

Inquiry into elder abuse - Supplementary questions

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1. Could you provide further information about South Australia's classification of chemical and physical restraint as a form of abuse of older people?

In the Strategy to Safeguard the Rights of Older South Australians 2014-2021,¹ chemical abuse is defined in the following terms:

Substance (or chemical) abuse is any misuse of drugs, alcohol, medications and prescriptions, including the withholding of medication and over-medication.

From memory, chemical abuse was included as a result of the lengthy consultation process undertaken prior to the drafting of the *Closing The Gaps Report*.² In the final report it was referred to as 'substance abuse', defined as follows: Substance (or chemical) abuse is any misuse of drugs, alcohol, medications and prescriptions, including the withholding of medication and over-medication.' In the *Closing The Gaps Report*, the signs of substance abuse were listed as follows:

Over-sedation, reduced physical or mental activity, grogginess, confusion, reduced or absent therapeutic response to prescribed treatment may be the result of under-medication, failure to fill prescription.

Pills scattered about may be signs of inappropriate use of drugs, medications and/or alcohol, reduced or absent therapeutic response to prescribed treatment may be the result of under-medication, if the carer is a substance abuser, he/she may be giving drugs or alcohol to the adult person.

2. How well does Australia rate in terms of addressing the problem of abuse of older people compared with other countries?

In my view, we rate quite poorly. We have been incredibly slow to move on this issue in a concerted way. Our existing state laws are inadequate, the policy documents and interagency protocols that are in place are well-intentioned but are weak and ineffective and too many vulnerable people fall through the cracks in service provision or the scope of protective legislation (guardianship laws, mental health laws, even intervention orders legislation). A brief description of overseas jurisdictions is set out on pages 31-46 of the *Closing The Gaps Report*.³ John Chesterman's Report would also provide additional examples.⁴

¹ The Strategy is available from the Office for the Ageing's website: <http://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/about+us/publications+and+resources/plans/strategy+to+safeguard+the+rights+of+older+south+australians+2014-2021>.

² 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 for the Office for the Ageing and Disability Services, October 2011): http://www.opa.sa.gov.au/resources/rights_based_adult_protection.

³ Ibid.

⁴ John Chesterman, *Responding to Violence, Abuse, Exploitation and Neglect: Improving Our Protection of At-Risk Adults* (Report for the Winston Churchill Memorial Trust of Australia, July 2013) 17 http://www.churchilltrust.com.au/media/fellows/Chesterman_John_2012_Report.pdf.

3. What are some effective strategies other countries or jurisdictions are using to address abuse of older people? a. Could you provide examples of education programs to address abuse of older people that have been successful in other jurisdictions?

I believe this question is a reference to my discussion of community networks for adult protection in Canada. Community based approaches to adult protection have the benefit of activating local community groups in promoting awareness and education as well as enhancing a community's capacity to identify instances of abuse. In Canada, British Columbia has one of the more advanced community based models; a model which is supported and framed by Part 3 of the *Adult Guardianship Act 1996*. Whereas the Act gives authority to designated agencies to investigate reports of abuse, it also enables the Public Guardian or Trustee to organise networks of bodies, organisations or persons for the provisions of support and assistance to abused or neglected adults (section 61(c)). British Columbia has an Association of Community Response Networks, which funds nearly 40 CRNs throughout British Columbia. The CRNs are informal networks of agencies and organisations aimed at building the community's capacity to address and prevent abuse through coordinating help to those who need it, and promoting education and awareness at the local level. The benefits of CRNs are that more organisations and service providers know what to do when faced with abuse, more members of the public can recognise abuse and access help, there is more effective use of resources within local communities and the safeguarding of adults becomes a community owned issue.

In the absence of a legislative framework which authorises specific agencies to investigate and formally respond to abuse, a community network model in an Australian state or territory would have to be based on strengthening measures for education and awareness, and ensuring that communities know how to respond in cases of suspected, reported or actual abuse – not by investigating the case themselves, but through referring individuals to the key agencies who can take a more active role.

An information sheet prepared by the Public Guardian and Trustee of British Columbia on Community Response Networks describes the CRNs and their role in the following way:⁵

A Community Response network or CRN is a group of people and organisations in a community who work together to create a coordinated response to adult abuse, neglect and self-neglect by:

- Including everyone in the community who wants to be involved,
- Raising community awareness and providing education agreements or protocols among members about how organisations or agencies will respond when an adult needs help,
- Keeping track of how the response is working and,

CRN members can be anyone in the community concerned about adult abuse and neglect including designated agencies, police, community organisations serving specific groups, faith communities, financial institutions, advocacy organisations and concerned citizens.

