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**ACT Greens submission to ACT Government’s proposed response to Elder Abuse in the ACT.**

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**Recommendations**

1. Any decisions to strengthen protections against ‘abuse against older persons’, should in fact be couched as ‘abuse against vulnerable adults’ whilst recognising the particular vulnerabilities (societal, medical and psychological) that an older person can experience.
  
2. That the ACT Government advocates for research on sexual assault against older people as a research priority under *the National Plan to Respond to the Abuse of Older Australians 2019-2023*.
  
3. That the ACT Government explore additional/alternative ways to strengthen protections against abuse of older people by:
  - a. signing the national Code for Unregistered Health Workers;
  - b. considering expansion of the Official Visitor Scheme to include aged care services;
  - c. ensuring all aged care workers have undergone a Working With Vulnerable People check; and
  - d. considering expansion of the Reportable Conduct Scheme to include abuse against vulnerable adults and listing aged care service providers as entities under the scheme.

4. That the ACT Human Rights Commission, the Public Advocate, the ACT Disability and Community Services and Health Commissioner, and the Public Trustee and Guardian are adequately resourced to exercise their investigative powers in relation to allegation of abuse against older people.
5. That consideration be given to the role of the Ombudsman's office, as the ACT's local preventative mechanism under the OPCAT, with regard to aged care and disability services where a person is not free to leave a facility.
6. That the ACT Government amend relevant existing offences to make violence and abuse against older people and vulnerable adults an aggravating factor.
7. That the ACT Government considers South Australia's definition of vulnerable adult for inclusion in any future legal reforms in the ACT.
8. That aggravating factors should not only include age but could also include assessment of the level of vulnerability of the victim of the crime.
9. That the ACT Government consistently strengthen definitions of all forms of abuse, whether against child, domestic partner or vulnerable adult to include physical, sexual, emotional or psychological abuse, neglect and financial abuse or exploitation, and coercion.
10. That consistent definitions of violence and abuse are used across all relevant ACT legislation.
11. That review of the ACT Family Violence Act considers the inclusion of violence and abuse against older people and other vulnerable adults and include carers in the meaning of 'relative'.
12. That the ACT Government expands the ACAT's powers to compensate an older person for loss caused by an attorney, manager or guardian's misuse of their power.
13. That witnessing provisions for Enduring Powers of Attorney (EPOAs) are introduced to ensure that attorneys are aware of their roles and responsibilities.
14. That a concerted education campaign about abuse of older persons, and obligations under POAs and EPOAs is undertaken and targeted at a range of specific audiences.
15. That the resolution of issues arising from financial abuse and misuse of powers of attorney includes opportunities for restorative approaches and practice.
16. Access to interpreters in tribunal hearings should be provided free of charge for people who require this service.

17. That the national online register for EPOAs be extended to include enduring guardianship arrangements.

18. That the ACT Government consider setting up a Will bank.

## Overview

The ACT Greens recognise and support the concept that older people deserve to be protected from abuse, harm, and exploitation, and to be treated with dignity and respect. We also recognise that addressing the issue of elder abuse does not lie solely at Territory level and that there is considerable work occurring at a national level to address this issue.

Notwithstanding the existence of the National Plan to Respond to the Abuse of Older Australians 2019-2023, we do agree that the Territory government has a role to play in protecting older and vulnerable Canberrans and that every effort must be taken to ensure their protection.

We are supportive of the ACT Government's intentions to increase protections for older people in our community, and provide our input through this submission.

Broadly speaking, the ACT Greens support the need for greater awareness of elder abuse, including what it is, how it should be addressed and responded to, and clear information about any criminal justice and other consequences for abusing older people. Where possible, however, we prefer to use the term 'abuse against older people' (or an older person), so as not to confuse the interpretation of the word 'elder' with its application in Aboriginal and Torres Strait islander communities

Whilst it is evident that many people over 60 or 65 continue to live full and productive lives, it is also clear that some people become more vulnerable as they age. This is particularly the case for those whose mobility, cognition or communication ability becomes impaired and it is these older people who are more vulnerable to abuse.

There are a large number of adults under the age of 65 however who do have mobility, cognition or communication impairment, and it is our recommendation that any decisions to strengthen protections against abuse against older persons, should in fact be couched as 'abuse against vulnerable adults'. By definition, vulnerable adults would include older people.

In this way, a wider number of people would benefit from the Government's efforts to afford greater protection of fundamental human rights.

**Recommendation 1:** Any decisions to strengthen protections against abuse against older persons, should in fact be couched as 'abuse against vulnerable adults' whilst recognising the particular vulnerabilities (social, medical, psychological) that an older person can experience.

