

Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia

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Abstract

Australia's ageing population is growing and so too is the number of older persons who experience abuse. Divorce, ill-health, disability, the death of a partner, dependency, poverty, social isolation, gender, and even the accumulation of assets, can heighten a person's vulnerability to abuse — physical, social, sexual, psychological, financial or neglect. Addressing elder abuse from a legal and policy perspective is not, however, simple. Perceived Commonwealth dominance in the ageing portfolio, despite the lack of a comprehensive legislative mandate to safeguard older Australians; a lack of innovative legal reform at the state level; ageism; the invisibility of our older people; a lack of awareness within the community of both the prevalence, nature and the signs of elder abuse; together with the absence of an international normative framework for protecting the rights of older persons, have together created a situation where elder abuse is simply not widely acknowledged as a serious issue in Australia and is inadequately addressed under existing laws. This article examines the current legal situation in Australia and calls for a collaborative national strategy for preventing and responding to elder abuse, incorporating a rights-based approach to the review and reform of state and territory laws. Recognising that elder abuse involves the denial of a person's basic human rights, including the right to live free from abuse, exploitation or neglect, this article calls for a national inquiry into elder abuse by the Australian Human Rights Commission.

I Introduction

Ageing is the most significant population change projected to occur both within Australia and globally over the next 50 years.¹ The number of people aged 60

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years or over is almost 700 million, and that figure is expected to increase to two billion by 2050.² Women currently outnumber men by 66 million among those aged over 60, and there are twice as many women as men over the age of 80.³ As the United Nations Secretary-General has pointed out, these increases will be most acutely felt in the developing world, ‘with Asia as the region with the largest number of older persons, and Africa facing the largest proportionate growth’.⁴ Within Australia, older persons will represent more than 25 per cent of the population by the year 2045, when people over the age of 85 (the ‘older old’) will have increased from the current 1.5 per cent to five per cent of the total population.⁵ The reality is that the number of older persons is increasing exponentially, people are living longer than ever before, and the implications for policy-makers — both present and future — are immense. One consequence of the phenomenon of global ageing is that there is a corresponding increase in the number of older persons living in vulnerable and dependent circumstances, making them particularly vulnerable to abuse and neglect.

Most Australians would be aware that Australia’s population is ageing, but this awareness is all too frequently coupled with ageist assumptions.⁶ Many Australians will have failed to consider the complex reality of what an ageing population will mean, both in terms of the challenges and the opportunities that it presents.⁷ Given the lack of consolidated national data on the prevalence of elder abuse, it is perhaps not surprising that few Australians would be conscious of elder abuse as a growing social issue. Yet available data indicates that between two and five per cent of Australians over the age of 65 years have experienced abuse, that up to 80 per cent of perpetrators are family members of the victims (the large majority being their children), that financial and psychological abuse are the most common forms of abuse, and that women are twice as likely to be victims of abuse.⁸ The abuse, exploitation and neglect of vulnerable older persons involves

¹ Australian Bureau of Statistics, *Population Projections — A Tool for Examining Population Ageing* <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/7d12b0f6763c78caca257061001cc588/0046daf21caa349bca2573d20010fe65!OpenDocument>>.

² United Nations General Assembly, *Follow-up to the Second World Assembly on Ageing, Report of the Secretary-General*, A/66/173, 66th sess, agenda item 27(c) (22 July 2011) 3.

³ Ibid.

⁴ Ibid.

⁵ Australian Government Productivity Commission, *Economic Implications of an Ageing Australia*, (Research Report, 12 April 2005) 5 <http://www.pc.gov.au/_data/assets/pdf_file/0020/69401/ageing.pdf>.

⁶ Australian Human Rights Commission (‘AHRC’), *Fact or Fiction? Stereotypes of Older Australians*, (Research Report, 2013) <http://www.humanrights.gov.au/sites/default/files/document/publication/Fact%20or%20Fiction_2013_WebVersion_FINAL_0.pdf>.

⁷ As the Age Discrimination Commissioner, Susan Ryan, has pointed out, ‘older Australians are a large and growing consumer market for an extensive range of products and services. Research also shows that an increase of 5% in paid employment of Australians over the age of 55 would result in a \$48 billion impact on the national economy, every year’: *ibid* 1.

⁸ See, eg, South Australian Government, Department of Health, *Draft South Australian Strategy for Safeguarding Older People 2014–2021*, 26 <<http://www.sahealth.sa.gov.au/wps/wcm/connect/72515d00400edc43a8d8bb4826472d56/Draft+SA+Strategy+for+Safeguarding+Older+People+Final+200613+%282%29.pdf?MOD=AJPERES&CACHEID=72515d00400edc43a8d8bb4826472d56>>; Victorian Government, Department of Health, *Elder Abuse Prevention and Response Guidelines 2012–2014* (June 2012) 3 <http://www.health.vic.gov.au/agedcare/downloads/pdf/eap_guidelines.pdf>; Victorian Government, Department of Human Services, *With Respect to Age*

the serious denial of a person's basic human rights, however, a lack of community awareness, ageism and the frequent invisibility of our elderly mean that elder abuse remains a hidden problem within society. As a consequence, governments have yet to improve the legal and policy mechanisms for dealing with the abuse of older Australians, as least through public campaigns that engage the wider community. It is imperative that, as a society, we develop better mechanisms for preventing and responding to abuse, and well before our older population comprises one quarter of Australia's population.