⁵ *B.C.'s Adult Guardianship Laws: Supporting Self-Determination for Adults in British Columbia – Protecting Adults From Abuse, Neglect and Self Neglect*, Public Guardian and Trustee of British Columbia.

Strategies for safeguarding vulnerable adults would be enhanced in Australia by the development of similar community networks (by either State or local governments), along similar lines to the CRNs operating in British Columbia. The primary role of such networks would be to promote education and awareness about elder abuse and its signs, develop programs for raising community awareness, coordinate training or information seminars to various community groups on elder abuse and to provide a local contact point for individuals seeking advice or assistance about key agencies and service providers.

In the *Closing The Gaps Report*,⁶ it was recommended that South Australia develop a system of Community Networks for Adult Protection along similar lines to that which is in place in British Columbia. The Report made the following recommendation:

Recognising the importance of local governments in servicing the needs of older persons within the community, South Australia's 74 local council areas could be used to establish locally based and coordinated community networks for adult protection. While an education campaign would need to be developed for the entire State, the dissemination of information and the raising of awareness at the grass-roots level will be needed to support a State-wide education plan. Local governments, working with key agencies such as ARAS, could be encouraged to lead the development of community networks for adult protection, whether that was articulated as an element of new legislative provisions (as occurred in British Columbia) or through the adoption of a whole-of-government policy, together with the use of Memorandums of Understanding (MOUs).⁷

I would also recommend reading the overseas examples considered in the *Closing The Gaps Report* (pages 31-45), and recommend searching on the web for overseas advertising campaigns on elder abuse. From memory, Canada and Scotland have had several very effective campaigns.

3. Do you think NSW (or Australia) needs a standalone act to protect older people such as the Adult Support and Protection Act in Scotland? Or is an amendment to the Crimes Act sufficient?

Along the lines of the *Closing The Gaps Report* and my *Sydney Law Review* article, I would strongly recommend comprehensive adult protection legislation. The key features of such legislation were listed in the *Closing The Gaps Report* as including the following:

- Clear definitions of 'abuse',
 - Refer to the Final Report prepared by OPA with respect to the definitions adopted by the project participants.
- Powers conferred on a new adult protection unit to investigate abuse and intervene in cases of serious abuse.
 - Here the provisions of the British Columbia *Adult Guardianship Act 1996* can be seen to strike a reasonable balance between the rights of the adult and the intervention powers of the investigating agency. The *Scottish Adult Support and Protection Act 2007* takes a stronger approach to intervention.

⁶ 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 for the Office for the Ageing and Disability Services, October 2011): http://www.opa.sa.gov.au/resources/rights_based_adult_protection.

⁷ At 26.

- The adult protection unit should have powers to investigate without court order, and the ability to seek more interventionist orders from a court. They should also have powers to intervene in emergency situations. The British Columbia model provides a good example of how those powers can be framed.
- The adult protection unit should be conferred the responsibility to receive reports or notifications of abuse and to convene adult protection case conferences involving key agencies and organisation:
 - Case conferences could result in a range of possible outcomes that should be set out in the legislation, ranging from no action, to taking emergency action and seeking court orders.
- An obligation on agencies and organisations to assist in the investigation of a case of abuse or neglect and to comply with Information Sharing Guidelines:
 - This would impose a statutory obligation to cooperate with the adult protection unit, but would not necessarily override the Information Privacy Principles, depending on how the obligation was framed. Unless there was a clear statutory obligation to share information, Information Sharing Guidelines would need to be developed and should operate on a consent based system, which is more reflective of a human rights based approach.
 - Key agencies should be identified and required to participate in adult protection case conferences convened by the adult protection unit, and participate in a coordinated interagency response designed to support and protect a vulnerable older person.
- The adoption of a human rights based approach, whereby the rights and freedoms of older persons are clearly set out, together with guiding principles on how those rights and freedoms can be respected:
 - This approach would be best achieved through the inclusion of a Charter of Rights and Freedoms as a Schedule to the Act, and a statement in the Act which imposed an obligation upon agencies to take the Charter into account when making decisions which affect older persons, when engaging with or providing services to older persons, and when developing internal policies and procedures. The Act would make it expressly clear what the legal effect of the Charter would be, ensuring that it provided no new cause of action.
 - It is important to ensure that the legislation makes it expressly clear that the adult protection response framework operates on a system of consent, whereby a person with capacity has the ability to refuse treatment. It is also important that any plan or intervention devised should involve action which is the least restrictive of a person's rights and freedoms.
- The adoption of a system of voluntary reporting of abuse and neglect, but a system of mandatory response that involved stages or levels of response appropriate to the circumstances of each case, and ensuring that the rights and freedoms of the adult condition the nature of any response.
 - Here, the British Columbia Act provides an excellent example of how interventions can only occur without the adult's consent in the most serious and extreme cases.

