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Adult safeguarding laws: Reviewing the proposal for a NSW Ageing and Disability Commissioner

by Lenny Roth

1. Introduction

On 15 December 2018, Premier Gladys Berejiklian announced that “a powerful and independent Ageing and Disability Commissioner will be established in NSW to investigate, and stamp out, the abuse of older people, and adults with disability”.¹ The Premier noted that this responded to a number of recent reviews including the NSW Ombudsman’s November 2018 report on abuse and neglect of vulnerable adults in NSW.²

This e-brief begins by looking at the prevalence of abuse of older people and adults with disability. It then outlines existing NSW agencies that play a role in protecting these groups from abuse. Next, it considers NSW and national review recommendations to establish agencies to protect “vulnerable” or “at-risk” adults from abuse and neglect. The key features of the proposal for a NSW Ageing and Disability Commissioner are then noted. The following sections examine “adult safeguarding laws” that have been enacted in South Australia and other countries.

Adult safeguarding laws seek to protect adults who have full decision-making ability (as well to those who do not) and a key issue with these laws is weighing up the need to protect an adult from harm with the adult’s right to autonomy: i.e. their right to make their own decisions about their lives.

2. Prevalence of abuse

Elder abuse is defined by the World Health Organisation as “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”.³

In recent years, there has been much concern about elder abuse in Australia. However, there is no official data on the prevalence

of elder abuse in this country.⁴ The *Elder Abuse National Research Project* aims to address this gap.⁵ Its objectives are to:

- develop a rigorous Australian definition of the term ‘elder abuse’ or ‘abuse of older people’
- test data collection tools to measure the abuse of older people against the agreed definition
- develop a data analysis plan and complete data analysis of defined Australian Bureau of Statistics data sets to answer key research questions about the abuse of older people.⁶

The project was due to be completed by the end of October 2018. At the timing of writing, no reports have been published.⁷

Globally, a 2017 meta-analysis of 52 studies of elder abuse in community settings, found a pooled prevalence rate of 15.7%, or about one in six adults aged 60 years or older.⁸ This included physical, sexual, psychological and financial abuse, as well as neglect.

Similarly, there is no official data on the abuse of people with disability. A 2015 Senate Committee [report](#) heard overwhelming anecdotal evidence of violence, abuse and neglect of people with disability, but noted that “there are currently no nationally consistent data sets available”.⁹

3. Existing agencies and policy

Public agencies and help lines

Commonwealth and NSW public agencies and help lines play a role in protecting older adults, and adults with disability, from abuse. Commonwealth agencies and help lines include:

- The [Department of Health](#) and other agencies that are responsible for regulating residential aged care;
- The [National Disability Abuse and Neglect Hotline](#) – receives and refers reports of abuse and neglect of people with disability in Commonwealth, State and Territory funded disability services; and
- The [NDIS Quality and Safeguards Commission](#) – an independent agency to improve the quality and safety of National Disability Insurance Scheme (NDIS) supports and services.

NSW public agencies and help lines include:

- [NSW Police](#) – the police can investigate reports of abuse and neglect where there is a suspected criminal offence or grounds for applying for an apprehended violence order;
- [NSW Elder Abuse Helpline & Resource Unit](#) – the Unit provides information, support and referrals relating to the abuse of older people living in the community;
- [Public Guardian](#) – the Public Guardian is a statutory officer who can be appointed to make important health and lifestyle decisions on behalf of a person who has a decision-making disability;

- [NSW Trustee and Guardian](#) – the Trustee and Guardian is a statutory officer who can be appointed to provide direct financial services for a person who has a decision-making disability;
- [NSW Civil and Administrative Tribunal](#) - determines applications about adults who are incapable of making their own decisions and who may require a legally appointed substitute decision maker; and
- [NSW Ombudsman](#) – the Ombudsman is a statutory officer that can investigate complaints about agencies delivering public services, including services for people with disabilities. “Reportable incidents” involving people with disabilities who live in supported group accommodation must be reported to the Ombudsman.¹⁰

Interagency policy on responding to elder abuse

The NSW Government’s [Preventing and responding to abuse of older people \(Elder Abuse\) NSW Interagency Policy](#) (June 2018) has four key themes:

1. Prevention and early identification
2. Support for people experiencing abuse
3. Intervention and protection
4. Collective action

A key element of the policy is that all agencies with significant interface with older people through service delivery must ensure that they have internal policies, procedures and protocols in place that reflect these themes.¹¹

The policy presents six principles designed to shape how the themes are to be implemented. One of these principles, “respect”, recognises an older person’s right to autonomy:

Where older people can make informed decisions about responses, they should be supported to do so. Where an individual makes an informed decision to not act in response to abuse, and the abuse is not criminal, that decision should be respected...¹²

4. NSW and national inquiries

NSW Parliamentary Committee (2016)

In a June 2016 [report](#) on elder abuse, the Legislative Council General Purpose Standing Committee No. 2 recommended:

That the NSW Government introduce legislation to establish a Public Advocate’s Office along the lines of the Victorian model, with powers to investigate complaints and allegations about abuse, neglect and exploitation of vulnerable adults, to initiate its own investigations where it considers this warranted, and to promote and protect the rights of vulnerable adults at risk of abuse. Further, that the operation of the Office be reviewed after three years.¹³

The Committee commented:

There was a clear call across a range of stakeholders for a body that has the power to investigate allegations of elder abuse. The committee heard that powers of the police, the Helpline, the Guardianship Division of NCAT and the Public Guardian are all circumscribed and that the gap between them leaves

people unprotected when they are very much at risk. There was also a clear call among many participants that the investigation gap should be filled by a statutory office of the Public Advocate, with that body being responsible for both investigating allegations and facilitating their resolution.¹⁴

The Committee noted that the Victorian Office of the Public Advocate:

...is an independent statutory office empowered with a number of functions under the *Guardianship and Administration Act 1986 (Vic)* and other legislation. Its roles include advocacy, investigation and guardianship services for people with cognitive impairment or mental ill health.¹⁵

Australian Law Reform Commission (2017)

In a June 2017 [report](#) on elder abuse, the Australian Law Reform Commission recommended that:

Adult safeguarding laws should be enacted in each state and territory. These laws should give adult safeguarding agencies the role of safeguarding and supporting 'at-risk adults'.¹⁶

In making this recommendation, the Commission referred to the 2016 NSW Legislative Council Committee report, a 2011 report on elder abuse in South Australia, and subsequent commentary by Professor Wendy Lacey, who was a co-author of that report. In a 2014 article, Professor Lacey stated:

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 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.¹⁷

The Commission also noted that such laws have been introduced in other jurisdictions, including in the United Kingdom and Canada.

The Commission concluded:

No government agency in Australia has the clear statutory role of safeguarding and supporting adults who, despite having full decision-making ability, are nevertheless at risk of abuse. In the ALRC's view, this protection and support should be provided by state adult safeguarding agencies.¹⁸

The Commission stated that adult safeguarding agencies need not be new agencies; the safeguarding function could be given to existing state and territory agencies, such as public advocates or government departments.¹⁹

The key features of the Commission's model are:

- At-risk adults would be people aged 18 years and over who:
 - have care and support needs; and
 - are being abused or neglected, or are at risk of abuse or neglect; and
 - are unable to protect themselves from abuse or neglect because of their care and support needs.

- Adult safeguarding agencies would generally need to secure the consent of an at-risk adult before investigating, or take any other action, in relation to the abuse or neglect of the adult. Exceptions would apply in serious cases of abuse or neglect; or if the adult could not be contacted or lacked capacity to give consent.
- The adult safeguarding agency would be able to:
 - coordinate legal, medical and other services for the adult;
 - meet with relevant government agencies and other bodies and professionals to prepare a plan to stop the abuse and support the adult;
 - report the abuse to the police;
 - apply for a court order in relation to the person thought to be committing the abuse (e.g. a violence intervention order).
- Adult safeguarding agencies would be given necessary coercive information-gathering powers, such as the power to require a person to answer questions and produce documents.
- People who, in good faith, report abuse to an adult safeguarding agency should be protected from legal liability and other consequences.
- Adult safeguarding agencies should work with relevant professional bodies to develop protocols for when prescribed professionals should refer the abuse of at-risk adults to adult safeguarding agencies.²⁰

On the issue of requiring the consent of an at-risk adult before taking any action, the Commission stated:

Whether state agencies should investigate and prosecute abuse when an abused person does not want the abuse investigated or prosecuted is a contested question that figures prominently in debates about responses to family violence. It is also an important question in relation to elder abuse.

Securing consent before taking action that will affect someone is one way of respecting that person's autonomy. Respecting autonomy is a guiding principle in this inquiry, and its importance has been widely stressed by stakeholders. Many consider that help should not be forced upon adults.

Some fear that adult safeguarding laws will result in the state second-guessing or undermining people's choices, and that vulnerable people will be given less liberty and autonomy than other people. The ALRC therefore recommends that adult safeguarding legislation should provide that consent should be obtained before an adult safeguarding agency investigates or responds to suspected abuse, except in limited circumstances.²¹

NSW Law Reform Commission (2018)

The NSW Law Reform Commission's May 2018 [report](#) on the *Guardianship Act 1987* recommended:

...that NSW establish a new independent statutory position known as the Public Advocate. The role of the Public Advocate would be to advocate for people in need of decision-making assistance, mediate decision-making disputes, provide information, advice and assistance about decision-making, and investigate cases of potential abuse, neglect and exploitation.²²

The Commission noted that submissions supported establishing this position and that it had been recommended by two inquiries including the 2016 Legislative Council Committee inquiry into elder abuse.