That said, we note that violence and assault are already crimes under the Crimes Act and a standalone offence to capture violence against older people should not be required on the

grounds that such conduct is already prohibited under existing ACT laws. Perpetrating violence against *anyone* in our community is already a crime.

Whilst violence and assault are already included in the ACT Statute, there is a need for a more holistic and encompassing definition of abuse, to ensure that issues such as financial abuse and neglect are covered. For example, the definition of neglect in S39 of *The Crimes Act 1900* only applies to children and young people, but it could be expanded to include that “a person must not ill-treat or abuse a vulnerable adult in the person’s care, or neglect a vulnerable adult for whom she or he has a caring role.”

Definitions of financial or economic abuse against vulnerable adults are already included in the *Family Violence Act 2016*, however these only apply if the abuse is perpetrated by a family member. The ACT Greens suggest that consideration is given to expanding the group of people against whom financial or economic abuse can occur, regardless of any familial relationship with the person allegedly perpetrating the abuse.

Furthermore, the definitional description of elder abuse in the Discussion Paper is not all inclusive of various forms of abuse that older people may experience. Whilst we know that by far the most common form of elder abuse is financial abuse, the most serious form of elder abuse is sexual abuse, and this is not included where it is described on page 5 which details various forms of abuse including physical violence, emotional abuse, neglect, and financial abuse).

Rates of sexual abuse and assault against older people are very difficult to quantify, as there is a lack of specific research on this topic. However, some work has been done in this area and we would recommend a report undertaken by Australian Research Centre in Sex, Health and Society,<sup>1</sup> called Norma’s Project. Whilst not specific to this particular discussion paper, we recommend that the ACT advocates for research on sexual assault against older people as a research priority under the National Plan.

**Recommendation 2:** that the ACT Government advocates for research on sexual assault against older people as a research priority under the *National Plan to Respond to the Abuse of Older Australians 2019-2023*.

A number of participants interviewed for Norma’s Project reported that when allegations of sexual abuse were made in residential aged care the alleged perpetrators were dismissed or left the organisation of their own accord – to work in other aged care facilities. Several participants raised concerns that perpetrators who targeted older women with dementia, dysphagia or cognitive impairment were free to move from one facility to another and may have continued perpetrating abuse.

Worst case scenarios would of course be consistent with the worst cases uncovered in the Royal Commission into Institutional Child Sexual Assault where victims are not believed and

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<sup>1</sup> <http://normasproject.weebly.com/uploads/1/8/6/8/18685098/researchreport.pdf>

perpetrators are not held to account, but rather, they are moved around between institutions to commit further abuse.

## Options for improving protection for older people experiencing elder abuse

There are several ways to improve protection for older people experiencing elder abuse in the ACT, including consideration of mandatory reporting of all suspected abuse and neglect of vulnerable adults, ensuring that workers in the aged care sector all have working with vulnerable people checks and signing on to the National Code for Unregistered Health Workers, which would include aged care workers. Additionally, expansion of the Official Visitor Scheme to include aged care services would increase protections.

It may be useful to identify ways of recording staff members who have had multiple reports of sexual or other abuse made against them – in ways that this information could be picked up on police checks (or similar processes). This could assist aged care service providers in ensuring they recruit appropriate staff to deliver high quality of care.

Consideration could also be given to expanding the current reportable conduct scheme to include vulnerable adults. This of course would apply to existing entities covered by the scheme but could also specifically include aged care and disability support service providers and would enforce corporate accountability of those providers. It is worth noting that the NSW reportable conduct scheme already includes disability services.

**Recommendation 3:** That the ACT Government explore additional/alternative ways to strengthen protections against abuse of older people by:

- signing the national Code for Unregistered Health Workers;
- considering expansion of the official Visitors Scheme to include Aged care services;
- ensuring all aged care workers have undergone a Working With Vulnerable People check; and
- considering expansion of the Reportable Conduct Scheme to include abuse against vulnerable adults and listing aged care service providers as entities under the scheme.

The ACT Greens note that the Public Advocate, the ACT Disability and Community Services and Health Commissioner and the Public Trustee and Guardian already have some limited powers to investigate allegations of elder abuse and misconduct by service providers or investigate complaints and allegations about actions of Guardians. The ACT Greens note, however, that there are insufficient resources for these office holders to undertake investigative actions in all instances of reported abuse, and we recommend that adequate resourcing is required, particularly if there is to be any expansion of these investigative roles.

