**Office of the Public Advocate**

**South Australia**



**Submission to the Australian Law Reform Commission on**

**Elder Abuse (ALRC Discussion Paper 83)**

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**Introduction**

The Office of the Public Advocate, South Australia (**OPA**) is grateful for the opportunity to provide a further submission to the Australian Law Reform Commission’s (**ALRC**) about elder abuse. In this submission, OPA will address the ALRC’s comprehensive *Elder Abuse Discussion Paper 83*.

We have chosen not to respond to all of the proposals and questions posed in the Discussion Paper, but have limited this submission to the areas most relevant to OPA’s functions and areas of expertise. We have referred to the chapter numbers, headings and proposal numbers used by the ALRC in the Discussion Paper.

OPA previously provided a submission to the ALRC in response to its *Elder Abuse Issues Paper 47*. This submission should be read in conjunction with our earlier submission for a complete picture of OPA’s position.

Please note that for ease of reference we have referred to public advocates and public guardians collectively as “public advocates”.

**Proposals and Questions**

**2. A National Plan**

***Proposal 2-1:* *A National Plan to address elder abuse should be developed***

OPA supports the proposal to develop a national plan to address abuse and considers it an important strategy for the protection of the rights of older people. OPA believes that the development and implementation of a national plan may help raise public awareness of the prevalence of the issue and create the conditions necessary to facilitate stronger safeguards against the abuse of older people.

A national plan may also create a foundation for enhancing consistency amongst the States and Territories. The process of reporting and responding to elder abuse requires nationally consistent procedures and, ideally, the longer-term goal of national legislative reform.

***Proposal 2–2*: *A national prevalence study of elder abuse should be commissioned***

The available body of reliable evidence on abuse of older people in Australia is limited for a number of reasons, including inconsistencies of data collection across the States and Territories and issues around under-reporting of abuse.

OPA has previously confirmed that it would support a prevalence study that would enable the measurement of incidence, causes and contributors to the abuse of older people, in order to assist in the detection of, early intervention in and response to the abuse of older people[[1]](#footnote-1).

OPA supports the proposal to commission a national prevalence study. However, we believe that it is important to address the practical issues and barriers associated with undertaking this exercise. To be truly effective, OPA believes that the prevalence study must be underpinned by a nationally consistent data collecting system and clear definitions of what substantiates elder abuse. As stated in OPA’s report *Closing the Gaps: Enhancing South Australia’s Response to the Abuse of Vulnerable Older People,[[2]](#footnote-2)* there is a difference between crime rates and prevalence of abuse. A challenge for a national prevalence study is arriving on definitional agreement and also research methodology which accounts for incidence of abuse which does not result in criminal conviction or other formal process of resolution.

OPA notes that there are some scoping initiatives in respect of the prevalence of elder abuse currently being undertaken. The Australian Institute of Family Studies is conducting a survey in respect to the prevalence of elder abuse. The Office of the Public Advocate (Victoria) is also reporting to the Australian Guardianship and Administration Council (AGAC). This work may assist the ALRC in any further recommendations about the details for a national prevalence study.

**3. Powers of Investigation**

***Proposal 3-1:* *State and territory public advocates or public guardians should be given the power to investigate elder abuse where they have a reasonable cause to suspect that an older person:***

1. ***Has care and support needs***
2. ***Is, or is at risk of, being abused or neglected; and***
3. ***Is unable to protect themselves from the abuse or neglect, or the risk of it because of care and support needs***

OPA considers that there are three broad issues to address with respect to proposal 3-1:

1. Should investigatory powers be vested in public advocates?
2. Should the power to investigate elder abuse be triggered where an older adult with care and support needsis at risk?
3. Should the investigatory powers be limited to suspicions of abuse of older people or should it apply more generally to all adults at risk regardless of age?

We will address each issue in turn.

