'abuse of an older person may include the use of deception, threats or violence to coerce the person to contribute, withdraw or transfer [assets] for the benefit of the abuser'.¹²⁹⁴ The 2022 Queensland Report similarly highlighted that 'coercive control is a pattern of behaviour involving threats, assaults and intimidation which intends to harm, punish, degrade, frighten or humiliate a victim'.¹²⁹⁵

7.3.5 One study observed the link between psychological abuse and financial abuse, noting that the former is a grooming behaviour for the latter.¹²⁹⁶ Psychological abuse 'seems to frequently co-occur with financial abuse, suggesting a pattern of behaviour analogous to grooming in the sexual abuse context'.¹²⁹⁷

7.3.6 A 2016 Australian Institute of Family Studies Report confirmed that financial abuse 'was accompanied by psychological abuse that was intimidating, controlling and fear inducing'.¹²⁹⁸ Among the ways in which financial abuse was carried out were through misuse of EPAs, coerced changes to wills, unethical trading in title to property, and the coercion of people without capacity into signing documents in relation to assets that would result in financial gain for the perpetrator. Concerns were also raised, particularly by professionals from helplines, in relation to situations where adult children were dependent on aged parents for accommodation or financial support by reason of addiction or mental ill health, but failed to fulfil reciprocal expectations in relation to caregiving activities.¹²⁹⁹

7.3.7 The NSW Department of Family and Community Services defined financial abuse in the context of elder abuse as 'the illegal or improper use or management of an older person's money, property or other financial resources'¹³⁰⁰ and that this can include the 'misuse of a power of attorney,

¹²⁹³ Select Committee into Elder Abuse, Legislative Council of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 42.

¹²⁹⁴ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 231.

¹²⁹⁵ Queensland Government, *Guidelines for Assessing Decision-Making Capacity* (Guidelines, 2020) <<https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/power-of-attorney-and-making-decisions-for-others/capacity-guidelines>>.

¹²⁹⁶ Kylie Miskovski, Alzheimers Australia NSW, *Preventing Financial Abuse of People with Dementia* (Discussion Paper No 10, June 2014), See also, eg, Rae Kaspiew, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, 2016) 8, 10, 47.

¹²⁹⁷ Rae Kaspiew, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, 2016) 47.

¹²⁹⁸ Rae Kaspiew, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, 2016) 10.

¹²⁹⁹ See Jo Wainer, Peter Darzins and Kei Owada, Monash University, *Prevalence of Financial Elder Abuse in Victoria: Protecting Elders' Assets Study* (Report, 10 May 2010).

¹³⁰⁰ Department of Family and Community Services, New South Wales Government, *Preventing and Responding to Abuse of Older People (Elder Abuse)* (Interagency Policy, June 2020) 11.

forcing or coercing an older person to change their will, taking control of a person's finances against their wishes and denying them access to their own money'.¹³⁰¹

7.3.8 The Financial Services Commission used the following case example in their 2015 symposium to detail the ways in which elder financial abuse can occur due to coercion, stating:

In basic terms elder financial abuse occurs in Australia where family members or trusted friends, or strangers, cheat an older person out of their assets, that is their home or their savings or any valuable items they may possess. They may do this by forgery, lies, misrepresentation or manipulation. They may do it by asking for a loan, or a loan guarantee, which they never repay. In other cases, the frail older person is persuaded to transfer their home to a son or daughter, on the understanding that a granny flat and care will be provided. When the handover happens and the elderly parent is left destitute, little can be done as typically there was no proper legal agreement in place.¹³⁰²

7.3.9 Many reported cases illustrate these themes. In the case of *R v Kerin*,¹³⁰³ for example, an older woman listed her son and grandson as her attorneys. Whilst in this position, they used the woman's financial assets for a series of risky trades amounting to serious financial harm to a total value of over \$200,000. The older woman subsequently lost capacity, which raised the issue of consenting to the trades. The trading of money left the woman destitute and her estate in debt.

7.3.10 The case of *SMcD (Guardianship)*¹³⁰⁴ demonstrates coercion relating to serious financial abuse. An older woman with a disability suffering the recent loss of her husband was removed from her aged care home by her adoptive children and then taken to the bank where they attempted to coerce her into withdrawing her assets and transferring them to her adult children's names.

7.3.11 Cases of elder financial abuse are increasingly common and result in a multitude of outcomes with one study noting that

about 33% of one million cases of elder abuse were financial. Other studies have reported similar rates and have concluded that financial abuse is among the top three forms of elder abuse. The effect of elder financial abuse on older people can be devastating. In addition to robbing them of their economic resources, it often causes extreme emotional distress of depression, increased dependence on others, a change in residence, decreased resources for medicines and health care, and a diminished quality of life.¹³⁰⁵

7.3.12 The Senior Rights Service noted that its 'clients disclose patterns of psychological and emotional abuse by a family member, usually one upon whom they rely for care. This is frequently accompanied by financial abuse.'¹³⁰⁶ The Service elaborated that such abuse included gaslighting:

¹³⁰¹ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 268 [8.6] (quoting the previous 2014 policy).

¹³⁰² Susan Ryan, 'Financial Services Council Elder Abuse Speech' (Speech, Australian Human Rights Commission, October 2015) <<https://humanrights.gov.au/about/news/speeches/elder-abuse-financial-abuse>>.

¹³⁰³ *R v Kerin* [2013] SASCFC 56.

¹³⁰⁴ *SMcD* [2007] VCAT 666.

¹³⁰⁵ Joan Braun, 'Elder Guardianship Mediation: Threat or Benefit to Abuse Victims?' [2012] (7) *International Perspectives on Victimology* 1–34.

¹³⁰⁶ Senior Rights Service, Submission No 127 to Joint Select Committee on Coercive Control, Parliament of New South Wales, *Coercive Control in Domestic Relationships* (12 February 2021) 1 <<https://www.parliament.nsw.gov.au/ladocs/submissions/70614/Submission%20-%2020127.pdf>>.

Gaslighting with comments such as ‘You are losing it’ (playing upon the older person’s fears of cognitive decline) and make them reluctant to call the abuser to account for failure to meet an obligation (‘But I did do that, don’t you remember? Your memory is so bad nowadays.’) or challenge their behaviour (‘That never happened. You’re just imagining things. Old people get like that’).¹³⁰⁷

7.3.13 The NSW Ageing and Disability Commission noted the ‘numerous reports’¹³⁰⁸ received by the Commission about adults with disability and older people who are subject to coercive and controlling behaviours, adding:

Most reports to the ADC involve more than one type of abuse. It is common, for example, for financial and psychological abuse to be reported together, noting that psychological abuse can be applied to gain access to a person’s finances.¹³⁰⁹

7.3.14 The following case study was presented by the Senior Rights Service to the NSW Parliamentary Report:

It is the women who are the recipients of the [coercive] abuse and as an example, Mary is in her early 80s. Lives in regional New South Wales in a house she owned. She left her abusive, controlling husband when her only son, Jim, was a teenager. She is struggling to live on the aged pension and her 55-year-old son has lived with her for over 10 years. He does not pay board, contribute to rates or food, insurance or utilities. He has a very bad temper. She never knows when he could blow up. She feels anxious all the time and this has affected her health. She does not sleep at night because sometimes Jim is awake all night and she is scared. Mary needs him to take her to the shops because she does not drive anymore but she cannot ask him to take her anywhere because he gets so angry. As a result, she has to wait until he happens to want to go into town and sometimes there is no food for her. When she has to wait for days, he does not seem to mind going without meals. He uses her pension money to buy things for himself and he tells her she owes it to him as he had a bad life because of his unhappy childhood. That is the sort of representative scenario of what people contact us about and because it is their children, they do not want their children to be arrested by the police and go to court. They still love them. What they want them to do is just stop doing what they are doing and make their life slightly better.¹³¹⁰

7.3.15 The use of gaslighting behaviours by family members to obtain financial benefit is also common. An older person may even be made to doubt themselves to the extent they believe they are

¹³⁰⁷ Ibid 2. Another example of gaslighting is presented in the following case study. ‘Mary ... is 75 years old and lives in a rural community. Mary has multiple sclerosis, but has no cognitive impairments. She has a history of being domestically abused, having been regularly assaulted by her long-time husband. Mary has low esteem and no friends or close family to support her. When her husband died, Mary’s son moved back in with her. He begins to physically and emotionally abuse her and begins “gas-lighting” her ... causing Mary to believe she is going insane. Mary’s son takes advantage of her mental distress and forces her to sign a power of attorney, giving him control of all her finances. In this instance, although Mary is highly capable, she is nevertheless highly vulnerable due to her circumstances’: Joan Braun, ‘Elder Guardianship Mediation: Threat or Benefit to Abuse Victims?’ [2012] (7) *International Perspectives on Victimology* 1–34, 22.

¹³⁰⁸ Ageing and Disability Commission, Submission No 108 to the Joint Select Committee on Coercive Control, Parliament of New South Wales, *Coercive Control in Domestic Relationships* (2 February 2021) <<https://www.parliament.nsw.gov.au/ladocs/submissions/70505/Submission%20-%20108.pdf>>.

¹³⁰⁹ Ibid 6.

¹³¹⁰ Evidence to Parliament of New South Wales, Joint Select Committee on Coercive Control, Sydney, 23 February 2021, 47–8 (Margaret Duckett).

mentally unfit, with one victim stating: ‘She convinced me I had Alzheimer’s and tried to force me to sign a legal paper to declare me incompetent’.¹³¹¹

7.3.16 The Western Australian Parliamentary report identified ‘befriending cases’ in which a perpetrator befriends a vulnerable person for the sole reason of taking advantage of them. The report noted that whilst this relationship of abuse will start with emotional abuse it will most commonly involve a financial incentive.¹³¹² SALRI’s consultation revealed similar scenarios, in which a neighbour or close friend with ill intent befriends an older person, providing them with a sense of comfort and companionship. However, this is exercised with the intention of stealing their assets.

7.3.17 This type of abuse is exemplified in *R v Gavare*,¹³¹³ where an older woman was ultimately callously murdered for financial gain by a neighbour who had attempted to befriend her and become her carer.¹³¹⁴ Gavare had targeted and harassed her victim due to the significant value of her home. This was a calculated attempt at developing a relationship, with financial gain the intended result.¹³¹⁵

7.3.18 In the examples discussed above the psychological abuse was not just another kind of abuse experienced by the victim, but a behaviour tailored toward achieving another aim, usually financial benefit for the perpetrator.

7.4 Consultation Data Overview

7.4.1 The relationship between forms of psychological abuse including coercive control and gaslighting and the financial abuse of older persons and persons with a disability was a common theme in SALRI’s consultation. Similarly, a number of parties raised the implications this kind of psychological abuse can have on a person’s consent.

7.4.2 Approaching the intersections of these factors was commonly described as a balancing exercise. Health practitioners from Mount Gambier and others raised the importance to SALRI of reflecting human rights principles and respecting a person’s capabilities. This must be considered simultaneously with the possible presence of coercive control and if there is free and voluntary consent.

7.4.3 SALRI was provided with a number of case studies relating to these topics. One involved an older man living in a residential aged care facility. Whilst he resided there his adult son had spent all of his assets. The issue was raised by the care facility when it became apparent the older man was no longer able to make his payments to the facility. SAPOL proceeded to investigate the issue as theft. However, as the son was listed as the power of attorney for his father no charge was brought against him as the issue lay in proving that the parent did not consent to the adult son using his financial assets.

¹³¹¹ Elizabeth Bates and Nikki Carthy, “‘She Convinced Me I Had Alzheimers’: Experiences of Intimate Partner Violence in Older Men” (2020) 21(4) *Journal of Men and Masculinities* 675, 679.

¹³¹² Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen to Me’: When Trust is Broken* (Final Report, September 2018) 17 [2.45].

¹³¹³ *R v Gavare* [2011] SASFC 38.

¹³¹⁴ Susan Ryan, ‘Financial Services Council Elder Abuse Speech’ (Speech, Australian Human Rights Commission, October 2015) <<https://humanrights.gov.au/about/news/speeches/elder-abuse-financial-abuse>>.

¹³¹⁵ Wendy Lacey, ‘Neglectful to the Point of Cruelty: Elder Abuse and the Rights of Older Persons in Australia’ [2014] 36 *Sydney Law Review* 99, 112–13.

7.4.4 SALRI was told that by the time the abuse is reported the older person is often incapacitated. The care facility will report a theft and the police will investigate, but due to the incapacity of the older person, there is often no charge or successful prosecution brought.¹³¹⁶

7.4.5 Another case study of serious financial abuse by a professional was also noted, in which the older person's lawyer was ultimately prosecuted for a breach of professional obligation. The abuse included the lawyer taking advantage of the older person's mental incapacity and stealing money from the victim's estate. This was reported when the beneficiaries of the estate found there were no substantial assets left in the deceased's estate.

7.4.6 Throughout SALRI's consultation process, the view that coercive control is almost always coupled with an element of financial abuse was consistently expressed. As ARAS noted to SALRI:

Whatever you call it, emotional abuse, coercive control or gaslighting, we virtually always see it go together with the reports to us of financial elder abuse. It is the means by which the financial abuse is able to be carried out.¹³¹⁷

7.4.7 Similar themes were provided to SALRI in relation to the abuse of persons with disability. Maggie Rutjens of DACSSA emphasised the close link between the financial abuse of persons with disability and coercive control.

7.4.8 A typical example of the complexities of elder abuse was presented to SALRI by a number of lawyers. This scenario is by no means unique. An elderly parent decides, often with reluctance, to move into a 'granny flat' at the house of an adult child. Over time, the adult child gradually becomes resentful and thinks that 'their inheritance' is due. The parent is the victim of slowly escalating psychological and financial abuse. The adult child may, slowly at first, spend the parent's money, believing they are entitled to do so or possess the mistaken belief that this spending is consistent with their parent's wishes. The financial abuse escalates until major assets and transactions are involved or potentially involved. At this stage of abuse, another child of the parent, family member or close friend may become sufficiently concerned to seek legal advice.

7.4.9 One of the primary issues revealed to SALRI by lawyers is that the older person is generally unwilling to pursue any formal action or complaint. Although they are aware that their situation is unsatisfactory and even abusive, they are clear that they do not want any action taken. This may be for a variety of reasons, including reluctance for their adult child, despite their misconduct, to get 'into trouble', fear of being moved into a residential aged care facility or never seeing their grandchildren again. As a Western Australian lawyer told the Western Australian Parliamentary Report:

The biggest barriers in reporting generally, I would say, is fear. Fear of being isolated from their families, from seeing their grandchildren, and from creating conflict within their family when they feel that they need their family more than ever.¹³¹⁸

7.4.10 The Hon Geoff Brock MP provided this illustrative case study in Parliament:

I have a personal involvement with someone with whom I have had a close family relationship over many years. From my observations, she had a happy marriage for nearly 50 years. We have since found out that this particular wife wanted to leave her husband after 14 years of marriage, as

¹³¹⁶ See below Part 10.5.

¹³¹⁷ SALRI's NGO roundtable comprising of both disability and aged care groups significantly noted the most common forms of abuse reported to them is financial abuse and this is typically accompanied by emotional abuse.

¹³¹⁸ Evidence to Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, Perth, 18 June 2018, 2 (Helen St John).

the children had then grown from young children to basically adults. The husband threatened to kill himself if she left him, and made it quite clear that she would lose contact with her children and would be seen as the culprit, so she stayed with him in this very stressful situation.

After a few years, with the assistance of her sister-in-law, she finally left. For the first time in nearly 45 years, she experienced living by herself and felt relieved by not being constantly berated and belittled. She invited her sister-in-law around to the new rental, but the sister-in-law was not aware that the husband was also there. When she arrived, the husband verbally abused his wife for letting her sister-in-law come around to this particular location. When the sister-in-law thought it was best that she leave, she asked the husband to move his car. He threatened both women and told the sister-in-law that he would deal with her next.

This sort of behaviour apparently was reported, but each time the relevant government department interviewed the wife the husband was always in the next room and, as such, the real truth never came out until just recently. Since then, unfortunately, the family have re-joined and moved to Adelaide. Even then, when the sisters-in-law asked where the new home would be, the husband would not divulge the new address to them. As far as I know, not even the wife knows the actual address of the new home, which may be due to her mental condition due to the continued belittling and berating she has received over the years.

To make issues worse, her husband has convinced authorities to give him power of attorney over his wife, and she is not fully aware of the consequences, mainly due to her mental capacity after many years of verbal intimidation. From investigations undertaken since this was brought to our attention, the issues were then reported by the sisters to the elder abuse hotline in 2020. However, as they did not receive a response, they contacted the elder abuse hotline again in 2021 only to be told that the file had been closed as they had spoken to the husband and everything was fine.

At this point, it was discovered that the husband applied for guardianship early in 2021 and was granted guardianship over his wife. Again, the sisters-in-law made further moves, contacting the Adult Safeguarding Unit and giving them the full story. The real concern here is that no-one from any government agency spoke to the wife to fully understand the actual activities and the behaviours. Each time the discussions were held, either the husband was there with her or in the next room, so his wife was not prepared or did not have the strength or the fortitude to be able to tell the truth as she had been intimidated and told she was no good. She had no money and had not been given any idea about finances and things like that.¹³¹⁹

7.4.11 SALRI was also given examples of the ‘befriender’ cases described above.¹³²⁰ A case study was provided by regional lawyers of a person thirty years younger than the vulnerable older person building up a friendship and coercing the older person into changing her will for the perpetrators own financial gain. These situations are common when considering the types of abuse vulnerable older people or people living with a disability are susceptible to.¹³²¹

7.4.12 SALRI was told that gaslighting may manifest in a situation where an adult child suggests to their elderly parent with a valid driver’s license and full capacity that ‘driving isn’t safe anymore, let me do it for you’ or ‘you shouldn’t be driving alone anymore’. These actions present themselves as generous and intended to aid the older person. However, over an extended period of time, the parent’s self-confidence and self-worth may be undermined, leaving them with a sense of doubt. The adult

¹³¹⁹ South Australia, *Parliamentary Debates*, House of Representatives, 9 June 2021, 6196 (Geoff Brock).

¹³²⁰ See above Part 7.3.

¹³²¹ C Pesiah et al. ‘The Wills of Older People: Risk Factors for Undue Influence’ (2009) 21(1) *International Psychogeriatrics* 7, 11.

child may take financial advantage of this. As a person ages, their cognitive ability may decline. By virtue of this, they are more susceptible to forms of coercion such as gaslighting.¹³²²

7.4.13 The issues raised in consultation again demonstrate the close nexus between psychological and financial abuse.

7.5 Consent Under the AAS Act

7.5.1 Consent and autonomy are integral to the operation of the ASU and the *AAS Act*. The Act provides that, unless an individual provides consent, the ASU is generally unable to take any action to safeguard that individual. Only in limited circumstances can the ASU to override an adult's lack of consent to take further action.¹³²³ This may occur if:

1. The adult's life or physical safety is at immediate risk; or
2. The risk of abuse involves an allegation that a serious criminal offence [which is not defined] has been or is likely to be committed; or
3. The adult has impaired decision-making capacity relating to the specific decision requiring consent; or
4. Following reasonable inquiries, the ASU has not been able to contact the adult.¹³²⁴

7.5.2 The *AAS Act* also enables the introduction of additional circumstances listed in the Regulations.¹³²⁵

7.5.3 The intersection of consent and coercion was often raised to SALRI with the observation that while it is not easy to identify and/or assess, it is a significant omission for the *AAS Act* to not mention coercion.

7.5.4 For consent to be valid a decision must have been made freely and voluntarily. In the English case of *Re T*, which concerned the refusal of a blood transfusion, Lord Donaldson noted that the 'right of choice exists whether the reasons for making that choice are rational, irrational, unknown or even non-existent.'¹³²⁶ Where there is external influence, such as coercion, it was further concluded that '[i]t matters not how strong the persuasion was, so long as it did not overbear the independence of the patient's decision.'¹³²⁷ This observation has wider application.

¹³²² Rae Kaspiew, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, 2016) 3; Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 61–6.

¹³²³ *AAS Act* s 24(1).

¹³²⁴ *Ibid* s 24(4)(a).

¹³²⁵ *Ibid* s 24(4)(a)(v); *Ageing and Adult Safeguarding Regulations 2019* (SA) Currently, reg 8 also encompasses circumstances where, the ASU is of the opinion that it is 'necessary or appropriate that action of the relevant kind be taken without first obtaining the consent of the vulnerable adult'. Associate Professor Ben Livings raised this provision as a significant potential means for the ASU to intervene without the apparent victim's consent. SALRI was told this provision does not carry much weight in practice. This Regulation seems at odds with the intention, if not the wording of the *AAS Act* and as such may be ultra vires.

¹³²⁶ *Re T* [1992] 4 All ER 649, [30].

¹³²⁷ *Ibid* [31].

7.5.5 Most parties in SALRI’s consultation acknowledged that there will be instances when the coercion or psychological abuse of an adult is of such a nature and extent that any consent cannot be said to have been freely and voluntarily given. However, SALRI notes that a number of parties took the view that where consent is not given, the ASU should not intervene and the presence of psychological pressure or abuse does not outweigh the expression of the individual’s autonomy.¹³²⁸ SALRI, with respect, is unable to accept such a proposition. Even allowing for the presumption of capacity, consent under the *AAS Act* is premised on a free and voluntary decision. If the presence of coercion and psychological abuse does not allow for a decision to be truly free and voluntary, then there is no valid consent. In cases where the free and voluntary nature of consent is questionable, a clinical capacity assessment and interview should be undertaken by a health professional, to determine whether the adult’s ability to make a decision has been completely subordinated by the presence of coercion.

7.5.6 The power to act without consent to further action is challenging in the context of adults who have capacity, but choose to accept remaining in an abusive situation and do not wish the ASU to intervene. This is a regular event in practice as both the ASU and lawyers confirmed to SALRI. In what circumstances should the ASU be entitled to intervene without the apparent victim’s consent? Should the ASU intervene in relation to serious financial harm? What is the impact of coercion on the apparent victim from the perpetrator?

7.5.7 This scenario requires a careful consideration of the following factors:

- The decision-making capacity of the adult;
- The adult’s autonomy and right reinforced in the *AAS Act* to make ‘poor decisions’;¹³²⁹
- The influence of culture, family and language;
- The validity of consent and whether a decision was made freely and voluntarily;¹³³⁰
- The presence of coercive behaviour and its scope and severity;¹³³¹ and
- Whether the coercive conduct justifies the ASU’s intervention and subsequent interference with the adult’s decision-making autonomy.

7.5.8 The presence of psychological abuse such as coercive control makes this exercise ‘more complex because the abused person appears to have capacity and appears to be prepared to live with the abuse.’¹³³²

¹³²⁸ A disability advocate, for example, presented the view that ‘if a person is fully capable of making the decision, no one can intervene’, whereas a disability advocate held the view that if you consider abuse in terms of domestic violence cases, many victims will not report it, even if they have capacity and stated ‘how is emotional abuse any less than physical abuse’.

¹³²⁹ See Recommendation 30.

¹³³⁰ See Recommendation 25.

¹³³¹ See Recommendation 30.

¹³³² David Lock, ‘Decision-Making, Mental Capacity and Undue Influence: Action by Public Bodies to Explore the Grey Areas between Capacity and Incapacity’ (2015) 20(1) *Judicial Review* 42.

The Approach in the United Kingdom

7.5.9 The UK courts have recently encountered a number of cases requiring the exercise of their inherent jurisdiction to intervene for protective purposes.¹³³³ In these cases, the adult is considered ‘so vulnerable’ that they are unable to make an independent decision, despite having decision-making capacity.¹³³⁴ This inherent jurisdiction enables the Court of Protection to exercise safeguarding powers for a vulnerable adult with capacity, who, due to the degree of coercion (or undue influence), is unable to make an informed decision. This jurisdiction seeks to promote the public policy position that social services should intervene in severe cases of abuse. As noted in the case of *DL v A Local Authority* (*DL*), ‘[w]here the facts justify it, such individuals require and deserve the protection of the authorities and the law so that they may regain the very autonomy that the [individual] rightly prizes.’¹³³⁵ Consistent with this view, in the more recent case of *Norfolk County Council v PB*, the Court held that the *Mental Capacity Act 2005* (UK), despite being applicable to persons lacking capacity, may also apply to a person who has capacity, but it is compromised due to the presence of other external factors, such as coercion.¹³³⁶

7.5.10 In the case of *DL*, Mr and Mrs L, aged 85 and 90 years respectively, lived in their own home with their son DL.¹³³⁷ Mrs L had a physical disability, requiring home care and supports. Both Mr and Mrs L had decision-making capacity and were capable of ‘managing their own affairs ... capable of deciding what their relationship with their son should be and ... whether he should continue to live under the same roof as themselves’.¹³³⁸ DL’s behaviour was characterised as ‘aggressive’, involving physical violence at times.¹³³⁹ Further, his behaviour included:

[V]erbal threats, controlling where and when his parents may move in the house, preventing them from leaving the house, and controlling who may visit them, and the terms upon which they may visit them, including health and social care professionals providing care and support for Mrs L.¹³⁴⁰

7.5.11 There were reports that DL sought to coerce Mr L into transferring ownership of their home into DL’s name, and pressuring them to move Mrs L into a care home against her wishes.¹³⁴¹

7.5.12 In light of these circumstances, the local authority initiated proceedings to seek protection for Mr and Mrs L from their son. It was known that Mrs L did not want to pursue action; her wish

¹³³³ Ibid; see *Norfolk County Council v PB* [2014] EWCOP 14; *DL v A Local Authority* [2012] EWCA Civ 253; *London Borough of Wandsworth v M* [2017] EWHC 2435 (Fam).

¹³³⁴ David Lock, ‘Decision-Making, Mental Capacity and Undue Influence: Action by Public Bodies to Explore the Grey Areas between Capacity and Incapacity’ (2015) 20(1) *Judicial Review* 42.

¹³³⁵ *DL v A Local Authority* [2012] EWCA Civ 253, [63].

¹³³⁶ *Norfolk County Council v PB* [2014] EWCOP 14, [58]; see also David Lock, ‘Decision-Making, Mental Capacity and Undue Influence: Action by Public Bodies to Explore the Grey Areas between Capacity and Incapacity’ (2015) 20(1) *Judicial Review* 42, 43.

¹³³⁷ *DL v A Local Authority* [2012] EWCA Civ 253, [9].

¹³³⁸ Ibid.

¹³³⁹ Ibid.

¹³⁴⁰ Ibid.

¹³⁴¹ Ibid.

was to ‘preserve her relationship’ with her son and she did not want any legal proceedings taken against him.¹³⁴² Although Mr L was ‘more critical of DL’s behaviour’, his wishes were uncertain.¹³⁴³

7.5.13 However, the local authority’s social workers felt differently and sought orders to restrain the actions of the son. The Court of Appeal supported the initial orders made by Theis J under its inherent jurisdiction to restrain the actions of the son. The basis of the orders was that, notwithstanding that the court accepted that, at that time, the parents had capacity to make their own decisions about contact and residence, the court should intervene at the behest of the local authority.

7.5.14 In determining whether the court should intervene, McFarlane LJ accepted that ‘issues of capacity and genuine consent or rejection are separate’, however, ‘in reality they may well overlap’, particularly where an external force such as coercion overpowers their ability to resist influence.¹³⁴⁴ The presence of coercion or undue influence was identified as a circumstance which may warrant intervention for the vulnerable person’s protection. It was noted:

[W]here the influence is that of a parent or other close and dominating relative, and where the arguments and persuasion are based upon personal affection or duty, religious beliefs, powerful social or cultural conventions, or asserted social, familial or domestic obligations, the influence may ... be subtle, insidious, pervasive and powerful. In such cases, moreover, very little pressure may suffice to bring about the desired result.¹³⁴⁵

7.5.15 Therefore, intervention should only occur when an adult is deprived of their capacity to make an independent decision or a free choice. This must be a case-by-case assessment, where a careful consideration of the facts¹³⁴⁶ is important to ensure any interference is necessary, reasonable and proportionate.

7.5.16 Counsel for DL emphasised the importance of preserving autonomy and respecting the wishes of Mr and Mrs L, even if this meant they would continue to live under abusive circumstances. It was submitted that ‘the fact that [Mrs L] is elderly, and that she has chosen to live in a situation which ... may put her at risk of harm or exploitation, does not give the court any right to intervene.’¹³⁴⁷ In contrast, counsel for the local authority, who sought safeguarding measures, argued a narrower focus and application of the Court’s jurisdiction to intervene. It would not be the premise of the Court to ‘ignore their fundamental right to autonomy’, but rather, for a limited group of adults who cannot give ‘true consent’, due to an external factor like undue influence (not a mental incapacity).¹³⁴⁸

7.5.17 The Court held that its longstanding inherent power¹³⁴⁹ (albeit exercised with caution and regard for the individual’s autonomy)¹³⁵⁰ was retained notwithstanding the introduction of the *Mental*

¹³⁴² Ibid.

¹³⁴³ Ibid.

¹³⁴⁴ Ibid citing Munby J in *Re SA* [2005] EWHC 2942 (Fam). See also *Re T* [1993] Fam 95, 117 (Butler-Sloss LJ).

¹³⁴⁵ Ibid [22], citing Munby J in *Re SA* [2005] EWHC 2942 (Fam) [78].

¹³⁴⁶ Ibid [26], citing Munby J in *Re SA* [2005] EWHC 2942 (Fam) [53].

¹³⁴⁷ Ibid [34].

¹³⁴⁸ Ibid, [50].

¹³⁴⁹ See, eg, *Hall v Hall* [1868] LR 1 P and D 481; *Allcard v Skinner* (1889) 36 Ch 35.

¹³⁵⁰ See also *Local Authority X v MM, KM* [2007] EWHC 2003 (Fam), [116]–[120].

Capacity Act 2005 (UK), and could be applied to a vulnerable individual with capacity.¹³⁵¹ McFarlane LJ found that intervention facilitated through the Court's inherent jurisdiction was:

... aimed at enhancing or liberating the autonomy of a vulnerable adult whose autonomy has been compromised by a reason other than mental incapacity because they are:

(a) Under constraint; or

(b) Subject to coercion or undue influence; or

(c) For some other reason deprived of the capacity to make the relevant decision or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent.¹³⁵²

7.5.18 In an earlier case, Munby J had elaborated:

A vulnerable adult who does not suffer from any kind of mental incapacity may nonetheless be entitled to the protection of the inherent jurisdiction if he is, or is reasonably believed to be, incapacitated from making the relevant decision by reason of such things as constraint, coercion, undue influence or other vitiating factors.¹³⁵³

7.5.19 As a result, the Court's ability to intervene should be perceived as a 'great safety net'¹³⁵⁴ to capture these very narrow classes of adults who have capacity, but are overborne by coercion or undue influence.

7.5.20 In an accompanying judgment in *Re L*, Davis LJ emphasised that the case for intervention must meet a high threshold:

[T]he decided authorities show that there can be no power of public intervention simply because an adult proposes to make a decision, or to tolerate a state of affairs, which most would consider neither wise nor sensible. *There has to be much more than simply that for any intervention to be justified: and any such intervention will indeed need to be justified as necessary and proportionate.*¹³⁵⁵

7.5.21 The request to intervene and override a lack of consent of an adult with decision-making capacity should not be taken lightly. It must be carefully considered, with regard to the adult's wishes, ability to appreciate the nature of abuse and its extent, the harm caused and their ability to weigh up the advantages and disadvantages of refusal or consenting to intervention.

7.5.22 This point was reinforced in the English case of *Re A*,¹³⁵⁶ which raised the relationship between undue influence and capacity. Although this case concerned a woman with a learning disability and a decision about the use of contraception, the central issue was framed in such a way that it can apply in any context.¹³⁵⁷ The Court framed the connection between influence and capacity by asking

¹³⁵¹ See also *A Local Authority v A* [2010] EWHC 1549 (Fam), [79].

¹³⁵² *DL v A Local Authority* [2012] EWCA Civ 253, [54].

¹³⁵³ *Re SA* [2006] 1 FLR 867, [79].

¹³⁵⁴ *DL v A Local Authority* [2012] EWCA Civ 253, [61].

¹³⁵⁵ *Ibid* [76].

¹³⁵⁶ *A Local Authority v A* [2010] EWHC 1549 (Fam).

¹³⁵⁷ *Ibid*; Jillian Craigie, 'Conceptualising "Undue Influence" in Decision-Making Support for People with Mental Disabilities' (2021) 29(1) *Medical Law Review* 48, 69.

‘whether the influence of Mr A over Mrs A has been so overpowering as to leave her unable to weigh up the information and take a decision of her free will.’¹³⁵⁸

7.5.23 There is a danger of ‘undue paternalism’.¹³⁵⁹ The cautionary comments of Munby J are illustrative:

We need to be careful not to embark upon ‘social engineering’. And we should not lightly interfere with family life. If the State is to say that it is the more appropriate person to look after a mentally incapacitated adult than her own partner or family, it assumes, as it seems to me, the burden — not the legal burden but the practical and evidential burden — of establishing that this is indeed so ... If the State is to justify removing children from their parents or vulnerable adults from their relatives, partners, friends or carers it can only be on the basis that the State is going to provide a better quality of care than that which they have hitherto been receiving ... The fact is that in this type of case the court is exercising an essentially protective jurisdiction ... The court must be careful to ensure that in rescuing a vulnerable adult from one type of abuse it does not expose her to the risk of treatment at the hands of the state which, however well-intentioned, can itself end up being abusive of her dignity, her happiness and indeed of her human rights.¹³⁶⁰

7.5.24 In 2011, the English Law Commission considered these issues. It observed that ‘the existing legal framework for adult protection is “neither systematic nor coordinated, reflecting the sporadic development of safeguarding policy over the last 25 years”’. Unlike in Scotland, there is no single or coherent statutory framework for adult protection in England and Wales.’¹³⁶¹ The Law Commission noted of the inherent jurisdiction of the High Court:

The High Court may offer protection to ‘vulnerable adults’ under its inherent jurisdiction, including in some cases adults with capacity. However, the inherent jurisdiction cannot be used to compel a capacitated but vulnerable person to do or not do something which they have, after due consideration, decided to do or not to do; the jurisdiction acts to ‘facilitate the process of unencumbered decision-making’ by those who have capacity ‘free of external pressure or physical restraint in making those decisions.’¹³⁶²

7.5.25 In light of the increasing incidence of elder abuse and awareness of its impact and implications, additional caution should be exercised to ensure intervention is not readily pursued. In a similar vein, it should not be assumed that any influence of family or friends is deliberate coercion or a means to exploit or abuse or amounts to coercive control.

Application to the Adult Safeguarding Unit

7.5.26 *Re L* and *BU*¹³⁶³ provide two examples on either end of the spectrum. In *Re L*, both parents had decision-making capacity. This case confirmed that a court (in England) may intervene to override an adult’s consent (who has capacity), in order to safeguard them from ongoing and future abuse. It highlighted that the assessment to determine whether intervention is warranted ought to be approached with care and caution. This is best achieved by a case-to-case approach, enabling a

¹³⁵⁸ *A Local Authority v A* [2010] EWHC 1549 (Fam) [66].

¹³⁵⁹ A Szerletics, Essex Autonomy Project, ‘Vulnerable Adults and the Inherent Jurisdiction of the High Court’ (Internal Briefing Document, 7 September 2011) <<https://autonomy.essex.ac.uk/resources/vulnerable-adults-and-the-inherent-jurisdiction-of-the-high-court/>>.

¹³⁶⁰ *Local Authority X v MM, KM* [2007] EWHC 2003 (Fam), [116]–[120] (emphasis in original).

¹³⁶¹ Law Commission (UK), *Adult Social Care* (Report No 326, 10 May 2011) 109 [9.1].

¹³⁶² *Ibid* 126 [9.80].

¹³⁶³ See Part 5 on Decision-Making Capacity.

thorough analysis of the person's circumstances. Meanwhile, in *BU* the coercion present was so significant that *BU* could not be said to have decision-making capacity.

7.5.27 The English approach has application to the role of the ASU under the *AAS Act*. An inclination to assume the 'worst case scenario' in cases of abuse may lead to intervention that is unnecessary. This should be a factor to consider when determining the scope of the ASU's power to intervene and proceed without the consent of the apparent victim. A holistic examination of a person's circumstances must be undertaken to ascertain whether abuse or coercion could be a factor impacting their ability to provide voluntary and free consent.

7.5.28 It must also be recognised that the assessment of capacity and consent takes place against a historical backdrop that perpetuated false assumptions concerning decision-making capacity of persons with a disability, mental illness or cognitive impairment. This underlines the need to take the least restrictive approach, by providing an adult with all necessary supports to enhance, retain and preserve decision-making capacity and autonomy.

7.5.29 One of the key roles of the ASU under the *AAS Act* is this safeguarding of autonomy. The power act without consent may be perceived as undermining this. The importance of preserving autonomy was reinforced in a recent Supreme Court case in Queensland.¹³⁶⁴ This case concerned a 69-year-old woman, Mrs Adamson, who settled a claim for damages via mediation, following injuries sustained in a motor vehicle accident.¹³⁶⁵ The settlement terms required Mrs Adamson to apply for a determination as to whether she had decision-making capacity.

7.5.30 Justice Applegarth considered Mrs Adamson's vulnerability to exploitation in light of her medically assessed mental state, literacy level and anticipated slow cognitive decline in future years. It was noted that 'risk is not, in itself, sufficient to conclude that [Mrs Adamson] currently has impaired capacity.'¹³⁶⁶ This highlights the fine line between respecting an individual's autonomy and exercising a protective role to prevent future exploitation of a person who will likely become more vulnerable to abuse. Despite this, there is a need to avoid 'paternalistic intervention'.¹³⁶⁷ Applegarth J referred to Mrs Adamson's ability to understand and communicate her decision-making process. She was 'headstrong' and able to draw upon support from her daughter to assist in her decision-making.¹³⁶⁸

7.5.31 Justice Applegarth directly referred to elder abuse in the context of voluntary consent, noting:

On the question of [Mrs Adamson's] capacity to voluntarily make decisions, the incidence of elder abuse should give any judge reason to consider the potential for exploitation of an elderly person's vulnerability. However, one should not presume that most children of elderly parents are inclined to exploit them.¹³⁶⁹

7.5.32 Justice Applegarth also highlighted the importance of a careful examination of the circumstances of an adult who may be at risk of abuse or exploitation.

7.5.33 Evidence is necessary to support any assertion that an adult's consent has not been given freely and voluntarily. SALRI notes that an assessment of the impact of coercion upon decision-making

¹³⁶⁴ *Adamson v Enever* [2021] QSC 221.

¹³⁶⁵ *Ibid.*

¹³⁶⁶ *Ibid* 309.

¹³⁶⁷ Ron Berghmans, 'Capacity and Consent' (2001) 14(5) *Current Opinion in Psychiatry* 491, 495.

¹³⁶⁸ *Adamson v Enever* [2021] QSC 221, 317.

¹³⁶⁹ *Ibid.*

capacity should only be pursued where there is evidence indicating partial or total subordination of an individual's autonomy. Further, the mere presence of a person actively supporting an adult in decision-making does not in itself indicate an exploitative, coercive relationship. Rather, in the first instance, it should be perceived as a positive means to facilitate supported decision-making. It may also prompt an enquiry into the nature and dynamics of the relationship, to ensure the individual is making independent decisions.

7.5.34 There are concerns relating to the risk of coercion or undue influence within a supported decision-making framework.¹³⁷⁰ In the context of medical decision-making, Scholten et al noted their concern that supported decision-making 'may sometimes be nothing more than covert substitute decision-making without accountability.'¹³⁷¹ The authors acknowledged that undue influence in this context may result from a conflict of interest or paternalism:

That is, support persons can unduly influence decision-making because they pursue their own interests rather than the best interest of the person concerned, or because they unconsciously project their own views on the best interest of the person concerned. Undue influence is thus not necessarily exerted in bad faith; it can also be exerted unwittingly by support persons with good intentions.¹³⁷²

7.5.35 This is consistent with the notion of benevolent ageism raised by parties such as COTA (SA) in consultation with SALRI.¹³⁷³ Similarly, Jillian Craigie has argued that the inappropriate involvement of a support person may lead to a 'greater than normal risk of undue influence' for the concerned person.¹³⁷⁴ Therefore, appropriate safeguards must be enforced to ensure supported decision-making is not used as a vehicle to perpetrate abuse, whether it be intentional or unintentional. One means to address this is through the doctrine undue influence.¹³⁷⁵ Craigie noted reforms in the *Alberta Adult Guardianship and Trustees Act 2008*, which states that:

[A] person may refuse to recognise a decision made or communicated by or with the assistance of a supporter as the decision of the supported adult if the person has reasonable grounds to believe that

(a) the supporter exercised undue influence on the supported adult to make the decision.¹³⁷⁶

¹³⁷⁰ See, eg, Jillian Craigie, 'Conceptualising "Undue Influence" in Decision-Making Support for People with Mental Disabilities' (2021) 29(1) *Medical Law Review* 48; see also Matthé Scholten et al, 'Combining Supported Decision-Making with Competence Assessment: A Way to Protect Persons with Impaired Decision-Making Capacity against Undue Influence' (2021) 21(11) *American Journal of Bioethics* 45.

¹³⁷¹ Matthé Scholten et al, 'Combining Supported Decision-Making with Competence Assessment: A Way to Protect Persons with Impaired Decision-Making Capacity against Undue Influence' (2021) 21(11) *American Journal of Bioethics* 45, 46.

¹³⁷² Ibid 45.

¹³⁷³ See above Parts 1.4 and 6.8.

¹³⁷⁴ Jillian Craigie, 'Conceptualising "Undue Influence" in Decision-Making Support for People with Mental Disabilities' (2021) 29(1) *Medical Law Review* 48, 50.

¹³⁷⁵ See Part 10 for a detailed discussion of civil redress.

¹³⁷⁶ Jillian Craigie, 'Conceptualising "Undue Influence" in Decision-Making Support for People with Mental Disabilities' (2021) 29(1) *Medical Law Review* 48, 50.

7.5.36 Alternatively, Scholten et al advocate for a ‘combined supported decision-making model’, which incorporates a clinical capacity assessment to ensure the adult has exercised decision-making autonomy free of influence or coercion.¹³⁷⁷

7.5.37 Where there is the presence of a supporter assisting an adult in decision-making, the arrangement must be ‘autonomy-enhancing’¹³⁷⁸ and neutral to ensure that an independent decision is still made.¹³⁷⁹ These risks must be considered when developing a robust, practical framework to enforce supported decision-making.

7.5.38 The English case of *DL* is significant, in that four key lessons can be drawn from it for application to the ASU:

1. The ASU’s determination to override the refusal of an adult with decision-making capacity should be made on a case-by-case basis;
2. To override the adult’s refusal to consent because of coercion or undue influence, the adult’s ability to make an independent decision must be completely overborne;
3. In determining the extent or impact of coercion or undue influence, a number of factors should be considered. These include the nature/dynamic of the relationship (child, spouse, parent), the underlying premise of the influence (religious or cultural expectation/norm, obligation) and the significance of that relationship; and
4. If the ASU determines refusal should be overridden, intervention should be necessary and proportionate, with an aim to reinstate the adult’s decision-making autonomy.

7.5.39 A clear threshold must be defined and met before the ASU exercises these powers, particularly in circumstances where the adult has decision-making capacity.

7.5.40 SALRI acknowledges, as often observed in consultation by parties such as Cassie Mason, Elicia White, Professor Ibrahim and both legal and health practitioners, that the assessment of capacity and the presence and extent and effects of coercion is a difficult task.¹³⁸⁰

The Right to Make Bad Decisions

7.5.41 Under the *AAS Act*, a person’s autonomy and right to make decisions of their own volition, and have those decisions respected, is paramount. This includes when a person makes a decision that is perceived to be not in their best interests, and having potentially damaging consequences.

¹³⁷⁷ Matthé Scholten et al, ‘Combining Supported Decision-Making with Competence Assessment: A Way to Protect Persons with Impaired Decision-Making Capacity against Undue Influence’ (2021) 21(11) *The American Journal of Bioethics* 45, 46.

¹³⁷⁸ Ibid 54 quoting Wayne Martin et al, *Three Jurisdictions Report* (Essex Autonomy Project, 2016) 45.

¹³⁷⁹ Matthé Scholten et al, ‘Combining Supported Decision-Making with Competence Assessment: A Way to Protect Persons with Impaired Decision-Making Capacity against Undue Influence’ (2021) 21(11) *The American Journal of Bioethics* 45, 58.

¹³⁸⁰ See generally, eg, James Spar, Marc Hankin and Ann Stodden, ‘Assessing Mental Capacity and Susceptibility to Undue Influence’ (1995) 13(3) *Behavioural Sciences and the Law* 391; Ann McDonald, ‘The Impact of the 2005 *Mental Capacity Act* on Social Workers’ Decision Making and Approaches to the Assessment of Risk’ (2010) 40(4) *British Journal of Social Work* 1229; Mark Jayes et al, ‘How do Health and Social Care Professionals in England and Wales Assess Mental Capacity? A Literature Review’ (2019) 42(19) *Disability and Rehabilitation* 2797.

7.5.42 During consultation, SALRI was presented with many examples of what was termed the ‘gold-digger’ scenario.¹³⁸¹ This occurs where an older, typically wealthy person (usually a man) begins a relationship with a person much younger (usually a woman, often from overseas). The new partner is able to promise an additional ‘level of love, support and companionship that [a person] feels is not provided by his/her existing family members.’¹³⁸² This often includes spending money or gifting assets to the younger partner. While many, and particularly the older partner’s adult children from a previous relationship, may not agree with the older person’s decision, the general consensus during consultation was that it is within a person’s rights to make decisions that are not in their best interest.¹³⁸³

7.5.43 The lawyers pointed out that these facts in and of themselves do not disclose any abuse or undue influence and that the client’s autonomy must be respected. There would be no grounds for the ASU to intervene. While many may question or doubt the wisdom of such decisions, it is the older person’s choice to make such choices. Indeed, Mr Westley, a regional lawyer, questioned whether in such circumstances the decision is truly unwise, irrational or imprudent. Indeed, Mr Westley accepted the ‘gold-digger’ label may well be unwarranted and unfair. Mr Norcock, another leading regional lawyer, told SALRI that the autonomy of the older person must be respected unless there are clear indications of abusive behaviour. Mr Norcock further noted that the ‘gold-digger’ scenario can play out in various ways, and the older person may indeed not always be a man.

7.5.44 The situation of paid carers and the real scope for undue influence and psychological and/or financial abuse within such arrangements were often raised to SALRI in relation to both older persons and persons with a disability. Mr Norcock, Mr Westley, other legal and health practitioners and NGOs drew SALRI’s attention to suspicious and concerning case examples of potential abuse and exploitation; a theme that also emerges from recent research into both elder abuse¹³⁸⁴ and the exploitation of persons with disability.¹³⁸⁵

7.5.45 However, SALRI was also cautioned against any generalised assumptions about paid carers. These parties noted the dedication and commitment of many paid carers and the often overlooked and undervalued nature of their role in relation to both older persons and persons with disability. They explained that many older persons, even if they have adult children, may well make a voluntary and reasoned decision to leave their estate or make substantial gifts to paid carers who have faithfully cared for them. This commitment is often in contrast to the indifference shown by their own families. This point was also highlighted by Professor Ibrahim. Such gifts and bequests cannot be classified as abusive or exploitative. Indeed, it may be the very opposite.

¹³⁸¹ While this term was commonly used, SALRI acknowledges its problematic nature, particularly given it is typically applied only to women.

¹³⁸² David Lock, ‘Decision-Making, Mental Capacity and Undue Influence: Action by Public Bodies to Explore the Grey Areas between Capacity and Incapacity’ (2015) 20(1) *Judicial Review* 42.

¹³⁸³ Indeed, despite the common perception of such ‘gold-diggers’, the older partner’s actions may well be in their personal best interests, but not in their children’s — leading to accusations of abuse.

¹³⁸⁴ Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 71, 72; Georgia Lowndes et al, Monash University, *Financial Abuse of Elders: A Review of the Evidence* (Report, June 2009) 15; Evidence to Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, Perth, 18 June 2018, 2–4 (Helen St Jack).

¹³⁸⁵ SALRI was told by parties in the disability sector that the financial and other abuse of persons with disability by paid carers or support workers is far from unusual. See generally Family and Community Development Committee, Parliament of Victoria, *Inquiry into Abuse in Disability Services* (Final Report, Parliamentary Paper No 167, May 2016) 12–13 [1.1.4]; Jan Breckenridge et al, *Understanding Economic and Financial Abuse and Disability in the Context of Domestic and Family Violence* (Gendered Violence Research Network, UNSW, 2021).

7.5.46 A regional lawyer highlighted the following case study in which, as the older person had full capacity to consent to the relationship, the family member's concerns over the older person's assets were not relevant:

The older father owned and operated a property and was reluctant to sell the property or stop working. After his wife passed away the father ran the property with his son. The father became ill and was diagnosed with cancer. The father commenced a relationship with his significantly younger carer. This relationship raised concern for the son who had at this stage taken over farming the property. There was concern over why the woman entered a relationship with a terminally ill, wealthy older man. There was strong concern over the loss of the father's estate. The father had full capacity to consent to the relationship, despite the son's concerns over the carer's intent for entering the relationship.

7.5.47 Another case study provided to SALRI was:

The owner of a large property became estranged from his three children. The children claimed physical abuse and the elderly father claims the children did nothing to care for him. He was subsequently left living isolated on his extensive acreage. The carer was the man's main companion as he lived isolated in a regional area on a large property. A provision was left for the elderly man's carer in his will. Once the adult children found out tensions arose as some children were not included in the will and were unhappy the man's carer was receiving part of his estate. The provision was considered a gift to his carer and precisely and deliberately done by the man whilst he has full capacity.

7.5.48 SALRI accepts, consistent with the *AAS Act*, the importance of respecting an individual's autonomy and ability to make decisions that others may regard as rash or imprudent. As the Adelaide lawyers noted: 'You should still have the right to make a bad decision.'¹³⁸⁶ However, there is a strong public policy argument in favour of enabling the ASU to override a lack of consent and intervene in certain circumstances, regardless of the adult's decision-making capacity. This may include implementing appropriate safeguards to prevent ongoing serious abuse and future loss(es) and to regain the autonomy and ability of an apparent victim to exercise decision-making capacity, unencumbered by external factors.

Acting Without Consent

7.5.1 The circumstances in which the ASU can effectively override an individual's refusal to consent to further action, where they have capacity, are very narrow.¹³⁸⁷ This was made clear in the 2018 Parliamentary Debate. As the then Minister explained:

It is important to note that the consent of the vulnerable adult must be sought as a matter of principle before any action is taken by the unit. A person with decision-making capacity experiencing abuse or neglect has the right to decline support in cases where no immediate harm is posed to either their life or that of others. Each of us has the right to make decisions for

¹³⁸⁶ Port Augusta health practitioners similarly told SALRI that it is important to leave the scope for people to be able to make decisions, have that dignity of risk. 'People need to have as much space as possible... Adults have the right to make decisions that are bad for them.'

¹³⁸⁷ *AAS Act* s 24(4).

ourselves, even if these decisions are considered by others to be wrong, inappropriate or pose a risk to the person.¹³⁸⁸

7.5.2 A Government MP spoke in similar terms:

The vulnerable adult will be at the centre of any safeguarding measures or interventions in accordance with the Bill's rights-based approach. Persons who have retained decision-making capacity and are experiencing abuse or neglect retain the ability to decline support in cases where no immediate harm is posed to either their life or that of others. *This is important: adults who have the ability to make decisions for themselves will be empowered to do so, or will continue to have the power to do so, under this Bill.* The only exception, of course, rightfully, is where their life or the life of another is in immediate peril.¹³⁸⁹

7.5.3 Under the current law, the ASU can therefore only intervene without the adult's consent in extreme circumstances. SALRI was told in consultation that this threshold for ASU intervention has been set too high and that it may be appropriate for the ASU to be given the authority to intervene in more cases, even when a person has decision-making capacity. The situation of serious financial abuse was often raised. In cases of serious psychological abuse, prior to intervention, a clinical capacity assessment must be sought to determine whether the external influence has completely subordinated the adult's ability to exercise decision-making autonomy.

7.5.4 If the adult appreciates their circumstances, but is able to justify their decision to live with the abuse through the process of weighing benefits, risks and disadvantages, it is likely to be inappropriate or premature to enable the ASU to intervene over the individual's wishes. In these cases, consideration must be given to a number of factors including, but not limited to, the nature and extent of any psychological pressures, cultural differences, expectations, norms, living conditions/standards, religion and family dynamics.

7.5.5 Drawing on *Rogers v Whitaker*, one should appreciate that each adult will attribute significance and value to different factors. One adult may place a high premium on preserving their fraught, abusive relationship with a family member. By doing so, they retain their sole social and emotional support person. In contrast, another adult may wish to fracture or end that relationship because they do not face the risk of social/emotional isolation, for example if they have other family members.

7.5.6 There are existing resources the ASU could draw upon when determining whether a person's refusal to take further action has not been freely and voluntarily made. For example, the Queensland Capacity Guidelines offer the following 'risk factors' or 'red flags':¹³⁹⁰

- Family conflict, especially if one family member has isolated the adult from other family members or their usual support networks;
- The history or presence of threats or perceived threats and abuse;

¹³⁸⁸ South Australia, *Parliamentary Debates*, Legislative Council, 20 June 2018, 566–7. See also South Australia, *Parliamentary Debates*, House of Assembly, 25 October 2018, 3158.

¹³⁸⁹ South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3552 (Fraser Ellis) (emphasis added).

¹³⁹⁰ Applegarth J in *Adamson v Enever* [2021] QSC 221 relied on these risk factors when discussing whether a decision is made freely and voluntarily: at 312–3 [46]–[48].

- Threats to withdraw care and support;
- Sudden decisions to make significant changes to their arrangements (like large gifts of money or property) that are out of character and would disadvantage the adult.¹³⁹¹

7.5.7 It is important that these risk factors not be applied too broadly, as an adult may choose to seek assistance from a third party in their decision-making.¹³⁹² Where this is the case, the focus is ‘whether the adult can make a decision free of intimidation, pressure or influence.’¹³⁹³ However, they provide a starting point in any consideration as to whether a party is being coerced.

7.5.8 The South Australian Capacity Guidelines refer to indications of undue influence. In these cases, it is noted ‘cognitive capacity and voluntariness of decision-making may be closely linked, where those with reduced capacity rely on others for assistance.’¹³⁹⁴

7.5.9 The presence of guidelines may serve as a useful tool to determine whether an adult’s decision-making autonomy is compromised. However, ‘influence of itself is not evidence of loss of capacity’.¹³⁹⁵ Thus, there may be a need for more prescriptive guidelines for practitioners, such as those working at the ASU, to rely on when determining whether intervention is necessary. A low threshold to override an individual’s consent ‘opens the door to the nanny state inappropriately interfering where capacitous individuals have made choices which are far from the mainstream and look like coercion from the outside but are choices that individuals have made.’¹³⁹⁶

7.5.10 The following contribution by Mr McBride in the Parliamentary Debate is illustrative:

Imagine an elderly patient in a care facility: the family visits regularly — that could be daily, weekly or even monthly — and it is considered, for example, that they are interfering in that patient’s life and perhaps making life difficult for that patient. In other words, it could happen that families could be ostracised from relatives and others in these care units because they may be a problem. The Government will have to have the strength and fortitude to say, ‘Okay, these are some of the outcomes we have in trying to look after patients, but we are disenfranchising them from their friends, their carers or their families because they are not good for them at that time of life.’ We know that this world is not perfect, and we know that there are going to be a lot of difficult cases where we try to advocate for the patient, the elderly person, the person with dementia and the person in their twilight years. The Bill embeds the vulnerable adult as the focus of safeguarding measures. The Bill supports an adult’s right to make decisions for themselves where they have the appropriate decision-making capacity. That is a really tough one to decipher if you think about that decision-making capacity as people get older: they may suffer from dementia and they may

¹³⁹¹ Queensland Government, *Guidelines for Assessing Decision-Making Capacity* (Guidelines, 2020) 17 <<https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/power-of-attorney-and-making-decisions-for-others/capacity-guidelines>>.

¹³⁹² Ibid 18.

¹³⁹³ Ibid.

¹³⁹⁴ Law Society of South Australia Client Capacity Committee, *Client Capacity: Statement of Principles with Guidelines* (Guidelines, May 2021) 17 <https://www.lawsocietysa.asn.au/Public/Publications/Guidelines/Client_Capacity_Guidelines.aspx>.

¹³⁹⁵ David Lock, ‘Decision-Making, Mental Capacity and Undue Influence: Action by Public Bodies to Explore the Grey Areas between Capacity and Incapacity’ (2015) 20(1) *Judicial Review* 42, 47 [24].

¹³⁹⁶ Ibid 45 [18].

have a lot of other issues in their life. It is going to be a really big grey area, and I hope that we as a Government get that right.¹³⁹⁷

7.5.11 Investigatory and/or prosecutorial bodies acting without the consent of an apparent victim is not a new concept. This is notable in the context of domestic and family violence. The ALRC noted the comments of a US lawyer with much experience in prosecuting elder abuse. The lawyer said that it was ‘vital that we do not allow elder abuse victims to self-determine whether a case gets investigated or prosecuted’,¹³⁹⁸ adding:

40 years ago in San Diego we allowed domestic violence victims to determine which cases were prosecuted. We don’t do that now because too many victims 40 years ago — who ‘declined to prosecute’ — ended up as homicide victims. Elder abuse victims must not be allowed to dictate what cases get investigated. For example, one of the most common physical elder abuse incidents is that involving an elderly mother who allows her middle aged son to ‘mooch’ off her. He is addicted to drugs, alcohol or gambling and is lazy. He steals from his mother and when she confronts him, he physically assaults her. Many of those elderly mothers do not want us to prosecute. But we must.¹³⁹⁹

7.5.12 The ALRC has also recognised that autonomy, whilst obviously highly important, is not absolute. It accepted that safeguarding agencies should be able to act in ‘particularly serious cases of physical abuse, sexual abuse and neglect’ of vulnerable adults, noting that ‘this may be seen as necessary action to secure people’s long-term autonomy interests and their immediate dignity.’¹⁴⁰⁰

7.5.13 The ALRC, consistent with the strong point made to SALRI by the Victim Support Service,¹⁴⁰¹ noted that intervention may actually enhance an apparent victim’s autonomy.¹⁴⁰² Where the presence of abuse is impeding a person’s ability to make free and voluntary decisions, interventions to stop the abuse may therefore support and restore a person’s autonomy, rather than undermine it.

7.6 Consultation Data Overview

Should the ASU Intervene Without Consent?

7.6.1 SALRI’s survey revealed mixed responses to the idea of the ASU taking action without the consent of the apparent victim. One respondent highlighted the importance of ‘choice and control’ as ‘paramount’ and a ‘basic human right’ that should not be overridden. Another respondent highlighted that ‘vulnerable adults will likely already find themselves in a position where they feel as though they may lack power or autonomy ... for this reason I think that consent is necessary before action is taken’.

¹³⁹⁷ South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2018, 3601 (Mr McBride).

¹³⁹⁸ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 396 [14.98]. Many parties in SALRI’s present consultation accepted this premise, noting that elder abuse and the abuse of persons with disability will often be a form of family violence or abuse. Others disagreed and maintained that the comparison between criminal justice responses to family violence and the ASU’s role under s 24 of the *AAS Act* is misplaced and it is paramount to not undermine the individual’s autonomy and intervene without consent.

¹³⁹⁹ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 396 [14.98].

¹⁴⁰⁰ *Ibid* 53 [2.99].

¹⁴⁰¹ See also *DL v A Local Authority* [2012] EWCA Civ 253, [63].

¹⁴⁰² Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Discussion Paper No 83, December 2016) 399 [14.112].

7.6.2 Other respondents highlighted the importance of these factors, but accepted there are circumstances in which acting without consent may be necessary. Adelaide lawyers told SALRI a more robust approach is necessary, in particular to address financial abuse. Another party noted:

A balance between respecting the person's rights and duty of care is important. If coercion or influence can be proven, the unit should be able to take action.

7.6.3 The potential for negative repercussions on the apparent victim were also highlighted in the survey responses:

Some risks (eg lifetime domestic conflict) are matters that they have chosen to tolerate and [it] should not be for the ASU to intervene without their consent as it is with matters of abuse, conflict and violence in the community generally.

7.6.4 Overall, the majority of survey respondents felt the ASU should have this power, at least in specific circumstances:

The unit is responsible for ensuring the safety of all vulnerable adults. They have the advantage of experience and information to make informed decisions ... The ASU should be resolved and determined in the charter to protect vulnerable adults.

Defining a Threshold for Intervention

7.6.5 There was wide, though not necessarily universal,¹⁴⁰³ agreement in SALRI's consultation that, although an individual's autonomy is compelling, the present grounds in the *AAS Act* allowing the ASU to intervene without consent are too restrictive. Currently the ASU 'may take action in respect of a report under this Act without first obtaining the consent of the vulnerable adult if'—

- a) —
 - i) the vulnerable adult's life or physical safety is at immediate risk; or
 - ii) the risk of abuse to which the report relates consists of an allegation that a serious criminal offence has been, or is likely to be, committed against the vulnerable person; or
 - iii) the vulnerable adult has impaired decision-making capacity in respect of a decision to consent to action of the relevant kind being taken; or
 - iv) the Adult Safeguarding Unit has not, after reasonable inquiries, been able to contact the vulnerable adult; or
 - v) in any other circumstances declared by the regulations to be included in the ambit of this paragraph; and
- b) the Director approves the taking of the action.¹⁴⁰⁴

¹⁴⁰³ For example, there was a view amongst some Mount Gambier service providers and practitioners, attendees at SALRI's Adelaide expert roundtable, and the Minister's expert reference group that autonomy is paramount and the present narrow grounds in the *AAS Act* should be retained.

¹⁴⁰⁴ *AAS Act* s 24(4).

7.6.6 SALRI's consultation revealed broad support for 'serious financial abuse' being included as a ground upon which the ASU may¹⁴⁰⁵ intervene and override an adult's lack of consent, regardless of their decision-making capacity status. The Adelaide, Clare, Berri, Mount Gambier, Port Lincoln and Port Pirie lawyers largely took this view.

7.6.7 The impetus for this approach stems from the increasing incidence and awareness of the financial abuse of older persons and persons with disability and the close nexus in practice between coercive behaviour and financial abuse.¹⁴⁰⁶ As Mr Salama, a NSW barrister, told SALRI, such financial abuse typically goes 'hand in glove' with coercive control or psychological abuse, adding 'they are not matters that can be separated, [they] are married at the hip.'¹⁴⁰⁷ This theme was echoed by many parties in SALRI's consultation who noted the intersection between financial abuse and psychological abuse or coercive control in relation to both elder abuse and the abuse and exploitation of persons with disability.¹⁴⁰⁸

7.6.8 The ASU's intervention without the consent of the apparent victim was supported by some respondents to SALRI's survey in cases of significant abuse. One response was:

If the vulnerable person is experiencing significant abuse and/or neglect that is or has the potential to threaten their wellbeing and safety, then it would be appropriate for the ASU to take action.

7.6.9 Disabled People's Organisations Australia, for example, supported the right for older people or persons with disability experiencing violence to refuse assistance or support, and that they have the right to make their own decisions about their care. This should form the basis of any investigations around abuse and violence against people with disability, as individuals are entitled to make their own decisions and have their legal capacity upheld.¹⁴⁰⁹ Several parties favoured this approach in SALRI's present consultation.

7.6.10 The South Australian Council on Intellectual Disability, drawing on the direct input of persons with disability, commented that the ASU should only be able to intervene without the consent of an adult with decision-making capacity 'in exceptional circumstances'. They provided the following examples:

1. If a person is in immediate risk and danger of being physically hurt.
2. If the abuse is coming from the person or people that are supposed to support them to give or not give consent.
3. If a person is at risk of being significantly disadvantaged (eg, leaving someone without any money or care for essential needs).
4. If a person is in immediate risk of being neglected (eg, left without food, or essential care).

¹⁴⁰⁵ It was widely accepted that any decision will depend on the precise facts of each case and the ability to intervene must be may and not shall. For example, as Cassie Mason and various legal and health practitioners and service providers reminded SALRI, intervention may cause more harm than good. See above Part 5.4.

¹⁴⁰⁶ See above Parts 7.3 and 7.4.

¹⁴⁰⁷ See also Kylie Miskovski, Alzheimers Australia NSW, *Preventing Financial Abuse of People with Dementia* (Discussion Paper No 10, June 2014); Rae Kaspiew, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, 2016) 8, 10, 47; Jo Wainer, Peter Darzins and Kei Owada, Monash University, *Prevalence of Financial Elder Abuse in Victoria: Protecting Elders' Assets Study* (Report, 10 May 2010).

¹⁴⁰⁸ SALRI's NGO sector roundtable comprising of both disability and aged care groups noted the most common forms of abuse reported to them is financial abuse and this is typically accompanied by emotional abuse.

¹⁴⁰⁹ Ibid.

5. If the person does not understand their right to be safe from abuse and neglect and that what they might be experiencing is not acceptable.
6. That if given the information ASU has, there is the view that ‘investigation is absolutely necessary for the person at-risk to be safe.

7.6.11 In their submission to SALRI, the OFAW noted the decision-making model adopted by the ASU places the adult experiencing abuse ‘at the centre’, which is consistent with principles of autonomy and self-determination. As a result, the ASU must ‘continuously and carefully balance’ the autonomy and wishes of an adult, against the need to safeguard them from abuse.

7.6.12 The OFAW noted the ‘strong risk’ that a more interventionist approach would result in ‘action being taken against a person’s wishes, potentially leading to fractured family relationships and/or unwelcome or unwanted changes to the person’s living circumstances.’ This highlights the complexity attached to situations where an adult has capacity and refuses further action, despite the presence of abuse and coercion.

7.6.13 In determining whether to act without consent, the OFAW advocated to SALRI for a case-by-case approach. Further, it was suggested that regulation 8¹⁴¹⁰ could be expanded to explicitly identify suspicion of duress, undue influence, coercive control, financial abuse or exploitation. The OFAW submission went on to conclude that the *AAS Act*:

strikes the appropriate balance between ensuring an effective and comprehensive basis for the Adult Safeguarding Unit to act without consent in a broad range of circumstances while continuing to prioritise a rights-based approach that supports people to exercise autonomy and exercise choice wherever it is safe and possible to do so.¹⁴¹¹

7.6.14 The importance of the case-by-case approach was also made clear in SALRI’s consultation regarding the types of abuse that may justify ASU action without consent. It was often pointed out to SALRI by parties such as Mr Westley and Mr Norcock that terms such as ‘serious criminal offence’ or ‘serious financial harm’ cannot be defined by reference to either the relevant penalty or the amounts involved. It has to be relative to the individual’s estate. An example presented to SALRI repeatedly, in relation to both older persons and persons with disability, was that, in relation to financial abuse, what is serious will depend on the circumstances of the individual. For example, the regular misappropriation of \$100 to a person on an age or disability support pension will have a far greater impact on their quality of life than for an affluent individual. Conversely, the misappropriation of even a considerable sum from an affluent individual may not amount to serious abuse. Port Pirie lawyers said that terms such as ‘serious financial abuse’ cannot be defined according to monetary value and serious financial abuse is a relative concept – relative to the person’s net worth.

7.6.15 ARAS remained concerned about possible changes to the threshold to override an individual’s consent, citing the need to respect that person’s autonomy. However, ARAS were supportive of extending s 24, citing an example involving serious financial abuse and the risk of displacement from the adult’s preferred place of residence, as circumstances where intervention may be warranted without consent. ARAS added that such financial abuse of an older person is generally associated with psychological abuse.

¹⁴¹⁰ *Ageing and Adult Safeguarding Regulations 2019* (SA).

¹⁴¹¹ In further discussion, Cassie Mason and Elicia White, acknowledged the arguments to add serious financial abuse to the circumstances in which the ASU can proceed without consent, as long as intervention is not mandated. They also cautioned that all too often there is realistically little, if anything, the ASU can do if the victim is not supportive.

7.6.16 The complexity of coercion was raised by the Office of the Public Advocate ('OPA'), who noted the dynamics of an abusive relationship are further amplified where coercive control is present. They further noted that the 'key is to offer ongoing opportunities for the person to seek out support'. This may prevent the further deterioration of a situation. These circumstances were described as 'difficult terrain to negotiate' — the act of balancing risk whilst upholding rights. However, the OPA reinforced the importance of the skills and experience of ASU practitioners in facilitating positive outcomes.

7.6.17 The OPA further recommended that a 'minimum level of scrutiny' could be required prior to overriding consent and that there should 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.

7.6.18 The impact of coercion or external influences on a person's decision not to consent to ASU intervention was highlighted by a number of survey respondents. One person wrote:

A balance between respecting the person's rights and duty of care is important. If coercion or influence can be proven, the unit should be able to take action.

7.6.19 Another response on this subject was:

If it is believed that the vulnerable or at risk person is in a compromising situation or under coercion from the alleged abuser then the ASU should certainly have the right to investigate the issue. If not, the vulnerable or at risk person is, in fact, losing their rights and autonomy to the abuser.

7.6.20 In addition, it must be noted that it may take time and ongoing effort to obtain an adult's consent. This further highlights the need to examine each circumstance on a case-by-case basis. This was also raised by Speech Pathology Australia, who submitted that '[a]ttempts to gain consent should be made wherever possible' and acknowledged:

There may be some difficulties in obtaining consent when someone does not understand the language that the consent documents are presented in, or the language used to explain the action or intervention. This may include individuals whose first language or dialect is not English, Alternative and Augmentative Communication users, individuals who have a brain injury, intellectual disability or deteriorating cognitive abilities. Therefore, there may need to be provision within the Act to allow for communication accessibility and the flexibility to gain consent within the person's mode of communicating or preferred language.