Compounding the prevalent, yet hidden, problem of elder abuse, is a complex constitutional situation where the responsibility for safeguarding vulnerable adults lies primarily with the state and territory governments,⁹ but where responsibility for ageing and aged care has increasingly been appropriated by the Commonwealth. Consequently, there has developed an apparent understanding or perception that ageing, as a portfolio area, is controlled by the Commonwealth, and that the states have limited capacity to develop law and policy with respect to older persons. This perception is based on an incomplete understanding of the Commonwealth's constitutional power and may partly reflect the paucity of legal scholarship and analysis around ageing policy and elder abuse within Australia.¹⁰ However, it is important that the myth of an all-encompassing Commonwealth legal and policy dominance in the ageing portfolio is revealed, for it has the potential to stifle policy innovation at the state level and to induce complacency by the states and territories, where issues can be ignored or paid mere lip service if they are not part of a federally funded program.

— 2009: *Victoria Practice Guidelines for Health Services and Community Agencies for the Prevention of Elder Abuse* (June 2009) 3 <http://www.health.vic.gov.au/agedcare/downloads/wrta/with_respect_to_age.pdf>; Duncan Boldy et al, 'Addressing Elder Abuse: West Australian Case Study' (2005) 24 *Australasian Journal on Ageing* 3; Mike Clare, Barbara Black Blundell and Joseph Clare, *Examination of the Extent of Elder Abuse in Western Australia* (Crime Research Centre, The University of Western Australia and Advocare Inc, April 2011) 27–30 <http://www.law.uwa.edu.au/_data/assets/pdf_file/0008/2129606/2011-Examination-of-the-Extent-of-Elder-Abuse-in-Western-Australia.pdf>; Elder Abuse Prevention Unit, Queensland, *Annual Report 2012*, 7–22, <<http://www.eapu.com.au/Portals/0/Annual%20Reports/2012%20EAPU%20Year%20in%20Review%20-%20WEB.pdf>> Similar statistics can be found in the United States: see Nina Santo, 'Breaking the Silence: Strategies for Combating Elder Abuse in California' (2000) 31 *McGeorge Law Review* 801, 816–17.

⁹ See further, 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.sa.gov.au/upload/franchise/Seniors/Office%20for%20the%20Ageing%20-%20Publications/Publications/Protection%20of%20Vulnerable%20Adults%20-%20E2%80%93%20Closing%20the%20Gaps.pdf>> 29–30 ('Closing the Gaps').

¹⁰ Debbie Whitmont and Mark Austin, 'Rights of the Elderly' (1983) 8 *Legal Services Bulletin* 167; Meredith McLaine, 'The Rights of the Elderly: Who Decides?' (1992) 17 *Alternative Law Journal* 228; Marianne James, Abuse and Neglect of Older People' (1994) 37 *Family Matters* 94; Owen Ames and John Harley, 'Elder Abuse: Being Part of the Solution, Not Part of the Problem' (2001) 23 *Law Society Bulletin (SA)* 34; Rosslyn Monro, 'Elder Abuse and Legal Remedies: Practical Realities?' (2002) 31 *Reform* 42; Tina Cockburn, 'Elder Financial Abuse by Attorneys: Relief under Statute and in Equity' (2005) 25(5) *Proctor* 22; Barbara Hamilton, 'Be Nice to Your Parents: or Else!' (2006) 4 *Elder Law Review* 8; Kim Forrester and Karen Williams, 'Elder Abuse in Aged Care' (2008) 86 *Precedent* 27; Susannah Sage-Jacobson, 'Elder Law, Elder Abuse and Housing' (2009) 94 *Reform* 31; Bernadette McSherry 'Elder Abuse and Neglect: Challenges and Directions for Legal Reform' (2010) 18 *Journal of Law and Medicine* 19.

Elder abuse offers one example where the myth of Commonwealth dominance can be exposed; outside the *Aged Care Act 1997* (Cth) (*'Aged Care Act'*) and the *Home and Community Care Act 1985* (Cth), the Commonwealth has only limited constitutional capacity to effect an adult protection regime that would safeguard all vulnerable older persons. The Commonwealth has considerable constitutional powers with respect to the funding of aged care, age pensions, carer pensions and other welfare regimes, the regulation of corporations established to provide residential care, and the funding of programs administered by the states and territories. The Commonwealth also has significant powers with respect to banking and finance, and industrial relations. As a 2008 government document states, the approach of the Commonwealth to population ageing incorporates a whole-of-government perspective 'across superannuation and retirement income support, workforce, housing, social inclusion and life-long education, as well as medical, health and aged care services'.¹¹ However, the Commonwealth does not have the constitutional ability to effect a comprehensive elder abuse prevention and response framework, other than through funding a scheme that would be largely administered by state and territory agencies, including public advocates, guardianship boards, public trustees, police and emergency services, legal services and advocacy bodies. In the absence of a national framework, the states and territories have developed strategies for coordinated inter-agency approaches to responding to elder abuse, but these are presently contained in variable and relatively weak policy instruments, if they exist at all.¹²