**i) Should investigatory powers be vested in public advocates?**

Proposal 3-1 involves expanding the role of public advocates by vesting them with powers with to investigate suspicions of elder abuse. OPA agrees, in principle, with vesting investigative powers in public advocates.

OPA currently has the power to investigate concerns of a person who is believed to have a mental incapacity and is at risk, but only if directed to do so by the South Australian Civil and Administrative Tribunal.[[3]](#footnote-3) These powers do not authorise OPA to undertake investigations of its own volition, to mandate information or to enter premises.

Public Advocates across Australia generally have some (often limited) powers of investigation. Expanding or strengthening those investigative powers might make for a reasonably simple and effective response to the issue of abuse of older people and one which might be implemented more quickly than comprehensive legislative reform. It may also provide the community with clarity about where they should report concerns.

In *Closing the Gaps*, OPA made recommendations for legislative reform in South Australia including the establishment of a new Adult Protection Unit (within government) to coordinate and lead the system for multidisciplinary response to abuse.[[4]](#footnote-4) OPA’s proposal for an Adult Protection Unit was part and parcel of recommendations for enactment of separate, comprehensive legislation in South Australia for the protection of vulnerable adults.

We do not consider proposal 3-1 to be necessarily inconsistent with the approach recommended in *Closing the Gaps*, particularly if it is augmented by a clear multi-agency framework to support the investigations function. Vesting investigative powers in public advocates would fulfil a number of elements identified in *Closing the Gaps* including:

1. the creation of a central point for the notification of abuse cases; and
2. assignment of lead authority for organising and convening case conferences.[[5]](#footnote-5)

Most importantly, whichever body is charged with leading and coordinating the investigation of abuse of older people (or abuse of vulnerable adults) it must be properly resourced to do so. OPA could not fulfil the expanded role within its current resources.

The establishment of a new Adult Protection Unit was supported in our inquiry partly to avoid a potential conflict with OPA’s independent advocacy role for persons with mental capacity or mental illness.[[6]](#footnote-6) That is, there is a risk that OPA’s ability to independently advocate for an alleged victim of abuse would be incompatible with the role of lead investigator of the allegations of abuse. OPA submits that this is remains a valid consideration in determining whether and how public advocates should be given powers to investigate allegations of abuse. Mechanisms would need to be developed in order to preserve the important independent advocacy function performed by public advocates.

The final point that we wish to make about this issue is that further clarification is needed about the potential overlap of the proposed investigative powers of public advocates and those of the Aged Care Complaints Commissioner regarding allegations of abuse in aged care facilities and which body would assume primary responsibility.

**ii) Should the power to investigate elder abuse be triggered where an adult with care and supportneedsis at risk?**

Under proposal 3-1, the application of the investigative powers of OPA would extend beyond older people with impaired decision-making capacity. Limiting public advocates’ investigative functions to persons with impaired decision-making capacity more comfortably aligns with current legislative powers and functions. However, OPA agrees that this broader scope, which focuses on the *inability to seek assistance*, is desirable in order to fill the “investigations gap” identified in the ALRC’s Discussion Paper.[[7]](#footnote-7) There will be situations where the victim of abuse has limited ability (other than by reason of a mental incapacity) to seek assistance.

OPA considers that an express right for people who have capacity to do so to refuse any support, assistance and protection (proposal 3-2) is generally an appropriate limitation of the investigative powers. It would safeguard against unwarranted intrusion into the lives and affairs of older people and their right to make their own choices. However, we believe that there needs to be further clarification about the ability for public advocates exercising the proposed investigative functions to make reports to the police or otherwise share information where there reasonably appears to be evidence that a serious criminal offence has occurred. We will address this further in our comments in response to proposals 3-2 and 3-4.

**iii) Should the investigatory powers be limited to suspicions of abuse of older people or should it apply more generally to all adults at risk, regardless of age?**

OPA’s *Closing the Gaps* inquiry focused on safeguarding vulnerable older people. In its report, OPA indicated that further consultation would be required to determine support for legislation which encompasses protection of all vulnerable adults.