In support of the Public Advocate having investigative powers, the Commission noted that this was common to public guardians and advocates in other states and territories.²³ The Commission acknowledged that other agencies in NSW had powers to investigate relevant matters but there were gaps. The Commission commented:

In cases where it is more appropriate for another agency to conduct an investigation, we see the Public Advocate's role 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.²⁴

NSW Ombudsman (2018)

In November 2018, the NSW Ombudsman published a [report](#) on the abuse and neglect of adults with disability in community settings, such as the family home. The report concluded:

In the context of the persuasive evidence provided by our standing inquiry, and the findings and recommendations from NSW and national inquiries into elder abuse, there is 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.

We strongly support the recommendations of the NSW Law Reform Commission from its review of the *Guardianship Act 1987*, relating to the establishment of an independent statutory position of a Public Advocate to (among other things) investigate – of its own motion or in response to a complaint – cases of potential abuse and neglect of people who need decision-making assistance...²⁵

The “persuasive evidence” comprised 206 reports of alleged abuse and neglect received by the Ombudsman between August 2015 and October 2018.²⁶ These reports did not relate to the conduct of service providers; they were about the conduct of the person's family and other informal supports, and members of the community. The reports came from external agencies, individuals, and from the National Disability Abuse and Neglect Hotline.

The Ombudsman's standing inquiry was a temporary measure that would cease from 1 July 2019.²⁷ The Ombudsman explained:

...the main way that we pick up adults with disability under our inquiry function is through an arrangement between the Commonwealth and NSW that provides for NDIS support providers to be 'service providers' under [the *Community Services (Complaints, Reviews and Monitoring) Act 1993*]. That arrangement has been extended on a temporary basis until 1 July 2019.²⁸

NSW Parliamentary Committee (2018)

In a December 2018 [report](#) on the National Disability Insurance Scheme (NDIS) and provision of disability services in NSW, the Legislative Council General Purpose Standing Committee No. 2 again recommended that “the NSW Government establish an Office of a Public Advocate”.²⁹ It made this

recommendation in a section discussing the oversight of disability services for people outside the NDIS. The report stated:

The committee is alarmed by the figures presented by the NSW Ombudsman in relation to matters involving people with disability and abuse within family and community settings. The committee strongly supports establishing a Public Advocate with the powers to investigate cases of potential abuse, neglect and exploitation of people with disabilities, as well as being the lead agency to liaise with other government and non-government stakeholders and coordinate responses of alleged abuse.

The committee believes that the Public Advocate should not replace, but complement the important work carried out by community and individual advocacy organisations and that of the NSW Ombudsman.

5. Proposed Commissioner in NSW

The Premier's [media release](#) outlined the key features of the proposed Ageing and Disability Commissioner:

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.

The Commissioner will be given special powers which will include:

- The power to initiate investigations on its own motion, or following a referral or complaint;
- The power to apply for and execute a search warrant, and seize evidence, as part of an investigation; and
- Information gathering and sharing powers.

The establishment of the Commissioner will bring together and expand on the work of the Elder Abuse Helpline and Resource Unit, and the NSW Ombudsman's Standing Inquiry.³⁰

It also noted that the new Ageing and Disability Commissioner would start operations from 1 July 2019.

6. Laws in South Australia

Background

The [Office for the Ageing \(Adult Safeguarding\) Amendment Act 2018](#) was enacted on 22 November 2018. When introducing the Bill into Parliament, the Minister for Health and Wellbeing, Stephen Wade, said:

Legislative reform in relation to adult safeguarding was first raised in South Australia in 2011, with the findings of the *Closing the Gap* report, written by Professor Wendy Lacey. More recently, the recommendations of the Australian Law Reform Commission's inquiring into *Protecting the Rights of Older Australians from Abuse* and the *Final Report of the Joint Committee on Matters Relating to Elder Abuse* have all called on the government to develop adult safeguarding legislation, including the establishment of a unit focused on the prevention of elder abuse.³¹

The Minister added:

Professor Wendy Lacey...has worked closely with the government to develop the [Bill]. This bill is the first of its kind in Australia and seeks to fill the gaps reported in our current system, in particular the lack of a single government agency with a clear statutory role for safeguarding vulnerable adults who, despite having full decision-making capacity, are experiencing abuse or neglect and are left to navigate complex systems alone. Events relating to the Oakden Older Persons Mental Health Service highlighted the need for safeguarding legislation...³²

Act summary

A summary of the Act is presented in Table 1.

