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The Executive Director
Australian Law Reform Commission
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Dear Executive Director,

Response to Elder Abuse: Issues Paper 47

I refer to Issues Paper 47. The Issues Paper is a wide-ranging examination of the problem of elder abuse and I will provide a response to those questions which are relevant to the work of the Legal Services Commission of South Australia.

The Legal Services Commission (the Commission) is the largest provider of legal assistance services in South Australia. We are actively involved in raising awareness about the problem of elder abuse through our legal advice and information service and through our community education programs. (<http://www.lsc.sa.gov.au/search.php?query=elder+abuse>)

The Commission has over the last 15 years developed links to many CALD communities throughout South Australia, working to educate community members about the law and the responsibilities and obligations that come with living in Australia. We have found that elderly CALD community members are particularly at risk of abuse.

The Commission has recently played a central role in the development of Advanced Care Directives in South Australia and in the implementation of the SA Disability Justice Plan. It has been selected by the Commonwealth Attorney Generals department to provide a new domestic violence protection service and Health Justice partnership at Elizabeth, in the northern suburbs of Adelaide.

The Commission has learnt that a collaborative approach is one of the most effective responses to elder abuse, particularly as between agencies. Elder abuse is a complex problem which may take many forms, including physical, psychological and financial abuse. Our strong partnerships with SA Health, and close association with other legal assistance providers and financial counsellors, allow for easy referral of clients and efficient identification of the signs of elder abuse and the formulation of appropriate responses.

South Australia

South Australia's population is ageing and we have a larger proportion of older persons compared to other jurisdictions. Below is table from our 2014-15 Annual Report showing that **2,407** persons over 66 years of age who sought the Commission's assistance during that financial year.

	Criminal Law			Family Law			Total	Civil Law			Overall Total
	Female	Male	Total	Female	Male	Other		Female	Male	Total	
Grants of Aid	10	79	89	9	8	0	17	0	2	2	108
Advice Services	63	185	248	89	72	2	163	743	936	1679	2090
Duty Lawyer Services	31	118	149	29	25	0	54	2	4	6	209

Response to Questions in Issues Paper 47

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

- Harm or distress
- Intention
- Payment for services

The Commission considers that while these issues are important, all three should not be mandatory in determining whether abuse has occurred. Harm, while an important element, needs to be interpreted widely and not confined to harm which is "distressing" to the victim. With regard to intention, some acts of abuse arise from negligence or are the unintended consequences of attempts to assist. In many cases the abuser will be related to the victim and not receiving formal payment for services.

The Commission supports the definition recommended in the Issues Paper, based on one developed in the United Kingdom in 1993 and adopted by the World Health Organisation and the International Network for the Prevention of Elder Abuse, because its focus is on the "relationship of trust" between the parties.

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

The Commission was a founding member of the South Australian *Alliance for the Prevention of Elder Abuse* since 1999 together with the Aged Rights Advocacy Service, the Public Trustee, the Office of the Public Advocate, and the South Australian Police. These agencies realised that they could achieve more together than as individual entities. At the time the Alliance was founded, the agencies determined that financial abuse of the elderly was a serious and pressing problem.

The Alliance continues to meet and work together, recently agreeing on a three year plan of action. The Alliance's focus is on education of the community and it identifies target

groups, such as Justices of the Peace, bank staff, or CALD community workers, for specialist training in recognising the signs of elder abuse relevant to the work of the identified group.

(For information about the Alliance see: <http://www.a pea.org.au/>)

Alliance members also present joint education and information sessions for community members who seem to better understand the help available to them when lawyers, social workers and police jointly listen to their stories and provide assistance. Jointly prepared publications are distributed to community members so that they have a number to call at a time that is right for them.

Question 28: What changes should be made to laws and legal frameworks relating to financial institutions to identify, improve safeguards against and respond to elder abuse?