There may well be a need for a framework/system to safeguard other vulnerable adults. We can certainly see disadvantages in the operation of separate systems for safeguarding vulnerable adults based on their age, rather than considering the circumstances of the person as a whole. Ultimately, making a distinction based on age may be discriminatory. Other jurisdictions, including England, Scotland and British Columbia have comprehensive systems for safeguarding adults which are not limited by age (with the exception that they apply to adults rather than children).

***Proposal 3-2: Public advocates or public guardians should be guided by the following principles:***

1. ***Older people experiencing abuse or neglect have the right to refuse support, assistance or protection***
2. ***The need to protect someone from abuse or neglect must be balanced with respect for the person’s right to make their own decisions about their care; and***
3. ***The will, preferences and rights of the older person must be respected***

OPA agrees that a rights-based approach should be taken in respect of the proposed investigative powers and that it is necessary to balance the older person’s rights and freedoms against their protection.

It is important to note that some older people will be unable to refuse or accept support, assistance or protection, or to make their own decisions about their care, due to impaired decision-making capacity. Therefore, there may be a case for more specific practice guidance about that class of person. Such guidance should include whether and when the current wishes and preferences of an older person with impaired decision-making capacity may be departed from (for example, by weighing the likelihood and seriousness of the risk of harm to that person and determining what the least restrictive alternative is in the circumstances).

In addition, we believe there needs to be consideration of what public advocates would be empowered to do when:

* investigation of abuse reveals a reasonable cause to suspect that a serious criminal offence has taken place; and
* the alleged victim has care and support needs but does not have a mental incapacity; and
* the alleged victim does not wish to make a police report or take protective measures.

We believe that it is important to recognise that an older person who has experienced/is experiencing abuse may be unable or unwilling to take or accept protective measures for reasons relating to complex family dynamics and relationships of power and control. The ALRC recognises in the Discussion Paper that elder abuse can intersect with family violence and that there are “shared dynamics” between the two (as well as divergences).[[8]](#footnote-8) This issue is complex and, when it comes to serious crimes and risk of serious harm, we believe that there must be careful consideration of how public authorities respond to the risk. This is why collaborative multi-agency arrangements are important.

***Proposal 3-3; Public advocates or public guardians should have the power to require that a person, other than the older person:***

1. ***Furnish information;***
2. ***Produce documents; or***
3. ***Participate in an interview relating to an investigation of the abuse or neglect of an older person.***

OPA reads this proposal in conjunction with existing police powers, including the ability of police to conduct a welfare check if access to a vulnerable older person is denied.

OPA supports this proposal and broadly agrees that powers to enter and inspect premises should rest with the police, as a matter of accountability, training and staff safety and security. It is important to emphasise, however, that there are barriers to reporting of allegations of abuse of older people to the police. If public advocates do not have the ability to apply for a warrant to enter premises in their suite of investigative powers, then protocols/processes may need to be developed (or existing ones clarified) for escalation of concerns to the police and for inter-agency sharing of information. OPA confirms its support for a collaborative multi-agency framework to support investigations into allegations of abuse of older people.

An option for strengthening these proposed powers of public advocates is to make a refusal to provide information requested by an investigator a criminal offence, as per a recommendation of the Victorian Law Reform Commission in its *Guardianship Final Report*.[[9]](#footnote-9)

***Proposal 3-4; In responding to the suspected abuse or neglect of an older person, public advocate or public guardian may:***

1. ***Refer the older person or the perpetrator to available health care, social, legal, accommodation or other services;***
2. ***Assist the older person or perpetrator in obtaining those services;***
3. ***Prepare, in consultation with the older person, a support and assistance plan that specifies any services needed by the older person; or***
4. ***decide to take no further action***

OPA supports the proposed “support and assistance” model of intervention in cases of alleged abuse of older people. We note that these powers of intervention are in addition to existing powers to apply for guardianship or financial administration orders.[[10]](#footnote-10) OPA supports a rights-based approach in favour of a paternalistic one and considers that the proposed model strikes a good balance between rights and protections.