**Recommendation 4:** That the ACT Human Rights Commission, the Public Advocate, the ACT Disability and Community Services and Health Commissioner and the Public Trustee and Guardian are adequately resourced to exercise their investigative powers in relation to allegation of abuse against older people.

Furthermore, with Australia's ratification of the Optional Protocol to the Convention Against Torture (OPCAT), the ACT should consider how local preventative mechanisms, such as the Ombudsman's office can include in their remit any person who may not be free to leave a facility, such as in aged care and disability support services. Any expansion of their role in this regard would provide important additional oversight of human rights in aged care and would likely require additional resourcing.

**Recommendation 5:** that consideration be given to the role of the Ombudsman's office, as the ACT's local preventative mechanism under the OPCAT, with regard to aged care and disability services where a person is not free to leave a facility.

Community education efforts about what elder abuse is, what to look out for and information about what to do if you suspect it is happening to someone are all features of a system designed to protect people and should be features of the ACT Government's efforts.

When it comes to criminal justice responses, the Greens note that standalone 'elder abuse offences' should not be required, as this conduct is already prohibited under existing ACT laws. Perpetrating violence against *anyone* in our community is already a crime and this is a view also supported by the ALRC, which did not recommend criminal offences to address elder abuse on the basis existing criminal law largely covered most conduct associated with elder abuse, and duplication of offences was undesirable.<sup>2</sup> The ACT Human Rights Commission echoed this view in its submission to the ALRC's Inquiry into Elder abuse.<sup>3</sup>

An alternative and preferable approach would be to amend definitions of neglect and financial abuse, as mentioned previously, and to introduce aggravated offences for violence or abuse against older persons and vulnerable adults. As noted in the discussion paper, this approach would set out additional circumstances which if present in the offending would attract a higher penalty than the basic offence.

The ACT Greens recommend that this applies not only to older people, but also to vulnerable adults and/or people with disability, as per previous discussion.

**Recommendation 6:** that the ACT Government introduce aggravated offences for violence and abuse against older people and vulnerable adults.

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<sup>2</sup> Australian Law Reform Commission (2017), *Elder Abuse – A National Legal Response: Final Report*, ALRC Report 131, (ALRC Inquiry Report) 364.

<sup>3</sup> ALRC Elder Abuse Inquiry, ACT Human Rights Commission submission #337 page 5

This approach would be similar to that taken in the Queensland Criminal Code, where an assault become a serious assault if it is perpetrated against someone older than 60.<sup>4</sup> The Queensland definition of serious assault also includes unlawfully assaulting any person who relies on a guide, hearing or assistance dog, wheelchair or other remedial device<sup>5</sup>, which includes a broader sub-population than the aged, yet not all vulnerable adults.

We note also that the Western Australian legislation includes aggravating factors for the offence of assault if the offence is committed against a person over 60 years of age, and if there was a familial relationship or a child present.<sup>6</sup>

In NSW, the Crimes Act includes aggravation in sexual assault as a factor if the assault occurred against an alleged victim who has a serious physical disability, or has a cognitive impairment, however it does not include any reference to a person over the age of 60 or 65.<sup>7</sup>

Other (international) jurisdictions use definitions which are more comprehensive, and which also include a broader population than the elderly. For example, the Californian Department of Justice couples elder abuse with dependant adult abuse.<sup>8</sup>

In South Australia, the Adult and Ageing Safeguarding Act 1995 defines “vulnerable adult: an adult person who by reason of age, ill health, disability, social isolation, dependence on others or other disadvantage is vulnerable to abuse.” And most recent amendments have established an Office for Ageing Well, which is responsible for administering the Act.

**Recommendation 7:** That the ACT Government consider adopting South Australia’s definition of vulnerable adult for inclusion in any future ACT legal reforms.

For legislative reform in the ACT, we recommend that aggravating factors should not only include age but could also include assessment of the level of vulnerability of the victim of the crime. In this way, there is recognition that some acts of violence are worse than others. It would also allow for specific tracking of prevalence of violence and abuse against vulnerable cohorts and is more inclusive in offering stronger protections for all vulnerable adults, not just those over 60 or 65.

**Recommendation 8:** That aggravating factors should not only include age but could also include assessment of the level of vulnerability of the victim of the crime.