The Commission recommends the abolition of the law of guarantee as a means to decrease the incidents of financial abuse of older Australians. Increasing sophistication, flexibility and choice in banking loan products over the last twenty years should provide ample opportunity for borrowers to enter the market without the need for security from, all too often, elderly family members. The law of guarantee has long played a role in this form of elder abuse and requirements regarding independent legal advice have not proved particularly useful. (See: *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; (1983) 151 CLR 447, 12 May 1983)

Question 29: What evidence is there of elder abuse committed by people acting as power of attorneys? How might this type of abuse be prevented and redressed?

The Commission often receives enquiries through our advice service relating to an act of abuse where the person acting as a power of attorney intentionally and dishonestly uses his or her position for financial gain or benefit. On occasions, a revoked power of attorney continues to be used, or the donor is mistakenly declared to have lost legal capacity. Often concerns are raised by other family members. One safeguard against this type of abuse may be to expand the role of Civil and Administrative Tribunals to conduct regular reviews of appointed attorneys, similar to the current auditing requirements where an administrator is appointed in South Australia by virtue of an order of the South Australian Civil and Administrative Tribunal (SACAT) and must provide annual reports to the South Australian Public Trustee.

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

This is an option worth considering, however it will be important to consider the structure of the register, the funding required to establish the service, and whether an existing body has scope to manage the register or a brand new body would need to be required for this purpose.

Question 31: Should the statutory duties of attorneys and other appointed decision-makers be expanded to give them a greater role in protecting older people from abuse by others?

It should be born in mind that any expansion in the role of the appointed attorney could also expand the potential for abuse to occur. As per question 29, the Commission has dealt with instances of elder abuse occurring through the actions of the appointed attorneys.

Any expansion in the statutory duty of attorneys would have to be clearly defined, for example, if the suggestion is made to place a statutory duty on the attorney to prevent

elder abuse, what would be the scope of that duty and the outcome if the attorney failed in that duty?

Question 32: What evidence is there of elder abuse by guardians and administrators? How might this type of abuse be prevented and redressed?

We receive inquiries through our Advice service relating to instances of elder abuse being committed by privately appointed guardians and administrators. A common example of abuse by a guardian is the intentional provision and enforced use of medicinal aids against the individual's wishes, often to keep them sedated.

Options to prevent this type of abuse occurring may include specific training requirements for guardians, or the regular review of guardians by a body such as OPA.

Case Study 1

Wendy, an elderly person, had previously given her daughter Peta an Enduring Power of Attorney. Some time later, Wendy moved into a nursing home as she was suffering from dementia. Wendy had money in investment accounts managed by Peta, an accountant. Using her authority, Peta paid herself and her two siblings \$30,000 each from their mother's investment accounts. Peta reasoned that as the three children were the beneficiaries of mother's estate, she was simply making an early bequest and the payment was consistent with her mother's known testamentary wishes.

She was advised by lawyers at the Legal Services Commission that this was in breach of her fiduciary duties as an Attorney and told to return the money to her mother's account. She indicated she would do this.

Case Study 2

Elizabeth, an elderly woman living in New South Wales, was becoming frail. Her daughter, Diana, who lived in South Australia, persuaded Elizabeth to move closer to her so that she could care for her mother. Elizabeth sold her house in Sydney. Diana, a real estate agent, asked her mother to give her an Enduring Power of Attorney so that she could assist her mother to purchase a home in Adelaide. A suitable house was purchased and Elizabeth moved in. Several years later, Diana and Elizabeth had a disagreement during which Elizabeth became aware that house was in Diana's name and not in her name as she had assumed. Elizabeth remembered signing paperwork given to her by daughter but she did not have a clear recollection of what they were. Lawyers at the Legal Services Commission attempted to mediate the matter between the parties but this failed. Elizabeth was referred to a private lawyer.

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

Currently, in South Australia the Office of the Public Advocate does not have investigative powers in relation to elder abuse. Often there is confusion or misunderstanding about where an individual can seek recourse for elder abuse. The Commission would support a proposal for Public Advocates to be given investigative powers which could be triggered once a complaint about elder abuse is made or by order from a tribunal.