We consider that there is room for clarification about whether and under what circumstances public advocates would have the power to share information with the police, in the absence of consent, where there is reason to believe a (serious) criminal offence has taken place.

***Proposal 3-5; Any person who reports elder abuse to the public advocate or public guardian in good faith and based on a reasonable suspicion should not, as a consequence of their report, be:***

1. ***Liable, civilly, criminally or under and administrative process;***
2. ***Found to have departed from standards of professional conduct;***
3. ***Dismissed or threatened in the course of their employment; or***
4. ***Discriminated against with respect to employment or membership in a profession or trade union.***

OPA supports this proposal which is intended to protect whistle-blowers.

**4. Criminal Justice Responses**

OPA notes that the ALRC has not made any proposals or posed any further questions with respect to criminal justice responses.

OPA does not propose to make any comments as to the content of the ALRC’s examination of the feedback it received from stakeholders’ earlier submissions. We would just like to highlight, as per our earlier submission, the extensive legislative reform that has taken place recently in South Australia, under the Attorney-General’s Department’s Disability Justice Plan, with the aim of supporting vulnerable victims and witnesses to give evidence in criminal justice proceedings.

The reforms include:

* giving witnesses (including victims and defendants) with complex communication needs access to communication assistance (including communication partners) for any contact with the criminal justice system;
* the ability for evidence of vulnerable witnesses to be taken in informal surroundings;
* provision of alternative measures for evidence of vulnerable witnesses to be presented at trial, including the admission of pre-recorded evidence and investigative interviews;
* specialist investigative training for government investigators, including police. [[11]](#footnote-11)

OPA highlights these reforms in order to make the point that strategies to address access to the criminal justice system for victims of elder abuse may not lay only in the availability of applicable criminal offences or in improved training for police. It is important to look at the processes within the criminal justice system which might create barriers for the equal treatment and participation of older people or people with a disability.

**5. Enduring Powers of Attorney and Enduring Guardianship**

***Proposal 5-1; A national online register of enduring documents, and court and tribunal orders for the appointment of guardians and financial administrators should be established.***

For ease of reference, OPA will refer to guardians, administrators and donees of enduring powers collectively as “substitute decision-makers”.

OPA supports proposal 5-1 in principle, but acknowledges that there are likely to be a number of practical obstacles.

Currently, there is a lack of accessible, up-to-date and reliable information about who has been appointed as a substitute decision-maker. A national register would enable checks to be carried out and information to be updated in the event of a change of circumstances. To be effective the system must have the ability to efficiently store and organise the information of those with appointed powers and be easy to update.

Practical issues include:

* how to keep a register low-cost, in order to encourage compliance and not add complexity or burden to the role of the substitute decision-maker;
* how to manage the divergences of legislation of the States and Territories given that the law relating to substitute decision-makers is not uniform;
* interaction with privacy laws;
* data security.

Given the complexities around establishment and maintenance of a national on-line register, OPA does not consider that this proposal should be a top priority.

**Proposal 5-2: The making or revocation of an enduring document should not be valid until registered. The making and registering of a subsequent enduring document should automatically revoke the previous document of the same type.**

**Proposal 5-3: The implementation of the national online register should include transitional arrangements to ensure that existing enduring documents can be registered and that unregistered enduring documents remain valid for a prescribed period.**

OPA supports proposals 5-2 and 5-3 as to registration of enduring documents, as it would act as a safeguard against the potential abuse of power by someone relying on an expired or invalid document.