7.6.21 In order to provide free and voluntary consent, an adult must be offered all available means to understand the relevant information and communicate that consent. This was reinforced by SACID, who also emphasised the importance of having an open and accessible conversation with the adult. The conversation should support the person and ensure the person understands the role of the ASU and what actions may occur if consent is provided. They noted '[m]any of the people that we spoke with said that they had not heard of ASU before and were unsure of what giving consent might mean for them if they were in that situation.'

7.6.22 In their submission to SALRI, SACID concluded that:

Acting without consent should also be dependent on the level of risk. For example, the ASU should not intervene until it is determined that there is a high level of risk where the person may be disadvantaged, for example, leaving a person with no money, or being at risk of getting seriously hurt. It is important to ensure that alternative options have been taken, including eliminating conditions that can create or increase the level of risk. ASU should consider if there are factors that are preventing an individual from giving consent such as coercion from the abuser, fear of the abuser, or misunderstanding of what consent will mean.

7.6.23 The OPA raised that a person in an abusive situation may be conditioned to decline support, for example, they may be instructed to refuse to consent. Where coercive control and psychological manipulation is present, this situation is heightened. The OPA also noted that the key to supporting apparent victims in an abusive situation where coercive control or gaslighting is present is to offer ongoing opportunities for the person to seek out support.

7.6.24 In cases of serious financial abuse where coercion may be present, regional lawyers told SALRI their view is that the current Act is too 'black and white' and does not have a trauma lens. The suggestion was made that the threshold for intervention should be lowered if there is a coercive control situation. The regional lawyers presented the view that in terms of serious financial abuse, there is little benefit in removing a victim from an abusive situation if there is no follow up procedure. The suggestion of a court ordered check-in could be a viable remedy. There was a broad consensus from regional lawyers that the ASU should be able to intervene if there is serious financial abuse. However, to prevent it reaching a level where this is needed, education would be the preferable option.

7.6.25 With respect to coercion being present whilst a person has capacity, members of the community held a strong view that a 'soft touch' approach is most appropriate. Where the ASU must intervene, the intervention must be necessary, proportionate and the least restrictive means.

7.6.26 The Victim Support Services ('VSS') noted that, whilst a victim's autonomy should be respected, this should not be conclusive in the context of significant abuse. Indeed, intervention to assist a party who is unable or unwilling to consent to such intervention may actually serve to promote and enhance that victim's overall autonomy. The VSS provided the example of a victim of family violence who, following prosecution of the abuser without her consent, spoke in positive terms of the impact of this on her autonomy. Should such intervention occur, it should be coupled with a complete risk assessment in which 'safety is prioritised'. The VSS acknowledged the potential risk of a victim resenting and rejecting this process but viewed the person's safety as paramount. This suggestion was raised as the VSS holds the view that whilst the abuse is occurring 'there is too much going on for [a victim] to fully be able to make that decision' and consent to intervention.

7.6.27 A number of respondents to SALRI's survey highlighted that intervention without consent already occurs in the domestic and family violence context.

7.6.28 Allowing the ASU greater scope to intervene without the consent of the apparent victim was also supported by various health and medical practitioners (including in Port Augusta) as well as various Adelaide and regional lawyers and Mr Salama, a NSW barrister. Mr Westley and Mr Norcock supported ASU involvement and intervention without the apparent victim's consent in a wider range of cases, notably in relation to serious financial abuse and the ASU should intervene before such abuse escalates. Mr Westley and Mr Norcock highlighted the dramatic impact of such abuse on the victim. The Port Augusta Uniting Country practitioners, whilst noting the importance of respecting a client's autonomy,

supported the ASU's ability to intervene in circumstances without consent such as where coercive control or serious financial abuse is present.

7.6.29 A number of respondents to SALRI's survey noted that in cases where the ASU does proceed with further action without consent, there should be appropriate follow ups and consultations with health professionals. Depending on the intervention taken by the ASU, the apparent victim should be able to access support from relevant persons including family, friends, carers or legal practitioners as the case requires.

7.7 SALRI's Observations and Conclusions

7.7.1 SALRI accepts that the issue of when the ASU or any State agency may take action without the consent of an apparent victim with decision-making capacity is a sensitive question.

7.7.2 This power and the consent-centric operation of the ASU necessitates a clear definition of consent within the *AAS Act*. SALRI therefore suggests this should be explicitly defined as a 'free and voluntary decision'. There is benefit in providing statutory clarity as to what is meant by valid consent under the *AAS Act*. SALRI further recommends, drawing on the *Voluntary Assisted Dying Act 2021* (SA), a statutory statement to the effect that a decision should not be a consequence of the suggestion, pressure or coercion of others. In obtaining consent from an adult who may be vulnerable to abuse, the ASU should turn their minds to the possible presence of an external pressure.

7.7.3 The circumstances in which the ASU can effectively override an individual's refusal to consent to further action, where they have capacity, are currently very narrow.¹⁴¹² SALRI considers that, drawing on its research and consultation, this approach is too restrictive.

7.7.4 SALRI agrees with the observations of the ALRC that, although safeguarding agencies should have a duty to investigate abuse, they should also have the crucial discretion and flexibility to decide whether and what further action should be taken.¹⁴¹³ The ALRC elaborated:

Where there is serious assault,¹⁴¹⁴ but no consent to act from the affected adult, the agency may in some cases exercise its discretion and not act (other than to report the abuse to the police, where this is required). In such cases, clear records should be kept, explaining why no action was taken. Wherever possible, action should only be taken with the older person's consent. In the few cases in which action is taken without consent, safeguarding agencies should nevertheless work with the adult at every stage, if this is what the adult wants, and consent should continue to be sought at later stages of the process.¹⁴¹⁵

7.7.5 The present South Australian provision draws on the ALRC's suggestion. It is significant this test was widely supported in the ALRC's consultation.¹⁴¹⁶ However, in SALRI's consultation there was a strong, though not necessarily universal, view that the *AAS Act* is too restrictive.

¹⁴¹² *AAS Act* s 24(4).

¹⁴¹³ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 400 [14.116].

¹⁴¹⁴ To this SALRI would act serious financial abuse. See also Recommendation 29.

¹⁴¹⁵ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 400 [14.116]–[14.117].

¹⁴¹⁶ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 394 [14.87].

7.7.6 Many parties told SALRI that, in certain contexts, both older people and people with disability may continue to live with behaviour which is objectively seen as abusive.¹⁴¹⁷ For the ASU to take action without the consent of the apparent victim may be seen as at odds with the usual premise in criminal law where a victim's consent is invalid in cases of death¹⁴¹⁸ and serious harm¹⁴¹⁹ and actual bodily harm¹⁴²⁰ (which simply means harm that is more than transient or trifling).¹⁴²¹

7.7.7 However, a distinction must be drawn between consent to otherwise abusive behaviours and consent to the ASU taking action. The test in the *AAS Act* is at odds with the wide understanding in cases involving the investigation and prosecution of family violence that, whilst the victim's views are significant they are not conclusive, and cases may well be prosecuted in the wider public interest notwithstanding it is contrary to the victim's views.¹⁴²² In such cases, the victim recognises the behaviour as abusive, but for complex reasons will often refuse to either report it or take part in a police investigation or formal prosecution.¹⁴²³

7.7.8 SALRI is of the view that the current threshold in the *AAS Act* for possible intervention without the apparent victim's consent is too high. Without in any way diminishing the importance of the individual's autonomy, there are circumstances, as was widely raised in SALRI's consultation and research, where either there is impaired decision-making capacity or the consent provided is not free

¹⁴¹⁷ A common example given was that of wealthy individual who was aware of carers taking more money than they were entitled to, but being unwilling to do anything as he 'enjoyed their friendship'. Another common example given to SALRI was where the parent becomes aware of emotional and/or financial abuse from a family member, but has capacity and makes a reasoned and rational decision and is unwilling to consent to the ASU or another party (such as a concerned family member) taking action as they fear having to move or losing touch with their grandchildren.

¹⁴¹⁸ *R v Rice* (1803) 3 East 581; *R v Brown* [1994] 1 AC 212. To quote the prosecutor in a New Zealand murder trial: 'You can't consent to your own murder': Eleanor Roy, 'Grace Millane Trial: "You Can't Consent to Your Murder", Prosecutor Says in Closing', *The Guardian* (online, 21 November 2019) <<https://www.theguardian.com/world/2019/nov/21/grace-millane-trial-closing-arguments-new-zealand>>.

There is also the notorious German case of Armin Meiwes, who was found guilty of murder, despite the fact that to be killed was the victim's explicit wish: see Luke Harding, 'German Court finds Cannibal Guilty of Murder', *The Guardian* (online, 10 May 2006) <<https://www.theguardian.com/world/2006/may/10/germany.lukeharding>>.

¹⁴¹⁹ *R v Lee* [2006] 3 NZLR 42.

¹⁴²⁰ *R v Brown* [1994] 1 AC 212; *R v Boyea* (1992) 156 JPR 505; *R v Emmett* [1999] EWCA Crim 1710; *R v BM* [2019] QB 1; *R v Stein* (2007) 18 VR 376. This remains a controversial area of the criminal law.

¹⁴²¹ *R v Donovan* [1934] 2 KB 498, 509.

¹⁴²² Louise Ellison, 'Prosecuting Domestic Violence without Victim Participation' (2002) 65(6) *Modern Law Review* 834; Charlotte Bishop and Vanessa Bettinson, 'Evidencing Domestic Violence, Including Behaviour that Falls Under the New Offence of Controlling or Coercive Behaviour' (2017) 22 (6) *International Journal of Evidence and Proof* 1; Nina Westera and Martine Powell, 'Prosecutors' Perceptions of how to Improve the Quality of Evidence in Domestic Violence Cases' (2017) 27(2) *Policing and Society* 127. 'Support for these policies is generally mixed': Christopher Dowling et al, Australian Institute of Criminology, *Policing Domestic Violence: A Review of the Evidence* (Research Study No 13, November 2018) 39. This point was made by a number of parties in SALRI's consultation such as Port Augusta medical practitioners and the Victim Support Service. One of this Report's authors, Dr David Plater, was closely involved with the English Crown Prosecution Service in the prosecution of domestic violence without the consent or involvement of the victims, when prosecution was assessed as warranted in the wider public interest. Despite the victim's absence, such cases can be successfully prosecuted. See, eg, *R v Richardson* [2004] EWCA Crim 758; *Eate v Police* (2004) 236 LSJS 376; *Barnaby v DPP* [2015] EWHC 232 (Admin); *Ibrahim v CPS* [2016] EWHC 1750 (Admin); *Morgan v DPP* [2016] EWHC 3414 (Admin).

¹⁴²³ SAPOL specialist officers told SALRI the police now have a positive arrest and prosecution approach to domestic violence, regardless of the victim's views (whilst acknowledging that such cases will be difficult to successfully prosecute without the victim's willing participation and testimony).

and voluntary, owing to the presence of coercion and/or the abuse is serious and warrants possible intervention (notwithstanding there is no imminent risk of death or serious physical harm).

7.7.9 SALRI recognises that the power to override a person's lack of consent for the ASU to take further action is challenging in the context of adults with decision-making capacity who choose to accept remaining in an abusive situation and do not wish the ASU to intervene. There are many reasons a person may have for making such a decision, such as preserving family or other relationships. This is a regular event in practice as the ASU, lawyers and service providers confirmed to SALRI. In many of these cases the abuse renders the adult 'so vulnerable' that they are unable to make an independent decision, despite having decision-making capacity.¹⁴²⁴

7.7.10 SALRI considers that a clear threshold must be defined and satisfied before the ASU exercises these powers. The request to intervene and act without the consent of an adult with decision-making capacity should not be taken lightly. It must be carefully considered, with regard to the adult's wishes, ability to appreciate the nature of abuse and its extent, the harm caused and their ability to weigh up the advantages and disadvantages of refusal or consenting to intervention. Further, where this lack of consent is overridden in the case of an adult with decision-making capacity, intervention must be necessary, reasonable and proportionate.

7.7.11 SALRI considers that this approach does not limit or encroach on a person's autonomy. In SALRI's view, where an individual's consent is compromised by coercion, the ASU intervening and proceeding with the prosecution of a perpetrator helps empower the victim. Whilst in an abusive scenario, the victim cannot bear the onus of consenting to an intervention. Through lowering the current threshold for intervention, a person's autonomy may be restored and protected.

7.7.12 SALRI recommends that when exercising its power under s 24 the ASU should be encouraged to intervene at an earlier stage, where doing so is appropriate in the circumstances. This would attempt to prevent further escalation of abuse, and significant harm, which can diminish the ordinary quality of life and standard of living of the adult who may be vulnerable to abuse.

7.7.13 Recognising the impacts of coercion and financial abuse, lowering the threshold in which the ASU may act without consent was an overwhelming theme of SALRI's consultation. This change would provide additional support to those in vulnerable situations who may not be in a position to fully comprehend the abuse occurring, have the capacity to consent or the abuse is of such nature and extent (notably financial abuse) that the ASU should have the option to take action without the apparent victim's consent. This does not mean action must be taken, but may be taken.

7.7.14 SALRI therefore considers that the circumstances in which the ASU should be able to act under the *AAS Act* without consent should be widened to include allegations of 'serious financial harm'. This, and the existing factor of a 'serious criminal offence' should be defined in the *AAS Act*. These definitions should provide that what amounts to serious financial harm or a serious criminal offence should be determined on a case-by-case basis, and be based on the impact of the abuse on the individual. It is impossible to define what amounts to serious financial harm or a serious criminal

¹⁴²⁴ David Lock, 'Decision-Making, Mental Capacity and Undue Influence: Action by Public Bodies to Explore the Grey Areas between Capacity and Incapacity' (2015) 20(1) *Judicial Review* 42.

offence by reference to the amount involved and/or the relevant penalty for that offence.¹⁴²⁵ Its definition is context-specific and will inevitably depend on the individual situation.

7.7.15 SALRI further suggests that the ASU should be provided with a list of statutory factors to take into account when deciding whether to act under s 24 of the *AAS Act* without an individual's consent. These factors should include the decision-making capacity of the adult, their autonomy, the impact of the abuse and the coercive behaviours on them, and the potential outcomes of the proposed action upon the adult. Where action is to be taken without consent, the intervention should be necessary, reasonable and proportionate. Such a list will promote consistency and provide necessary clarity to the ASU, other relevant agencies, and the community in the exercise of an important and sensitive power. Many parties in SALRI's consultation saw the benefits of such a list.

7.7.16 Finally, SALRI emphasises that the *AAS Act* should make clear that the ASU *may* act without consent in these circumstances.¹⁴²⁶ Whether intervention is taken is a question the ASU should decide, based on a balance of the above factors. It has to be a decision for the careful judgement of the relevant ASU practitioner(s). This is where the input of a lawyer at the ASU could prove of value.

7.7.17 Recommendations

RECOMMENDATION 25

SALRI recommends that a statutory definition of 'consent' should be included in the *Ageing and Adult Safeguarding Act 1995* (SA) which defines consent as 'a free and voluntary decision'. SALRI further recommends that this definition should include the vital premise drawing on s 8(1)(k) of the *Voluntary Assisted Dying Act 2021* (SA) that every person vulnerable to abuse has the right to make decisions requiring their consent under the *Ageing and Adult Safeguarding Act 1995* (SA) freely, and not as a consequence of the suggestion, pressure or coercion of others.

RECOMMENDATION 26

SALRI recommends that, in deciding whether to take action under s 24 of the *Ageing and Adult Safeguarding Act 1995* (SA), the Adult Safeguarding Unit should be encouraged to intervene at an early stage before the abuse escalates, where it is appropriate in all of the circumstances.

¹⁴²⁵ For example, a threshold based on the distinction between summary, minor indictable and major indictable offences would be unworkable and inappropriate. What may amount to a summary offence of dishonesty simply based on value, may be of a drastic impact to the victim. Conversely, what may amount to a minor or even major indictable offence of dishonesty simply based on value, may not have a drastic impact on a more affluent victim. Additionally, a victim of greater means may have more access to other forms of redress including a civil action to recover an amount lost.

¹⁴²⁶ SALRI acknowledges that, as reminded in consultation, intervention without an individual's consent may on occasion do more harm than good.

RECOMMENDATION 27

SALRI recommends that the term ‘serious criminal offence’ in s 24(4)(a)(ii) of the *Ageing and Adult Safeguarding Act 1995* (SA) should be defined. This definition should provide that what constitutes a serious criminal offence is to be determined by the outcome of such an offence (current or potential) in that such an offence has resulted, or will result, in a substantial adverse impact on the individual who may be vulnerable to abuse and/or their ordinary quality and standard of living. The impact on the individual must be determined on a case-by-case basis and cannot be determined by the classification of the offence or the penalty of the offence under the criminal law.

RECOMMENDATION 28

SALRI recommends that s 24(4)(a) of the *Ageing and Adult Safeguarding Act 1995* (SA) should be amended to widen the circumstances in which the Adult Safeguarding Unit may¹⁴²⁷ be entitled to intervene without the consent of the relevant individual to include ‘serious financial abuse’.

RECOMMENDATION 29

SALRI recommends that ‘serious financial abuse’ should be defined in the *Ageing and Adult Safeguarding Act 1995* (SA) by reference to the outcome or potential outcome of such abuse on the apparent victim in that such abuse will result in a substantial adverse impact on the individual who may be vulnerable to abuse and/or their ordinary quality and standard of living.

SALRI further recommends that ‘serious financial abuse’ should be determined on a case-by-case basis.¹⁴²⁸ When deciding whether the abuse meets this threshold, the Adult Safeguarding Unit may draw upon the following as non-exhaustive examples of serious financial abuse:¹⁴²⁹

- a. Risk of homelessness;
- b. Being moved into a residential aged care facility against the wishes of the apparent victim and at their personal expense;
- c. Selling or transferring assets (including a home) against the wishes of the apparent victim;
- d. Inability to financially support activities of the apparent victims’ ordinary life such as grocery shopping, medication, rent, and other basic necessities;
- e. Withholding money or preventing access to funds;

¹⁴²⁷ The ASU’s power to intervene under the *AAS Act* should be utilised with diligence and care. Intervention should not be mandated, but depend upon an individual judgement in each case. Many parties pointed out to SALRI that, whilst supporting this threshold, intervention may leave the person at risk of abuse in an even worse situation.

¹⁴²⁸ It is impossible to define serious financial abuse by reference to either monetary value or the penalty attached to any offence. What is a modest sum to one victim, may be a large amount to another.

¹⁴²⁹ Whether this list of factors be included in the *AAS Act*, Regulations or Code of Practice is a matter for the Minister, Parliament and Parliamentary Counsel.

- f. Misuse of a Power of Attorney (or Enduring Power of Attorney);
- g. Misuse of the powers and functions of a Trustee;
- h. Exerting undue influence to give away assets or gifts;
- i. Pressuring the adult who may be vulnerable to abuse to make or change their estate planning measures.¹⁴³⁰

RECOMMENDATION 30

SALRI recommends that, when determining whether to override the decision of an adult with decision-making capacity under s 24(4) of the *Ageing and Adult Safeguarding Act 1995* (SA), the Adult Safeguarding Unit should take into account the following, non-exhaustive, list of factors:¹⁴³¹

- a. The decision-making capacity of the adult;
- b. The adult's autonomy and right to make 'poor decisions';
- c. The influence of culture, family and language;
- d. The nature/dynamic of the relationship and its significance to the adult;
- e. The underlying premise of the influence (religion, cultural expectation/norm, obligation);
- f. The risk of displacement or destitution from preferred residence;
- g. The validity of consent and whether a decision was made freely and voluntarily;
- h. The gravity of the abuse (whatever form(s) it may take);
- i. The presence of psychological abuse and its severity and effects;
- j. The potential outcomes of the proposed actions for the adult who may be vulnerable to abuse and any other relevant parties; and
- k. Whether the coercive conduct justifies the Adult Safeguarding Unit's intervention and subsequent interference with the adult's decision-making autonomy.

SALRI further recommends that where consent is overridden in the case of an adult with decision-making capacity, that intervention should be necessary, reasonable and proportionate.

¹⁴³⁰ Estate planning measures includes wills, enduring guardianship, powers of attorney and superannuation nominations.

¹⁴³¹ Whether this list of factors be included in the *AAS Act*, Regulations or Code of Practice is a matter for the Minister, Parliament and Parliamentary Counsel.

Part 8 – Definition of Vulnerable

8.1 Background

Current Definition of Vulnerable under the AAS

The use and definition of the term ‘vulnerable adult’ was a contentious issue in SALRI’s research and consultation, with debate as to both the term itself and the kinds of people it is defined to include. The term is integral to the scope and operation of the *AAS Act* and, crucially, it defines the remit of the ASU.

8.1.1 The *AAS Act* defines a ‘vulnerable adult’ as a

person who, by reason of age, ill health, disability, social isolation, dependence on others or other disadvantage, is vulnerable to abuse.¹⁴³²

8.1.2 This definition was intentionally left broad to capture older people vulnerable to abuse by reason of age or ill health,¹⁴³³ older people experiencing abuse such as domestic violence,¹⁴³⁴ and other adults who might need support to deal with a situation of abuse or harm.¹⁴³⁵

8.1.3 The ASU’s Code of Practice further develops this concept of vulnerability by recognising that being a member of a non-majority community ‘compounds’ and ‘worsens’ the person’s exposure to abuse.¹⁴³⁶

8.1.4 The breadth of persons falling within the remit of the ASU is notable. Despite the significant focus on elder abuse in its formation, the ASU is not confined to the safeguarding of older persons. As the then Minister explained:

[W]e know that age alone does not make a person vulnerable to abuse, neglect or harm. It is the combination of age — whether advanced age or the fact that child protection laws no longer apply — combined with other factors, which make a person vulnerable. This may be ill health, disability, cognitive dysfunction or dementia, dependence on others for one’s care, mobility or day to day lifestyle challenges or even social isolation. Age, combined with one of these factors, is what makes an adult potentially vulnerable to abuse or harm. All vulnerable adults deserve to have their rights safeguarded and to live a life of dignity and autonomy as far as is possible or practical.¹⁴³⁷

History of the term ‘Vulnerable Adult’

8.1.5 The impetus behind law reform in this area was the need to address the systemic issues brought to light after the events of Oakden¹⁴³⁸ and a decade of pressure from advocacy and government bodies for enhanced protections for older people, and other vulnerable people in the

¹⁴³² *AAS Act* s 3. This expansive definition comes into effect on 1 October 2022.

¹⁴³³ Office for the Ageing, *Strategy to Safeguard the Rights of Older South Australians 2014–2021* (SA Health Document, 2014) 14.

¹⁴³⁴ Ibid.

¹⁴³⁵ Explanatory Memorandum, Office for the Ageing (Adult Safeguarding) Amendment Bill 2018 (SA), 2.

¹⁴³⁶ Office for Ageing Well, South Australian Adult Safeguarding Unit, *Code of Practice* (2019).

¹⁴³⁷ South Australia, *Parliamentary Debates*, Legislative Council, 20 June 2018, 565.

¹⁴³⁸ Bruce Lander, Independent Commissioner Against Corruption, *Oakden: A Shameful Chapter in South Australia’s History* (Report, 2020).

community.¹⁴³⁹ The South Australian Parliament recognised that the current laws and systems were ‘inadequate to afford people over the age of 18 even the most basic of protections’ and thus considered it a ‘fundamental responsibility’ to protect the rights of vulnerable people in the community.¹⁴⁴⁰

8.1.6 The concept of limiting the application of adult safeguarding laws to the protection of ‘vulnerable adults’ (as opposed to all adults) from abuse initially arose in the elder abuse context, but has been extended to include younger adults who are vulnerable to abuse. For example, the 2011 *Closing the Gaps* Report suggested a clear definition of ‘vulnerable’ specifically designed to define what makes an older person vulnerable rather than what makes a person vulnerable generally (noting that this Report was focused on older people).¹⁴⁴¹ The Report also emphasised that the adult should not be automatically treated as vulnerable and thus in need of support and protection, unlike in the child protection system (where relevant law applies to all children experiencing or at risk of harm).¹⁴⁴²

8.1.7 In the adult safeguarding context, age alone does not make a person vulnerable,¹⁴⁴³ nor, as noted in the *Safeguarding Task Force* Report, does disability.¹⁴⁴⁴ These premises proved recurring also in SALRI’s consultation. The ALRC recommended a ‘functional’ approach to vulnerability, to ensure safeguarding services are extended to all people, rather than people over a certain age.¹⁴⁴⁵ The South Australian approach recognises that the risk of abuse increases with age in the presence of other factors such as impaired mobility, cognitive impairment, or dependency.¹⁴⁴⁶

8.1.8 It is this combination of age with other factors such as ‘ill health, disability, cognitive dysfunction or dementia, dependence on others for one’s care, mobility or day to day lifestyle challenges, or even social isolation’ that leads to vulnerability.¹⁴⁴⁷ Applying the *AAS Act* to all ‘vulnerable adults’, rather than adopting an age specific definition, was supported in consultation with older people conducted by the OFAW.¹⁴⁴⁸

¹⁴³⁹ See in particular, South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia’s Response to the Abuse of Vulnerable Older People* (Report, October 2011) 65, 68; Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 386; Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017); Kelly Vincent and David Caudrey, *Safeguarding Task Force* (Report, 31 July 2020) 1.

¹⁴⁴⁰ South Australia, *Parliamentary Debates*, Legislative Council, 6 June 2018, 410 (Frank Pangelo).

¹⁴⁴¹ South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia’s Response to the Abuse of Vulnerable Older People* (Report, October 2011) 13. See also Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017).

¹⁴⁴² Ibid 23.

¹⁴⁴³ South Australia, *Parliamentary Debates*, Legislative Council, 20 June 2018, 565 (Stephen Wade, Minister for Health and Wellbeing).

¹⁴⁴⁴ Kelly Vincent and David Caudrey, *Safeguarding Task Force* (Report, 31 July 2020) 9. These themes were often emphasised to SALRI in consultation.

¹⁴⁴⁵ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 376.

¹⁴⁴⁶ Office for the Ageing, *Strategy to Safeguard the Rights of Older South Australians 2014–2021* (SA Health Document, 2014) 14.

¹⁴⁴⁷ South Australia, *Parliamentary Debates*, Legislative Council, 20 June 2018, 565 (Stephen Wade, Minister for Health and Wellbeing).

¹⁴⁴⁸ Office for the Ageing, SA Health, *Elder Abuse Responses: Safeguarding the Rights of Older South Australians* (Consultation Outcomes Report, 2018) 8.

8.1.9 The *AAS Act* aimed to set out a ‘functional definition’ of vulnerability to ensure that resources are allocated to the people ‘most in need of safeguarding and support’.¹⁴⁴⁹ The *AAS Act* reflected stakeholder feedback that the definition of ‘vulnerable’ needs to be inclusive of adults who are vulnerable to abuse but may have no dependence on or need for support from others,¹⁴⁵⁰ unlike the definitions in other jurisdictions.¹⁴⁵¹

8.1.10 However, the *AAS Act* was to have a staggered implementation. When the *AAS Act* became operational on 1 October 2019, a three-year transitional clause limited the initial definition of ‘vulnerable adult’ to an ‘Aboriginal or Torres Strait Islander person aged 50 or older, or in any other case, a person 65 years and older.’¹⁴⁵²

8.1.11 This limited definition was introduced because the State Government acknowledged that the ASU was the first of its kind in Australia and the demand on resources was ‘untested and unknown’.¹⁴⁵³ The Government included adults with disability within the transitional provision of the ASU from 1 October 2020.

8.2 Position in Other Jurisdictions

New South Wales

8.2.1 The *Ageing and Disability Commissioner Act 2019* (NSW) (*ADC Act*) came into force on 1 July 2019. Section 13 of the *ADC Act* provides that a person may make a report to the Commissioner concerning

(a) an adult with disability or older adult if the person has reasonable grounds to believe the adult is subject to, or at risk of, abuse, neglect or exploitation,¹⁴⁵⁴

(b) circumstances that the person has reasonable grounds to believe will result in the abuse, neglect or exploitation of an adult with disability or older adult.¹⁴⁵⁵

8.2.2 The objects of the *ADC Act* are to ‘protect and promote the rights of adults with a disability and older adults, and to protect adults with disability and older adults from abuse, neglect and exploitation.’¹⁴⁵⁶ Evident from the language used in the objects clause of the *ADC Act*, the remit of the Office of Ageing and Disability Commissioner is restricted in that it only applies to *adults with a disability and older adults*.¹⁴⁵⁷

8.2.3 During the Second Reading Speech, the Minister for Families, Communities and Disability Services, Gareth Ward, justified the relatively narrow scope of the Bill, explaining that

¹⁴⁴⁹ Explanatory Memorandum, Office for the Ageing (Adult Safeguarding) Amendment Bill 2018 (SA) 2.

¹⁴⁵⁰ Ibid.

¹⁴⁵¹ The definitions used in the jurisdictions comprising the United Kingdom are discussed below.

¹⁴⁵² *AAS Act* sch 1, s 2(a)(i), (ii). However, under sch 1 of the *AAS* the Minister was permitted to make a declaration concerning ‘any other vulnerable adult or vulnerable adult of a class,’ and therefore, the definition of ‘vulnerable adult’ could have been expanded during the first three years of operation.

¹⁴⁵³ Explanatory Memorandum, Office for the Ageing (Adult Safeguarding) Amendment Bill 2018 (SA) 2.

¹⁴⁵⁴ *Ageing and Disability Commissioner Act 2019* (NSW) s 13(1)(a).

¹⁴⁵⁵ Ibid s 13(1)(b).

¹⁴⁵⁶ Ibid ss 4(1)(a), (b).

¹⁴⁵⁷ See Explanatory Notes, Overview of Bill, Ageing and Disability Commissioner Bill 2019 (NSW).

there are significant numbers of people with disability and older people who are abused, neglected or exploited but who do not qualify for help through existing channels or existing safeguards do not go far enough ... this Bill expands the scope of protection given to people with a disability to allow reports about any person alleged to be abusing, neglecting or exploiting the vulnerable person.¹⁴⁵⁸

8.2.4 The Office of the New South Wales Ombudsman had reached a similar conclusion in its Report titled *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action*, concluding that ‘there is a need for swift action to establish a comprehensive adult safeguarding approach that will both fill the looming gap in relation to adults with disability, and address the longstanding gap in relation to vulnerable older persons.’¹⁴⁵⁹

8.2.5 The NSW model takes a more targeted approach to the definition of ‘vulnerable adult’ based on the increased reports of ‘alleged abuse and neglect of adults with a disability’¹⁴⁶⁰ and older people.¹⁴⁶¹

Adults with a Disability

8.2.6 Under the *ADC Act*, the definition of ‘disability’ is consistent with the definition provided in the *Disability Inclusion Act 2014* (NSW).¹⁴⁶² In relation to a person, disability ‘includes a long-term physical, psychiatric, intellectual or sensory impairment that, in interaction with various barriers, may hinder the person’s full and effective participation in the community on an equal basis with others.’¹⁴⁶³ Furthermore, the *ADC Act* applies to *adults with a disability* which is defined as a person aged 18 years or older¹⁴⁶⁴ which is consistent with the *Disability Inclusion Act 2014* (NSW).¹⁴⁶⁵ It is necessary to note that the definition of disability is open to interpretation and, to date, has not been subject of consideration before the NSW Civil and Administrative Tribunal.

Older Adults

8.2.7 The *ADC Act* defines ‘older adult’ as a person who is aged ‘50 years or over, in the case of an Aboriginal or Torres Strait Islander Person, or 65 years or over, in any other case.’¹⁴⁶⁶ A report can be made to the Commissioner¹⁴⁶⁷ on the basis that the person has attained a certain age, as this is the sole criterion for vulnerability.

¹⁴⁵⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 May 2019, 55 (Gareth Ward, Minister for Families, Communities and Disability Services).

¹⁴⁵⁹ NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018) 3.

¹⁴⁶⁰ *Ibid* 1.

¹⁴⁶¹ See, eg, Lenny Roth, ‘Adult Safeguarding Laws: Reviewing the Proposal for a NSW Ageing and Disability Commissioner’ (e-brief, Parliamentary Research Services, Parliament of New South Wales, March 2019).

¹⁴⁶² *Ageing and Disability Commissioner Act 2019* (NSW) s 3 (definition of ‘disability’).

¹⁴⁶³ *Disability Inclusion Act 2014* (NSW) s 7(1) (definition of ‘disability’).

¹⁴⁶⁴ See Ageing and Disability Commission, New South Wales Government, *NSW Ageing and Disability Commission 2020–21 Annual Report* (Report, 26 October 2021).

¹⁴⁶⁵ *Disability Inclusion Act 2014* (NSW) s 7(1).

¹⁴⁶⁶ *Ageing and Disability Commissioner Act 2019* (NSW) s 3 (definition of ‘older adult’).

¹⁴⁶⁷ *Ibid* s 13.

Consent

8.2.8 Consistent with the position under the ALRC's Report, the *ADC Act* requires the NSW Commissioner to first obtain the person's consent to investigate an allegation of abuse, neglect or exploitation unless the Commissioner is of the opinion that the person is incapable of giving consent (despite having been provided with the appropriate support for the purposes of making such a decision) or the matter involves a serious risk to the safety of the adult.¹⁴⁶⁸

Other Disadvantaged Groups

8.2.9 In the objects and principles of the *ADC Act* it was explicitly noted that special consideration must be given to adults with a disability and older adults who face additional disadvantages and barriers such as women, Aboriginal and Torres Strait Islander adults, LGBTIQ communities, adults from CALD backgrounds and adults living in regional and remote areas.¹⁴⁶⁹

Scotland: 'Adult at Risk'

8.2.10 The *Adult Support and Protection (Scotland) Act 2007* (Scot) ('*ASPA Act*') has been operational since October 2008 and 'aims to fill a perceived gap between general welfare law and mental health and mental capacity law.'¹⁴⁷⁰ Adult safeguarding legislation (or the lack thereof) had been a topic of increased interest in the decade preceding the introduction of the *ASPA Act* into the Scottish Parliament.¹⁴⁷¹ For instance, in 1997, the Scottish Law Commission published its Report of Vulnerable Adults,¹⁴⁷² which made recommendations for widespread reform of the law to increase the protection of vulnerable adults who did not fit under the protective scope of mental health law.¹⁴⁷³

8.2.11 The *ASPA Act* permits the local Council to make inquiries about 'a person's well-being, property, or financial affairs if it knows or believes ... that the person is an adult at risk, and, that it might need to intervene ... in order to protect the person's well-being, property or financial affairs.'¹⁴⁷⁴ A wide range of protective orders can be made in relation to the adult at risk under the *ASPA Act*

¹⁴⁶⁸ Ibid ss 13(11)(a), (b).

¹⁴⁶⁹ Ibid ss 4(3)(b)(i)–(v).

¹⁴⁷⁰ Kathryn Mackay and Mary Notman, 'Adult Support and Protection (Scotland) Act 2007: Reflections on Developing Practice and Present Day Challenges' (2017) 19(4) *Journal of Adult Protection* 187, 188. See also, eg, Sally Cornish and Michael Preston-Shoot, 'Governance in Adult Safeguarding in Scotland since the Implementation of the Adult Support and Protection (Scotland) Act 2007' (2013) 15(5) *Journal of Adult Protection* 223.

¹⁴⁷¹ For an overview of the inquiries undertaken in the 1990s that influenced the *ASPA Act*, see Law Reform Commission, Parliament of the United Kingdom, *Report on Vulnerable Adults* (Final Report, February 1997).

¹⁴⁷² Law Reform Commission, Parliament of the United Kingdom, *Report on Vulnerable Adults* (Final Report, February 1997).

¹⁴⁷³ Ibid 5. For the operation of the Scottish model to date, See Michael Preston-Shoot and Sally Cornish, 'Paternalism or proportionality? Experiences and outcomes of the *Adult Support and Protection (Scotland) Act 2007*' (2014) 16(1) *Journal of Adult Protection* 5; Kathryn Mackay, 'Choosing to Live with Harm? A Presentation of Two Case Studies to Explore the Perspective of those who Experienced Adult Safeguarding Interventions' (2017) 11(1) *Ethics and Social Welfare* 33; Kathryn Mackay and Mary Notman, 'Adult Support and Protection (Scotland) Act 2007: Reflections on Developing Practice and Present Day Challenges' (2017) 19(4) *Journal of Adult Protection* 187; Fiona Sherwood-Johnson and Kathryn Mackay, 'Building Knowledge for Policy and Practice Based on Service User and Carer Experiences: A Case Study of Scottish Adult Safeguarding Research' (2020) 21(5) *Journal of Social Work* 1182.

¹⁴⁷⁴ *Adult Support and Protection (Scotland) Act 2007* (Scot) ss 4(a), (b).

and,¹⁴⁷⁵ depending on the subject matter, include assessment orders,¹⁴⁷⁶ removal orders¹⁴⁷⁷ and banning orders.¹⁴⁷⁸

8.2.12 The powers and functions exercisable under the *ASPA Act* only apply to ‘adults at risk’, which is defined under s 3 of the *ASPA Act* as adults who:

- a) are unable to safeguard their own well-being, property, rights or other interests,¹⁴⁷⁹
- b) are at risk of harm, and¹⁴⁸⁰
- c) 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.¹⁴⁸¹

8.2.13 In relation to s 3(1)(a), an adult is at risk of harm if ‘another person’s conduct is causing (or is likely to cause) the adult to be harmed,’¹⁴⁸² or ‘the adult is engaging (or is likely to engage) in conduct which causes (or is likely to cause) self-harm.’¹⁴⁸³

8.2.14 As can be seen, the *ASPA Act* avoids using the term ‘vulnerable adults’ and instead adopts the term ‘adults at risk,’¹⁴⁸⁴ which is a tripartite test. Furthermore, the *ASPA Act* does not explicitly enforce older age as a sole criterion of ‘adult at risk’, and the consent of the adult at risk must ordinarily be obtained prior to making a protection order or carrying out or enforcing a protection order.¹⁴⁸⁵

England: Safeguarding ‘Adults at Risk of Abuse or Neglect’

8.2.15 The *Care Act 2014* (UK) (*‘Care Act’*) came into force in April 2015 and permits local authorities to take measures to safeguard adults at risk of abuse or neglect.¹⁴⁸⁶ Under the *Care Act*, adults are defined as being persons 18 years and older,¹⁴⁸⁷ and the local authority may make an enquiry if they have reasonable cause to suspect that an adult

- a) has needs for care and support (whether or not the authority is meeting any of those needs),¹⁴⁸⁸
- b) is experiencing, or is at risk of, abuse or neglect, and¹⁴⁸⁹

¹⁴⁷⁵ Ibid s 35.

¹⁴⁷⁶ Ibid ss 11, 12.

¹⁴⁷⁷ Ibid ss 14–18.

¹⁴⁷⁸ Ibid ss 19–23.

¹⁴⁷⁹ Ibid s 3(1)(a).

¹⁴⁸⁰ Ibid s 3(1)(b).

¹⁴⁸¹ Ibid s 3(1)(c).

¹⁴⁸² Ibid s 3(2)(a).

¹⁴⁸³ Ibid s 3(2)(b).

¹⁴⁸⁴ Ibid s 3.

¹⁴⁸⁵ Ibid s 35(1), (2). There are some exceptions to the requirement to obtain consent: at ss 35(3), (4).

¹⁴⁸⁶ *Care Act 2014* (UK) s 42–47. Local Authorities are defined as ‘a county council in England, a district council for an area in England for which there is no county council, a London borough council, or the Common Council of the City of London’: at ss 1(4)(a)–(d).

¹⁴⁸⁷ Ibid s 2(8).

¹⁴⁸⁸ Ibid s 42(1)(a).

¹⁴⁸⁹ Ibid s 42(1)(b).

- c) as a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it.¹⁴⁹⁰

8.2.16 The omission of the term ‘vulnerable adult’ to define a person who may need to be safeguarded from abuse under the *Care Act* was intentional.¹⁴⁹¹ On this point, Johnson and Boland state that the concept of ‘vulnerable adult’ was criticised by the English Law Commission ‘as the label of vulnerability was not appropriate and could be “stigmatising, dated, negative and disempowering.”’¹⁴⁹² Therefore, the *Care Act* primarily uses the term ‘has needs for care and support’¹⁴⁹³ when referring to an adult who comes under the scope of the Act.

Wales: Safeguarding ‘Adults at Risk’

8.2.17 The *Social Services and Well-being Act 2014* (Wales) (*SSW Act*) came into force on 1 May 2014. This Act also avoids using the term ‘vulnerable adult’ and instead adopts the term ‘adult at risk.’¹⁴⁹⁴ An ‘adult at risk’ is defined as a person who is aged 18 years or over¹⁴⁹⁵ who

- a) is experiencing or is at risk of abuse or neglect,¹⁴⁹⁶
- b) has needs for care and support (whether or not the authority is meeting any of those needs),¹⁴⁹⁷ and
- c) as a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it.¹⁴⁹⁸

Northern Ireland

8.2.18 On 17 December 2020, the Northern Ireland Department of Health released a Consultation Document titled *Legislative Options to Inform the Development of an Adult Protection Bill for Northern Ireland* (‘Consultation Document’),¹⁴⁹⁹ which proposed to reform adult safeguarding law by enacting an Adult Protection Bill. In discussing the impetus behind introducing adult protection legislation, the Minister for Health, Robin Swan, remarked that this legislative reform would give ‘a statutory footing to our policy around Adult Safeguarding, and would bring us in line with other parts of the UK where such legislation already exists.’¹⁵⁰⁰

8.2.19 The Consultation Document flagged that the term ‘vulnerable adult’ had come into disfavour, with the current position under the Adult Safeguarding Prevention and Protection Policy

¹⁴⁹⁰ Ibid s 42(1)(c).

¹⁴⁹¹ See Katherine Johnson and Billy Boland, ‘Adult Safeguarding under the *Care Act 2014*’ (2018) 43(1) *Psych Bulletin* 38.

¹⁴⁹² Ibid.

¹⁴⁹³ See for example, ibid s 42; for general discussion on the provisions of the local authority to safeguard adults at risk of abuse see Katherine Johnson and Billy Boland, ‘Adult Safeguarding under the *Care Act 2014*’ (2018) 43(1) *Psych Bulletin* 38.

¹⁴⁹⁴ *Social Services and Well-being Act 2014* (Wales) s 126(1)(a)–(c).

¹⁴⁹⁵ Ibid s 3(2).

¹⁴⁹⁶ Ibid s 126(1)(a).

¹⁴⁹⁷ Ibid s 126(1)(b).

¹⁴⁹⁸ Ibid s 126(1)(c).

¹⁴⁹⁹ Northern Ireland Department of Health, *Legislative Options to Inform the Development of an Adult Protection Bill for Northern Ireland* (Consultation Document, 17 December 2020).

¹⁵⁰⁰ Ibid 2.

(‘the Policy’) adopting the term ‘risk of harm and in need of protection.’¹⁵⁰¹ Several factors are relevant in determining whether an adult is at ‘risk of harm’¹⁵⁰² or an adult is in ‘need of protection,’¹⁵⁰³ with the policy establishing different criteria for the different tests.

8.2.20 An adult at risk of harm is defined as a ‘person aged 18 years and over, whose exposure to harm through abuse, exploitation or neglect may be increased by their personal characteristics and/or life circumstances.’¹⁵⁰⁴ Furthermore, the Policy defines personal characteristics as including ‘age, disability, special educational needs, illness, mental or physical frailty or impairment of, or disturbance in, the functioning of the mind or brain.’¹⁵⁰⁵ Life circumstances, on the other hand, are defined as including ‘isolation, socio-economic factors and environmental living conditions.’¹⁵⁰⁶

8.2.21 In contrast, an adult in need of protection pertains to more serious cases and the key conditions are that the person must be, ‘aged 18 or over, whose exposure to harm through abuse, exploitation or neglect may be increased by their personal characteristics and/or life circumstances and who is unable to protect their own well-being, property, assets, rights or other interests and where the action or inaction of another person or persons is causing or is likely to cause, him/her to be harmed.’¹⁵⁰⁷ Personal characteristics and life circumstances has the same definition for an adult at risk of harm, as discussed in the preceding paragraph.¹⁵⁰⁸

8.2.22 The Department of Health highlighted in the Consultation Document that the scope of the proposed Act ‘should have a continued focus on harm arising from abuse, neglect or exploitation [as] harm (without the presence of abuse, neglect or exploitation) is a much broader concept, likely to encompass many aspects of risk that may be present in day-to-day living ... which do not require an adult protection response.’¹⁵⁰⁹

8.2.23 Legislative reform of adult safeguarding and protection in Northern Ireland has seemingly not yet occurred. Review of the literature in Northern Ireland, however, provides some insight into preferred terminology, and who should come under the protective scope of the proposed law.

8.3 Issues

8.3.1 It is clear from the overview of legislation and policy in the jurisdictions discussed above that there is no consensus concerning the definition of key terms and what class of persons should come under the remit of adult safeguarding law and practice.

8.3.2 The NSW legislation takes a different approach to the *AAS Act* by limiting the scope of the *ADC Act* to older persons and adults with a disability. In Scotland, England, Wales and Northern Ireland, the term ‘vulnerable adult’ has fallen out of favour, with the latter three jurisdictions adopting the term ‘adult at risk’¹⁵¹⁰ and the former delineating between ‘adult at risk of harm’ and ‘adult in need

¹⁵⁰¹ Ibid 11.

¹⁵⁰² Ibid 10.

¹⁵⁰³ Ibid 10–11.

¹⁵⁰⁴ Ibid 10.

¹⁵⁰⁵ Ibid.

¹⁵⁰⁶ Ibid 10–11.

¹⁵⁰⁷ Ibid 10.

¹⁵⁰⁸ Ibid 11.

¹⁵⁰⁹ Ibid 13–14.

¹⁵¹⁰ This term received some support in SALRI’s consultation, but was generally opposed by Aboriginal Elders and health agencies.

of protection,’ where the defining characteristic is the severity / seriousness of the subject matter, and whether the person is at risk of harm or self-harm. Each of these four jurisdictions define adult as being a person aged 18 years or over.

8.3.3 Under the *AAS Act*, the current definition of ‘vulnerable adult’ focuses on certain characteristics (such as age and disability), which can lead to the assumption that having certain characteristics or traits (such as old age and disability) makes an adult inherently vulnerable. The idea that age, disability or being a member of an Aboriginal community in itself, for example, denotes or presumes a person is ‘vulnerable’ was heavily criticised in SALRI’s consultation.

8.3.4 SALRI notes that being vulnerable to abuse or neglect usually arises out of specific factors or a combination of factors — for example, declining health and cognitive impairment or social isolation that result in an adult being unable to protect themselves from abuse or neglect. In addition, as SALRI was often reminded in consultation, the term ‘vulnerable’ is likely to be perceived among older persons and persons with a disability as having a negative connotation and adding to the stigma against these groups. In discussing the expansion of the ASU’s scope to persons with a disability, the Opposition addressed this tension with the term ‘vulnerable’, stating that:

[M]any people are fine with the use of the words ‘vulnerability’ and ‘vulnerable’ when it comes to applying labels to groups of people, but I have also had really good evidence and representation from many people, particularly young, powerful disabled people in our community who do not feel vulnerable unless it is our policies and practices in the community that put people who are marginalised into the category of vulnerable.¹⁵¹¹

8.3.5 The following is a summary of the key issues regarding this definition, as discussed in consultation:

- Is the term ‘vulnerable’ the most suitable term in the *AAS Act* to describe adults more susceptible to abuse or neglect? Would ‘at-risk’ be more appropriate?
- What are the factors that make an adult vulnerable to abuse and could vulnerability be better defined?
- Should the definition of ‘vulnerable adult’ have a greater focus on the abilities and capabilities of that person, rather than their characteristics?
- Should groups of people, for instance, persons with an intellectual or physical disability, older persons, persons suffering from ill health, or persons of low socio-economic status be specifically included in the definition of vulnerable?
- When defining who may be vulnerable to abuse, should it be made clear in the definition that an adult is a person aged 18 years or over?

8.4 Consultation Data Overview

8.4.1 It is now widely accepted that age alone does not make a person vulnerable to abuse.¹⁵¹² A key issue in SALRI’s consultation was determining how to identify those adults who are in more

¹⁵¹¹ South Australia, *Parliamentary Debates*, House of Assembly, 1 July 2020, 1858 (Natalie Cook)

¹⁵¹² South Australia, *Parliamentary Debates*, Legislative Council, 20 June 2018, 565 (Stephen Wade, Minister for Health and Wellbeing).

need of protection without being ‘paternalistic’.¹⁵¹³ SALRI recognises that vulnerability is a much more nuanced concept than automatically applying on the basis of older age or disability.

8.4.2 There was unanimous agreement that the term ‘vulnerable’ should not be directly correlated to someone’s age or disability, and that merely having certain characteristics does not make a person inherently vulnerable. There was also unanimous agreement that the terminology used should have a greater focus on the capabilities of the individual rather than segregating groups of people based on discrete qualities without recognising that multiple factors might cause vulnerability.

8.4.3 However, respondents were divided on the best way to best capture the vulnerabilities of an individual without increasing stigma.

8.4.4 From the consultation data, SALRI distilled four potential options that were raised to best capture the concept of vulnerability moving forward.

Option 1: Keep the current definition

8.4.5 There was very little support for this approach, although a few consultees felt that the term was adequate (although not perfect). Most people in SALRI’s regional and metropolitan consultation considered the term vulnerable inappropriate, as it associates vulnerability with disability or age and implies that certain people are inherently vulnerable and at risk of harm.

8.4.6 Consultees at the NGO roundtable expressed that ‘any adult is vulnerable to abuse in some circumstance or situation’ and similar sentiments were echoed by many other consultees and respondents to the survey.

8.4.7 The disability community group members noted that no person is vulnerable to everything and, therefore, vulnerability should be assessed on a case-by-case basis. Furthermore, it was articulated that vulnerability is situation dependent. Some consultees pointed out that some people are not vulnerable until they are abused, and it is the abuse that makes them vulnerable. Once again, this was reiterated by consultees across the board.

8.4.8 The particular premise that age does not (and should not) in itself denote vulnerability was often noted. COTA (SA) for example favoured ‘adult at risk’ and told SALRI:

The [44S Act] refers to adults who are more susceptible to experiencing abuse or neglect as a vulnerable adult. Our concerns with this terminology and the current definition in the Act include:

- Vulnerable is a nebulous term. If used without context that describes the vulnerable situation, people may well make invalid assumptions about the risk and needs of the person.
- Vulnerability is not static and depends on setting and circumstance.
- It can reinforce ageist stereotypes that older age itself creates vulnerability.
- Terms like vulnerable attribute a characteristic and a deficit to the older person experiencing abuse rather than to their circumstances or to the predatory behaviour of the perpetrator.
- Adults experiencing abuse may not consider themselves to be vulnerable and may fall through the gaps of safeguarding.

¹⁵¹³ Sarah Donnelly et al, HSE National Safeguarding Office and Trigraph, *Adult Safeguarding Legislation and Policy Rapid Realist Literature Review* (Report, May 2017) 40.

8.4.9 The term ‘vulnerable’ was seen as particularly offensive and inappropriate to consultees with lived experience with a disability. Consultees said that although people with a disability are considered inherently vulnerable, they are actually strong people who, in some situations, may need more protection. The South Australian Council on Intellectual Disability reflected that people with intellectual disability disliked the implication that having an intellectual disability or cognitive impairment is associated with vulnerability.

8.4.10 The Speech Pathology Association also recognised having a communication difficulty is sometimes seen as synonymous with a loss of capacity and competence. Many consultees found that use of the term ‘vulnerable’ reflects and reinforces existing negative stereotypes about people living with disability or older people, which often leads to isolation and loneliness, discrimination or missed opportunities to participate as active members of their community.

8.4.11 The submission from the South Australian Council on Intellectual Disability found it fundamental that the *AAS Act* acknowledge the socioecological factors and systems that contribute to adults with a disability being more at risk of abuse and neglect.

8.4.12 In consultation in Port Augusta, Aboriginal Elders powerfully encapsulated the systematic issues with categorising a person as ‘vulnerable’. One Elder stated

Aboriginal people were never vulnerable, it is the system that has made us vulnerable ... We have a right to our own society; we can’t always be told what to do and how to do it all the time. We are not vulnerable people.

8.4.13 Is it important not to impose Western concepts of vulnerability onto other cultures, and to recognise the mistrust Aboriginal communities often harbour towards the Australian legal system and both State and national Governments.¹⁵¹⁴

8.4.14 The OFAW criticised the use of the term ‘vulnerable’, remarking that it may incorrectly lead to the presumption that the ASU’s function is to address the underlying vulnerability of the person rather than their actual role of addressing the circumstances in which abuse is occurring and safeguarding the adult’s rights to be free from abuse.

8.4.15 Many consultees said that the term ‘vulnerable’ assumes that people with that label require protection, diminishing a person’s right to autonomy and dignity. Dementia Australia expressed that by using the term ‘vulnerable’, we ‘inadvertently perpetuate a stereotype of weakness or deficiency’. The term ‘vulnerable’ was also viewed as paternalistic by some consultees with ‘at-risk’ being deemed as more appropriate.

8.4.16 Purple Orange asked that consideration be given to defining abilities and capabilities (reliance on support, ability to work, financial independence, independent living, a person’s mental capacity), rather than only focusing on characteristics (for example older people, people living with disability).

8.4.17 There were only a few people who felt the definition was suitable, with one submission noting that ‘the current definition is all-encompassing and should remain so’ as further limiting the definition would create more gaps in the system.

8.4.18 Of the 113 respondents who answered the survey, 23 respondents felt that vulnerable was the more appropriate term while around 10 respondents felt that either ‘vulnerable’ or ‘at-risk’ meant

¹⁵¹⁴ This was highlighted by Aboriginal Elders and Aboriginal community members who emphasised the continuing legacy of the Stolen Generation and their concern over child protection practices to Aboriginal communities.

the same thing. The general reasoning was that the term ‘at-risk’ did not import the same negative connotations of the term ‘vulnerable’ and focuses more on the circumstances of the abuse rather than the vulnerabilities of an adult.

Age determinants

8.4.19 There was unanimous support from all consultees in the consultations and roundtables across metro and regional South Australia for the removal of age determinants in the *AAS Act*. Many consultees emphasised that ‘age is just a number and is not determinative of a person’s capabilities’.

8.4.20 SALRI further notes that age limitations are arbitrary and there is no cohesive standard definition of an ‘older person’ across the aged care advocacy bodies and services for older persons.¹⁵¹⁵

8.4.21 Many consultees raised that vulnerability is created by an environment. The importance of addressing systemic issues and social stigma around certain groups of people (such as older people and people with a disability) was raised by many participants as important, with one consultee in Mount Gambier noting that ‘vulnerability highlights barriers’. One attendee at the Minister’s stakeholder reference group suggested adopting the ‘social model’ of disability to place a greater focus on the environment/situation that can make a person vulnerable, which all attendees at the session agreed with.

8.4.22 The Elders in Port Augusta noted that the concepts of older age and being an ‘elder’ in Aboriginal society are distinct from western norms. An ‘Elder’ may be as young as 40 or 45 depending on the culture and family lines.

OPTION 2: An adult ‘may’ be vulnerable to abuse because of ... a list of factors

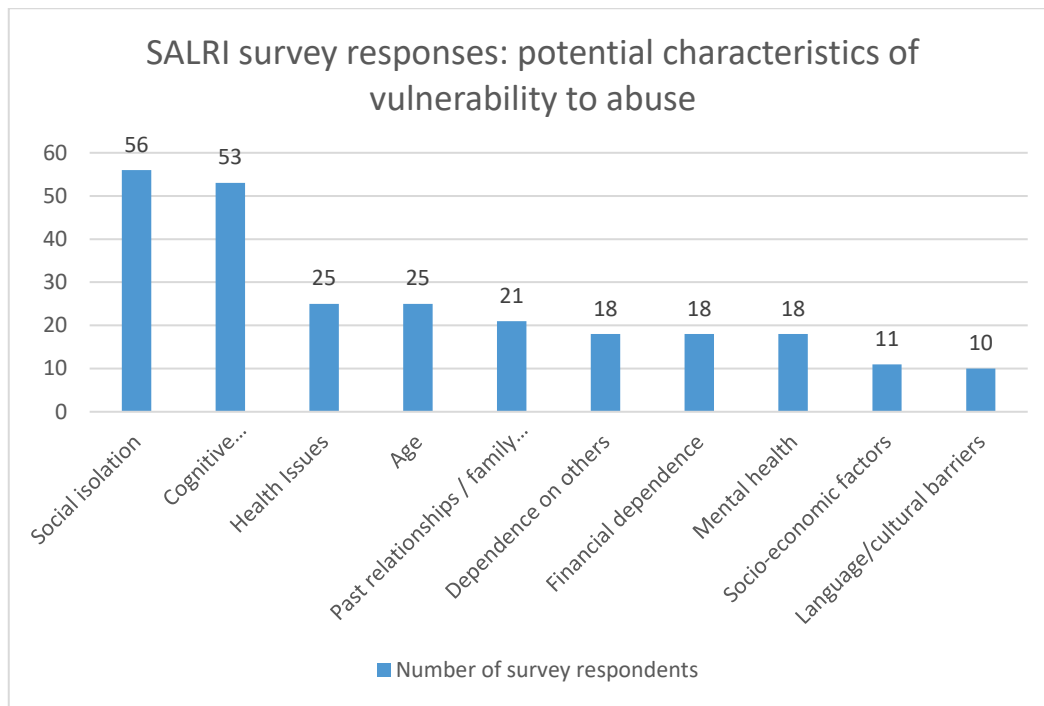
8.4.23 There was overwhelming agreement among consultees that no single factor makes a person vulnerable. Certain attributes might, in certain circumstances, make a person more vulnerable to abuse, but these factors do not exist or operate in isolation and adults are not inherently vulnerable for having one of those attributes.

8.4.24 Many consultees, including lawyers in Clare, supported using the phrase ‘may be vulnerable’ rather than ‘is vulnerable’ in the *AAS Act* definition of vulnerability, if the current definition was to be retained. Berri consultees tentatively supported this premise, but emphasised the need for this list to be open and transparent and readily available to the public. There must also be some way for the ‘list’ to be consistently applied to prevent one person from being assessed as vulnerable by one member of the ASU, but not by another.

8.4.25 All consultees agreed that there should not be an exhaustive list and the legislation could adopt a phrase such as ‘including but not limited to.’

8.4.26 115 survey respondents provided their insights into characteristics that could potentially make an adult vulnerable to abuse. The results are shown in the graph below.

¹⁵¹⁵ Different agencies define ‘older person’ with respect to various ages. From a policy perspective the OFAW engages with people 50 years and older, the Retirement Homes Unit engages with people 55 years and older, and the Seniors Card engages with people 60 years and over.



- 56 mentioned social isolation
- 53 people mentioned some form of cognitive impairment/cognitive decline/capacity issue
- 25 mentioned health issues
- 25 mentioned age
- 21 mentioned abusive past relationships/family trauma
- 18 mentioned dependence on others
- 18 mentioned financial dependence (in particular)
- 18 mentioned mental health in particular
- 11 mentioned socio-economic factors
- 10 mentioned language

8.4.27 Age and disability were two factors that respondents generally felt should not suggest inherent vulnerability, but should be tactfully included in the *AAS Act*. All consultees agreed that vulnerability arises not because of age alone but arises when age interplays with other factors like reduced mobility or ill health. Having a disability can lead to increased vulnerability in some circumstances, as opposed to being an attribute that always makes a person vulnerable.

8.4.28 Some survey respondents highlighted that people can be vulnerable to abuse for reasons other than age or disability. A gap was identified in the provision of services to people under the age of 65. However, many respondents were of the view that older people and people with disability should be prioritised.

8.4.29 Social isolation was a factor frequently raised in consultation as a potential cause of vulnerability. The increase in social isolation due to the effects of the Covid-19 pandemic was highlighted by one survey respondent. This is already captured in the *AAS Act*, and there was strong support for it to be retained. An individual submission from a community member identified some

ways social isolation can arise, including by choice, through coercion or force by another person, lack of opportunity to socialise, insufficient financial means to join an activity, or other barriers such as physical or mental disability.

8.4.30 Location of the adult, such as regional or rural locales or the absence of family or other adequate supports, was identified as a factor that could lead to social isolation and other vulnerabilities.

8.4.31 Attendees at the Multicultural Communities Council of South Australia (‘MCCSA’) community group agreed that language barriers can make a person more vulnerable to abuse, including the ability to process information, comprehend information, or speak the relevant language.

8.4.32 One survey respondent provided an example of her 91-year-old mother who has two hearing aids and has difficulties understanding strong accents of people for whom English is not their first language. Her mother gets confused, or misunderstands, and ultimately gives up asking for help. While this is not an inherent vulnerability, there is potential for the older woman to be abused or to get taken advantage of by others due to her inability to hear or comprehend, and this also creates barriers to reporting.

8.4.33 Similar barriers were raised by Speech Pathology Australia for people with ‘expressive communication difficulties’ in their ability to send or receive messages verbally or otherwise. Speech Pathology Australia raised that the *AAS Act* does not address communication disability at all¹⁵¹⁶ and recommended that complex communication needs be included as a factor that might lead to abuse. They noted that having a communication impairment can lead to other risk factors for abuse including social isolation, reduced social support, inability to advocate for oneself, functional dependence, behavioural changes and caregiver stress. Further, communication impairments become more prevalent with older age.

8.4.34 Several health practitioners and other consultees, as well as many survey respondents, suggested that mental illness should be included. Dementia Australia advocated that dementia should also be acknowledged as a type of disability, being a more common cause of disability in older Australians and the third leading cause of disability in 2011, overall.¹⁵¹⁷

8.4.35 There was general consensus at the community roundtable for the recognition that an inability to cope with everyday tasks also increases vulnerability. Other submissions and consultation identified reliance on others for daily care needs as a factor that might make an adult more vulnerable.

8.4.36 A regional health worker gave an example of a woman who had never worked outside of her home, had low literacy levels, did not complete secondary schooling, and was completely lost as to how to find a job or work for herself. Despite not being old or disabled, she would still be vulnerable to abuse because of her limited life experience.

8.4.37 Financial dependency was also raised as a critical factor that might cause vulnerability in a person, due to their reliance on others or inability to govern aspects of their life.

¹⁵¹⁶ Despite the ABS estimation that 1.2 million Australians had some level of communication disability: Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings 2015* (Catalogue No 4430.0, 29 November 2017).

¹⁵¹⁷ Australian Institute of Health and Welfare, *Dementia in Australia* (Report, 2012) 28.

8.4.38 Carer and Community Support made a strong submission as to why caregivers may also be considered vulnerable where their physical, financial, emotional and mental health and resources diminish as a result of the demands often placed on caregivers by health and social systems as well as the complexity of the care giving role.

8.4.39 Various reports have also addressed factors leading to potential vulnerability. The 2017 South Australian Joint Committee Report on Elder Abuse also notes that other diverse needs need to be accounted for such as Aboriginality, CALD communities, LGBTIQ people, veterans, older people facing homelessness, those who are financially disadvantaged, and regionally located persons.¹⁵¹⁸

8.4.40 The 2021 AIFS Elder Abuse Prevalence Study Final Report highlighted that some factors to take into consideration include health, disability, socio-economic status, relationship type, housing type, mental health, frequency of contact with family members and friends, level of social support, being divorced, and language and cultural backgrounds.¹⁵¹⁹

8.4.41 The National Plan to Respond to the Abuse of Older South Australian 2019–2023 identified the characteristics that increase a person’s vulnerability include ‘social isolation from family and friends, cognitive decline, need for care, a history of trauma or family conflict, and language and cultural barriers’.¹⁵²⁰ The ALRC identified that poor health, low income, cognitive impairment, and living alone with the perpetrator can increase an individual’s risk level.¹⁵²¹

8.4.42 The *Safeguarding Task Force* Report noted that the NDIA does not have a clear concept of vulnerability, but suggested that ‘living alone’ is a criteria that should be added as a factor in addition to ‘complex support needs (including communication difficulties), cognitive challenges, poverty, domestic violence or lack of connection to family/friends/services’ and a lack of awareness about the services available and what they need.¹⁵²² The *Safeguarding Task Force* identified factors that can increase the vulnerability of a person with a disability, including social isolation from family and friends, lack of proper care from a service provider, and failure to have adequate systems in place for people to access, and failure to monitor the quality of services.¹⁵²³

8.4.43 In NSW, there was support for taking additional consideration of adults belonging to a certain class or groups that may face additional disadvantages or barriers including women, Aboriginal and Torres Strait Islander adults, LGBTIQ communities, adults from CALD backgrounds, and adults living in regional or remote areas.¹⁵²⁴

8.4.44 The ALRC’s June 2017 National Plan to Combat Elder Abuse also advised:

The rights of LGBTI+ people in Australia have been part of significant public debate in recent times, especially in regards to marriage equality. However, little attention has been paid to the

¹⁵¹⁸ Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017) 35, 39.

¹⁵¹⁹ Lixia Qu et al, National Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 54.

¹⁵²⁰ Council of Attorneys-General, *National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019–2023* (Report, July 2019) 30.

¹⁵²¹ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 20.

¹⁵²² Kelly Vincent and David Caudrey, *Safeguarding Task Force* (Report, 31 July 2020) 8.

¹⁵²³ Ibid 21.

¹⁵²⁴ *Ageing and Disability Commissioner Act 2019* (NSW) ss 4(3)(b)(i)–(v).

experiences of older LGBTI+ people; particularly those entering or already in aged-care facilities. LGBTI+ seniors are far more vulnerable to interactions with caregivers than their heterosexual and cisgender counterparts. Lack of education and understanding of how the law operates has resulted in many LGBTI+ seniors being unaware of how the legal system can be used to protect themselves against elder abuse and discrimination.¹⁵²⁵

8.4.45 From the discussions above, it is plain to see that the plethora of factors that may make a person vulnerable to abuse make it near impossible for legislation to capture every single possibility. One consultee likened these factors to ‘Pandora’s Box’, and it can be seen why from the innumerable considerations to take into account when determining vulnerability. It would make the ASU’s role impracticable, if not next to impossible.

8.4.46 There were concerns and criticisms about this approach. The Minister’s community reference group raised a concern that if people are asked about their vulnerabilities against a ‘checklist’ before being assisted this would create gaps in service. The Adelaide health roundtable questioned the practicality of such a list and the incredibly large discretion it provides to the ASU staff. One lawyer in Clare noted that a list of factors ‘smells of segregation’.

8.4.47 The *AAS Act*, if setting out a non-exhaustive list of considerations, would have to identify key factors such as social isolation, cultural barriers, age and disability, but leave the list open. The practitioners at the ASU would then have the discretion to assess a report on a case by cases basis, without prescriptive legislation.

Option 3: Changing the term ‘vulnerable’ to ‘at-risk’

8.4.48 Surprisingly, a plurality (49/113) of survey respondents expressly preferred the term ‘at risk’, with around ten respondents determining that both it or ‘vulnerable’ could be suitable as they are similar in their effect and can be used interchangeably. This term was also supported by the Public Advocate in Victoria as it does not suggest an inherent deficiency in the way that the term ‘vulnerable adult’ might.¹⁵²⁶

8.4.49 In explaining their preference, a number of consultees found ‘at-risk’ more appropriate as it does not place the blame on the victim, nor does it imply that the person is weaker or unable to advocate for themselves but rather focuses more on circumstances than a personal quality or characteristic. Other survey respondents preferred the term ‘at-risk’ because it is ‘self-explanatory’ and lends itself to early intervention rather than waiting for the person to become vulnerable.

8.4.50 Recognising that vulnerability can be transient or temporary, the Ombudsman considered ‘at-risk’ is the most suitable term as it avoids characterising the vulnerability of a person as permanent.

8.4.51 Attendees at the MCCA community group felt the term ‘at-risk’ was easier to understand than the term ‘vulnerable’ for those from CALD backgrounds, but it would depend on how the term is used. The South Australian Council on Intellectual Disability (SACID) held discussions with people with lived experience of disability who collectively agreed that ‘at-risk’ was simpler to understand as the term ‘vulnerable’ was open to different interpretations.

¹⁵²⁵ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 73 [3.60].

¹⁵²⁶ Office of the Public Advocate (Vic), *Line of Sight: Refocussing Victoria’s Adult Safeguarding Laws and Practices* (Report, August 2022) 95.

8.4.52 SACID also suggested that ‘at-risk’ would also be more suitable when expanding the definition to people outside of those with a disability and older people, remembering that not everyone with a disability is ‘vulnerable’.

8.4.53 Holding a contrary view, Aboriginal Elders in Port Augusta disliked the term ‘at-risk’ as they felt it would target the Aboriginal population unfairly. Aboriginal health practitioners also disliked the term. Health practitioners in Mt Gambier felt the term ‘at-risk’ resembled the language used in child protection, which could be demeaning and undermine the autonomy of adults. Dr Kris Wilson of University Technology Sydney echoed this theme, pointing out the term ‘at-risk’ is problematic, especially for Aboriginal communities. This was also pointed out by two survey respondents who noted that the term ‘at-risk’ mimics child protection processes or has connotations with displaying criminal behaviour and should not be used to describe people who may be experiencing abuse. The community roundtable in Adelaide considered terms like ‘at-risk’ and ‘ageing’, but did not like these.

8.4.54 Lawyers in Clare noted that ‘at-risk’ is a softer term and more inclusive of more people but there could still be negative connotations attached to the term.

8.4.55 Some alternative terms were also considered during consultations such as ‘a person with reasonable need of protection from abuse’, ‘person vulnerable to abuse’, ‘adults at increased risk’ or ‘safeguarding adults’ or ‘safeguarding the the rights of adults vulnerable to abuse’.