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

An Act that provided a framework for identifying and investigating elder abuse could allow for a collaborative and coordinated response to this often hidden problem. One suggestion is a requirement for government and other agencies to take steps to identify whether an adult client is at risk of elder abuse. If a risk of abuse is identified, the legislation could provide for reporting requirements to a relevant body with investigative powers so that an investigation and potential further action could be taken as well as support be provided to the adult at risk. This would be consistent with overseas adult protection models, such as the Scottish Government model through their *Adult Support and Protection (Scotland) Act 2007*.

Question 37: Are health-justice partnerships a useful model for identifying and responding to elder abuse?

The Commission has been part of two successful health-justice partnerships and is currently involved in a third. In 2013, the Commission was funded to prepare for and assist with the implementation of the new *Advanced Care Directives Act (SA) 2013* and changes to the *Guardianship and Administration Act (SA) 1993*. SA Health provided funding to the Commission to develop and maintain the Advance Care Directive website, a one stop shop for all relevant information about the new Advance Care Directive form. The Commission was responsible for providing an extensive education program to relevant stakeholders regarding the changes, (<http://www.lsc.sa.gov.au/search.php?query=advance+care>)

In July 2016, the Commission launched a new resource guide to comprehensively inform senior South Australians about their legal rights and avenues of support. The guide, *Knowing Your Rights*, covers varied legal issues from age discrimination to consumer rights through to Centrelink matters and also includes sections on planning ahead for health and financial matters. The guide, written in plain English and moderated by peer educators, is available in both hard copy and on line. This project was delivered in collaboration with SA Health. (http://www.lsc.sa.gov.au/cb_pages/knowning_your_rights_new_resource_page.php)

The Commission recently commenced involvement in a health-justice partnership in the northern suburbs of Adelaide in response to increasing domestic violence. Many victims of domestic violence also suffer elder abuse. Resources need to be allocated to all Legal Aid Commissions around Australia to establish health-justice partnerships to combat elder abuse. Legal aid is well placed to deliver a unique, consistent model of service delivery for the hundreds of thousands of people who currently access their services.

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

Many instances of elder abuse involve criminal conduct and the Commission believes that these offences should continue to be prosecuted through the criminal courts. However, tribunals can offer alternative access to justice for non-criminal issues, disputes between facilities and residents, and for matters where, because of personal relationships, the victim wants redress but does not wish to pursue criminal charges.

Case Study 3

In South Australia, SACAT currently requires an applicant to establish, by virtue of a medical report, that an individual has lost capacity before SACAT will then make a guardianship or administration order. In the event that an individual refuses to be medically assessed, SACAT cannot make such an order even if it would be in the individual's best interests. Expanding the scope of SACAT to allow for the hearing of medical evidence relating to a person's capacity, and then having the ability to order that an assessment be done in relation to the guardianship or administration application, would resolve this issue. This would be consistent with the approach previously taken by the repealed SA Guardianship Board.

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

Currently in South Australia, the Office of the Public Advocate provides mediation services for disputes relating to Advance Care Directives, which negates the need to apply to SACAT for a resolution. A similar mediation service does not exist for power of attorney disputes, so the creation of such a service would be advisable.

Question 42: In what ways should criminal laws be improved to respond to elder abuse? For example, should there be offences specifically concerning elder abuse?

Currently, elder abuse is covered in South Australia by existing offences such as deception, fraud, and assault. The creation of distinct elder abuse offences could result in a clearer definition of elder abuse, as well as the provision of specific penalties proportionate to the specific offences.

Question 43: Do state and territory criminal laws regarding neglect offer an appropriate response to elder abuse? How might this response be improved?

Please refer to our answer to question 42. The creation of specific elder abuse criminal offences may improve the response to elder abuse.

Question 44: Are protection orders being used to protect people from elder abuse? What changes should be made to make them a better safeguard against elder abuse?

The Commission's experience is that protection orders are not commonly sought as a method of protecting people from elder abuse. In South Australia, intervention orders are regulated by the *Intervention Orders (Prevention of Abuse) Act 2009* (SA). If the Act were amended to include a specific definition of elder abuse, and recognition of this abuse as a form of harm warranting an intervention order, this may better safeguard against elder abuse.