Table 1: South Australian laws

Feature	Description
New agency	Adult Safeguarding Unit (ASU), which may be located within the Office of Ageing Well (s 13). Its functions include: <ul style="list-style-type: none"> • promoting and advocating for the rights and interests of vulnerable adults; • investigating reports relating to the suspected abuse of vulnerable adults; and • preparing and publishing reports on matters relating to the abuse of vulnerable adults at a systemic level. (s 15)
Vulnerable adult	A vulnerable adult is “an adult person who, by reason of age, ill health, disability, social isolation, dependence on others or other disadvantage, is vulnerable to abuse”. (s 3) Abuse includes physical, sexual, emotional, psychological, and financial abuse of the vulnerable adult (s 4). It also includes a denial, without reasonable excuse, of the basic rights of the vulnerable adult. (s 4)
Principles	The Act outlines several principles including: (h) the best approach to safeguarding vulnerable adults from abuse is through coordinating a multi-agency and multi-disciplinary response, drawing on the expertise of relevant persons and bodies in order to effectively support and empower vulnerable adults to safeguard their rights and mitigate against abuse. ... (f) 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. (s 12)
Reporting abuse	A person may report to the ASU a suspicion that a vulnerable adult is at risk of abuse. (s 22)
Action by ASU	The Director of the ASU must assess each report and take at least one of the following actions: <ul style="list-style-type: none"> • Investigate the matter; • Refer the matter to an appropriate State authority or other person or body; • Decline to take further action. (s 23)

Feature	Description
Adult's consent required	Generally, the ASU should not take action in respect of a report unless the vulnerable adult to whom the report or notification relates consents to the action being taken (s 24). However, the ASU may take action without consent in certain circumstances such as if the vulnerable adult's life or physical safety is at immediate risk. (s 22)
Investigative powers	<p>Authorised officers have a range of powers to investigate a matter including:</p> <ul style="list-style-type: none"> entering on and inspecting any premises; requiring a person to produce books of account or records for inspection; requiring any person who is in a position to provide information relating to the vulnerable adult to answer any question on that subject; by notice in writing requiring a specified person (including a State authority) to provide them with information. (ss 19, 42)
Court orders	<p>The Director of the ASU may apply to the Magistrate's Court for certain types of order if the Director reasonably suspects that a vulnerable adult is at risk of abuse and the Director is of the opinion that such orders are necessary or appropriate to protect the vulnerable adult from abuse, or to properly assess whether the vulnerable adult has been abused, or is at risk of abuse. (s 31)</p> <p>The orders that the Court can make are:</p> <ul style="list-style-type: none"> An order authorising or requiring an examination or assessment of a specified kind of the vulnerable adult; 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; Such other orders as may be necessary or appropriate to enable the functions of the ASU to be performed in respect of the vulnerable adult. (s 33)
Appeals	A person who is aggrieved by a decision of the ASU or the Director is entitled to a review of the decision. An internal review is to be carried out by the Chief Executive of the Department (s 39). If a person is dissatisfied with the determination of the Chief Executive, and it relates to circumstances in which a vulnerable adult is suspected of being at risk of serious abuse, they may apply to the Ombudsman for an external review. (s 40)
Exchange of information	The ASU and a State authority may provide certain information to each other if the provider reasonably believes that the information would assist the recipient to perform official functions relating to the health or wellbeing of a vulnerable adult, or to manage any risk to a vulnerable adult that might arise in the recipient's capacity as an employer or provider of services. (s 43)

The Minister noted that the legislation and operation of the ASU:

...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.³³

The SA Government intends for the Act to come into effect before the end of the 2018-19 financial year.³⁴ There will be a staged implementation. For the first three years, the Act will only apply to a vulnerable adult who is aged 65 years or older (50 years or older for Aboriginal persons) (Sch 1).

The 2018-19 Budget allocates \$638,000 for the establishment of the ASU, growing to \$756,000 per annum from 2021.³⁵

Issues in debate

All political parties supported the Bill.³⁶ The main concern raised by the Opposition was that the Adult Safeguarding Unit lacked independence:

...one of the positive benefits of what the committee had recommended in terms of putting it in the Office of the Public Advocate was that that would carry a high degree of independence from the government of the day. Currently, the legislation before us does not place any independence in relation to how that would be administered. It is a government agency like any other. It is a government department like any other.³⁷

The Minister said that the Office of the Public Advocate was considered but was not the preferred option because of:

... the potential conflict of interest that may be created in instances where the Office of the Public Advocate is required to act as both advocate and investigator and the perception that locating the unit in the Office of the Public Advocate may undermine the independence of that office in advocating for persons with limited capacity. Locating the new adult safeguarding unit within the Office of the Public Advocate would also complicate the governance arrangements with crossing over of responsibilities between departments and ministers.³⁸

7. Laws in other countries

Adult safeguarding laws have been enacted in other countries including the United States (State laws: since the 1970s);³⁹ Canada (Provincial laws: since the 1970s);⁴⁰ and the United Kingdom (Scotland was the first in 2007, followed by separate laws in England and Wales in 2014).⁴¹

The following brief overview has been provided of laws in the United States:

...while Congress declared “protection from abuse, neglect and exploitation” a national objective in its Older Americans Act in 1965, each state was free to define actionable conduct and to implement civil interventions and criminal penalties. Consequently, at most, US states have “similar” elder abuse systems. Federal funding grants influenced development of protective service systems in all states: eight states have laws specifically addressing elder abuse, 14 have laws which address protection of both vulnerable (or disabled) adults and older people and 29 have more generic adult protection laws. Growing awareness and concern about elder abuse led to enactment of the federal Elder Justice Act (2009), providing an opportunity for nationalised reporting and, thus, greater consistency in approaches...⁴²