The reason why the Commonwealth's power is limited in this area stems from the fact that, under s 51 of the *Constitution*, the federal Parliament has no power to legislate on elder abuse or adult protection, meaning that any measures it might adopt would be limited to older persons accessing such services. Further, the number of Australians accessing Commonwealth-funded services is only a small proportion of the number aged over 65 years. According to figures cited by the Council of the Ageing Australia (*'COTA'*), in 2011, fewer than 240 000 older Australians accessed federally funded aged care services or were living in residential aged care.¹³ And, according to the Australian Bureau of Statistics, only one per cent of people aged between 65 and 79, and only 15 per cent aged 80 or over, are living in residential care.¹⁴ Following the implementation of the *Living Longer. Living Better.* reform package announced in April 2012,¹⁵ 125 people out of every 1000 aged over 65 years are expected to receive support through Commonwealth-funded packages or residential care over the next 10 years.¹⁶ Thus,

¹¹ Australian Government, Department of Health and Ageing, *Ageing and Aged Care in Australia*, (July 2008) 2.

¹² The Northern Territory, for example, currently has no strategy for dealing with elder abuse.

¹³ COTA, *Rights Respect, Recognition: A New Deal For Older Australians*, COTA Australian Federal Election Platform (August 2013) 20 <<http://www.cota.org.au/australia/Events/2013/p253.aspx>>.

¹⁴ Australian Bureau of Statistics, *Age Matters: Latest Findings*, Catalogue No 4914.0.55.001 (2011), cited in Australian Human Rights Commission, *Respect and Choice: A Human Rights Approach For Ageing and Health* (2012) 5 <http://www.humanrights.gov.au/sites/default/files/document/publication/human_rights_framework_for_ageing_and_health.pdf>.

¹⁵ See further Australian Government, Department of Health and Ageing, *Living Longer Living Better* <<http://www.livinglongerlivingbetter.gov.au/>>.

¹⁶ See COTA, above n 13, 14.

in terms of sheer numbers, the Commonwealth's aged care packages reach only a very small proportion of the three million Australians currently aged over 65.¹⁷

Beyond the Commonwealth's capacity to regulate aged care services, there are additional powers under the *Constitution* that might expand the Commonwealth's ability to establish a national framework for dealing with elder abuse. Those powers include the external affairs power,¹⁸ the executive power¹⁹ and the power to give tied grants to the states.²⁰ The external affairs power is potentially the most important, as it opens up the possibility of using international human rights treaties to frame a national approach to the prevention of elder abuse. However, the Commonwealth would still encounter constitutional difficulties, given the patchy and aspirational nature of the relevant instruments and their likely inability to enliven the external affairs power.²¹ A new international convention on the rights of older persons, currently being considered at the United Nations by the Open-Ended Working Group on Ageing ('OEWGA'),²² would potentially expand the Commonwealth's power in this regard (if ratified by Australia), but the prospects of a new convention being adopted are not high in the short to medium term. Even if the Commonwealth were equipped with the constitutional power to comprehensively address elder abuse — assuming a convention on the rights of older persons contained relevant legal obligations upon state parties — the constitutional doctrine of implied immunities may restrict the Commonwealth's capacity to direct the activities of state agencies and instrumentalities.²³ Thus, in any event, the cooperation of the state and territory governments would be prudent, if not constitutionally necessary.

The reality — based on the Commonwealth's legislative powers as set out in s 51 of the *Constitution* — is that the Commonwealth has only a partial ability to effect a legal framework for preventing and responding to elder abuse. And, in any case, the Commonwealth would need to rely on state-based agencies. These agencies currently work at the coalface of elder abuse, including in cases where abuse takes place in residential care facilities, and it would be implausible for the Commonwealth to duplicate their work. Thus, in practical terms, responsibility for addressing the problem will continue to reside with the states and territories, even in the event of new federal law or policy. In the meantime, variable and relatively weak policy frameworks continue to operate at the state level, meaning that the ability to safeguard vulnerable adults effectively through prevention, early

¹⁷ Australian Government, Department of Treasury, The 2010 Intergenerational Report, *Australia to 2050: Future Challenges* <http://archive.treasury.gov.au/igr/igr2010/report/pdf/IGR_2010.pdf>.

¹⁸ *Constitution* s 51(xxix).

¹⁹ *Ibid* s 61.

²⁰ *Ibid* s 96.