Question 45: Who should be required to report suspected elder abuse, in what circumstances and to whom?

The Commission supports the reporting of incidents of elder abuse to appropriate authorities such as the police and public advocates. However, as the mandatory reporting of child abuse has shown, lack of resourcing to triage reports and over reporting of minor matters can paralyse the agencies tasked with taking action. In some areas of elder abuse

such as financial abuse, laws which focus on prevention by restricting certain transactions may be more effective.

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

The Commission would like to see a more focussed involvement by the police or other appropriate authorities through the establishment of special elder abuse units as in the United States. In the US State of California, for example, the Facilities Enforcement Team “investigates and prosecutes corporate entities, such as skilled nursing homes, hospitals, and residential care facilities, for adopting policies or promoting practices that lead to neglect and/or poor quality of care” while the Operation Guardians team “identifies instances of abuse or neglect for further investigation and possible criminal or civil prosecution by the Bureau of Medi-Cal Fraud and Elder Abuse,” (<https://oag.ca.gov/bmfea/elder>)

Within California, the county of San Diego has established its elder abuse unit within the District Attorney’s Office for reporting and prosecution of elder and vulnerable adult abuse. (<http://www.sdcda.org/helping/elder-abuse.html>)

A detailed review of international responses to elder abuse policing can be found in the research report, *Elder Abuse Understanding issues, Frameworks and Responses* released by the Australian Institute of Family Studies in February 2016.

(<https://aifs.gov.au/publications/elder-abuse/8-what-can-we-learn-international-approaches>)

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

South Australia recently enacted vulnerable witness legislation which would be applicable to infirm, elderly people. The legislation is intended to ensure that persons with disabilities are not precluded from giving evidence because of communication difficulties. A detailed explanation of the new laws can found on the South Australian Attorney-General’s website:

(<http://www.agd.sa.gov.au/initiatives/disability-justice-plan/statutes-amendment-vulnerable-witnesses-act-2015>)

Question 48: How should sentencing laws and practices relating to elder abuse be improved?

If specific elder abuse offences were created, then specific penalties should be imposed that are appropriate to the offence committed. Currently, in South Australia, a breach of a donee’s obligation to keep accurate records of all financial transactions made on a donor’s behalf pursuant to a Power of Attorney can result in a criminal prosecution where the maximum penalty is a fine of up to \$1,000 (see section 8 of the *Powers of Attorney and Agency Act 1984* (SA)). Harsher or more far-reaching penalties may better safeguard against elder abuse.

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

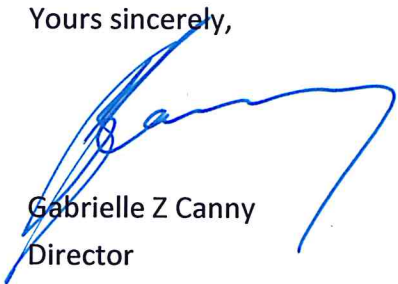
Restorative justice can play an important role in situations where there has been abuse in a relationship of trust. Victims, or their guardians, should have the right to meet the abuser, if desired, to explain the impact of the abuse and receive an apology. They should be entitled to compensation for any loss or additional expenses arising from the abuse. If the abuse took place in a supported facility, they should have the right to move to a different facility if they no longer feel safe in the current one. The cost of this move should be born by the facility where the abuse took place.

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

The Commission believes that civil penalties should not replace or be a substitute for criminal charges however they can be effective in cases of institutional abuse where the abuse is the result of systemic failure on the part of a corporate operator of a supported residential facility. A relatively low proportion of elder abuse matters result in criminal prosecution in South Australia. If civil penalty provisions were created to allow for bodies such as Civil and Administrative Tribunals to hear disputes and impose penalties, it may lead to a more effective resolution of particular types of elder abuse disputes.

Thank you for the opportunity to comment on this issues paper.

Yours sincerely,



Gabrielle Z Canny
Director