OPA has previously supported the registration of advance care directives/enduring powers of guardianship, ensuring they are easily accessible in the event of a person’s sudden, unexpected loss of mental capacity and an urgent decision must be made.[[12]](#footnote-12)

***Question 5-2; should public advocates and public guardians have the power to conduct random checks of enduring attorneys’ management of principals’ financial affairs?***

Powers to undergo random checking of enduring attorneys’ management of the principal’s financial affairs may be an effective safeguard for protection and prevention of financial abuse. However, OPA does not believe that it is necessary for the public advocates to be empowered to conduct random checks. Any such power should lie with public trustees, who have the financial expertise necessary to fulfil such a role.

***Proposal 5-4 Enduring documents should be witnessed by two independent witnesses, one of whom must be either a:***

1. ***legal practitioner***
2. ***medical practitioner***
3. ***justice of the peace;***
4. ***registrar of the Local Magistrates Court; or***
5. ***police officer holding the rank of sergeant or above***

***Each witness should certify that:***

1. ***the principal appeared to freely and voluntarily sign in their presence;***
2. ***the principle appeared to understand the nature of the document; and***
3. ***the enduring attorney or enduring guardian appeared to freely and voluntarily sign in their presence***

OPA agrees with the ALRC that strict witnessing requirements are necessary to protect against abuse or misuse of enduring powers.[[13]](#footnote-13) However, OPA submits that witnessing requirements must not become too onerous or complicated, so as to work as a disincentive to the creation of enduring powers. It is OPA’s view that it is sufficient protection for there to be one *independent* witness who must be either a:

1. legal practitioner
2. medical practitioner;
3. justice of the peace;
4. registrar of the Local Magistrates Court; or
5. police officer holding the rank of sergeant or above.

OPA agrees with position of the Office of the Public Advocate (Victoria) that “independent witness” should be expressly defined to exclude family of the principal or the proposed substitute decision-maker, health providers of the principal and beneficiaries under the principal’s will.

***Proposal 5-5 State and territory tribunals should be vested with the power to order that enduring attorneys and enduring guardians or court and tribunal appointed guardians and financial administrators pay compensation where the loss was caused by that persons failure to comply with their obligations under the relevant Act.***

OPA supports this proposal, on the basis that the test has a high threshold, being a *causal* link between the loss and the failure to comply with statutory duties. OPA reads the proposal as existing alongside current protections against liability for acts done in good faith in the relevant legislation. Further consideration would be required about tribunal appointed public guardians and administrators and the interaction with other legislation dealing with the liability of public authorities.

***Proposal 5-6: Laws governing enduring powers of attorney should provide that an attorney must not enter into a transaction where there is, or may be, a conflict between the attorney's duty to the principal and the interests of the attorney (or a relative, business associate or close friend of the attorney document) unless:***

1. ***the principal foresaw the particular type of conflict and gave express authorisation in the enduring power of attorney document; or***
2. ***a tribunal has authorised the transaction before it is entered into.***

OPA supports this proposal, on the qualification that there should be consideration of expressly exempting certain actions from being taken, on their own, to be conflict transactions. In particular, there should an exemption relating to the dealing of property held jointly by the attorney and the principal in recognition that partners and other family members are often appointed as attorneys. OPA suggests that s64(2) of the *Powers of Attorney Act 2014 (Vic)* is a good model to consider for this purpose.

***Proposal 5-7; A person should be ineligible to be an enduring attorney if the person:***

1. ***is undischarged bankrupt***
2. ***is prohibited from acting as a director under the Corporations Act 2001 (Cth);***
3. ***Has been convicted of an offence involving fraud or dishonesty; or***
4. ***Is, or has been, a care worker, a health care provider or an accommodation provider for the principal.***

OPA supports this proposal.

***Proposal 5-8: Legislation governing enduring documents should explicitly list transactions that cannot be completed by an enduring attorney or enduring guardian including:***

1. ***Making or revoking the principles will***
2. ***Making or revoking an enduring document on behalf of the principal;***
3. ***Voting in elections on behalf of the principal***
4. ***Consenting to adoption of a child by the principal***
5. ***Consenting to marriage or divorce of the principal; or***
6. ***Consenting to the principal entering into a sexual relationship.***

The OPA supports this proposal. It will provide clarity and will assist to improve substitute decision-makers’ understanding of the limits to their powers.