²¹ See further *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416, 486–7 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

²² The OEWGA was established by a General Assembly Resolution in 2011: *Follow-up to the Second World Assembly on Ageing*, GA Res 65/182 UN GAOR, 65th sess, 71st plen mtg, Agenda Item 27(c), UN Doc A/Res/65/182 (4 February 2011) [28].

²³ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192; *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188.

intervention and the provision of appropriate responses in cases of elder abuse, is limited in significant ways.

It is almost inevitable, however, that the existing state-based frameworks will be publicly called into question as ‘strategies’ for dealing with cases of elder abuse in Australia. The tragic deaths of Cynthia Thoresen in Queensland, Vonne McGlynn in South Australia and Jorge Chambe Coloma in New South Wales, offer confronting examples of the effects of neglect, social isolation and vulnerability to financial exploitation among our elderly. These cases, each outlined below, also demonstrate the need for an integrated, whole-of-government strategy for preventing and responding to elder abuse, which engages the entire community. As the South Australian Public Advocate has stated:

The abuse and neglect of older people is everybody’s business. The challenge is to create a ... community which does not tolerate a culture of abuse and neglect. This will be a community which offers information and support to its vulnerable citizens, informing them of their rights and offering protection through legal and social mechanisms which prevent abuse, provide easy pathways to help and provide a mandated service response so that vulnerable older people are offered help and opportunities for ongoing assistance.²⁴

The great risk lies in avoiding a paternalistic approach to elder abuse policies.²⁵ Older persons, no matter how vulnerable, disabled or dependent, are entitled to the respect and recognition of their fundamental human rights, and an older person, unlike a child, is not inherently vulnerable and in need of protection. Thus, the challenge will be in shaping law and policy in a manner that is clearly premised on the rights of all older persons to dignity, personal liberty, autonomy and self-determination. However, that challenge must be addressed while also recognising a further challenge: that the majority of Australia’s jurisdictions lack human rights charters,²⁶ and that a normative human rights framework is presently absent in binding international instruments.²⁷

Existing human rights treaties (other than the *Convention on the Rights of the Child*)²⁸ extend protection to all older persons, but only two instruments refer to age or older persons specifically.²⁹ The consequence is that the rights of older persons are effectively marginalised under international human rights law, leaving treaty committees to develop comments and interpretive strategies that recognise

²⁴ *Closing the Gaps*, above n 9, 2.

²⁵ *Ibid* 6, 19, 24.

²⁶ Only Victoria and the Australian Capital Territory have such legislation: *Human Rights Act 2004* (ACT); *Charter of Rights and Responsibilities Act 2006* (Vic).

²⁷ See the conclusions of the Office of the High Commissioner for Human Rights (‘OHCHR’): OHCHR, *Normative Standards in International Human Rights Law in Relation to Older Persons: Analytical Outcome Paper* (August 2012) <<http://social.un.org/ageing-working-group/documents/ohchr-outcome-paper-olderpersons12.pdf>> (‘OHCHR Report’).

²⁸ Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

²⁹ *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003) art 7 (‘Migrant Workers Convention’); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 Mar 2007, 2515 UNTS 3 (entered into force 3 May 2008) arts 25(b), 28(2)(b) (‘CRPD’).

the rights of older persons as being within a treaty's scope.³⁰ A campaign for a new convention on the rights of older persons is currently being pursued at the international level,³¹ championed by civil society groups and several Latin-American nations engaged in the OEWGA, established by the General Assembly in 2010. However, the prospects of a new convention are slim.

Irrespective of what transpires at the international level, national and sub-national governments will be increasingly called upon to develop strategies to safeguard and promote the rights and wellbeing of older citizens, including safety from elder abuse. This trend is already evident in Australia, where the states and territories have been grappling with establishing more integrated and coherent policy frameworks that reflect a rights-based approach. There is an increasing call for the federal government to develop a national approach to dealing with elder abuse.³² Ultimately, it will be at the state and territory level that elder abuse strategies must be implemented. While the Commonwealth has the capacity to fund a new national elder abuse strategy and to set a new normative framework within which the states and territories must operate, it is to state law, state agencies and their policies and protocols that we must turn.

Until strategies are backed by legislative reform, vulnerable adults will continue to fall through the cracks of existing protective mechanisms and specialist services.³³ 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; privacy laws can inhibit the sharing of information between agencies that could facilitate early intervention strategies; the lack of a coordinated interagency response framework means that individuals fall between the gaps in the legislative mandate of statutory agencies and eligibility criteria of service providers; 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; the rights of older persons are either not, or are only partially incorporated into elder abuse frameworks, meaning that paternalistic approaches may still emerge in the handling of elder abuse cases; and only the police have the legal authority to enter premises and investigate a case of abuse, when other agencies would be more suited (given the familial and personal relationships frequently involved) to conducting the initial investigation in a case of elder abuse. As recent reports from Victoria and South Australia have concluded, law reform is necessary properly to equip state agencies to be able to respond effectively in cases of elder abuse;³⁴ the question is whether we simply

³⁰ OHCHR, above n 27, 8, 11–12.