The ACT Greens support amendments to the Sentencing Act requiring the Court to consider the age and vulnerability of the victim in sentencing. This would include vulnerable adults as

<sup>4</sup> *Criminal Code 1899* (Qld) s 340 (1)(g): <https://www.legislation.qld.gov.au/view/pdf/inforce/current/act-1899-009>

<sup>5</sup> *Criminal Code 1899* (Qld) s 340 (1)(h): <https://www.legislation.qld.gov.au/view/pdf/inforce/current/act-1899-009>

<sup>6</sup> [https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc\\_42213.pdf/\\$FILE/Criminal%20Code%20Act%20Compilation%20Act%201913%20-%20%5B19-g0-00%5D.pdf?OpenElement](https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_42213.pdf/$FILE/Criminal%20Code%20Act%20Compilation%20Act%201913%20-%20%5B19-g0-00%5D.pdf?OpenElement)

<sup>7</sup> <https://www.legislation.nsw.gov.au/#/view/act/1900/40/whole#/part3/div9/sec61> ( Section 61J, (f) and (g).

<sup>8</sup> [https://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=PEN&sectionNum=368](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PEN&sectionNum=368)

well as those over a certain age (60 or 65), with the severity increasing for older victims. For example, the vulnerability is higher if a person is 95, compared to even 75.

We would further recommend that the ACT Government consistently strengthen definitions of all forms of abuse, whether against child, domestic partner or vulnerable adult to include physical, sexual, emotional or psychological abuse, neglect and financial abuse or exploitation, and coercion.

Consistency should apply across the Crimes Act, the Family Violence Act, the Children and Young People Act and the Guardianship Act.

**Recommendation 9:** That the ACT Government consistently strengthen definitions of all forms of abuse, whether against child, domestic partner or vulnerable adult to include physical, sexual, emotional or psychological abuse, neglect and financial abuse or exploitation, and coercion.

**Recommendation 10:** That consistent definitions of violence and abuse are used across all relevant ACT legislation.

The Family Violence Act should also be amended to specifically include carers, as has been raised by disability groups over past years. Carers are persons who an individual should be able to trust and, on whose mercy, older people are often reliant. Many of them provide intimate and personal services. Expanding definitions in the Family Violence Act to include carers would afford greater protections for older people and vulnerable adults and would allow for longer protection orders to be made without an applicant having to prove special or exceptional circumstances.

We note that the Family Violence Act is currently under review and recommend that the issue of including abuse against older people and other vulnerable adults is considered in this review and specifically recommend that carers are included in the meaning of 'relative' in this Act.

**Recommendation 11:** that review of the ACT Family Violence Act considers the inclusion of violence and abuse against older people and other vulnerable adults and include carers in the meaning of 'relative'.

Specifically, the crime of neglect of vulnerable adults should be included in the statute. These changes would also align with the ALRC recommendation that offences for neglect are under-utilised, and prosecutions can be challenging. Despite this, they found that "...offences for neglect resulting in something less than the death of the older person do not exist in all states and territories. In absence of specific offences for elder abuse, it is important to ensure that general 'neglect' offences exist in all States and Territories."<sup>9</sup>

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<sup>9</sup> ALRC report p 367, recommendation 13.17



## Strengthening ACAT powers

The ACT Greens support strengthening ACAT powers to address misuse of powers of attorney and wrongdoings of guardians and managers.

The expansion of ACAT's jurisdiction will help improve access to justice for older Canberrans, particularly for older people seeking appropriate compensation. Older persons will be able to seek legal recourse in a timely and cost-effective manner.

Evidence shows that financial abuse is the most prevalent form of elder abuse and that in a significant minority of cases, this occurs through the misuse of a power of attorney<sup>10</sup>.

Factors appearing to facilitate abuse include:

- a) principals (older people) with diminished decision-making ability may have limited ability to monitor the activities of their attorney;
- b) family members are most commonly appointed as attorneys and this relationship of trust makes it less likely the principal and third parties will question their actions; and
- c) there is generally a limited understanding in the community of the powers and duties of the attorney.

This biggest issue in addressing such abuse is that in many cases, an older person may even know that the abuse is occurring but chose not to take any action because they prioritise and value the relationship with the attorney who is often a family member. Fear of loneliness and isolation overrides the fact that their finances are being misused.

The issue of loneliness and isolation also increases the risk of exploitation for older people who have no family, as they can develop what they think is a trusting relationship with a helper or carer. For example, a gardener or carer becomes a confidant, then a lodger, then an attorney with full access to finances.

The current system of having to apply to the Supreme Court for such remedies is in many cases prohibitive in terms of costs for legal representation for the older person. Expanding ACAT's powers to compensate an older person for loss caused by an attorney, manager or guardian's misuse of their power makes justice and reparation more accessible. It provides a practical way to redress loss for an older person unwilling or unable to take action in the Supreme Court.