Option 4: Having no definition or requirement for ‘vulnerable’ in the AAS Act

8.4.56 COTA (SA) in their submission reflected the Safeguarding Task Force’s suggestion that vulnerability should be assessed on a case-to-case basis, and not be defined in a ‘static’ way — to account for the fact that a person can become more or less vulnerable over time.¹⁵²⁷

8.4.57 Having no definition of vulnerability within the *AAS Act* would mean that any person who is or who knows someone who is experiencing the prescribed type of abuse could make a report to the ASU and have their concerns heard. Kathy Williams first raised this idea and suggested it would place the focus more on what the person is experiencing rather than their characteristics.

8.4.58 The OFAW and ASU joint submission further highlighted the problem with defining groups of South Australians as ‘vulnerable’ or ‘at-risk’ based on prescribed characteristics (for example, age) as ‘problematic and may be perceived as unjustly limiting a person’s rights and autonomy, leading to a sense of disempowerment’.

8.4.59 The OFAW supported and expanded on the idea of repealing the definition of ‘vulnerable’ and strengthening the definition of abuse to confine it to situations of abuse ‘where the abusive act or omission is being carried out by a family member or occurring within a relationship where there is an expectation of trust or duty of care’.¹⁵²⁸ This approach would ensure that the services and finite resources of the ASU are targeted towards and prioritise people who are experiencing abuse in specified circumstances rather than labelling people as vulnerable based on transient characteristics. SALRI notes this would also support the operational focus and effectiveness of the ASU. As one roundtable attendee said: ‘The ASU can’t be all things to all people.’ There is a real concern the ASU’s effectiveness and expertise will be diminished if its safeguarding role is spread too wide, notably where other services or agencies already exist and are better suited to meet that report.

¹⁵²⁷ Kelly Vincent and David Caudrey, *Safeguarding Task Force* (Report, 31 July 2020) 9.

¹⁵²⁸ SALRI’s recommendation on changing the definition of abuse can be found at Part 9.6.

8.4.60 One consultee at the community roundtable in Adelaide asked: ‘Why title a person? They are still a person regardless of their age or disability’ and suggested using ‘person’ instead of vulnerable adult. Similarly, some consultees raised that having a definition would result in a ‘screening’ of reports, and felt it was important that the ASU be available to everyone. For this reason, many community members preferred having no definition of vulnerable so the *AAS Act* would be inclusive and no one would be turned away by the ASU.

8.4.61 At the Minister’s expert reference group one attendee raised concerns that having no definition or having a broad definition would mean that cases such as family violence or marriage issues could end up at the ASU. However, the ASU noted in response that the present definition is broad enough to include these circumstances already.

8.5 SALRI’s Observations and Conclusions

8.5.1 The terminology and definition of ‘vulnerability’ was one of, if not the most, contentious issue in SALRI’s consultation. It was one of the relatively few issues on which there was not a broad consensus. It is a term with differing meanings. As a Mount Gambier practitioner told SALRI: ‘There is not a person in the world who is not vulnerable at some point.’

8.5.2 The initial purpose of defining a vulnerable adult under the *AAS Act* during the transitional phase was to identify a limited portion of the community, namely older people, and to ease the ASU into their functions so demand and adequate resourcing for the ASU could be best determined.¹⁵²⁹ In October 2022, the scope of the *AAS Act* is set to expand to all vulnerable adults, a wide remit in any view. It is therefore important to consider what this definition should be, as it determines who can access the services provided by the ASU. It is clear that all vulnerable adults ‘deserve to have their rights safeguarded and to live a life of dignity and autonomy as far as is possible or practical’.¹⁵³⁰

8.5.3 It is first important to clarify who is an ‘adult’ for the purposes of the *AAS Act*. Defining an ‘adult’ as a person aged 18 years and over is consistent with other jurisdictions discussed above, especially England, Wales and Northern Ireland.

8.5.4 SALRI’s first recommendation is that the definition of ‘adult’ be clearly defined as 18 years and above to provide greater clarity in the *AAS Act* and to distinguish the child protection system from the adult safeguarding legislation.

8.5.5 There was virtual unanimous agreement among consultees and survey respondents that ‘what someone is capable of is way more important than the label we put on them’. SALRI endorses this proposition. The definition used to describe adults who may be vulnerable to abuse under the *AAS Act* should not segregate, dilute or diminish someone’s autonomy and dignity. A virtually universal theme that emerged in SALRI’s consultation was that neither disability nor age of themselves denote or suggest vulnerability. SALRI agrees with this proposition.

8.5.6 SALRI considered many options about how to best reform the *AAS Act* to reflect the important idea that merely being older or having a prescribed characteristic makes a person inherently

¹⁵²⁹ Explanatory Memorandum, Office for the Ageing (Adult Safeguarding) Amendment Bill 2018 (SA), 2.

¹⁵³⁰ South Australia, *Parliamentary Debates*, Legislative Council, 20 June 2018, 565 (Stephen Wade, Minister for Health and Wellbeing).

vulnerable. Many advocates preferred a humanistic and empowering approach and for the language used in the *AAS Act* to be ‘person- and human-centred’.

8.5.7 Option 1 is to retain the present definition. Most consultees strongly agreed that the present definition is unsuitable. The phrasing of the *AAS Act* insinuates that by being older, or having a disability, an adult *is* vulnerable to abuse. It is clear from consultation that such presumptions are reductionist and inappropriate, might increase the stigma around older age or disability, or place the blame for abuse on the adult with these ‘vulnerabilities’ rather than on the wider social structures or on the abuser themselves. The term ‘vulnerable’ was dismissed by the UK Law Commission as discriminatory and inappropriate as it purports to place the blame on the victim rather than putting the responsibility on the alleged abuser.¹⁵³¹

8.5.8 Option 2 was to change the terminology to ‘at-risk’ or another suitable phrase. The term ‘at-risk’ is adopted by both the ALRC and the Disability Royal Commission. At-risk is also the preferred terminology in England, Wales and Scotland because the term ‘vulnerable’ was considered disempowering and contrary to the principles of the legislation.¹⁵³²

8.5.9 The term ‘at-risk’ was preferred for being easier to understand and more accessible for people with an intellectual disability, people with English as a second language, and people with limited literacy and comprehension skills.

8.5.10 However, in consultation with Aboriginal Elders, Aboriginal health agencies and many other practitioners there was clear disfavour toward the term ‘at-risk’ as it imported negative connotations about the capabilities of an adult and was too similar to the language of the child protection system.

8.5.11 Option 4 was to have no definition. In practical terms, this would place greater responsibility on the ASU to identify the type of abuse faced by the adult and shifting the focus from arbitrary characteristics. The 2014 Strategy to Safeguard Older Australians acknowledges that those who provide services to older people are in a unique position to identify situations of risk, including older person’s vulnerability to abuse.¹⁵³³

8.5.12 However, since the scope of the ASU will expand in October 2022 to include all adults vulnerable to abuse, it is not enough for the members of the Unit to have an awareness about elder abuse alone. A general understanding of different factors of vulnerability especially relating to persons with a disability, Aboriginal communities, and CALD communities is needed. Such expertise would necessitate appropriate training and resources for the staff working at the Unit in order for people to receive the most tailored service that responds to their individual needs.

8.5.13 Finally, option 3 was to retain a non-exhaustive list of factors to consider when determining whether an adult may be vulnerable to abuse. This approach is preferred by SALRI as it encourages the ASU to actively consider the person’s needs and to explore the intersectionality between various factors that may lead to vulnerabilities, noting that one of these factors in isolation

¹⁵³¹ Sarah Donnelly et al, HSE National Safeguarding Office and Trigraph, *Adult Safeguarding Legislation and Policy Rapid Realist Literature Review* (Report, 2017) 21.

¹⁵³² See above Part 8.2.

¹⁵³³ Office for the Ageing, *Strategy to Safeguard the Rights of Older South Australians 2014–2021* (SA Health Document, 2014) 17.

does not cause inherent vulnerability in all situations.¹⁵³⁴ For instance, older people are more susceptible to abuse if they also experience one of the following risk factors: cognitive impairment or other disabilities; mental and physical health issues; visual and auditory impairment; social isolation; prior trauma; and family conflicts.¹⁵³⁵ Evidence also demonstrates that the majority of elder abuse victims are dependent on others, and in particular on the abuser, for care.¹⁵³⁶ One study found that in 81% reported cases of elder financial abuse, dependency on a family member for care was a major risk factor.¹⁵³⁷

8.5.14 The National Older Persons Legal Service acutely described issues with the narrow definition used in Scotland and England requiring the adult to have care and support needs as it excludes the abuse of older persons by a third party.¹⁵³⁸ If Australia adopted a similar definition there would be groups who would fall through the cracks.¹⁵³⁹ Similarly, Legal Aid ACT suggested that the requirement for ‘care and support needs’ should not be adopted as the definition fails to account for things like geographic location, lack of access to appropriate facilities, and general frailty.¹⁵⁴⁰

8.5.15 Although the OFAW and ASU preferred having no definition of ‘vulnerable’ in the *AAS Act*, they recommended that if SALRI sought to have a definition, it should have a greater focus on the abilities and capabilities of that person, rather than their characteristics. This is consistent with the views of most consultees, that the focus should be placed on the situation and circumstances of the individual rather than targeting those experiencing abuse and labelling such characteristics as vulnerable.

8.5.16 This approach received the widest, though not universal, support in SALRI’s consultation and was seen to reflect both contemporary understanding (age or disability in themselves should not denote or presume vulnerability) of vulnerability and to provide clarity and guidance for ASU practitioners in implementing the *AAS Act*.

¹⁵³⁴ Disability Advocacy and Complaints Service of South Australia, *2019–2020 Annual Report* (Report, 2020) 5.

¹⁵³⁵ Kelly Purser, Tina Cockburn and Elizabeth Ulrick, ‘Examining Access to Formal Justice Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney’ (2019) 12(1) *Elder Law Review* 1, 12.

¹⁵³⁶ Kelly Purser, Tina Cockburn and Elizabeth Ulrick, ‘Examining Access to Formal Justice Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney’ (2019) 12(1) *Elder Law Review* 1, 13. See, eg, *Smith v Glegg* [2005] 1 Qd R 561 the victim, an 85-year-old widow who suffered from depression and was legally blind, was financially abused by her eldest daughter, who had been appointed power of attorney. The daughter abused her powers by convincing the victim to transfer her house into the daughters sons name so that the daughter could sell the house and use the proceeds to buy a house for herself. McMurdo J noted the victim was wholly reliant on her daughter for domestic and medical care, transport and personal company and as a result was under undue influence to transfer the house.

¹⁵³⁷ Dale Bagshaw et al ‘Financial Abuse of Older People by Family Members: Views and Experiences of Older Australians and their Family Members’ (2013) 66(1) *Australian Social Work* 86.

¹⁵³⁸ National Older Persons Legal Services Network, Submission No 363 to the Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (March 2017) 4.

¹⁵³⁹ *Ibid*.

¹⁵⁴⁰ Legal Aid ACT, Submission No 223 to the Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (February 2017) 4.

8.5.17 SALRI echoes the view of the Joint Committee on Elder Abuse that violence against an older person ‘does not exist in a vacuum’ and may arise out of a wide range of family and personal issues’.¹⁵⁴¹ The same can be said for people with a disability, Aboriginal people, and other communities typically considered ‘vulnerable’.

8.5.18 SALRI’s consultation identified key factors that *might* make a person vulnerable to abuse including age, disability, social dependence, ill health, dependence on others (social, financial, or otherwise), mental illness, cognitive impairment, cultural and language barrier, adults living in regional, remote or rural areas, education, gender, or sexual orientation.

8.5.19 For operational and drafting reasons,¹⁵⁴² SALRI recommends that any reference to ‘vulnerable adult’ in the current *AAS Act* be amended to the term ‘relevant adult’. SALRI further recommends that s 3 of the *AAS Act* should define relevant adult, consistent with the reasoning in this Part, as ‘an adult who may be vulnerable to abuse’ and define ‘adult’ as a person aged 18 years and older.

8.5.20 When determining whether an adult may be vulnerable to abuse, the ASU should take into account the following non-exhaustive list of factors: age, disability, social isolation, ill health, dependence on others (social, financial, or otherwise), mental illness,¹⁵⁴³ cognitive decline or impairment, cultural and language barriers, adults living in regional and rural areas, education, and gender or sexual orientation.

8.5.21 Recommendation

RECOMMENDATION 31

1. SALRI recommends replacing the term ‘vulnerable adult’ used in the *Ageing and Adult Safeguarding Act 1995* (SA) with ‘relevant adult’.¹⁵⁴⁴

Specifically, SALRI recommends s 3 of the *Ageing and Adult Safeguarding Act 1995* (SA) define:

- a. ‘Relevant adult’ as ‘an adult who may be vulnerable to abuse’.
- b. ‘Adult’ as ‘a person 18 years and older’.

2. When determining whether an adult may be vulnerable to abuse, the Adult Safeguarding Unit should take into account the following, non-exhaustive, list of factors:

- a. age, or
- b. disability; or
- c. social isolation; or
- d. ill health; or
- e. dependence on others (social, financial, or otherwise); or

¹⁵⁴¹ Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017) 23.

¹⁵⁴² Having the term ‘adult who may be vulnerable to abuse’ appear throughout the Act would be cumbersome.

¹⁵⁴³ As defined in the *Mental Health Act 2009* (SA).

¹⁵⁴⁴ The use of a short term in legislation was considered essential for operational reasons.

- f. mental illness, or
- g. cognitive impairment; or
- h. cultural and language barriers; or
- i. adults living in regional, remote or rural areas; or
- j. education; or
- k. gender; or
- l. sexual orientation.¹⁵⁴⁵

¹⁵⁴⁵ Whether this list of factors be included in the *AAS Act*, Regulations or Code of Practice is a matter for the Minister, Parliament and Parliamentary Counsel.

Part 9 - Defining Abuse

9.1 Background

9.1.1 The definition of ‘abuse’ is integral to the scope and operation of the ASU under the *AAS Act* and, with the term ‘vulnerable’, governs the remit of the ASU. If SALRI’s recommendation that safeguarding adults who may be vulnerable to abuse be introduced as the central purpose of the *AAS Act*, it is necessary to define the kinds of behaviours that are to be considered abuse under the Act. Recent scholarship and commentary in this area, and indeed on the topic of family violence more broadly, has sought to expand the understanding of abuse from purely physical violence to a broader range of abusive behaviours, crucially including psychological abuse and the notion of ‘coercive control’.¹⁵⁴⁶

9.1.2 The current definition of abuse under the *AAS Act* is too broad and encompasses both a wide range of possible abusive actions as well as potential perpetrators.¹⁵⁴⁷ Having a clearer and more specific definition of abuse in the *AAS Act* may therefore assist affected or interested parties to better understand whether the ASU is the most appropriate body to take action in the particular circumstances.

9.1.3 It is important that the term ‘abuse’ under the *AAS Act* should not extend to conduct that others may regard as rash or imprudent.¹⁵⁴⁸ Additionally, SALRI was reminded that elder abuse or the abuse and exploitation of persons with disability may not be committed maliciously.¹⁵⁴⁹ The harm may be accidental or deliberate.¹⁵⁵⁰ The Hon Geoff Brock MP has noted that ‘it can also be the result of intentional or unintentional neglect from both parties’.¹⁵⁵¹ As the Western Australian Parliamentary

¹⁵⁴⁶ See Heather Douglas, ‘Do We Need a Specific Domestic Violence Offence?’ (2015) 39(2) *Melbourne University Law Review* 434; Sandra Walklate, Kate Fitz-Gibbon and Jude McCulloch, ‘Is More Law the Answer? Seeking Justice for Victims of Intimate Partner Violence through the Reform of Legal Categories’ (2018) 18(1) *Criminology and Criminal Justice* 115; Parliament of New South Wales, Joint Select Committee on Coercive Control, ‘Coercive Control in Domestic Relationships’ (Report, 2021). See further above Part 7.2.

¹⁵⁴⁷ See below Part 9.2.

¹⁵⁴⁸ ‘It is important to acknowledge that ageing does not remove or dilute citizens’ rights. Under the law, a person of advanced age who maintains mental capacity is no different to any other adult, with the right to spend their money, keep or dispose of their assets, and live their life as they wish, and are able to, and access the services and legal avenues available to every Australian’: Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017) 25. Professor Ibrahim and others also reminded SALRI that older persons ‘are more generous as they get older’ and it is important to respect their right to spend their money, notably to friends or family as they choose.

¹⁵⁴⁹ Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 1 [4]; Rebecca Turner, ‘Elder Abuse: Many People Committing Financial Abuse Unintentionally, MP Says’, *ABC News* (online, 13 September 2018) <<https://www.abc.net.au/news/2018-09-13/elder-abuse-report-handed-down/10241574>>. Many of the calls to the ASU relate to queries for advice or reports of what is categorised as relatively minor abuse, such as adult children moving back home to live with their older parents and not paying their share of household bills or assisting with the maintenance of the house. This seems a common form of financial abuse. See Melanie Joosten et al, Senior Rights Victoria, *Seven Year of Elder Abuse Data in Victoria* (Report, August 2020) 19; Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 36.

¹⁵⁵⁰ Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017) 18, 22

¹⁵⁵¹ South Australia, *Parliamentary Debates*, House of Assembly, 9 June 2021, 6195 (Geoff Brock).

Elder Abuse report noted, '[it] may be unintentional or because of a lack of skills or support'.¹⁵⁵² The Report elaborated:

Many perpetrators do not commit elder abuse maliciously and there are many instances of family members or carers (or those who are both) being overwhelmed with their responsibilities who inadvertently commit elder abuse because of their inability to cope ... Carer stress¹⁵⁵³ or 'carer burnout' is also a risk factor for elder abuse, where a perpetrator may experience difficulties whilst caring for an older person or may not have/know of support services available.¹⁵⁵⁴

9.1.4 The Western Australian report noted the need to consider the motivation of a perpetrator of elder abuse on a 'spectrum'.¹⁵⁵⁵ As one submission to the Report noted:

[P]erpetrators may be pre-meditated 'bad actors' committing deliberate actions, or 'exploiters' who readily take advantage of unexpected opportunities. 'Reluctant' perpetrators may exploit opportunities due to mixed motivations, including caregiver stress. 'Inappropriate' abusers may act in a way that is somewhat consistent with the older person's wishes, though inappropriately. 'Unintentional' perpetrators are people who legitimately do not understand why their actions or omissions are abusive, or are not capable of fulfilling expected roles.¹⁵⁵⁶

9.1.5 SALRI was told by the disability sector and practitioners that similar pressures and issues may well arise in relation to the abuse and/or neglect of persons with disability.

Elder Abuse

9.1.6 As a result of numerous reports, enquiries, and Royal Commissions,¹⁵⁵⁷ the issue of elder abuse has grown significantly in the public consciousness in recent years, with a clearer definition of what this entails having emerged. The most commonly cited definition of elder abuse is that offered by the World Health Organisation:

[A] single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person.¹⁵⁵⁸

¹⁵⁵² Select Committee into Elder Abuse, Legislative Council of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 41 [3.68].

¹⁵⁵³ SALRI acknowledges the helpful submission of Carer and Community Support and in particular their explanation of the pressures on carers: 'when compared to the general population, caregivers experience significantly higher rates of psychological distress, financial stress, social isolation, and poor health and wellbeing.'

¹⁵⁵⁴ Ibid i [4]–[5]. See also 34 [3.35], 41–3 [3.66]–[3.73], Findings 18–20; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, 'Elder Abuse in New South Wales' (Report, June 2016) 42–6 [4.44]–[4.59], 50 Recommendation 2; Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017) 28–30.

¹⁵⁵⁵ Select Committee into Elder Abuse, Legislative Council of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 34 [3.35].

¹⁵⁵⁶ Ibid 42 [3.72] quoting Submission No 40 to Select Committee into Elder Abuse, Legislative Council of Western Australia, 23 November 2017, 8 (Dr Barbara Blundell, Prof Mike Clare and Amy Warren).

¹⁵⁵⁷ *Royal Commission into Aged Care Quality and Safety*, Care, Dignity and Respect (Final Report, 26 February 2021).

¹⁵⁵⁸ World Health Organisation, 'Abuse of Older People' (Web Page, 13 June 2022) <<https://www.who.int/news-room/fact-sheets/detail/abuse-of-older-people>>.

9.1.7 This definition has been adopted in Australia by numerous parties including the South Australian Parliamentary Elder Abuse Report,¹⁵⁵⁹ Human Rights Commission,¹⁵⁶⁰ the Australian Institute of Family Studies,¹⁵⁶¹ the Queensland Elder Abuse Prevention Unit,¹⁵⁶² the Australian Law Reform Commission,¹⁵⁶³ the Aged Rights Advocacy Service,¹⁵⁶⁴ the Western Australian Parliamentary Report,¹⁵⁶⁵ the Queensland Law Society and Queensland Public Advocate¹⁵⁶⁶ and other studies.¹⁵⁶⁷ This definition is often also cited in case law.¹⁵⁶⁸

9.1.8 The submissions to the Western Australian Parliamentary Report largely supported this definition, and particularly the element of an ‘expectation of trust’.¹⁵⁶⁹ It was noted that this includes abuse not just from family and friends, but professionals supporting the older person and others they may be dependent upon as well.¹⁵⁷⁰

9.1.9 In this context, the 2021 Australian Institute of Family Studies (‘AIFS’) study extended its definition of elder abuse to include not just relationships with an expectation of trust, but where there is a power imbalance between the older person and the party responsible for the abuse.¹⁵⁷¹ The report argued that a ‘central aspect of the conceptual definition of elder abuse is a “relationship of trust” or “a power imbalance”’.¹⁵⁷² The AIFS approach was supported by the recent joint Report of the Queensland Law Society and the Queensland Public Advocate:

¹⁵⁵⁹ Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017) 18.

¹⁵⁶⁰ Australian Human Rights Commission, ‘Elder Abuse’ (Web Page, 1 November 2021) <<https://humanrights.gov.au/elderabuse/>>.

¹⁵⁶¹ Rae Kaspiew, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, 2016) 2, 54.

¹⁵⁶² Queensland Government, *Elder Abuse Prevention Unit*, ‘What is Elder Abuse’ (Web Page) <<https://eapu.com.au/what-is-elder-abuse/>>.

¹⁵⁶³ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 40–1 [2.38]–[2.43], 95 [3.167], 392 [14.76]–[14.78] Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen To Me’: When Trust is Broken* (Final Report, September 2018) 19 [1.8]. See also Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, ‘Elder Abuse in New South Wales’ (Report No 44, June 2016) 65 [3.9].

¹⁵⁶⁴ Aged Rights Advocacy Service Inc, *What is Abuse of Older People?* (ARAS Pocket Guide) <https://www.sa.agedrights.asn.au/files/50_aras_pocket_guide.pdf?v=372>.

¹⁵⁶⁵ Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen To Me’: When Trust is Broken* (Final Report, September 2018) Finding 4.

¹⁵⁶⁶ Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 14–15.

¹⁵⁶⁷ See, eg, Jo Wainer, Peter Darzins and Kei Owada, Monash University, *Prevalence of Financial Elder Abuse in Victoria: Protecting Elders’ Assets Study* (Report, 10 May 2010) 8; Kelly Purser, Tina Cockburn and Elizabeth Ulrick, ‘Examining Access to Formal Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney’ [2019] 12 *Elder Law Review* 1–32, 7; Kelly Purser et al, ‘Alleged Financial Abuse of Those Under an Enduring Power of Attorney: An Exploratory Study (2018) 48(4) *British Journal of Social Work* 887, 890.

¹⁵⁶⁸ John Anderson, ‘Vulnerability of Elders to Physical Harm and Death: Criminal Law Responses’ (2019) 93(8) *Australian Law Journal* 631, 631.

¹⁵⁶⁹ Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 7–9 [2.4]–[2.11].

¹⁵⁷⁰ *Ibid* 8 [2.8].

¹⁵⁷¹ Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 17–19, 20, 32. This is explored further below in Part 9.4.

¹⁵⁷² *Ibid* 32.

While accepted definitions remain in flux, and conceptual and theoretical approaches continue to evolve, this paper adopts this working definition of abuse of older persons because it reflects the most recent attempt in Australia to define the abuse of older persons for the purposes of assessing prevalence. Furthermore, the definition adopts a widely accepted approach by incorporating situations where power imbalances exist, in addition to an expectation of trust.¹⁵⁷³

9.1.10 Other parties submitted to the AIFS Report that a human-rights based approach should be taken to defining elder abuse. This was defined by Professor Lacey in evidence to the committee as ‘the denial or restriction of a person’s basic rights and freedoms — removing a person’s power to make decisions for themselves.’¹⁵⁷⁴

9.1.11 In South Australia, this approach can be seen through the *Charter of the Rights and Freedoms of Vulnerable Adults*, the formulation of which was a requirement of the *AAS Act*.¹⁵⁷⁵ This approach has been adopted elsewhere and can be seen in the numerous Charters that have been drafted to enunciate the rights of older people, such as the Charter of Rights and Freedoms of Older Persons drafted by the Australian Research Network on Law and Ageing.¹⁵⁷⁶

9.1.12 As a supplement to this broad definition above, many organisations and reports provide examples of the kinds of behaviours which may be considered elder abuse. For example, the influential WHO definition acknowledges that elder abuse can include ‘physical, sexual, psychological and emotional abuse; financial and material abuse; abandonment; neglect; and serious loss of dignity and respect.’ The ALRC provided examples of psychological, financial, physical and sexual abuse, as well as neglect, in their definition of elder abuse.¹⁵⁷⁷ The Western Australian Parliamentary Report found, adopting a definition provided by APEA, that the most common forms of elder abuse are emotional or psychological, financial or material, neglect, physical, sexual and social abuse.¹⁵⁷⁸

9.1.13 There has been, until recently, a relative lack of firm statistics as to the extent of elder abuse in Australia.¹⁵⁷⁹ This is partly due to limited research, the fact that there is no universal definition of elder abuse and the fact that the majority of cases of elder abuse are not reported.¹⁵⁸⁰ It is also estimated that for every reported case of elder abuse there are another five cases that are not reported.¹⁵⁸¹ While precise estimates may not be available, elder abuse is still clearly a large issue in

¹⁵⁷³ Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 15. See also at: 14, 38.

¹⁵⁷⁴ Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *‘I Never Thought It Would Happen To Me’: When Trust is Broken* (Final Report, September 2018) 9 [2.12].

¹⁵⁷⁵ *AAS Act* s 20.

¹⁵⁷⁶ Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *‘I Never Thought It Would Happen To Me’: When Trust is Broken* (Final Report, September 2018) 10 [2.15].

¹⁵⁷⁷ *Ibid* 19 [1.9]–[1.13].

¹⁵⁷⁸ *Ibid* Finding 9, 18–20 [2.48]–[2.50].

¹⁵⁷⁹ See now Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021).

¹⁵⁸⁰ Rae Kaspiew, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, 2016) 5.

¹⁵⁸¹ SA Health, Government of South Australia, ‘Stop Elder Abuse’ (Web Page) <<https://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/conditions/stop+elder+abuse/stop+elder+abuse>>.

Australia. Instances of elder abuse are also expected to increase as a result of Australia's aging population.¹⁵⁸²

9.1.14 The AIFS study noted that studies on elder abuse have typically focused on either one kind of abuse, or have looked only at the abuse that is reported to advocacy bodies.¹⁵⁸³ Their National Elder Abuse Prevalence Study was designed to assess the proportion of older people who have experienced abuse, the most common kinds of abuse, and the extent to which this abuse is under-reported.¹⁵⁸⁴

9.1.15 The study found that 14.8% of Australians over 65 had experienced elder abuse in the previous 12 months.¹⁵⁸⁵ The most common form of abuse was psychological, with an 11.7% prevalence rate.¹⁵⁸⁶ This was followed by neglect (2.9%), financial (2.1%), physical (1.8%) and sexual abuse (1%).¹⁵⁸⁷

9.1.16 The study then looked deeper at the kinds of abuse described within these categories. With respect to financial abuse, the three most common examples were:

- Pressured you into giving or loaning them money, possessions or property;
- Taken your money, possessions or property without your permission;
- Not contributed to household expenses such as rent, food or aged care/home service fees where it was previously agreed.¹⁵⁸⁸

9.1.17 Common examples of psychological abuse included:

- Insulted you, called you names or swore at you in a way you found offensive or aggressive;
- Excluded you or repeatedly ignored you;
- Undermined or belittled what you do;
- Prevented you from seeing or contacting family members or your doctor/nurse;

A high number of respondents also reported someone had 'done anything else to cause you emotional distress'.¹⁵⁸⁹

¹⁵⁸² Kelly Purser, Tina Cockburn and Elizabeth Ulrick, 'Examining Access to Formal Justice Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney' (2019) 12(1) *Elder Law Review* 1; Rae Kaspiew, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, 2016) 1.

¹⁵⁸³ Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 1.

¹⁵⁸⁴ Ibid.

¹⁵⁸⁵ Ibid 33. It should be noted that there remain gaps in the research and the precise prevalence of elder abuse is unknown. Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 16–18. The under reporting of such abuse is well established. See Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Final Report, May 2017) 94 [3.163]; Rae Kaspiew, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, 2016) 32. There is also an under reporting of abuse and exploitation by persons with disability. See Centre for Evidence and Implementation and Monash University, *Disability Royal Commission*, 'Rapid Evidence Review: Violence, Abuse, Neglect and Exploitation of people with Disability' (Research Report, 2021) 31–2; Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime* (Research Findings, July 2014) 6.

¹⁵⁸⁶ Ibid.

¹⁵⁸⁷ Ibid.

¹⁵⁸⁸ Ibid 36.

¹⁵⁸⁹ Ibid 43.

9.1.18 Common experiences of neglect related to:

- Doing routine housework;
- Travel or transport;
- Shopping for groceries or clothes; and
- Preparing meals.¹⁵⁹⁰

9.1.19 The findings of this study are the most up-to-date and comprehensive statistics on the prevalence of elder abuse. SALRI has previously used¹⁵⁹¹ the findings of Wendy Lacey et al's *Prevalence of Elder Abuse in South Australia* Report, which compiled statistics provided from ARAS, who are considered to collect the most comprehensive data in South Australia on elder abuse.¹⁵⁹² This Report similarly found psychological and financial abuse, and neglect, to be the most common kinds of elder abuse in South Australia.¹⁵⁹³

People With a Disability

9.1.20 In comparison to elder abuse, the abuse of people with a disability has gathered relatively little attention in research and academic literature. SALRI was often reminded in consultation by parties such as Skye Kakoschke-Moore, Natalie Wade, Maggie Rutjens, community groups and various health practitioners, that the abuse and exploitation of persons with disability, regardless of age, is a real concern and must not be overlooked.¹⁵⁹⁴

9.1.21 However, this is likely to change once the findings of the ongoing *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* are released.

9.2 Current Position in South Australia

9.2.1 Abuse is currently defined in s 4(1) of the *AAS Act* as:

- (a) physical, sexual, emotional or psychological abuse of the vulnerable adult; and
- (b) financial abuse or exploitation of the vulnerable adult; and
- (c) neglect of the vulnerable adult; and
- (d) abuse, exploitation or neglect consisting of a person's omission to act in circumstances where the person owes a duty of care to the vulnerable adult; and
- (e) the abuse or exploitation of a position of trust or authority existing between the vulnerable adult and another person; and
- (f) a denial, without reasonable excuse, of the basic rights of the vulnerable adult; and
- (g) any other act or omission of a kind declared by the regulations to be included in the ambit of this section

¹⁵⁹⁰ Ibid 47.

¹⁵⁹¹ Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 225.

¹⁵⁹² Wendy Lacey et al, University of South Australia, *Prevalence of Elder Abuse in South Australia* (Final Report, February 2017) 63. This cited the ARAS findings of elder abuse reports for the period 2012–2016.

¹⁵⁹³ Ibid.

¹⁵⁹⁴ See also NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018); Kelly Vincent and David Caudrey, *Safeguarding Task Force* (Report, 31 July 2020).

but does not include an act or omission of a kind declared by the regulations to be excluded from the ambit of this section.

9.2.2 Section 4(3) provides that a reference to physical abuse in the *AAS Act* includes the use of unlawful physical or chemical restraints. Section 4(4) in turn provides that physical or chemical restraints can include the over-medication or under-medication of a vulnerable adult.

9.2.3 The ‘basic rights’ in section 4(1)(f) are to be taken from the *South Australian Charter of the Rights and Freedoms of Vulnerable Adults*, as specified in section 4(2).

9.2.4 The *Ageing and Adult Safeguarding Regulations 2019* (SA) do not currently make reference to any other act or omission which constitutes abuse, nor do they exclude any particular acts or omissions from the above definition of abuse either.

9.2.5 While the legislation outlines the broad categories of abuse, to which the ASU are to prevent and respond, further guidance is contained in the ASU’s Code of Practice. This Code of Practice was designed to provide practical guidance on how the ASU will fulfil its functions under the *AAS Act*.¹⁵⁹⁵ Here, abuse is defined as ‘any deliberate or unintentional action, or lack of action, carried out by a person, often in a trusted relationship, which causes distress and/ or harm to a person who may be vulnerable, or causes loss or damage to property or assets’.¹⁵⁹⁶ The Code of Practice also notes that ‘abuse is more likely to be carried out by someone familiar’ and commonly takes place ‘at home, in places visited regularly, or where services or care are accessed’.¹⁵⁹⁷

9.2.6 Mirroring the *AAS Act* for the most part, the ASU’s Code of Practice lists that abuse can consist of the following types:

- Physical
- Sexual
- Emotional or psychological
- Financial abuse or exploitation
- Neglect (this does not include self-neglect).¹⁵⁹⁸

9.2.7 Further, it is said that abuse may also include:

- abuse, exploitation or neglect consisting of a person’s omission to act in circumstances where a person owes a duty of care to the adult vulnerable to abuse; and
- a denial, without reasonable excuse, of the basic rights of a person who may be vulnerable to abuse.¹⁵⁹⁹

¹⁵⁹⁵ Government of South Australia, Department for Health and Wellbeing, *South Australian Adult Safeguarding Unit Code of Practice* (2019) 5.

¹⁵⁹⁶ Ibid.

¹⁵⁹⁷ Ibid.

¹⁵⁹⁸ Ibid 6.

¹⁵⁹⁹ Ibid.

9.3 Position in Other Jurisdictions

Federal

9.3.1 While the Commonwealth Government is unable to establish a national adult safeguarding system due to its limited constitutional powers,¹⁶⁰⁰ it has published a national plan to combat elder abuse following recommendations made by the ALRC in 2017.¹⁶⁰¹ The Commonwealth developed this plan in consultation with State and Territory Governments to provide a national framework to respond to elder abuse.¹⁶⁰²

9.3.2 The *National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019–2023* adopts the WHO definition of abuse.¹⁶⁰³ It recognises that complex factors are often involved in elder abuse with no single profile as to who is at risk of abuse or who can perpetrate abuse.¹⁶⁰⁴ The types of abuse included in this plan are the five commonly recognised types of abuse: financial, psychological/emotional, physical, neglect and sexual.¹⁶⁰⁵

New South Wales

9.3.3 In 2019, New South Wales established the Ageing and Disability Commission (‘ADC’) to protect adults with disability and older people from abuse, neglect and exploitation in home and community settings.¹⁶⁰⁶ However, while the ADC’s functions include investigating allegations of abuse of older people and adults with a disability and raising awareness of these issues,¹⁶⁰⁷ ‘abuse’ is not defined in the *Ageing and Disability Commissioner Act 2019* (NSW).

9.3.4 Instead, the ADC is partly guided by a NSW Interagency Policy document, *Preventing and Responding to Abuse of Older People (Elder Abuse)*. This policy sets out the approach which is to be taken by all NSW Government agencies to prevent and respond to the abuse of older people.¹⁶⁰⁸ In this document, the widely accepted WHO definition of elder abuse is adopted.¹⁶⁰⁹ Self-neglect, professional misconduct, consumer scams, criminal acts committed by strangers or distant acquaintances and other forms of harm that may be experienced by older persons in residential aged care settings are explicitly excluded from NSW’s definition of abuse.¹⁶¹⁰

9.3.5 The NSW Policy document also lists five commonly recognised types of abuse and the behaviours and signs that may be associated with them.¹⁶¹¹ The types of abuse referred to are the same

¹⁶⁰⁰ Wendy Lacey, ‘Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia’ (2014) 36(1) *Sydney Law Review* 99, 102–3.

¹⁶⁰¹ Public Advocate and Queensland Law Society, *Elder Abuse* (Joint Issues Paper, February 2022) 23.

¹⁶⁰² *Ibid.*

¹⁶⁰³ Council of Attorneys-General, *National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019–2023* (Report, July 2019) 2.

¹⁶⁰⁴ *Ibid.*

¹⁶⁰⁵ *Ibid.* 3.

¹⁶⁰⁶ *Ageing and Disability Commissioner Act 2019* (NSW) s 4(1); NSW Ageing and Disability Commission, *Annual Report 2020–2021* (Report, October 2021) 8.

¹⁶⁰⁷ *Ageing and Disability Commissioner Act 2019* (NSW) ss 12(a), (c).

¹⁶⁰⁸ New South Wales Government, *Preventing and Responding to Abuse of Older People (Elder Abuse)* (Interagency Policy, June 2020) 6.

¹⁶⁰⁹ *Ibid.* 11.

¹⁶¹⁰ *Ibid.* Such an explicit statement is not found in the *AAS Act*.

¹⁶¹¹ *Ibid.* 25–7.

as the five listed in the ASU Code of Practice and the *National Plan to Respond to the Abuse of Older Australians (Elder Abuse)*. Further, the potential co-occurrence of different types of abuse is recognised, as the document provides the example of how psychological and emotional abuse in the form of cutting off one's communication with others can be used to enable other types of abuse.¹⁶¹²

9.3.6 In defining the abuse of older people, the policy also notes that different cultural perceptions can inform what is considered abuse.¹⁶¹³

Western Australia

9.3.7 Western Australia does not have a specific government body designed to address and respond to the abuse of older people or vulnerable adults. Elder abuse support services are predominantly provided by non-profit organisations such as Advocare, COTA (WA) and Older People's Rights Service.¹⁶¹⁴ That said, the Western Australian Government released a ten-year strategy aimed at addressing the abuse of older people in 2019.¹⁶¹⁵ Like NSW, Western Australia has adopted the WHO definition of abuse in its government strategy.¹⁶¹⁶

9.3.8 The Western Australian strategy draws on available studies and lists some widely accepted characteristics of elder abuse.¹⁶¹⁷ This includes the fact that, generally speaking, elder abuse 'occurs when a person abuses their power over an older person' and 'abuse is committed by people the older person trusts'.¹⁶¹⁸ The strategy also acknowledges that it can be caused by intentional and unintentional acts and encompasses criminal and non-criminal acts.¹⁶¹⁹

9.3.9 The types of abuse outlined in this strategy includes social abuse, in addition to the other five commonly recognised types of abuse.¹⁶²⁰ Social abuse here is defined as the 'intentional prevention from having social contact with family or friends, or accessing social activities'.¹⁶²¹

Victoria

9.3.10 Like Western Australia, Victoria does not have a specific government body designed to address and respond to the abuse of older people or vulnerable adults.¹⁶²² The Victorian Government funds a free helpline, legal, advocacy and referral service run by COTA Victoria known as Senior Rights

¹⁶¹² Ibid 12.

¹⁶¹³ Ibid 11.

¹⁶¹⁴ Government of Western Australia, 'Elder Abuse Support Services and Resources' (Web Page, 9 November 2021) <<https://www.wa.gov.au/government/document-collections/elder-abuse-support-services-and-resources>>.

¹⁶¹⁵ Government of Western Australia, 'Elder Abuse Strategy' (Web Page, 2 June 2022) <<https://www.wa.gov.au/organisation/departments-of-communities/elder-abuse-strategy>>.

¹⁶¹⁶ Government of Western Australia, Department of Communities, *WA Strategy to Respond to the Abuse of Older People (Elder Abuse) 2019–2029* (Government Publication, 18 November 2019) 5.

¹⁶¹⁷ Ibid 7.

¹⁶¹⁸ Ibid.

¹⁶¹⁹ Ibid 5.

¹⁶²⁰ Ibid 11–12.

¹⁶²¹ Ibid 11.

¹⁶²² See also Office of the Public Advocate (Vic), *Line of Sight: Refocussing Victoria's Adult Safeguarding Laws and Practices* (Report, August 2022).

Victoria.¹⁶²³ The Victorian elder abuse prevention and response guidelines are consistent with the approaches taken in NSW and Western Australia in using a definition of abuse based on the commonly accepted WHO definition. The types of abuse included in its definition are as follows: physical, social, financial, psychological and/or sexual, mistreatment and neglect.¹⁶²⁴

9.3.11 In Victoria's disability abuse prevention strategy, abuse is framed as the violation of a person's human rights and can be perpetrated by a range of individuals such as support workers, carers, family members and community members.¹⁶²⁵ The categories of abuse identified mirror the five types of elder abuse commonly recognised and based on the WHO definition.¹⁶²⁶

Queensland

9.3.12 Queensland does not have a publicly available elder abuse strategy.¹⁶²⁷ However, the Queensland Government does provide funding for an Elder Abuse Prevention Unit ('EAPU') run by Uniting Care.¹⁶²⁸ The EAPU uses the WHO definition of abuse as a guiding framework for its activities.¹⁶²⁹

9.3.13 That said, the EAPU acknowledges a couple of contentious aspects of this definition.¹⁶³⁰ Of particular relevance, the EAPU notes that there is debate over what constitutes a relationship with an 'expectation of trust'.¹⁶³¹ In its operations, the EAPU classifies the following types of people as being in a relationship with an 'expectation of trust': family member, carer, or close friend who is 'acting as family'.¹⁶³² Relationships with aged care services and workers based on consumer contracts however, are defined as relationships involving a 'position of trust' rather than an 'expectation of trust'.¹⁶³³ Further, relationships with neighbours, housemates, and strangers are not considered as relationships with an 'expectation of trust', unless the neighbour or housemate is also a close friend who 'acts as family'.¹⁶³⁴

9.3.14 While the EAPU receives reports involving all of the types of relationships above, they are treated separately in its operations and analysis of data.¹⁶³⁵ This is because, the EAPU has previously

¹⁶²³ State of Victoria, Department of Health, 'Elder Abuse Prevention and Response' (Web Page, 28 February 2022) <<https://www.health.vic.gov.au/wellbeing-and-participation/elder-abuse-prevention-and-response>>; Seniors Rights Victoria, 'About us' (Web Page) <<https://seniorsrights.org.au/about-us/>>.

¹⁶²⁴ Ibid.

¹⁶²⁵ State of Victoria, Department of Health and Human Services, *Dignity, Respect and Safer Services: Victoria's Disability Abuse Prevention Strategy* (Government Publication, March 2018) 4.

¹⁶²⁶ Ibid.

¹⁶²⁷ Melanie Joosten, Freda Vrantidis and Briony Dow, *Understanding Elder Abuse* (Scoping Study, June 2017) 49.

¹⁶²⁸ The Public Advocate and Queensland Law Society, *Elder Abuse* (Joint Issues Paper, February 2022) 30; UnitingCare, *Elder Abuse Prevention Unit Year in Review 2019–20* (Annual Report, 2020) 1.

¹⁶²⁹ Uniting Care, *Elder Abuse Prevention Unit Year in Review 2019–20* (Annual Report, 2020) 4.

¹⁶³⁰ Ibid.

¹⁶³¹ Ibid.

¹⁶³² Ibid.

¹⁶³³ Ibid.

¹⁶³⁴ Ibid.

¹⁶³⁵ Ibid.

found differences in the patterns of abuse when there is an expectation of trust compared to other types of relationships.¹⁶³⁶

Tasmania

9.3.15 Like most other states in Australia, Tasmania has a state elder abuse helpline and a strategy in relation to the prevention of elder abuse, which adopts the WHO definition of abuse.¹⁶³⁷ The strategy notes that abuse is often perpetrated by someone in a trusting relationship with an older person.¹⁶³⁸ Examples of people who can be in a trusting relationship with an older person provided in the strategy include an older person's 'spouse or partner, children, in-laws, grandchildren, carers, neighbours and friends'.¹⁶³⁹

9.3.16 This strategy recognises the five common types of abuse and further acknowledges two emerging categories of abuse, which may otherwise be considered as forms of psychological or emotional abuse: social abuse and spiritual abuse.¹⁶⁴⁰ Whereas social abuse is defined in a manner consistent with the Western Australian definition above, spiritual abuse is defined as 'the denial or use of spiritual or religious beliefs and practices to control and dominate a person, damage their spiritual experience and isolate them'.¹⁶⁴¹ Self-neglect and self-mistreatment are expressly excluded from Tasmania's definition of abuse.¹⁶⁴²

9.4 Issues

9.4.1 Defining 'abuse' in this context is not a simple task. There is no consensus on how to define elder abuse,¹⁶⁴³ and there has been limited consideration of the abuse of other vulnerable adults, notably persons with disability.¹⁶⁴⁴ The perpetrators of abuse and behaviours which constitute abuse are widely debated¹⁶⁴⁵ and a myriad of approaches have been taken interstate and internationally.¹⁶⁴⁶

¹⁶³⁶ Ibid.

¹⁶³⁷ Tasmanian Government, Department of Communities, *Respect and Protect Older Tasmanians Tasmania's Elder Abuse Prevention Strategy 2019–2022* (Government Publication, June 2019) 7, 10.

¹⁶³⁸ Ibid 10.

¹⁶³⁹ Ibid.

¹⁶⁴⁰ Ibid 11.

¹⁶⁴¹ Ibid.

¹⁶⁴² Ibid 10.

¹⁶⁴³ Josie Dixon et al, 'Defining the "Perpetrator": Abuse, Neglect and Dignity in Care' (2013) 15(1) *Journal of Adult Protection* 5, 6; Robert Wallace and Richard Bonnie, *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Ageing America* (National Academies Press, 2003) 34; Rae Kaspiew, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, 2016) 2.

¹⁶⁴⁴ 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) 37–8 [2.68].

¹⁶⁴⁵ See, eg, Rae Kaspiew et al, Australian Institute of Family Studies, *Elder Abuse National Research: Strengthening the Evidence Base* (Research Definition Background Paper, 2019) 10–15.

¹⁶⁴⁶ Lorna Montgomery, 'Implications of Divergences in Adult Protection Legislation' (2016) 18(3) *The Journal of Adult Protection* 149, 153–4; Robert Wallace and Richard Bonnie, *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Ageing America* (National Academies Press, 2003) 34.

9.4.2 While it is important that definitions are broad enough to cover all relevant forms of the abuse of vulnerable adults,¹⁶⁴⁷ definitions that are too broad are unable to make a meaningful distinction between abuse and behaviours not requiring a safeguarding response.¹⁶⁴⁸ The definition of abuse is also key to defining the remit of the ASU and setting it apart from other agencies such as SAPOL and domestic and family violence services. In brief, a recurring concern identified to SALRI was that an overly expansive remit (especially where other services already exist) for the ASU risks diluting its expertise and focus and ability to effectively carry out its core safeguarding role.

9.4.3 In reviewing the current definition of abuse under the *AAS Act*, three key issues have emerged:

- The use of the word ‘and’ after each subsections in section 4(1) should be substituted with ‘or’;
- Whether the current definition should be expanded to cover additional forms of abuse; and
- Whether the current definition should include a requirement of a relationship of trust or duty of care.

Use of the Word ‘And’ Instead of ‘Or’

9.4.4 The abuse of older people is broadly described as encompassing a range of behaviours and consisting of various forms.¹⁶⁴⁹ Due to constant debates and developments regarding its nature (such as the increased understanding of the effects and implications of psychological abuse, including gaslighting and coercive control), policymakers are encouraged to take a flexible and provisional approach to defining elder abuse.¹⁶⁵⁰

9.4.5 Section 4 of the *AAS Act* provides an exhaustive list of the types of behaviours which may constitute abuse for the purpose of the Act. In s 4(1), the word ‘and’ is used after each subsection containing a relevant type of abuse. As submitted by the OFAW, the use of this word creates ‘ambiguity and may be interpreted to mean that the types of abuse set out at section 4(1)(a) to 4(1)(g) must all be present in order for the provisions of the *AAS Act* to apply’. This concern was raised by other parties to SALRI.

9.4.6 Additionally, the definition provided in s 4(1) of the *AAS Act* includes examples of abuse by reference to their action or outcome (eg physical abuse or financial exploitation) as well as by the context in which the action occurs (eg ‘a person’s omission to act in circumstances where the person owes a duty of care to the vulnerable adult’).

¹⁶⁴⁷ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Discussion Paper No 83, December 2016) 21.

¹⁶⁴⁸ Josie Dixon et al, ‘Defining Elder Mistreatment: Reflections on the United Kingdom Study of Abuse and Neglect of Older People’ (2010) 30(3) *Ageing and Society* 403, 414.

¹⁶⁴⁹ Jonathan Herring, ‘Elder Abuse: A Human Rights Agenda for the Future’ in Israel Doron and Ann Soden (eds) *Beyond Elder Law* (Springer Berlin Heidelberg, 2012) 175, 176.

¹⁶⁵⁰ Josie Dixon et al, ‘Defining Elder Mistreatment: Reflections on the United Kingdom Study of Abuse and Neglect of Older People’ (2010) 30(3) *Ageing and Society* 403, 418.

9.4.7 Subsequently, in line with other definitions of abuse,¹⁶⁵¹ the OPA and OFAW submitted that the word ‘and’ should be substituted with the word ‘or’ instead, so that each of the subsections containing a type of abuse are clearly identified as behaviour which on its own can constitute as abuse.

9.4.8 Alternatively, rather than having an exhaustive list, the *AAS Act* could take a more flexible approach by listing types of abuse as examples, while recognising that abuse may also occur in other forms. Such an approach would be consistent with other definitions¹⁶⁵² and suggestions in the literature for a flexible and provisional approach to defining elder abuse.¹⁶⁵³

What Types of Abuse are not Currently Covered Under the AAS Act?

9.4.9 The *AAS Act*’s current definition of abuse covers a broad range of actions and omissions.¹⁶⁵⁴ Nonetheless, as identified during SALRI’s consultation and research, there are several types of abuse not expressly covered by the current definition, which can be considered for further inclusion. The key types of abuse identified are social abuse, spiritual abuse, cultural abuse and self-neglect. These types of abuse and the issues regarding their inclusion in the *AAS Act*’s definition of abuse will now be considered in turn.

Social Abuse

9.4.10 Social abuse, also referred to as ‘social isolation’, is defined by SA Health as:

The forced isolation of older people, with the sometimes additional effect of hiding abuse from outside scrutiny and restricting or stopping social contact with others, including attendance at social activities.¹⁶⁵⁵

9.4.11 ARAS defines social abuse as ‘restricting or stopping activities and/or social contact with others’.¹⁶⁵⁶ Social abuse often allows other forms of abuse to occur.¹⁶⁵⁷

9.4.12 Examples of behaviours considered to be social abuse include:

- stopping contact with other family or friends;
- withholding mail;
- cutting off activities without explanation and other controlling behaviours;
- disconnecting an older person’s phone without their consent; and

¹⁶⁵¹ See, eg, State of Victoria, Department of Health, ‘Elder Abuse Prevention and Response’ (Web Page, 28 February 2022) <<https://www.health.vic.gov.au/wellbeing-and-participation/elder-abuse-prevention-and-response>>; World Health Organization, *The Toronto Declaration on the Global Prevention of Elder Abuse* (WHO Document, 2002).

¹⁶⁵² See the WHO definition of abuse. See also Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 19 [1.8].

¹⁶⁵³ Josie Dixon et al, ‘Defining Elder Mistreatment: Reflections on the United Kingdom Study of Abuse and Neglect of Older People’ (2010) 30(3) *Ageing and Society* 403, 418.

¹⁶⁵⁴ *AAS Act* s 4. Cf *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8.

¹⁶⁵⁵ Government of South Australia, SA Health, ‘What is Elder Abuse?’ (Web Page) <<https://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/conditions/stop+elder+abuse/what+is+elder+abuse/>>.

¹⁶⁵⁶ Aged Rights Advocacy Service, *Accessing the Aged Rights Advocacy Service to Prevent Elder Abuse* (Report, November 2013) 5.

¹⁶⁵⁷ Relationships Australia, ‘What is Elder Abuse’ (Web Page, 19 June 2018) <<https://relationships.org.au/document/what-is-elder-abuse/>>.

- preventing an older person from engaging in religious or cultural practices.¹⁶⁵⁸

9.4.13 While many of the behaviours captured by the term ‘social abuse’ may be considered as forms of psychological and emotional abuse,¹⁶⁵⁹ it is commonly recognised at an interstate and international level as a sixth separate category in addition to the five commonly accepted types of abuse.¹⁶⁶⁰ Additionally, behaviours amounting to social abuse may not necessarily be intentional, unlike psychological abuse,¹⁶⁶¹ but still result in isolation or distress for the adult.

9.4.14 Given social abuse is already recognised as a separate category of abuse by ARAS and SA Health,¹⁶⁶² SALRI is of the view that, for the purposes of clarity and consistency, the *AAS Act* should include an express reference to it. While social abuse and social isolation may be used interchangeably in this context, the former term is to be preferred in any definition of abuse as ‘social isolation’ is also used as a factor that may make a person vulnerable to abuse.¹⁶⁶³

Spiritual and Cultural Abuse

9.4.15 Spiritual abuse, which is also known as religious abuse, refers to situations where a person uses spiritual or religious beliefs in a way to hurt, scare or control another person.¹⁶⁶⁴ It can involve:

- forcing another person to participate in spiritual or religious practices;
- preventing someone from practising their religious or spiritual beliefs;
- shaming or insulting a person because of their religious or spiritual beliefs; and
- using a person’s religious or spiritual beliefs to exploit them.¹⁶⁶⁵

¹⁶⁵⁸ Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *‘I Never Thought It Would Happen To Me’: When Trust is Broken* (Final Report, September 2018) 20; Seniors Rights Victoria, ‘Social Abuse’ (Web Page, 2021) <<https://seniorsrights.org.au/elder-abuse/social-abuse/>>.

¹⁶⁵⁹ See, eg, Tasmanian Government, Department of Communities, *Respect and Protect Older Tasmanians Tasmania’s Elder Abuse Prevention Strategy 2019–2022* (Government Publication, June 2019) 7, 11; New South Wales Government, *Preventing and Responding to Abuse of Older People (Elder Abuse)* (Interagency Policy, June 2020) 11–12.

¹⁶⁶⁰ See, eg, Sarah Donnelly et al, HSE National Safeguarding Office and Trigraph, *Adult Safeguarding Legislation and Policy Rapid Realist Literature Review* (Report, May 2017) 34,7; Tasmanian Government, Department of Communities, *Respect and Protect Older Tasmanians Tasmania’s Elder Abuse Prevention Strategy 2019–2022* (Government Publication, June 2019) 7, 11; State of Victoria, Department of Health ‘Elder Abuse Prevention and Response’, (Web Page, 28 February 2022) <<https://www.health.vic.gov.au/wellbeing-and-participation/elder-abuse-prevention-and-response>>; Government of Western Australia, Department of Communities, *WA Strategy to Respond to the Abuse of Older People (Elder Abuse) 2019–2029* (Government Publication, 18 November 2019) 11.

¹⁶⁶¹ SA Health defines psychological abuse as behaviours ‘designed to intimidate another person and cause fear of violence, isolation, deprivation, or feelings of powerlessness’: Government of South Australia, SA Health, ‘What is Elder Abuse?’ (Web Page) <<https://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/conditions/stop+elder+abuse/what+is+elder+abuse>>.

¹⁶⁶² Ibid; Aged Rights Advocacy Service, *Accessing the Aged Rights Advocacy Service to Prevent Elder Abuse* (Report, November 2013) 5.

¹⁶⁶³ See above Part 8; *AAS Act* s 3.

¹⁶⁶⁴ Tasmanian Government, Department of Communities, *Respect and Protect Older Tasmanians Tasmania’s Elder Abuse Prevention Strategy 2019–2022* (Government Publication, June 2019) 7, 11; 1800Respect, ‘Spiritual Abuse’ (Web Page) <<https://www.1800respect.org.au/violence-and-abuse/spiritual-abuse>>.

¹⁶⁶⁵ Government of Canada, ‘Legal Definitions of Elder Abuse and Neglect’ (Web Page 8 December 2021) 2.3.3 <<https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/elder-aines/def/p23.html?wbdisable=true>>; 1800Respect, ‘Spiritual Abuse’ (Web Page) <<https://www.1800respect.org.au/violence-and-abuse/spiritual-abuse>>.

9.4.16 Spiritual abuse can be considered as a form of social abuse or emotional/psychological abuse.¹⁶⁶⁶ That said, spiritual abuse has been recognised as a separate type of abuse by some parties during SALRI's consultation (notably its discussion in Port Lincoln) as well as in academic surveys of older people's perceptions of elder abuse and policy documents outside of South Australia.¹⁶⁶⁷ There is an argument that, in the interest of consistency and reflecting the experiences of individuals who have experienced abuse, for the express inclusion of spiritual abuse in the *AAS Act*'s definition of abuse. However, this suggestion received far from universal support in SALRI's consultation. There was a view that such 'abuse' is simply too subjective and it is unnecessary and even unhelpful to add it to the definition of abuse in the *AAS Act*. Mount Gambier practitioners, for example, were of this view.

9.4.17 Similarly, while abuse relating to culture can also be considered as a form of social abuse or emotional/psychological abuse,¹⁶⁶⁸ it was often raised during SALRI's consultation as a form of abuse that should be recognised separately under the *AAS Act*. In contrast to spiritual abuse, cultural abuse rarely features as a separate category of abuse in the literature. That said, the recent *National Elder Abuse Prevalence Study* recorded data about abuse relating to language and culture in addition to the five standard categories of abuse.¹⁶⁶⁹ The study measured the frequency that CALD respondents experienced abuse relating to language and culture, which included situations where:

- an older person is talked to in a way which makes them feel not respected due to their culture, race or ethnicity,
- an older person is prevented from engaging in culturally familiar activities or contacting other people from the same cultural background; or
- an older person is denied access to important information in their preferred language.¹⁶⁷⁰

9.4.18 In this instance, the AIFS study found that out of 608 participants who identified as being of CALD background, 4% had experienced abuse relating to language and culture in the previous twelve months before the study.¹⁶⁷¹ Subsequently, the inclusion of cultural abuse under the *AAS Act* could be considered due to recent recognition of its prevalence and the need to reflect the experiences of individuals who have experienced abuse within legislation. However, it should be noted that the literature conceptualising cultural abuse is less developed in comparison to other types of abuse. The

¹⁶⁶⁶ Tasmanian Government, Department of Communities, *Respect and Protect Older Tasmanians Tasmania's Elder Abuse Prevention Strategy 2019–2022* (Government Publication, June 2019) 7, 11; Government of Western Australia, Department of Communities, *WA Strategy to Respond to the Abuse of Older People (Elder Abuse) 2019–2029* (Government Publication, 18 November 2019) 11.

¹⁶⁶⁷ See, eg, Jenny Ploeg, Lynne Lohfeld and Christine Walsh, 'What Is "Elder Abuse"? Voices From the Margin: The Views of Underrepresented Canadian Older Adults' (2013) 25(5) *Journal of Elder Abuse and Neglect* 396, 415; Tasmanian Government, Department of Communities, *Respect and Protect Older Tasmanians Tasmania's Elder Abuse Prevention Strategy 2019–2022* (Government Publication, June 2019) 7, 11; Government of Canada, 'Legal Definitions of Elder Abuse and Neglect' (Web Page, 8 December 2021) 2.3.3 <<https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/elder-aines/def/p23.html?vbdisable=true>>.

¹⁶⁶⁸ Government of Western Australia, Department of Communities, *WA Strategy to Respond to the Abuse of Older People (Elder Abuse) 2019–2029* (Government Publication, 18 November 2019) 11.

¹⁶⁶⁹ Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 49–51.

¹⁶⁷⁰ Ibid 50.

¹⁶⁷¹ Ibid 49.

suggestion of adding cultural abuse as an explicit factor also received far from universal support in SALRI's consultation. There was a view such 'abuse' is too subjective to define and it is unnecessary and even unhelpful to add it to the *AAS Act*.

Self-Neglect

9.4.19 Self-neglect is often expressly excluded from definitions of abuse in Australian policies and strategies aimed at responding to elder abuse.¹⁶⁷² This position contrasts with the approach taken under international adult safeguarding agencies such as Canada and the USA.¹⁶⁷³

9.4.20 The concept of self-neglect is highly contested.¹⁶⁷⁴ Self-neglect was first conceptualised as a medical syndrome unique to older persons in studies examining the characteristics of individuals who departed from usual standards of cleanliness and hygiene.¹⁶⁷⁵ Subsequent studies dispute whether self-neglect is only applicable to older people and is a distinct medical issue unrelated to other physical and mental impairments.¹⁶⁷⁶ Alternately, other commentators have rejected the medical conceptualisation of self-neglect in favour of a socio-cultural model, which frames self-neglect as a social construct influenced by social, cultural and professional values.¹⁶⁷⁷ While self-neglect has been associated with various factors, such as trauma, depression, functional impairment, diminished social networks and personal values, the causes of self-neglect are unclear and there is no overarching explanatory model.¹⁶⁷⁸ Consequently because of the lack of clarity surrounding the concept of self-neglect, the term can be interpreted in various ways and may refer to a diverse range of circumstances.¹⁶⁷⁹

9.4.21 Debates surrounding the conceptualisation of 'self-neglect' are also apparent when examining definitions outside Australia. In the United States, self-neglect is commonly characterised as a situation where an older person is unable to provide care for themselves in a way which threatens their health or safety.¹⁶⁸⁰ Behaviours of self-neglect are said to include situations where an older person fails to provide themselves with adequate food, water, clothing, shelter, personal hygiene or

¹⁶⁷² See, eg, New South Wales Government, *Preventing and Responding to Abuse of Older People (Elder Abuse)* (Interagency Policy, June 2020) 11; Tasmanian Government, Department of Communities, *Respect and Protect Older Tasmanians Tasmania's Elder Abuse Prevention Strategy 2019–2022* (Government Publication, June 2019) 10.

¹⁶⁷³ Sarah Donnelly et al, HSE National Safeguarding Office and Trigraph, *Adult Safeguarding Legislation and Policy Rapid Realist Literature Review* (Report, May 2017) 60–2; Suzy Braye, David Orr and Michael Preston-Shoot, 'Conceptualising and Responding to Self-Neglect: The Challenges for Adult Safeguarding' (2011) 13(4) *The Journal of Adult Protection* 182, 182; Shannon McDermott, 'The Devil is in the Details: Self-Neglect in Australia' (2008) 20(3) *Journal of Elder Abuse & Neglect* 231, 231–2.

¹⁶⁷⁴ Shannon McDermott, 'The Devil is in the Details: Self-Neglect in Australia' (2008) 20(3) *Journal of Elder Abuse and Neglect* 231, 232.

¹⁶⁷⁵ Ibid.

¹⁶⁷⁶ Ibid 233–4; Suzy Braye, David Orr and Michael Preston-Shoot, 'Conceptualising and Responding to Self-Neglect: The Challenges for Adult Safeguarding' (2011) 13(4) *Journal of Adult Protection* 182; 184.

¹⁶⁷⁷ Suzy Braye, David Orr and Michael Preston-Shoot, 'Conceptualising and Responding to Self-Neglect: The Challenges for Adult Safeguarding' (2011) 13(4) *Journal of Adult Protection* 182, 183–4.

¹⁶⁷⁸ Ibid 184.

¹⁶⁷⁹ Brian Payne and Randy Gainey, 'Differentiating Self-Neglect as a Type of Elder Mistreatment: How Do These Cases Compare to Traditional Types of Elder Mistreatment' (2008) 17(1) *Journal of Elder Abuse & Neglect* 21, 32–3; Mary Rose Day, Patricia Leahy-Warren and Geraldine McCarthy, 'Perceptions and Views of Self-Neglect: A Client-Centered Perspective' (2013) 25(1) *Journal of Elder Abuse & Neglect* 76, 88–9.

¹⁶⁸⁰ US Department of Health and Human Services, National Centre on Elder Abuse, 'Types of Abuse' (Web Page) <<https://ncea.acl.gov/Suspect-Abuse/Abuse-Types.aspx>>.

medication.¹⁶⁸¹ However, the US definition excludes situations where an older person is mentally competent and voluntarily engages in such behaviours as a matter of personal choice.¹⁶⁸² By comparison, McDermott found that, in the Australian context, ‘self-neglect’ is interpreted as only referring to situations involving a lack of personal hygiene or self-care, whereas the neglect of one’s environment constitutes as squalor and is treated as a distinct issue.¹⁶⁸³ Likewise, the inability to throw out items (hoarding) and the accumulation of certain objects (collecting) are considered as issues distinct from the concept of self-neglect.¹⁶⁸⁴

9.4.22 Outside of, but in many ways connected to, these conceptual debates are the competing views as to whether self-neglect is a form of abuse to which adult safeguarding agencies should respond. In the literature, self-neglect is commonly considered to be distinct from other forms of elder or other abuse. McDermott for example, does not classify self-neglect as a form of abuse as, unlike other recognised categories, it does not meet the essential requirement of occurring in a ‘relationship of trust’.¹⁶⁸⁵ Payne and Gainey raise that individuals who self-neglect often have fewer vulnerabilities compared to victims of elder abuse and neglect.¹⁶⁸⁶ Subsequently, individuals who self-neglect are more likely to refuse support from adult safeguarding agencies and arguably require a different approach to prevention and response from that of elder abuse victims.¹⁶⁸⁷

9.4.23 An argument raised in favour of safeguarding agencies providing a response in cases of self-neglect is that it could be connected to other forms of abuse.¹⁶⁸⁸ This is because the line between self-neglect and neglect by others may be unclear and self-neglect can expose individuals to people to other forms of abuse or may manifest as a result of abuse.¹⁶⁸⁹

9.4.24 There are different views about how to best respond to cases of self-neglect and the efficacy of responses.¹⁶⁹⁰ For example, it is debated whether safeguarding responses are only appropriate in situations where a self-neglecting person does not have capacity.¹⁶⁹¹

9.4.25 One academic study also expressed concerns about including self-neglect within the safeguarding remit because this would further extend the scope of practitioners work and potentially make it unsustainable.¹⁶⁹²

¹⁶⁸¹ Ibid.

¹⁶⁸² Ibid.

¹⁶⁸³ Shannon McDermott, ‘The Devil is in the Details: Self-Neglect in Australia’ (2008) 20(3) *Journal of Elder Abuse and Neglect* 231, 238.

¹⁶⁸⁴ Ibid.

¹⁶⁸⁵ Ibid 233.

¹⁶⁸⁶ Brian Payne and Randy Gainey, ‘Differentiating Self-Neglect as a Type of Elder Mistreatment: How Do These Cases Compare to Traditional Types of Elder Mistreatment’ (2008) 17(1) *Journal of Elder Abuse and Neglect* 21, 33.

¹⁶⁸⁷ Ibid.

¹⁶⁸⁸ Marie Therese Connolly, ‘Elder Self-Neglect and the Justice System: An Essay from an Interdisciplinary Perspective’ (2008) 56(s2) *Journal of the American Geriatrics Society* s244, s245.

¹⁶⁸⁹ Ibid.

¹⁶⁹⁰ Suzy Braye, David Orr and Michael Preston-Shoot, ‘Conceptualising and Responding to Self-Neglect: The Challenges for Adult Safeguarding’ (2011) 13(4) *Journal of Adult Protection* 182, 188–90.

¹⁶⁹¹ Ibid 187.

¹⁶⁹² Ibid.

Should There be an Additional Requirement that Abuse Must Occur Within a Relationship of Trust?

9.4.26 Although definitions of abuse may vary, the premise of trust is generally included as a key component.¹⁶⁹³ In contrast, the *AAS Act*, which only lists relevant acts and omissions, does not contain a requirement of a trust relationship in its definition of abuse.¹⁶⁹⁴ A prominent topic in SALRI's consultation and survey responses was whether the definition of abuse in the *AAS Act* should be qualified by a relationship of trust, drawing on the influential WHO definition. SALRI has considered the significance of the notion of trust and linked factors such as a power imbalance¹⁶⁹⁵ and whether the definition of abuse under the *AAS Act* should be amended to incorporate such a requirement.

Rationale

9.4.27 The vital component of trust is generally used in definitions in order to distinguish elder abuse from criminal acts committed by strangers against older people.¹⁶⁹⁶ This approach is supported by commentators on the grounds that the dynamics in elder abuse cases are different from that of criminal acts committed by strangers against older people.¹⁶⁹⁷ For example, a report produced by the ACT Legislative Assembly on elder abuse stated that

... all wrongdoings against an older people are not necessarily considered to be elder abuse ...

Elder abuse does not generally include action carried out by strangers such as bag-snatching, home invasions, confidence tricks targeting older people or street assault on older people.

The issue of trust is important in a discussion of elder abuse. Research shows that elder abuse is most commonly found in relationships where one person is dependent on another. Dependency is often the result of frailty, illness and disability. An older person may be dependent upon a spouse, a child, grandchild or sibling or in the care of an institution of some kind. Where a person is to a greater or lesser extent dependent upon another, the duty of care is amplified as the dependent person's capacity for self-determination may be limited to some degree and they may require a great deal of assistance in managing their affairs, whether financial, emotional or physical.

¹⁶⁹³ See, eg, Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 17–19, 20, 32; Thomas Goergen and Marie Beaulieu, 'Critical Concepts in Elder Abuse Research' (2013) 25(8) *International Psychogeriatrics* 1217, 1218; John Chesterman, 'Taking Control: Putting Older People at the Centre of Elder Abuse Response Strategies' (2016) 69(1) *Australian Social Work* 115, 115.