³¹ See further Israel Doron and Benny Spanier, 'International Convention on Rights of Older Persons: Where We Were, Where We Are and Where Are We Going?' (2012) 8 *Global Ageing* 7.

³² COTA, above n 13, 5.

³³ See, eg, *Closing the Gaps*, above n 9.

³⁴ See further *Closing the Gaps*, above n 9; 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> ('*Chesterman Report*').

extend the powers conferred under guardianship and administration legislation, or adopt comprehensive adult protection legislation.

This article is intended to provide an overview of the legal context in which elder abuse is currently dealt with in Australia, and the possibilities that exist for at least beginning to improve the existing legal framework. The discussion is necessarily placed in a broader framework, acknowledging the wider policy setting around ageing and aged care, as well as the international developments taking place around a possible new convention on the rights of older people. As the examination below demonstrates, the subject is complex; it is affected by the complexities and challenges of Australia's federal structure, the absence (in most Australian jurisdictions) of a human rights charter, and the difficulties associated with promoting and raising community awareness around both the rights of older Australians and the prevalence of elder abuse. The relative dearth of legal academic literature that examines the legal and constitutional issues has almost certainly not helped. However, Australia is not alone in terms of the late arrival of lawyers to the analysis of ageing and age-related issues. As a Canadian legal expert recently observed:

[L]awyers had not been at the table, nor were they part of any multidisciplinary bodies examining these important questions of the day. The legal aspects of aging formed no part of the study of gerontology, for example. As lawyers we were particularly equipped to defend legal rights and the important values of older adults: *dignity*, the freedom from age discrimination; *security*, including financial and workplace security, the promise of a health care system meeting their needs and protection from abuse and exploitation; and *autonomy*, the right to be treated as independent beings, even in the presence of diminished capacity.

From an academic standpoint there were many specific legal issues affecting older adults that would benefit from multi-dimensional and cross-disciplinary research to ensure that their rights were appropriately and respectfully addressed. Some areas of law would be fairer and more effective if they reflected the issues of aging. Others would require that ageist and age-related references which perpetuated judgments, policies, practices and views that excessively or unnecessarily restricted older people's rights and autonomy be reformed or expunged. Certain legal terms expressed outdated social concepts justifying paternalistic interventions.³⁵

These observations could apply equally to Australia and it is time that lawyers came to the table, and in greater numbers, on discussions around ageing and elder abuse.

II What is Elder Abuse?

Elder abuse is not a new phenomenon, although, as the World Health Organization ('WHO') has remarked, it has remained 'societally hidden'.³⁶ In comparison with

³⁵ Ann M Soden, 'Foreword' in Israel Doron and Ann M Soden (eds), *Beyond Elder Law: New Directions in Law and Aging* (Springer, 2012) vii–viii.

³⁶ WHO, *Missing Voices: Views of Older Persons on Elder Abuse* (2002) 2 <http://whqlibdoc.who.int/hq/2002/WHO_NMH_VIP_02.1.pdf?ua=1>.

child abuse and domestic violence, it has taken longer for the problem and prevalence of elder abuse to be identified in research literature and the reports of international organisations.³⁷ As two American Senators noted in 2003:

Other family violence issues, such as domestic violence and child abuse, have taught us that abuse, neglect and exploitation require a multifaceted solution, including public health, social service, and law enforcement approaches. But while these other types of abuse have been recognized and receive sizeable federal funding, elder abuse remains underresearched, underreported and underfunded.³⁸

As a form of interpersonal violence, the problem of elder abuse was first acknowledged in British journals in 1975,³⁹ but was more seriously picked up in the United States, where legislation was adopted at the state level to address the problem.⁴⁰ While the subject has been on the agenda of the WHO for some time, research into elder abuse has been largely dominated by the work of gerontologists and social workers.⁴¹ The WHO, the International Network for the Prevention of Elder Abuse ('INPEA') and the Australian Network for the Prevention of Elder Abuse ('ANPEA'), all adopt the definition of 'elder abuse' originally formulated by the United Kingdom multidisciplinary organisation, Action on Elder Abuse, which is as follows:

Elder abuse is 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.⁴²

Under international human rights law, all persons have the right to live free from abuse, exploitation and neglect.⁴³ As the WHO describes, 'elder abuse is a violation of human rights and a significant cause of injury, illness, lost

³⁷ Ibid. See also Santo, above n 8, 807; Audrey S Garfield, 'Elder Abuse and the States' Adult Protective Services Response: Time for a Change in California' (1991) 42 *Hastings Law Journal*, 859, 863–4.

³⁸ John B Breaux and Orrin G Hatch, 'Confronting Elder Abuse, Neglect, and Exploitation: The Need for Elder Justice Legislation' (2003) 11 *Elder Law Journal* 207, 208.

³⁹ A A Baker, 'Granny Battering' (1975) *Modern Geriatrics* 20; G R Burston, 'Do Your Elderly Patients Live in Fear of Being Battered?' (1977) 7 *Modern Geriatrics* 54.