There are four different types of adult protection regimes in Canada:

- Comprehensive Adult Protection Regimes (British Columbia, the Yukon, New Brunswick and Prince Edward Island): have enacted laws that specifically address adult abuse and neglect, which apply to all adults regardless of location or care recipient status. Such regimes tend to be embedded in supported decision-making or guardianship legislation, and to embody a least-restrictive approach. Definitions of abuse tend to employ rights-based language and agencies are generally equipped with powers to investigate abuse with a range of possible outcomes.
 - Residential Care Regimes (Ontario, Alberta, Manitoba): no specific legislation dealing with abuse or neglect in respect of persons living outside of social/ health care centres.
 - Protectionist Regimes (Nova Scotia): characterised as protectionist because of broad mandatory reporting and response obligations, as well as an emphasis on the welfare of the adult as opposed to respect for their views.
- 'Patchwork' Regimes (Northwest Territories, Nunavut, Saskatchewan, Québec): have not implemented specific adult abuse and neglect legislation, but the subject matter falls within the scope of other legislation such as domestic violence statutes, adult guardianship and human rights laws.⁴³

Variations between the adult safeguarding laws within the United Kingdom jurisdictions have also been noted. For example:

In England, the requirement to ensure enquiries are made into allegations of abuse or neglect might be characterised as a minimalist or least interventionist approach...The Welsh legislation goes further; in addition to the requirement that local authorities make enquiries, a power of entry to facilitate practitioners in speaking in private with adults suspected of being at risk of abuse is provided. The Scottish legislation contains a wider range of powers and duties that distinguish between initial inquiries and fuller investigations. Scotland also created 'Protection Orders' authorizing stronger action in response to higher thresholds of serious harm...⁴⁴

The 2011 *Closing the Gaps* report in South Australia referred to the laws in Scotland and British Columbia in making its recommendations.⁴⁵ The Australian Law Reform Commission had regard to adult safeguarding laws in the United Kingdom and British Columbia when formulating its proposals. Several other reports have also compared laws across these and other jurisdictions.⁴⁶ The Scottish laws were selected for a case study (see below) because they were the first laws of this type enacted in the United Kingdom; they are often cited in international comparisons; and more commentary was available on the operation of these laws than the British Columbia laws.

8. Scotland: a case study

Background

The [*Adult Support and Protection \(Scotland\) Act 2007*](#) was enacted "to provide support and protection for those people in our communities who are vulnerable to harm, inadvertent or otherwise, but who are not covered by existing legislation".⁴⁷ In 1997, the Scottish Law Commission recommended new laws to protect vulnerable adults.⁴⁸ A consultation paper was released in 2001 and, according to the government, respondents indicated strong support for the measures.⁴⁹ Further impetus for the legislation came from the 2004 Borders investigation into the care of a woman with learning disabilities who had suffered abuse over many years.⁵⁰

Act summary

The key features of the Act are outlined in Table 2.

Table 2: Scottish laws

Feature	Description
Key agency	Local Councils
Adult at risk	<p>An adult is a person aged over 16. (s 53)</p> <p>Adults at risk are those who:</p> <ul style="list-style-type: none"> (a) are unable to safeguard their own well-being, property, rights or other interests, and (b) are at risk of harm, and (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. (s 3) <p>Harm includes physical, psychological, and financial harm. (s 53)</p>
Principles	<p>Several principles including that a person can only intervene if the intervention - (a) will provide benefit to the adult which could not reasonably be provided without intervening in the adult's affairs, and (b) is, of the range of options likely to fulfil the object of the intervention, the least restrictive to the adult's freedom. (s 1)</p>
Duty to inquire	<p>Council has a duty to make inquiries if it believes (a) that an adult is at risk, and (b) that it might need to intervene in order to protect the person's wellbeing, property or financial affairs. (s 4)</p>
Duty to report	<p>Certain public bodies and office holders (e.g. Health Board, Chief Constable) have a duty to report a case to the council if it believes that (a) a person is an adult at risk, and (b) action needs to be taken to protect that person from harm. (s 5)</p>
Cooperation	<p>Certain public bodies and office holders must cooperate with a council making inquiries, and with each other. (s 5)</p>
Powers	<p>Council officers have certain powers to conduct investigations: e.g. to enter a place, to interview any adult in the place, and to require a person to provide records relating to the adult at risk. (ss 7-10)</p>
Action	<p>If a council considers that it needs to intervene in order to protect an adult at risk of harm, the council must have regard to the importance of providing appropriate services, including independent advocacy services to the adult (s 6). Council can also apply to the sheriff (i.e. a magistrate) for a protection order.</p>
Court orders	<p>There are three types of protection order:</p> <ul style="list-style-type: none"> • Assessment order – authorises a council officer to take a person from a place being visited to allow for that person to be interviewed or medically examined; (s 11) • Removal order – authorises a council officer to move a person to a specified place and to take steps to protect the moved person from harm; (s 14) • Banning order - bans the subject of the order from being in a specified place; (s 19) <p>The sheriff can only make a removal or banning order if satisfied that an adult at risk is likely to be seriously harmed. (s 15, 20)</p>