***Proposal 5-9: Enduring attorneys and enduring guardians should be required to keep records. Enduring attorneys should keep their own property separate from the property of the principal****.*

OPA supports this proposal, as a means of easier identification of financial abuse. However, as with proposal 5-6, above, there will need to be a mechanism for recognition of that some principals and their substitute decision-makers will be family members and may hold property jointly before the principal’s loss of capacity.

**Proposal 5-10: State and Territory governments should introduce nationally consistent laws governing enduring powers of attorney (including financial, medical and personal), enduring guardianship and other substitute decision makers.**

OPA supports this proposal and agrees that national consistency is likely to improve prevention and response to abuse of older people. OPA acknowledges that a process of harmonisation of laws would be lengthy and complex. As a minimum, OPA believes there should be greater mutual recognition of guardianship orders and advance care directives/enduring powers of guardianship.

***Proposal 5-11: The term ‘representatives’ should be used for the substitute decision makers referred to in proposal 5-10 and the enduring instruments under which these arrangements are made should be called ‘Representative Agreements’.***

In South Australia, “substitute decision-making” is guided by legislatively enshrined principles which do a great deal to recognise the rights of the principal.[[14]](#footnote-14) However, OPA acknowledges and supports moves toward more formal recognition of the rights of people with impaired decision-making capacity in accordance with the UN Convention on the Rights of Persons with Disabilities and supported decision-making models.

***Proposal 5-12: A model representative agreement should be developed to facilitate the making of these arrangements.***

OPA generally supports this proposal, but is concerned that development of one model representative agreement may be too inflexible in its application

OPA agrees that the model representative agreement (or however otherwise described) should ask what level of support is necessary to assist the principal to express their will and preferences. OPA also supports the inclusion of the guidelines for a functional approach to assessing decision-making capacity recommended by the ALRC in its *Equality, Capacity and Disability Report* and restated in Discussion Paper 83 at paragraph 5.118.[[15]](#footnote-15)

***Proposal 5-13: Representatives should be required to support and represent the will, preferences and rights of the principal.***

OPA generally supports this proposal, but considers that there should be recognition of the fact that it will not always be possible or reasonably practicable for the representative to ascertain the current will and preferences of the principal. OPA suggests that the wording of any legislative requirement of this kind, or supporting guidance, should include that:

* the current will and preferences of the principal be ascertained unless it is not possible or reasonably practicable to do so; and
* any past wishes and preferences of the principal be taken into account; and
* any of the principal’s beliefs and values which would likely influence their making of the decision if they had capacity be taken into account.[[16]](#footnote-16)

OPA believes that there is still a need to provide representatives/substitute decision-makers with guidance about whether and in what circumstances they can depart from the current will and preferences of the principal. The will and preferences of the principal may sometimes compete with certain “rights” of the principal, if rights are viewed in a broad sense to include rights related to safety or protection from harm. In any event, substitute decision-makers may be faced with situations in which the principal is exposed to a risk of significant harm should their will and preferences be followed and so will need guidance about how to manage that risk.

**6. Guardianship and Financial Administration Orders**

***Proposal 6-1: Newly-appointed non-professional guardians and financial administrators should be informed of the scope of their roles, responsibilities and obligations.***

OPA supports this proposal. OPA has historically produced information resources for private guardians and is currently undertaking a project to produce updated resources about the role and responsibilities of the guardian and provide some training for private guardians, as a means of enhancing the rights of persons under guardianship.

There is clearly a need for private guardians and administrators to be informed of their roles and duties. However, by placing too many requirements for formal qualifications and training may deter private guardians and administrators from agreeing to accept the role. This would likely lead to more appointments of public guardians and would, therefore, have resource implications on offices of public advocates.