¹⁶⁹⁴ While trust relationships are mentioned in two subsections (ss 4(1)(d)-(e)), these subsections are treated as specific types of abuse. Apart from this there are no other references to trust relationships in the definition of abuse under section 4 the *AAS Act*.

Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 17–19; 20, 32.

¹⁶⁹⁶ Thomas Goergen and Marie Beaulieu, 'Critical Concepts in Elder Abuse Research' (2013) 25(8) *International Psychogeriatrics* 1217, 1225; Shannon McDermott, 'The Devil is in the Details: Self-Neglect in Australia' (2008) 20(3) *Journal of Elder Abuse and Neglect* 231, 233.

¹⁶⁹⁷ See, eg, Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 392; Standing Committee on Health and Community Care, Legislative Assembly for the Australian Capital Territory, 'Elder Abuse in the ACT' (Report No 11, August 2001) 12.

The issue of elder abuse, therefore, primarily involves a breach of a trust which may exist between an older person and their carer, family member or friend. It is the issue of trust that distinguishes elder abuse from abuse generally.¹⁶⁹⁸

9.4.28 The ALRC similarly observed that the relationship dynamics in cases of elder abuse differ from ordinary crimes committed against older people by strangers:

Elder abuse commonly refers to abuse by those in a relationship of trust. Should an adult safeguarding agency be focused on abuse by trusted people, or should it also investigate abuse by strangers? While strangers can cause very serious harm, the ALRC considers that this type of abuse calls for a different response, often a criminal justice response, and that this should not be part of an adult safeguarding agency's role. Harm caused even intentionally by strangers does not have some of the features that make it more difficult for people to stop, or recover from, 'intimate abuse'. There is not the additional pain that comes when a loved one or a trusted carer breaks that trust. The 'harm in an abusive intimate relationship goes particularly deep'. It is also less likely to come with the added complication, felt by some victims of abuse, of not wanting the abuser to be punished or suffer any other consequences. In fact, in many cases of elder abuse, an older person may wish to preserve their relationship with the abusive person. The ALRC therefore recommends that adult safeguarding laws focus on abuse by people in a relationship of trust with the at-risk adult. This would include family members, including adult children and intimate partners, and carers, including paid carers.¹⁶⁹⁹

9.4.29 SALRI finds this reasoning compelling. Following on from this, different responses are appropriate in these different situations — abuse requires an adult safeguarding response whereas crimes are more likely to require a police and criminal justice response.¹⁷⁰⁰ A focus on a betrayal of trust and a requirement of an expectation of trust are also more consistent with research exploring the views of older people on the psychological dimensions of abuse compared to those which do not.¹⁷⁰¹

Issues with the Requirement

9.4.30 Other commentators have expressed concerns about qualifying the definition of abuse to include a 'trust relationship' as it may impact whether a safeguarding response can be provided.¹⁷⁰² One of the main issues with this approach is that trust as a concept is unclear and subsequently often ill-defined in research and policy contexts.¹⁷⁰³ Trust, according to Riegelsberger, is described as 'the

¹⁶⁹⁸ Standing Committee on Health and Community Care, Legislative Assembly for the Australian Capital Territory, *Elder Abuse in the ACT* (Report No 11, August 2001) 11.

¹⁶⁹⁹ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 392 [14.76]–[14.78].

¹⁷⁰⁰ Ibid 392 [14.76]. The example often presented in consultation was that an assault on an older person by a stranger on a tram should be dealt with by the police. The ASU was not designed to address such reports and realistically there is little it can do in such a situation.

¹⁷⁰¹ Janet Anand et al, *A Review of the Adult Safeguarding Framework in Northern Ireland, the UK, Ireland and Internationally* (Report, 30 January 2014) 13, 29.

¹⁷⁰² See, eg, Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' (2014) 36(1) *Sydney Law Review* 99; Michael Mandelstam, *Safeguarding Vulnerable Adults and the Law* (Jessica Kingsley Publishers, 2009) 31–2; Rae Kaspiew et al, Australian Institute of Family Studies, *Elder Abuse National Research: Strengthening the Evidence Base* (Research Definition Background Paper, 2019) 33.

¹⁷⁰³ Josie Dixon et al, 'Defining the "Perpetrator": Abuse, Neglect and Dignity in Care' (2013) 15(1) *The Journal of Adult Protection* 5, 8; Josie Dixon et al, 'Defining Elder Mistreatment: Reflections on the United Kingdom Study of Abuse and Neglect of Older People' (2010) 30(3) *Ageing and Society* 403, 414.

willingness to be vulnerable based on positive expectations about the actions of others'.¹⁷⁰⁴ Trust is linked to vulnerability and dependency.¹⁷⁰⁵ However, while trust is present in people's main relationships in life, it is fluid, rarely given unconditionally and may change depending on circumstances.¹⁷⁰⁶

9.4.31 Subsequently, one of the issues with defining elder abuse based on relationships involving an 'expectation of trust' is that there may be a variety of different interpretations as to what constitutes such a relationship.¹⁷⁰⁷ For example, in surveying perceptions of elder abuse in the UK, Dixon et al found that assumptions about certain relationships involving an 'expectation of trust' did not always reflect the experiences of older people.¹⁷⁰⁸ In contrast to common descriptions of elder abuse which focus on behaviours occurring in the relationship categories of family, friends and carers, the level of trust that Dixon et al's interviewees displayed towards individuals in each of these respective categories varied.¹⁷⁰⁹ Further, while older people may not necessarily trust family, close friends or carers as assumed, they may place a considerable degree of trust in strangers.¹⁷¹⁰ As such, Goergen and Beaulieu argue that, if trust is considered as a key element of elder abuse, crimes such as scams and frauds committed by strangers which involve creating and abusing the trust of older people could also be considered abuse.¹⁷¹¹ That being said, Wallace and Bonnie, while recognising that the views of older people should be taken into account in determining whether a relationship of trust exists for research purposes, argue that in many instances it may be necessary for these views to be superseded by social conventions or legal duties.¹⁷¹²

9.4.32 Another issue raised with defining abuse based on the notion of trust is that it may not adequately capture all of the situations which require an adult safeguarding response. Historically in Australia, for example, state based organisations largely did not respond to the abuse of older people perpetrated by paid carers and legal, health and finance professionals because such individuals are considered as having a non-trust relationship with older people.¹⁷¹³ Moreover, there are concerns that abuse in situations where there is no personal relationship will be unjustly excluded in formulations of

¹⁷⁰⁴ Jens Riegelsberger, 'Trust in Mediated Interactions' (PhD Dissertation, University of London, 2005) 30.

¹⁷⁰⁵ Thomas Goergen and Marie Beaulieu, 'Critical Concepts in Elder Abuse Research' (2013) 25(8) *International Psychogeriatrics* 1217, 1224.

¹⁷⁰⁶ Josie Dixon et al, 'Defining Elder Mistreatment: Reflections on the United Kingdom Study of Abuse and Neglect of Older People' (2010) 30(3) *Ageing and Society* 403, 413–4; Thomas Goergen and Marie Beaulieu, 'Critical Concepts in Elder Abuse Research' (2013) 25(8) *International Psychogeriatrics* 1217, 1224–5.

¹⁷⁰⁷ UnitingCare, *Elder Abuse Prevention Unit Year in Review 2019–20* (Annual Report, 2020) 4; Rae Kaspiew et al, Australian Institute of Family Studies, *Elder Abuse National Research: Strengthening the Evidence Base* (Research Definition Background Paper, 2019) 33.

¹⁷⁰⁸ Josie Dixon et al, 'Defining Elder Mistreatment: Reflections on the United Kingdom Study of Abuse and Neglect of Older People' (2010) 30(3) *Ageing and Society* 403, 410–3.

¹⁷⁰⁹ Ibid.

¹⁷¹⁰ Ibid 410.

¹⁷¹¹ Thomas Goergen and Marie Beaulieu, 'Critical Concepts in Elder Abuse Research' (2013) 25(8) *International Psychogeriatrics* 1217, 1225. See also Rae Kaspiew et al, Australian Institute of Family Studies, *Elder Abuse National Research: Strengthening the Evidence Base* (Research Definition Background Paper, 2019) 13 Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017) 48–51.

¹⁷¹² Robert Wallace and Richard Bonnie, *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Ageing America* (National Academies Press, 2003) 52.

¹⁷¹³ Barbara Blundell and Mike Clare, 'Designing Australian Responses to Elder Abuse: Issues and Challenges' in Mala Kapur Shankardass (ed), *International Handbook of Elder Abuse and Mistreatment* (Springer Singapore, 2020) 539, 542.

abuse based on trust.¹⁷¹⁴ The 2021 AIFS report noted that situations of neglect where no one is available to help do not accord with definitions of abuse based on a relationship of trust as there is no clear actor involved.¹⁷¹⁵

Alternate Approaches to Defining a Relationship of Trust

9.4.33 Due to the abstract nature of trust and concerns that an ‘expectation of trust’ does not cover all forms of abusive behaviour which require an adult safeguarding response, other terms have also been used to describe the common dynamics of elder abuse.

9.4.34 First, to capture the abuse of paid carers and other relevant professionals, definitions may refer to individuals in a ‘position of trust’. The phrase ‘position of trust’ aims to capture anyone who owes a duty of care towards someone else.¹⁷¹⁶ Paid carers and other relevant professionals fit within this concept as they would generally be considered as having a duty of care towards the older person (or a person with disability) they are assisting in their professional capacity.¹⁷¹⁷

9.4.35 The term ‘power imbalance’ has also been used to describe elder abuse and capture abusive circumstances that fall outside of trust relationships.¹⁷¹⁸ Kaspiew et al’s working definition of ‘abuse’, is a notable example of where this language of ‘power imbalance’ is used in addition to the language of ‘expectation of trust’.¹⁷¹⁹ Here abuse is defined as:

a single or repeated act or failure to act, including threats, that results in harm or distress to an older person. These occur where there is an expectation of trust and/or where there is a power imbalance between the party responsible and the older person.¹⁷²⁰

9.4.36 Kaspiew et al included the term ‘power imbalance’ in their definition of because it was frequently raised as a relevant concept in professional stakeholder workshops, focus groups and consultations.¹⁷²¹ The term had a utility beyond the premise of trust to accurately convey the nature of some forms of elder abuse.¹⁷²² The notion of a power imbalance was found to be applicable to a range

¹⁷¹⁴ Michael Mandelstam, *Safeguarding Vulnerable Adults and the Law* (Jessica Kingsley Publishers, 2009) 31–2.

¹⁷¹⁵ Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 165.

¹⁷¹⁶ Josie Dixon et al, ‘Defining Elder Mistreatment: Reflections on the United Kingdom Study of Abuse and Neglect of Older People’ (2010) 30(3) *Ageing and Society* 403, 412.

¹⁷¹⁷ Barbara Blundell and Mike Clare, ‘Designing Australian Responses to Elder Abuse: Issues and Challenges’ in Mala Kapur Shankardass (ed), *International Handbook of Elder Abuse and Mistreatment* (Springer Singapore, 2020) 539, 542.

¹⁷¹⁸ Thomas Goergen and Marie Beaulieu, ‘Critical Concepts in Elder Abuse Research’ (2013) 25(8) *International Psychogeriatrics* 1217, 1225; Rae Kaspiew et al, Australian Institute of Family Studies, *Elder Abuse National Research: Strengthening the Evidence Base* (Research Definition Background Paper, 2019) 16. See also The Public Advocate and Queensland Law Society, *Elder Abuse* (Joint Issues Paper, February 2022) 15 which adopted the Australian Institute of Family Studies’ working definition of abuse.

¹⁷¹⁹ Rae Kaspiew et al, Australian Institute of Family Studies, *Elder Abuse National Research: Strengthening the Evidence Base* (Research Definition Background Paper, 2019) 16. See also at: 4, 5, 9, 11, 14–15.

¹⁷²⁰ Ibid.

¹⁷²¹ Ibid 14.

¹⁷²² Ibid. This point also emerged in SALRI’s consultation. In discussion in Clare, Port Pirie, Berri and Mount Gambier and elsewhere it was observed that a relationship of trust may fail to cover some forms of the abuse and exploitation of older persons and persons with disability that should fall within the definition of abuse in the *AAS Act*. The befriending neighbour or paid carer was often raised. The person vulnerable to abuse may not trust such a perpetrator, but there is a power imbalance. See also Legislative Council Select Committee into Elder Abuse,

of circumstances such as vulnerability arising from dependence on care, lack of knowledge about the rights of older people, physical strength and, among individuals from CALD groups with limited English language proficiency, dependency on others for translation.¹⁷²³ The appropriateness of the term was further reinforced by the results in the 2021 *National Elder Abuse Prevalence Study* which found that individuals who experience elder abuse are more likely to report psychological ill-health, physical ill-health, disability and social isolation compared to those who don't.¹⁷²⁴ Additionally, more so than cases of abuse perpetrated by adult children, indicators of vulnerability were commonly identified in cases of abuse from friends.¹⁷²⁵

9.4.37 Power imbalances or dependency on others is also a common factor in the abuse of people with disability.

9.4.38 Some commentators have alternatively endorsed a human rights approach in defining 'abuse'.¹⁷²⁶ Rather than framing abuse in terms of trust relationships and associated dynamics, this approach covers 'any act which denies a person's rights to safety, security or dignity'.¹⁷²⁷ Subsequently by recognising a wide range of harms, incorporating a human rights framework to guide the interpretation of abuse and largely making no requirements in relation to relationships of trust or duty of care, the *AAS Act* currently reflects the human rights approach. The rationale behind this approach is to enable an effective adult safeguarding response that covers both abuse and neglect occurring within familial and personal relationships as well as situations arising due to isolation where there is no clear actor involved.¹⁷²⁸

9.4.39 A common critique of this approach is that it is too broad.¹⁷²⁹ By covering such a broad range of harms experienced by older people or persons with disability as abuse, there is a risk that this approach may unintentionally reinforce ageism.¹⁷³⁰ This is because a broad approach treats the harms that both older people and other adults face differently and thus denies the adult social status of older people, as they may be subject to policy and third-party interventions that other adults would not face.¹⁷³¹ This approach also risks casting the ASU's remit to an impracticably wide extent.

Parliament of Western Australia, *I Never Thought It Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 17 [2.45], 63 [6.35].

¹⁷²³ Rae Kaspiew et al, Australian Institute of Family Studies, *Elder Abuse National Research: Strengthening the Evidence Base* (Research Definition Background Paper, 2019) 16.

¹⁷²⁴ Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 164.

¹⁷²⁵ Ibid.

¹⁷²⁶ See, eg, Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' (2014) 36(1) *Sydney Law Review* 99, 113; Jonathan Herring, 'Elder Abuse: A Human Rights Agenda for the Future' in Israel Doron and Ann Soden (eds) *Beyond Elder Law* (Springer Berlin Heidelberg, 2012) 175, 177.

¹⁷²⁷ Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' (2014) 36(1) *Sydney Law Review* 99, 113.

¹⁷²⁸ Ibid.

¹⁷²⁹ Josie Dixon et al, 'Defining Elder Mistreatment: Reflections on the United Kingdom Study of Abuse and Neglect of Older People' (2010) 30(3) *Ageing and Society* 403, 404.

¹⁷³⁰ Richard Hugman 'The Implications of the Term 'Elder Abuse' for Problem Definition and Response in Health and Social Welfare' (1995) 24(4) *Journal of Social Policy* 493, 502.

¹⁷³¹ Ibid; Josie Dixon et al, 'Defining Elder Mistreatment: Reflections on the United Kingdom Study of Abuse and Neglect of Older People' (2010) 30(3) *Ageing and Society* 403, 415.

9.5 Consultation Data Overview

9.5.1 During SALRI's consultation in Adelaide and regional South Australia with various community groups, government agencies, NGO's and advocacy bodies, health practitioners, and lawyers, there was strong agreement that there needs to be some limitation on the types of abuse that can be reported to and assessed by the ASU. It was widely accepted that the ASU's vital role needs to be practicable. Many consultees suggested that the current definition of abuse is too broad and that a limited definition of abuse should target more serious forms of abuse, especially the common forms of abuse perpetrated against older people and persons with disability.

9.5.2 The primary concern revealed by many parties during consultation was the imminent expansion of the ASU remit to capture all adults who may be vulnerable to abuse (as defined within the *AAS Act*) and the potential for this to severely increase the workload of the ASU and overwhelm the service. It was expressed that limiting the scope was necessary to ensure that the ASU remit was not so broad as to be impracticable. An opposing view was held by some consultees (such as at the Adelaide expert roundtable), including one survey respondent who articulated that leaving a broad definition 'may lead to an increase of referrals for the ASU who could then refer on to the appropriate authority. The benefit would be that the process of reporting would be simplified for the community.'

Common types of abuse

9.5.3 At SALRI's NGO roundtable there was discussion and acceptance by all attendees that the most common form of abuse in practice, regarding both older persons and persons with disability, is that of financial harm. It was noted that this is generally accompanied by psychological abuse or other forms of abuse. Many subsequent discussions with health practitioners and members of the community similarly revealed that the most common type of abuse experienced by both older persons and persons with disability is financial abuse and psychological abuse.

9.5.4 One attendee at the multicultural focus group raised that in her extensive experience working in the aged care space, the most common form of abuse encountered is financial abuse and psychological abuse, and the undermining of basic rights. This attendee stated that children often view their parents as a burden, so 'they sell the home, take their parents' money and leave their parents homeless.'

9.5.5 At the NGO roundtable, the attendees identified the most common forms of financial abuse as follows: 'Financial abuse from family members, often coupled with forms of gaslighting, manipulation and psychological abuse.' It was also noted that where psychological and physical abuse are present, financial abuse is often uncovered. 'Long term gaslighting' where an older person is manipulated to accept that if they are 'elderly' they are 'a burden' and made to 'pay their way'. An adult child might convince their older parent that they should no longer drive (even if they are still capable), convincing them that they don't need their car or house, then ultimately selling these assets for their own gain. Financial abuse from service providers where people are being overcharged was also raised.

9.5.6 It was raised to SALRI during the disability community session that people with disability typically use cash as opposed to card payments and that this could create barriers in monitoring and identifying financial abuse.

9.5.7 The ASU Annual report data shown in Appendix B demonstrates that over the last three years, financial abuse and psychological/emotional abuse are the most prevalent forms of abuse for both older persons and persons with disability. Neglect is also fairly common, especially relating to persons with disability. The ASU Annual report data indicates that older persons appear to experience

financial and emotional/psychological abuse slightly more than people with disability, whereas people with disability tend to experience neglect and physical abuse more than older people.

9.5.8 A survey respondent provided a case study of her step-father being reported for elder abuse for emotionally and financially abusing her mother, sharing that:

She still has no property in her name (having contributed over half) and my stepfather is telling lies about her in the small town they both lived (my mother is in residential care in Adelaide and is distressed, by the lies and mistruths, to the point she had to seek a psychologist for help. Up until working with the psychologist, my mother did not realise she was being abused in the ways she was, as she thought abuse was only physical.

9.5.9 Chemical restraint and sexual abuse were far less common in reports of abuse against older persons and persons with disability, although in 2021-2022 the reports received by the ASU revealed that people with a disability experienced sexual abuse far more than older persons.¹⁷³² The absence of data in the Annual Report during the first two years of ASU operation makes it difficult to determine if sexual abuse has become more prevalent recently, or if it has not been reported or recorded previously. Crucially, information about the types of abuse experienced in a report are unrecorded for 10-13% of reports.

9.5.10 Self-neglect was raised by the disability community and disability advocates as a potential area of abuse.

9.5.11 The ASU explained that the types of abuse dealt with in reports are often relatively minor. Examples include an adult child pressuring their parents to fill up their car with petrol in exchange for providing support to do the shopping, or an adult child not paying rent or helping around the house. In significant contrast with other jurisdictions where there appears to be more reports of financial abuse involving more money, the ASU does not typically receive reports about high level financial abuse.

9.5.12 The ASU and other consultees such as Berri health practitioners told SALRI that reports of instances of ‘abuse’ reported to the ASU often arise from family disputes and family conflicts about who should have the power to make decisions, fights over family assets, or conflict arising from miscommunications and misunderstandings.

Types of Abuse

9.5.13 SALRI also discussed the frequency and severity of abuse that should be captured within the *AAS Act* and whether it should cover one-off incidents or repeated acts of abuse.

9.5.14 At SALRI’s NGO roundtable there was consensus that an important distinction is to be made between one off acts of abuse and ongoing abusive situations, and this view was supported in SALRI’s community roundtable. There was general agreement across SALRI’s consultations that the ASU should not be dealing with reports of one-off incidents as these were perceived as a matter for police rather than the ASU. It was expressed that the ASU should be acting where it can be of the most use, meaning situations where there is a pattern of abuse or potential for a pattern of abuse.

9.5.15 However, there was general recognition across various consultations that the specific nature of the one-off abuse should also be considered on a case-by-case basis. If the act was the sale

¹⁷³² The ASU Report found 9.8% of reports relating to a person with disability involved sexual abuse, compared to 1.5% of reports relating to an older person.

of an older person's property or moving them to a residential care home, or something of a serious nature, this 'one-off' abuse should fall within the ASU remit.

9.5.16 In Berri and during other consultation, it was agreed that the types of abuse within the ASU's remit should account for the slow-build-up of violence where a single act may not amount to abuse, but over time the severity and nature of the abuse can change.

9.5.17 Scams were recognised as a potential form of abuse by a few people, with consultees specifically pointing to online romance scams and cyber abuse that should be included in the *AAS Act*. However, it was also recognised that these forms of abuse would be considered a criminal matter and therefore more suitable for SAPOL than the ASU.

Relationship of Trust

9.5.18 SALRI participated in many discussions about way the definition of abuse could be refined and amended. Though there were differing opinions, most agreed that the overarching purpose of capturing more serious types of abuse commonly perpetrated by family members, carers, powers of attorney, and neighbours should be included in particular. One survey respondent articulated that 'A relationship of trust and duty of care is important to differentiate the "abuse" from someone in a position of trust to someone without this relationship to the vulnerable person.'

9.5.19 The WHO definition of elder abuse was noted as being useful, but attendees queried whether it could be applied to situations involving other adults.

9.5.20 Other ways of articulating the requisite relationship were considered. For example, the requisite relationship needs to cover a scenario where a 'vulnerable adult' developed a friendship with a carer and granted them access to their credit card. There was also strong agreement that neighbours can cause abuse and the definition of abuse should extend to situations where neighbours are perpetrators. One survey respondent identified that abuse can be 'opportunistic' and be perpetrated by a neighbour or someone with a loose connection such as a gardener.

9.5.21 There was a view expressed by many people that abuse may still occur in situations without 'trust' and outside of a relationship of trust. In Berri, consultees expressed that the defined relationship needs to capture a relationship between the perpetrator and abuser, but it may not necessarily be trust. Although it was agreed by most that trust is not a conclusive factor, it was recognised as significant.

9.5.22 Professor Ibrahim, whilst agreeing that the role of the ASU should not extend to all abusive situations, told SALRI that confining the definition to a relationship of trust is problematic: there will be situations where the family member, 'friend', or carer who is carrying out the abuse of either an older person or a person with disability is not actually trusted by the victim. A wider definition was appropriate to cover such situations. A similar view was expressed to SALRI by Clare and Port Pirie lawyers.

9.5.23 At the NGO roundtable it was expressed that a relationship of trust on its own is insufficient and that 'proximity' would be most relevant. Proximity would include a relationship where there is potential for a pattern of ongoing abuse to occur and there is sufficient proximity to the victim.

9.5.24 A lawyer at the Adelaide legal focus group provided an example of a situation where groups of people hang around shopping malls and observe older persons who might be sitting alone or who frequently visit the shopping mall alone. These groups notice patterns of behaviour in older people and calculate when to approach them. They then befriend the older person and steal money

from them. There was agreement in the legal focus group that this sort of ‘predatory behaviour’ should be included within the requisite relationship under the *AAS Act*.

9.5.25 Groups and practitioners from the disability sector, whilst noting the relative lack of research and that elder abuse differs in various respects, generally observed that the ASU’s role in relation to the abuse and exploitation of persons with disability should be defined according to a situation of trust and/or power imbalance. A wider definition beyond trust was seen as appropriate.

9.5.26 The ASU Annual Report data in Appendix B demonstrates that the alleged perpetrators of abuse for older persons are typically the adult sons and daughters,¹⁷³³ whereas for people with disability it is the parents or service providers. This demonstrates that abuse for older persons and people with disability is typically perpetrated by those known to and trusted by them. However, the data is quite sparse in this area and therefore the most common perpetrators of abuse cannot be analysed with certainty.

9.5.27 At SALRI’s expert roundtable, one attendee suggested adopting the famed torts law *Donoghue v Stevenson* duty of care test as a threshold test for abuse. Other attendees felt this approach is inappropriate and duty of care can be difficult to define, especially for non-lawyers. Some survey respondents criticised the adoption of a duty of care test as inappropriate and too high a standard. This was also viewed as difficult to understand and unduly legalistic.

9.5.28 At the health practitioner roundtable, it was suggested abuse could be defined with the requirement of a ‘close and continuing relationship’ in order to include the situation where neighbours are abusive.

9.5.29 Some views expressed that narrowing the definition would be unhelpful as it would over-define the *AAS Act* and result in gaps where vulnerable people can fall through. The importance of a human rights framework was reiterated and one attendee felt the definition of abuse was deliberately left open in the *AAS Act* to safeguard everyone and it should be kept this way. There were reservations about the inclusion of a ‘relationship of trust’ within the *AAS Act* as some found this wording difficult to understand for non-lawyers and perceived practical difficulties in proving a relationship was one involving trust.

9.5.30 In particular, a majority of survey respondents preferred the *AAS Act* to remain broad and not specify a requisite relationship between the alleged perpetrator and victim, with some respondents having very strong views on this matter. It was stated by one survey respondent that

strangers can harm just as much as a person known to that person, someone may take someone in short term, just to extract what they can. Some forms of abuse may be better served by police, but the ASU could assist that person who has no advocate to seek the best help.

9.5.31 Another respondent stated that ‘surely, it is the act of abuse that is of concern, not the nature of the relationship that surrounds the act of abuse.’

¹⁷³³ For older persons between 2019–2022 there was an average of 27.6% of cases reported where the perpetrator was the adult son, and an average of 18.7% in which it was the adult daughter. For persons with a disability the reports suggest that in 12.1% of cases the alleged perpetrator will be the mother and 9.3% that it is the father. In the 2021–2022 annual report data 15.1% of reports related to the abuse by a service provider.

9.5.32 However, it was also highlighted that abuse occurring in these kinds of relationships is ‘more devastating and less likely to be identified’. It was also noted that most acts of abuse by a stranger are ‘simply criminal acts’.

9.5.33 Some consultees supported the inclusion of spiritual, religious and cultural abuse. In SALRI’s Port Lincoln roundtables there was general agreement that restriction or forced culture and religion should be included as a factor of abuse. Isolation from culture was viewed as a serious concern especially for Aboriginal groups, and Aboriginal health workers SALRI spoke with coined it as ‘cultural bound syndrome’. Aboriginal health workers advised SALRI that the ‘soul gets sick’ and provided an example of a case where an Aboriginal woman from interstate presented to the GP and was diagnosed with depression and digestive issues. It was uncovered that homesickness was the cause of this and when the Aboriginal woman returned to Country, she was healed.

9.5.34 The inclusion of spiritual, religious, and cultural abuse was also supported elsewhere as it would encourage ASU practitioners to actively turn their mind to specific cultural and religious traditions and to improve their understanding of differing spiritual, religious and cultural norms.

9.5.35 Other consultees held reservations about the inclusion of spiritual, religious and cultural abuse under the *AAS Act*. It was recognised that especially in a multicultural society, one should not impose a particular view on cultural norms or practices and that including this should be ‘treading on dangerous grounds’ as it might lead to potential discrimination. It was also raised that the notion of cultural or spiritual abuse is inherently subjective and difficult, if not impossible, to define.

9.5.36 The difficulties of navigating complex cultural differences were demonstrated in a case example provided of an Aboriginal woman whose nephew would come into her house with his friends and eat her food, rack up her bills, and steal things from her house. It was an expectation that as an older person in the Aboriginal community the woman had an obligation to open her house to the community and family. In instances like this, people who have experienced elder abuse might not realise it is abuse.

9.5.37 SALRI did not reach a consensus on this topic during consultation.

9.6 SALRI’s Observations and Conclusions

9.6.1 Defining abuse within the *AAS Act* is essential as it establishes the kinds of behaviours the ASU is tasked with responding to and dealing with. Defining abuse to reflect the kinds of abuse most commonly experienced by vulnerable adults limits the remit of the ASU to cases in which its expertise is most applicable. It also ensures that cases outside this definition can be referred to and are dealt with by more appropriate agencies. The current definition is noteworthy in that it does not reflect the most commonly cited definition of elder abuse, that offered by the WHO.

9.6.2 SALRI notes that much of the literature in this area is focused on elder abuse, and not persons with disability or vulnerable adults more broadly. To ensure that the ASU is able to adequately respond to abuse, more research is needed on the types and frequency of abuse perpetrated against vulnerable groups such as persons with disability. Despite this, and in the absence of research pointing to the need for another approach, the aspects of elder abuse discussed above should be reflected in the definition of abuse as it pertains to all vulnerable adults. SALRI’s recommendations on this issue reflect this existing academic and law reform literature, which overwhelmingly defines elder abuse in line with the definition offered by the WHO.

9.6.3 SALRI recommends, as it heard in consultation, that the definition of abuse contained in the *AAS Act* should be updated. First, the definition should include a statement that abuse can entail an act or a series of acts. This recognises that abuse can be a one off situation, such as a forcible transfer of property, or ongoing, such as the repeated transfer of small amounts of money. Additionally, this provides that abuse may be made up of a series of actions which, in isolation, would not be abusive, as typified by gaslighting.¹⁷³⁴

9.6.4 Further, the definition should be modified to limit abuse to behaviours which occur in a relationship of trust, dependency or power imbalance. This is an expanded view of the WHO definition, reflecting the criticism that trust alone does not reflect the full range of relationships and situations in which abuse occurs, and which should fall within the ASU's remit. This formulation received wide support in consultation. The addition of dependency and power categories is intended to reflect the frequency with which abuse is perpetrated by carers and other professionals, as well as in the friendly neighbour or 'befriender' scenario.¹⁷³⁵

9.6.5 SALRI further recommends that the legislative definition of abuse include a non-exhaustive list of the types of abuse the ASU is expected to respond to, subject to the above. This should include financial abuse, physical abuse, psychological or emotional abuse, sexual abuse, neglect, and social abuse.¹⁷³⁶ These examples should be drafted to make clear they are independent examples of abuse. The current use of the term 'and' should be avoided in favour of 'or' to emphasise that not all the attributes need to be present for the ASU to take action, rather that the presence of one of these types of abuse is enough. This expansive approach is supported by the more recent literature on elder abuse.¹⁷³⁷

9.6.6 The addition of emerging types of abuse, including spiritual, religious and cultural abuse, was discussed throughout SALRI's consultation. There were opposing views. SALRI does not recommend these be included within the legislative definition at this stage. However, SALRI is of the view, as explored further below in Part 11, that ASU practitioners must be alive to the religious and cultural contexts in which abuse may occur. This issue may be better addressed through training and/or in the Code of Practice.

¹⁷³⁴ See above Part 7.2.

¹⁷³⁵ See also Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 17 [2.45], 63 [6.35].

¹⁷³⁶ These terms should retain the definitions currently used by SA Health: see Government of South Australia, SA Health, 'What is Elder Abuse?' (Web Page) <<https://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/conditions/stop+elder+abuse/what+is+elder+abuse>>.

¹⁷³⁷ See generally Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021).

RECOMMENDATION 32

SALRI recommends that the *Ageing and Adult Safeguarding Act 1995* (SA) should be amended to include the following definition of abuse: ‘Abuse is defined as — an act or series of acts, including lack of appropriate action, occurring within a relationship of trust, dependency or imbalance of power, which causes harm or distress to a vulnerable adult. For the purposes of this definition, this may include, but is not limited to:

- a. Financial abuse; or
- b. Physical abuse; or
- c. Psychological or emotional abuse; or
- d. Sexual abuse; or
- e. Neglect; or
- f. Social abuse.

Part 10 – Civil and Criminal Redress for Abuse

10.1 Current Position in South Australia

10.1.1 The adequacy and effect of the civil remedies under the *AAS Act* and elsewhere to address the abuse of older persons and persons with disability, particularly in relation to financial abuse, was a major issue raised in the course of this reference. The adequacy of the criminal law to respond to this abuse was also raised to SALRI. Indeed, these themes were also raised in SALRI's POA reference.

10.1.2 The *AAS Act* currently provides the Director of the OFAW and authorised officers with a wide range of investigative and other powers.¹⁷³⁸ The Director also has the power to apply for a broad range of orders to the Magistrates Court in relation to a vulnerable adult.¹⁷³⁹ The Director can apply for such an order if they reasonably suspect that a vulnerable adult is at risk of abuse, and are of the opinion that such an order is necessary and appropriate to protect the adult, assess whether they have been or are at risk of being abused, or allow the exercise of other powers or functions under the Act.¹⁷⁴⁰ The broad scope of the Director's powers, as was often noted in consultation, are significant. However, the ASU are yet to invoke these broad powers.

10.1.3 The ASU may not take action following a report of abuse without the consent of the vulnerable adult except in certain circumstances.¹⁷⁴¹ These circumstances include where the vulnerable adult's life or physical safety is at immediate risk, or the risk of abuse relates to a 'serious criminal offence' (which is not defined), or the vulnerable adult has impaired decision-making capacity in respect of their ability to consent to the action being taken.¹⁷⁴²

10.1.4 The Director may also apply in other circumstances with leave of the court.¹⁷⁴³ These actions are heard in the Magistrates Court.¹⁷⁴⁴ However, the *AAS Act* provides that the court is not bound by the rules of evidence and 'must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms'.¹⁷⁴⁵

10.1.5 The *AAS Act* empowers the Magistrates Court to make a broad range of orders:

- (a) an order authorising or requiring an examination or assessment of a specified kind of the vulnerable adult;
- (b) an order requiring a specified person to do a specified thing, or to refrain from doing a specified thing, in respect of the vulnerable adult;
- (c) an order authorising the Adult Safeguarding Unit, the Director or an authorised officer to take specified action where the vulnerable adult has refused to consent to the taking of that action;

¹⁷³⁸ See above Part 5.1.

¹⁷³⁹ *AAS Act* part 4 div 6.

¹⁷⁴⁰ *Ibid* s 31.

¹⁷⁴¹ *Ibid* s 24.

¹⁷⁴² *Ibid* s 24(4).

¹⁷⁴³ *Ibid* s 31(b).

¹⁷⁴⁴ *Ibid* s 2.

¹⁷⁴⁵ *Ibid* s 34.

- (d) such other orders as may be necessary or appropriate to enable the functions conferred on the Adult Safeguarding Unit under this Act to be performed in respect of the vulnerable adult;
- (e) such consequential or ancillary orders as the Court thinks fit.¹⁷⁴⁶

10.1.6 The Director and the vulnerable adult are automatically party to a hearing under this Part; with the Court having the discretion to join other persons.¹⁷⁴⁷ The vulnerable adult to whom the proceedings relate must be given the opportunity to have their opinion on the case heard, unless the Court is satisfied that they lack the capacity to do so.¹⁷⁴⁸ The Court may also allow other persons to be heard, even if they are not party to the case, including family members and carers of the vulnerable person.¹⁷⁴⁹

10.1.7 The contravention of an order of the Magistrates Court under this Division of the *AAS Act* is an offence with a maximum penalty of \$10,000. However, the *AAS Act* makes it clear that the vulnerable person themselves cannot be guilty of aiding, abetting, counselling or procuring the commission of a contravention.¹⁷⁵⁰

10.2 Issues

10.2.1 The *AAS Act* currently grants these powers to the Magistrates Court, unlike the powers in similar areas of the law, most notably guardianship and administration, which are provided to SACAT.¹⁷⁵¹ In its previous POA Report, SALRI heard from many parties as to the inadequacy of existing civil remedies to respond to the misuse of an EPA or other financial abuse. There was strong support for giving SACAT powers to deal with alleged breaches of an EPA (including compensation for misuse and interim and incidental orders), noting that this would make any remedy more easily accessible to the community and especially to the victim of the abuse.¹⁷⁵² It was widely considered that the available redress for financial abuse of people with a disability and older people was broadly inadequate.¹⁷⁵³ It is relevant that, concerning EPAs, most other Australian jurisdictions currently have such remedies available through their Tribunals.¹⁷⁵⁴

10.2.2 It was notable that there was considerable support in SALRI's wide consultation on its POA Report for SACAT to be given the role and powers to deal with alleged breaches of an EPA (including compensation for misuse and interim and incidental orders).¹⁷⁵⁵

¹⁷⁴⁶ Ibid s 33.

¹⁷⁴⁷ Ibid s 32.

¹⁷⁴⁸ Ibid s 35.

¹⁷⁴⁹ Ibid s 36.

¹⁷⁵⁰ Ibid s 37.

¹⁷⁵¹ *Guardianship and Administration Act 1993* (SA) part 4.

¹⁷⁵² Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) Recommendation 81.

¹⁷⁵³ Ibid 303 [7.4.56].

¹⁷⁵⁴ Ibid 291–4 [7.4.4]–[7.4.16].

¹⁷⁵⁵ Ibid 300–5 [7.4.25]–[7.4.50]. See also Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 177, Recommendation 5–2; 178–81 [5.82]–[5.98]; Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 83 Recommendation 21; The OPA, for example, supported a new low

10.2.3 SALRI explained its reasoning:

The present cost and inaccessibility of civil remedies through the Supreme Court was a particular and consistent theme in SALRI's consultation (the apparent assumption amongst most legal practitioners was only the Supreme Court has the jurisdiction to deal with the misuse of an EPA). The need for an effective, informal, flexible and low-cost civil avenue was emphasised. It is notable that there has been virtually unanimous support in SALRI's [EPA] consultation for a civil remedy to deal with the misuse of an EPA and to allow SACAT to deal with such claims and disputes as to the operation of an EPA. SALRI sees strong benefit in SACAT acquiring this role. The flexible and informal and no costs processes of SALRI¹⁷⁵⁶ (including that it is not bound by the rules of evidence)¹⁷⁵⁷ support SACAT's jurisdiction in this area. The fact that SACAT already has the specialised expertise and handles the closely linked areas of ACD disputes and guardianship and administration (as widely raised in SALRI's consultation) further supports the case to extend SACAT's jurisdiction to claims or disputes involving EPAs. As the Hon David Bleby QC and others pointed out to SALRI, it is logical and consistent to provide SACAT with this jurisdiction.¹⁷⁵⁸

10.2.4 It is interesting to note that, despite its recommendations and reasoning, the Powers of Attorney Bill would have retained the power to make orders relating to a POA for the Supreme Court.¹⁷⁵⁹

10.2.5 In its POA Report, SALRI supported this standing being provided to individuals such as the parties to the EPA, a close relative or spouse or domestic partner of the principal, or any other person considered by SACAT to have a relevant and proper interest.¹⁷⁶⁰ In the context of the *AAS Act*, similar reasoning applies. This could include family members, close friends or carers of the vulnerable adult or an agency or NGO like ARAS. The typical party SALRI heard who may seek to bring an action to SACAT under the *AAS Act* would be a family member, often the one who discovers the abuse being carried out. Widening the class of persons able to apply for such orders under the *AAS Act* would increase their accessibility and the likelihood of action being taken to prevent or

cost flexible civil remedy in light of the inadequacy of existing avenues: 'In the OPA's view, the current process of applying to the Supreme Court for remedies (revocation, amendments, restitution) following alleged abuse or misuse of a POA is prohibitive on the basis of cost and time. The OPA understands that the SALRI is considering whether there is scope to expand the jurisdiction of the SACAT to deal with abuses of POAs, given that the SACAT has powers in relation to ACDs. The SACAT would be vested with powers for restitution and revocation of POAs. The OPA is certainly in favour of exploring more cost-effective and accessible means for dealing with breaches of POAs and can see the attraction of utilising existing mechanisms and infrastructure to do so': Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 302 [7.4.37].

¹⁷⁵⁶ *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 8. It is also significant that SACAT 'is to be accessible by being easy to find and easy to access, and to be responsive to parties, especially people with special needs': at s 8(1)(b).

¹⁷⁵⁷ *Ibid* s 39.

¹⁷⁵⁸ Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 305 [7.4.53].

¹⁷⁵⁹ Powers of Attorney Bill 2021 (SA) ss 3 (definition of 'Court'), 43.

¹⁷⁶⁰ Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) Recommendation 90.

address (including seeking compensation or restitution) abuse against a vulnerable adult. SALRI accepts that SACAT would need the power to preclude vexatious or frivolous claims.¹⁷⁶¹

Constitutional Jurisdiction of SACAT

10.2.6 One potential impediment to SACAT exercising power in cases under the *AAS Act* is the scope of its jurisdiction under the Commonwealth *Constitution*. The *Constitution* reserves jurisdiction in certain matters¹⁷⁶² to ‘Courts’, to be defined by the Commonwealth Parliament.¹⁷⁶³ SACAT, as it is presently constituted, does not meet the definition of a ‘court’.¹⁷⁶⁴ The High Court’s decision in *Burns v Corbett*¹⁷⁶⁵ confirmed that State administrative tribunals, unless properly constituted as a Court, cannot exercise powers in cases involving this ‘federal diversity jurisdiction’.

10.2.7 Relevantly, the type of cases reserved for courts exercising federal jurisdiction includes cases in which one party resides in another State. In its POA Report, SALRI noted that it is routine for South Australians to have family residing interstate, particularly in border communities such as those in the South-East, but also in the community more broadly.¹⁷⁶⁶ This issue may well arise in cases under the *AAS Act*, such as where a person financially abusing a vulnerable adult resides in another State.

10.2.8 Additionally, the recent decision in *Citta Hobart*¹⁷⁶⁷ expands the conception of cases in which federal judicial power arises to include those in which constitutional issues such as the s 109 inconsistency provision arise. That case concerned an action under Tasmanian anti-discrimination legislation in which the defendant asserted that the Commonwealth legislation had ‘covered the field’ making the State Act invalid.

10.2.9 The *Safeguarding Task Force* Report noted that

The South Australian Government has received advice from the Crown Solicitor on this issue. Having considered this advice, the state’s view is that the NDIS Act has ‘covered the field’ in the area of quality and safeguards and that constitutional issues would arise if the state were to legislate to provide those powers to a CVS [Community Visitor Scheme] in relation to NDIS funded services.¹⁷⁶⁸

10.2.10 This raises the significant possibility of a s 109 argument being raised in a SACAT hearing brought by the ASU, particularly if the matter involved alleged abuse by someone providing services

¹⁷⁶¹ There was near universal support in both SALRI’s EPA and present consultation to extend SACAT’s jurisdiction, but several lawyers cautioned that easier access to a civil remedy through SACAT risked escalating family feuds.

¹⁷⁶² *Australian Constitution* ss 75 & 76.

¹⁷⁶³ *Ibid* s 77.

¹⁷⁶⁴ For example, not all SACAT members hold a judicial appointment and many are subject to limited terms: see eg *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 19(6).

¹⁷⁶⁵ 265 CLR 304.

¹⁷⁶⁶ Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 341 [7.5.1].

¹⁷⁶⁷ *Citta Hobart Pty Ltd v Canthorn* [2022] HCA 16 (*‘Citta Hobart’*).

¹⁷⁶⁸ Kelly Vincent and David Caudrey, *Safeguarding Task Force* (Report, 31 July 2020) 18. This argument also poses potential complications as to the constitutionality of the *AAS Act* either in whole or at least relating to NDIS and federally funded aged care providers. This question is well outside SALRI’s terms of reference and would need to be tested in the High Court to be conclusively settled.

under the NDIS. In these cases, an action under the *AAS Act* could be considered an exercise of federal judicial power in similar circumstances.

10.2.11 This issue only arises if the power in question is considered to be judicial rather than administrative in nature. SACAT can only exercise judicial power so long as it does not fall within one of the categories of federal judicial power set out in ss 75 and 76 of the *Constitution*.¹⁷⁶⁹

10.2.12 Determining whether a power is judicial or administrative in nature is a difficult task¹⁷⁷⁰ and depends on the nature of the powers exercised.¹⁷⁷¹ Unlike the EPA context, which deals with an alleged breach of an existing legal obligation,¹⁷⁷² the current powers exercisable under the *AAS Act* are more akin to administrative powers. They do not purport to settle an existing legal dispute between parties. The orders available under s 33 allow the Magistrates Court (and therefore SACAT, should these powers be transferred) to compel something to happen or cease happening. This is a typical administrative function.

10.2.13 To address some of the constitutional issues, South Australia with the *Statutes Amendment (SACAT Federal Diversity Jurisdiction) Act 2018* (SA) amended the *SACAT Act* to allow matters involving federal diversity jurisdiction¹⁷⁷³ to be transferred to the Magistrates Court (which is a Court for the purposes of the Constitution).¹⁷⁷⁴ Proceedings are then to take place in the same way and with the same jurisdiction, powers and function as they would have proceeded if heard by SACAT.¹⁷⁷⁵ The Act also provides that the fee payable with respect to the application is that which would have been payable to SACAT and no additional fees are payable unless a ‘substantial alteration in the nature of the claims in the proceeding’ is made.¹⁷⁷⁶ In practice, these matters are heard by a SACAT member who also holds appointment as a Magistrate, meaning there is no need for physical transfer of the matter.

10.2.14 This pragmatic transfer mechanism means that should the powers given to SACAT amount to judicial power, cases involving a party who lives interstate, or other forms of federal jurisdiction, will still be able to be dealt with should the powers in the *AAS Act* be given to SACAT. However, two points should be noted. First, the *SACAT Act* defines ‘federal diversity jurisdiction’ as ‘jurisdiction of the kind referred to in section 75(iii) or (iv) of the *Constitution*’.¹⁷⁷⁷ This only encompasses matters in which either the Commonwealth or a person on behalf of the Commonwealth, or an interstate resident or other State, themselves is a party. The Act has not been updated to allow transfer of the matters considered to be federal judicial power in *Citta Hobart*, relating to s 109. Given the

¹⁷⁶⁹ See, eg, *Attorney General (SA) v Raschke* (2019) SASFC 83.

¹⁷⁷⁰ Anna Olijnyk and Stephen McDonald, ‘The High Court’s Decision in *Burns v Corbett*: Consequences, and Ways Forward, For State Tribunals’ [2019] *ALAL Forum* 95.

¹⁷⁷¹ *Attorney General (SA) v Raschke* (2019) SASFC 83.

¹⁷⁷² See Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 315 [7.5.4].

¹⁷⁷³ The Act defines ‘federal diversity jurisdiction’ as ‘jurisdiction of the kind referred to in section 75(iii) or (iv) of the *Constitution*’: *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 38A (1). This only encompasses matters in which either the Commonwealth or a person on behalf of the Commonwealth, or an interstate resident or other State themselves is a party. The Act has not been updated to allow transfer of the matters considered to be federal judicial power in *Citta Hobart*.

¹⁷⁷⁴ *South Australian Civil and Administrative Tribunal Act 2013* (SA) Part 3A.

¹⁷⁷⁵ *Ibid* s 38C(3).

¹⁷⁷⁶ *Ibid* ss 38B(5), (6).

¹⁷⁷⁷ *Ibid* s 38A(1).

apparent likelihood of such a question being raised, it appears prudent that the *SACAT Act* should be amended to allow transfer of these matters.

10.2.15 Secondly, while there do not appear to be any significant questions of validity, whether this transfer mechanism is constitutional has so far not been tested in the High Court.¹⁷⁷⁸

10.3 Consultation Data Overview

10.3.1 There was almost unanimous agreement in SALRI's consultation, including at all its Adelaide and regional roundtables and meetings, that the powers currently vested to the Magistrates Court under the *AAS Act* should be provided to SACAT. It was widely noted, consistent with SALRI's reasoning in its POA Report, that SACAT has the expertise and flexible processes required, and already deals with linked areas such as administration and guardianship. Many lawyers questioned the suitability of the Magistrates Court under the *AAS Act* in light of its busy workload and perceived relative lack of specialist knowledge. In its present consultation, most lawyers, as well as SACAT themselves, supported SACAT having this role and powers under the *AAS Act*. SACAT told SALRI that this would be appropriate given its 'characteristics as a fair, flexible, low-cost and party focused jurisdiction' as well as its subject matter expertise and SACAT already deals with closely linked areas. SACAT also told SALRI that should SACAT be vested with the powers under the *AAS Act*, they would arrange for only the President or other senior Members to hear any such cases. The Magistrates Court was seen as ill-suited to exercise the specialist nature of the role conferred on it by s 32 of the *AAS Act*.

10.3.2 Several lawyers and health practitioners expressed misgivings based on their perceptions of SACAT, but still acknowledged that SACAT is the preferable jurisdiction to exercise the powers under the *AAS Act* presently given to the Magistrates Court. Professor Ibrahim noted he held misgivings as to SACAT's role, but accepted it is the preferable jurisdiction providing the relevant Members possess the necessary expertise.

10.3.3 There was near universal recognition in SALRI's EPA consultation of the inadequacy of present civil and criminal remedies to respond to financial abuse and the misuse of an EPA.¹⁷⁷⁹ There was wide support in SALRI's consultation,¹⁷⁸⁰ consistent with the views of other law reform agencies,¹⁷⁸¹ for an effective civil remedy through SACAT (as opposed to the Supreme Court) to

¹⁷⁷⁸ See, eg, Stephen McDonald, "I'm Sorry, I Can't Hear You ... My Jurisdiction Keeps Dropping Out" *Citta Hobart Pty Ltd v Cawthorn* [2022] HCA 16', *AusPubLaw* (online, 20 May 2022) <<https://www.auspublaw.org/blog/2022/05/im-sorry-i-cant-hear-you-my-jurisdiction-keeps-dropping-out-citta-hobart-pty-ltd-v-cawthorn>>. SALRI is grateful for the valuable input of Mr McDonald SC on this section.

¹⁷⁷⁹ See also Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 299–305 [7.4.20]–[7.4.50].

¹⁷⁸⁰ See also Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, "I Never Thought It Would Happen to Me": *When Trust is Broken* (Final Report, September 2018) 83 Recommendation 21; Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 177, Recommendation 5–2. See further at: 178–81 [5.82]–[5.98].

¹⁷⁸¹ Reform Committee Parliament of Victoria, 'Inquiry into Powers of Attorney' (Final Report, Parliamentary Paper No 352, August 2010) 221; Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 177, Recommendation 5–2. See further at: 178–81 [5.82]–[5.98]; Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 83 Recommendation 21. 'The Committee therefore notes that SAT is best placed to potentially remedy a situation where an older person may be experiencing financial abuse as a result of an EPA ... being misused. SAT [the State Administrative Tribunal] already has procedures in place to deal with

address suspected or actual misuse of an EPA and SACAT's role to include both interim and final measures.

10.3.4 Many interested parties and legal practitioners (albeit sometimes again with a degree of reservation)¹⁷⁸² echoed the themes of the POA reference as to the suitability of SACAT to assume the powers given to the Magistrates Court under the *AAS Act*. It was widely again noted to SALRI that SACAT has the expertise and processes and the existing specialised jurisdiction and informal processes in relation to such closely linked areas as guardianship and ACDs and it is logical and consistent to provide the powers under the *AAS Act* to SACAT.

10.3.5 It was suggested to SALRI by more than one practitioner or service provider that a civil cause of action similar to the equitable doctrines of unfair influence¹⁷⁸³ or unconscionability¹⁷⁸⁴ should be introduced to SACAT.¹⁷⁸⁵ It was noted these remedies typically capture the situation of the financial abuse of an older persons or a person with disability and SACAT could usefully be vested with these remedies. This suggestion is not without merit as these remedies, at equity, are already of application in cases of financial abuse of older persons and/or persons with disability. However, it raises complex potential constitutional and other considerations. Powers to make an order akin the types of remedies available in equity for unconscionable conduct or undue influence, to order compensation or restitution for a wrong, or to enhance the enforceability of such orders may well be more properly characterised as judicial powers. This raises the *Burns v Corbett* issue and may prevent access to these remedies in the circumstances described above. As Mr Salama, a NSW barrister, noted of the often fine distinction between judicial and non-judicial powers: 'If it looks like a duck, if it goes quack, then it is a duck whatever you may try to call it.' Other Adelaide lawyers, whilst supportive of an enhanced role for SACAT under the *AAS Act* and/or to the misuse of an EPA, were also apprehensive at conferring wide equity type roles or powers to a tribunal.

10.3.6 SALRI acknowledges this caution and does not favour the introduction of statutory causes of action similar to the equitable doctrines of unfair influence or unconscionability to SACAT.

10.4 SALRI's Observations and Conclusions

10.4.1 For the reasons discussed above, SALRI believes it is appropriate that the powers currently given to the Magistrates Court to make orders relating to the abuse of a vulnerable adult should be transferred to SACAT. SACAT seems the preferable jurisdiction with the specialised expertise and closely linked roles dealing with administration and guardianship. Such a proposal was almost universally supported in SALRI's consultation, including by SACAT themselves. SACAT noted that they already deal with closely linked areas, telling SALRI that they did not hold any concerns

these sensitive applications and is familiar with the (additional) needs of people in guardianship or administration applications': at 79 [7.27].

¹⁷⁸² There were some doubts over the necessary expertise and capacity of SACAT and the fact that it is not a court.

¹⁷⁸³ *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; *Bridgewater v Leahy* [1997] QCA 36. See also Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 271–2 [7.2.14]–[7.2.20].

¹⁷⁸⁴ *Allcard v Skinner* (1887) 36 Ch 145; *Louth v Diprose* (1992) 175 CLR 621, 628; *Johnson v Buttress* (1936) 56 CLR 113; *Royal Bank of Scotland v Etridge [No 2]* [2001] 4 All ER 449; *Lloyds Bank Ltd v Bundy* [1974] 3 All ER 757. See also Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 269–71 [7.2.8]–[7.2.13].

¹⁷⁸⁵ See further below Part 10.5.

regarding this proposed extra jurisdiction and the powers under the *AAS Act* would be only exercised by the President or a senior Member.

10.4.2 SALRI is of the view that incidental changes should be made to ss 31–7 of the *AAS Act*, in particular s 33, to support and strengthen the powers available to SACAT, including adding to the existing orders listed in s 33 a new power to allow SACAT to order compensation or restitution for loss, damage or harm resulting from abuse in an appropriate case.

10.4.3 SALRI acknowledges the problem posed by s 75 of the *Constitution* and its interpretation in *Burns v Corbett* and *Citta Hobart*. In the adult safeguarding context, the issue is most likely to arise where parties reside in different States. For this reason, SALRI considers it prudent to keep the powers granted to SACAT administrative where possible, to ensure SACAT remain accessible. The powers currently available in the Magistrates Court likely achieve this.

10.4.4 An issue that was commonly raised in consultation was that these current powers do not go far enough. The Director is currently only empowered to take action where the vulnerable adult themselves consents, or in narrow circumstances such as where there is a risk of a serious crime being committed. However, this term is not defined.

10.4.5 As discussed above, SALRI considers that the *AAS Act* should be broadened to allow action to be taken without the consent of the apparent victim in cases where there has been, or there is a risk of, serious financial abuse to the vulnerable adult. This would include the power to seek an order from SACAT. What amounts to serious financial abuse should be considered on a case-by-case basis, with regard to the particular financial circumstances of the vulnerable adult.¹⁷⁸⁶

10.4.6 SALRI also considers that consideration ought to be given to factors such as coercion which may impact a person's ability to consent to action being taken. For this reason, the Director should consider a defined list of factors when deciding whether to seek an order from SACAT without the apparent victim's consent.¹⁷⁸⁷ In these cases, the Tribunal should still be able to hear the views of the vulnerable adult, and consider their reasons for not consenting when determining what action to take. This should include the ability for the vulnerable adult to have their views aired privately and confidentiality. This approach would balance the right of self-determination with a recognition of the impact of coercion and gaslighting¹⁷⁸⁸ and the community interest in preventing abuse.

10.4.7 SALRI is of the view that, as expressed in its POA Report, the class of people eligible to bring an action in response to the abuse of a vulnerable adult should be expanded to include interested third parties, with leave of SACAT.¹⁷⁸⁹ These third parties must have a genuine and legitimate interest (as distinct from mere busybodies) and sufficient standing in relation to the vulnerable adult. This would complement and support the role of the ASU.

10.4.8 SALRI considers, as previously raised by the Hon David Bleby QC and others, that it is appropriate that cases involving significant monetary amounts, such as the transfer of property,

¹⁷⁸⁶ See Recommendation 29.

¹⁷⁸⁷ See also Recommendation 30. Reserving the power to bring an action in the absence of consent for the Director, rather than interested third parties, recognises the potential impact such an action may have on the dynamics that may exist between the vulnerable adult and the alleged abuser and allows the vulnerable adult the perception of distance between their wishes and the action being taken.

¹⁷⁸⁸ See above Part 7.2.

¹⁷⁸⁹ This could include the alleged victim themselves so long as they retain decision-making capacity.

continue to be dealt with in the higher Courts. SACAT's role should remain primarily in stopping abuse from continuing, or preventing it from occurring, with compensation only supplementary.

10.4.9 SALRI does not support providing SACAT, at this stage at least, with the jurisdiction to deal with wide statutory causes of action based on the venerable actions in equity such as undue influence or unconscionability. Such suggestions are not without merit. Professor Gino Dal Pont, a noted expert in this area, said he had an open mind to such a suggestion. However, any such suggestion, as Adelaide lawyers and Mr Salama, a NSW barrister, cautioned, raises complex legal, constitutional and operational issues and implications. Due to factors such as the flexibility of SACAT's potential orders, and a desire to have these orders remain as administrative rather than judicial power, SALRI considers that a new remedy is not necessary. Rather, the ancillary and consequential orders SACAT may make should be expanded to include compensation or restitution.

10.4.10 Finally, SALRI reiterates its view from its Report into the role and operation of EPAs that SACAT should be conferred with the jurisdiction to deal with disputes and claims of misuse as to Powers of Attorney, including interim and incidental orders. SALRI recommends that the relevant recommendations (81–92) from its prior Report into the role and operation of Powers of Attorney should be implemented in South Australia.¹⁷⁹⁰

10.4.11 Recommendations

RECOMMENDATION 33

SALRI recommends that the roles and powers presently found in sections 31 to 37 of the (SA) (or equivalent powers) should be conferred upon the South Australian Civil and Administrative Tribunal in preference to the Magistrates Court.

RECOMMENDATION 34

SALRI recommends that incidental changes should be made to sections 31 to 37 of the *Ageing and Adult Safeguarding Act 1995* (SA), in particular s 33, to support and strengthen the powers available to the South Australian Civil and Administrative Tribunal, including adding to the existing orders listed in s 33, a new power to allow the South Australian Civil and Administrative Tribunal to order compensation or restitution for loss, damage or harm resulting from abuse in an appropriate case.

RECOMMENDATION 35

SALRI recommends that Division 6 of the *Ageing and Adult Safeguarding Act 1995* (SA) should be amended to allow any interested party to seek an order of the kind listed in ss 33(1)(a), (b) and (e). SALRI notes that this will enable 'any party with a legitimate interest in the matter' to bring an action. In these cases, the Director should not automatically be a party to that proceeding, but may choose to be added as an interested party.

¹⁷⁹⁰ See Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) Recommendations 81–92. See also below Appendix C: Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *'I Never Thought It Would Happen to Me': When Trust is Broken* (Report, September 2018) 83 Recommendation 21; Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 177, 178–81 [5.82]–[5.98], Recommendation 5–2.

RECOMMENDATION 36

SALRI reiterates its view from its Report into the role and operation of Powers of Attorney that the South Australian Civil and Administrative Tribunal should be conferred with the jurisdiction to deal with disputes and claims of misuse as to Powers of Attorney, including interim and incidental orders. SALRI recommends that the relevant recommendations (81–92) from its Report into the role and operation of Powers of Attorney should be implemented in South Australia.

10.5 Criminal Remedies

Current Position in South Australia

10.5.1 The *AAS Act* does not contain any provisions deeming certain acts of abuse as criminal acts or make reference to civil or criminal penalties for acts of abuse. Where powers of attorney are involved, the *POA Act* provides that it is an offence for an attorney to fail to keep and preserve accurate records and accounts of all dealings and transactions made in pursuance of the power. However, if found to have committed such an offence, the penalty is limited: they will be liable to a penalty (recoverable summarily) of an amount not exceeding \$1,000.¹⁷⁹¹

10.5.2 Beyond that, in South Australia, there are currently no additional specific criminal offences applicable to the financial abuse of an older person, person with a disability, or a person who may be otherwise vulnerable to abuse. Instead, such misconduct would generally be prosecuted as a dishonesty offence, including theft or deception or the dishonest exploitation of a position of advantage.¹⁷⁹² The effectiveness and enforcement of such general crimes to deal with financial abuse in the adult safeguarding context which is, as noted above, typically perpetrated in a pre-existing relationship, is questionable.¹⁷⁹³ With respect to EPAs, there is no agency to oversee attorneys and ensure they are performing their roles properly and honestly.

10.5.3 There are specific offences relating to the abuse of an EPA in Victoria¹⁷⁹⁴ and Queensland¹⁷⁹⁵ (though the effectiveness of these crimes is dubious). Only the ACT has a specific crime relating to elder abuse, which includes financial abuse.¹⁷⁹⁶

10.5.4 There were a number of suggestions made to SALRI, as part of the current reference that new offences relating to the misuse of an EPA or of elder abuse more generally are necessary in South

¹⁷⁹¹ *Powers of Attorney and Agency Act 1984* (SA) s 8.

¹⁷⁹² *Criminal Law Consolidation Act 1935* (SA) Part 5.

¹⁷⁹³ One succession lawyer told the ABC. ‘I have always maintained that once you move into the realm of transferring assets from someone, it’s very, very dangerous and could well be criminal ... But there does seem to be reluctance by the Fraud Squad to really dig into these issues because they are family arguments’: Rebecca Turner, ‘How Enduring Power of Attorney Documents Enable Children to Rip Off the Elderly’, *ABC News* (online, 16 June 2018) <<https://www.abc.net.au/news/2018-12-16/unrestricted-enduring-power-of-attorney-ripping-off-elderly/10621388>>.

¹⁷⁹⁴ *Powers of Attorney Act 2014* (Vic) ss 135–6.

¹⁷⁹⁵ *Powers of Attorney Act 1998* (Qld) ss 26, 61.

¹⁷⁹⁶ Daniella White, ‘Australian-First Laws to Criminalise Elder Abuse Pass ACT Legislative Assembly’, *Canberra Times* (online, 13 August 2020) <<https://www.canberratimes.com.au/story/6878335/australian-first-laws-to-criminalise-elder-abuse-pass-act-legislative-assembly/>>.

Australia to deter misconduct and encourage the police to act. This view was especially expressed to SALRI by Port Pirie lawyers.

Issues

10.5.5 Criminal law and the sanction assigned to an offence is largely derived from statute. In South Australia, the criminal law is largely governed by the *Criminal Law Consolidation Act 1935* (SA) and the *Summary Offences Act 1953* (SA). These Acts outline the various offences that arise. They also provide the available criminal remedies; that being, the minimum and maximum penalties for those convicted of an offence. The *Sentencing Act 2017* (SA) sets out the types of penalties available to the court as well as the general principles¹⁷⁹⁷ and material factors as to the circumstances surrounding the offence, victim and offender that should be taken into consideration when a court is deciding on the appropriate penalty.

10.5.6 While there is a potential role for the criminal law with respect to all abuse in the broad adult safeguarding context, it was found during consultation for SALRI's EPA reference that the issue of criminalisation is most prevalent with respect to the abuse of older people, and particularly financial abuse of an EPA. In consultation for the present reference there were serious concerns raised about the abuse of people with disability and the growing prevalence of psychological abuse such as gaslighting and coercive control.

10.5.7 SALRI concluded in its EPA reference that a crime of elder abuse is unnecessary¹⁷⁹⁸ and upholds this view in the current reference. SALRI refers to the reasoning and conclusion on this point of the ALRC,¹⁷⁹⁹ the Western Australian Parliamentary Committee¹⁸⁰⁰ and the 2022 Queensland Report.¹⁸⁰¹ SALRI remains of the view that the problem is not the absence of an applicable offence,

¹⁷⁹⁷ The *Sentencing Act 2017* (SA) provides that the 'primary' or 'paramount' principle in sentencing is the protection of the community: s 3.

¹⁷⁹⁸ Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) Recommendation 95, 316 n 1671, 307 [7.4.64]. See also Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 364 [13.7].

¹⁷⁹⁹ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 364–6. The ALRC explained such crimes were unnecessary and would duplicate existing crimes, and the particular risk that such crimes would risk being paternalistic and diminish the autonomy and dignity of older people (and SALRI would note persons with disability): at 364 [13.7]. No other Australian State or Territory bar the ACT (see the *Crimes (Offences Against Vulnerable People) Legislation Amendment Act 2020* (ACT)) at this stage has specific elder abuse or similar offences in their criminal law.

¹⁸⁰⁰ Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 68 [6.52]. See also at: Finding 36. The Western Australian Committee noted that the ALRC was not persuaded that a specific offence for misusing a POA is necessary as the preferable approach was to suggest that State and Territory administrative tribunals be given the power to order compensation for the misuse or abuse of a power of attorney or where an attorney has failed to comply with their obligations. The Western Australian Committee 'notes and understands this approach, [but] it is firmly of the view that it would also be beneficial to create a [new] offence... for an attorney who fails to uphold their statutory obligations as this will go some way to addressing instances of elder abuse connected with EPA': at 83 [7.50].

¹⁸⁰¹ Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 42: '[T]here is a divergence of views as to whether discrete criminal offences for elder abuse should be considered in Queensland. A new offence should only be created to address conduct which is not already an offence and ought to be. There are concerns that specific criminal offences for elder abuse may capture conduct which should not be the subject of criminal sanction. For example, whilst the *Criminal Code* does not contain a specific offence dealing with financial abuse, there would be difficulties in drafting an offence in such a way that it only captures conduct which is dishonest. There are also risks in the criminal law being prescriptive about how older persons

but rather the issues in enforcement of the present law.¹⁸⁰² Most of the misconduct that would be within such a general crime is already subject in South Australia to specific crimes such as unlawful threats,¹⁸⁰³ forms of assault,¹⁸⁰⁴ recklessly or intentionally causing harm¹⁸⁰⁵ or serious harm,¹⁸⁰⁶ criminal neglect of a vulnerable adult causing death or harm,¹⁸⁰⁷ acts endangering life or creating risk of serious harm or harm,¹⁸⁰⁸ various sexual offences,¹⁸⁰⁹ theft,¹⁸¹⁰ obtaining a benefit by deception,¹⁸¹¹ dishonest dealings with documents,¹⁸¹² offences relating to the role of a fiduciary,¹⁸¹³ and especially the dishonest exploitation of position of advantage.¹⁸¹⁴

10.5.8 It is also significant that there are substantial barriers to people (regardless of age) with disability — particularly people with cognitive impairment — engaging with the criminal (or civil) justice system on an equal basis with others, including reporting to police and participating in investigations and any court proceedings.¹⁸¹⁵ Victims, family members and interested parties are often reluctant to report the abuse of persons with disability to the authorities, ‘even in circumstances where physical abuse has been witnessed, or there is serious and ongoing risk of harm to the adult with disability’.¹⁸¹⁶

10.5.9 The lack of a specific crime addressing the abuse of an EPA in South Australia does not necessarily mean there is a ‘gap’ in the criminal law to address abuse as there are various general crimes of dishonesty that could apply.¹⁸¹⁷ More serious offending is, albeit very rarely, prosecuted under these

with capacity should make decisions and in assuming, in this context, that recipients of financial benefits or gifts have acted improperly. Creating specific offences which are broad, ill-defined or lack clarity as to their scope may result in uncertainty for carers, aged care institutions, older persons, the police and the courts.’

¹⁸⁰² Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) Rec 95, 290–4 [7.3.10]–[7.3.19], 316 n 1671, 307 [7.4.64].

¹⁸⁰³ *Criminal Law Consolidation Act 1935* (SA) s 19.

¹⁸⁰⁴ *Ibid* s 20.

¹⁸⁰⁵ *Ibid* s 24.

¹⁸⁰⁶ *Ibid* s 23.

¹⁸⁰⁷ *Ibid* s 14.

¹⁸⁰⁸ *Ibid* s 29.

¹⁸⁰⁹ *Ibid* div 11.

¹⁸¹⁰ *Ibid* s 134.

¹⁸¹¹ *Ibid* s 139.

¹⁸¹² *Ibid* s 140.

¹⁸¹³ *Ibid* ss 146–50.

¹⁸¹⁴ *Ibid* s 142.

¹⁸¹⁵ NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018) 27. See also Janine Benedet and Isabel Grant, ‘Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases’ (2012) 50(1) *Osgoode Hall Law Journal* 1. Indeed, these concerns prompted the *South Australian Disability Justice Plan, Statutes Amendment (Vulnerable Witnesses) Act 2015* (SA) and similar reforms elsewhere to address the unsatisfactory situation of parties with disability in the justice system. See generally David Plater et al, South Australian Law Reform Institute, *Providing a Voice to the Vulnerable: A Study of Communication Assistance in South Australia* (Report No 16, September 2021).

¹⁸¹⁶ NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018) 25. See also at: 25–6.