Feature	Description
	The sheriff must not make a protection order if the adult at risk has refused to consent to the order (s 35). However, a refusal to consent may be ignored if the sheriff believes (a) that the adult at risk has been unduly pressurised to refuse consent, and (b) that there are no steps which could reasonably be taken with the adult's consent which would protect the adult from the harm. (s 35)
Committees	Each council is required to establish an Adult Protection Committee, including representatives of the council and of certain public bodies and office holders. Its functions include reviewing the procedures and practices of the public bodies and office holders, and giving them information and advice. (ss 42, 43)
Guidance	Code of Practice

Issues in debate

All political parties supported the Bill.⁵¹ However, the Opposition did have some concerns:

The minister referred to the debate about balancing the protection of the individual against their liberty and rights, including the right to be unsafe and to take risks. We are talking about individuals who have capacity, and the idea of overriding someone's consent in such a situation makes many of us feel uneasy. We will certainly watch the implementation closely, and we would suggest careful monitoring by the Scottish Executive Health Department in the first year of operation, especially if we are to satisfy some of the on-going concerns of certain groups—groups representing those with a disability were particularly concerned about the bill.⁵²

The Health Committee's [report](#) on the Bill noted the concerns of organisations representing people with disabilities:

The main concerns of these organisations are that:

- the Bill is unnecessary given existing legislation and criminal law
- it discriminates against those with disabilities by specifying them in the definition of adults at risk and allowing their consent to be overridden, even if they have capacity.
- it overrides some beneficial measures contained in existing legislation.

There is thus a concern that aspects of the Bill could detract from the autonomy of people with disabilities rather than enhancing it.⁵³

Operation of Act

A 2012 article by Mackay et al explored the perspectives of 29 practitioners in applying the Act. By way of introduction, it noted:

...social work services have always worked with adults who might be at risk of harm, and Scotland like the other UK countries had what was formerly called a protection of vulnerable adults policy. Therefore, a question that arises is the extent to which the [the Act] has changed the practice of front-line social work service practitioners who have the lead responsibility in relation to the new investigative and protective powers.⁵⁴

The article concluded:

This research demonstrates that the [Act] has had a positive effect on safeguarding practice in Scotland. The clearest differences are in relation to what is “new” within the law: the protection orders, power to access records, the formal role of the council officer in undertaking the duty of investigation and the duty of public bodies to cooperate. First, it has 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.⁵⁵

A 2014 article by Preston-Shoot and Cornish considered the experiences of people who had interacted with adult protection services, including service users, carers, family members and social work staff. It noted that service users had reported improved quality of life and safety as a result of the support received under the Act.⁵⁶ The article also commented:

The Act has achieved a balance between autonomy and protection. The low number of orders, despite fears that the Act would be used intrusively and to compel people to do what agencies saw as in their best interests, was evidence that many situations had been resolved by contact, use of relationships and voluntary measures.⁵⁷

A 2017 article by Mackay and Notman reported on how the Act had been implemented within Perth and Kinross Council.⁵⁸ Information was mainly sourced from the council’s biennial reports for the Scottish Government and their internal annual data and quality reports. The article noted that since the Act came into effect only seven protection orders had been made in the council area. The article concluded that the case study:

...highlights the contribution a standalone statute can make to raising awareness of harm against adults and to developing better ways of addressing it. What should not be downplayed is the amount of work required at the local level to maintain this level of awareness, to continue to provide training and informal advice. Yet, challenges remain. There is a need for [National Health Service] governance processes and staff to recognise the potential value of the [Act] for patients who have been harmed. Another challenge is that there is no legal duty on private and voluntary agencies to cooperate in the same way as exists for public bodies.

This case study also demonstrates that if you give social work services extra powers, they can develop proportionate ways of deploying them. Investigations and protection orders are a very small part of the statutory response to adult at risk referrals. Yet, protection orders are an important tool in the few situations where other legal avenues cannot be pursued and serious harm is present...⁵⁹

In July 2018, the Care Inspectorate published a [report](#) on a joint inspection of six partnerships across Scotland.⁶⁰ The report made a wide range of findings about adult support and protection including that:

...People who work in the adult protection field often comment that adult support and protection is behind child protection in terms of:

- the priority afforded to it
- maturity of the key underpinning processes
- commitment of the partners

- knowledge and skills of the frontline staff who carry out the critical work.