The OPA believes that newly-appointed non-professional guardians and financial administrators should have access to training in a simple, informal and accessible manner, which likely means having the option of both online as well as face-to-face training.

1. OPA, 2016, *Submission to the ALRC on Protecting the Rights of Older Australians from Abuse*, page 2. [↑](#footnote-ref-1)
2. OPA in collaboration with the University of South Australia, October 2011, *Closing the Gaps: Enhancing South Australia’s Response to the Abuse of Vulnerable Older People*. [↑](#footnote-ref-2)
3. *Guardianship and Administration Act 1993, (SA), s 28.*  Under s 28(1) of the Act, the Public Advocate must, if the tribunal so directs for the purpose of the Part, investigate the affairs of a person (a) who is subject to an application for an order under the Part, or (b) who has had an advanced care directive revoked by the Tribunal under the *Advance Care Directives Act 2013 (SA).* [↑](#footnote-ref-3)
4. Above, note 2, at pages 14, 26, 46 and 68. [↑](#footnote-ref-4)
5. Above, note 2, at page 27. [↑](#footnote-ref-5)
6. Above, note 2, at page 26. [↑](#footnote-ref-6)
7. Australian Law Reform Commission, *Elder Abuse Discussion Paper 83*, December 2016 at pages 62-63. [↑](#footnote-ref-7)
8. Above, note 7, at pages 33 and 83. [↑](#footnote-ref-8)
9. Victorian Law Reform Commission, 2012, *Guardianship Final Report 24*, recommendation 331. [↑](#footnote-ref-9)
10. Above, note 7, at page 72. [↑](#footnote-ref-10)
11. See:

*Statutes Amendment (Vulnerable Witnesses) Act 2015 (SA)*: [https://www.legislation.sa.gov.au/LZ/V/A/2015/Statutes%20Amendment%20(Vulnerable%20Witnesses)%20Act%202015\_16.aspx](https://www.legislation.sa.gov.au/LZ/V/A/2015/Statutes%20Amendment%20%28Vulnerable%20Witnesses%29%20Act%202015_16.aspx)

Hansard Record, The Honourable John Rau, Deputy-Premier, Second Reading Speech, Statutes Amendment (Vulnerable Witnesses) Bill, 6 May 2015: <http://hansardpublic.parliament.sa.gov.au/Pages/HansardResult.aspx#/docid/HANSARD-11-19527>

Attorney-General’s Department, South Australia, Disability Justice Plan: <http://www.agd.sa.gov.au/sites/agd.sa.gov.au/files/documents/Initiatives%20Announcements%20and%20News/DJP/Disability%20Justice%20Plan%20WEB.pdf> [↑](#footnote-ref-11)
12. Above, note 1, at page 6. [↑](#footnote-ref-12)
13. Above, note 7, at page 102. [↑](#footnote-ref-13)
14. See, for example, section 5 of the *Guardianship and Administration Act 1993* *(SA)* and sections 10 (particularly s 10(g)) and 35 of the *Advance Care Directives Act 2013 (SA)*. [↑](#footnote-ref-14)
15. Above, note 7, at pages 110-111. Namely:

-All adults must be presumed to have ability to make decisions that affect their lives.

- A person must not be assumed to lack decision-making ability on the basis of having a disability.

- A person’s decision-making ability must be considered in the context of available supports.

- A person’s decision-making ability is to be assessed, not the outcome of the decision they want to make.

- A person’s decision-making ability will depend on the kind of decisions to be made.

- A person’s decision-making ability may evolve or fluctuate over time. [↑](#footnote-ref-15)
16. An example is the provisions of s4(6) of the *Mental Capacity Act 2005 (England)*, in which past and present wishes, values and beliefs must be taken into account in determining what is in the best interests of a person who lacks mental capacity to make a specific decision. [↑](#footnote-ref-16)