¹⁸¹⁷ See Part 5 of the *Criminal Law Consolidation Act 1935* (SA), especially theft (s 134), deception (s 139) and dishonest dealings with documents (s 140).

general criminal law provisions.¹⁸¹⁸ Of particular note is the offence under s 142 of the *Criminal Law Consolidation Act 1935* (SA) of the dishonest exploitation of a position of advantage. A person is guilty of an offence if the person dishonestly exploits an advantage to which this section applies in order to benefit him. According to the Act:

This section applies to the advantage that a person who has no disability or is not so severely disabled has over a person who is subject to a mental or physical disability.¹⁸¹⁹

This section would seem to cover the abuse of an EPA, where it is activated due to the principal's lack of capacity.

10.5.10 It is difficult to identify what gap in the criminal law a new general offence of elder abuse would meet, with the possible exception of an offence of coercive control.

10.5.11 Coercive control is not currently a specific crime in South Australia¹⁸²⁰ (though such crimes exist elsewhere).¹⁸²¹ However, any question of making coercive control a specific crime, including beyond the intimate partner situation to apply to other relationships, is a complex area.¹⁸²²

¹⁸¹⁸ See, eg, *R v Kerin* [2014] SASC 19; *AMT v COT, GSZ* [2017] SACAT 2, [3] (referring to a related prosecution).

¹⁸¹⁹ See also *R v Hinks* [2000] 4 All ER 833.

¹⁸²⁰ Various Bills have been introduced in South Australia to introduce such a crime. See, eg, Criminal Law Consolidation (Domestic Abuse) Amendment Bill 2020 (SA) (see further South Australia, *Parliamentary Debates*, Legislative Council, 20 February 2020, 217); Criminal Law Consolidation (Coercive Control Amendment) Bill (see further South Australia, *Parliamentary Debates*, House of Assembly, 2 December 2020, 3601–3 (Katrine Hildyard); Criminal Law Consolidation (Abusive Behaviour) Amendment Bill 2021 (see further South Australia, *Parliamentary Debates*, House of Assembly, 27 October 2021, 8379–81 (Vickie Chapman, Attorney-General). These Bills did not proceed and lapsed with the 2022 State election.

¹⁸²¹ *Domestic Violence Act 2018* (Ireland) s 39; *Serious Crime Act 2015* (UK) s 76; *Family Violence Act 2004* (Tas) s 8. Tasmania is the only Australian jurisdiction with a specific coercive control type offence aimed at non-physical family violence of an intimate partner such as economic abuse and emotional abuse or intimidation. A new offence of coercive control is to be introduced in NSW. See Cecilia Connell, 'NSW Government Releases Draft Coercive Control Bill, Proposes Seven-Year Jail Term', *Sydney Morning Herald* (online, 29 July 2022) <<https://www.abc.net.au/news/2022-07-20/coercive-control-laws-nsw-draft-bill/101253266>>.

¹⁸²² Heather Douglas, 'Do We Need a Specific Domestic Violence Offence?' (2015) 39(2) *Melbourne University Law Review* 434. The comments of a 2022 Queensland Report are germane. 'It can be difficult to distinguish coercive control from genuine care, particularly where behaviour is viewed in isolation or where well-intentioned concerns becomes overbearing behaviour. Circumstances of vulnerability and dependence can create particularly apt conditions under which coercive control may be perpetrated. In addition, individual acts of coercive control rarely satisfy the elements of an existing criminal offence. This makes coercive control not only difficult to detect, but difficult to respond to': Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 55.

There are views both in favour of¹⁸²³ and against¹⁸²⁴ such a crime. Particular problems may occur in establishing the elements of such an offense within Aboriginal and multicultural communities.¹⁸²⁵

10.5.12 There was a strong view in the consultation for SALRI's POA Report that introducing new crimes missed the underlying problems. It was noted that there are already 'perfectly adequate' general crimes of dishonesty in the *Criminal Law Consolidation Act 1935* (SA) to address the abuse of an EPA and what was missing was effective enforcement. Many parties in consultation, without wishing to criticise the police, noted that the police are reluctant to treat a complaint of the abuse of an EPA as a criminal investigation as opposed to a 'civil' or 'private' issue.¹⁸²⁶ The many demands on the police and the problems in gathering the necessary evidence in often complex financial crime and the inability or unwillingness of victims to testify were also raised in consultation (themes SALRI would reiterate).¹⁸²⁷

¹⁸²³ See, eg, Marilyn McMahon and Paul McGorrey, 'Criminalising Emotional Abuse, Intimidation and Economic Abuse in the Context of Family Violence: the Tasmanian Experience' (2016) 35(2) *University of Tasmania Law Review* 1; Parliament of New South Wales, Joint Select Committee on Coercive Control, 'Coercive Control in Domestic Relationships' (Report, 2021); Women's Safety and Justice Taskforce, *Hear her Voice: Report One, Addressing Coercive Control and Domestic and Family Violence in Queensland* (Report, November 2021); Paul McGorrey and Marilyn McMahon, 'Prosecuting Controlling or Coercive Behaviour in England and Wales: Media Reports of a Novel Offence' (2021) 21(4) *Criminology and Criminal Justice* 566. See also above Part 7.

¹⁸⁷³ See, eg, Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response* (ALRC Report No 114, NSWLRC Report No 128, October 2010) 587 [13.85], 592–3 [13.107]–[13.111]; Sandra Walklate, Kate Fitz-Gibbon and Jude McCulloch, 'Is More Law the Answer? Seeking Justice for Victims of Intimate Partner Violence through the Reform of Legal Categories' (2018) 18 (1) *Criminology and Criminal Justice* 115; Heather Douglas, 'Do We Need an Offence of Coercive Control?' (2018) 144 *Precedent* 18; Julie Tolmie, 'Coercive Control: To Criminalise or not to Criminalise?' (2018) 18(1) *Criminology and Criminal Justice* 50; Chelsea Watego et al, 'Carceral Feminism and Coercive Control: When Indigenous Women Aren't Seen As Ideal Victims, Witnesses Or Women', *The Conversation* (online, 25 May 2021) <<https://theconversation.com/carceral-feminism-and-coercive-control-when-indigenous-women-arent-seen-as-ideal-victims-witnesses-or-women-161091>>. See also above Part 7.

¹⁸²⁵ See, eg, Ben Smee, "'Racist': Coercive Control Laws could Harm Indigenous Women in Queensland, Advocates Warn", *The Guardian* (online, 18 May 2021) <<https://www.theguardian.com/australia-news/2021/may/18/racist-coercive-control-laws-could-harm-indigenous-women-in-queensland-advocates-warn>>.

¹⁸²⁶ See also House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, 'Older People and the Law' (Final Report, September 2007) 26; Rebecca Turner, 'How Enduring Power of Attorney Documents Enable Children to Rip Off the Elderly', *ABC News* (online, 16 Dec 2018) <<https://www.abc.net.au/news/2018-12-16/unrestricted-enduring-power-of-attorney-ripping-off-elderly/10621388>>.

¹⁸²⁷ This point was acknowledged by the NSW Parliamentary Report. 'With respect to policing, it is clear to the committee that the NSW Police Force leadership is seeking to improve front line police responses to vulnerable communities, including older people. We recognise that police face a number of challenges in responding effectively to elder abuse ... We acknowledge the other challenges for police that were brought to our attention: the difficulty of gaining evidence of sufficient standard to give confidence of conviction; the perceived or actual limitations in the evidence of victims with cognitive and other disabilities; the importance of factoring the vulnerability and care needs of victims into the police response. Each of these challenges also represents a responsibility on the part of the Police Force to ensure that older people, most especially who are vulnerable, obtain an effective front line police response': Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, 'Elder Abuse in New South Wales' (Report No 44, June 2016) 141 [8.72]–[8.73].

10.6 Intervention Orders

10.6.1 The role of intervention or restraint orders to address the abuse of an older person and/or a person with disability was also raised with SALRI in consultation.¹⁸²⁸ The suggestion of intervention or similar orders to address such abuse, though largely overlooked, has been raised elsewhere.¹⁸²⁹

10.6.2 In South Australia, such orders are governed by the legislative framework of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) ('the *IO Act*'). Intervention orders may be made in respect of a wide range of abuse, including physical, sexual, emotional or psychological abuse and financial harm.¹⁸³⁰ Such orders are initially made on an interim basis and may subsequently be confirmed as final orders. The power to make intervention orders is vested with both police and the courts. Police powers to issue intervention orders are limited to the issue of interim orders, which are then subject to a court hearing whereby the court determines whether a final intervention order is made. Initiating applications for intervention orders may also be made to court directly by either police or the alleged victim. Such applications direct to court are subject to a preliminary hearing to determine whether an interim order is to be issued. Any interim order that is issued by the court at a preliminary hearing is then subject to a hearing to determine whether a final intervention order is made.

10.6.3 An intervention order may be issued if it is reasonable to suspect that the defendant will, without intervention, commit an act of abuse against a person; and the issuing of the order is appropriate in the circumstances.¹⁸³¹ It is an offence to contravene a term of an intervention order.

10.6.4 SALRI was informed by several parties in consultation that an intervention order may prove effective in cases of the abuse of older people or persons with disability and indeed may be preferable to prosecution for an underlying offence. The situation of the predatory 'friend' or neighbour 'befriending' or taking advantage of a vulnerable adult was raised.¹⁸³²

10.6.5 It is important to note that an intervention order may be issued in South Australia for the protection of a person, even if that person is not an applicant for the order and the application is not made on their behalf.¹⁸³³ This raises the prospect that, in an appropriate case, an intervention order could be sought by police in circumstances where the victim does not consent or does not have capacity.¹⁸³⁴ SALRI understands from the input of several specialist police officers that the issue of intervention orders without the consent of the alleged victim is a regular event in relation to both interim and final intervention orders in cases of domestic partner abuse featuring physical abuse.

¹⁸²⁸ See also Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 62–5 [6.27]–[6.43]; Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 50–3.

¹⁸²⁹ Barbara Hamilton, 'Be Nice to Your Parents: Or Else!' [2006] 4 *Elder Law Review* 8, 10; Victorian Office of the Public Advocate, *Line of Sight: Refocussing Victoria's Adult Safeguarding Laws and Practices* (Report, August 2022) Recommendation 2, 75–6, 88.

¹⁸³⁰ *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8.

¹⁸³¹ *Ibid* s 6.

¹⁸³² See also Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 17 [2.45], 63 [6.35]. An example of such abuse and the value of an intervention order was given to the Western Australian committee. see Evidence to Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, Perth, 7 May 2018, 5 (Alison Xamon MLC).

¹⁸³³ *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 7(2).

¹⁸³⁴ See generally *AAS Act* s 24.

The Intervention Orders (Prevention of Abuse) Act 2009 (SA) ('IO Act')

10.6.6 When the current intervention order framework of the *IO Act* was introduced in South Australia, it was intended as a protective measure against personal violence of any kind, regardless of whether it occurs within a domestic relationship or not.¹⁸³⁵ However, despite the broad potential ambit of the scheme, it was conceded that 'there is a strong emphasis on domestic abuse and there is no doubt that these laws will mostly be used by people seeking to protect themselves and their children from domestic abuse.'¹⁸³⁶

10.6.7 The example of domestic abuse invoked — that of intimate or domestic partner abuse — represents the majority of intervention orders. However, it also illustrates what is arguably a widespread misconception about the intervention order scheme, namely, that 'domestic abuse' is confined to intimate partner abuse. In fact, the definition of 'domestic abuse' under the *IO Act* is far broader. It requires there to be a relationship or former relationship. However, whilst 'relationship' includes marriage or a domestic partnership,¹⁸³⁷ it also includes:

- two people related to each other by or through blood, marriage, a domestic partnership or adoption;¹⁸³⁸
- two people related according to Aboriginal or Torres Strait Islander kinship rules or are both members of some other culturally recognised family group;¹⁸³⁹ and
- where one is the carer of the other.¹⁸⁴⁰

10.6.8 'Carer' is relevantly defined in general terms as a person who provides ongoing care or assistance to: a person who has a disability;¹⁸⁴¹ a person who has a chronic illness, including a mental health illness;¹⁸⁴² or a person who, because of frailty, requires assistance with the carrying out of tasks.¹⁸⁴³ It does not include a person who is contracted to provide care or assistance, nor a person who provides care or assistance in the course of community work organised by a community organisation.

10.6.9 The definition of 'domestic abuse' under the *IO Act* encompasses far more than domestic partner abuse. Significantly, it covers the relationships within which many older persons or persons with disability sustain, or are at risk of sustaining, abuse.

10.6.10 Even in circumstances where the abuse of older persons or persons with disability does not fall within the definition of 'domestic abuse', the *IO Act* extends to protect against 'non-domestic

¹⁸³⁵ South Australia, *Parliamentary Debates*, Legislative Council, 28 October 2009, 3793 (Gail Gago).

¹⁸³⁶ *Ibid.*

¹⁸³⁷ *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(8)(a), (b).

¹⁸³⁸ *Ibid* (SA) s 8(8)(i).

¹⁸³⁹ *Ibid* s 8(8)(j).

¹⁸⁴⁰ *Ibid* s 8(8)(k).

¹⁸⁴¹ Within the meaning of the *Disability Inclusion Act 2018* (SA).

¹⁸⁴² Within the meaning of the *Mental Health Act 1993* (SA).

¹⁸⁴³ See *Carers Recognition Act 2005* (SA) s 5.

abuse’.¹⁸⁴⁴ Why then, are intervention orders not used with greater frequency to protect people who may be vulnerable to abuse?

Intervening in cases of Psychological Abuse

10.6.11 The most overt acts of abuse against vulnerable adults are likely, at least in theory, to be dealt with by the criminal law, namely, prosecution for acts of violence and/or crimes of dishonesty. The process of arrest, the laying of charges and/or the imposition of bail conditions should, theoretically, prove effective to restrain and/or prevent abusive conduct in these cases. Further means of intervention may not be required.

10.6.12 However, it is the more subtle conduct such as psychological abuse that occurs within relationships with adults vulnerable to abuse which presents a particular challenge: when to intervene and how? SALRI was often told, consistent with much research,¹⁸⁴⁵ that for both older persons and persons with disability the individual and external barriers for victims to report such abuse and seek help are ‘substantial and numerous’.¹⁸⁴⁶ There are particular difficulties for the police in responding to claims of financial abuse;¹⁸⁴⁷ with a number of particular ‘significant’ practical and evidentiary challenges arising.¹⁸⁴⁸

10.6.13 Coercive control and gaslighting are recognised forms of abuse under the *IO Act*. Section 8 of the *IO Act* provides that ‘abuse’ may take many forms including emotional and psychological abuse. An act is an ‘act of abuse’ if it results or is intended to result in emotional or psychological harm, or an unreasonable and non-consensual denial of financial, social or personal autonomy. Further, emotional or psychological harm includes mental illness; nervous shock; and distress, anxiety, or fear that is more than trivial.

10.6.14 Significantly, the *IO Act* provides a range of ‘examples’ of acts of abuse against a person, many of which reflect instances of coercive control or gaslighting (or a combination thereof), which are directly applicable to older persons and/or persons with disability:

- threatening to withhold a person’s medication or prevent the person accessing necessary medical equipment of treatment;¹⁸⁴⁹
- threatening to institutionalise the person;¹⁸⁵⁰

¹⁸⁴⁴ *Intervention Orders (Prevention of Abuse) Act 2009 (SA)* s 8(9).

¹⁸⁴⁵ See generally Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 220–329; David Plater et al, South Australian Law Reform Institute, *Providing a Voice to the Vulnerable: A Study of Communication Assistance in South Australia* (Report No 16, October 2021 109–145.

¹⁸⁴⁶ Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, ‘Elder Abuse in New South Wales’ (Report No 44, June 2016) 121 [8.1]. See also at 121–2 [8.2]–[8.4]. ‘The biggest barriers in reporting generally, I would say, is fear. Fear of being isolated from their families, from seeing their grandchildren, and from creating conflict within their family when they feel that they need their family more than ever’: Evidence to Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, 18 June 2018, 2 (Helen St John).

¹⁸⁴⁷ Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, ‘Elder Abuse in New South Wales’ (Report No 44, June 2016) 126–7 [8.19]–[8.23].

¹⁸⁴⁸ Ibid 126 [8.19]. See also at: 124–8 [8.12]–[8.28].

¹⁸⁴⁹ *Intervention Orders (Prevention of Abuse) Act 2009 (SA)* s 8(4)(m).

¹⁸⁵⁰ Ibid s 8(4)(n).

- threatening to withdraw care on which the person is dependent;¹⁸⁵¹
- denying the person the financial autonomy that the person would have had, but for the act of abuse;¹⁸⁵²
- withholding the financial support necessary for meeting the reasonable living expenses of the person ... in circumstances in which the person is dependent on the financial support to meet those living expenses;¹⁸⁵³
- causing the person through coercion or deception to:
 - relinquish control over assets or income;
 - claim social security payments;
 - sign a power of attorney enabling the person's finances to be managed by another person;
 - sign a contract for the purchase of goods or services;
 - sign a contract of guarantee;
 - sign any legal document for the establishment or operation of a business.¹⁸⁵⁴

10.6.15 Whilst such psychological abuse is, by its very nature, covert, it may nevertheless be apparent, as SALRI was told, to other individuals who are involved in the family and/or caring networks of the person. However, this does not mean that anything is necessarily done about the 'concerning' or 'suspicious' conduct. That is, until more tangible or grave instances of financial (or other) abuse are manifest.

10.6.16 Traditionally, intervention orders are overlooked in this context. However, in some cases of the psychological and/or financial abuse (recalling these are typically connected) of both older persons and persons with disability, intervention orders may present an appropriate means of action to either cease and/or prevent such abuse.

10.6.17 In cases involving psychological abuse, there are likely to be evidentiary issues, that is, an absence of evidence of any overt act of abuse. Significantly, the grounds required for the issuing of an intervention order are flexible in this respect. The grounds are anticipatory; there is no requirement to prove an act of abuse before an intervention order is issued. Grounds exist if it is reasonable to suspect that the defendant will, without intervention, commit an act of abuse (widely defined) against a person, and the issuing of the order is appropriate in the circumstances.¹⁸⁵⁵ Moreover, in dealing with applications under the *IO Act*, the court need only be satisfied of factual matters to the lesser civil standard of proof, on the balance of probabilities.¹⁸⁵⁶

10.6.18 There is also a broad discretion as to the terms that may be included in an intervention order. Whilst the *IO Act* provides for some mandatory terms (ie regarding firearms)¹⁸⁵⁷ and a range

¹⁸⁵¹ Ibid s 8(4)(o).

¹⁸⁵² Ibid s (8)(5)(a).

¹⁸⁵³ Ibid s (8)(5)(b).

¹⁸⁵⁴ Ibid s (8)(5)(e).

¹⁸⁵⁵ Ibid s 6.

¹⁸⁵⁶ Ibid s 28.

¹⁸⁵⁷ Ibid s 14.

of other suggested terms,¹⁸⁵⁸ it otherwise states that an intervention order may impose any requirement on the defendant to take, or to refrain from taking, specified action.¹⁸⁵⁹ It further provides that an intervention order may specify conditions under which a prohibition imposed by the order does not apply, and conditions that must be complied with in relation to a requirement imposed by the order.¹⁸⁶⁰ The court has much latitude when it comes to the terms of an intervention order, including making orders with in-built flexibility by way of imposing conditions in relation to general terms.

10.6.19 It is often the case, as SALRI was told, that the relationships that people who are vulnerable to abuse share with relatives and/or those individuals who provide them with care and assistance are complex and multifaceted. For example, an individual may need to be restrained from interfering with an older person's finances, whilst being permitted to remain in contact with the older person to provide them with company, care and/or assistance. Further, that individual may need to be restrained from interfering with an older person's finances, whilst being permitted to assist the older person with their weekly grocery shop. Conceivably, the flexibility and discretion afforded by the *IO Act* could allow for an intervention order to be tailored with specific terms and conditions to accommodate such circumstances. The clear objective being to preserve and encourage the positive aspects of such a relationship with the older person or person with disability, whilst ensuring necessary intervention is made to safeguard that individual.

10.6.20 It may also present as an avenue for court ordered programs of rehabilitation and/or community education in the area of abuse against older persons and persons with disability, should such referral pathways be established between the courts and relevant support service providers.¹⁸⁶¹

10.6.21 Given the nature of psychological abuse, it would not usually be expected that police would become involved in the way that they would by responding to an 'incident' of physical abuse. Any application for an intervention order in such cases would therefore likely be a private application to the court (that is, not a police order or a police application to the court).¹⁸⁶² This means that any application for an intervention order would need to be made to the court by the older person or person with disability themselves or a 'suitable representative of such a person given the permission to apply to the court'.¹⁸⁶³

10.6.22 A potential difficulty in the context of older persons and persons with disability is the implicit requirement that any application made by a suitable representative is made with their consent.¹⁸⁶⁴ Issues of consent and capacity are not only complex issues when dealing with vulnerable adults,¹⁸⁶⁵ but they are also matters that may be impacted by the very psychological abuse which is sought to be addressed by intervention.¹⁸⁶⁶ However, support and advocacy services may potentially

¹⁸⁵⁸ Ibid ss 12, 13.

¹⁸⁵⁹ Ibid s 12(1)(l).

¹⁸⁶⁰ Ibid ss 12(2)(a), (b).

¹⁸⁶¹ Ibid s 13.

¹⁸⁶² Ibid div 2, s 20.

¹⁸⁶³ Ibid s 20(1)(b).

¹⁸⁶⁴ See, for example, *Department of Human Services (Cth) v Fitzpatrick* [2018] SASC 180, [32] (Kourakis CJ).

¹⁸⁶⁵ David Lock, 'Decision-Making, Mental Capacity and Undue Influence: Action by Public Bodies to Explore the Grey Areas between Capacity and Incapacity' (2015) 20(1) *Judicial Review* 42.

¹⁸⁶⁶ See above Part 7.

play a useful role in assisting private applications (whether as representatives themselves or assisting others) and/or liaising with the police for the police to bring applications before the court in appropriate cases.

10.6.23 SALRI is unable to comment at length on the use (or lack of use) of intervention orders to address the abuse of older people and/or persons with disability in South Australia and their utility owing to the relative lack of research and consultation input.¹⁸⁶⁷

10.6.24 Several specialist SAPOL officers did note to SALRI that the present SAPOL focus is to seek intervention orders in respect of physical abuse featuring domestic partners,¹⁸⁶⁸ but they acknowledged that abuse extends beyond domestic partnerships and encompasses financial abuse, gaslighting, coercive control and emotional abuse. The officers said that at present a victim would have to make a private application for an intervention order for such abuse, though this may change in the future.

10.6.25 The role of intervention orders to address elder abuse has been noted in various contexts. Their use was noted as ‘not common’ in the 2021 Australian Institute of Family Studies (‘AIFS’) Report.¹⁸⁶⁹ The 2022 Queensland study identified an apparent police reluctance to utilise such orders in relation to elder abuse,¹⁸⁷⁰ and noted their ‘limitations’ in the context of elder abuse.¹⁸⁷¹ The Western Australian Police conceded in evidence before the Parliamentary Committee as to police seeking an intervention order in cases of elder abuse: ‘It does happen, but very rarely, though; a very small proportion.’¹⁸⁷² The Western Australian Parliamentary Committee identified that such orders had been sought by police in Western Australia in only three instances during 2017/2018 on behalf of parties aged over 65.¹⁸⁷³ Indeed, the Western Australian Police Commissioner had doubted such orders were even available in respect of financial elder abuse¹⁸⁷⁴ or without the victim’s consent.¹⁸⁷⁵

10.6.26 The effectiveness of such orders has also been seen as mixed. On the one hand in the 2021 AIFS Report, they were seen in some instances as putting a stop to the abuse and also providing

¹⁸⁶⁷ SAPOL declined to make a formal written submission, but SALRI had a valuable discussion with several specialist officers.

¹⁸⁶⁸ This is from SAPOL’s formal policy known as a General Order. A General Order specifies standards that are applicable to all employees and are approved by the Commissioner of Police or the Deputy Commissioner. The specific General Order that relates to intervention orders is ‘General Order, Intervention-restraining orders’.

¹⁸⁶⁹ The 2021 AIFS study found that a ‘personal protection order’ (what in South Australia would be called an ‘intervention order’) was obtained against the perpetrator in 3.8% of cases of elder abuse, breaking down as in cases of financial abuse (4.4%), physical abuse (9.3%), sexual abuse (0.7%), psychological abuse (3.8%) and neglect (0.9%). See Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 86.

¹⁸⁷⁰ Queensland Law Society and Queensland Public Advocate, *Elder Abuse: Joint Issues Paper* (Joint Issues Paper, February 2022) 54–5.

¹⁸⁷¹ Ibid 53–4 [6.2.4].

¹⁸⁷² Evidence to Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, 7 May 2018, 4 (Susan Young).

¹⁸⁷³ Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 64.

¹⁸⁷⁴ Evidence to Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, 7 May 2018, 2–3, 4–5 (Chris Dawson).

¹⁸⁷⁵ Ibid 3, 4.

a deterrent going forward.¹⁸⁷⁶ But it was also noted in the 2021 AIFS Report that ‘in some cases legal action was ignored or not understood by the perpetrator or restraining orders were flouted and did not prevent the perpetrator from reoffending.’¹⁸⁷⁷ Substantial minorities of the victims in the 2021 AIFS study considered such actions to be ineffective.¹⁸⁷⁸

10.6.27 Professor Lacey was unconvinced of the value of intervention orders to the Western Australian Parliamentary Committee:

So [intervention orders under the *Restraining Orders Act 1997* (WA)] ... which you can seek to safeguard a vulnerable person, are largely directed at a domestic violence scenario and you see very few provisions of such legislation actually aimed at addressing and safeguarding vulnerable adults more generally. By that, I include not just older people who are vulnerable; I include any vulnerable adult — anyone living with a disability over the age of 18. I think that we need legislation which kicks in after the children’s protection Acts stop operating and we need to be able to protect all vulnerable adults. The criminal law should be an avenue of last resort in my opinion.¹⁸⁷⁹

10.6.28 However, the Western Australian Parliamentary Report was more positive of the value of intervention orders. The Committee noted that the definition of ‘family violence’ in the *Restraining Orders Act 1997* (WA) covered behaviour that falls within the definition of elder abuse, in particular, behaviour that, depending on the facts, could be classified as financial elder abuse (in s 5A(2)(g) and (h) of the Act) and/or psychological or emotional elder abuse (in s 5A(2)(c) through (f), (i) and (k) of the Act).¹⁸⁸⁰ Indeed, conduct such as withholding financial support or financial autonomy and preventing a family member from keeping family connections could fall within this definition.¹⁸⁸¹ The Committee also found that elder abuse that is carried out by a person who is not related to the older person in question can be stopped or prevented by an application for a misconduct restraining order or a violence restraining order under sections 11A or 35A of the *Restraining Orders Act 1997* (WA).¹⁸⁸² Such perpetrators could fall within the ‘befriender’ or ‘predatory carer’ category.¹⁸⁸³

10.6.29 The Western Australian Committee raised that an intervention order may be available and well suited to discourage or deter financial abuse by the ‘predatory neighbour’ or associate ‘befriending’ a vulnerable adult in order to take financial advantage of them.¹⁸⁸⁴

¹⁸⁷⁶ Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 88.

¹⁸⁷⁷ Ibid 89.

¹⁸⁷⁸ Ibid 3.

¹⁸⁷⁹ Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 72 [6.68].

¹⁸⁸⁰ Ibid 63.

¹⁸⁸¹ Ibid 63 [6.31].

¹⁸⁸² Ibid 64.

¹⁸⁸³ Ibid 63 [6.35]. The Committee elaborated of such abusers: ‘The Committee also heard evidence of a group of perpetrators of elder abuse who are not relatives of the older person, but who “befriend” the older person and then seek to gain (usually) financially through taking advantage of the person’s vulnerability. The type of person who seeks to gain from an older person can further be classified as potentially falling into one of two groups of “predatory carers” or “befrienders”’: 17 [2.45].

¹⁸⁸⁴ Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 63 [6.312].

10.6.30 A regional lawyer and social worker, Helen St Jack, spoke of the problems posed by ‘predatory carers or befrienders’:

In terms of informal and formal settings, we are looking at family, carers. We may be looking at professionals who are in a position to financially exploit older people and certainly at the legal centre, what we are seeing is a very fraught situation that very often involves enduring powers of attorney and guardianship and wills ... It is very clear when you see a person present as a carer repeatedly for people who are in very, very vulnerable situations. One person will pass away; they will very quickly move on to another vulnerable person ... I think there are two groups of predatory carers or befrienders. One is the befrienders who have very limited insight into whether what they are doing is morally and ethically right. For example, those sorts of people might provide care for a person. They see themselves as providing support and assistance, and so they see nothing wrong with taking \$100 out of their account or encouraging them to change the will to leave them a lump sum to recompense them for the care that they have provided, even though they see themselves as great friends and so on. Then you have the people who are going about the caring process deliberately to see a will changed, or to see an EPA executed in their favour ... you would say about those people that they have insight, they are embarking on a deliberate course of conduct to benefit them financially during the life of that vulnerable person, and certainly after that person has passed away.¹⁸⁸⁵

10.6.31 SALRI notes that it heard in consultation of similar cases of the abuse of an older person and/or a person with disability.

10.6.32 The following was presented in evidence before the Committee as an example of where an intervention order pursued by the police would have proved of value to address elder abuse:

I know of an example where an elderly couple, who were very frail, were being visited by a young man who had a drug addiction every second day or so turning up demanding money. That was being handed over willingly. When I say ‘willingly’, I mean because those people were frightened and did not know what would happen if they did not pay that money. The police were made aware of it and the police made it very clear that there was nothing that they could do and it would require civil action on behalf of the family in order to stop that. In that instance, the young man managed to do away over time with \$25 000 of what was effectively their life savings. Those are the sorts of scenarios that I am talking about, wanting to know why the police could not, or alternatively would not, at least pay a visit to that man whose address was known to say, ‘You do not go around there anymore; this stops’, let alone potentially press charges for what was really quite intimidatory behaviour, even if it was not accompanied with overt threat. Do you have any comments about that sort of scenario?¹⁸⁸⁶

10.6.33 The Committee noted that, despite the broad statutory powers, it had heard of a ‘distinct reluctance’ by the Western Australia Police to exercise these powers either where the older person in question does not consent to the order or does not want the orders in place¹⁸⁸⁷ (indeed in evidence before the Committee the police either doubted such powers existed in relation to financial elder abuse or were available without the victim’s consent). The Committee observed that the tension

¹⁸⁸⁵ Evidence to Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, Perth, 18 June 2018, 2–4 (Helen St Jack).

¹⁸⁸⁶ Evidence to Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, Perth, 7 May 2018, 5 (Alison Xamon MLC).

¹⁸⁸⁷ Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 64 [6.38].

between the police duty to protect vulnerable older people in the community and the duty to respect the inherent dignity and autonomy of adults in terms of the decision to apply for orders under the *Restraining Orders Act 1997* (WA) may ‘sometimes result in a lack of appropriate action being taken to protect an older person from continued or greater harm’.¹⁸⁸⁸ The Committee, whilst appreciating the difficult position that this tension may create, was of the view ‘that Western Australia Police’s duty to protect vulnerable older people in the community should take precedence where to take no action could result in continued or greater harm.’¹⁸⁸⁹

10.6.34 SALRI observes it has had heard similar tensions in relation to the role of the ASU.

10.6.35 ARAS noted to SALRI that such orders could also be of utility to address elder abuse. ARAS said that, whilst it is ‘very rare’, they have had had several instances where they have assisted an older person to approach the police and obtain an intervention order against their abuser in relation to threats of physical violence, emotional abuse or financial abuse. Port Pirie lawyers raised the value of intervention orders to address some forms of elder abuse. Maggie Rutjens told SALRI that intervention orders may also prove effective in relation to the abuse or exploitation of persons with disability and could be preferable to such drastic alternatives as the victim being the subject of a guardianship or administration order through SACAT. She believes it is worth evaluating the appropriateness of this alternative.¹⁸⁹⁰

10.6.36 The option of an intervention order was seen by the specialist SAPOL officers as very useful and flexible to address elder abuse as well as the abuse of persons with disability. Such orders cover wide forms of abuse. The enforcement of an intervention order also does not necessarily depend on a victim’s testimony. The SAPOL officers noted that, owing to the present SAPOL focus on seeking intervention orders in respect of physical abuse featuring domestic partners, at present a victim would have to make a private application for an intervention order in circumstances involving financial abuse, gaslighting, coercive control and/or emotional abuse (though this may change in the future). The officers reiterated their support for intervention orders as an option, noting that simply prosecuting at the outset for an underlying crime is a ‘blunt instrument’.

¹⁸⁸⁸ Ibid 65.

¹⁸⁸⁹ Ibid 65 [6.43].

¹⁸⁹⁰ Ms Rutjens’ further comments are informative in considering the utility of intervention orders to address the abuse of persons with disability: ‘If proven to have relevant utility, the mechanism of an intervention order would help remove onus on a victim with disability to keep themselves safe. Current use of guardianship and administration while necessary in some instances, are sometimes felt to be punitive of the victim rather than holding a perpetrator accountable. Other stakeholders may benefit from the intervention order mechanism also. For example, an accommodation provider may be able to support a victim of abuse by using intervention orders to inform visitation processes, eg screening and consent. Guardianship and administration orders are often long term or lifelong. It should be explored whether intervention orders focussed on the perpetrator are able to be more dynamic and reflexive to changing circumstances as to safeguard without subjecting a victim to unnecessary restrictions. Benefits and limitations of intervention orders, including unintended consequences for people with disability should be further explored. It is predicted that for intervention orders to be useful in this context, emergency services, police and other sectors will need capacity building in disability awareness, and adequate resourcing of peripheral support services will be important to ensure equitable access to the intervention orders. Otherwise, it may be an underutilised mechanism for people with disability because of a lack of support to navigate the complexity of associated processes.’

10.6.37 There is a need not to overextend the broad jurisdiction of the *IO Act*¹⁸⁹¹ and add to the already lengthy file lists of the specialist family violence court in the Magistrates Court. However, the prevalence of abuse which falls within the ambit of the *IO Act* should not deter the pursuit of intervention where it is appropriate.

10.6.38 Apposite are the following principles for intervention against abuse as stated in s 10 of the *IO Act*: abuse occurs in all areas of society, regardless of socio-economic status, health, age, culture, gender, sexuality, ability, ethnicity and religion;¹⁸⁹² and abuse may involve overt or subtle exploitation of power imbalances and may consist of isolated incidents or patterns of behaviour.¹⁸⁹³

10.6.39 SALRI accepts an intervention order is not a solution in many, nor probably the majority of cases of the abuse of vulnerable adults. It may be that ongoing contact between the parties is inevitable. However, their use and utility, as the Western Australian Parliamentary Report made clear, should not be discounted. Whilst there are differences between the Western Australian and South Australian legislation, an intervention order in South Australia may be available and useful in at least some instances of the suspected abuse of an older person or a person with disability. The predatory carer, neighbour or ‘befriender’ comes to mind. It may also be possible to obtain an intervention order in respect of the abusive conduct of the perpetrator who is a family member, whilst retaining a measure of contact between the apparent victim and the perpetrator. An intervention order can be issued in South Australia in respect of a wide range of abusive behaviour, including financial and emotional abuse. SALRI is conscious of the work involved in applying for such orders and their enforcement, but reiterates that intervention orders may be useful in cases of both elder abuse and the abuse of persons with disability. SAPOL currently only applies for such orders in cases of physical abuse between domestic partners, but crucially such orders are not confined to domestic partners and can extend to physical, emotional and financial abuse.

10.6.40 SALRI suggests that the ASU should be encouraged, in response to reports of suspected abuse, to consider the utility of such orders and to be able to refer potential cases to SAPOL for such an order, including, in cases of the more serious suspected abuse, without the victim’s consent.¹⁸⁹⁴ SALRI notes that it is not saying such cases must be referred to SAPOL, but may be referred. It is vital to retain flexibility to assess what is likely to work best in any individual situation.

10.6.41 The option of an intervention order is also likely to prove more appealing in some instances than prosecution for any underlying offence.

10.6.42 The option of a ‘banning order’ from a Tribunal also emerges in the recent Victorian Report.¹⁸⁹⁵ The review proposed 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 entry and assessment orders, removal and placement orders, service provision orders and

¹⁸⁹¹ See *Rana v Gregurev* [2015] SASC 37, [15] (Peek J): ‘...because the concept of abuse is so broadly defined, it is ... necessary for the courts to ensure that this broad jurisdiction is not itself abused by specious or unwarranted claims with their associated detrimental consequences to both the limited resources of the courts and to persons the subject of unmeritorious applications. The necessary balance is achieved by investing the Magistrates with a great deal of discretion in the course they may take in any given case.’

¹⁸⁹² *Intervention Orders (Prevention of Abuse) Act 2009 (SA)* s 10(1)(a).

¹⁸⁹³ *Ibid* s 10(1)(b).

¹⁸⁹⁴ See also above Part 7.

¹⁸⁹⁵ Victorian Office of the Public Advocate, *Line of Sight: Refocussing Victoria’s Adult Safeguarding Laws and Practices* (Report, August 2022) Recommendation 4, 77.

banning orders. SALRI considers this option, whilst of merit, is unnecessary in South Australia. The Magistrates Court already has wide powers under the *AAS Act* to effectively do all these things, notably ‘an order requiring a specified person to do a specified thing, or to refrain from doing a specified thing, in respect of the vulnerable adult.’¹⁸⁹⁶ SALRI has proposed these powers in the *AAS Act* be conferred on SACAT.¹⁸⁹⁷

10.6.43 SALRI considers it is preferable to avoid duplication and confusion and that intervention orders should remain with the *IO Act*.

10.7 SALRI’s Observations and Conclusions

10.7.1 SALRI is of the view that a general crime of elder abuse is inappropriate and could prove unhelpful. As Cassie Mason and others noted to SALRI, such general offences of elder abuse could deter or discourage reports to the ASU owing to a fear that the culprit could be prosecuted in the criminal courts when that is often not the wish of the apparent victim. The existing crimes are adequate.

10.7.2 It is beyond the scope of this report to resolve whether any new crime of coercive control is appropriate and, in particular, if any such crime should extend beyond domestic partners to relationships involving a person who may be vulnerable to abuse. This is a complex question that would require careful consideration and consultation.

10.7.3 The application of intervention orders to address the abuse of an adult who may be vulnerable to abuse has been largely overlooked to date. Specialist SAPOL officers in consultation noted that the police focus for such orders is on physical abuse between domestic partners. However, there is a potential for wider application. Intervention orders were raised and accepted by parties such as ARAS, Maggie Rutjens and the specialist SAPOL officers as a worthwhile remedy to consider in responding to reports of the abuse of a vulnerable adult. SALRI is of the view that this is an option that should be considered by the ASU and others in responding to reports of abuse. Over-extending resources given the broad jurisdiction of the *IO Act* should be avoided. However, the prevalence and nature of the abuse which falls within the wide ambit of the *IO Act* should not deter the pursuit of intervention orders where it is appropriate.

10.7.4 SALRI accepts that, in many cases, an intervention order will not be of utility. The victim, for example, may be adamant they wish to retain contact with their abuser, especially if they are close relatives. However, notably in cases of the predatory ‘befriender’ as described by the Western Australian Parliamentary Report, they present an appropriate means of early and effective intervention to either cease and/or prevent such abuse. They may offer an accessible means of intervention when other existing remedies are not available or not suitable. They may provide for a flexible and case-specific intervention in cases where there is a complex and multifaceted relationship not only between the relevant parties, but also between the actual and potential psychological and financial abuse at play. An apparent victim may prefer an intervention order be sought than for the police to prosecute for any underlying offence.

10.7.5 SALRI notes that the application for an intervention order is within the expertise and established role of the police and it would be inappropriate to vest that power with a body such as the ASU. SALRI suggests that the ASU should develop clear criteria and processes for consideration

¹⁸⁹⁶ *AAS Act* s 33(1)(b).

¹⁸⁹⁷ See above Recommendation 33.

of the utility of an intervention order in response to reports of the abuse of a vulnerable adult. In appropriate cases, the ASU should be able to refer the case to SAPOL for their consideration of whether to apply for an intervention order. This should include in those cases under s 24 of the *AAS Act* where the ASU is able to act without the victim's consent. SALRI reiterates that it is not saying such cases must be referred to SAPOL, but may be referred. SALRI also suggests that the ASU should consider how it may assist persons vulnerable to abuse and/or their representatives to make a private application to the court for an intervention order in appropriate cases.

10.7.6 Recommendations

RECOMMENDATION 37

SALRI considers that a new crime of elder abuse (or such similar crime in relation to persons who may be vulnerable to abuse such as persons with disability) is unnecessary in South Australia.

RECOMMENDATION 38

SALRI recommends that further consultation and research should be undertaken to consider whether any new offence of coercive control should be extended beyond domestic partners to other family members or other relationships where the victim is vulnerable, including older persons and persons with disability.

RECOMMENDATION 39

SALRI recommends that the Adult Safeguarding Unit should develop clear criteria and processes to assess the utility of an intervention order under the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) in response to reports of the suspected abuse of an adult vulnerable to abuse. This should include, in appropriate cases, possible referral of a case to SAPOL for their consideration whether to apply for an intervention order. This should include cases where action is taken without the victim's consent under s 24 of the *Ageing and Adult Safeguarding Act 1995* (SA). It is also recommended that the Adult Safeguarding Unit should consider how it may assist persons vulnerable to abuse and/or their representatives to make a private application to the Court for an intervention order in appropriate cases.

Part 11 – Implications for Aboriginal Communities and Diverse Communities

11.1 Background

11.1.1 The ASU is a State-wide service, with an expansive remit to respond to cases of suspected abuse of ‘vulnerable adults’. From October 2022, the ASU will operate for all South Australian adults who meet the definition of vulnerable under the Act. Abuse does not discriminate between gender, ethnicity or geographical location. As a result, from an operational perspective, it is important that the functions of the ASU are adaptable to provide culturally appropriate and safe practices. This extends beyond investigation of abuse, to education and ongoing non-interventionist support. It is also important that the ASU operates effectively outside Adelaide and into regional and remote areas of South Australia.

11.1.2 Particular challenges and barriers in relation to the reporting of abuse and access to the ASU arise for Aboriginal communities, those from a Culturally and Linguistically Diverse background (‘CALD’)¹⁸⁹⁸ and persons with a disability. These themes were often highlighted to SALRI, notably by members of the disability community, Aboriginal communities and CALD communities. SALRI’s sessions with the disability community and CALD communities emphasised the need for these communities to know of the ASU and its role, and for effective and accessible reporting options to exist.¹⁸⁹⁹

11.1.3 Further, for adults living in regional or rural South Australia, access to the ASU and support may be difficult. This theme was often reiterated during SALRI’s regional consultation and was repeatedly expressed in Clare, Port Pirie, Port Augusta, Port Lincoln, Berri and Mount Gambier. This is relevant to the resourcing and governance of the ASU, to enable them to serve South Australians living in regional and rural areas.

11.1.4 For the purposes of this discussion, ‘older person’ refers to those aged 65 years and over. In the context of Aboriginal people, ‘older person’ refers to those aged 50 years and over.¹⁹⁰⁰ However, SALRI notes that the overwhelming view in consultation was that any age cut off is not of assistance in determining a person’s vulnerability.

¹⁸⁹⁸ CALD refers to individuals who are from a non-English speaking background, whereby their first language is not English.

¹⁸⁹⁹ SALRI’s consultation with members of the disability community reported wide unawareness of the ASU and its role within that community. A person with disability also told SALRI that simply providing a phone number is not enough: ‘What do I say?’ There would be no idea how to articulate what they have experienced or how to formulate the complaint.

¹⁹⁰⁰ This was also the approach used by the ASU when it was limited only to older people: see *AAS Act* sch 1 cl 1(2). In Port Augusta, SALRI was told that even this lowering of the age is of little utility as many Aboriginal people do not reach 50 years of age.

11.1.5 Aboriginal communities¹⁹⁰¹ continue to experience ongoing barriers in access to justice and linked services.¹⁹⁰² These barriers are systemic and attitudinal and extend to language and culture. The definition and presence of abuse may differ according to cultural understandings and practices. As such, this must be a consideration when dealing with an Aboriginal person.¹⁹⁰³ An example of this was expressed to SALRI in Northern South Australia where an Aboriginal man, requiring high levels of care, was living at home with his wife. While he received regular government assisted care and western medical intervention, the family elected to treat some more minor ailments by way of ‘bush medicine’. When the man was admitted to respite care a medical professional, who had not previously been involved with the family, reported this treatment to the ASU as a form of abuse. Due to the regional location of the man and his family, and the cultural aspects of the care it was reported to SALRI that internally the ASU did not have the capacity to respond promptly and in a culturally sensitive manner to the complaint, however credit was given to their attempts to seek on the ground service providers to assist them. Sadly, however, these local providers were those involved with the family and as such formed part of the group of alleged perpetrators of the abuse.

11.1.6 Further, the ASU, like any Government body, must operate recognising the implications of historical and continuing intergenerational trauma experienced by Aboriginal communities in all facets of life. Aboriginal parties referred the Law Council in its *Justice Project* Report to ‘cycles of social disadvantage, racism, poverty, intergenerational trauma and grief, as well as experiences of systemic injustice that accumulate over a lifetime.’¹⁹⁰⁴ One Elder told SALRI ‘[t]he gap is not closing at all, it’s getting wider and wider.’ The mistrust associated with Government must be acknowledged as impacting the reporting of abuse and seeking support.

11.1.7 SALRI was informed that while the ASU has made concerted efforts to promote its role to regional and Aboriginal communities, specific strategies to facilitate culturally appropriate and safe means of accessing support through the ASU are an area requiring further consideration, resourcing and funding. In addition, communication and education strategies to bolster the ASU’s presence among various communities are necessary. SALRI’s consultation revealed a widespread lack of knowledge of the ASU’s existence and role, especially outside Adelaide. This illustrates the need for greater awareness of the ASU’s role and reporting options in regional, rural and remote communities.

11.1.8 As stressed in SALRI’s previous references, policy, law and practice should only be designed and implemented in co-design with, and with close input from, the particular Aboriginal community affected.¹⁹⁰⁵ This also applies to CALD communities, who may also face particular challenges.¹⁹⁰⁶

¹⁹⁰¹ SALRI references to ‘Aboriginal peoples’ in this discussion relate to both Aboriginal and Torres Strait Islander peoples. See also Bruce Pascoe and David Horton (eds), *The Little Red Yellow Black Book: An Introduction to Indigenous Australia* (Australian Institute of Aboriginal and Torres Strait Islander Studies, 4th ed, 2018) 8–10. The discussion will largely relate to South Australian Aboriginal Communities.

¹⁹⁰² See generally Law Council of Australia, *The Justice Project: Aboriginal and Torres Strait Islander People* (Final Report, August 2018); David Plater et al, South Australian Law Reform Institute, *Providing A Voice to the Vulnerable: A Study of Communication Assistance in South Australia* (Report No 16, 2021) 146–94.

¹⁹⁰³ See generally Law Council of Australia, *The Justice Project: Aboriginal and Torres Strait Islander People* (Final Report, August 2018).

¹⁹⁰⁴ Ibid 8.

¹⁹⁰⁵ See David Plater et al, South Australian Law Reform Institute, *Providing A Voice to the Vulnerable: A Study of Communication Assistance in South Australia* (Report No 16, 2021) 147 [6.1.7].

¹⁹⁰⁶ See generally Law Council of Australia, *The Justice Project: Recent Arrivals to Australia* (Final Report, August 2018).

11.1.9 It is important to recognise that, as noted by the Law Council, Aboriginal communities ‘have diverse perspectives and cultures, and approaches applicable to one community may not be reproduced effectively in another, in the absence of local consultation and adaption’.¹⁹⁰⁷

11.1.10 This Part will briefly outline the particular barriers relating to abuse and its reporting, among Aboriginal communities, CALD communities and persons with a disability. Access issues for regional, rural and remote communities will also be addressed.

11.2 Current Position in South Australia

11.2.1 South Australia has a rich cultural diversity, which highlights the need to consider future laws and policies to meet the specific needs, interests and concerns of the Aboriginal and CALD communities. In areas of law, policy and practice, it is vital that Aboriginal and CALD community members are actively involved in their design and implementation. Mistrust of the Government and related entities, particularly for Aboriginal people, must be recognised. It may also serve as a barrier to reporting abuse and access to support.¹⁹⁰⁸

Aboriginal Communities

11.2.2 There are nine Aboriginal townships within South Australia — Amata, Koonibba, Maralinga Tjarutja (Oak Valley), Mimili, Nepabunna (Nipapanha), Pukatja (Ernabella), Raukkan, Umuwa and Yalata, and over 30 distinct Aboriginal Nations.¹⁹⁰⁹ Whether an Aboriginal person lives inside or outside of these townships does not impact the need for culturally relevant and sensitive information and services, or experiences and barriers associated with the legal system. The issues raised in this Part are relevant to all Aboriginal communities in South Australia.

11.2.3 Access to appropriate and culturally sensitive information is crucial. For older members of Aboriginal communities, ARAS offers advocacy services and information sessions. This service may include support in accessing interpreters, providing guidance on culture, collecting information and informing third parties on culturally appropriate responses to concerns.¹⁹¹⁰ This service is only available to older Aboriginal people receiving Australian Government funded aged care. ARAS engages with key community networks and groups to gain an understanding of emerging issues in communities, and share information about access to suitable support services.

11.2.4 In addition, ARAS established the Aboriginal Intergenerational Gathering (also known as Mentoring Camp), a program funded by the Australian Government, Department of Health. This program brings together First Nations Elders, youth and community representatives in a different regional location each year with the purpose of fostering respect and understanding. The program is led by ARAS’ Aboriginal Advocate, who partners with key community representatives with an aim to:

- Increase and restore respect of Elders by Aboriginal Youth;
- Re-affirm Aboriginal Youth Identity including spirituality and belonging;

¹⁹⁰⁷ Ibid 7.

¹⁹⁰⁸ This may also apply to recent immigrants to Australia, in light of previous experiences and trauma.

¹⁹⁰⁹ National Indigenous Australians Agency, *Communities List* (Web Page, 2020) <https://www.indigenous.gov.au/communities/list-view?title=&field_indig_state_tid=21>.

¹⁹¹⁰ Aged Rights Advocacy Service, *Scope of Service 2019 Aboriginal Advocacy* (Web Page, 2019) <https://www.sa.agedrights.asn.au/aboriginal_advocacy/overview>.

- Raise the level of respect for Elders, and increase their safety in the community; and
- Build confidence, develop leadership skills and future ambassadors to safeguard Elders.

11.2.5 Additionally, ARAS recently commissioned research from the University of Adelaide on unmet need and demand for advocacy services in APY Lands in order to understand the needs, perspectives and preferred model/approach of the different communities. ARAS is in the preliminary stages of progressing the first stage of the findings with a community engagement co-design approach focussed on the preferred way to support each of the communities. Additional resources are likely to be required.

11.2.6 The success of this case can be largely attributed to the relationship of trust that was established between the First Nations older person and the support worker which enables the process to be so effective.

11.2.7 The Aboriginal Legal Rights Movement (‘ALRM’) is an organisation that advocates for the interests of Aboriginal communities (though it is far from the only such body). The ALRM’s Community Legal Education Program is an important conduit of communication with community leaders.¹⁹¹¹ It is facilitated by a Community Legal Education Officer, who informs the Aboriginal community of their legal rights, responsibilities and available services through the ALRM.¹⁹¹² The program relies on engagement with Aboriginal communities, the organisation of community events, dissemination of appropriate educational and promotional material, the implementation of a communication strategy, program development, networking and more.¹⁹¹³

11.2.8 SALRI suggests that information campaigns are necessary to increase understanding and awareness of the ASU and the delivery of information must be culturally and linguistically appropriate.

CALD Communities

11.2.9 With respect to CALD individuals, the most recent 2016 census revealed nearly 400,000 South Australians were born overseas and nearly 270,000 speak a non-English language at home.¹⁹¹⁴ This means approximately 15% (excluding children) of South Australia’s population are CALD.¹⁹¹⁵ According to the latest data, primary non-English speaking countries of origin include India, China, Italy, Vietnam, Philippines, Germany, Greece and Malaysia.¹⁹¹⁶

¹⁹¹¹ Some community members have noted to SALRI that there can be a perception of bias within ALRM as, due to their nature primarily as a legal service their focus is, and rightly so, on assisting alleged perpetrators. This can cause difficulties where education and outreach has a focus on victims as the community may query the purpose of the education. SALRI however is of the view that the ALRM has the appropriate skills and networks to convey information about the ASU not only to community but also other relevant service providers in a timely and culturally sensitive manner. They may not however, due to the perceptions above and their primary functions, be in a position to assist community members with reporting.

¹⁹¹² Aboriginal Legal Rights Movement, *Annual Report 2018/19* (Report, 2019) 21.

¹⁹¹³ Ibid.

¹⁹¹⁴ Department of Premier and Cabinet South Australian Government, *South Australian at a Glance* (Web Page, 2021) <<https://www.dpc.sa.gov.au/responsibilities/multicultural-affairs/population-and-migration/south-australia-at-a-glance>>.

¹⁹¹⁵ Ibid.

¹⁹¹⁶ Ibid.

11.2.10 In 1980, the South Australian Multicultural and Ethnic Affairs Commission (“SAMEAC”) was established under the *South Australian Multicultural and Ethnic Affairs Commission Act 1980*.¹⁹¹⁷ The purpose of this Act was to promote the interests of South Australia’s ethnic communities, by ensuring these interests were reflected in government policies and proposed laws.¹⁹¹⁸ Inherent within this purpose, is the importance of acknowledging multiculturalism — which is defined in the *South Australian Multicultural and Ethnic Affairs Commission Act 1980* (SA) as:

[P]olicies and practices that recognise and respond to the ethnic diversity of the South Australian community and have as their primary objects the creation of conditions under which all groups and members of the community may— (a) live and work together harmoniously; and (b) fully and effectively participate in, and employ their skills and talents for the benefit of, the economic, social and cultural life of the community; and (c) maintain and give expression to their distinctive cultural heritages.¹⁹¹⁹

11.2.11 Cultural and language differences will influence the way in which an individual perceives or defines abuse, coercion or influence. Further, it may be that a particular concept or term does not exist in that language or culture.

11.2.12 In an attempt to address these language barriers, fact sheets are available in other languages. For example, the Alliance for the Prevention of Elder Abuse provides fact sheets on EPA’s and managing finances in Chinese, Greek, Italian, Polish and Vietnamese.¹⁹²⁰ ARAS also provides an overview brochure, outlining their role and how they can assist in 17 languages.¹⁹²¹

11.2.13 The Multicultural Communities Council of South Australia (‘MCCSA’) is an affiliate of the Federation of Ethnic Communities Council, which is the peak national body advocating for CALD communities. The MCCSA supports CALD individuals ‘to realise their potential as active contributors to the economic, social and cultural life of South Australia’.¹⁹²² This is achieved through productive collaboration and active engagement with community leaders in consultation and policy reform, identifying and understanding cultural values and promoting multiculturalism through various programs. The MCCSA runs information sessions and engages with CALD communities via alternative platforms, such as community radio stations, social media and newsletters. Their work is integral in promoting the rights and interests of CALD communities, bridging gaps in communication and understanding and implementing safeguards to protect the rights of CALD communities.

Bridging Gaps

11.2.14 Greater engagement with Aboriginal and CALD communities will facilitate and encourage the development of appropriate policies and education programs. Methods to alleviate barriers to

¹⁹¹⁷ *South Australian Multicultural and Ethnic Affairs Commission Act 1980* (SA). For more information about SAMEAC’s functions, see Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 368 [9.1.11].

¹⁹¹⁸ South Australian Multicultural and Ethnic Affairs Commission, *History of SAMEAC* (Web Page, 2019) <<https://www.dpc.sa.gov.au/responsibilities/multicultural-affairs/south-australian-multicultural-and-ethnic-affairs-commission/history-of-sameac>>.

¹⁹¹⁹ *South Australian Multicultural and Ethnic Affairs Commission Act 1980* (SA) s 4.

¹⁹²⁰ Alliance for the Prevention of Elder Abuse, *In Your Language* (Web Page, 2020) <<https://www.a pea.org.au/copy-of-publications>>.

¹⁹²¹ Aged Rights Advocacy Service, *Information in Your Language* (Web Page, 2020) <<https://www.sa.agedrights.asn.au/resources/information-in-your-language>>.

¹⁹²² Multicultural Communities Council of South Australia, *Our Mission* (Web Page, 2020) <<http://mccsa.org.au/about/>>.

access culturally and linguistically appropriate information are appropriate. In addition, strategies to minimise difficulties in locating this information will improve access.

11.3 Issues

11.3.1 The presence of a language barrier, differences in culture and values, a limited education, a lack of understanding, and systemic disadvantage are material factors supporting the implementation of policy and reform which provide measures to protect vulnerable populations.

Aboriginal Communities

11.3.2 In a 2011 Report, the Australian Institute of Aboriginal and Torres Strait Islander Studies aptly commented on the history and impact of negative perceptions of Aboriginal communities:

Persistent perceptions of deficit, difference and conflict have characterised and constrained the history of relations between Aboriginal and non-Aboriginal Australians since contact. The success of their saturation is apparent in a continuing approach that commonly presents the response to Aboriginal needs in terms of health and education ‘gaps’, ‘the Aboriginal *problem*’, ‘mainstreaming’ (making *them* more like *us*) and ‘the intervention’ (with the lack of agency that such a word implies).

Despite the use of such language within programs to address very real health, economic and social need, the underlying approach continues to carry (and replicate) an implicit assumption of deficit and a positioning of the locus of control away from Aboriginal people. Instead of being value neutral, the use of this type of terminology frames Aboriginal identity in a negative way and acts, therefore, as a component of negative stereotyping.¹⁹²³

11.3.3 This is a significant barrier.¹⁹²⁴ A new communication strategy, which fosters engagement and active participation in discussions and reform, would help alleviate this barrier. This was reinforced in the 2016 Redfern Statement:

The health and wellbeing of Aboriginal and Torres Strait Islander peoples cannot be considered at the margins.

It is time that Aboriginal and Torres Strait Islander voices are heard and respected, and that the following plans for action in relation to meaningful engagement, health, justice, preventing violence, early childhood and disability, are acted upon as a matter of national priority and urgency.¹⁹²⁵

11.3.4 In addition, further barriers such as language, poor access to relevant information, a lack of cultural relevance within the system and an inherent distrust in government due to previous detrimental government-initiated systems, all contribute to the vulnerability of Aboriginal communities.¹⁹²⁶ A number of barriers to promoting the positive health outcomes of older Aboriginal

¹⁹²³ Scott Gorringer, Joe Ross and Cressida Fforde, Australian Institute of Aboriginal and Torres Strait Islander Studies, ‘*Will the Real Aborigine Please Stand Up: Strategies for Breaking the Stereotypes and Changing the Conversation*’ (Research Discussion Paper No 28, 2011) 4.

¹⁹²⁴ Ibid.

¹⁹²⁵ ‘The Redfern Statement’ (Peak Body Statement, 9 June 2016) 9
<<https://nacchocommunique.files.wordpress.com/2016/06/redfern-statement-june-2016-elections-18-pages.pdf>>. See also Law Council of Australia, *The Justice Project: Aboriginal and Torres Strait Islander People* (Final Report, August 2018) 9.

¹⁹²⁶ NSW Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 35 [4.35]. Although these barriers were identified in the context of the guardianship system, they remain relevant. ‘Aboriginal and

people were identified by the Wardliparingga Aboriginal Research Unit based at the South Australian Health and Medical Research Institute ('SAHMRI'). These barriers included:

- A lack of Aboriginal staff in support services (Government and non-government);
- Difficulty in accessing services;
- Lack of resourcing and funding;
- Culturally unsafe environments;
- A lack of community awareness about abuse;
- Fear of negative consequences;
- Financial constraints;
- The hidden nature of elder abuse;
- Disempowerment; and
- Drug and alcohol misuse — this was identified as a barrier when family and friends of the older Aboriginal person experienced drug or alcohol misuse.¹⁹²⁷

11.3.5 The number of Aboriginal people aged 50 years and over subject to elder abuse is increasing and is expected to 'more than double from 59,400 in 2011 to up to 130,800 in 2026'.¹⁹²⁸ The prevalence of elder abuse in Aboriginal communities is largely unknown and methods to identify and measure the incidence of abuse are challenging.¹⁹²⁹ This was raised in the 2018 Western Australian Parliamentary Report which 'encountered significant difficulty with obtaining evidence from the community and key stakeholders regarding the additional risks that are faced by older Aboriginal and Torres Strait Islander people.'¹⁹³⁰ A number of factors were relevant to this finding, including the 'hidden nature and shame' attached to elder abuse.¹⁹³¹ Family obligation and kinship are integral parts of Aboriginal culture.¹⁹³² The Western Australian Parliamentary Report observed that 'Kinship and family bonds are highly valued in many Aboriginal cultures and "for the elderly Aboriginal person, family obligation is at the core of their Aboriginality"'.¹⁹³³ It was found that '[s]trong family

Torres Strait Islander people tend to experience multiple types of disadvantage. This disadvantage is a product of a history of dispossession and a legacy of systemic social, political and legal discrimination towards Aboriginal and Torres Strait Islander peoples in Australia': Law Council of Australia, *The Justice Project: Aboriginal and Torres Strait Islander People* (Final Report, August 2018) 7. See also Natalie Clements, Jayne Clapton and Lesley Chenoweth, 'Indigenous Australians and Impaired Decision-Making Capacity' (2010) 45(3) *Australian Journal of Social Issues* 383.

¹⁹²⁷ Wardliparingga Aboriginal Research Unit South Australian Health and Medical Research Institute, *What Keeps You Safe: Approaches to Promote the Safety of Older Aboriginal People* (Final Report, 2019) 10.

¹⁹²⁸ Ibid 3.

¹⁹²⁹ Ibid.

¹⁹³⁰ Western Australian Select Committee into Elder Abuse, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 29 [3.18].

¹⁹³¹ Ibid.

¹⁹³² Bruce Pascoe and David Horton (eds), *The Little Red Yellow Black Book: An Introduction to Indigenous Australia* (Australian Institute of Aboriginal and Torres Strait Islander Studies, 4th ed, 2018) 25.

¹⁹³³ Western Australian Select Committee into Elder Abuse, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 31 [3.29].

relationships may dissuade an older person from viewing negative behaviour towards them as elder abuse, which can increase their vulnerability.¹⁹³⁴

11.3.6 Through SALRI's consultation process, the issue of managing a suspected abusive situation relating to Aboriginal people was raised. Regional lawyers from Clare identified that due to cultural practices and the legacy of the Stolen Generation and child removal policies, an interventionist approach is not appropriate. Instead, a nuanced approach is necessary.

11.3.7 In 2016, the Australian Institute of Family Studies noted that the mainstream conceptualisation of 'elder abuse' needed to be reconsidered for Aboriginal communities.¹⁹³⁵ The terms 'elder' and 'abuse' were problematic, considered to be 'inapt and confrontational'.¹⁹³⁶ The Wardliparingga Aboriginal Research Unit found that the term 'elder' held a specific meaning, reflecting 'someone who has gained recognition as a custodian of knowledge and lore, and who has permission to disclose knowledge and beliefs (not necessarily based on age)'.¹⁹³⁷ In relation to abuse, the term 'Elder mistreatment' was 'commonly preferred'.¹⁹³⁸

11.3.8 The Law Reform Commission of Western Australia also raised the appropriateness of the term 'money', in relation to guardianship and administration.¹⁹³⁹ It noted:

Some elderly people, particularly from traditional communities, appear to have no 'western' concept of money and they give monies to relatives because they have a cultural obligation to share. Sometimes this type of relationship can be taken advantage of by perpetrators for their own financial gain.¹⁹⁴⁰

11.3.9 This observation reiterates the need for culturally appropriate definitions relating to the ASU's work — which incorporates financial decision-making, abuse and elder abuse.

11.3.10 The ASU when carrying out its functions must be capable of dealing with kinship and collective-based decision-making. When dealing with Aboriginal clients and raising awareness of elder abuse, active and inclusive engagement with Aboriginal communities is necessary. In addition, it must be emphasised that the barriers experienced by Aboriginal communities are often a product of a rigid system that is incapable of adapting to Aboriginal culture. In this way, the approach to reform is reframed. As Professor Marcia Langton and Professor Tom Calma comment: '[a]n Indigenous voice

¹⁹³⁴ Ibid 29 [3.20].

¹⁹³⁵ Rae Kaspiew, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report, February 2016) 12 [3.4].

¹⁹³⁶ Ibid. See also Wardliparingga Aboriginal Research Unit South Australian Health and Medical Research Institute, *What Keeps You Safe: Approaches to Promote the Safety of Older Aboriginal People* (Final Report, 2019) 3. The incidence of humbugging has been explored further below in this Part. For more information, please see: Western Australian Select Committee into Elder Abuse, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 31–2.

¹⁹³⁷ Wardliparingga Aboriginal Research Unit South Australian Health and Medical Research Institute, *What Keeps You Safe: Approaches to Promote the Safety of Older Aboriginal People* (Final Report, 2019) 12. This was also explained to SALRI by Elders in Port Augusta.

¹⁹³⁸ Ibid.

¹⁹³⁹ See Law Reform Commission of Western Australia, *Aboriginal Customary Laws* (Final Report No 94, September 2006) 246.

¹⁹⁴⁰ Ibid.

will ensure Aboriginal and Torres Strait Islander peoples' voices are heard in the development of policy and in decision-making at the local, regional and national level.¹⁹⁴¹

Culturally Appropriate Strategies for Engagement

11.3.11 The Western Australian Parliamentary Committee heard evidence that any response to elder abuse in Aboriginal communities must be 'culturally safe' and be delivered by culturally competent professionals 'or else older Aboriginal people will not access the services'.¹⁹⁴² The Committee found that any support service that is offered to older Aboriginal people must be culturally safe, developed in conjunction with Aboriginal people and acknowledge the unique circumstances in which elder abuse can occur.¹⁹⁴³ SALRI agrees with these observations.

11.3.12 In its Final Report, the Wardliparingga Aboriginal Research Unit made a number of recommendations for engaging in a meaningful and culturally appropriate way with Aboriginal communities, in the context of elder abuse. Three key recommendations were identified, all of which rely upon and enable community co-design.

11.3.13 The first recommendation advocated for raising awareness and providing useful and effective information,¹⁹⁴⁴ noting:

The Aboriginal community should have access to useful and effective information about elder abuse and mistreatment including types, warning signs, risk factors and where to get help. For example, this report could be shared with relevant community and aged care sector services. Aboriginal community should be involved in the planning and co-design of all resources or strategies relating to preventing Aboriginal elder abuse or mistreatment.¹⁹⁴⁵

11.3.14 A number of suggestions were identified to implement this recommendation, which were derived from consultation and literature:

- Creating a website to provide information: this requires community co-design, consideration of language barriers and the use of visual aids;¹⁹⁴⁶
- A community-led awareness campaign about elder abuse: this would incorporate education about the types/signs of abuse and how to access support. It was noted that '[t]he campaign could involve Aboriginal community champions with lived experience and could also use imagery and artwork that comes directly from the community members.'¹⁹⁴⁷ This would also require meaningful engagement with Aboriginal communities and services, the establishment of a community reference group and yarning circles.¹⁹⁴⁸

¹⁹⁴¹ National Indigenous Australians Agency, 'News and Media: Work With Us and We Will Have a Better Future' (Web Page, 2020) <<https://www.indigenous.gov.au/news-and-media/stories/work-with-us-better-future>>.

¹⁹⁴² Western Australian Select Committee into Elder Abuse, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 30 [3.21].

¹⁹⁴³ Ibid Finding 14.

¹⁹⁴⁴ Wardliparingga Aboriginal Research Unit South Australian Health and Medical Research Institute, *What Keeps You Safe: Approaches to Promote the Safety of Older Aboriginal People* (Final Report, 2019) 5.

¹⁹⁴⁵ Ibid 6.

¹⁹⁴⁶ Ibid.

¹⁹⁴⁷ Ibid.

¹⁹⁴⁸ Ibid.

- Providing clear posters and pamphlets containing information about elder abuse; this must be formulated in co-design with community members, using visual aids and promoting cultural values and principles.¹⁹⁴⁹

11.3.15 The second recommendation concerned support for older Aboriginal people to ‘connect with and to continue their culture’.¹⁹⁵⁰ It was noted that:

Older Aboriginal people may need support to be able to continue their deep connection to culture, family and spirituality. Practicing culture can strengthen and safeguard elder wellbeing. Any barriers to cultural connection (access to programs, transport or financial barriers) should be carefully addressed.¹⁹⁵¹

11.3.16 As part of its implementation, it was noted that Aboriginal Elders required support to ‘engage with a cultural camp for Elders that connects Elders with youth and promotes strong intergenerational relationships.’¹⁹⁵² In addition, cultural workshops, held at an Aboriginal men’s shed, would be valuable.¹⁹⁵³

11.3.17 Finally, the third recommendation stated the importance of upholding the safety of older Aboriginal people. It stated ‘[o]lder Aboriginal people should have access to safe environments to gain respite and support from harmful situations and their safety should always be upheld.’¹⁹⁵⁴

11.3.18 The establishment of a community Healing House for respite, Aboriginal support phone line for elder mistreatment and the provision of mediators or advocates for prevention and intervention purposes were suggested.¹⁹⁵⁵ The Wardliparingga Aboriginal Research Unit made a number of important insights into a culturally appropriate communication approach for elder abuse. Diagram 1 on the following page was provided in their Report, detailing themes from literature and their own consultations to identify culturally appropriate practices:

¹⁹⁴⁹ Ibid 7.

¹⁹⁵⁰ Ibid.

¹⁹⁵¹ Ibid.