- Provisions to protect workers who report abuse within the context of their employment and provisions which ensure the confidentiality of any person who reports abuse as well as protecting them from any liability arising from the making of a report.
 - The relevant sections of the *Adult Guardianship Act 1996* in British Columbia provide a useful reference point, from which those provisions could be modelled.
- The inclusion of a system for developing Community Networks for Adult Protection (CNAPs):
 - The British Columbia innovation should be replicated in South Australia and underpin the development of a State-wide education campaign around the abuse of older persons and the development of stronger support networks for vulnerable adults within local communities;
 - Local governments could be called upon to lead the establishment of CNAPs throughout the State, which would be open to all interested members of a community (ie, schools, sporting, cultural and religious organisations etc).
- The development of a practically focused Code of Practice, similar to that which supplements the Scottish *Adult Support and Protection Act 2007* in Scotland, to support and promote the implementation of the Act.

While similar results could be achieved through amendments to guardianship legislation, most guardianship laws do not have a rights based approach underpinning them, having been adopted in a different era and for very different purposes. I do not believe that simply amending criminal laws would provide the necessary legal framework to support early intervention or a coordinated multi-agency response framework. While criminal laws should be reviewed, along with intervention orders legislation, and the exercise of prosecutorial discretion, it should be conducted as part of broad review of existing laws when framing a new adult protection act.

4. Some have argued that care recipients who have received poor or inappropriate care should use legal avenues to seek redress for the poor care. What is your view on this? a. Are there examples in other jurisdictions or countries that address this issue or provide a higher standard of accountability and/or oversight?

I would recommend looking at the remedies and orders which are available under Scotland's Adult Protection Act. That statute enables the court to hand down a range of orders which are specifically directed at safeguarding the rights of the older victim, whilst not eroding their dignity, autonomy or right to exercise self-determination.

If poor or inappropriate care has been given, it may well constitute criminal neglect, or the breach of a duty of care. Existing criminal and other laws should be sufficient to cover victims living in the community, but persons in residential care facilities should have redress to better remedies under the *Aged Care Act 1997* (Cth). While the latter is perhaps beyond the scope of this inquiry, you can refer to my comments on this federal Act and the inadequacy of its complaints scheme in my *Sydney Law Review* article.

It should also be noted that legal redress from the courts should be available for the most serious of cases, but many cases of abuse or neglect are not pursued because victims do not wish to punish their children (often the perpetrators), criminal prosecutions are often not brought although victims speak of wanting the abuse to stop. Mediation (including shuttle mediation where the parties are not co-located in the same room) conducted by multidisciplinary teams (lawyers, social workers etc) would possibly provide a more appropriate method for resolving cases of abuse. Thus,

consideration of a civil remedy in a tribunal where mediation was mandated should be considered for cases where criminal prosecutions are neither likely nor available. There would need to be specific safeguards put in place, including independent advocacy for the victim. However, where an agency or provider is being paid by the government to provide care for an older person, I would create a specific criminal offence for cases of abuse and neglect, and consider other penalties for the organisation.

**5. Are you aware of any examples of government assessing the impact of chemical restraint?
a. If so, what are they?**

I am not aware of any specific assessments, however, public advocates and guardians, along with many front-line providers, would probably be familiar with cases where it takes place – both in residential care facilities and in people’s homes. I suspect that case files for agencies would include details of such abuse, but my research indicates that even where agencies are collecting information for personal files, no agency is collating de-identified data which can be used to track cases of abuse, trends in abuse, or outcomes of any intervention. This is one of the key barriers to getting prevalence data, along with the reluctance of victims to disclose instances of abuse.

At the hearing in Sydney, I was asked to provide the Committee with a copy of the Charter of Rights and Freedoms of Older Persons, which is part of the Strategy to Safeguard Older South Australians 2014-2021. That Charter can be accessed here:

<http://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/about+us/publications+and+resources/plans/strategy+to+safeguard+the+rights+of+older+south+australians+2014-2021>

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1 April 2016.**