The ACAT uses a more flexible and informal approach to procedural and evidentiary matters than a court and this in and of itself makes it more accessible and less intimidating. The ACT Greens support expansion of ACAT's powers to be the same as the Supreme Court's in such

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<sup>10</sup> National Ageing Research Institute and Seniors Rights Victoria, Profile of Elder Abuse in Victoria. Analysis of Data about People Seeking Help from Seniors Rights Victoria (2015)

matters, on the condition that very complex matters can still be referred to the Supreme Court if required.

**Recommendation 12:** that the ACT Government expands the ACAT's powers to compensate an older person for loss caused by an attorney, manager or guardian's misuse of their power.

The other benefit of expanding ACAT's power is that this would also operate as a deterrent to misusing funds, especially as any interested party, including another family member with an interest in the affairs of the older person, can seek a tribunal order for compensation on their behalf. The ACAT should of course, have appropriate discretion to excuse breaches that are inadvertent or otherwise in good faith.

Issues have been raised by some stakeholders however, that legal representation may still be required in instances where the loss experienced by the older person is significant, such as a house or the value of a house.

In these cases, we recommend that accessible and affordable legal assistance be available to older people should they require it.

## Additional issues for consideration:

### Witnessing requirements:

Currently in the ACT, there is a requirement for two witnesses (one who must be authorised to witness statutory declarations) to certify that the principal (i.e. the older person) signed the POA/EPOA voluntarily and appeared to understand the nature and effect of making the POA/EPOA, but there is no requirement for any witness to certify that the Attorney understands the nature and effect of the EPOA.

The ACT Greens recommend that witnessing provisions are introduced to ensure that attorneys are aware of their roles and responsibilities, not unlike the requirement for witnessing to ensure that principles understand the implications of what they are signing.

**Recommendation 13:** That witnessing provisions for EPOAs are introduced to ensure that attorneys are aware of their roles and responsibilities.

### Community Education:

Community education is of course part of the solution to end or reduce instances of elder abuse. Greater understanding of what it is and what can be done about it can significantly contribute to its prevention. Understanding what causes elder abuse in the first instance can inform public preventative campaigns. Highlighting its prevalence and the various forms it

can take will increase community awareness and alert bystanders (often other family members) to look out for signs of elder abuse in order to take preventative steps and/or intervene early.

There is generally a limited understanding in the community of the powers and duties of the attorney, which indicates a need for more education about powers of attorney and enduring powers of attorney, including with the legal profession. Ideally undertaking specific training about POAs and EPOAs should be regarded as a Professional Development Unit for law practitioners.

Other groups that would benefit from such an education campaign would be banks and financial institutions and medical practitioners as well as people who are likely to become or who already are attorneys.

This education should include information about the responsibilities of being an attorney, the role of ACAT and understanding the notion of capacity.

**Recommendation 14:** That a concerted education campaign about abuse of older persons, and obligations under POAs and EPOAs is undertaken and targeted at a range of specific audiences.

#### [Restorative practices](#)

The ACT Greens support the use of restorative practices where appropriate, including restorative justice responses where there is capacity for the parties to be able to discuss the harms caused by the misuse of powers. This may include non-offending family members as well as the older person, whose capacity may already be diminished.

**Recommendation 15:** That the resolution of issues arising from financial abuse and misuse of powers of attorney includes restorative approaches and practice.

#### [Access to interpreters](#)

All relevant stakeholders should bear in mind that as people from culturally diverse backgrounds age, they can revert to using and thinking in their mother tongue. Efforts should always be made to ensure that an older person understands what is occurring, what they are signing and the implications of any enduring powers of attorney or advanced care directives.

Where matters are brought before the ACAT, the ACT Government must ensure that older people in such circumstances have free access to interpreters for tribunal hearings.

**Recommendation 16:** Free access to interpreters in tribunal hearings for those who need assistance.

### National Register:

The ACT Greens support the introduction of a national register of Enduring Powers of Attorney (EPOA) and note that its feasibility is currently being considered under the National Plan. We reiterate that a national registration scheme or system will enhance protections for older people or people whose decision-making capacity is impaired and reduce the risk of exploitation or of the use of an EPOA that has either expired or been replaced. The online register should include enduring guardianship arrangements as well as EPOA over finances.

Furthermore, in discussion with relevant stakeholders, the issue of a Will bank was also raised. At present it is impossible to know if someone has a will or if indeed it is still effective. It is our understanding that such a record or repository of will exists in WA. Having a Will Bank or register of wills will also enhance protection for older people against their assets not being distributed in line with their wishes.

**Recommendation 17:** that the national online register for EPOAs be extended to include enduring guardianship arrangements

**Recommendation 18:** that the ACT Government consider setting up a Will bank.