⁴⁰ WHO, above n 36, 2. See also Santo, above n 8; Georgia J Anetzberger, 'The Evolution of a Multidisciplinary Response to Elder Abuse' (2012) 13 *Marquette Elder's Advisor* 107, 110–11.

⁴¹ See, eg, AHRC, above n 6; Nina A Kohn, 'The Lawyer's Role in Fostering an Elder Rights Movement' (2010) 37 *William Mitchell Law Review* 49; Doron and Spanier, above n 31, 8; Nina A Kohn, 'Elder Rights: The Next Civil Rights Movement' (2012) 21 *Temple Political & Civil Rights Law Review* 321; Frédéric Mégret, 'The Human Rights of Older Persons: A Growing Challenge' (2011) 11 *Human Rights Law Review* 37.

⁴² *What is Elder Abuse?* Action on Elder Abuse <<http://www.elderabuse.org.uk/Mainpages/Abuse/abuse.html>>; see further WHO, *The Toronto Declaration on the Global Prevention of Elder Abuse* (2002) <http://www.who.int/ageing/projects/elder_abuse/alc_toronto_declaration_en.pdf>.

⁴³ Relevant provisions would depend on the type of abuse, but may include: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976 except Art 41, which came into force 28 March 1979) ('ICCPR') arts 2, 6–7, 9–10, 12, 17–20, 22–23, 25–27 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) arts 2–3, 6, 10–13, 15.

productivity, isolation and despair'.⁴⁴ The most recent policy instruments adopted within Australia tend to include both the internationally accepted definition and the WHO statement about human rights when defining elder abuse.⁴⁵ Internationally, five forms of elder abuse are generally recognised — physical, sexual, psychological, financial and neglect. However, within Australia, additional categories have been recognised at the state level. For example, the Victorian *Elder Abuse Prevention and Response Guidelines 2012–2014* includes six categories, defined as follows:

Physical abuse: Non-accidental acts that result in physical pain, injury or physical coercion.

Sexual abuse: Unwanted sexual acts, including sexual contact, rape, language or exploitative behaviours, where the older person's consent is not obtained, or where consent was obtained through coercion.

Financial abuse: Illegal use, improper use or mismanagement of a person's money, property or financial resources by a person with whom they have a relationship implying trust.

Psychological abuse: Inflicting mental stress via actions and threats that cause fear or violence, isolation, deprivation or feelings of shame and powerlessness. These behaviours — both verbal and nonverbal — are designed to intimidate, are characterised by repeated patterns of behaviour over time, and are intended to maintain a hold of fear over a person. Examples include treating an older person as if they were a child, preventing access to services and emotional blackmail.

Social abuse: The forced isolation of older people, with the sometimes additional effect of hiding abuse from outside scrutiny and restricting or stopping social contact with others, including attendance at social activities.

Neglect: Failure of a carer or responsible person to provide life necessities, such as adequate food, shelter, clothing, medical or dental care, as well as the refusal to permit others to provide appropriate care (also known as abandonment). This definition excludes self-neglect by an older person of their own needs.⁴⁶

South Australia's recently released *Draft Strategy for Safeguarding Older People 2014–2021* includes the same six categories as Victoria (with slightly different definitions), but has added chemical abuse to the list, defined as follows:

Substance (or chemical) abuse is any misuse of drugs, alcohol, medications and prescriptions, including the withholding of medication and over-medication.⁴⁷

Definitions of elder abuse will include both criminal and non-criminal acts, as not every act of abuse will constitute a crime under state or territory law.⁴⁸ Nonetheless, legislative frameworks developed as strategies for addressing

⁴⁴ WHO, *Active Ageing: A Policy Framework* (2002) 29 <http://whqlibdoc.who.int/hq/2002/WHO_NMH_NPH_02.8.pdf?ua=1>.

⁴⁵ South Australian Government, above n 8.

⁴⁶ Victorian Government, *Elder Abuse*, above n 8, 1.

⁴⁷ South Australian Government, above n 8, 46.

⁴⁸ See, eg, Victorian Government, *Elder Abuse*, above n 8, 2.

domestic violence cases will be of potential assistance in cases falling short of criminal behaviour, by providing a measure of intervention to safeguard an older person who is vulnerable to abuse. An example would be South Australia's *Intervention Orders (Prevention of Abuse) Act 2011* (SA) s 8, which provides for intervention orders in cases of abuse including physical injury, emotional or psychological harm, unreasonable or non-consensual denial of financial, social or personal autonomy, and damage to property.