The overwhelming evidence from our joint inspection of adult support and protection was that adult protection does somewhat lag behind child protection. Scotland has made good progress in 10 years to develop awareness of adult protection, create and train the workforce and put effective governance systems in place. The results of this are that many adults at risk of harm are safe, protected, and supported. Their wellbeing and quality of life has improved. We have come far but inevitably, there is further to travel.⁶¹

9. Conclusion

The proposal for a NSW Ageing and Disability Commissioner is in response to several NSW and national reports that identified the limitations of existing agencies in investigating the abuse of vulnerable adults. The full details of the proposed Commissioner have not yet been outlined. It is therefore difficult to make comparisons with the adult safeguarding systems in South Australia and Scotland. Key questions to consider are:

- whether the Commissioner's jurisdiction will extend to all vulnerable or "at-risk" adults (as in South Australia and Scotland);
- whether any agencies or persons will have a duty to report abuse to the Commissioner (as in Scotland);
- whether the adult's consent will be required before the Commissioner can take action (as in South Australia, with limited exceptions); and
- whether the Commissioner can apply to a court for orders to protect the adult from abuse (as in South Australia and Scotland).

¹ Berejiklian G, [New Commissioner to Protect Older People and Adults with Disability](#), Media Release, 15 December 2018.

² NSW Ombudsman, [Abuse and neglect of vulnerable adults in NSW – the need for action](#), A Special Report to Parliament under section 31 of the Ombudsman Act 1974, 2 November 2018

³ World Health Organization, [Elder abuse](#), [website – accessed 7 December 2018].

⁴ Australian Institute of Health and Welfare, [Older Australia at a Glance](#), September 2018 [website – accessed 7 December 2018].

⁵ Australian Institute of Family Studies, [Elder Abuse National Research Strengthening the Evidence Base – Stage One](#), [website – accessed 7 December 2018].

⁶ Australian Institute of Family Studies, note 5.

⁷ Australian Institute of Family Studies, note 5.

⁸ Yon Y et al, [Elder abuse prevalence in community settings: a systematic review and meta-analysis](#), *Lancet Global Health*, 2017, 5(2), p E147-E156.

⁹ Senate Community Affairs References Committee, [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](#), 25 November 2015, p 37, 45-48, 281.

¹⁰ [Ombudsman Act 1974 \(NSW\)](#), Part 3C.

¹¹ NSW Government, [Preventing and responding to abuse of older people \(Elder Abuse\) NSW Interagency Policy](#), June 2018, p 8.

¹² NSW Government, note 11, p 8.

¹³ Legislative Council General Purpose Standing Committee No. 2, [Elder abuse in New South Wales](#), 24 June 2016, Rec 11, p 143.

¹⁴ Legislative Council General Purpose Standing Committee No. 2, note 13, p 142.

¹⁵ Legislative Council General Purpose Standing Committee No. 2, note 13, p 134.