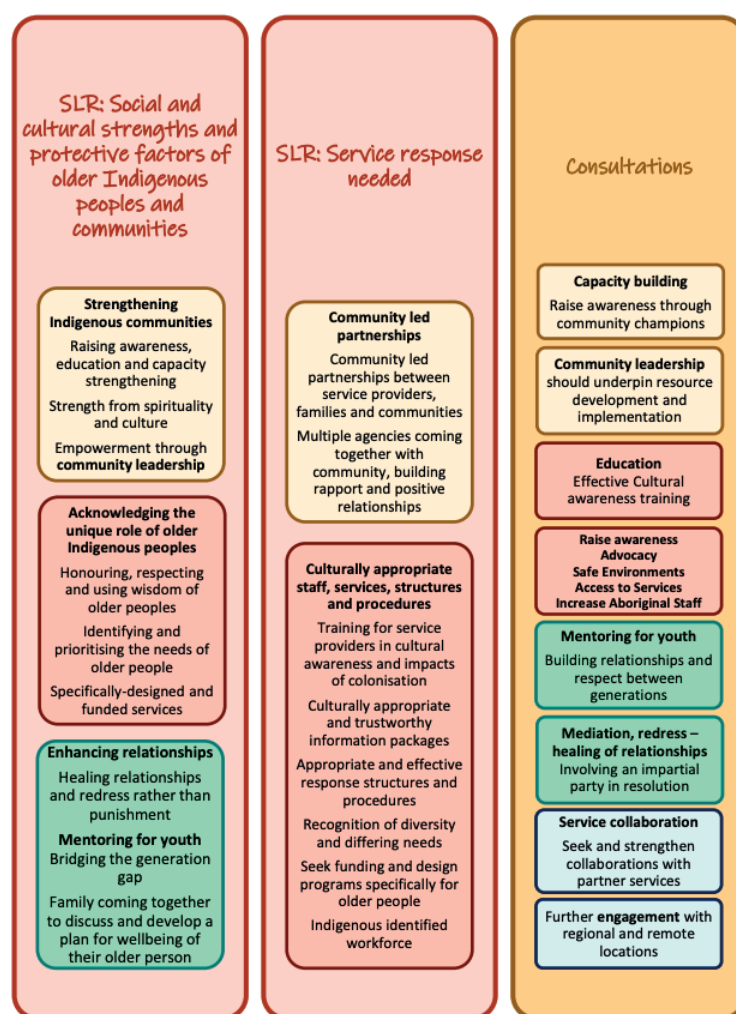
¹⁹⁵² Ibid 7.

¹⁹⁵³ Ibid.

¹⁹⁵⁴ Ibid 8.

¹⁹⁵⁵ Ibid 8.

Diagram 1: Themes to identify culturally appropriate practices¹⁹⁵⁶



11.3.19 It was suggested that, when working with Aboriginal communities, the focus needs to be on a culturally sound and consistent approach, so that a relationship is built between the OFAW/ASU and Aboriginal communities, with an educational focus as to the OFAW's and ASU's roles. This method will help ensure that there is no miscommunication as to the role of the ASU and may encourage victims and others to come forward regarding the reporting of suspected abuse. This approach encourages communication between the OFAW/ASU and Aboriginal communities, as Aboriginal people tend to distrust police and government agencies as they are often unsure regarding their rights and fearful of potential outcomes, particularly if family is often involved.¹⁹⁵⁷ An advocate from DACCSA shared this view with SALRI and raised that community programs focussed on enhancing awareness and education are central to preventing abuse. DACCSA emphasised that

¹⁹⁵⁶ This table is taken from ibid 9.

¹⁹⁵⁷ Kimberly Community Legal Service, *No More Humbug! Reducing Aboriginal Financial Elder Abuse in the Kimberly* (Research Report, December 2020) 11.

education is particularly important in regional areas where awareness and definitions of abuse may differ to that in urban areas.

11.3.20 ARAS suggested the need for ‘an increased focus on cultural, historical and lifestyle considerations when working with priority populations, such as care givers and First Nations people, by taking into account trauma informed assessment and ensuring cultural safety is at the forefront of practice’. ARAS provided to SALRI the following case study as evidence of what culturally appropriate and specialised service can accomplish:

Rose is an older Aboriginal female residing in a country town. Rose has numerous medical conditions and mobility issues and relies on community and rehab support and CHSP (Commonwealth Home Support Programme) cleaning for assistance. At the time of referral, Rose was already registered with My Aged Care (MAC) but needed support choosing a Level 2 Home Care Package provider, as she had a very limited understanding of the home care system and felt overwhelmed about what to do next. The Navigator Specialist Support Worker (SSW) met with Rose to explain how the financial component of home care packages, consumer contributions and the MAC system works, then, with approval, phoned MAC as Rose’s representative. MAC confirmed Rose had been assessed as eligible for a Level 4 home care package and was being offered Level 2 (currently being used for cleaning) until Level 4 was available. SSW showed Rose how to compare local Level 2 providers, including Aboriginal specific providers, on the MAC website. Simultaneously, Rose’s Level 4 home care package was approved, so SSW attended the first interview with Rose and a Level 4 provider who informed Rose about the number and type of services she could acquire under the package. After a second interview with the provider, Rose signed the contract. Rose is now able to have a carer weekly, cleaning, some home modifications are scheduled, and there is room in the budget for more.

11.3.21 The success of this case can be largely attributed to the relationship of trust that was established between the Aboriginal person and the support worker which enabled the process to be so effective.

A Human Rights Perspective

11.3.22 In 2009, the Australian Government formally supported the *United Nations Declaration on the Rights of Indigenous Peoples* (‘UNDRIP’).¹⁹⁵⁸ This landmark Declaration was a significant step towards the recognition and protection of Indigenous rights.¹⁹⁵⁹ The UNDRIP outlines ‘the individual and collective rights of the world’s 370 million native peoples, calls for the maintenance and strengthening of their cultural identities, and emphasizes their right to pursue development in keeping with their own needs and aspirations’.¹⁹⁶⁰ Although this is a non-binding Declaration, without legal force, it has been reiterated that ‘in several instances formally non-binding norms have played an even more effective

¹⁹⁵⁸ ‘Experts Hail Australia’s Backing of UN Declaration of Indigenous Peoples’ Rights’, *United Nations News* (online, 3 April 2009) <<https://news.un.org/en/story/2009/04/295902-experts-hail-australias-backing-un-declaration-indigenous-peoples-rights>>.

¹⁹⁵⁹ United Nations, ‘General Assembly Adopts Declaration on Rights of Indigenous Peoples; “Major Step Forward” Towards Human Rights for All, Says President’ (Media Release, 13 September 2007) <<https://www.un.org/press/en/2007/ga10612.doc.htm>>.

¹⁹⁶⁰ Ibid.

role [than legal norms] in promoting respect for human rights.¹⁹⁶¹ However, as highlighted by Mick Dodson, '[t]he value of human rights is not in their existence; it is in their implementation'.¹⁹⁶²

11.3.23 The *UNDRIP* identifies the fundamental human rights of Australia's Indigenous communities. These rights promote and uphold equality,¹⁹⁶³ freedom from discrimination,¹⁹⁶⁴ self-determination,¹⁹⁶⁵ autonomy,¹⁹⁶⁶ participation,¹⁹⁶⁷ respect of culture and dignity, and safety.¹⁹⁶⁸ In particular, Articles 18 and 19 of the *UNDRIP* refer to rights of participation and consultation in legislative and administrative reform.¹⁹⁶⁹ Aboriginal communities have a right to actively participate in decision-making with respect to matters that may impact their rights.¹⁹⁷⁰ As part of any reform process, the State has an obligation to consult, engage and cooperate with Aboriginal communities to gain informed consent prior to the adoption and implementation of legislative or administrative reforms.¹⁹⁷¹ This illustrates the need to formulate laws and systems which are culturally appropriate and relevant for Aboriginal communities.

11.3.24 A human rights-based approach to policy and legislative reform should address the relevant rights set out in the *UNDRIP* and the *Convention on the Rights of Persons with Disability* for Aboriginal people with a disability (which will be further explored in this Part). In addition, a targeted engagement strategy will help ensure effective and productive consultation with Aboriginal communities.

11.3.25 These conclusions highlight the importance of recognising the systemic disadvantage of Aboriginal communities, the need to understand and incorporate cultural values within the law and associated processes and the acknowledgement that culture dictates definitions of concepts such as 'elder abuse', 'financial abuse' or 'safeguarding'. These terms should be defined in accordance with an Aboriginal kinship system and cultural understandings.

11.3.26 The NSW Law Reform Commission also favoured the implementation of 'additional general principles' that should apply where an Aboriginal person requires support in decision-making.¹⁹⁷² The principles are:

¹⁹⁶¹ Claire Charters, 'The Legitimising Effect of Coordination Between Relevant International Institutions and the Harmonisation of the Rights of Indigenous Peoples' (2015) 32(1) *Arizona Journal of International & Comparative Law* 169, 170.

¹⁹⁶² Australian Human Rights Commission, *The Community Guide to the UN Declaration on the Rights of Indigenous Peoples* (Guide, 13 December 2010) 8.

¹⁹⁶³ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295, (2 October 2007, adopted 13 September 2007), art 2.

¹⁹⁶⁴ *Ibid.*

¹⁹⁶⁵ *Ibid* arts 3–4.

¹⁹⁶⁶ *Ibid* art 4.

¹⁹⁶⁷ *Ibid* art 5.

¹⁹⁶⁸ See also *Disability Royal Commission*, 'The Experience of First Nations People with Disability in Australia' (Issues Paper, 9 June 2020) 2.

¹⁹⁶⁹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295, (2 October 2007, adopted 13 September 2007), arts 18–19.

¹⁹⁷⁰ *Ibid* art 18.

¹⁹⁷¹ *Ibid* art 19.

¹⁹⁷² NSW Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 47 Rec 5.3.

- Recognition of culture;
- Customary law, values and beliefs;
- Kinship relationships;
- History and connection to traditional lands and waters;
- Acknowledge Aboriginal communities as facing systemic disadvantage; and
- Encourage a working relationship with Aboriginal communities who require decision-making assistance.¹⁹⁷³

11.3.27 This reinforces the need to understand and actively consider culture, values and customs for Aboriginal communities requiring decision-making assistance.

Culturally Appropriate Capacity Assessments

11.3.28 Safeguards should also be implemented in capacity assessments in relation to Aboriginal communities. Capacity assessments should be undertaken properly to ensure the rights of the vulnerable individual are preserved.¹⁹⁷⁴ Capacity should only be taken away when *necessary* — this is often not the case. Capacity assessments can further disadvantage Aboriginal communities due to a lack of cultural understanding, educational level and language barriers when undertaking the assessment. This was raised by the Western Australian Office of the Public Advocate to the Law Reform Commission of Western Australia’s 2006 Report into Aboriginal Customary Laws — ‘capacity assessments often have no regard to a person’s Aboriginality and that this may work to the disadvantage of Aboriginal people.’¹⁹⁷⁵

11.3.29 The Office of the Public Advocate went on to note:

Often the assessment of an Aboriginal person’s capacity is done from a non-Aboriginal perspective and does not fully consider cultural aspects of competency. Aboriginal people, particularly those from traditional backgrounds who come into contact with the guardianship and administration system can be severely disadvantaged because they do not understand the concepts of guardianship and administration.¹⁹⁷⁶

11.3.30 For example, a Western Australian guardianship case of *Re FS*¹⁹⁷⁷ concerned an Aboriginal man, Mr S, who required decision-making assistance. This case highlighted the importance of cultural sensitivity when a health professional engages with an Aboriginal person. Evidence provided by a psychologist specialised in working with Aboriginal communities stated:

[Mr S] is very aware of providing for his family as he is able to articulate the traditional obligations that have been evident for thousands of years within the Aboriginal culture. He is also very aware that this cultural obligation is reciprocal and should he need assistance his family and elders

¹⁹⁷³ Ibid 47. Similar principles are found in the *Disability Inclusion Act 2014* (NSW): see s 5(2).

¹⁹⁷⁴ See above Part 4.

¹⁹⁷⁵ Law Reform Commission of Western Australia, *Aboriginal Customary Laws* (Final Report No 94, September 2006) 245.

¹⁹⁷⁶ Ibid.

¹⁹⁷⁷ *Re FS* [2007] WASAT 202. See also Natalie Clements, Jayne Clapton and Lesley Chenoweth, ‘Indigenous Australians and Impaired Decision-Making Capacity’ (2010) 45(3) *Australian Journal of Social Issues* 383, 389.

(especially those with law relationships to [Mr S]) they [sic] are obliged to assist him as much as they possibly can.¹⁹⁷⁸

11.3.31 In light of guiding traditional obligations of reciprocity, the psychologist further noted:

Mr S's family and his community have expressed a desire to assist Mr S in making appropriate financial decisions by using the 'old way' which is a process of meetings between Mr S, his family and the relevant elder to discuss financial issues and to attempt to reach a consensus (with, however, Mr S having the final say on how the money is used).¹⁹⁷⁹

11.3.32 This case demonstrates that different cultural values and systems will influence perceptions and definitions of coercion or influence in decision-making, abuse and, in particular, financial abuse. The obligation of reciprocity influenced the way in which Mr S sought to make financial decisions. This is relevant to the ASU's work, in which these cultural factors must be considered. In Aboriginal communities, decision-making assistance is perceived as a 'communal responsibility'.¹⁹⁸⁰ The informal arrangement, as observed in *Re FS*,¹⁹⁸¹ recognises and preserves cultural values, such as reciprocity and a kinship obligation which imposes a duty to care and support kin.¹⁹⁸² It respects culture and promotes the autonomy of the person requiring decision-making support. This informal arrangement is consistent with a human rights-based approach of supported decision-making.

11.3.33 The importance of cultural values and systems should be understood when undertaking a capacity assessment. A failure to take this into consideration undermines the rights of Aboriginal people who have capacity. This was observed in an example provided by the Western Australian Public Advocate. An Aboriginal person was diagnosed as delusional, following 'mainstream psychological methods'.¹⁹⁸³ However, an assessment by an expert in Aboriginal mental health concluded there were no delusions, when the person's culture and beliefs were considered.¹⁹⁸⁴

11.3.34 An assessment tool, known as the Kimberley Indigenous Cognitive Assessment, was developed in collaboration with Aboriginal health and aged care organisations.¹⁹⁸⁵ This assessment was adapted and tailored for Aboriginal communities, taking into consideration factors impacting capacity assessments.¹⁹⁸⁶ This includes educational level, English as a third or fourth language, poor literacy, lack of written language (as many languages are oral), poor eyesight, conceptual understandings of numbers, time and space and the appropriateness of conversations relating to personal or family issues.¹⁹⁸⁷ The

¹⁹⁷⁸ *Re FS* [2007] WASAT 202, 17 [70].

¹⁹⁷⁹ *Ibid.*

¹⁹⁸⁰ Natalie Clements, Jayne Clapton and Lesley Chenoweth, 'Indigenous Australians and Impaired Decision-Making Capacity' (2010) 45(3) *Australian Journal of Social Issues* 383, 388.

¹⁹⁸¹ *Re FS* [2007] WASAT 202.

¹⁹⁸² See Law Reform Commission of Western Australia, *Aboriginal Customary Laws* (Discussion Paper No 94, December 2005) 269.

¹⁹⁸³ *Ibid.*

¹⁹⁸⁴ *Ibid.*

¹⁹⁸⁵ Dina LoGiudice et al, 'Kimberley Indigenous Cognitive Assessment tool (KICA): Development of a Cognitive Assessment Tool for Older Indigenous Australians' (2006) 18(2) *International Psychogeriatrics* 269. See also Natalie Clements, Jayne Clapton and Lesley Chenoweth, 'Indigenous Australians and Impaired Decision-Making Capacity' (2010) 45(3) *Australian Journal of Social Issues* 383, 387.

¹⁹⁸⁶ Dina LoGiudice et al, 'Kimberley Indigenous Cognitive Assessment tool (KICA): Development of a Cognitive Assessment Tool for Older Indigenous Australians' (2006) 18(2) *International Psychogeriatrics* 269, 271.

¹⁹⁸⁷ *Ibid.*

development of the Kimberley Indigenous Cognitive Assessment may assist in preserving the rights of the Aboriginal persons undertaking the assessment and acknowledges cultural, linguistic and educational factors impacting interpretation of results. However, the use of an accredited interpreter in the specific dialect required remains paramount.

11.3.35 Dr Tracy Westerman is a Nyamal woman from the Pilbara region of Western Australia and a clinical psychologist.¹⁹⁸⁸ Dr Westerman has created culturally appropriate and standardised assessment tools, after observing the limitations associated with mainstream tools.¹⁹⁸⁹ She notes:

When mainstream tests are applied to Aboriginal people for the purpose of assessment, because of their cultural inappropriateness for Aboriginal people, they can result in what is often referred to in psychology as ‘test error’ and misdiagnosis.¹⁹⁹⁰

11.3.36 Dr Westerman’s psychometric tests are culturally appropriate for Aboriginal people and have broadly addressed the ‘suicide risk of Aboriginal people; mental health risk of Aboriginal people; and cultural competency measurements in respect of the culture of Aboriginal peoples given the absence of Government funding.’¹⁹⁹¹

11.3.37 Clements et al addressed the cultural relevance of current capacity assessment tools in a 2010 article examining decision-making capacity of Aboriginal communities.¹⁹⁹² Cognitive assessments for capacity are ‘problematic cross-culturally’.¹⁹⁹³ Assessments rely on language, a certain level of education and specific stimuli to determine capacity.¹⁹⁹⁴ These instruments have a ‘cultural bias towards non-Indigenous people’, which may lead to ‘misdiagnosis among those from other cultures’.¹⁹⁹⁵ Clements et al went on to note ‘[p]erformance deficits on tasks that suggest brain dysfunction may actually arise from cultural determinants for Indigenous peoples such as socio-economic status, language or expectations of the assessment experience’.¹⁹⁹⁶ This was observed in the case of *Re FS* provided by the Western Australian Public Advocate, where cultural determinants led to a misdiagnosis of a delusional disorder.

11.3.38 Cultural values and beliefs must be considered prior to deeming that an Aboriginal person lacks decision-making capacity. Capacity assessors must be acquainted with specific ‘ethnic protocols’ relevant to Aboriginal peoples, such as modes of communication and taboos.¹⁹⁹⁷ Clements et al highlighted the importance of understanding and accounting for ethnic protocols:

¹⁹⁸⁸ For more information about Dr Westerman’s work, please see: Indigenous Psychological Services, *Home* (Web Page) <<https://indigenoupsychservices.com.au/>>. See also Tracy Westerman, Statement to the *Disability Royal Commission* (24 November 2020).

¹⁹⁸⁹ Tracy Westerman, Statement to the *Disability Royal Commission* (24 November 2020) 3.

¹⁹⁹⁰ *Ibid.*

¹⁹⁹¹ *Ibid* 4.

¹⁹⁹² Natalie Clements, Jayne Clapton and Lesley Chenoweth, ‘Indigenous Australians and Impaired Decision-Making Capacity’ (2010) 45(3) *Australian Journal of Social Issues* 383.

¹⁹⁹³ *Ibid* 387.

¹⁹⁹⁴ *Ibid* 386.

¹⁹⁹⁵ *Ibid.*

¹⁹⁹⁶ *Ibid* 386–7.

¹⁹⁹⁷ *Ibid* 387.

As an example, due to the Indigenous preference for indirect communications (eg using metaphors and stories), a non-Indigenous professional may not realise when a patient has in fact answered a question, nor what the response means.¹⁹⁹⁸

11.3.39 The Western Australian Public Advocate supported mandatory requirements to consider cultural values and beliefs prior to a final determination of capacity and recommended the State Administrative Tribunal investigate cultural issues prior to making a final decision on capacity.¹⁹⁹⁹ In their 2015/16 Annual Report, the Western Australian Public Advocate concluded: ‘Making decisions for represented people from an Aboriginal and Torres Strait Islander background requires an understanding of cultural differences.’²⁰⁰⁰

11.3.40 The Law Reform Commission of Western Australia also noted the importance of developing assessment tools which are culturally appropriate and tailored to the culture, values and beliefs of Aboriginal communities.²⁰⁰¹ Further, cultural awareness training was recommended for all Western Australian government employees, contractors and sub-contractors and court and Tribunal staff to enhance knowledge and understanding of Aboriginal culture.²⁰⁰² Recommendation 73 imposed an obligation on the State Administrative Tribunal to actively take steps to ensure ‘Aboriginal perspectives’ are considered in the assessment of capacity.²⁰⁰³

11.3.41 Language barriers and poor access to accredited interpreters have the potential to further undermine capacity assessment. Significant barriers exist for Aboriginal peoples who do not speak English.²⁰⁰⁴ Access to and availability of accredited interpreters for many of these dialects is limited or unavailable,²⁰⁰⁵ which further exacerbates inequity in relation to accessing services.²⁰⁰⁶ Professor Jane Simpson has identified three factors which lead to barriers for Aboriginal communities: namely

all government services are delivered in English as the default; interpreters and translations are often not available, or only available for serious court cases and serious medical problems and schools mostly operate in English with inadequate attention to the language needs of the children.²⁰⁰⁷

11.3.42 Specific issues relating to Aboriginal people with a disability are discussed below.

11.3.43 When considering elder abuse and the abuse of Aboriginal people living with a disability, it is important to consider not only the specific cultural and ethnic norms and traditions that are in

¹⁹⁹⁸ Ibid.

¹⁹⁹⁹ Law Reform Commission of Western Australia, *Aboriginal Customary Laws* (Final Report No 94, September 2006) 245.

²⁰⁰⁰ Public Advocate of Western Australia, *Annual Report 2015/16* (Report, 9 September 2016) 31.

²⁰⁰¹ Law Reform Commission of Western Australia, *Aboriginal Customary Laws* (Final Report No 94, September 2006) 245–6.

²⁰⁰² Ibid 246.

²⁰⁰³ Ibid.

²⁰⁰⁴ Ibid. Aboriginal people in remote communities are likely to speak English as a second, third or even fourth language. Law Council of Australia, *The Justice Project: Aboriginal and Torres Strait Islander People* (Final Report, August 2018) 31.

²⁰⁰⁵ There is a ‘major scarcity’ of suitable qualified interpreters: Law Council of Australia, *The Justice Project: Aboriginal and Torres Strait Islander People* (Final Report, August 2018) 4. See also at: 45–6.

²⁰⁰⁶ Law Reform Commission of Western Australia, *Aboriginal Customary Laws* (Final Report No 94, September 2006) 246.

²⁰⁰⁷ Ibid.

place, but also longstanding intergenerational trauma, including from the Stolen Generation and child removal policies.²⁰⁰⁸ SALRI was told of the reluctance of Aboriginal communities to report suspected abuse to a Government agency such as the ASU.

11.3.44 SALRI's consultation with Aboriginal communities and service providers on this and previous references revealed distrust of 'the people in white utes' who come into town but do not have a permanent presence in regional Aboriginal communities. Without this fundamental, ongoing relationship, cultural barriers within Aboriginal communities mean that most Aboriginal people will not come forward to report abusive situations.

Culturally and Linguistically Diverse Communities

11.3.45 Australia's multiculturalism and multilingualism are reflected through CALD communities. Specific barriers exist for CALD communities, especially for new and emerging communities, who do not have the same degree of establishment as groups such as the Italian and Greek communities.

11.3.46 The findings of the 2021 Australian Institute of Family Studies ('AIFS') Elder Abuse Prevalence Study found that 15.3% of CALD participants (total of 608) reported experiencing elder abuse.²⁰⁰⁹ In particular, it was found that 1.6% of CALD participants experienced financial abuse and 11.9% psychological abuse.²⁰¹⁰ Many instances involved abuse relating to language and culture, such as denial of access to information in preferred language, mistranslations of financial and legal documents and lack of respect due to culture, race and ethnicity.²⁰¹¹

11.3.47 Empirical evidence regarding the prevalence of elder abuse among CALD communities remains challenging to obtain. As a result, greater engagement with CALD communities and community leaders is necessary to raise awareness, educate and enhance capacity to report abuse. These initiatives must be undertaken in a culturally appropriate way and safe environment.

11.3.48 Many barriers identified in relation to awareness of elder abuse in the context of Aboriginal communities are also applicable to CALD communities. These include:

1. Language barriers;
2. Cultural relevance;
3. Lack of awareness and understanding;
4. Limited access to culturally and linguistically relevant information;
5. Limited access and/or no availability of accredited interpreters; and
6. Vulnerability with respect to capacity assessments.

²⁰⁰⁸ Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 170.

²⁰⁰⁹ Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 49.

²⁰¹⁰ Ibid.

²⁰¹¹ Ibid 49–50.

11.3.49 The notion of ‘familism’ may render a CALD community member at greater risk of elder abuse. Familism is described as:

[A] cultural value that emphasises the importance of the family over the individual and is a significant issue in some CALD communities. Familism may lead to a reluctance to report elder abuse, create interdependence in family relationships and priority being placed on reliance on family for support rather than institutions or agencies (such as the idea of trusting family more than the ‘system’).²⁰¹²

11.3.50 The practical implications of familism may lead to a person relying on a family member(s) for general support and access to service providers.²⁰¹³ It is in these situations where the risk for abuse becomes apparent.²⁰¹⁴

11.3.51 This was reinforced in a 2011 study of older Australians from Italian, Greek and Vietnamese backgrounds.²⁰¹⁵ The study revealed that older CALD people were ‘more likely than Australian-born older people to rely on support from family for financial management’.²⁰¹⁶ Further, the study found that older CALD people were more vulnerable to financial abuse due to language and literacy barriers, whereby reliance is placed on other for translation and assistance with finances.²⁰¹⁷

11.3.52 In its 2015 Review, the Federation of Ethnic Communities’ Councils of Australia (‘FECCA’) identified significant differences between CALD individuals and those from a non-CALD background. These differences act as barriers, contributing to disadvantages experienced by CALD individuals:

1. Poor socioeconomic status;²⁰¹⁸
2. Language barriers:²⁰¹⁹ the review revealed ‘higher levels of English language ability ... [were] found to be associated with better health, wellbeing and better social inclusion outcomes’;²⁰²⁰
3. ‘Cultural translations’: different ‘cultural practices and norms can lead to misdiagnoses, lack of understanding and barriers to service use’;²⁰²¹

²⁰¹² Western Australian Select Committee into Elder Abuse, *I Never Thought It Would Happen To Me’: When Trust is Broken* (Final Report, September 2018) 35 [3.43].

²⁰¹³ Ibid 36 [3.44].

²⁰¹⁴ For a more detailed discussion, please see ibid 36–7.

²⁰¹⁵ Melanie Joosten, Freda Vratsidis and Briony Dow, *Understanding Elder Abuse* (Scoping Study, June 2017) 18 citing Jo Wainer, Peter Darzins and Kei Owada, Monash University, *Prevalence of Financial Elder Abuse in Victoria: Protecting Elders’ Assets Study* (Report, 10 May 2010).

²⁰¹⁶ Ibid.

²⁰¹⁷ Ibid.

²⁰¹⁸ Federation of Ethnic Communities’ Councils of Australia, *Review of Australian Research on Older People from Culturally and Linguistically Diverse Backgrounds* (Report, March 2015) 10.

²⁰¹⁹ See also South Australian Multicultural and Ethnic Affairs Commission, *Report on CALD Ageing* (Report, December 2016) 4.

²⁰²⁰ Federation of Ethnic Communities’ Councils of Australia, *Review of Australian Research on Older People from Culturally and Linguistically Diverse Backgrounds* (Report, March 2015) 10.

²⁰²¹ Ibid.

4. Period of time in Australia: the total length of time in Australia will contribute to 'health and wellbeing outcomes' and overall 'life course and ... experiences of ageing';²⁰²²
5. Poor exposure to services and systems: there is a lack of understanding and knowledge in navigating services and systems.²⁰²³ As a result, diagnoses of dementia or cancer may be delayed in older CALD individuals;²⁰²⁴ and
6. 'Preference for family members to provide care'²⁰²⁵: some CALD communities prefer family to care for older people.²⁰²⁶

11.3.53 Language barriers are another significant factor impacting CALD communities. This extends to both financial and language literacy levels.²⁰²⁷ As identified by FECCA, information must be available in a variety of languages to cater for CALD communities.²⁰²⁸ Although translation is important, one must consider the possibility that translated materials may be poorly understood for CALD individuals with poor literacy.²⁰²⁹ In consultation, literacy was also raised as an issue and point of embarrassment for CALD individuals. Another factor concerning translations is their accuracy. Inaccurate translations of concepts may occur, especially where concepts do not exist in a culture.²⁰³⁰

11.3.54 The MCCSA advocated for greater access to translated information on EPAs, with plain English and minimal legal jargon.²⁰³¹ Increased use of bilingual professionals, such as qualified interpreters and translators would be very helpful as effective conduits for communication to CALD communities.²⁰³² The need for translated materials was reiterated by the VLRC, which recommended that power of attorney forms and information be presented in a 'bilingual format', including a number of different languages.²⁰³³

11.3.55 This highlights the need in the context of the OFAW and especially ASU for flexibility to adapt materials for CALD communities. Information should be tailored to the specific CALD community, taking into consideration language, literacy, accessibility and cultural relevance.

²⁰²² Ibid.

²⁰²³ Ibid.

²⁰²⁴ Ibid.

²⁰²⁵ Ibid; South Australian Multicultural and Ethnic Affairs Commission, *Report on CALD Ageing* (Report, December 2016) 4.

²⁰²⁶ Federation of Ethnic Communities' Councils of Australia, *Review of Australian Research on Older People from Culturally and Linguistically Diverse Backgrounds* (Report, March) 10.

²⁰²⁷ Western Australian Select Committee into Elder Abuse, *I Never Thought It Would Happen To Me': When Trust is Broken* (Final Report, September 2018) 35 [3.41].

²⁰²⁸ Federation of Ethnic Communities' Councils of Australia, *Review of Australian Research on Older People from Culturally and Linguistically Diverse Backgrounds* (Report, March) 10.

²⁰²⁹ Ibid 10. See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 267 [9.3.2].

²⁰³⁰ Evidence to Law Reform Committee, Parliament of Victoria, Melbourne, *Inquiry into Powers of Attorney*, 30 March 2010, 7.

²⁰³¹ Multicultural Communities Council of South Australia, Submission to South Australian Law Reform Institute, *Review of Powers of Attorney in South Australia* (14 September 2020).

²⁰³² Ibid.

²⁰³³ See Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 61 Rec 10.

11.3.56 Access to accredited, independent interpreters will ensure a CALD individual understands the relevant information conveyed to them.²⁰³⁴ MCCSA also advocated for greater access to qualified interpreters and translators from ‘diverse cultural backgrounds who understand and can “translate”’ relevant systems and processes.²⁰³⁵ Further, the need for upskilling interpreters was emphasised, in the use and understanding of legal terms and processes.²⁰³⁶

11.3.57 In addition, the MCCSA proposed the creation of ‘gateways’ to act as ‘information points’ to increase understanding of how to access relevant services.²⁰³⁷ This includes the dissemination of information across various platforms, such as community radio stations, online websites and social media, stations for ethnic TV, community information sessions, pamphlets and videos.²⁰³⁸ Strategies and actions to alleviate language barriers require a commitment of funding and resources, training for educators and most importantly, a partnership to promote engagement with CALD communities. As highlighted by the VLRC, ‘involving the target community in developing the campaign, and utilising CALD organisations’ connections with the community were viewed as vital’.²⁰³⁹

11.3.58 In SALRI’s focus group with the MCCSA, there was a discussion concerning factors that may make a person more vulnerable to abuse. Attendees identified a number of factors, including:

- Language barriers — which refers to comprehension and verbal communication skills and understanding legal, medical or technical terms;
- Cultural barriers and differences, visa and migrant status;
- Quality of and access to interpreters;²⁰⁴⁰ and
- Fear of reporting abuse and its impact on visa status.

11.3.59 Culturally appropriate means of engagement were also explored during this session. It was noted that ‘community leaders are the gatekeepers for information’. A number of points were noted in relation to effective ways to engage with CALD communities:

- It was suggested that a combination of physical and digital methods should be used, including papers, flyers, e-mail and Facebook;
- A member of the Russian community suggested the use of speakers in conjunction with an interpreter is an effective way of building relationships with community members;

²⁰³⁴ Federation of Ethnic Communities’ Councils of Australia, *Review of Australian Research on Older People from Culturally and Linguistically Diverse Backgrounds* (Report, March 2015) 10, 14.

²⁰³⁵ Multicultural Communities Council of South Australia, Submission to Transforming Health (SA), *Discussion Paper* (2015) 2.

²⁰³⁶ Multicultural Communities Council of South Australia, Submission to South Australian Law Reform Institute, *Review of Powers of Attorney in South Australia* (14 September 2020).

²⁰³⁷ Multicultural Communities Council of South Australia, Submission to Transforming Health (SA), *Discussion Paper* (2015) 2.

²⁰³⁸ Multicultural Communities Council of South Australia, Submission to South Australian Law Reform Institute, *Review of Powers of Attorney in South Australia* (14 September 2020).

²⁰³⁹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 267 [9.3.2].

²⁰⁴⁰ Many interpreters work on a casual basis, which limits their availability.

- A variety of channels should be used, including ethnic radio, translated pamphlets, building relationships with community leaders and volunteers;²⁰⁴¹
- Responses should be tailored to each community group — community leaders should be contacted and given options regarding how to distribute information;²⁰⁴²
- It is important to follow up if you task a community with distributing information — ensuring the information is received by respective communities; and
- There is a need for audio and video advertising as there are community members who are unable to read in their own language.

11.3.60 When communicating information to CALD communities, it is important to keep language plain and simple. Engagement with CALD communities must be tailored to the specific community, to ensure cultural appropriateness and safety. This is especially important in the context of abuse and reporting cases of suspected abuse.

11.3.61 Finally, the CALD focus group discussed cultural barriers to reporting abuse. It was agreed that there is a general reluctance to report. In particular, some migrants are more reluctant due to past trauma and fear of consequences. One example underpinning this fear is being revealed as the person who complained. This may also be applicable to employers who perpetrate abuse against a CALD person. It was noted that migrants are often reluctant to report their employer, due to the fear of losing work and diminishing future prospects for employment.

11.3.62 It was also suggested that apathy may impact reporting, as a person might assume the abuse will be reported by another party. Lack of education and awareness was also identified as a barrier. As a result, it was agreed that greater education about abuse is necessary to ensure a person, regardless of education level, literacy or ethnicity, understands their rights and powers. It is important to empower people, regardless of their vulnerabilities.

11.3.63 An example was provided in which one parent died. The family sold the house following this death. The remaining parent was removed from their home. In this case, it was asked — who will report it? The surviving parent was now homeless. SALRI's consultations have revealed this to be a not uncommon scenario.

11.3.64 Another barrier to reporting abuse pertains to risk of social isolation and unwillingness to disclose mistreatment or neglect for fear of social stigmatisation of abuse.²⁰⁴³

Culturally Appropriate Capacity Assessments

11.3.65 Members of CALD communities are also particularly vulnerable with respect to capacity assessments. SALRI's consultation revealed that capacity assessments must use an accredited and

²⁰⁴¹ In relation to volunteers specifically, it was noted that governments 'underestimate the value of volunteers'.

²⁰⁴² For example, one attendee suggested a cohesive 'package', containing all relevant information in one place, such as phone numbers, emails and names.

²⁰⁴³ Melanie Joosten, Freda Vrantzidis and Briony Dow, *Understanding Elder Abuse* (Scoping Study, June 2017) 18 citing Lana Zannettino et al, 'The Role of Emotional Vulnerability and Abuse in the Financial Exploitation of Older People From Culturally and Linguistically Diverse Communities in Australia' (2015) 27(1) *Journal of Elder Abuse and Neglect* 74.

independent interpreter for CALD individuals. This reduces the risk of the assessment being used as a means to exploit vulnerable CALD individuals.

11.3.66 The interpretation of results from a capacity assessment must take into account the use of an interpreter and the fact that the individual is of a non-English speaking background (CALD). In the Code of Conduct from the American Psychological Association, this refers to a requirement for an assessor to consider ‘situational, personal, linguistic and cultural differences that might affect psychologists’ judgments or reduce the accuracy of their interpretations’.²⁰⁴⁴ Language and cultural factors extend to familiarity with English or western concepts and terms. In addition to cultural, language and ethnic factors, the educational level of the CALD individual must also be considered in the interpretation of capacity assessment results.²⁰⁴⁵ This also includes the individual’s literacy level.

11.3.67 The Rowland Universal Dementia Assessment Scale (‘RUDAS’) may be used as an instrument to assess cognitive impairment, as its design ‘minimise[s] the effects of cultural learning and language diversity on the assessment of baseline cognitive performance’.²⁰⁴⁶ In the validation report for the RUDAS, results ‘consistently demonstrated that it is not influenced by education or preferred language/CALD status’.²⁰⁴⁷ The use of an instrument sensitive to cultural and linguistic differences is critical for CALD individuals.

11.3.68 Guidance is also provided if an accredited interpreter is used in the administration of a RUDAS assessment.²⁰⁴⁸ The Administration and Scoring Guide noted:

1. Interpreters should be used in all situations where the test taker’s preferred language is not spoken fluently by the test administrator.
2. Make sure that the language spoken by the interpreter (including the dialect) is the same one with which the test taker is familiar.
- ...
5. It is important to brief the interpreter before starting the assessment:
 - a. The interpreter should be aware of the general nature of the interaction ie that it is a cognitive assessment
 - b. Remind the interpreter of the importance of concurrent and precise interpreting. Explain that your instructions and the test taker’s responses should be interpreted as exactly as possible.
 - c. Ask the interpreter to take note of any instances during the assessment where the test taker’s performance may have been affected by subtle or unintended changes to the meaning of the test instructions due to language or cultural factors

²⁰⁴⁴ Paul Moberg and Kathryn Kniele, ‘Evaluation of Competency: Ethical Considerations for Neuropsychologists’ (2006) 13(2) *Applied Neuropsychology* 101, 114.

²⁰⁴⁵ See American Bar Association Commission on Law and Aging and American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (Handbook, 2005) 17, 24, 27.

²⁰⁴⁶ Dementia Australia, *Rowland Universal Dementia Assessment Scale* (Web Page, 2020) <<https://www.dementia.org.au/resources/rowland-universal-dementia-assessment-scale-rudas>>.

²⁰⁴⁷ Jeffrey Rowland et al, *A Study to Evaluate the Rowland Universal Dementia Assessment Scale (RUDAS) in Two Populations Outside of the Sydney South West Area Health Service* (Report, January 2007) 40.

²⁰⁴⁸ See Dementia Australia, *RUDAS Administration and Scoring Guide* (Guide) 4 <https://www.dementia.org.au/sites/default/files/20110311_2011RUDASAdminScoringGuide.pdf>.

- d. Inform the interpreter that it may be necessary at the end of the test for you to clarify a concept covered in the assessment to further make the distinction between the test taker's actual cognitive capacity and potential cultural bias which may arise as a result of the translation process.²⁰⁴⁹

11.3.69 This also extends to the individual administering the assessment, if they are multilingual. The above points highlight the importance of precise and concurrent translating and interpreting. This emphasises the need for accredited interpreters, capable of accurately translating and interpreting assessment materials, conveying answers and explaining legal concepts/processes.

11.3.70 As observed in the context of Aboriginal communities, capacity assessments can further disadvantage CALD individuals due to a lack of cultural understanding, educational level and language barriers when undertaking the assessment.

11.3.71 A multifaceted strategy tailored to South Australia's CALD communities to increase awareness and understanding will help bridge gaps and alleviate barriers. It must be noted that CALD communities are not 'homogenous'.²⁰⁵⁰ Diversity means different culture, language and values.²⁰⁵¹ As noted by one study: 'The concept of culture is complex, multifaceted and difficult to define. Cultural diversity offers distinct advantages as well as potential problems.'²⁰⁵²

11.3.72 This highlights the reality and implications of cultural and linguistic diversity. It also offers insight into the importance of identifying the distinct disadvantages faced by Australia's CALD communities. These should be considered in future policy development and reform.

Persons with a Disability

11.3.73 Persons with a disability may be vulnerable to abuse and exploitation. This systemic issue has remained prevalent for some time, with the Commonwealth Disability Royal Commission being established to investigate these issues.²⁰⁵³ It is well established that persons with a disability face disadvantage, which impede upon the fundamental principles of equality, self-determination, autonomy and participation.²⁰⁵⁴

11.3.74 Many Australians live with disability. Recent research suggests that 'around 1 in 6 (18%) people in Australia — or about 4.4 million — have disability'.²⁰⁵⁵ Among Australians with disability one in three (about 1.4 million or 5.7% of the Australian population) have severe or profound disability (sometimes or always needing assistance with self-care, mobility or communication); three in four's (77%) main disability is physical, and one in four's (23%) main disability is mental or behavioural.²⁰⁵⁶

²⁰⁴⁹ Ibid 4.

²⁰⁵⁰ Ibid 7.

²⁰⁵¹ See *ibid*.

²⁰⁵² D Visala Rao, Jeni Warburton and Helen Bartlett, 'Health and Social Needs of Older Australians from Culturally and Linguistically Diverse Backgrounds: Issues and Implications' (2006) 25(4) *Australasian Journal of Ageing* 174, 175.

²⁰⁵³ *Disability Royal Commission*, 'Interim Report' (Report, October 2020).

²⁰⁵⁴ See generally David Plater et al, South Australian Law Reform Institute, *Providing A Voice to the Vulnerable: A Study of Communication Assistance in South Australia* (Report No 16, September 2021) 109–32; Law Council of Australia, *The Justice Project: People with Disability* (Final Report, August 2018).

²⁰⁵⁵ Australian Institute of Health and Welfare, *People with Disability in Australia* (Report, 2020) 18.

²⁰⁵⁶ *Ibid*.

11.3.75 For the purposes of this discussion, the term disability will be defined in accordance with South Australia's *Disability Inclusion Act 2018* and the World Health Organization definition. The *Disability Inclusion Act 2018* (SA) defines disability as follows:

[I]n relation to a person, includes long-term physical, psycho-social, intellectual, cognitive, neurological or sensory impairment, or a combination of any of these impairments, which in interaction with various barriers may hinder the person's full and effective participation in society on an equal basis with others.²⁰⁵⁷

11.3.76 The World Health Organization also incorporates the social model of disability, which acknowledges social and environmental factors impacting attitudes toward disability:²⁰⁵⁸

The International Classification of Functioning, Disability and Health (ICF) defines disability as an umbrella term for impairments, activity limitations and participation restrictions. Disability is the interaction between individuals with a health condition (eg Cerebral Palsy, Down Syndrome and depression) and personal and environmental factors (eg negative attitudes, inaccessible transportation and public buildings, and limited social supports).²⁰⁵⁹

11.3.77 This definition addresses 'personal and environmental factors' acting as the driving force behind negative attitudes and barriers to access transportation, buildings and services.

11.3.78 Given the varying definitions of disability, SALRI acknowledges that the term 'disability' is a complex construct, influenced by medical, social, political and legal factors.²⁰⁶⁰ Importantly, its definition is context-specific.

11.3.79 The United Nations *Convention on the Rights of Persons with Disabilities* ('CRPD')²⁰⁶¹ is an essential instrument identifying the fundamental human rights of persons with a disability. Legislation and policy should remain consistent with the CRPD — which promotes many principles including autonomy, equality, self-determination, freedom from discrimination and participation.

11.3.80 The National Disability Insurance Scheme ('NDIS') falls outside the scope of this reference as the NDIS retains exclusive jurisdiction over funds received and spent. However, it is acknowledged that, as SALRI often heard in consultation from the disability sector and service providers, NDIS funding can be used as a means to financially exploit persons with a disability.

11.3.81 Particular safeguards to preserve the rights and interests of persons with a disability are required, to ensure an attorney remains accountable and does not financially exploit the vulnerable person.

²⁰⁵⁷ *Disability Inclusion Act 2018* (SA) s 3. SALRI has adopted this definition for this Report.

²⁰⁵⁸ Justin Haegle and Samuel Hodge, 'Disability Discourse: Overview and Critiques of the Medical and Social Models' (2016) 68(2) *Quest* 193, 196–7.

²⁰⁵⁹ World Health Organization, *Disability and Health* (Web Page, 1 December 2018) <<https://www.who.int/news-room/fact-sheets/detail/disability-and-health>>.

²⁰⁶⁰ See, eg, Michelle de Souza, 'Regulating Preimplantation Genetic Diagnosis in Australia: Disability and Parental Choice' (2015) 22(4) *Journal of Law and Medicine* 915; Kristin Savell and Isabel Karpin, 'The Meaning of "Serious Disability" in the Legal Regulation of Prenatal and Neonatal Decision-Making' (2008) 16(2) *Journal of Law and Medicine* 233, 245.

²⁰⁶¹ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

11.3.82 Pursuant to an EPA, an attorney may be authorised to control money received via a Disability Support Pension ('DSP'). Therefore, it is relevant to address this issue, as the DSP can potentially be used by an attorney to financially exploit a vulnerable person with a disability.

11.3.83 The DSP is available to individuals who satisfy both non-medical and medical rules.²⁰⁶² Non-medical rules pertain to residence status (the individual must be an Australian resident for a specified period of time) and income and assets tests.²⁰⁶³ Medical rules refer to the diagnosis of a medical condition or disability, such as an intellectual disability.²⁰⁶⁴ Eligibility for the DSP does not preclude an individual from receiving NDIS funding.

11.3.84 Misuse of DSP funds was observed by the Community Affairs References Committee, who received evidence of misconduct on behalf of service delivery agencies authorised to manage the finances of resident money.²⁰⁶⁵ This was reflected through an example of Elise, a person with a disability:

Elise has lived in a group home with several other people for 10 years. She is middle aged with intellectual disability and has difficulty with communication. She receives DSP paid into her personal bank account and staff take her to the bank to withdraw her DSP which is then paid into the household working account run by the group home. Two years ago, it was discovered that \$9,000 could not be accounted for by the group home. Elise needed her advocate to help her complain. The advocate sought assistance from IDRS [Intellectual Disability Rights Service]. Initially the NGO promised financial statements but then said the matter would be investigated by its own auditors. The matter was reported to the police. Five months later there were still no accounts and the NGO refused to answer questions posed by the advocate. In the end it was a year before any accounts were provided. The police advised the advocate that so many people had access to the account that they did not have enough evidence to charge anyone. When the police asked to interview staff, they refused to be interviewed. Some of Elise's money was finally reimbursed but no account was given of how the reimbursement was calculated. The advocate believed the amount was at least \$1,500 short. No-one was charged by police. No action was taken against the service provider. The advocate suspected there were 5 other residents with similar stories.²⁰⁶⁶

11.3.85 Cases of the financial exploitation of persons with a disability are not unusual.²⁰⁶⁷ In their 2018–2019 Annual Report, the Intellectual Disability Rights Service ('IDRS') provided a case example of financial exploitation perpetrated by the family:

²⁰⁶² Australian Government, *Services Australia*, 'Disability Support Pension: Who Can Get It' (Web Page, 2020) <<https://www.servicesaustralia.gov.au/individuals/services/centrelink/disability-support-pension/who-can-get-it>>.

²⁰⁶³ Australian Government, *Services Australia*, 'Disability Support Pension: Non-Medical Rules' (Web Page, 2020) <<https://www.servicesaustralia.gov.au/individuals/services/centrelink/disability-support-pension/who-can-get-it/non-medical-rules>>.

²⁰⁶⁴ Australian Government, *Services Australia*, 'Disability Support Pension: Medical Rules' (Web Page, 2020) <<https://www.servicesaustralia.gov.au/individuals/services/centrelink/disability-support-pension/who-can-get-it/medical-rules>>.

²⁰⁶⁵ 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) 90 [4.68].

²⁰⁶⁶ Ibid.

²⁰⁶⁷ Family and Community Development Committee, Parliament of Victoria, 'Inquiry into Abuse in Disability Services' (Final Report, Parliamentary Paper No 167, May 2016) 12–13 [1.1.4].

Joe is a young man with intellectual disability. His only income is the disability support pension.

Joe had lived with some relatives after the death of his mother, but they had forced him to leave. A worker from the homeless shelter, where he had been sleeping, brought Joe to IDRS for legal help.

Joe had been served with a Statement of Claim lodged in the Supreme Court. The bank was seeking an order for possession of a house and \$400,000 due under a mortgage. Joe had no idea what this was about and could not give any details. He just knew that his relatives had bought the house. He thought he was going to live there but they had made him leave. He had no paperwork and no details.

The shelter worker had already taken Joe to Legal Aid NSW and to a community legal center who said they could not help. Time was running out.

After much investigation the IDRS solicitor established that Joe's relatives had arranged for him to sign some papers related to the purchase of a house. These documents and Joe's bank accounts showed that Joe had paid \$230,000 towards the purchase of the house where his relatives lived. The money had been an inheritance from his mother. Signing the documents had also made Joe jointly liable for the mortgage loan of almost \$400,000 on the home. Joe's relatives had made no repayments on the loan. Joe had no understanding of what he had signed or the dire financial situation he was in.

Joe had less than 28 days to file a defence with the court or he would lose his \$230,000.

...

Without IDRS assistance, Joe would have lost his inheritance and would have been jointly liable to repay \$400,000 to the bank. This would have been impossible for him.²⁰⁶⁸

11.3.86 This case example further highlights the vulnerability of persons with a disability and the way in which the DSP can be used to financially exploit individuals.²⁰⁶⁹

Aboriginal People with a Disability

11.3.87 Higher rates of disability are observed in Aboriginal communities, with data indicating rates are twice as high compared to non-Aboriginal communities.²⁰⁷⁰ In addition, Aboriginal people with a disability are more vulnerable to abuse, exploitation and violence.²⁰⁷¹ The 2018–2019 National

²⁰⁶⁸ Intellectual Disability Rights Service, *IDRS Annual Report 2018–2019* (Report, 2019) 12.

²⁰⁶⁹ The recent case of Ann Marie Smith in South Australia was also widely cited to SALRI in consultation. The Commonwealth *Disability Royal Commission*, in its Media Release statement noted '[p]eople with disability have the right to live independently in the community and in the safety of their home': *Disability Royal Commission*, 'Statement Regarding the Death of Ann Marie Smith' (Media Release, 20 May 2020). See also Kelly Vincent and David Caudrey, *Safeguarding Task Force* (Report, 31 July 2020).

²⁰⁷⁰ 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) 11; John Gilroy et al, 'Conceptual Framework for Policy and Research Development with Indigenous People with Disabilities' [2013] 2 *Australian Aboriginal Studies* 42.

²⁰⁷¹ 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) 42.

Aboriginal and Torres Strait Islander Health Survey reported four in ten people had a disability.²⁰⁷² The data revealed the number of people with a disability was similar between males (39%) and females (37%) and those living in a non-remote area (38%) and a remote area (37%).²⁰⁷³ For the purposes of this survey, it was noted that there were many types of disability, which may be caused by an accident, illness, genetic disorder or another unidentified cause.²⁰⁷⁴

11.3.88 The Report *People with Disability in Australia 2022: In Brief* identified a key data gap regarding access to and quality of disability support services among Aboriginal peoples.²⁰⁷⁵

11.3.89 The *Disability Royal Commission* highlighted that ‘scope and definitions in most jurisdictions do not include disability specific abuse (such as deprivation of supports) and relationships in which people with disability experience violence (such as support workers, unpaid carers, house mates, co-residents and wider First Nations kinship networks)’.²⁰⁷⁶ The nature of the relationships within a community or kinship network are unique for Aboriginal people, and therefore, require special consideration.

11.3.90 Disabilities Victoria found that the experiences of Aboriginal people overlap with racial discrimination and intergenerational trauma and stated that: ‘First Nations women can be reluctant to seek help for violence due to fear of having their children taken away. We heard that First Nations women may also be fearful of what will happen to their partner in police custody because of the increased risk of police violence against First Nations people’.²⁰⁷⁷ The lack of education and trust magnifies these issues and discourages Aboriginal people with a disability from seeking help.

11.3.91 The experiences of Aboriginal people when dealing with government bodies such as the police are often negative, in a system where they experience bias and discrimination. The Disability Royal Commission found that police regularly ‘incorrectly characterise women with disability, especially those with psychosocial disability, as the perpetrator of violence and abuse. This is because of negative attitudes towards them, especially First Nations women with disability’.²⁰⁷⁸

11.3.92 Coleman et al conducted a study examining the prevalence of disability amongst Aboriginal communities.²⁰⁷⁹ The study revealed:

Attempting to apply the concept of disability on Aboriginal and Torres Strait Islander communities is regarded by many Aboriginal and Torres Strait Islander peoples as culturally insensitive, making any attempt at a universally accepted definition of disability difficult.²⁰⁸⁰

²⁰⁷² Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Health Survey*, ‘Disability’ (Catalogue No 5715.0, 11 December 2019).

²⁰⁷³ Ibid.

²⁰⁷⁴ Ibid.

²⁰⁷⁵ Australian Institute of Health and Welfare, *People with Disability in Australia 2022: In Brief* (Report, July 2022) 34.

²⁰⁷⁶ *Disability Royal Commission*, ‘Overview of Responses to the Violence and Abuse of People With Disability at Home’ (Issues Paper, March 2022) 2.

²⁰⁷⁷ Ibid 5.

²⁰⁷⁸ Ibid 11.

²⁰⁷⁹ See Clare Coleman et al, ‘Aboriginal and Torres Strait Islander Disability Prevalence: Making Sense of Multiple Estimates and Definitions’ (2018) 42(6) *Australian and New Zealand Journal of Public Health* 562.

²⁰⁸⁰ Ibid 563.

11.3.93 This was reiterated by the Community Affairs References Committee, who heard in evidence from the North Australian Aboriginal Justice Agency:

There is no comparable word in many Aboriginal languages to ‘disability’. This adds a significant barrier in identifying the numbers of Indigenous Australians with a disability or combating any disadvantage suffered as a result of a disability.²⁰⁸¹

11.3.94 The term disability is context-specific and is determined in accordance with relevant cultural and social values. In light of the complexity associated with disability rates in Aboriginal communities, greater understanding of the term ‘disability’ is required. The way in which ‘disability’ is perceived and defined within Aboriginal communities must be considered in policy development. Gilroy et al argued that the ‘terms “disability” and “handicap” were imposed on Indigenous communities by the various knowledge disciplines of Western science’.²⁰⁸² However, ‘the approach to disability in Indigenous communities is as diverse as the cultures within the Indigenous population’.²⁰⁸³ In light of this, the social model of disability will significantly influence the definition of disability, as culture is considered a ‘personal and environmental factor’.²⁰⁸⁴

11.3.95 A disproportionate number of Aboriginal peoples engage with disability services. This may be attributed to the varying perceptions of disability in Aboriginal communities. However, it also highlights the barriers to access relevant services for Aboriginal people with a disability.

11.3.96 In light of the significant gap in understanding disability, Gilroy et al proposed a conceptual framework for policy development for Aboriginal people with a disability.²⁰⁸⁵ Gilroy noted:

In developing a conceptual framework for research and policy development regarding Indigenous people with disabilities, each Indigenous community must be understood in the context of their experience of colonisation, disadvantage and cultural heritage. The aim of establishing such a framework will be a better understanding of the experience of disability and the factors influencing outcomes for Indigenous people with disabilities...²⁰⁸⁶

11.3.97 In developing a conceptual framework, Gilroy recommended the establishment of a foundational theory, comprised of factors which influence human functioning.²⁰⁸⁷ The following six factors were suggested:

1. Inclusion of Aboriginal communities: research and policy development must rely upon consultation and engagement with Aboriginal communities;²⁰⁸⁸

²⁰⁸¹ 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) 179 [6.102].

²⁰⁸² John Gilroy et al, ‘Conceptual Framework for Policy and Research Development with Indigenous People with Disabilities’ [2013] 2 *Australian Aboriginal Studies* 42, 44.

²⁰⁸³ Ibid 42, 44.

²⁰⁸⁴ Ibid 43; World Health Organization, *Disability and Health* (Web Page, 1 December 2018) <<https://www.who.int/news-room/fact-sheets/detail/disability-and-health>>.

²⁰⁸⁵ See John Gilroy et al, ‘Conceptual Framework for Policy and Research Development with Indigenous People with Disabilities’ [2013] 2 *Australian Aboriginal Studies* 42.

²⁰⁸⁶ Ibid 45.

²⁰⁸⁷ Ibid 53.

²⁰⁸⁸ Ibid.

2. Colonisation is deemed a ‘social determinant of disability’;²⁰⁸⁹ the impact of colonisation, systemic disadvantage, oppression and dispossession must be considered when examining disability in Aboriginal communities;²⁰⁹⁰
3. The differences between Aboriginal communities must be considered in the understanding of disability;²⁰⁹¹
4. ‘Emancipatory’;²⁰⁹² the differences between and within Aboriginal communities must be recognised;²⁰⁹³
5. Recognition of a cultural interface: different experiences and cultural values will dictate understandings of disability;²⁰⁹⁴ and
6. Use of the appropriate Aboriginal languages.²⁰⁹⁵

11.3.98 The implementation of a culturally sensitive framework was proposed to promote the participation of Aboriginal communities in policy development and increase engagement with disability services. It also attempts to prevent the enactment of ‘incomplete and marginalising conceptual frameworks in understanding the experience of Indigenous people with disabilities.’²⁰⁹⁶

11.3.99 The lack of participation of Aboriginal communities in policy development was also raised by the UN Committee on the Rights of Persons with Disabilities. In the Committee’s Concluding Observations on the combined second and third reports of Australia in 2019, it was concluded that Aboriginal communities needed to be involved and consulted in policy development and legislative reform.²⁰⁹⁷ The Committee concluded:

[There] is no effective legislative framework to protect persons with disabilities from systemic, intersectional and multiple forms of discrimination, especially at the Commonwealth level, that Aboriginal and Torres Strait Islander persons with disabilities are particularly disadvantaged and often not consulted on matters that affect them...²⁰⁹⁸

11.3.100 It is obvious that Aboriginal communities experience significant disadvantages. This is further compounded for Aboriginal people with disability. The issues discussed raise a number of barriers confronting Aboriginal communities, including people with a disability.

²⁰⁸⁹ Ibid.

²⁰⁹⁰ Ibid.

²⁰⁹¹ Ibid.

²⁰⁹² Ibid.

²⁰⁹³ Ibid.

²⁰⁹⁴ Ibid.

²⁰⁹⁵ Ibid.

²⁰⁹⁶ Ibid 54.

²⁰⁹⁷ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Combined Second and Third Periodic Reports of Australia*, 22nd sess, UN Doc CRPD/C/AUS/CO/2–3 (15 October 2019) 3; *Disability Royal Commission*, ‘The Experience of First Nations People with Disability in Australia’ (Issues Paper, 9 June 2020) 2.

²⁰⁹⁸ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Combined Second and Third Periodic Reports of Australia*, 22nd sess, UN Doc CRPD/C/AUS/CO/2–3 (15 October 2019) 3.

Elder Abuse in Aboriginal Communities

11.3.101 There is limited research available in relation to the abuse of older Aboriginal and/or Torres Strait Islander people.²⁰⁹⁹ The unique set of cultural expectations existing in Aboriginal communities means the nature of the abuse of vulnerable people, such as older persons and people living with a disability, requires different mechanisms in place than are appropriate in urban areas.

11.3.102 One factor that has particular implications as to elder abuse in an Aboriginal context is

[the] cultural obligations and the circumstances of grandparents. From a cultural perspective, Aboriginal norms in relation to reciprocity, the expectation that resources will be shared, and kinship (where a wide variety of relationships are involved in familial and community networks), are dimensions that complicate understandings of whether and how elder abuse is occurring. The extent to which calls on grandparent resources to care for grandchildren are culturally reasonable or unreasonable was also highlighted by the research.²¹⁰⁰

11.3.103 The issue of ‘humbugging’ has been identified in the Kimberley (though how applicable it is in a South Australian context is unknown). Humbugging involves demanding money from someone else ‘with no intention of repaying it’.²¹⁰¹ While resource sharing is a common practice within Aboriginal communities, humbugging may have negative connotations. This arises where the behaviour is not reciprocated and is accompanied by threats of violence or abuse, or cultural shaming of the ‘victim’. Humbugging may be a form of serious financial abuse, often composed of demands for money, accompanied by threats which can lead to physical violence and abuse. Sometimes humbugging can include direct theft, such as a person’s bank card being taken without consent.²¹⁰²

11.3.104 Because resource sharing within wide kinship networks is common within Aboriginal communities it can be difficult to distinguish between consensual practices and abusive behaviours.²¹⁰³ ‘Cultural norms relating to kinship structures, as well as sharing, reciprocity and expectations around communal property may complicate the way in which abuse is experienced and understood in those communities.’²¹⁰⁴ An expectation arises that if there are resources, these will be shared. SALRI was told by regional Aboriginal health practitioners that this issue must be considered in the context of cultural and traditional norms. In Aboriginal communities, parenting does not just come from the parents: there is a wide community base, strong respect for Elders, and ‘more togetherness’, resulting in an (not necessarily malicious) expectation of resource sharing.

11.3.105 The issue of ‘humbugging’ goes beyond this and may amount to abuse. A report from the Kimberley Community Legal Services provides a case study in which an Aboriginal woman stated

an older person I know got \$20K, and her family insisted she take the whole amount out. They gave her a few hundred and then the large crowd that surrounded her took the rest and left. There

²⁰⁹⁹ Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 32.

²¹⁰⁰ Rae Kaspiew, Rachel Carson and Helen Rhoades, ‘Elder Abuse in Australia’ [2016] 98 *Family Matters* 64, 70.

²¹⁰¹ Kimberly Community Legal Service, *No More Humbug! Reducing Aboriginal Financial Elder Abuse in the Kimberley* (Research Report, December 2020) 3.

²¹⁰² Ibid.

²¹⁰³ Ibid.

²¹⁰⁴ Queensland Law Society and Queensland Public Advocate, *Elder Abuse* (Joint Issues Paper, February 2022) 32.

is greed happening. If people don't get what they want, they will intimidate and threaten and even bash the older person.²¹⁰⁵

11.3.106 The cultural expectations within Aboriginal communities, particularly for older Aboriginal people who have been raised more traditionally, promotes kinship and a belief that they must provide for their family and community. However, this belief may not be found among the younger members of the community, leaving older people at potential significant disadvantage.²¹⁰⁶

11.3.107 These case studies highlight some of the many forms in which financial abuse can present in Aboriginal communities:

I know of adult children charging their elderly parents when giving them assistance on matters such as shopping, this is wrong.²¹⁰⁷

Client was receiving Centrelink benefit; younger nephew was his contact person for Centrelink. He was demanding his payment from him outside the Commonwealth Bank each pay cycle. On one occasion the client presented with a broken arm and when asked what had happened, he stated that his nephew had forced him to hand over his money, which resulted in the client being left with a broken arm. When asked if he would like to be taken to the Police and report the incident, he said no, it was his nephew and he couldn't report him.²¹⁰⁸

Family members stole an elder's bank card and withdrew all their money and spent it on alcohol. It wasn't until the elder came into branch because they had not received their pension for several weeks that we found the issue. In addition, this elder was in hospital while her own family were stealing her money.²¹⁰⁹

A family member claimed Carers Allowance without any other family knowing about it. The elder suffers from undiagnosed dementia. Online banking was set up by the family member and the elder's money is controlled this way. The family member uses the elder's money to buy alcohol, drugs, all her children mobile phones, clothes, throwing birthday parties and giving her children cash on top of it etc. The family member also applies for the Centrelink loan every year. The elder does not have any clothing, swag, toiletries or does not live with the so-called carer as the elder lives with my mother. The Carer couldn't care less about taking the elder to the hospital or escort her anywhere. The elder's spending money is \$50 or \$100 if she is lucky, it depends how the Carer is feeling.²¹¹⁰

11.3.108 In consultation with SALRI, Aboriginal health practitioners and service providers highlighted the necessity in the context of the ASU and *AAS Act* to be aware of the cultural and traditional norms present in Aboriginal communities. Regional practitioners raised the example of Aboriginal Elders feeling a sense of responsibility to care for others in the community as they are family. However, this may result in the Elder being left with nothing.

²¹⁰⁵ Kimberly Community Legal Service, *No More Humbug! Reducing Aboriginal Financial Elder Abuse in the Kimberly* (Research Report, December 2020) 17.

²¹⁰⁶ Ibid 3.

²¹⁰⁷ Ibid 15.

²¹⁰⁸ Ibid.

²¹⁰⁹ Ibid.

²¹¹⁰ Ibid.

11.3.109 This is a complex area. As a 2016 study noted:

Substantially more work is required to understand and conceptualise elder abuse in the Aboriginal context, especially among different groups in different circumstances, given the diversity among Aboriginal and Torres Strait Islander communities.²¹¹¹

11.3.110 SALRI shares the view that more work is required in this area.

CALD Individuals with a Disability

11.3.111 The Disability Royal Commission reiterated that '[t]here is a lack of data documenting the diversity of disability in culturally and linguistically diverse communities.'²¹¹² The Report *People with Disability in Australia 2022: In Brief* identified a key data gap regarding access to and quality of disability support services among CALD people with a disability.²¹¹³

11.3.112 In 2015, the rate of disability for non-English speaking individuals was 15.8%.²¹¹⁴ The Community Affairs References Committee found that CALD individuals, specifically 'newly arrived migrants such as refugees and special humanitarian entrants' were 'particularly vulnerable'.²¹¹⁵ Further, CALD individuals with a disability were more likely to 'experience multiple disadvantages'.²¹¹⁶ This related to limited access to information and 'communication difficulties or cultural sensitivities and differences' acting as barriers to receiving support.²¹¹⁷

11.3.113 Both CALD individuals and Aboriginal people with a disability also face significant hardships in accessing culturally sensitive and appropriate services and support.²¹¹⁸ This is further exacerbated for those living in rural and remote areas.²¹¹⁹ In its submission to the Community Affairs References Committee, the Human Rights Commission noted:

For Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse backgrounds with disabilities access to culturally competent services with disability expertise, and Aboriginal legal services, was even harder.²¹²⁰

²¹¹¹ Rae Kaspiew, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, 2016) 12.

²¹¹² *Disability Royal Commission*, 'The Experiences of Culturally and Linguistically Diverse People with Disability' (Issues Paper, March 2021) 5.

²¹¹³ Australian Institute of Health and Welfare, *People with Disability in Australia 2022: In Brief* (Report, July 2022) 34. This was also the case for 'people with disability living in remote locations, and people with disability who are lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ).'

²¹¹⁴ See Centre for Applied Disability Research, *Research to Action: Bridging the Gap Between What We Know and What We Do* (Guide) 18, Appendix 3 <<https://www.cadr.org.au/images/1809/cald-full-guide-v2.pdf>>.

²¹¹⁵ 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) 11.

²¹¹⁶ Ibid.

²¹¹⁷ Ibid.

²¹¹⁸ Ibid 153.

²¹¹⁹ Ibid.

²¹²⁰ Ibid 153 [6.15].

11.3.114 The Committee on the Rights of Persons with Disabilities emphasised the importance of ‘culturally appropriate’ avenues for access to support services, including legal advice.²¹²¹

11.3.115 A Review into the needs of older CALD individuals revealed social and health needs are different to older persons from a non-CALD background.²¹²² As a result, the Review observed that the way in which these ‘needs are addressed by families, service providers and policy-makers’ must be different.²¹²³ This Review also noted Commonwealth initiatives to promote and implement policies that are culturally and linguistically appropriate.²¹²⁴ However, there remains a ‘paucity of longitudinal [and] large-scale Australian studies on the implementation and success of these initiatives’.²¹²⁵

11.3.116 As highlighted in the context of Aboriginal people with a disability, an understanding of cultural differences is required in policy development for CALD individuals.²¹²⁶ Current gaps in research with respect to CALD individuals and those with a disability highlights the need for greater data collection, to ensure policies are informed by evidence. It is widely known that the needs of CALD individuals with a disability differ, due to cultural and linguistic diversity.²¹²⁷ Specific factors impacting the needs of CALD individuals include ‘communication competencies’, reasons for migration, financial status, geographical location of the CALD community, literacy and language proficiency.²¹²⁸

11.3.117 The Disability Royal Commission offered two suggestions to enhance inclusivity of CALD people with a disability in policy frameworks.²¹²⁹ This followed from consultation data received in response to their Issues Paper concerning CALD people with a disability. It was suggested that governments should:

- partner with people with disability from culturally and linguistically diverse backgrounds, their representative organisations and advocates, to co-design and co-evaluate policy approaches. Policy frameworks need to include realistic and specific measures and timeframes to proactively dismantle the barriers faced by people with disability from culturally and linguistically diverse backgrounds.
- work with people with disability from culturally and linguistically diverse backgrounds, their representative organisations and advocates, to develop, implement and evaluate comprehensive communication and engagement strategies, particularly in departments or agencies which have a service delivery function. These strategies need to ensure that people with disability from

²¹²¹ Committee on the Rights of Persons with Disabilities, *General Comment No 6: On Equality and Non-Discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018) 19.

²¹²² D Visala Rao, Jeni Warburton and Helen Bartlett, ‘Health and Social Needs of Older Australians from Culturally and Linguistically Diverse Backgrounds: Issues and Implications’ (2006) 25(4) *Australasian Journal on Ageing* 174, 175.

²¹²³ Ibid.

²¹²⁴ See generally *ibid.*

²¹²⁵ Ibid 174.

²¹²⁶ See *ibid.*

²¹²⁷ Ibid 175.

²¹²⁸ Ibid.