III The Invisible Elderly and Problems with Defining Elder Abuse

Scholars have frequently observed that the rights of older people have been largely ignored and, even where older people are acknowledged, they tend to be viewed through a lens of negative stereotypes.⁴⁹ As Australia's Age Discrimination Commissioner, the Hon Susan Ryan AO, has stated:

Our society tolerates a range of negative stereotypes about older people, for example all older people are mentally and physically weak, stubborn, out of date, unable to learn, seriously unhealthy, in all, a burden to society. When a society accepts these images, it is not surprising that older people are treated worse just because of their age, in employment, in financial and other important services, in having their views and choices respected. In other words they are subjected to age discrimination. Not only are they denied fair treatment, but this negative stereotyping actually damages their health.⁵⁰

Reducing the invisibility of our older persons is one of the motivations behind calls for a new international convention on the rights of older persons. Recent discussion at the United Nations has frequently included concern at the lack of disaggregated data collected by governments on older persons and the consequential fact that the elderly can be hidden or missed in data that informs future policy and planning.⁵¹ Australia's Age Discrimination Commissioner recently commissioned research into age stereotypes in the media, with the aim of 'encouraging the media to drop unjustified negative age stereotypes and replace them with realistic images of older people'.⁵² Mégret has described a power/vulnerability paradox that applies to perceptions of the elderly, reflecting the very diverse nature of older persons as a group.⁵³ From one perspective, older persons are generally wealthier, better integrated in society and appear as a

⁴⁹ See, eg, Kwong-Leung Tang and Jik-Joen Lee, 'Global Social Justice for Older People: The Case for an International Convention on the Rights of Older People' (2006) 36 *British Journal of Social Work* 1135, 1136.

⁵⁰ The Hon Susan Ryan AO, Age Discrimination Commissioner, 'The Rights of Older People and Age Discrimination in Australia', (Paper presented at the Australian Association of Gerontology National Conference, Brisbane, 22 November 2012) <<http://www.humanrights.gov.au/news/speeches/rights-older-people-and-age-discrimination-australia-2012>>. See also the subsequent report of the AHRC, above n 6.

⁵¹ See, eg, Background Note on the Availability of Basic Demographic Data on the Older Population Prepared by the Population Division of the Department of Economic and Social Affairs, OEWGA, 2nd sess, agenda item 4, A/AC278/2011/CRP1 (1–4 August 2011) <<http://social.un.org/ageing-working-group/documents/newngos/AC%20278%202011%20CRP%201.pdf>>.

⁵² Ryan, above n 50. The Report was released in June 2013.

⁵³ Mégret, above n 41, 45–6.

particularly powerful group in society — independent and prosperous.⁵⁴ However, from another perspective, the elderly can be viewed as a particularly vulnerable group, often sharing ‘a common experience of poverty, discrimination and isolation’, rendering them more vulnerable to disease, death, abuse and exploitation.⁵⁵ According to Mégret, this paradox ‘structures society’s very ambivalent rapport to its elderly’.⁵⁶ The following cases demonstrate the tragic consequences of this ambivalence.

A *The Case of Cynthia Thoresen*

Elder abuse cases, where they are publicly reported and commented upon, have the potential to challenge society’s ambivalence towards vulnerable older people. Recent reporting and commentary on the tragic circumstances surrounding the death of Cynthia Thoresen provide an example.⁵⁷ Ms Thoresen died in a Brisbane hospital on 3 January 2009, one week shy of her 89th birthday.⁵⁸ She had underlying medical conditions including osteoporosis, Alzheimers and coronary atherosclerosis, all of which contributed to her death. However, according to the Coroner’s Report, her death was ultimately caused by pulmonary thromboembolism, caused by a broken leg that she had sustained in a fall. The Coroner also reported that Ms Thoresen had endured the pain of a broken leg for up to 12 weeks, during which she had been bedbound and immobile. When she arrived at hospital, she was in a state of ‘filth’, covered in faeces and urine, with numerous pressure sores on her body and in a state of moderate to severe malnourishment. As one of her doctors noted and, as the Coroner subsequently reported, Ms Thoresen’s treatment at the hands of her ‘carer’ (her daughter) was considered ‘neglectful to the point of cruelty in a distressed, demented and totally dependent patient’.⁵⁹ Despite these facts, Ms Thoresen’s daughter was not prosecuted under the *Criminal Code 1899* (Qld), as the investigating officer considered there was insufficient evidence to support a successful prosecution, having regard to other recent prosecutions.⁶⁰

Section 285 of the *Criminal Code 1899* (Qld) creates a duty to provide necessities and s 324 makes it a crime to fail to provide the necessities of life. Further, s 290 deals with a duty to do certain acts, and s 328 provides for negligent acts causing harm. While the evidence may not have been sufficient to sustain a

⁵⁴ Ibid 45.

⁵⁵ Ibid 46.

⁵⁶ Ibid 47.

⁵⁷ Sarah Elks, ‘Elderly Woman Suffered Immeasurably after Neglect by Daughter’, *The Australian* (online), 29 May 2013 <<http://www.theaustralian.com.au/national-affairs/state-politics/elderly-woman-suffered-immeasurably-after-neglect-by-daughter/story-e6frgcx-1226652559359#>>; Marissa Calligeros, ‘Cruel Neglect Prompts Call for Crackdown on Carers’ *The Brisbane Times* (online), 30 May 2013 <<http://www.brisbanetimes.com.au/queensland/cruel-neglect-prompts-call-for-crackdown-on-carers-20130530-2nd96.html>>; Eileen Webb, ‘The Mistreatment of Older People: Is It Time to Legislate against Abuse?’ *The Conversation* (online), 7 June 2013 <<http://theconversation.com/the-mistreatment-of-older-people-is-it-time-to-legislate-against-abuse-14922>>.