- ¹⁶ Australian Law Reform Commission, [Elder Abuse – A National Legal Response](#), Report 131, 14 June 2017, Rec 14-1, p 377.
- ¹⁷ Lacey W, [Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia](#), 2014, *Sydney Law Review* 36, p 99, 105.
- ¹⁸ Australian Law Reform Commission, note 16, p 384.
- ¹⁹ Australian Law Reform Commission, note 16, p 384.
- ²⁰ Australian Law Reform Commission, note 16, Rec 14-2 to 14-8, p 386-413.
- ²¹ Australian Law Reform Commission, note 16, p 392-393.
- ²² NSW Law Reform Commission, [Review of the Guardianship Act 1987](#), Report 145, May 2018, p 206.
- ²³ NSW Law Reform Commission, note 22, p 216.
- ²⁴ NSW Law Reform Commission, note 22, p 217.
- ²⁵ NSW Ombudsman, [Abuse and neglect of vulnerable adults in NSW – the need for action](#), A Special Report to Parliament under section 31 of the Ombudsman Act 1974, 2 November 2018, p 2. .
- ²⁶ NSW Ombudsman, note 25, p 1.
- ²⁷ NSW Ombudsman, note 25, p 19.
- ²⁸ NSW Ombudsman, note 25, p 19.
- ²⁹ Legislative Council General Purpose Standing Committee No. 2, [Implementation of the National Disability Insurance Scheme and the provision of disability services in New South Wales](#), 6 December 2018, Rec 23, p 168.
- ³⁰ Berejiklian G, note 1.
- ³¹ Wade S, [SA Parliamentary Debates \(LC\)](#), 20 June 2018, p 565. The reports mentioned include Office of the Public Advocate and University of South Australia, [Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People](#), October 2011; and Joint Committee on matters relating to Elder Abuse, [Final Report of the Joint Committee on matters relating to Elder Abuse](#), 31 October 2017.
[Citation of reports mentioned in quote]
- ³² Wade S, [SA Parliamentary Debates \(LC\)](#) , 20 June 2018, p 566. See also Groves A et al, [The Oakden Report](#), 10 April 2017.
- ³³ Wade S, [SA Parliamentary Debates \(LC\)](#), 20 June 2018, p 567.
- ³⁴ Van Holst Pellekaan D, [SA Parliamentary Debates \(LA\)](#), 13 November 2018, p 3606.
- ³⁵ Wade S, [SA Parliamentary Debates \(LC\)](#), 23 October 2018, p 1720.
- ³⁶ See [SA Parliamentary Debates \(LC\)](#), 6 September, 19 September, 18 October, and 23 October 2018; and [SA Parliamentary Debates \(LA\)](#), 25 October, 13 November 2018.
- ³⁷ Picton, [SA Parliamentary Debates \(LA\)](#), 13 November 2018, p 3549.
- ³⁸ Wade S, [SA Parliamentary Debates \(LC\)](#), 23 October 2018, p 1724.
- ³⁹ World Health Organization, [World report on violence and health](#), 2002, p 138.
- ⁴⁰ World Health Organization, note 39, p 138.
- ⁴¹ [Adult Support and Protection \(Scotland\) Act 2007](#); [Care Act 2014](#); and [Social Services and Well-being \(Wales\) Act 2014](#)
- ⁴² Montgomery L et al, [Implications of divergences in Adult Protection legislation](#), *Journal of Adult Protection*, 2016, 18(3), p 152.
- ⁴³ HSE National Safeguarding Office and Trigraph Limited, [Adult Safeguarding Legislation and Policy Rapid Realist Literature Review](#), May 2017, p 58. This paper added that “Québec adopted adult safeguarding legislation in May 2017” (p 58-59).
- ⁴⁴ Montgomery L et al, note 42, p 154.
- ⁴⁵ Office of the Public Advocate and University of South Australia, [Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People](#), October 2011.
- ⁴⁶ See Ireland Health Information and Quality Authority and Mental Health Commission, [Adult Safeguarding: Background document to support the development of national standards for adult safeguarding](#), May 2018; Donnelly S and O'Brien M, [Speaking Up about Adult Harm: Options for Policy and Practice in the Irish Context](#), March 2018; HSE National Safeguarding Office and Trigraph Limited, [Adult Safeguarding Legislation and Policy Rapid Realist Literature Review](#), May 2017; Montgomery L et al, [Implications of divergences in Adult Protection legislation](#), *Journal of Adult Protection*, 2016, 18(3), p 149; Commissioner for Older People for Northern Ireland, [A review of the adult safeguarding framework in Northern Ireland, the UK, Ireland and Internationally](#), 30 January 2014; Chesterman J, [Responding to violence, abuse, exploitation and neglect: Improving our protection of at-risk adults](#), Report for the Winston Churchill Memorial Trust of Australia, 30 July 2013.
- ⁴⁷ Macdonald L, [Official Report](#), 23 November 2006.
- ⁴⁸ Scottish Law Commission, [Report on Vulnerable Adults](#), Report 158, 1997.

⁴⁹ Macdonald L, [Official Report](#), 23 November 2006.

⁵⁰ Social Work Services Inspectorate and Mental Welfare Commission, [Investigations into Scottish Borders Council and NHS Borders Services for People with Learning Disabilities: Joint Statement from the Mental Welfare Commission and the Social Work Services Inspectorate](#), April 2004

⁵¹ Scottish Parliament, [Adult Support and Protection \(Scotland\) Bill](#), [website accessed 7 December 2018].

⁵² Robison S, [Official Report](#), 15 February 2007.

⁵³ Scottish Parliament Health Committee, [The Adult Support and Protection \(Scotland\) Bill](#), 16th Report, 2006 (Session 2), paras 73-74.

⁵⁴ Mackay K et al, [What difference does the Adult Support and Protection \(Scotland\) 2007 make to social work service practitioners' safeguarding practice?](#) *Journal of Adult Protection*, 2012, 14(4), p 197.

⁵⁵ Mackay K et al, note 54, p 204.

⁵⁶ Preston-Shoot M and Cornish S, [Paternalism or proportionality? Experiences and outcomes of the Adult Support and Protection \(Scotland\) Act 2007](#), *Journal of Adult Protection*, 2014, 16(1), p 14.

⁵⁷ Preston-Shoot M and Cornish S, note 56, p 14.

⁵⁸ Mackay K and Notman M, [Adult Support and Protection \(Scotland\) Act 2007: reflections on developing practice and present day challenges](#), *Journal of Adult Protection*, 2017, 19(4), p 191.

⁵⁹ Mackay and Notman, note 58, p 196.

⁶⁰ Care Inspectorate and HM Inspectorate of Constabulary in Scotland, [Joint inspection of adult support and protection in these partnerships North Ayrshire, Highland, Dundee City, Aberdeenshire, East Dunbartonshire and Midlothian](#), July 2018, p 16.

⁶¹ Care Inspectorate and HM Inspectorate of Constabulary in Scotland, note 60, p 16.

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