²¹²⁹ *Disability Royal Commission*, ‘The Experiences of Culturally and Linguistically Diverse People with Disability’ (Issues Paper, March 2021) 21.

culturally and linguistically diverse backgrounds can understand and access information, entitlements, services and supports.²¹³⁰

11.3.118 A qualitative study examining CALD community engagement of services for dementia revealed CALD communities faced difficulties in gaining access to relevant services.²¹³¹ However, improved engagement and use of services was observed when they were culturally and linguistically appropriate.²¹³²

11.3.119 CALD individuals with disabilities experience significant barriers to accessing services, including legal advice. Greater understanding of culture and language differences are needed to ensure the interests and barriers for CALD individuals with a disability are adequately addressed. In addition, further studies and data collection are required to better understand the barriers for CALD individuals with a disability and inform policy development.

The Adult Safeguarding Unit's Initiatives

11.3.120 In the ASU's 2020–2021 Annual Report, updates were provided regarding the community awareness campaign launched in October 2020.²¹³³ As part of this campaign, the ASU's role, focus and contact details were promoted via various means, including print, digital, social media and radio.²¹³⁴ During the campaign, it was reported that twice as many cases involving Aboriginal people and CALD people were received from the year prior.²¹³⁵

11.3.121 In 2021, the OFAW's annual campaign Stop Elder Abuse, reframed the issue as one of 'Older people have rights'.²¹³⁶ This was also promoted via various means, including digital/social media, radio (metro and regional) and display screens in GP waiting rooms and pharmacies.²¹³⁷

11.3.122 A new video series featuring Aboriginal ambassadors was released, focussing on respecting the rights and safety of older Aboriginal people.²¹³⁸ This formed part of the five-year Respect.Connect campaign.²¹³⁹

LGBTIQ Community

11.3.123 SALRI also acknowledges that particular barriers exist for people from the LGBTIQ community. These barriers and their implications for the role of the ASU were raised by a number of parties in SALRI's consultation. The Western Australian Parliamentary Report found that members of LGBTIQ communities may be more vulnerable to abuse, due to a higher likelihood of 'poor or

²¹³⁰ Ibid.

²¹³¹ Christopher Shanley et al, 'A Qualitative Study into the Use of Formal Services for Dementia by Carers from Culturally and Linguistically Diverse (CALD) Communities' (2012) 12(1) *BMC Health Services Research* 354.

²¹³² Ibid 364.

²¹³³ South Australian Adult Safeguarding Unit, *Annual Report 2020–2021* (Report, 2021) 18.

²¹³⁴ Ibid.

²¹³⁵ Ibid.

²¹³⁶ Ibid.

²¹³⁷ Ibid.

²¹³⁸ Ibid.

²¹³⁹ See SA Health, *Respect.Connect Resources* (Web Page, 2021) <<https://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/conditions/stop+elder+abuse/respect+connect+campaign+for+aboriginal+communities/respect+connect+resources>>.

estranged relationships with biological families’.²¹⁴⁰ It was noted that elder abuse may manifest itself in a variety of ways, including:

- Denial or restriction of contact with LGBTIQ friends or partners;
- A failure to recognise and exclude the LGBTIQ partner of the older person in decision-making, claims to possession and/or property;
- Denial of access to grandchildren if the older person does not ‘conform to their [children’s] wishes’; and
- Threatening to ‘out’ an LGBTIQ person, causing exploitation and manipulation.²¹⁴¹

11.3.124 Although LGBTIQ older people may experience the same risks as heterosexual older people, these risks may be ‘amplified and ... affected by their experiences as a [LGBTIQ] person throughout their lives.’²¹⁴²

11.3.125 SALRI notes that many of these barriers may be institutional in nature and that while they may contribute to a person’s experiences of vulnerability or abuse, there will often not be a single person against whom the ASU could take action. In these cases, other avenues such as anti-discrimination law may be more appropriate avenues for redress.

Regional Communities

11.3.126 People living in regional or rural communities face an extra set of disadvantages, with issues such as a lack of resources and social isolation increasing a person’s vulnerability.²¹⁴³ One of the main issues that results from this is that it may act as a prohibiting factor from reporting.

11.3.127 Through SALRI’s consultation process in various regional and rural communities throughout South Australia, a recurring theme of a lack of consistent presence of government services presented as one of the leading issues.

11.3.128 In consultation with relevant NGOs there was a general consensus that the current practice of the ASU is ineffective as the organisation does not take the time to connect with the local community and build a relationship, as they do not visit the regions frequently enough. This results in ineffective advocacy as members of the local community are unable to form trusting relationships with the ASU and are disenfranchised with government organisations promising them assistance and then not returning.

11.3.129 Mr Westley and Mr Norcock from Naracoorte spoke with SALRI and identified the issue that, as a result of the lack of specific services for regional and rural communities and low frequency of contact with organisations such as the ASU, abuse is allowed to ‘fall through the cracks’.

²¹⁴⁰ Western Australian Select Committee into Elder Abuse, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 36 [3.48].

²¹⁴¹ Ibid.

²¹⁴² Ibid 37 [3.51].

²¹⁴³ Susan Ryan, ‘Financial Services Council Elder Abuse Speech’ (Speech, Australian Human Rights Commission, October 2015) <<https://humanrights.gov.au/about/news/speeches/elder-abuse-financial-abuse>>.

11.3.130 During consultation, a representative from ARAS identified similar issues and suggested a consistent presence is needed in regional communities to build a relationship of trust so vulnerable people feel comfortable coming forward to discuss an abusive situation.

11.3.131 A disability advocate presented the view that regional communities require a relationship with these services, and that face-to-face contact is ‘not optional when it comes to safeguarding and this helps to protect against the coercion factor’.

11.3.132 An allied health professional, for example, stated that the ASU does not reach the regions and there is an inequity in service access and response from the ASU for people living in the regions and as a result, social workers in particular, have become a stopgap for market failures in other services.²¹⁴⁴

11.3.133 The following case study provided by a Perth community legal centre to the Western Australian Parliamentary Report details the nature and relationship of one type of abuse that occurs in this sphere:

I always recall a case that we had where a person lived out [regionally], and she had a little dog, and she wanted to come out of the house. As it was his house, she could not get out of the house, and he had all her stuff; he had taken everything, and so she had no access to her documents; she had no access to anything. We had to arrange with the neighbours so that when she was suffering violence, or threatened with violence, she used to put a little book in the window, so that the neighbours knew, so they would ring us and tell us. But the issue around that was housing. We had nowhere to put her; that was the big issue. The big issue is that there is nowhere for old people, particularly older people, to go in terms of housing. If there is an issue in the house, if they are in the granny flat — granny flats are another story — or they are in the actual house of the perpetrator, moving them from that area is very, very difficult.²¹⁴⁵

11.3.134 This case study highlights why victims may choose to remain in an abusive situation, and not consent to further ASU action. Particularly in small communities, there is often no other alternative, and even if there were, that vulnerable person would then face social isolation or other negative outcomes. Even in cases of serious abuse, alternative arrangements may be severely limited. For example, housing availability in regional South Australia has been described as in ‘crisis’.²¹⁴⁶

11.4 SALRI’s Observations and Conclusions

11.4.1 Several key themes emerged from SALRI’s consultation and research. First, there was wide unawareness, especially in regional and rural communities, of the existence and role of the ASU and the access of these communities to it. There are particular barriers to accessing and reporting cases

²¹⁴⁴ Other parties though acknowledged the ASU’s effective role outside Adelaide. A Mount Gambier practitioner spoke in very positive terms of the work of the ASU in resolving concerns about the exploitation of a person with disability.

²¹⁴⁵ Evidence to Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, Perth, 19 March 2018, 14 (Karen Merrin, Manager, Older People’s Rights Service, Northern Suburbs Community Legal Centre). This case was also raised by the Committee as an example where an intervention order may have assisted.

²¹⁴⁶ Bethany Anderson and Angela Smallacombe, ‘Regional South Australia Housing Crisis Continues, Survey Shows’, *ABC News* (online, 9 March 2022) <<https://www.abc.net.au/news/2022-03-09/regional-south-australia-housing-crisis-survey/100891962>>.

of abuse to the ASU for members of Aboriginal and CALD communities. Finally for persons with a disability there are particular challenges in accessing support services.

11.4.2 SALRI notes that the ASU only operates from Monday to Friday and from 9am–5pm. The ASU is based in Adelaide. There was concern often voiced to SALRI in regional and rural communities as to the ASUs perceived lack of a presence or profile outside Adelaide and various suggestions were made for the ASU to enhance awareness in such communities of its role and how to make reports.²¹⁴⁷

11.4.3 Elicia White acknowledged to SALRI that, despite the ASU’s efforts to date, it has an ‘Adelaide centric’ focus and presence and more work is needed in this context.

11.4.4 Elders and members of Aboriginal community groups and health agencies, service providers and health practitioners raised their disquiet to SALRI as to the effectiveness and cultural soundness of reporting suspected abuse within Aboriginal communities. It was often noted that it is unlikely members of Aboriginal communities will simply call an Adelaide phone number or send an email to make a report of abuse.

11.4.5 The comments of Alan Zubrinich, the Port Pirie Deputy Mayor, were illustrative.²¹⁴⁸ Mr Zubrinich is closely involved in the regional service landscape.

11.4.6 Mr Zubrinich was frank that he had not heard of the ASU. He saw the value of the ASU, noting the high proportion in Port Pirie of residents with disability and low income, and/or from Aboriginal and multicultural communities, who all may be vulnerable to abuse and exploitation. Mr Zubrinich noted the particular concerns of elder abuse. Mr Zubrinich said the ASU needs to be more active and better known in the regions.

11.4.7 These issues and problems will be compounded for Aboriginal communities. Mr Zubrinich emphasised the importance of the ASU having a regional presence and local contacts and making its vital role known and how to make reports of suspected abuse. There are local regional service providers and agencies with strong links to Aboriginal communities that could be utilised such as Uniting Country SA. Mr Zubrinich noted that there will be reluctance to report suspected abuse and exploitation, especially in multicultural and Aboriginal communities. This is so even though the ASU is not a police type body. The historic mistrust of Government agencies in Aboriginal communities is longstanding and understandable.

Aboriginal Communities, CALD Communities and Persons with a Disability

11.4.8 SALRI acknowledges the unique barriers to access information and support for elder abuse, including the ASU’s support. In addition, SALRI recognises that cultural and language barriers contribute to the low reporting of abuse, particularly in Aboriginal and CALD communities.

11.4.9 SALRI also recognises the barriers to the actual reporting of cases of abuse, particularly for Aboriginal and CALD communities.

²¹⁴⁷ See also Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017) 39–40.

²¹⁴⁸ Similar themes were raised to SALRI by various parties in consultation in Clare, Berri, Port Pirie, Port Augusta, Port Lincoln and Mount Gambier.

11.4.10 Communication strategies targeted to specific communities are needed to promote elder abuse awareness and education and the ASU's functions. The use of simple, plain English, with minimal legal jargon would help to alleviate this issue and improve accessibility. The OFAW and the ASU have made an impact with current campaigns to raise awareness among various groups.²¹⁴⁹

11.4.11 Further efforts to engage meaningfully with Aboriginal and CALD communities are important. Campaigns should be designed and led by Aboriginal Elders and community leaders and CALD community leaders to ensure cultural appropriateness and safety.

11.4.12 SALRI also acknowledges the importance of accredited and independent interpreters in the assessment of capacity. SALRI notes the need for upskilling of interpreters and translators, to ensure they are capable of understanding and explaining legal concepts and consequences. The primary avenue to become an appropriately accredited interpreter or translator is through the National Accreditation Authority for Translators and Interpreters, which the South Australian Government endorses and relies upon. This is the national body for accreditation in Australia, which mandates training on ethical and intercultural competency and requires a test of English proficiency to screen potential applicants.²¹⁵⁰ In order to gain recertification, professional development is mandatory.²¹⁵¹

11.4.13 It is also emphasised that access and availability of interpreters may be a significant barrier for specific languages and dialects, especially in Aboriginal communities.

11.4.14 There is a need for greater community education targeted to Aboriginal and CALD communities and persons with a disability. This can be facilitated through initiatives to build and strengthen relationships with relevant stakeholders within each population. Consultation reiterated the importance of including community leaders in education and establishing a rapport with each population. A multi-faceted communication strategy which embraces various platforms and formats should be implemented. These various platforms and formats could usefully include:²¹⁵²

²¹⁴⁹ This issue has been raised elsewhere. The importance of community education was reinforced by the First Nations Women's Legal Program, who told a NSW Parliamentary Inquiry that 'comprehensive community education gives people access to a common language when talking about different types of domestic abuse: Community-based education is very, very valuable. People having access to what the common languages around violence, domestic violence abuse, financial violence abuse, verbal abuse. All that has to be a common language between what the legal people are doing, what community services are doing and what people—just your average person who is not — may not be particularly working in those fields but may have the experience of being abused on some level': Evidence to Joint Committee on Coercive Control, Parliament of New South Wales, Sydney, 23 February 2021, 41 (Dixie Link-Gordon, First Nations Women's Legal Program).

²¹⁵⁰ National Accreditation Authority for Translators and Interpreters, *Become Certified* (Web Page, 2020) <<https://www.naati.com.au/become-certified/>>.

²¹⁵¹ Ibid. An example of an alternative course is observed in Victoria. From 2014 to 2016, the Professional Development Program for Translators and Interpreters in Victoria and Monash University offered a short course entitled 'Legal Interpreting'. This course educated participants on legal terminology and processes and examined interpreting in various settings such as lawyer-client interviews, police interviews and tribunal hearings: Victorian Multicultural Commission, *Interpreters Training and Scholarships* (Web Page, 2014) <<https://www.multicultural.vic.gov.au/projects-and-initiatives/improving-language-services/interpreter-scholarships/236>>.

²¹⁵² This was raised in SALRI's previous Report on Enduring Powers of Attorney. See Multicultural Communities Council of South Australia, Submission to South Australian Law Reform Institute, *Review of Powers of Attorney in South Australia* (14 September 2020); Multicultural Affairs SA, Submission to South Australian Law Reform Institute, *Review of Powers of Attorney in South Australia* (3 September 2020).

- a. Ethnic TV and radio;
- b. Translated materials in community languages;
- c. Videos;
- d. Audio files;
- e. Graphics;
- f. Social media;
- g. Written and digital pamphlets/brochures;
- h. Community education sessions;
- i. Use of focus colours; and
- j. Use of a relay service.

11.4.15 This will assist in improving access for persons with a disability and Aboriginal and CALD communities.²¹⁵³

11.4.16 SALRI notes that education campaigns should extend to workers and volunteers in relevant sectors, in the form of cultural awareness or competence training. There is scope for greater understanding and awareness of culture, values and norms/practices in the context of Aboriginal and CALD communities. Training will improve delivery of services and information, to ensure all content is culturally and linguistically relevant.

11.4.17 SALRI suggests that information be translated into community languages present within South Australia and widely published across Government, legal and medical service providers, and community organisations (including Aboriginal advocacy organisations, disability advocacy organisations and multicultural organisations). This material could usefully include:

- a. Definitions of abuse;
- b. Relevant contacts — both Government departments and community organisations;
- c. How to access information, services and support — such as interpreters, translators and legal practitioners;
- d. Understanding rights and responsibilities;
- e. Identifying signs or triggers of incapacity;
- f. Identifying signs of financial abuse or exploitation; and
- g. How to report known or suspected cases of abuse.

11.4.18 SALRI supports the adoption of quality assurance measures to ensure translated materials are accurate. This may be facilitated through engagement with accredited interpreters/translators and consultation with community organisations. SALRI suggests that this information be disseminated on various platforms and in a number of formats such as those identified above.²¹⁵⁴

²¹⁵³ This draws on the two September 2020 submissions of the Multicultural Communities Council of South Australia to SALRI.

²¹⁵⁴ See above [11.4.14].

11.4.19 SALRI suggests the development and implementation of initiatives to build and strengthen relationships with community organisations, including Aboriginal grass roots organisations and advocacy organisations, Aboriginal communities, multicultural organisations and communities, disability advocacy organisations and persons with a disability.

11.4.20 SALRI suggests the development of cultural awareness/competence training for practitioners working in the ASU.

11.4.21 SALRI supports the provision of additional resources and funding to accredit or recertify/upskill interpreters and translators through the National Accreditation Authority for Translators and Interpreters.

11.4.22 SALRI suggests that consideration be given to the establishment of a Government funding/rebate scheme to pay for accredited, independent interpreters and/or translators for individuals from a non-English speaking background. SALRI suggests that an accredited, independent interpreter be offered and made available for capacity assessments of Aboriginal communities and CALD individuals.

11.4.23 SALRI raises that communication aids, or if required, a communication partner should be offered and made available to persons with a complex communication need who engage with, or want to engage with, the ASU.

11.4.24 SALRI recommends the use of culturally and linguistically appropriate capacity assessment tools for both Aboriginal communities and CALD individuals.

11.4.25 Recommendations

RECOMMENDATION 40

SALRI recommends that educational resources relating to abuse, and the functions/role of the Office for Ageing Well and the Adult Safeguarding Unit should be translated into community languages present within South Australia and widely published across Government, legal and medical service providers, and community organisations (including groups representing older persons, Aboriginal advocacy and community organisations, disability advocacy and community organisations and multicultural organisations). SALRI further recommends that this translated material could contain information on various topics including, but not limited to:

- a. Relevant contacts — both Government departments and community organisations;
- b. How to access information, services and support — such as interpreters, translators and legal practitioners;
- c. Understanding rights and responsibilities;
- d. Identifying signs or triggers of incapacity;
- e. Identifying signs of financial abuse or exploitation; and
- f. How to report known or suspected cases of abuse.

RECOMMENDATION 41

SALRI recommends that the Adult Safeguarding Unit should undertake further measures to promote greater awareness of its role in rural, regional and remote communities, including how to make reports to the Adult Safeguarding Unit relating to the suspected abuse of vulnerable adults. As part of this increased promotion, the Adult Safeguarding Unit should make increased provision and avenues for residents in rural, regional and remote communities to make reports of the suspected abuse of an adult who may be vulnerable to abuse.

RECOMMENDATION 42

SALRI recommends that the Adult Safeguarding Unit should take further measures to promote greater awareness of its role in Aboriginal communities and how to make reports to the Adult Safeguarding Unit of the suspected abuse of adults vulnerable to abuse. The Adult Safeguarding Unit should also make improved provision and avenues for members of Aboriginal communities to provide reports in an effective and culturally sensitive manner.

RECOMMENDATION 43

SALRI recommends that consideration be given to:

1. The establishment of appropriate position(s) for an ASU practitioner(s) in each regional area or Local Health Network; and
2. The establishment of appropriate position(s) within the ASU for an Aboriginal Advocate(s) or Aboriginal Liaison Officer(s) in metropolitan and regional areas; and
3. The availability of accredited and independent interpreters and the use of suitable and culturally and linguistically appropriate capacity assessment tools for people from Aboriginal communities and CALD individuals.

RECOMMENDATION 44

SALRI recommends that quality assurance measures are adopted to ensure translated materials are accurate and that educational materials be distributed by various platforms and in a number of formats.

Part 12 – Other Issues

12.1 Issues Outside Terms of Reference

12.1.1 A number of topics were raised in SALRI's consultation that, whilst significant, were outside SALRI's terms of reference and therefore have not been the subject of lengthy consideration in this Report. These topics include:

1. The introduction of a civil cause of action similar to the equitable doctrines of unfair influence²¹⁵⁵ or unconscionability²¹⁵⁶ to SACAT.²¹⁵⁷
2. SALRI discussed in its POA Report the desirability or practicability of the ASU (or any other agency assuming an active investigatory or other role) assisting civil actions by or on behalf of a vulnerable victim of financial abuse, notably before SACAT.²¹⁵⁸ Such a suggestion, whilst not without merit, raises complex questions of law, policy, practice and resources. It was rightly pointed out to SALRI in both its EPA and present consultation that the ASU are not a SAPOL type investigatory unit and have a distinct safeguarding role and rationale. SALRI therefore recommended as part of its POA Report 'that that the State Government should consider the future roles, practices and processes of the Office of the Public Advocate, the Adult Safeguarding Unit, South Australia Police, the Public Trustee and any other interested agency, to receive and respond to reports or claims in relation to the suspected abuse or misuse of EPAs, including the possible intervention or investigation of cases brought to SACAT'.²¹⁵⁹ SALRI adheres to this view. This is a question for any future wider review.²¹⁶⁰

²¹⁵⁵ *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; *Bridgewater v Leahy* [1997] QCA 36. See also Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 271–2 [7.2.14]–[7.2.20].

²¹⁵⁶ *Allcard v Skinner* (1887) 36 Ch 145; *Louth v Diprose* (1992) 175 CLR 621, 628; *Johnson v Buttress* (1936) 56 CLR 113; *Royal Bank of Scotland v Etridge [No 2]* [2001] 4 All ER 449; *Lloyds Bank Ltd v Bundy* [1974] 3 All ER 757. See also Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 269–1 [7.2.8]–[7.2.13].

²¹⁵⁷ This suggestion is not without merit as these remedies are of particular application in the financial abuse of older persons and/or persons with disability. However, it raises complex potential constitutional and other considerations. See further above Part 10.4.

²¹⁵⁸ Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 429–31 [10.5.24]–[10.5.31].

²¹⁵⁹ *Ibid* Recommendation 120. See also at: 429–31 [10.5.24]–[10.5.31].

²¹⁶⁰ See above Recommendation 1.

3. Extending the common law forfeiture rule to non-lethal abuse.²¹⁶¹ SALRI has received past suggestions from the NSW Law Society²¹⁶² and Mr Browne, a NSW legal practitioner, that the common law forfeiture rule for homicide could be extended to cases of elder abuse, especially financial abuse.²¹⁶³ SALRI has previously recommended that, at this stage, the common law forfeiture rule should not be extended to cases involving elder abuse (including financial abuse or the misuse of an EPA) as this issue raises complex implications and requires further consideration.²¹⁶⁴ The suggestion of extending the forfeiture rule is not without merit, but raises complex issues of policy and practice.²¹⁶⁵ SALRI remains of the view that the extension of the common law forfeiture rule to elder financial or other abuse requires detailed consideration as part of a specific future law reform project.²¹⁶⁶
4. The role and scope of the Community Visitor scheme given the recent growth of service provision by the Commonwealth, particularly the NDIS,²¹⁶⁷ to provide oversight against the possible abuse of older persons or persons with disability.²¹⁶⁸

²¹⁶¹ See further South Australian Law Reform Institute, *Riddles, Mysteries and Enigmas: The Common Law Forfeiture Rule* (Report No 14, February 2020) 250–4 [9.2.1]–[9.2.17]; Mikaylie Page, ‘Public Trustee (WA) v Mack: An Uncertain Future for the Forfeiture Rule in Elder Abuse Cases?’ (2018) 18 *Macquarie Law Journal* 137, Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, June 2017) 279–81 [8.52]–[8.61]; Barbara Hamilton, ‘Be Nice to Your Parents: Or Else!’ [2006] 4 *Elder Law Review* 8; Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 413–8 [10.3.1]–[10.3.18].

²¹⁶² Letter from NSW Law Society to Professor John Williams (SALRI), ‘Review of the Forfeiture Rule’, 3 May 2019 <<https://www.lawsociety.com.au/sites/default/files/2019-06/Letter%20to%20South%20Australian%20Law%20Reform%20Institute-%20review%20of%20the%20common%20law%20forfeiture%20rule%20-%20203%20May%202019.pdf>>.

²¹⁶³ See generally South Australian Law Reform Institute, *Riddles, Mysteries and Enigmas: The Common Law Forfeiture Rule* (Report No 14, February 2020) 250–4 [9.2.1]–[9.2.17]. See also Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, June 2017) 279–81 [8.52]–[8.61].

²¹⁶⁴ See also South Australian Law Reform Institute, *Riddles, Mysteries and Enigmas: The Common Law Forfeiture Rule* (Report No 14, February 2020) 250–4 [9.2.1]–[9.2.17] Recommendation 65.

²¹⁶⁵ As the erudite Professor Gino Dal Pont of the University of Tasmania has previously told SALRI: ‘I can understand the sentiments of persons who are inclined to widen the forfeiture rule to address elder abuse, as it seems contrary to morality that a person who has engaged in elder abuse should be able to benefit (or at least benefit fully) from the elder’s will. At the same time, elder abuse works at so many levels that identifying the relevant trigger may be nigh impossible. Given the challenges in identifying the parameters of the forfeiture rule in the context of (unlawful) killing, the challenges in setting parameters when it comes to a more amorphous concept of ‘elder abuse’ are tricky indeed ... the very breadth of what can constitute “elder abuse” makes it, to my mind, nigh impossible to set appropriate clear parameters’: Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) [10.3.16]. Professor Dal Pont reiterated this position to SALRI in present consultation, as did Mr Salama, a NSW barrister.

²¹⁶⁶ See generally South Australian Law Reform Institute, *Riddles, Mysteries and Enigmas: The Common Law Forfeiture Rule* (Report No 14, February 2020) 251 [9.2.4].

²¹⁶⁷ The Community Visitor scheme in South Australia has had its role as to both aged care and disability oversight reduced over recent years with the Commonwealth assuming a greater role in both areas. The main role of the Community Visitor scheme is now confined to oversight under the *Mental Health Act 2009* (SA). The intervention of the Commonwealth through the NDIS raises a concern that constitutional issues relating to s 109 would arise should the State Government give the CVS powers with respect to NDIS providers: Kelly Vincent and David Caudrey, *Safeguarding Task Force* (Report, 31 July 2020) 18. See also above Part 10.2.

²¹⁶⁸ The benefit of this role has been raised elsewhere. One review cited by Mr Robertson QC in his Report into the case of Anne Marie Smith said: ‘In 2016–17 CVS made over 12,000 visits to adult disability services. The broad purpose common to all the CVS considered by this review is to visit people with disability and independently

5. The operation of ACDs and their intersection with EPAs,²¹⁶⁹ the ASU²¹⁷⁰ and mental health.²¹⁷¹
6. An enhanced and more formal role for mediation in relation to disputes or complaints involving suggestions of elder abuse²¹⁷² (or potentially other individuals vulnerable to abuse).

monitor if their human rights are being met by the service systems they rely on. At their best, CVS achieve important outcomes for people with disability in services, encouraging them to express their views, listening, building capacity in asserting rights or linking with supported decision-making processes and advocates. Visiting in person and talking assists people with disability to build confidence and experience in expressing their views and needs. By tracking service responses to issues CVS can also demonstrate that it is worth complaining, as well as being safe to do so. Disability services indicated strong support for CVS in all the jurisdictions with schemes. As well as assisting in the local resolution of issues and complaints they play a capacity-building role in identifying good practice. They also escalate serious matters and enable systemic issues to be identified': Alan Robertson, *Independent Review of the Adequacy of the Regulation of the Supports and Services Provided to Ms Ann-Marie Smith, an NDIS Participant, Who Died on 6 April 2020* (Report, 31 August 2020) 72. Mr Robertson added: 'there is a place for a Community Visitor Scheme because it can be that extra pair of eyes of somebody coming in and being able to talk to individuals about how things are going in their lives and having some kind of external input. Then the community visitor can refer any matters of concern to the appropriate investigating authority. In this respect, community visitors are expert "complainants": at 72. See also at: 74–6. SALRI will examine aspects of the Community Visitor's Scheme role and operation in the context of its review of the *Mental Health Act*.

²¹⁶⁹ A recurring theme in SALRI's EPA consultation is the confusion held by many in the community as to the different roles of an EPA, ACD and a will: at Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) ix n 24. SALRI did not examine the operation of the *ACD Act* as part of its POA Report, but a consistent theme in SALRI's EPA consultation amongst both legal and health practitioners was dissatisfaction over the ACD form and 72 page ACD kit on account of their perceived complexity and witnessing formalities. There were other concerns as to aspects of the *ACD Act*. See further Wendy Lacey, *Report of the Review of the Advance Care Directives Act 2013 (SA)* (Report, June 2019). See also Letter from the Law Society to the Health Minister, 24 May 2019 <<https://www.lawsocietysa.asn.au/pdf/submissions/L%20240519%20to%20the%20Minister%20for%20Health%20and%20Wellbeing%20re%20Review%20of%20ACD%20Act%20Final.pdf>>; Letter from the Law Society to the Attorney-General, 30 September 2019 <<https://www.lawsocietysa.asn.au/pdf/Submissions/ACD19.pdf>>; Letter from the Law Society to the Attorney-General, 11 May 2020 <<https://www.lawsocietysa.asn.au/pdf/L110520totheAGDreAdvanceCareDirectivesAct2013.pdf>>; Letter from the Law Society to the Health Minister, 29 July 2020 <<https://www.lawsocietysa.asn.au/pdf/L290720totheMinisterforHealthandWellbeingResponseReportontheReviewoftheAdvanceCareDirectivesAct2013.pdf>>. Conceptually, ACDs are a useful and well-intentioned document seeking to promote individual autonomy. However, a key issue is their enforcement in practice. Despite the presence of a valid ACD, whether it is applied in practice is a significant barrier to its utility. See Olga C Pandos and Bernadette Richards, 'Lost in Translation: Overcoming Practical Barriers in the Operation of Advance Care Directives and Enduring Powers of Attorney in South Australia' (2022) *Adelaide Law Review* (forthcoming). See also Sylvia Villios and Olga C Pandos, 'A Review of Advance Care Directives and Enduring Powers of Attorney in South Australia: Preserving Autonomy and Preventing Abuse' (2022) *Adelaide Law Review* (forthcoming).

²¹⁷⁰ Margaret Young, at the University of South Australia, for example, raised that one of the primary objectives of the ASU is preventing financial abuse. An important factor in the prevention of abuse is the reform of South Australia's *Powers of Attorney and Agency Act 1984* (SA). As a result, the ASU will better achieve their objective of abuse prevention.

²¹⁷¹ The validity and enforcement of ACDs in the context of mental health treatment has also been raised in SALRI's Review of the *Mental Health Act*. This will be considered further by SALRI in due course.

²¹⁷² A group of researchers based at the University of South Australia asked SALRI to look at the role and benefit of mediation. The role and value of ADR or mediation (potentially through SACAT) for disputes involving EPAs was previously pointed out to SALRI by various parties. See Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 323–4 [7.6.11]–[7.6.19], 369 [7.6.55]. See also Law Reform Committee Parliament of Victoria, 'Inquiry into Powers of Attorney' (Final Report, Parliamentary Paper No 352, August 2010) 200–1.

7. The definition and assessment of capacity and wider issues under the *Guardianship and Administration Act 1993* (SA).²¹⁷³
8. The value of a comprehensive renewed *Disability Justice Plan*²¹⁷⁴ to assist and promote the participation of parties with disability within the justice system in light of the acute continuing concerns regarding the situation of persons with disability within the justice system,²¹⁷⁵ whether as suspect, accused, witness, victim or litigant.²¹⁷⁶ This would replace the now lapsed original South Australian *Disability Justice Plan*²¹⁷⁷

12.2 Charter and Code of Practice

12.2.1 The *AAS Act* requires the development of a Charter of the Rights and Freedoms of Vulnerable Adults and a Code of Practice to guide the ASU's operations and service response. These documents were developed in consultation with a diverse range of stakeholders, including older people and people living with a disability, and are available on the SA Health website. In addition to the specific provisions within the *AAS Act*, the ASU must generally operate in alignment with key principles, the Charter of the Rights and Freedoms of Vulnerable Adults and the Code of Practice in carrying out its functions and responsibilities.

Charter

12.2.2 Section 20 of the *AAS Act* requires a *Charter of the Rights and Freedoms of Vulnerable Adults* ('Charter') to be prepared by the Minister with the support of the OFAW following consultation with relevant bodies and community members. The Explanatory memorandum states that:

The purpose of the Charter is to ensure that the rights-based approach informs the operation of the Act and the Adult Safeguarding Unit. This does not mean that the Bill creates new 'rights'

²¹⁷³ This issue was regularly raised in SALRI's consultation, but is more appropriately considered in the context of SALRI's forthcoming separate review of the *Mental Health Act*. See further above Part 6.

²¹⁷⁴ This suggestion was again raised to SALRI during the present reference by parties such as Skye Kakoschke-Moore, Natalie Wade and Maggie Rutjens. The original *Disability Justice Plan* was singled out for praise and urged for national adoption. See Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (Report, February 2014) 17; 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) 164 [6.49]–[6.50]; Law Council of Australia, *The Justice Project: People with Disability* (Final Report, August 2018) 5, 85; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Combined Second and Third Periodic Reports of Australia*, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019) 25(b), II(b); *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report, August 2017) 70. SALRI has previously supported such a suggestion. 'SALRI recommends that the State Government should consider a renewed *Disability Justice Plan* combining legislative, operational and training measures to provide further support to persons with disability within the civil and criminal justice system, both in and out of court. SALRI further recommends that any renewed *Disability Justice Plan* must be developed in co-design with the disability community and disability sector and that there should be an evaluation at the end of any renewed *Disability Justice Plan* there should be an evaluation of the operation and effects of the Plan': David Plater et al, South Australian Law Reform Institute, *Providing a Voice to the Vulnerable: A Study of Communication Assistance in South Australia* (Report No 16, September 2021) Recommendation 16. See further at: 129–31 [4.4.2]–[4.4.6].

²¹⁷⁵ *Disability Royal Commission* (Interim Report, October 2020); David Plater et al, South Australian Law Reform Institute, *Providing a Voice to the Vulnerable: A Study of Communication Assistance in South Australia* (Report No 16, September 2021) 109–32.

²¹⁷⁶ This was an integral feature of the original *Disability Justice Plan*. See South Australia, *Parliamentary Debates*, House of Assembly, 6 May 2015, 1036 John Rau, Attorney-General; Evidence to *Royal Commission into Institutional Responses to Child Sexual Abuse*, Public Hearing, Case Study 38, 24 March 2016, 18334 (Dr David Plater).

²¹⁷⁷ Attorney-General's Department (SA), *Disability Justice Plan 2014–2017* (June 2014).

which are enforceable in the courts, ie a breach of rights would not be the subject of actions brought before the courts. The rights set out in the Charter must be a mandatory relevant consideration of prescribed State authorities in carrying out functions or exercising powers under the Act. Whilst initially the Office for Ageing Well (and the Adult Safeguarding Unit) will be the only prescribed State Authority, it is intended that the Regulations may be amended to include additional State Authorities in due course.

12.2.3 The *AAS Act* explicitly states that the Charter does not create legally enforceable rights or entitlements. Regardless, the *AAS Act* expressly required the ASU to have regard to, and seek to give effect to, the Charter in carrying out its functions. Section 20(6) reiterates this requirement in that a prescribed State Authority must have regard to and seek to give effect to this Charter in exercising their functions or powers under the *AAS Act*. This obligation ensures that a rights-based approach informs both the administration of the Act and the operation of the ASU.

Code of Practice

12.2.4 Section 21 of the *AAS Act* provides that the Minister may publish codes of practice for the purposes of the Act. The Code of Practice must be complied with by the prescribed State authority operating under the *AAS Act* to the extent that it is reasonably practicable to do so. It was expected that the practical operation of the ASU and detail about their process in responding to reports of abuse would be set out in the Code of Practice.

12.2.5 The explanatory memorandum states that:

Each prescribed State Authority engaged in the administration, operation or enforcement of the Act must, to the extent that it is reasonably practicable to do so, comply with the Code of Practice. Whilst initially the Office for Ageing Well (and the Adult Safeguarding Unit) will be the only prescribed State Authority, it is intended that the Regulations may be amended to include additional State Authorities in due course.

12.2.6 Originally, the *Closing the Gaps* Report recommended the development of a practically focused Code of Practice, similar to that which supports the *Adult Support and Protection (Scotland) Act 2007* (Scot) to minimise duplication and to increase the collaboration between different agencies.

12.2.7 The explanatory memorandum for the *AAS Act* explains that:

The intent of the Code of Practice is to outline in a detailed and practical way how the Act is to be implemented, including how organisations will work together, share information, and set criteria for referrals, etc.

12.2.8 SALRI notes that any consequential or incidental amendments should be made to the *Ageing and Adult Safeguarding Regulations 2019* (SA), *Charter of the Rights and Freedoms of Vulnerable Adults*, Standard Operating Procedures and any other internal protocols required as a result of any adopted recommendations from this Report to amend the *AAS Act*.

RECOMMENDATION 45

SALRI recommends that any consequential or incidental amendments should be made to the *Ageing and Adult Safeguarding Regulations 2019* (SA), *Charter of the Rights and Freedoms of Vulnerable Adults*,²¹⁷⁸ and Standard Operating Procedures required as a result of any adopted recommendations from this Report to amend the *Ageing and Adult Safeguarding Act 1995* (SA).

12.3 Microboards²¹⁷⁹

12.3.1 One issue that was raised in SALRI's consultation by the disability sector, service providers and legal and health practitioners was the potential utility of microboards to provide long term support and assistance to persons with disability and older persons as an alternative to existing options such as an EPA, administration and/or guardianship.²¹⁸⁰ The problems and concerns with both EPAs²¹⁸¹ and seeking administration and/or guardianship²¹⁸² were often noted to SALRI.²¹⁸³ SALRI

²¹⁷⁸ For example, the name of the Charter should be updated in line with any changes made to the terminology used in the Act.

²¹⁷⁹ SALRI acknowledges the input and insight of Dr Mark 'Matt' Giancaspro and Associate Professor Beth Nosworthy to this discussion.

²¹⁸⁰ See generally Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) 405–11 [10.1.1]–[10.1.23]; David Plater et al, 'New Avenues of Providing Effective Care: The Role of Microboards' (2021) 43(6) *The Bulletin: The Law Society of South Australia Journal* 9.

²¹⁸¹ A person's current views, relationships and choices may not correlate with 'future self[s] ... preferences': Terry Carney, 'Searching for Workable Alternatives to Guardianship for Vulnerable Populations?' (2015) 1(1) *Ethics, Medicine and Public Health* 113, 116. This means that an appointed enduring POA may need to be changed, but in South Australia this can only be done if the principal is not yet legally incapacitated. It can also be very difficult to change a POA or guardianship once the principal is legally incapacitated, especially if they have a limited support network. Interested parties can apply to the Supreme Court or SACAT where elder abuse is suspected, subject to requirements. In terms of guardianship, SACAT has the power, on application, revoke a guardianship order.

²¹⁸² Damian Bugg, *Independent Review Public Trustee Tasmania* (Report, 30 November 2021) 12–13, 26–7. '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": Office of the Public Advocate, *Line of Sight: Refocussing Victoria's Adult Safeguarding Laws and Practices* (Report, August 2022) 77. The *Disability Royal Commission* has noted there will be hearings into the guardianship and trustee system later this year, saying that while the process serves some people, it has received submissions that 'it may limit some people's decision-making rights and can amount to, or lead to, violence, abuse, neglect or exploitation': Anne Connolly, Ali Russell and Stephanie Zillman, 'Queensland's Public Trustee system to be investigated after Four Corners report revealed high fees and financial mismanagement', *ABC News* (online, 15 March 2022) <<https://www.abc.net.au/news/2022-03-15/public-trustee-system-under-fire-over-fees-to-vulnerable-people/100908772>>.

²¹⁸³ There are criticisms of both guardianship and EPAs owing to reports of abuse, financial misappropriation and a lack of autonomy. See, eg, Law Reform Committee, Parliament of Victoria, 'Inquiry into Powers of Attorney' (Final Report, Parliamentary Paper No 352, August 2010) 26.

also heard of continued misgivings in this context over the role of the Public Trustee,²¹⁸⁴ especially in light of recent concerning interstate developments in Tasmania²¹⁸⁵ and Queensland.²¹⁸⁶

12.3.2 There was also concern about placing undue reliance on commercial and even Government care providers.²¹⁸⁷

12.3.3 It appears to SALRI that, in relation both to elder abuse and the abuse of persons with disability, families are searching for new avenues to address fears of financial and other abuse and provide long term support and assistance. The 2021 Australian Institute of Family Studies' Elder Abuse Report noted:

The research revealed limited reliance on formal services and significant reliance on avoidant strategies among those who experienced elder abuse. This indicates a need for further examination of the barriers to help seeking and whether the services presently available to address elder abuse are sufficient. In particular, given the complex relationship dynamics involved in elder abuse, it is necessary to assess whether existing services are appropriately designed for this context. For example, in financial abuse, the predominance of adult children as perpetrators, the lower levels of help seeking, and the higher levels of negative effectiveness assessments of actions, taken together, suggest that further consideration of responses to financial abuse is needed.²¹⁸⁸

12.3.4 A microboard is one suggestion to emerge. A microboard was seen as a means of avoiding recourse to the ASU. It is a relatively new concept. A microboard is a small group of interested individuals who gather around a person with special needs (whether an older person and/or with a disability) to support them throughout their lives.²¹⁸⁹ These groups may take the form of an incorporated legal entity²¹⁹⁰ and can serve as a vehicle for supported decision-making in a number of

²¹⁸⁴ SALRI expresses no view whether these misgivings are justified in a South Australian context.

²¹⁸⁵ Rebecca Hewett, 'Tasmania's Public Trustee Found to Have "Genuinely Misunderstood" its Duties for 26 Years', *ABC News* (online, 2 December 2021) <<https://www.abc.net.au/news/2021-12-02/tasmania-public-trustee-misunderstood-its-duties-review-finds/100667428>>. See further Damian Bugg, *Independent Review Public Trustee Tasmania* (Report, 30 November 2021).

²¹⁸⁶ Anne Connolly, Ali Russell and Stephanie Zillman, 'Queensland's Public Trustee system to be investigated after Four Corners report revealed high fees and financial mismanagement', *ABC News* (online, 15 March 2022) <<https://www.abc.net.au/news/2022-03-15/public-trustee-system-under-fire-over-fees-to-vulnerable-people/100908772>>; Anne Connolly, Ali Russell and Stephanie Zillman, 'Trapped, Stripped of Assets, and Silenced. And it's all Perfectly Legal', *ABC News* (online, 14 March 2022) <<https://www.abc.net.au/news/2022-03-14/public-trustee-four-corners-investigation/100883884>>; Anne Connolly, 'Queensland's Public Trustee Accused of Profiting Off People who Lack Capacity to Manage Own Affairs', *ABC News* (online, 24 February 2021) <<https://www.abc.net.au/news/2021-02-24/queensland-public-trustee-accused-of-profiting-off-people/13183638>>.

²¹⁸⁷ The recent disturbing case of Ann Marie Smith in Adelaide has heightened such concerns. See Isabel Dayman, 'Ann Marie Smith's Death Shocked the Public, but it Also Got the Neale Family Making Future Plans', *ABC News* (online, 12 July 2020) <<https://www.abc.net.au/news/2020-07-12/ann-marie-smith-and-future-planning-for-disability-community/12436824>>.

²¹⁸⁸ Lixia Qu et al, Australian Institute of Family Studies, *National Elder Abuse Prevalence Study* (Research Report, December 2021) 5.

²¹⁸⁹ Leighton Jay and Michael Schaper, 'Microboards: What Are They and How Do They Work?' (2012) 26(4) *Training and Management Development Methods* 4.01.

²¹⁹⁰ The model of an incorporated body was used originally in Canada and is now used in Western Australia and elsewhere in Australia.

areas, including financial management,²¹⁹¹ health care and treatment, safeguarding and governance. Microboards, as was often pointed out to SALRI in both its EPA and present consultation, have the advantage of exercising the decisions relating to both financial issues and health care and medical treatment. ‘A microboard combines’, as Dr Mark Giancaspro pointed out to SALRI, ‘the roles of both a POA and an ACD and arguably renders both of these otiose or unnecessary.’ A key difficulty in the use of microboards currently in Australia is the form of incorporation chosen, as neither method currently available was developed or tailored with this particular use in mind, as discussed further below.

12.3.5 Law and social reform in the area of disability since the 1970’s has been characterised by an emphasis on supported decision-making. Supported decision-making is a premise which aims to support people with impaired decision-making capacity to make and implement informed decisions.²¹⁹² In many ways, this accords with much of the ‘normal’ decision-making process, with consultation and input from family, friends and relevant professionals.²¹⁹³ Supported decision-making takes various practical forms, including making information accessible, giving advice about different pathways, taking steps to recognise the person’s actual preferences and assisting the person in communicating their wishes to others.²¹⁹⁴

12.3.6 Supported decision-making acts as an alternative to substitute decision-making by protecting autonomy and is ‘viewed as an inter-dependent rather than independent phenomenon.’²¹⁹⁵ Substitute decision-making means that someone else is given the power to make decisions on behalf of a person with impaired decision-making capacity. Supported decision-making involves the principal’s permission and engagement in the process. Therefore, the principal retains autonomy, but is provided with resources and support to make a decision alone or jointly. This can apply to financial, medical and/or personal decisions. Supported decision-making has a focus on elevating the actual will, preferences and rights of the person, and enabling decisions to be made collaboratively, whereas substitute decision-making seeks to act merely in the best interests of the principal.²¹⁹⁶ There is a substantial body of literature on the broader benefits of supported decision-making in improving the quality of life for people with a disability.²¹⁹⁷

²¹⁹¹ Not all microboards directly manage a person’s funding, but many do. See Tim Stainton, ‘Supported Decision-Making in Canada: Principles, Policy and Practice’ (2016) 3(1) *Research and Practice in Intellectual and Developmental Disabilities* 1, 8.

²¹⁹² Victorian Law Reform Commission, *Guardianship* (Report No 24, 31 January 2012) 116; NSW Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 19–21 [3.25]–[3.32].

²¹⁹³ Terry Carney, ‘Supported Decision-Making in Australia: Meeting the Challenge of Moving from Capacity to Capacity-Building?’ (2017) 35(2) *Law in Context* 44. The introduction of the NDIS has prompted a focus on supported decision-making, simply from the scheme’s design. This is because the NDIS is an individualised program which focuses on tailored support based on the needs and desires of the person.

²¹⁹⁴ See Victorian Law Reform Commission, *Guardianship* (Report No 24, January 2012).

²¹⁹⁵ Bruce Alston, ‘Towards Supported Decision-Making: Article 12 of the *Convention on the Rights of Persons with Disabilities* and Guardianship Law Reform’ (2017) 35(2) *Law in Context* 21, 24.

²¹⁹⁶ See generally Genevra Richardson, ‘Mental Disabilities and the Law: From Substitute to Supported Decision-Making?’ (2012) 65(1) *Current Legal Problems* 333; Nandini Devi, ‘Supported Decision-Making and Personal Autonomy for Persons with Intellectual Disabilities: Article 12 of the UN *Convention on the Rights of Persons with Disabilities*’ (2014) 41(4) *Journal of Law Medicine and Ethics* 792; Terry Carney, ‘Supported Decision-Making in Australia: Meeting the Challenge of Moving from Capacity to Capacity-Building?’ (2017) 35(2) *Law in Context* 44.

²¹⁹⁷ Shih-Ning Then et al, ‘Supporting Decision-Making of Adults with Cognitive Disabilities: The Role of Law Reform Agencies: Recommendations, Rationales and Influence’ (2018) 61 *International Journal of Law and Psychiatry*

12.3.7 Microboards operate to facilitate supported decision-making as they seek to place a supportive network around the person with impaired decision-making capacity to assist their realisation of ‘dreams, hopes and visions’ and clarify their needs.²¹⁹⁸ Microboards are based on a committed relationship with the subject person and promote a consultative and collaborative approach. These boards are often tailored to the needs of the principal and jurisdiction in relation to what issues they cover — whether it be personal, financial or legal. Another benefit of microboards is the flexibility of the membership and it can be varied with changing circumstances.

12.3.8 The absence of relationships and support networks outside of a paid individual(s) in relation to a vulnerable adult was raised by a number of parties in both SALRI’s EPA and present consultation as a source of concern.²¹⁹⁹ The presence of non-family relationships is seen as essential to safeguarding, particularly when parents are no longer around.²²⁰⁰ A microboard, SALRI was told, seeks to formalise relationships into a legal structure with accountability mechanisms (which will, of course, vary depending on the precise legal structure the microboard utilises), ensuring that safeguards exist beyond the lifespan of any primary carers.

12.3.9 In 1984, the first microboard was established in Manitoba to support a person with an intellectual disability in being removed from an institution.²²⁰¹ This idea was expanded upon by the Vela Microboards Association (then the Vela Housing Society) in British Columbia, which in the early 1990s set up a number of pilot microboards.²²⁰² The first large scale microboard development and implementations took place in British Columbia. The British Columbian *Societies Act* governs the incorporation of non-profit associations, and is the vehicle used for the establishment of microboards.²²⁰³ As of 2015 there were over 900 microboards in British Columbia, including all but one of the original pilot boards established in the early 1990s. There are also a number of microboards currently established, or being established, in Western Australia.

12.3.10 At least one microboard has been established in South Australia. This microboard, after a recent SACAT decision, takes the form of an association incorporated under the *Associations Incorporation Act 1985* (SA) (*Incorporation Act*). SALRI notes that, although the *Incorporation Act* can be now be used for microboards, it is potentially not the ideal vehicle. The *Incorporation Act* was not designed with disability or older person support in mind, but was rather introduced with a strong emphasis on accountability in associations²²⁰⁴ (such as a sports or social club).²²⁰⁵ As they are

64; Terry Carney, ‘Supported Decision-Making in Australia: Meeting the Challenge of Moving from Capacity to Capacity-Building?’ (2017) 35(2) *Law in Context* 44.

²¹⁹⁸ Leighton Jay and Michael Schaper, ‘Microboards: What Are They and How Do They Work?’ (2012) 26(4) *Training and Management Development Methods* 4.01.

²¹⁹⁹ Isabel Dayman, ‘Ann Marie Smith’s Death Shocked the Public, but it Also Got the Neale Family Making Future Plans’, *ABC News* (online, 12 July 2020 <<https://www.abc.net.au/news/2020-07-12/ann-marie-smith-and-future-planning-for-disability-community/12436824>>).

²²⁰⁰ Rachel Fyson and Deborah Kitson, ‘Human Rights and Social Wrongs: Issues in Safeguarding Adults with Learning Disabilities’ (2010) 22(5) *Practice: Social Work in Action* 309.

²²⁰¹ Carolyn Lemon and James Lemon ‘Community-Based Cooperative Ventures for Adults with Intellectual Disabilities’ (2003) 47(4) *Canadian Geographer* 414.

²²⁰² Linda Perry, ‘Vela and Microboards: A Brief History’ [2006] (Winter) *VelaVision* 6.

²²⁰³ Whether this is the best avenue remains unresolved.

²²⁰⁴ South Australia, *Parliamentary Debates*, House of Assembly, 26 February 1985, 2838–40 (Greg Crafter).

²²⁰⁵ See David Plater et al, ‘New Avenues of Providing Effective Care: The Role of Microboards’ (2021) 43(6) *The Bulletin: The Law Society of South Australia Journal* 9, 11 n 27.

incorporated under the *Incorporation Act*, microboards are not afforded any special legal recognition beyond that ordinarily given to any incorporated association. As a microboard deals with the livelihood of a vulnerable member of society, questions about the need for an adequate definition (to differentiate it from an ordinary association) are likely to arise. There are other unresolved legal implications and issues.²²⁰⁶ Some of these implications and issues stem directly from adaptation of the framework of provisions within the *Incorporation Act* to the relatively novel rationale, purpose and structure of a microboard.

12.3.11 The role and operation of microboards is a relatively new area in Australia. However, it is clearly of interest to the community as the role and potential value of microboards consistently arose in both SALRI's EPA and present consultation as an alternative to both an EPA and an order of administration and/or guardianship through SACAT. The fact that a microboard can cover health, lifestyle, financial and related decisions was highlighted as was the fact that a microboard will not be of utility to everyone but for others it might.²²⁰⁷ There is not only a lack of empirical research in this emerging area, but the issue of whether present law and practice (notably the use of the incorporated association structure under the *Associations Incorporation Act 1985* (SA) (*'Incorporation Act'*) provides for the establishment and effective operation of a microboard is unclear.

12.3.12 A recent decision of SACAT, discussed below, provides some measure of clarity as to how the *Incorporation Act* could provide the infrastructure for the formation and incorporation of a microboard. What is unclear at present though is whether the *Incorporation Act* could or should be amended to better cater for microboards or whether a new specific legislative and practical framework may be preferable.

12.3.13 In *Sands v Commissioner for Corporate Affairs*,²²⁰⁸ SACAT was asked to review a decision of the South Australian Commissioner for Corporate Affairs ('the Commissioner') to refuse to incorporate an association – specifically, a microboard – under the *Incorporation Act*. The Commissioner considered the association to be ineligible for incorporation under the *Incorporation Act*. The cited reasons for the Commissioner's decision were as follows:

1. the stated purpose of the association was to benefit an individual and the Commissioner considered that the *Incorporation Act* was to be interpreted as benefiting particular purposes or classes of people and not individuals; and
2. alternatively, it would be more appropriate for the association's activities to be carried on through a different corporate structure, such as a body corporate incorporated under another Act (such as a company limited by guarantee under the *Corporations Act 2001* (Cth)).

12.3.14 The applicant in the matter was the 78-year-old father of Andrew Sands, who suffered an acquired brain injury at birth resulting in lifelong disabilities, notably legal blindness. The applicant and

²²⁰⁶ In *Bloch Holdings Corporation v Ministry of Children, Community and Social Services* [2019] ONSC 4227, for example, a microboard was found to lack standing to seek judicial review of a decision to decline State funding. The Ontario Supreme Court held that, despite the microboard in question existing to manage care and funding, it had 'no direct right or interest' in the funding: at [19].

²²⁰⁷ Indeed, one health practitioner previously described to SALRI how a microboard could be an ideal arrangement to care for her adult child with disability if anything ever happened to her and her husband. The health practitioner outlined her misgivings with using an EPA, placing the adult child in a residential facility and/or guardianship and administration through SACAT.

²²⁰⁸ [2021] SACAT 103.

his wife had worked tirelessly to provide Mr Sands with appropriate care and support before seeking to establish a formal support system and structure to ensure his lifelong well-being. Following extensive research, the applicant and his wife determined that a microboard with Andrew's long-term health and social and emotional wellbeing as its purpose would be 'the best structure to ensure a continuity of support for Andrew on an ongoing basis from a "board" of committed volunteers'.²²⁰⁹ In particular, the low cost of incorporation and administration, coupled with the lack of complexity associated with the incorporated association structure and its suitability for smaller scale community groups, made it especially appealing to the applicant and his wife. They drafted the rules, objects and purposes of the association, assembled a team of willing members, and submitted the documentation to incorporate the association under the *Incorporation Act*. The Commissioner refused the application for the reasons stated above.²²¹⁰

12.3.15 SACAT noted that the applicant's application was made under s 18(1)(c) of the *Incorporation Act*, which relevantly provides that an association formed 'for the purpose of providing medical treatment or attention, or promoting the interests of persons who suffer from a particular physical, mental or intellectual disability' is, subject to the Act, eligible for incorporation under the Act. SACAT also acknowledged s 20(2)(a) of the *Incorporation Act*, which provides that the Commissioner can refuse incorporation of an association where, for example, it would 'be more appropriate for its activities to be carried on by a body corporate incorporated under some other Act'. Finally, reference was made to s 26 of the *Acts Interpretation Act 1915* (SA), which provides that, in every Act: '(a) every word implying a particular gender will be construed as including every other gender; and (b) every word in the singular number will be construed as including the plural number; (c) every word in the plural number will be construed as including the singular number ...'.

12.3.16 The applicant's case, in essence, was that the Commissioner wrongly applied s 18(1)(c) of the *Incorporation Act* as being applicable only to persons in the plural and not to a person in the singular. Section 26 of the *Acts Interpretation Act 1915* (SA) was referred to in support of this submission. This interpretation was said to be 'consistent with the broader purposes of the Act which is to facilitate the incorporation of community groups or bodies with a common interest or purpose of a not-for-profit nature'.²²¹¹ The applicant further argued that the alternative corporate structure recommended was inappropriate given it was expensive, complex, and disproportionate to the size and resources of small community-based groups such as the association in question. Reference was also made to the fact the Western Australian Commissioner had permitted incorporation of a microboard under that State's equivalent to s 18(1)(c) of the *Incorporation Act*.

12.3.17 The Commissioner submitted that the *Incorporation Act* needed to be read within its context as a whole. This, it was argued, indicated that the Act 'is not intended to incorporate associations conceived for the sole benefit of a particular individual but contemplates associations formed to further particular purposes, causes or for people of a particular class or group'.²²¹² The Commissioner reiterated that incorporation under a different Act was the preferable course.

²²⁰⁹ Ibid [13].

²²¹⁰ SALRI understands that the Commissioner was acting on legal advice. SALRI emphasises it intends no criticisms of the Commissioner.

²²¹¹ *Sands v Commissioner for Corporate Affairs* [2021] SACAT 103, [19].

²²¹² Ibid [28].

12.3.18 In agreeing with the applicant, SACAT acknowledged the increasing use of microboards in other jurisdictions as a structure to support individuals with typically complex care needs over their lifetime.²²¹³ SACAT also highlighted the many benefits of microboards and the suitability of the *Incorporation Act* to facilitate such a structure:

Microboards appear to have many advantages including flexibility in membership but a guaranteed ongoing membership with appropriate rules in place to govern any changes in the volunteer base. It ensures an ongoing communal commitment from a group of volunteers to the support, assisted decision-making and wellbeing of a disabled person. The structure provided by an incorporated association permits the membership of that group to vary over time as individual member's circumstances change but for the group to still maintain a consistent legal identity and consistent objectives. As they become more common it appears likely (and indeed it may already be happening in some jurisdictions) that grant bodies or philanthropic institutions considering a grant to a disabled person may insist on a stable legal entity such as a micro board that is incorporated and is a legal entity, to make any such application for the disabled individual because of the accountability of an incorporated association. A micro board permits ownership of property, the ability to contract on behalf of the disabled and the management of finances for the disabled person on an ongoing basis.²²¹⁴

12.3.19 SACAT determined that the *Incorporation Act*, considered against the backdrop of the interpretative rules stipulated in the *Acts Interpretation Act 1915* (SA), did not impliedly exclude s 18(1)(c) as being limited to the plural and not the singular.²²¹⁵ Additionally, s 18 of the *Incorporation Act*, which lists in broad terms many examples of the types of organisations which can be incorporated under the Act,

was not drafted to be unduly restrictive of the categories of not-for-profit organisations that could gain incorporated status as contended by the [CCA] and was not intended to preclude an association that had as its sole object the medical treatment or attention or promoting the interests of a person (as opposed to persons) who suffers from a particular physical, mental or intellectual disability.²²¹⁶

12.3.20 Finally, SACAT agreed with the applicant that structuring a microboard as a company limited by guarantee was not feasible for the reasons cited by the applicant. This would not only disincentivise membership through the imposition of onerous and ever-increasing obligations, it would also considerably increase expenses and require formalities that a small voluntary not for profit organisation should not be subjected to.²²¹⁷ Moreover, unlike with corporations, incorporated associations (which often serve a community or benevolent purpose) are typically structured to operate outside of trade or commerce.²²¹⁸ The *Incorporation Act* and the association's rules were deemed to provide sufficient safeguards to ensure appropriate accountability. The Commissioner was therefore found to have been in error refusing to accept the applicant's application for incorporation of the association (microboard) for Mr Sands.

²²¹³ Ibid [35].

²²¹⁴ Ibid [37]–[38].

²²¹⁵ Ibid [46].

²²¹⁶ Ibid [53].

²²¹⁷ Ibid [61].

²²¹⁸ Ibid [60].

12.3.21 This case is significant in that it is the first decision in South Australia to address the question as to whether a microboard can be incorporated under the *Incorporation Act*. The decision supports a clear trend towards the use of associations' incorporation laws as a framework for the establishment of legally recognised microboards.

12.3.22 There are a number of benefits to a microboard which can be obtained through the incorporation process, as opposed to relying on informal arrangements.²²¹⁹ Many of the provisions of the *Incorporation Act* would aptly cover essential aspects of a microboard's operation. For example, incorporation of a microboard establishes it as a distinct legal entity separate from its members.²²²⁰ This provides a measure of protection for members of the microboard who can therefore maintain their own personality and identity. A microboard established as an incorporated association could acquire, hold, deal with and dispose of real property, administer trust property, appoint agents, invest funds, enter into contracts, and sue and be sued in its own name.²²²¹ This form of indemnity for members also provides a desirable protection for persons who might otherwise be hesitant to participate in the incorporated association. In functional terms, therefore, a microboard incorporated under the *Incorporation Act* could perform most of the fundamental functions for which other legal instruments such as powers of guardianship and attorney are typically granted.

12.3.23 The incorporated association structure governed by the *Incorporation Act* also imposes stringent obligations upon members of the association, both in terms of eligibility for membership and in terms of rights and obligations attaching to such membership. Bankrupts are not permitted to sit on the management board or committee of an incorporated association without permission from the Commissioner.²²²² Similarly, those convicted of certain serious offences, including for corporate misconduct, fraud and dishonesty, are also excluded subject to leave from the Commissioner.²²²³ Heavy fines apply to the contravention of these provisions. These safeguards are commensurate with the objectives of a microboard, particularly the desire to ensure only reliable persons who can be trusted to manage the affairs and assets of the subject person. There are also disclosure obligations which require members of an incorporated association to reveal any direct or indirect pecuniary interests in a contract (or proposed contract) with the association.²²²⁴ Such conflicts of interest also impact upon voting rights.²²²⁵ Committee members (described as 'officers' in the *Incorporation Act*) must not commit acts to deceive or defraud the association, make improper use of their position or any information acquired, and must act with reasonable care and diligence in the exercise of powers and performance of duties under the Act.²²²⁶ Again, these measures would go some way to ensuring that members of a microboard do not abuse their position of authority for personal gain.

12.3.24 The *Incorporation Act* is careful to restrain the rights and liabilities of members. It expressly provides that membership of an incorporated association does not confer upon members any rights, titles or interests in real or personal property of the association, except as provided by the association's

²²¹⁹ David Plater et al, 'New Avenues of Providing Effective Care: The Role of Microboards' (2021) 43(6) *The Bulletin: The Law Society of South Australia Journal* 9, 10.

²²²⁰ *Incorporation Act* s 20(3).

²²²¹ *Ibid* ss 20(3), 25.

²²²² *Ibid* s 30(1).

²²²³ *Ibid* s 30(2).

²²²⁴ *Ibid* s 31.

²²²⁵ *Ibid* s 32.

²²²⁶ *Ibid* s 39A.

rules.²²²⁷ This serves to maintain the clear divide between the association and its members, which again would be beneficial in a microboard setting where confusion may arise as to entitlements due to the inherently personal nature of the arrangement. The rules of the association (including any other rules, ordinances or bylaws) are binding on its members.²²²⁸

12.3.25 All incorporated associations must record and explain the transactions of the association and their financial position. Prescribed associations, being those that had gross receipts in the previous financial year in excess of \$500,000, must keep proper records of accounts and are also subject to more stringent financial reporting obligations.²²²⁹ Given the likely modest nature of the subject person's asset holdings, the microboards assisting most subject persons will not be prescribed associations. Regardless, the obligation to account is constant for all types of incorporated association, meaning microboards administering the affairs and assets of any subject person, whether affluent or otherwise, must keep appropriate financial records.

12.3.26 Naturally, microboards will often meet so as to discuss the affairs of their subject person. It is envisaged such meetings would be held periodically as a matter of course, but depending on the subject person's capacity and circumstances, it may be that meetings are held infrequently or only when important decisions concerning the subject person need to be made. A potential issue here is that the *Incorporation Act* mandates the holding of certain meetings at specific milestones.²²³⁰ However, these statutory requirements are quite flexible, and it is expected that most microboards would meet at least once per year and satisfy the AGM stipulation.

12.3.27 *Sands v Commissioner for Corporate Affairs*²²³¹ provides the clearest guidance yet as to the suitability of the incorporated association structure for microboards. The *Incorporation Act* now provides, at the least, a framework in South Australia through which a microboard can be established and administered. However, difficulties remain. The *Incorporation Act* is applicable in South Australia, and while similar Acts exist interstate, they do contain minor differences, and the entities incorporated under them are regulated independently by each state.²²³² A person with assets in more than one jurisdiction, or who wished to relocate from one state to another, may find that the incorporated association structure will not work well for their circumstances.

12.3.28 It is also problematic to ask individuals to utilise a structure predominantly employed by sporting and social clubs to formalise a supportive decision-making structure for their benefit. Similar difficulties arise when considering the alternative, the public company limited by guarantee, which is available under the *Corporations Act 2001* (Cth). Although this registration model is federal, and therefore bypasses the difficulties encountered by the state-based regulation for the incorporated association, it is generally not intended for not-for-profit business entities. It is a sub-set of a public company, and is regulated as such — including the requirements to prepare annual financial reports, appoint an auditor to have those reports audited, prepare directors' reports, and hold annual general

²²²⁷ Ibid s 21.

²²²⁸ Ibid s 23.

²²²⁹ Ibid s 35; *Associations Incorporation Regulations 2008* (SA) reg 4.

²²³⁰ Ibid s 39.

²²³¹ [2021] SACAT 103.

²²³² See, eg, *Associations Incorporations Act 2009* (NSW), as regulated by the NSW Fair Trading Registry and Accreditation.

meetings.²²³³ There is capacity to be declared a small company limited by guarantee,²²³⁴ which reduces some of these regulatory burdens — but, again, the language of the regulations speaks of ‘revenue’ and ‘payment of dividends’, which sits at odds with the rationale of a microboard.

12.3.29 Neither the incorporated association nor the company limited by guarantee provide a perfect structure for a microboard to take shape and operate. The *Incorporation Act* is also far from an ideal vehicle. This Act was never intended for the particular purposes and issues a microboard is designed for. It has been suggested that ‘the use of the incorporated association to provide for the role and operation of microboards is akin to trying to put a square peg in a round hole’.²²³⁵

12.3.30 SALRI has been told that microboards appear to offer an encouraging alternative to existing and problematic substitute decision-making mechanisms such as guardianship and powers of attorney. It was pointed out to SALRI that, despite unresolved legal issues and implications, this relatively new and innovative approach of a microboard has the potential to act as a long-term, sustainable safeguard in the lives of vulnerable people. There is a lack of empirical evidence as to the long-term effectiveness of microboards, both in Australia and internationally. Whilst limited anecdotal evidence suggests that a microboard can serve as an effective long-term safeguard against financial and other abuse and can improve the quality of life for its subject person with a focus on supported decision-making,²²³⁶ there is a lack of firm research.

12.3.31 It has been noted:

The role and operation of microboards is a relatively new area in Australia and is clearly of interest to the community, health and disability sectors. The fact that a microboard can cover health, lifestyle and financial decisions is significant. A microboard is not a universal solution, particularly in circumstances where a person lacks sufficient social capital to establish a network in the first place. This does not negate the fact that in many situations the concept may offer a promising, sustainable and contemporary approach to disability support.²²³⁷

12.3.32 A microboard is seen as a means of avoiding recourse to the ASU. The role and operation of microboards is an emerging area. The intersection of the role and operation of a microboard with the NDIS in Australia remains unclear.²²³⁸ The issue of whether present law and practice (notably the use of the incorporated association structure under the *Incorporation Act*) is the best fit for the establishment and effective operation of a microboard is unclear. It is also unclear whether the

²²³³ See, eg, *Corporations Act 2001* (Cth) ss 250N, 292(1), 295, 298, 308–9, 327A.

²²³⁴ *Ibid* s 45B.

²²³⁵ David Plater et al, ‘New Avenues of Providing Effective Care: The Role of Microboards’ (2021) 43(6) *The Bulletin: The Law Society of South Australia Journal* 9, 10.

²²³⁶ There is now a substantial body of literature on the broader benefits of supported decision-making in improving the quality of life of people with a disability. See Shih-Ning Then, et al, ‘Supporting Decision-Making of Adults with Cognitive Disabilities: The Role of Law Reform Agencies: Recommendations, Rationales and Influence’ (2018) 61 *International Journal of Law and Psychiatry* 64; Terry Carney, ‘Supported Decision-Making in Australia: Meeting the Challenge of Moving from Capacity to Capacity-Building?’ (2017) 35(2) *Law in Context* 44.

²²³⁷ David Plater et al, ‘New Avenues of Providing Effective Care: The Role of Microboards’ (2021) 43(6) *The Bulletin: The Law Society of South Australia Journal* 9, 11.

²²³⁸ There are suggestions that the NDIS may finance the establishment of a microboard. See also Christine Bigby et al, ‘Delivering Decision Making Support to People with Cognitive Disability: What has Been Learned from Pilot Programs in Australia from 2010 to 2015’ (2017) 52(3) *Australian Journal of Social Issues* 222, 224

Incorporation Act could or should be amended to better cater for microboards or whether a new specific legislative and practical framework may be preferable.

12.3.33 In its POA Report, SALRI noted that the suggestion of microboards to provide for the long term care of persons with disability has apparent merit, but it was beyond the scope of that reference and SALRI recommended that it should undertake a future reference in close consultation with interested parties to examine the role and operation and implications of microboards.²²³⁹ SALRI adheres to this view.

12.3.34 Recommendation

RECOMMENDATION 46

SALRI notes the suggestion of microboards to provide for the long-term care of older persons and/or persons with disability has apparent merit, but it is beyond the scope of this reference. SALRI recommends that it should undertake a future reference in close consultation with interested parties to examine the role and operation and implications of microboards.²²⁴⁰

²²³⁹ Sylvia Villios et al, South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020) Recommendation 118. The use and utility of microboards has also been raised in SALRI's current review of the *Mental Health Act*.

²²⁴⁰ See *ibid* Recommendation 118. This issue arose surprisingly often in both SALRI's EPA and present consultation as an alternative to both an EPA and an order of guardianship. See further at 405–11 [10.1.1]–[10.1.21].

APPENDIX A – Consultation Discussion Questions

Office for Ageing Well (Fact Sheet 2)

1. Is the language used to describe older people appropriate and suitable?
2. Do the objectives and/or functions of Office for Ageing Well reflect contemporary society and issues? What changes may be appropriate?

Background to the Act (Fact Sheet 3)

1. Should the provisions of the Act be focused on older people and people with a disability or extend to all adults vulnerable to abuse?
2. Is the safeguarding response provided for in the Act suitable for other ‘vulnerable adults’?

Guiding Principles of the Adult Safeguarding Provisions (Fact Sheet 4)

1. Do the Principles reflect what is meaningful for a broad range of adults who may be vulnerable to abuse?
2. Should the Adult Safeguarding Unit retain the same rights-based approach or be more interventionist?

Functions of the Adult Safeguarding Unit (Fact Sheet 5)

1. Are the present functions of the ASU suitable and appropriate to achieve its aims? Should they have a more specific focus?
2. Do the functions of the ASU complement or duplicate other services?

Definition of Vulnerable Adult (Fact Sheet 6)

1. Is the term ‘vulnerable’ the most suitable term to describe adults more susceptible to abuse or neglect? Would ‘at-risk’ be more appropriate?
2. What are the factors that make an adult vulnerable to abuse and how could vulnerability be
3. Should the definition of ‘vulnerable adult’ have a greater focus on the abilities and capabilities of that person, rather than their characteristics?

Definition of Abuse (Fact Sheet 7)

1. Does the present definition of ‘abuse’ in the Act accurately reflect the issues that vulnerable adults need safeguarding from?
2. Should there be an additional requirement within the definition of ‘abuse’ for a relationship of trust or duty of care to exist between the vulnerable adult and the alleged abuser?

Interaction of Current Law with ASU’s Service Model (Fact Sheet 8)

1. Should the legislation set out prescriptive steps about the actions the ASU must take, or should the Act be more flexible for the ASU to use best practice and clinical judgement to take action?
2. Should ‘safeguarding’ be explicitly included in the Act as an action for the ASU to take in respect of a report of abuse or neglect? How would this be defined?

Capacity and Consent (Fact Sheet 9)

1. In what circumstances, if any, should the ASU be able to take action without the consent of a vulnerable adult with decision-making capacity? How would this look in practice?
2. In what circumstances should consent be obtained before an action is taken? How can this be made more consistent in the Act?

3. What implications does fluctuating capacity have on the ASU's ability to obtain consent?
4. How can the Act best promote and protect the autonomy of adults with impaired decision-making capacity?

Appendix B – ASU Annual Report Data (2019-2022)

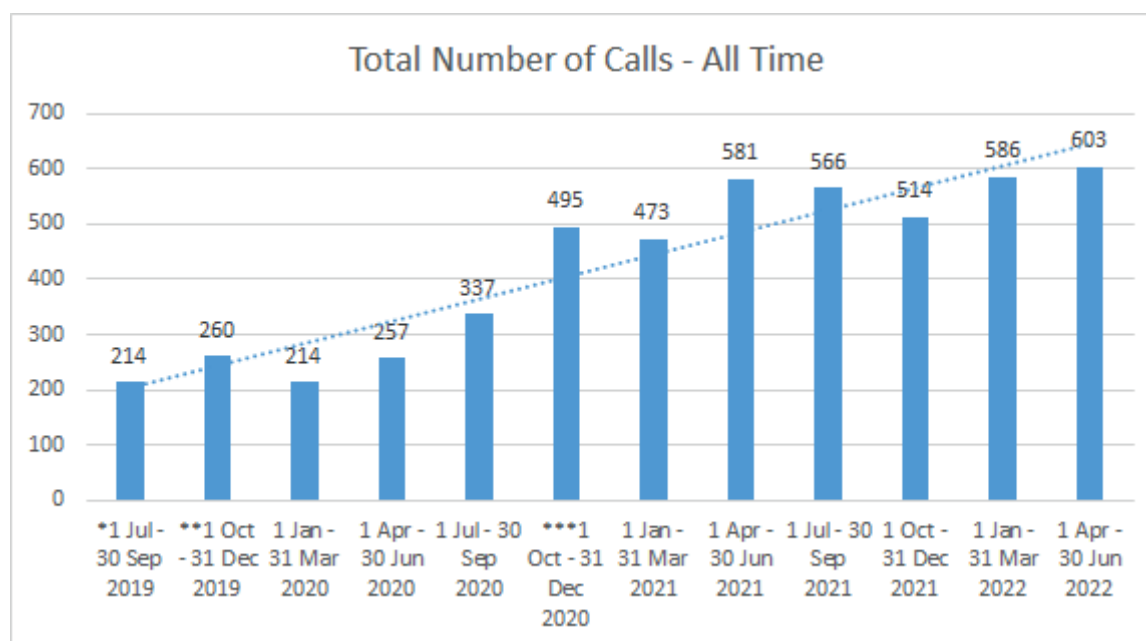
Breakdown of Calls Received by the ASU*

	Annual Report 2019-2020	Annual Report 2020-2021	Annual Report 2021-2022
Number of advice and information calls	640	927 458 older persons 155 adults living with disability	1156 668 older persons 261 adults living with disability
Number of reports to the Unit	306	959 538 older persons 239 adults living with disability	1113 795 older persons 319 adults living with disability
Total Calls	946	1,886 996 older persons 394 adults living with disability	2269 1463 older persons 580 adults living with disability

* ASU began taking enquiry calls from 1 July 2019

* ASU began taking reports from 1 October 2019

Total Calls Data



Caller Details

	Annual Report 2019-2020	Annual Report 2020-2021 older persons	Annual Report 2020-2021 adults living with disability	Annual Report 2021-2022 older persons	Annual Report 2021-2022 adults living with disability
Service Provider	28%	28.1%	56.6%	24.9%	61.5%
Family Member	31.7%	27.3%	8.1%	29.4%	7.8%
Friends	7.2%	N/A	N/A	3.4%	1.2%
Acquaintances	1.7%	N/A	N/A	0.8%	0.9%
Neighbours	2.1%	N/A	N/A	2.6%	1.2%
From the person experiencing abuse	10.4%	9.3%	N/A	7.1%	5.3%
South Australian Police	N/A	4.5%	4.1%	11.1%	3.4%
Allied Health	N/A	N/A	4.1%	12.3%	6%
Other organisations				3.5%	8.9%
Bank/Financial Institution	N/A	N/A	N/A	0.8%	0.0
Other	N/A	N/A	N/A	2.5%	2.8%

Gender of those experiencing abuse

	Annual Report 2019-2020	Annual Report 2020-2021 older persons	Annual Report 2020-2021 adults living with disability	Annual Report 2021-2022 older persons	Annual Report 2021-2022 adults living with disability
Female	53.4%	67.5%	52.0%	69.4%	55.9%
Male	19.8%	30.8%	45.9%	28.3%	42.2%
Not identified	26.8%	1.7%	2.1%	2.3%	1.9%

Location of person experiencing abuse

	Annual Report 2019-2020	Annual Report 2020-2021	Annual Report 2021-2022
Metropolitan	64.3%	N/A	61.4%
Regional and Rural	18.1%	N/A	19.8%
Remote	0.1%	N/A	0.7%
Not recorded	17.5%	N/A	18.1%

Age of Person experiencing abuse

	Annual Report 2019-2020	Annual Report 2020-2021 older persons	Annual Report 2020-2021 adults living with disability	Annual Report 2021-2022 older persons	Annual Report 2021-2022 adults living with disability
18-24 years	N/A	N/A	12.7%	N/A	14%
25-34 years	N/A	N/A	8.1%	N/A	13.3%
35-49 years	N/A	N/A	17.3%	N/A	18.6%
50-54 years	N/A	N/A	4.8%	1.4%	7.2%
55-64 years	N/A	N/A	16.2%		14.3%
65-74 years	7%	16.7%	N/A	17.0%	1.6%
75-84 years	12.2%	18.5%	N/A	24.1%	N/A
85+ years	8.9%	16.8%	N/A	21.3%	N/A
Not recorded	71.9%	48%	40.9%	36.3%	31%

Type of Disability

	Annual Report 2019-2020	Annual Report 2020-2021 adults living with disability	Annual Report 2021-2022 adults living with disability
Intellectual	N/A	41.1%	34.7%
Psychiatric\cognitive	N/A	18.3%	8.1%
Physical	N/A	18%	13.1%
Neurological	N/A	16%	14.5%
Sensory	N/A	N/A	2.6%
Other	N/A	N/A	5.5%
Not Recorded	N/A	6.6%	27.9%

Type of Abuse reported*

*In a number of calls more than one type of abuse was specified

	Annual Report 2019-2020	Annual Report 2020-2021 older persons	Annual Report 2020-2021 adults living with disability	Annual Report 2021-2022 older persons	Annual Report 2021-2022 adults living with disability
Financial	42.7%	43.6%	34.8%	38.6%	29.1%
Emotional/Psychological	35.6%	42.7%	30.2%	47.8%	45.3%
Neglect	14%	20.3%	28.2%	21.4%	27.4%
Physical	13%	17.3%	22.6%	16.8%	19.3%
Chemical	N/A	N/A	N/A	0.9%	2.6%
Sexual	N/A	N/A	N/A	1.5%	9.8%
Other	N/A	N/A	N/A	10.5%	12.8%

Alleged Perpetrators

	Annual Report 2019-2020 older persons	Annual Report 2020-2021 older persons	Annual Report 2020-2021 adults with a disability	Annual Report 2021-2022 older persons	Annual Report 2021-2022 adults with a disability
Adult sons	27.4%	28.2%	N/A	27.3%	3.4%
Adult Daughters	19%	18.1%	N/A	18.9%	1.6%
Mother	N/A	N/A	12.9%	0.1%	11.3%
Father	N/A	N/A	10.4%	0.1%	8.1%
Service Provider	N/A	N/A	N/A	4.4%	15.1%
Partner	N/A	N/A	N/A	14.4%	12.7%
Grandchildren	N/A	N/A	N/A	3.8 %	0
Friend	N/A	N/A	N/A	5.2%	6.0%
Not recorded	53.6%	53.7%	76.7%	10%	14.8%

Action Taken After A Report Is Assessed

	Annual Report 2019-2020	Annual Report 2020-2021	Annual Report 2021-2022
Investigation	78.1%	56.6%	23.5% (2.9% suspected serious abuse)
No Action Taken	19.9%	41.3%	10.9%
Report Still Under Assessment	1%	1.9%	65.7%
Referral	1%	0.2%	3.4%
Action taken without consent (adult has impaired decision-making capacity)	N/A	N/A	0.4% (9 cases)

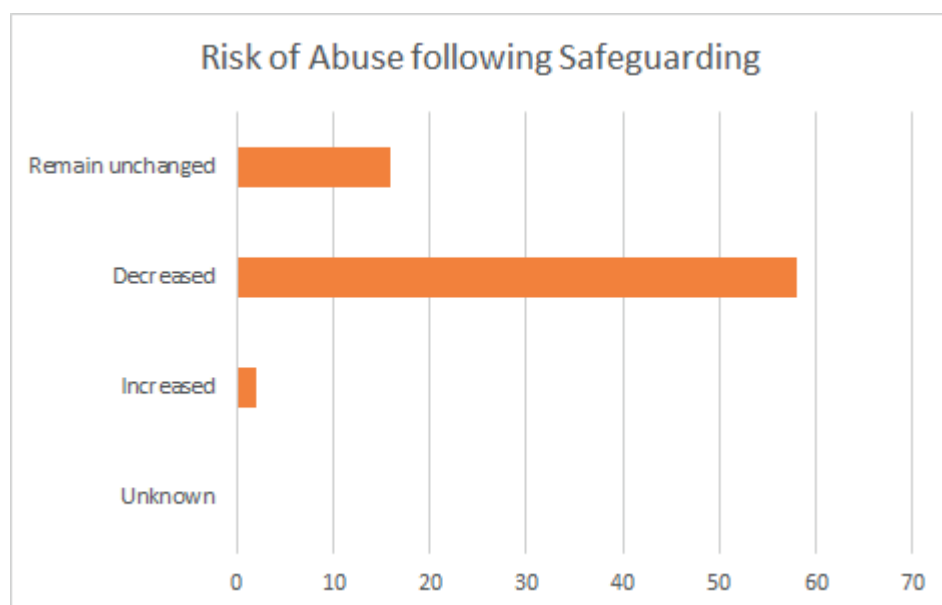
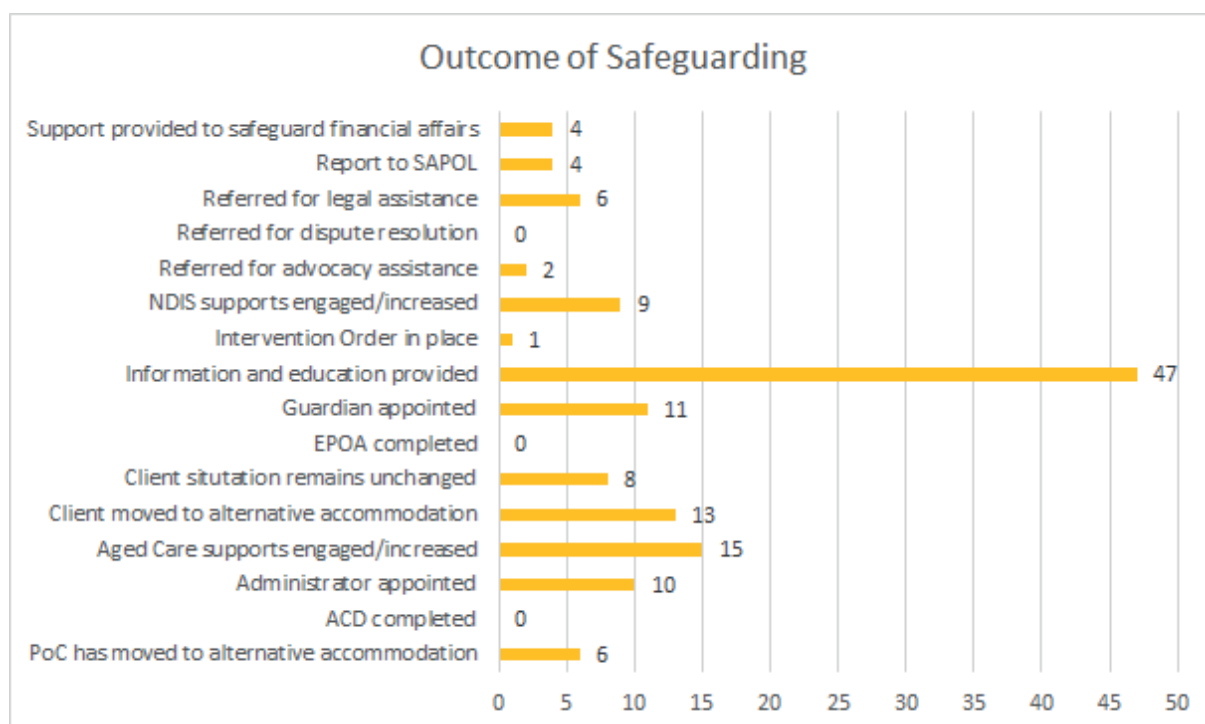
Instances Where No Further Action Is Taken

	Annual Report 2019-2020	Annual Report 2020-2021	Annual Report 2021-2022
Appropriately managed/safeguarded	68.9%	46%	40.4%
Does not meet remit	13.1%	7.1%	1.4%
Previously Dealt With	9.8%	6.1%	1%
More appropriate statutory/regulatory response required	8.2%	3.5%	0.9%
Report is trivial, vexatious, frivolous	N/A	0.5%	0.6%
Consent not provided for initial contact	N/A	10.6%	9.1%
Client deceased	N/A	2.3%	3.1%
After assessment no abuse identified	N/A	16.2%	19.4%
Safeguarding advice provided, no further assistance required	N/A	3.0%	4.7%
Safeguarding advice provided, declined further assistance	N/A	4.8%	7.7%
Unable to contact adult after multiple attempts	N/A	N/A	3.4%
Consent withdrawn	N/A	N/A	0.4%
Safeguarding finalised	N/A	N/A	7.9%

Safeguarding Response 2021-2022

Of the 1,113 reports, 76 requiring safeguarding have been closed with the below outcomes. One case may have multiple outcomes identified

Outcome of safeguarding	Number of cases	Percentage of cases
Client has moved to alternative accommodation	6	7.9%
Advanced Care Directive completed	0	0.0%
Administrator Appointed	10	13.2%
Aged Care supports engaged/increased	15	19.7%
Client moved to alternative accommodation	13	17.1%
Client situation remains unchanged	8	10.5%
EPOA completed	0	0.0%
Guardian Appointed	11	14.5%
Information and education provided	47	61.8%
Information order in place	1	1.3%
NDIS supports engaged/increased	9	11.8%
Referred for advocacy assistance	2	2.6%
Referred for dispute resolution	0	0.0%
Referred for legal assistance	6	7.9%
Report to SAPOL	4	5.3%
Support provided to safeguard financial affairs	4	5.3%



APPENDIX C – Recommendations from SALRI’s Powers of Attorney Report

Introduction

RECOMMENDATION 1

SALRI recommends that, for clarity, a new *Powers of Attorney Act* should be formulated to cover the role and operation of powers of attorney or, in the alternative, that the *Powers of Attorney and Agency Act 1984* (SA) be amended and updated.

RECOMMENDATION 2

SALRI recommends that the State Government should conduct an evaluation of the new (or amended) *Powers of Attorney Act* after it has been in operation for five years, in light of ongoing developments and to determine whether it has proved effective in meeting its objectives.²²⁴¹

RECOMMENDATION 3

SALRI recommends that the State Government, through the National Federation Reform Council²²⁴² and other such forums should continue to work towards the national harmonisation or consistency of POA laws (in the context of a national EPA register) as a matter of the highest priority.

RECOMMENDATION 4

SALRI recommends that, in light of the likely delay in the development of uniform (or at least consistent) national laws (especially in the context also of the establishment of an EPA register), South Australia should, as far as practicable, revise its laws and practices in relation to EPAs until national laws are formulated, to ensure that the State’s laws and practices are as effective as possible.²²⁴³

²²⁴¹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, 2010) 47, Rec 6.

²²⁴² Until 29 May 2020, this body was known as the Council of Australian Governments. The new National Federation Reform Council will centre around the National Cabinet: Australian Government, *Department of Prime Minister and Cabinet*, ‘COAG Becomes National Cabinet’ (Media Release, 2 June 2020) <<https://www.pmc.gov.au/news-centre/government/coag-becomes-national-cabinet>>.

²²⁴³ Ibid 35–8. SALRI notes that nationally harmonious or consistent EPA laws and especially the introduction of a national EPA register is likely to prove a prolonged and involved process. On 29 November 2019, Council of Attorneys-General participants:

Agreed to pursue a staged approach to enduring power of attorney reform for financial decisions, first focusing on law reforms to support the establishment of a mandatory national register of enduring power of attorney instruments, followed by further consideration of reforms to enhance safeguarding provisions and enhance access to justice arrangements.

Agreed to consider a detailed proposal and implementation plan for a Commonwealth established and maintained register in stage 1 reforms at the first CAG of 2020.

On 27 July 2020, CAG participants ‘agreed in-principle to the proposed broad policy design for a national register of enduring documents, and tasked the Commonwealth to present a final proposal on the possible implementation and costing of the scheme, including resolution of outstanding issues, before the end of 2020.’: Council of Attorneys-General, *Communiqué* (CAG Document, 27 July 2020) 2. See also Commonwealth Attorney-General’s Department, *Enhancing Protections Relating to the Use of Enduring Power of Attorney Instruments* (Consultation Regulation Impact Statement, February 2020); Commonwealth Attorney-General’s Department, *Enduring Power of Attorney Mandatory Registration Scheme* (Detailed Proposal and Implementation Plan, July 2020).

The use of Powers of Attorney in South Australia and Guiding Law

Promoting the use of EPAs

RECOMMENDATION 5

SALRI recommends that the State Government should conduct a study of the demographic profile of people making EPAs and of how widely EPAs are used in South Australia to inform and support the development of information and education about EPAs and to increase awareness and understanding of the role and value of EPAs.

RECOMMENDATION 6

SALRI recommends that the State Government should, in consultation with community groups and interested parties, develop and implement an ongoing community education campaign to increase awareness and understanding of EPAs. This campaign could:

- (a) provide simple easy-to-understand information about powers of attorney in plain English and in a variety of community languages;
- (b) use a variety of media, including social media, websites, DVDs, television, radio, newspapers, newsletters, pamphlets, fact sheets and posters; and
- (c) include a community engagement component, with information sessions provided through a range of existing community forums.

RECOMMENDATION 7

SALRI recommends that the State Government should develop, in consultation with relevant community groups and interested parties, targeted information and resources about EPAs for older persons and persons with disability and provide regular information sessions about EPAs.

RECOMMENDATION 8

SALRI recommends that the State Government, in consultation with affected agencies, professional bodies, legal organisations and community and health sector organisations, should conduct an education campaign to inform key practitioners, including legal practitioners, those working in the health and community sectors and in the banking and finance sector about EPAs and any new (or amended) *Powers of Attorney Act*. Any such education campaign should include the production of targeted information and resources about EPAs and the new or amended Act and a training program on EPAs and the new or amended Act.

RECOMMENDATION 9

SALRI recommends that the Commonwealth Government,²²⁴⁴ the Australian Banking Association²²⁴⁵ and the Customer Owned Banking Association take further measures to continue to encourage the banking and finance sector to develop streamlined and effective policies and procedures across all

²²⁴⁴ This is largely a Commonwealth rather than State area of responsibility.

²²⁴⁵ The Australian Banking Association informed SALRI of its ongoing efforts in this area. The ABA is an industry association with its members being 22 banking groups. The ABA does not represent all banks or credit unions. Smaller banks and credit unions are represented by the Customer Owned Banking Association (COBA). COBA has its own Code, industry guidance etc.

banks and credit unions for the acceptance of EPAs and to identify and respond to suspected fraud or misuse of EPAs and to provide the appropriate training for staff.²²⁴⁶

The guiding law

RECOMMENDATION 10

SALRI recommends that the EPA instrument and other advance care planning documents, including the ACD form, should continue to remain separate and not be consolidated into a single combined instrument.

RECOMMENDATION 11

SALRI recommends that the law in South Australia relating to EPAs and advance care directives should continue to be covered in two separate and distinct Acts.

RECOMMENDATION 12

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an EPA does not operate to confer authority to perform functions that the principal has as a trustee or personal representative.

RECOMMENDATION 13

SALRI recommends that the new (or amended) *Powers of Attorney Act*²²⁴⁷ should provide, to the maximum extent possible, for the recognition in South Australia of all EPA instruments validly executed in another Australian State or Territory.²²⁴⁸

RECOMMENDATION 14

SALRI recommends that the new (or amended) *Powers of Attorney Act* should incorporate (with any consequential necessary changes) the list of statutory objectives and statement of the general principles from ss 9 and 10 of the *Advance Care Directives Act 2013* (SA) that should apply to an attorney, SACAT, the Supreme Court or any other person, agency or body exercising a power under the *Powers of Attorney*

²²⁴⁶ The Western Australian Parliamentary Review found that: 'Banks have the potential to play a crucial role in identifying and taking steps to prevent financial role in identifying and taking steps to prevent financial elder abuse in the community, by both effectively training frontline staff and using data analytics to raise red flags on suspicious banking activity.'; Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) finding 49, 98. See generally at Chapter 8. SALRI heard of inconsistent practices and responses to EPAs within the banking sector.

²²⁴⁷ SALRI notes that some of its suggestions for changes to the *POA Act* may be better dealt with in the supporting Regulations.

²²⁴⁸ See also South Australian Law Reform Institute, *Surrogacy: A Legislative Framework: A Review of Part 2B of the Family Relationships Act 1975 (SA)* (Report No 12, South Australian Law Reform Institute, October 2018) Rec 28: 'SALRI recommends that South Australian law should recognise surrogacy related processes that occur in analogous and comparable Australian jurisdictions which contain key features and safeguards of the South Australian legislative regime.'

Act or otherwise in connection with the administration, operation and enforcement of the *Powers of Attorney Act*.²²⁴⁹

RECOMMENDATION 15

SALRI recommends that the new (or amended) *Powers of Attorney Act* should be drafted in simple language and use consistent terminology, free of legal jargon and where possible use consistent terminology to that in the *Advance Care Directives Act 2013* (SA) so that the Acts are able to complement each other.

Enduring power of attorney forms

RECOMMENDATION 16

SALRI recommends that the State Government should develop a single prescribed form for creating EPAs that should be short, simple and written in plain English.²²⁵⁰

RECOMMENDATION 17

SALRI recommends that the prescribed EPA form include a separate explanatory booklet which provides appropriate information about:

- (a) the role and operation of an EPA;
- (b) the roles, functions and obligations of the principal, attorney and the witness;
- (c) how to complete the form; and
- (d) the registration process.

RECOMMENDATION 18

SALRI recommends the new (or amended) *Powers of Attorney Act* should provide that a principal may either elect to make an EPA effective immediately (which will continue to remain effective notwithstanding the principal's incapacity) or at a time the principal is medically or clinically found as having impaired decision-making capacity (as defined within the new (or amended) *Powers of Attorney Act*) or upon another nominated date, event or occasion.

RECOMMENDATION 19

SALRI recommends that the prescribed EPA form should include a list of tick boxes with examples of possible limits on the attorney's power (see **Recommendation 68** for examples) under the conditions panel of the form, as well as a field allowing for additional conditions as nominated by the principal to be included in the EPA.

RECOMMENDATION 20

SALRI recommends that the prescribed EPA form should be reviewed two (or at the most five) years after its implementation.

²²⁴⁹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, 2010) 35–41, Rec 2, 174 Recs 49–50.

²²⁵⁰ SALRI was often told that something like the ACD form should be avoided owing to its perceived complexity. Indeed, the present ACD form was widely criticised in SALRI's consultation. See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, 2010) 61, Rec 9. The design of a simple but effective EPA form is 'extremely challenging': at 60.

RECOMMENDATION 21

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that all EPAs made under the Act should be in the prescribed form.

RECOMMENDATION 22

SALRI recommends that the State Government should make the prescribed form for creating an EPA widely available both online and in hard copy paper formats.

Formal requirements for creating enduring powers of attorney**RECOMMENDATION 23**

SALRI recommends that the new (or amended) *Powers of Attorney Act* should include the following formal requirements for the valid execution of an EPA:

- (a) be in the prescribed form; and
- (b) be signed by the principal in the presence of a suitable authorised witness; and
- (c) be signed and dated by the suitable authorised witness in the presence of the principal; and
- (d) contain a certificate signed by the suitable authorised witness certifying:
 - (i) that the principal signed the form voluntarily and in the presence of the witness; and
 - (ii) that, at the time of signing, the principal appeared to the witness to understand the nature and effect of giving the power of attorney; and
 - (iii) that he or she is not a party to the EPA and is not a close relative²²⁵¹ to any party to the EPA.
- (e) require all attorneys to:
 - (i) formally accept their appointment; and
 - (ii) sign an undertaking with respect to their role, responsibilities and obligations; and
 - (iii) require their acceptance of appointment and undertaking with respect to their responsibilities and obligations to be signed by a suitable authorised witness. This witness does not need to be the same person who witnessed the signing of the EPA by the principal.

RECOMMENDATION 24

SALRI recommends the new (or amended) *Powers of Attorney Act* should provide that SACAT may declare valid an EPA instrument that does not strictly satisfy the formal requirements, if satisfied that the principal intended the instrument to be an EPA, that the principal had the necessary capacity to make an EPA and that the principal signed the instrument freely and voluntarily.

²²⁵¹ SALRI favours the definition of ‘close relative’ in s 3 of the *Powers of Attorney Act 2000* (Tas). A ‘close relative’ means a spouse of the person; a parent of the person; someone who has one or both parents in common with the person; a child of the person; a child of, or a parent of, the spouse of the person; a grandparent of the person or an aunt or uncle of the person.

RECOMMENDATION 25

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that a principal may revoke an EPA at any time provided that he or she does not lack the requisite mental capacity.

RECOMMENDATION 26

SALRI recommends that there should be a prescribed form for the revocation of an EPA.²²⁵²

RECOMMENDATION 27

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide the following formal requirements for the revocation of an EPA:

- (a) be in the prescribed form; and
- (b) be signed by the principal in the presence of an authorised witness; and
- (c) be signed and dated by the authorised witness in the presence of the principal; and
- (d) contain a certificate signed by the authorised witness certifying—
 - (i) that the principal signed the form voluntarily and in the presence of the authorised witness; and
 - (ii) that, at the time of signing, the principal appeared to the authorised witness to understand the nature and effect of revoking the EPA; and
 - (iii) that he or she is not a party to the EPA and is not a close relative to any party to the EPA.

RECOMMENDATION 28

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that, if a principal revokes an EPA, they must provide the attorney or attorneys with notice in writing of the revocation.

RECOMMENDATION 29

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an attorney under an apparently genuine EPA is entitled to presume that the EPA is valid and in force, unless he or she knew, or ought reasonably to have known, that the EPA was not valid or was not in force.

RECOMMENDATION 30

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an EPA is taken to have been revoked in the following circumstances:

- (a) on the death of the principal;
- (b) on the revocation by the attorney of the relevant EPA;
- (c) if events have occurred such that an attorney would not, under **Recommendation 46**, be entitled to be appointed as an attorney under the EPA;
- (d) at such time as the EPA ceases to have effect according to its terms;
- (e) at such time as a new EPA made by the principal takes effect, unless a principal specifies otherwise;
- (f) if the principal and attorney are married or are domestic partners or are in a registered relationship — on the dissolution or annulment of the marriage or cessation of the domestic relationship or the end of the registered relationship.²²⁵³

²²⁵² The need for a clear and effective system for revocation of an EPA was emphasised to SALRI in consultation.

²²⁵³ *Relationships Register Act 2016* (SA) ss 10–14.

RECOMMENDATION 31

SALRI recommends that the forms for creating EPAs should allow a principal to specify any previous EPAs that the principal does not wish to revoke.

RECOMMENDATION 32

SALRI recommends that the principal's signature need only be witnessed by one witness.

RECOMMENDATION 33

SALRI recommends the new (or amended) *Powers of Attorney Act* should require that any person witnessing an EPA form must be authorised to witness affidavits.²²⁵⁴

RECOMMENDATION 34

SALRI recommends the prescribed form for the creation of an EPA should require the authorised witness to briefly state the basis of his or her qualification to witness the instrument.

RECOMMENDATION 35

SALRI recommends the new (or amended) *Powers of Attorney Act* should prohibit a party to the EPA or any person who is a close relative to any party to the EPA from witnessing an EPA form.

RECOMMENDATION 36

SALRI recommends that the form for creating an EPA should require each witness to declare that he or she is not a party to the EPA and is not a close relative to any party to the EPA.

RECOMMENDATION 37

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that one of the formal requirements for the execution of an EPA is that it contain a certificate signed by the authorised witness certifying:

- (a) that the principal signed the form voluntarily and in the presence of the witness; and
- (b) that, at the time of signing, the principal appeared to the witness to understand the nature and effect of giving the power of attorney.

RECOMMENDATION 38

SALRI recommends that the State Government, in consultation with relevant professional organisations,²²⁵⁵ assist in the development and provision of suitable training for authorised witnesses about their role, including resources which will assist an authorised witness when assessing a principal's understanding of the nature and effect of an EPA and information about how to identify evidence of

²²⁵⁴ See *Oaths Act 1936* (SA) s 8.

²²⁵⁵ SALRI notes the potential roles of the Royal Society of Justices of South Australia Inc and the State Attorney-General's Department in the provision of resources and training. SALRI also notes the roles of the Law Council of Australia and the Law Society of South Australia in providing ongoing training and updated guidelines (including on capacity assessment) for legal practitioners that reflect current medical knowledge and emphasise supported decision-making.

duress and evidence that may displace the presumption of capacity.²²⁵⁶ Such training should be strongly encouraged for all JPs and proclaimed police officers who are authorised to witness an EPA under the *Oaths Act 1936* (SA).²²⁵⁷

The Principal's Legal Capacity

Defining Capacity

RECOMMENDATION 39

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that a person is presumed to have the capacity to make his or her own decisions and to enter into an EPA.

RECOMMENDATION 40

SALRI recommends that, for clarity and consistency, the new (or amended) *Powers of Attorney Act* to govern the question of capacity should include (with any necessary adaptations) the legislative definition of 'impaired decision-making capacity' set out in s 7 of the *Advance Care Directives Act 2013* (SA).²²⁵⁸

Capacity Assessment

RECOMMENDATION 41

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that at the point of execution of an EPA, any person authorised to witness affidavits is able to assess the capacity of an individual to create an EPA.²²⁵⁹

²²⁵⁶ There was strong, though not universal, support in SALRI's consultation (partly for access) for suitable JPs to witness EPAs. SALRI heard that properly trained JPs are suitable to witness EPAs. SALRI also heard from a number of health and legal practitioners that some JPs do not properly witness EPAs and there is a need for both appropriate initial and continuing training for JPs as to assessing the signatory's capacity and linked issues and only those JPs who have completed such training should be allowed to witness EPAs. The Royal Society of Justices of South Australia noted that membership of the Society is optional and supported this proposal and noted their initial and ongoing training as to capacity assessment and linked issues. Such training and linked resources for all JPs is strongly encouraged. See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 72–73, 80–82, Recs 18–19. SALRI holds some misgivings as to the suitability of proclaimed police officers to witness EPAs as this is not within their role or usual expertise. However, SALRI accepts for reasons of accessibility that proclaimed police officers should continue to be an authorised witness to an EPA but SALRI strongly encourages the provision of suitable training and resources for this important role to be properly carried out by a police witness to an EPA.

²²⁵⁷ See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 72–73, 80–82, Recs 18–19.

²²⁵⁸ The effect of this recommendation is that the common law test as to capacity (see *Banks v Goodfellow* (1870) LR 5 QB 549, 556; *Gibbons v Wright* (1954) 91 CLR 423; *Re K* [1988] 1 ch 310) is modified, rather than discarded. The common law test is not entirely inconsistent with modern understandings of capacity and, whilst still of some utility, is problematic and SALRI considers should not be the exclusive applicable test for capacity in the context of EPAs. The common law test notably fails to accord for fluctuating capacity.

²²⁵⁹ This reflects existing law and practice. A lawyer, JP or proclaimed police officer with real doubts as to the potential principal's capacity should as a matter of professional practice seek clarification of capacity and advise the person to seek a medical practitioner's opinion on this question.

RECOMMENDATION 42

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that, at the point of the execution of an EPA, if there is material that suggests the presumption of capacity may be displaced in relation to the principal, a medical or clinical assessment of the principal's capacity should be obtained.²²⁶⁰

RECOMMENDATION 43

SALRI recommends the new (or amended) *Powers of Attorney Act* should provide that with respect of an EPA which is conditional upon the principal losing their decision-making capacity, that a medical or clinical assessment of the principal's capacity within the *POA Act* must be obtained at the point of activation of that EPA. The specific medical practitioner who undertakes this assessment should be determined by the particular circumstances of the individual, such as medical conditions or diagnoses, treating care team in or out of hospital and the particular event prompting consideration of activation and capacity assessment.

RECOMMENDATION 44

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that, in relation to EPAs which are conditional upon the principal losing their decision-making capacity, if a medical or clinical assessment of capacity within the *POA Act* results in the determination that the principal has impaired decision-making capacity, then a medical certificate from the relevant medical practitioner should be lodged with the body responsible for registering EPAs, together with the original EPA in order for the EPA to be activated.

RECOMMENDATION 45

SALRI recommends the new (or amended) *Powers of Attorney Act* should contain a statement of objects and principles which should be adapted from Part 2 of the *Advance Care Directives Act 2013* (SA) to guide the assessment of a principal's capacity.

The role of the attorney in South Australia

Appointing an attorney(s)

RECOMMENDATION 46

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide (subject to Recommendations 49, 50 and 51) that an attorney cannot be:

- (a) under the age of 18 years; or
- (b) a person who lacks mental capacity; or
- (c) a witness to the power of attorney; or

²²⁶⁰ Dr Chris Moy of the AMA(SA) and other medical and health practitioners highlighted to SALRI that in most cases the opinion of the principal's GP would be sufficient and only in rare cases would it be necessary to see a specialist medical practitioner.

- (d) a paid carer; or anyone involved in a professional or administrative capacity in the principal's care and treatment or in the provision of accommodation to the principal;²²⁶¹ or
- (e) a person who is bankrupt or personally insolvent or has been bankrupt or personally insolvent within the last five years; or
- (f) a person who after the execution or activation of an EPA is convicted of an offence involving dishonesty²²⁶² or violence which occurs in a family context;²²⁶³ or
- (g) prior to the execution of an EPA, has been convicted of an offence involving dishonesty, or violence which occurs in a family context within the last five years; or
- (h) after the execution or activation of an EPA, a person who is convicted of an offence involving dishonesty, or violence which occurs in a family context within the last five years.²²⁶⁴

RECOMMENDATION 47

SALRI recommends that, subject to those disqualified persons listed in **Recommendation 46**, there should be no further restriction on who can be appointed and act as an attorney.

RECOMMENDATION 48

SALRI recommends that there should be no mandatory requirement for the appointment of attorneys with specialist expertise or training.

RECOMMENDATION 49

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that a person disqualified from acting as an attorney on account of a prior conviction for an offence involving dishonesty or violence in a family context or someone who has been bankrupt within the last five years (providing they have been discharged) may be eligible for appointment as an attorney if the person discloses this fact to the principal and the principal ticks a box on the EPA form to confirm such disclosure has occurred. This must occur in the presence of the authorised witness. It is a decision for

²²⁶¹ See also *Guardianship and Administration Act 1986* (Vic) s 35A(4)–(5). A number of health and legal practitioners pointed out to SALRI that it is an unwelcome conflict of interest for a paid carer to be able to act as an attorney.

²²⁶² *Criminal Law Consolidation Act 1935* (SA) Part 5.

²²⁶³ A definition of 'family context' might include those circumstances that constitute an aggravated offence for this reason: see *Criminal Law Consolidation Act* s 5AA(1)(g) and s 5AA(4a). See also *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8.

²²⁶⁴ This is not unusual. The Eastern Community Legal Centre noted to the ALRC regarding such convictions that, in particular, as enduring documents are often executed many decades before they are used, there is no avenue for requiring the disclosure of convictions recorded after the EPA is signed. They suggested that persons who are acting under an EPA should be required to report any of the ineligibility criteria listed which arise after the EPA has been signed. Where the power has not yet been activated, the report should be made to the principal who may then amend or revoke the EPA. Where the power has been activated and the principal no longer has capacity to make or revoke an enduring power of attorney, the report should be made to the tribunal with appropriate jurisdiction. See Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 175 [5.67]. 'The ALRC also supports the suggestion from the ECLC that persons who have been appointed under an enduring power of attorney document should be required to report any subsequent events that may make them ineligible': at 175 [5.69]. SALRI agrees with this approach. SALRI notes the valuable input of Laura Kelly.

Powers of Attorney Report: Recommendations

the principal, having had any prior conviction for dishonesty or violence or prior bankruptcy disclosed by the attorney, whether they still wish to appoint that person as an attorney.²²⁶⁵

RECOMMENDATION 50

SALRI recommends that if the attorney is convicted of an offence of dishonesty or violence in a family context *after* the EPA has been executed, the EPA is automatically revoked. If the principal retains capacity at this stage, they may create a new EPA and consent to appoint the otherwise excluded attorney. If the principal no longer retains decision-making capacity, the attorney may apply to the South Australian Civil and Administrative Tribunal to continue the power, who may determine whether they can continue to act in that role.

RECOMMENDATION 51

SALRI's recommends that if the attorney has been bankrupt *after* the EPA has been executed, the EPA is automatically revoked. If the principal retains capacity at this stage, they may create a new EPA after the bankrupt has been discharged and consent to appoint the otherwise excluded attorney. If the principal no longer retains decision-making capacity, an attorney who is a discharged bankrupt may apply to the South Australian Civil and Administrative Tribunal to continue the power, who may determine whether they can continue to act in that role.

RECOMMENDATION 52

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that, when accepting an appointment as an attorney, the person must declare that he or she is eligible to be appointed as an attorney. The prescribed EPA form should clearly list the disqualifying factors so that these are clearly presented to the principal and the attorney.

RECOMMENDATION 53

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that a person who accepts an appointment as an attorney when he or she is not eligible, is guilty of an offence.²²⁶⁶

²²⁶⁵ This point was the subject of much debate in SALRI's consultation and was one of the relatively few issues on which no consensus was reached. There was virtually no support for attorneys to provide a police check. As the Victorian Parliamentary Report noted: 'In the Committee's opinion, requiring potential representatives to undergo a police check prior to their appointment would introduce an unnecessary bureaucratic hurdle to the process of creating a power of attorney, potentially discouraging use of these documents': Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 143. However, one view was a prior conviction involving dishonesty should disqualify someone from acting as an attorney. 'The Committee believes that excluding inappropriate persons from acting as representatives is an important protection against abuse ... In addition, the Committee considers there should be some further restrictions on who can be appointed as a representative under an enduring power of attorney (financial). While recognising the benefits of consistency, the Committee is of the view that the increased risk of abuse of financial powers when a principal has impaired decision-making capacity means that these powers should be subject to extra protections. It recommends that people with a criminal conviction of a type involving dishonesty should be prohibited from acting as a representative under an enduring power of attorney (financial). This restriction is warranted because the nature of the offence directly relates to the type of powers with which a representative is entrusted' at 142. See also Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 174 [5.64]. However, the opposing view which SALRI ultimately accepted was that such a prohibition is problematic and undermines the principal's autonomy. It is consistent with upholding as far as practicable the preferences of the principal (even if some may consider such a decision to be unwise). The prior conviction may also be trivial or dated in nature. Further, there may be some people and communities where it is not uncommon to have such a criminal history. SALRI acknowledges the input of Laura Kelly on this question.

²²⁶⁶ See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 143, Rec 38(d).

RECOMMENDATION 54

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that a principal may appoint one or more attorneys.

RECOMMENDATION 55

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that a principal may appoint one or more alternative attorneys.

RECOMMENDATION 56

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an attorney can relinquish all powers under an EPA to an alternative attorney nominated in the EPA by providing a signed notice stating that the attorney is unwilling to act in that role to the principal, the alternative attorney and to the body responsible for registering EPA instruments (if applicable).

Multiple attorneys

RECOMMENDATION 57

SALRI recommends the new (or amended) *Powers of Attorney Act* should provide that a principal can appoint multiple attorneys to act jointly, jointly and severally, or in any combination, for example as a majority.

RECOMMENDATION 58

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that attorneys can apply to SACAT for directions when they cannot agree about a decision to be made in relation to the exercise of their powers under an EPA.

RECOMMENDATION 59

SALRI recommends the new (or amended) *Powers of Attorney Act* should provide that, if a principal does not specify how two or more attorneys are appointed, they are presumed to be appointed jointly.²²⁶⁷

RECOMMENDATION 60

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that, unless the EPA states otherwise, when a joint attorney's power ends, any remaining attorney or attorneys may continue to exercise power under the EPA, provided that the power is capable of being exercised, according to its terms, by any remaining attorneys.²²⁶⁸

²²⁶⁷ See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 148, Rec 42.

²²⁶⁸ See also *ibid* 149, Rec 43.

The role, powers and duties of attorneys

RECOMMENDATION 61

SALRI recommends the new (or amended) *Powers of Attorney Act* should provide that attorneys:

- (a) must, at all times when exercising the EPA act in accordance with the requirements of any *Powers of Attorney Act* and act in accordance with any requirements specified in the EPA instrument and otherwise act in good faith and with due care;
- (b) must take reasonable steps to keep the other attorneys (if any) informed of any action taken by the attorney under the EPA;
- (c) must (other than during a period of mental incapacity of the principal) unless the contrary intention is specified, consult with the principal before, and notify the principal after, exercising the EPA; and notify the principal of any actual or potential conflict transactions;²²⁶⁹
- (d) must keep accurate records and accounts of all dealings and transactions made under the EPA; and
- (e) must keep the attorney's property (including money and financial assets) separate from the principal's property.

RECOMMENDATION 62

SALRI recommends the new (or amended) *Powers of Attorney Act* should require attorneys when accepting an appointment to undertake to act in accordance with the statement of principles. This undertaking will be included in the attorney's execution panel in the prescribed form.

RECOMMENDATION 63

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that, subject to the Act and to any provision specified in the EPA, an attorney may take any action that the principal could have lawfully taken for or in relation to any financial or property matter, including (but not limited to) the following:

- (a) paying maintenance and accommodation expenses for the principal and the principal's dependants;
- (b) paying the principal's debts and expenses;

²²⁶⁹ SALRI supports the formulation in the Queensland Act. 'A "conflict transaction" is a transaction in which there may be conflict, or which results in conflict, between—

- 1) the duty of an attorney towards the principal; and
- 2) either—
 - a) the interests of the attorney, or a relation, business associate or close friend of the attorney; or
 - b) another duty of the attorney.

Examples—

- 1) A conflict transaction happens if an attorney for a financial matter buys the principal's car.
- 2) A conflict transaction does not happen if an attorney for a financial matter is acting under section 89 to maintain the principal's dependants.
- 3) However, a transaction is not a conflict transaction merely because by the transaction the attorney in the attorney's own right and on behalf of the principal—
 - (a) deals with an interest in property jointly held; or
 - (b) acquires a joint interest in property; or
 - (c) obtains a loan or gives a guarantee or indemnity in relation to a transaction mentioned in paragraph (a) or (b): *Powers of Attorney Act 1998* (Qld) s 73(6).

- (c) receiving and recovering amounts payable to the principal;
- (d) carrying on the principal's trade or business;
- (e) discharging a mortgage over the principal's property;
- (f) paying rates, taxes, insurance premiums and other outgoings for the principal's property;
- (g) insuring the principal or the principal's property;
- (h) preserving or improving the principal's estate;
- (i) investing in authorised investments for the principal;
- (j) continuing investments of the principal;
- (k) undertaking a real estate transaction for the principal;
- (l) dealing with land under the *Law of Property Act 1936* or the *Real Property Act 1886*;
- (m) undertaking a transaction for the principal involving the use of the principal's property as security (for example, for a loan or by way of a guarantee) for an obligation the performance of which is beneficial to the principal;
- (n) a legal matter related to the principal's finances or property;
- (o) withdrawing amounts from, or depositing amounts into, an account of the principal held with an ADI.

RECOMMENDATION 64

SALRI recommends the EPA booklet accompanying the prescribed EPA form should provide a summary of an attorney's powers, duties, and responsibilities.

RECOMMENDATION 65

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an application may be made by an attorney under an EPA to SACAT for:

- (a) advice or direction as to the exercise of the EPA under the *POA Act* or any other Act or law; or
- (b) for advice or direction as to the scope of the EPA; or
- (c) for approval to the taking of any action under the EPA for which the approval of SACAT is required under the *POA Act*.

RECOMMENDATION 66

SALRI recommends the State Government should:

- (a) produce simple, easy-to-understand information and educational materials for attorneys;
- (b) provide assistance and support for attorneys in understanding their obligation to avoid conflict transactions;
- (c) provide advice and ongoing support to attorneys, including through a free telephone advice service and free education training for attorneys; and
- (d) actively advertise this free education training as part of its community education program.

Limitations of an attorney's power

RECOMMENDATION 67

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an authority conferred by an EPA may be expressed to be subject to specified conditions, limitations or exclusions.²²⁷⁰

²²⁷⁰ One example often presented in consultation was that the principal in the EPA may wish to preclude or at least restrict the sale of their home.

RECOMMENDATION 68

SALRI recommends that the prescribed EPA form should provide a ‘tick box’ of possible conditions, limitations or exclusions the principal may wish to place on their EPA with respect of the following transactions or events:

- (a) the exercise, for the first time, of the EPA;
- (b) the sale of the principal’s home;
- (c) the purchase on behalf of the principal of real estate or any other major asset;
- (d) the registration of an instrument with the Lands Titles Office;
- (e) financial arrangements for a major change to the principal’s lifestyle, for example, to move the principal into residential care;
- (f) a gift or transaction on behalf of the attorney that benefits the attorney or a relative, associate or close friend of the attorney;
- (g) any other transaction or event.

RECOMMENDATION 69

SALRI recommends that the prescribed EPA form should include a section which provides the principal with an option to nominate a person who the attorney or attorneys must notify if they intend to take one or more of the actions listed in **Recommendation 68**.

RECOMMENDATION 70

SALRI recommends that a nominated person appointed under **Recommendation 69** may request information from the attorney about the following matters:

- (a) details (including records and accounts) of any transactions carried out by the attorney in the exercise or purported exercise of the power of attorney;
- (b) the currency of the power of attorney;
- (c) the mental capacity of the principal;
- (d) the wishes or preferences of the principal during a period of mental incapacity of the principal.

RECOMMENDATION 71

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an attorney who fails to comply with the requirements listed in **Recommendation 70**, is guilty of an offence.

RECOMMENDATION 72

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an attorney must not enter into a conflict transaction in relation to a power of attorney except:

- (a) if the EPA clearly authorises the transaction, conflict transactions of that kind or conflict transactions generally; or
- (b) with the approval of SACAT.

RECOMMENDATION 73

SALRI recommends that the new (or amended) *Powers of Attorney Act* and the EPA booklet accompanying the prescribed EPA form should include examples of what are, or are not, considered to be prohibited conflict transactions.

RECOMMENDATION 74

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an attorney will incur no criminal or civil liability for an act or omission done or made in good faith, without negligence and in accordance with an EPA.²²⁷¹

Abuse of Powers of Attorney — Current Legal and Practical Remedies

The Abuse of Enduring Powers of Attorney

RECOMMENDATION 75

SALRI recommends that the State Government should implement work to be undertaken with the key agencies over the next five years to enhance their data collection practices, reflecting their statutory and/or contractual mandates. Such data collection should ideally distinguish between elder abuse generally and financial abuse more specifically, notably, as it relates to the abuse or misuse of EPAs.

Detection, reporting and investigation of abuses of enduring powers of attorney

RECOMMENDATION 76

SALRI notes the suggestion of mandatory reporting of the suspected financial abuse (including the abuse or misuse of an EPA) of an older person or a person with disability is not without merit, but raises complex implications of practice, privacy and policy and requires further consideration and SALRI therefore recommends at this stage against the imposition of mandatory reporting of the suspected financial abuse (including the abuse or misuse of an EPA) of an older person or a person with disability.²²⁷²

RECOMMENDATION 77

SALRI recommends that the State Government should develop and implement a suitable public education campaign to increase general community awareness about the role and potential misuse or abuse of EPAs.

RECOMMENDATION 78

SALRI recommends the South Australian Government and/or the Commonwealth Government should develop and implement protocols and training for professionals in the health, aged care and community sectors and the banking and finance sector about detecting and reporting the suspected abuse of EPAs.

²²⁷¹ See, eg, *Powers of Attorney Act 2014* (Vic) s 74.

²²⁷² The suggestion of mandated reporting of financial abuse of vulnerable adults such as older persons or persons with a disability prompted much debate in SALRI's consultation and no consensus. SALRI notes that, although it does not support mandated reporting, this should not discourage voluntary reporting to the ASU by parties such as the banking sector. Most banks and other financial institutions now have established internal procedures to try to identify the signs of financial elder abuse that may occur even where a valid EPA exists for a customer.

RECOMMENDATION 79

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide protection from civil and criminal liability for any person who, in good faith, reports the suspected abuse or misuse of an EPA.

RECOMMENDATION 80

SALRI recommends that the *Powers of Attorney Act* should provide for an alternative dispute resolution mechanism, similar to that under s 45 of the *Advance Care Directives Act 2013* (SA), to allow a suitable agency to mediate if an EPA has been made and there is disagreement or dispute about the financial decisions to be made for a principal.²²⁷³

Improving/reforming the current legal remedies in order to prevent abuse**RECOMMENDATION 81**

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide for SACAT to have:

- (a) the jurisdiction in relation to any cause of action, or claim for statutory relief in the nature of equitable remedies, that is available against an attorney in the Supreme Court for abuse or misuse of power or the failure to adequately perform their duties; and
- (b) the power to order any remedy available to the Supreme Court.²²⁷⁴

RECOMMENDATION 82

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that application may be made to SACAT by an interested person for one or more of the following orders in relation to the making, revocation, operation or effect of a power of attorney:

- (a) requiring the attorney (or former attorney) of an EPA to file in SACAT and serve on the applicant a copy of all records and accounts kept by the attorney of dealings and transactions made by him in pursuance of the power; or
- (b) requiring such records and accounts to be audited by an auditor appointed by SACAT and requiring a copy of the report of the auditor to be furnished to SACAT and the applicant for the order; or
- (c) requiring an attorney submit a plan of financial management to SACAT for approval; or
- (d) approving or disapproving of any act proposed to be done by the attorney; or
- (e) authorising an attorney to undertake a transaction that the attorney is not otherwise authorised to undertake or may not otherwise be authorised to undertake; or
- (f) revoking an attorney's appointment; or

²²⁷³ See *ACD Act* s 48 which provides if disputes cannot be resolved by the OPA Dispute Resolution Service in respect of health care and/or medical treatment under an ACD, the matter will proceed to the more formal process in SACAT for either a review or a declaration or direction.

²²⁷⁴ See also Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) 100–1 [6.98]–[6.102], 101 Rec 7; Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *'I Never Thought It Would Happen To Me': When Trust is Broken* (Final Report, September 2018) 83 Rec 21. 'The Committee therefore notes that SAT is best placed to potentially remedy a situation where an older person may be experiencing financial abuse as a result of an EPA ... being misused. SAT already has procedures in place to deal with these sensitive applications and is familiar with the (additional) needs of people in guardianship or administration applications': at 79 [7.27]); Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 177, Rec 5–2. See further at: 178–81 [5.82]–[5.98].

- (g) appointing a substitute attorney of such a power; or
- (h) revoking or varying the terms of an EPA; or
- (i) declaring that the principal lacked or did not lack the mental capacity to make or revoke an EPA; or
- (j) declaring that the EPA or its revocation is invalid (either in whole or in part); or
- (k) make any order that it considers appropriate in the circumstances.²²⁷⁵

RECOMMENDATION 83

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that SACAT may take into account the following matters in determining whether to remove an attorney from that role:

- (a) Whether the attorney is willing or able to act as attorney;
- (b) Whether the attorney is a suitable person to act as attorney;
- (c) Whether the attorney has failed to act:
 - (i) in accordance with a requirements of the EPA or the applicable Act; or
 - (ii) in accordance with any requirement specified in the EPA; or
 - (iii) otherwise in good faith and with due care;
- (d) Whether the attorney has been charged with, or convicted of, an offence against the *POA Act* or an offence of dishonesty;
- (e) Whether the attorney has a financial or personal interest that may detract from his or her ability or willingness to act in the best interests of the principal;
- (f) Any other relevant matter in SACAT's opinion.

RECOMMENDATION 84

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide for a new statutory civil remedy in cases where there is found to be an abuse or misuse by an attorney of an EPA.²²⁷⁶ This power should allow both interim or interlocutory orders as well as final determinations on liability or restitution.

RECOMMENDATION 85

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that, where there is a reasonable suspicion of abuse or misuse by the attorney of an EPA, any interested person can apply to SACAT for remedial orders to be made against the attorney. SACAT can set a hearing at which time interested parties can attend and comment on the matters before SACAT. Following this process, SACAT can make a determination as to whether or not the suspected abuse of the EPA has taken place.

RECOMMENDATION 86

SALRI recommends that that the new (or amended) *Powers of Attorney Act* should provide that an interested person must establish 'reasonable suspicion' of misuse or abuse to safeguard against vexatious, frivolous or unreasonable claims.

²²⁷⁵ See also *Powers of Attorney and Agency Act 1984* (SA) s 11.

²²⁷⁶ The only substantive civil cause of action under the present Act is the less than clear process under s 7. 'The donee of an enduring power of attorney must, during any period of legal incapacity of the donor, exercise his powers as attorney with reasonable diligence to protect the interests of the donor and, if he fails to do so, shall be liable to compensate the donor for loss occasioned by the failure'. SALRI received virtually unanimous support in its consultation for a new clear statutory cause of action for the misuse or abuse of an EPA through SACAT.

RECOMMENDATION 87

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that SACAT may make an order for costs against a party to these proceedings, but only if SACAT is satisfied that the institution and/or conduct of the proceedings was frivolous, vexatious unreasonable or calculated to cause delay.²²⁷⁷

RECOMMENDATION 88

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that in making any determination as to whether or not the suspected abuse or misuse of an EPA by an attorney has taken place, SACAT should have the power to impose a restitutionary remedy, such that the attorney will be required to return any funds or property (or its value) to the principal which have been wrongfully distributed in exercise of the EPA.²²⁷⁸

RECOMMENDATION 89

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that if SACAT finds the commission (or suspected commission) of a significant degree of abuse by the attorney (such as substantial transactions over an extended period of time), or where the attorney is unable to return the requisite funds, property (or its value), SACAT may make a recommendation to the Commissioner of Police or the Director of Public Prosecutions (DPP) that the matter be formally investigated and potentially prosecuted as a criminal offence.²²⁷⁹

RECOMMENDATION 90

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an ***interested person***, in relation to an EPA, means:

- (a) the principal; or
- (b) any attorney; or
- (c) a person who has been nominated to take on an oversight function under a special condition under the EPA; or
- (d) a close relative of the principal; or
- (e) the Public Advocate;
- (f) the Adult Safeguarding Unit;
- (g) any other person who, in the opinion of SACAT, has a proper interest in the proceedings.

RECOMMENDATION 91

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an application for internal review²²⁸⁰ may be made by:

- (a) the applicant in proceedings before SACAT in the exercise of its original jurisdiction for the purposes of this Act; or
- (b) a person to whom the proceedings relate (if not the applicant under paragraph (a)); or

²²⁷⁷ See also *South Australian Civil and Administrative Tribunal Act 2013* (SA) ss 57–58.

²²⁷⁸ SALRI notes that, as raised by the Hon David Bleby QC and Terry Evans and other legal practitioners, this power should be subject to an ability for SACAT to refer unduly complex or large claims or those raising constitutional issues (see *Burns v Corbett* (2018) 265 CLR 304) to the Supreme Court.

²²⁷⁹ See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper no 352, August 2010) 219 Rec 65.

²²⁸⁰ *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 70.

- (c) any person who presented evidence or material before, or made submissions to, SACAT in the relevant proceedings; or
- (d) any other person who satisfies SACAT that he or she has a proper interest in the matter;

The person to whom an application for internal review relates (if he or she is not the applicant) will be a party to those proceedings.

RECOMMENDATION 92

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that SACAT may make an order for costs against a party to proceedings for internal review, but only if SACAT is satisfied that the institution of the proceedings, or the party's conduct in relation to the proceedings, institution and/or the party's conduct of the proceedings was frivolous, vexatious unreasonable or calculated to cause delay.

RECOMMENDATION 93

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that, where the principal of an EPA dies leaving a will and it appears at the death of the principal that, in consequence of any exercise of power by the attorney of the EPA during that period of incapacity, the share of any beneficiary under the will has been affected, the Supreme Court may, on application by any person who has, in the opinion of the Supreme Court, a proper interest in the matter, make such orders as it thinks just to ensure that no beneficiary gains a disproportionate advantage, or suffers a disproportionate disadvantage, of a kind not contemplated by the will, in consequence of the exercise of the attorney's powers during the period of legal incapacity of the principal.²²⁸¹

RECOMMENDATION 94

SALRI recommends that an application under **Recommendation 93** must be made within six months from the date of the grant of probate of the will or letters of administration unless the Supreme Court, after hearing such of the persons affected as the Supreme Court thinks necessary, extends the time for making the application. An extension of time granted may be granted:

- a) on such conditions as the Supreme Court thinks fit; and
- b) whether or not the time for making an application under this section has expired.

An application for extension of time must be made before the final distribution of the estate. A distribution of any part of the estate made before an application for extension of time will not be disturbed by reason of the application or any order made on the application.

RECOMMENDATION 95

SALRI recommends that there should not be a new separate offence dealing with financial abuse and exploitation or the abuse of an EPA in relation to vulnerable persons, including older persons, persons with impaired capacity and persons with disability.²²⁸²

²²⁸¹ *Powers of Attorney and Agency Act 1984* (SA) s 11A.

²²⁸² SALRI widely heard in its consultation that the problem is not the lack of existing crimes to address the misuse of an EPA, but rather the lack of enforcement of existing general crimes such as theft which cover such misconduct. SALRI concurs with the view of the ALRC. "The ALRC is not persuaded that there is a need for a specific offence for misusing powers of attorney. Where they exist, offences for misusing powers of attorney have been established based on the argument that existing, broader offences are not being utilised, as opposed to the fact that they do not encompass the relevant conduct. Creating new offences risks duplicating existing offences, and risks increasing complexity, without any assurance of increased prosecution of the conduct": Australian Law Reform Commission,

RECOMMENDATION 96

SALRI recommends that the existing offence in s 8 of the *Powers of Attorney and Agency Act 1984* (SA) for an attorney failing to keep proper records²²⁸³ should be updated so that the maximum penalty is more than a fine of \$1000.²²⁸⁴

Register of Powers of Attorney in South Australia

RECOMMENDATION 97

SALRI recommends that the State Government, through the National Federation Reform Council and other such forums should continue to work towards the establishment of a national EPA register (through also the harmonisation or consistency of POA laws) as a matter of the highest priority.

RECOMMENDATION 98

SALRI, whilst supportive of the establishment of a national EPA register,²²⁸⁵ recommends that, in light of the likely delay in the establishment of a national EPA register (especially in the context of the concurrent need for the harmonisation, of or at least consistency between, national EPA laws), South Australia should, in the interim, establish an effective State based EPA register.²²⁸⁶

RECOMMENDATION 99

SALRI recommends that the new (or amended) *Powers of Attorney Act* should require all instruments creating and/or revoking EPAs to be registered.

RECOMMENDATION 100

SALRI recommends that the State Government, through the National Federation Reform Council and other such forums, should actively support and promote an arrangement whereby a certified copy of an EPA registered in one Australian jurisdiction is sufficient to satisfy the requirement to register an EPA in any other Australian jurisdiction.

RECOMMENDATION 101

SALRI recommends that the new (or amended) *Powers of Attorneys Act* should require all EPAs to be registered before any act under an EPA can be validly performed. For EPAs that are effective

Elder Abuse: A National Legal Response (Report No 131, May 2017) 365–6 [13.12]. Cf Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 209.

²²⁸³ ‘The donee of an enduring power of attorney shall, if he fails to keep and preserve accurate records and accounts of all dealings and transactions made in pursuance of the power, be guilty of an offence and liable to a penalty (recoverable summarily) of an amount not exceeding one thousand dollars’: *POA Act 1984* (SA) s 8.

²²⁸⁴ SALRI widely heard that this requirement is honoured more in the breach than the observance and no one could recall any prosecution of an attorney for such an offence.

²²⁸⁵ See also Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 181–98 [5.99]–[5.177].

²²⁸⁶ SALRI notes that nationally harmonious or consistent EPA laws and the introduction of a national EPA register is likely to prove a prolonged and involved process. ‘The Committee supports the urgent creation of a State register of enduring powers while a national register is being considered’: Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *‘I Never Thought It Would Happen To Me’: When Trust is Broken* (Final Report, September 2018) ii [11]. See also Commonwealth Attorney-General’s Department, *Enhancing Protections Relating to the Use of Enduring Power of Attorney Instruments* (Consultation Regulation Impact Statement, February 2020).

immediately and continue to remain effective notwithstanding the principal's subsequent incapacity, SALRI recommends that the EPA must be registered at the point at which the principal wishes to activate the EPA (which will generally be immediately after the execution of the EPA). For EPAs that are effective at the point at which the principal loses their capacity, SALRI recommends that the EPA must be registered by the attorney(s) after a medical or clinical assessment of the principal's capacity under **Recommendation 43** has been carried out and the original EPA, together with the medical certificate of incapacity must be lodged with the registration body in order for the instrument to be active on the register.

RECOMMENDATION 102

SALRI recommends the new (or amended) *Powers of Attorney Act* should provide that any act performed under an EPA has no legal effect unless the relevant instrument is registered.

RECOMMENDATION 103

SALRI recommends that EPAs that have been executed prior to the establishment of any compulsory register should be registered within 12 months following the introduction of the register in order for them to remain active and valid.²²⁸⁷

RECOMMENDATION 104

SALRI recommends that the State Government should conduct a public education campaign to inform members of the community who may have already made EPAs about the requirement to register the instrument.

RECOMMENDATION 105

SALRI recommends that there should be no mandatory notification scheme for the exercise of powers under an EPA but, in accordance with **Recommendation 67**, such a requirement can be implemented by the attorney.

RECOMMENDATION 106

SALRI recommends that any State based Register should contain the following information; namely the name and date of birth of the principal; the date of the principal's registration; the name(s) and date(s) of birth of the attorney(s); the prescribed conditions under the EPA and the details of any revocations.

RECOMMENDATION 107

SALRI recommends that the register should be accessible to the public.

RECOMMENDATION 108

SALRI recommends that the State Government should appoint the most appropriate agency to set up and maintain the State register of EPA instruments.²²⁸⁸

²²⁸⁷ SALRI accepts there will be transitional issues given the many EPAs in circulation waiting the principal's incapacity to be activated. One leading Adelaide succession lawyer remarked to students of the Law Reform class that her firm had many EPAs older than the students still waiting to be activated by the client's incapacity.

²²⁸⁸ This is plainly an operational decision for the State Government (though the Land Services Group SA raised in SALRI's consultation that they have the existing role and processes and expertise to be able to effectively set up and maintain a State based EPA register). This would be as a prelude to any ultimate national register.

RECOMMENDATION 109

SALRI recommends that the State Government should provide that any fees for the registration of an EPA are kept to a minimum to ensure that such costs do not discourage the use of EPAs and further that registration fee reductions or waivers should be available for those people who are eligible such as concession card holders, pensioners or low-income earners.²²⁸⁹

RECOMMENDATION 110

SALRI recommends that the registration of an EPA should be able to occur online or in person.²²⁹⁰

RECOMMENDATION 111

SALRI recommends that the registration body should conduct a basic check to ensure that an instrument creating or revoking an EPA satisfies the formal requirements before registering the instrument.

RECOMMENDATION 112

SALRI recommends that the *Powers of Attorney Act* provide that third parties dealing with attorneys with a registered and active EPA are entitled to presume that the EPA is valid and in force (unless the third party knew, or ought reasonably to have known, that the EPA was not valid or was in force).

Vulnerable Populations

RECOMMENDATION 113

SALRI recommends that the educational resources relating to EPAs developed by the South Australian Government should be translated into community languages present within South Australia and widely published across Government, legal and medical service providers, and community organisations (including groups representing the elderly, Aboriginal advocacy and community organisations, disability advocacy and community organisations and multicultural organisations). SALRI further raises that this translated material could contain information on various topics including, but not limited to:

- (a) Relevant contacts — both Government departments and community organisations;
- (b) How to access information, services and support — such as interpreters, translators and legal practitioners;
- (c) Understanding rights and responsibilities;
- (d) Identifying signs or triggers of incapacity;
- (e) Identifying signs of financial abuse or exploitation; and
- (f) How to report known or suspected cases of financial abuse.

²²⁸⁹ SALRI heard from most (though not all) consultees that, although in favour of an EPA register, any fees for registration and/or inspection must be modest so as not to deter or discourage the use of the register. There should also be scope SALRI was told for certain categories of persons to be exempt from any fee for registration.

²²⁹⁰ SALRI has heard concerns that many parties such as the elderly, migrants or those in remote locations may lack the means or ability to register an EPA online.

RECOMMENDATION 114

SALRI recommends that the State Government should ensure that quality assurance measures are adopted to ensure translated materials are accurate²²⁹¹ and that educational materials such as those listed below be distributed by various platforms and in a number of formats including, but not limited to:

- (a) Ethnic television or radio programs, community radio stations and community education sessions;
- (b) Digital and print fact sheets/brochures;
- (c) Via a national relay service;
- (d) Audio files;
- (e) Videos and graphics; and
- (f) Social media.

RECOMMENDATION 115

SALRI recommends that the State Government should consider the provision of appropriate funding and resources to facilitate cultural awareness training for medical practitioners, allied health practitioners and legal practitioners.

RECOMMENDATION 116

SALRI recommends that an accredited, independent interpreter should be offered and made available for capacity assessments in relation to people from Aboriginal communities and CALD individuals.

RECOMMENDATION 117

SALRI recommends the use of suitable and culturally and linguistically appropriate capacity assessment tools in relation to EPAs for people from Aboriginal communities and CALD individuals.

Other Recommendations

RECOMMENDATION 118

SALRI notes the suggestion of microboards to provide for the long term care of persons with disability has apparent merit but it is beyond the scope of this reference and SALRI recommends that it undertake a future reference in close consultation with interested parties to examine the role and operation and implications of microboards.

RECOMMENDATION 119

SALRI recommends that, at this stage, the common law forfeiture rule should not be extended to cases involving elder abuse, (including financial abuse or the misuse of an EPA) as this issue raises complex implications and requires further consideration.²²⁹²

²²⁹¹ This may be facilitated through engagement with accredited interpreters/translators and consultation with community organisations.

²²⁹² See also South Australian Law Reform Institute, *Riddles, Mysteries and Enigmas: The Common Law Forfeiture Rule* (Report No 14, February 2020) 250–4 [9.2.1]–[9.2.17], Rec 65.

RECOMMENDATION 120

SALRI recommends that that the State Government should consider the future roles, practices and processes of the Office of the Public Advocate, the Adult Safeguarding Unit, South Australia Police, the Public Trustee and any other interested agency, to receive and respond to reports or claims in relation to the suspected abuse or misuse of EPAs, including the possible intervention or investigation of cases brought to SACAT.

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