⁵⁸ *Inquest into the Death of Cynthia Thoresen* (Coroner’s Court, Brisbane, 2009/3, 22 May 2013) <http://www.courts.qld.gov.au/__data/assets/pdf_file/0004/184117/cif-thoresen-c-20130522.pdf>.

⁵⁹ Ibid 13.

⁶⁰ Ibid.

prosecution for offences such as assault, torture or deprivation of liberty, it seems unusual that Ms Thoresen's daughter was not prosecuted for failing to provide the necessities of life. Whether the outcome was influenced by the perceived difficulty in proving the elements of the offence, or a lack of prosecutorial will, this case demonstrates a need to review existing criminal laws throughout Australia,⁶¹ as well as the exercise of prosecutorial discretion, for the purpose of ensuring that elder abuse, where it constitutes criminal activity, is adequately covered by the criminal law.

B *The Case of Jorge Chambe Coloma*

In January 2008, Jorge Chambe Coloma, 64, was found dead in his Western Sydney housing trust unit, where he had lain unnoticed for more than a year before police discovered his remains.⁶² Almost a year earlier, Meals on Wheels had contacted the police after noticing that Mr Coloma's meals had not been collected, as pre-arranged, from an esky (portable icebox) placed on the doorstep to his unit.⁶³ Police responded by visiting the unit complex in late January 2007, speaking with neighbours but not entering Mr Coloma's unit. According to reports, police believed that Mr Coloma had simply locked up and gone away for a while.⁶⁴ Mr Coloma, a retired factory worker originally from Ecuador, had no next of kin listed with the local council and had no family in Australia. The New South Wales Department of Housing, whose policy was to make contact with every client over the age of 60 at least twice a year after a spate of similar deaths in 2006, failed to check on Mr Coloma throughout 2007.⁶⁵ As mail collected at his unit over the course of 12 months, it was the neighbours who eventually contacted authorities, whereupon his body was finally discovered. One week later, the decomposing body of another elderly man, 73-year-old Kevin Jones, was found in his Department of Housing flat in Sydney's north.⁶⁶

The lonely deaths of these two Sydney men demonstrate how social isolation can leave older persons vulnerable — not merely to physical ailments and death, but also to possible abuse and exploitation. While government policies and service protocols are essential in safeguarding ageing populations, engaging communities in an effort to raise awareness of the needs of older persons is also needed.⁶⁷ Elder abuse — like domestic violence in decades past — is still largely hidden from public consciousness, and community education and awareness-raising are needed. While several state governments have recently developed or

⁶¹ A review of existing criminal laws was also recommended in *Closing the Gaps*, above n 9, 69.

⁶² See Farah Farouque, 'The Loneliest Number', *The Age* (online), 12 January 2008 <<http://www.theage.com.au/news/in-depth/the-loneliest-number/2008/01/11/1199988586279.html>>.

⁶³ Jordan Baker, 'Man's Lonely Death: Signs Were Missed', *Sydney Morning Herald* (online), 11 January 2008 <http://www.smh.com.au/news/national/mans-lonely-death-signs-were-missed/2008/01/10/1199554832946.html?s_cid=rss_national>.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Mary Beadnell, 'Two More Elderly Men Die Alone in Sydney', World Socialist Web Site (online), 28 January 2008 <<http://www.wsws.org/en/articles/2008/01/aged-j29.html>>.

⁶⁷ See further *Closing the Gaps*, above n 9, 50, 68–9.

announced public education campaigns,⁶⁸ the breadth and scale of such campaigns has tended to be relatively small and they are localised to particular jurisdictions within Australia. Further, campaigns which focus solely on elder abuse as traditionally defined, although significant and necessary, have not tended to include a broader safeguarding approach based on empowerment and strategies for self-protection. Arguably, a human rights-based approach must also entail the adoption of a broader lens through which to examine abuse, notwithstanding that abuse within relationships of trust is more common and invariably more complex, particularly given the general desire of the victim to maintain the relationship with the perpetrator.

C *The Case of Vonne McGlynn*

Elder abuse is complex, as is the range of factors which may contribute to vulnerability in older persons. The tragic case of Vonne McGlynn, murdered for financial gain, shows us that even socially connected and healthy older persons can be vulnerable to abuse, particularly financial exploitation. In Ms McGlynn's case, it was the value of her home that made her a target, having been harassed in the weeks prior to her murder by a woman wanting to become her carer; this woman would later become her killer. The accumulation of substantial assets and wealth can make older persons particularly vulnerable to financial abuse and fraud, whether or not they have other characteristics or conditions which make them more vulnerable to abuse.⁶⁹

Vonne McGlynn was an 83-year-old woman who lived alone in Reynella, a southern suburb of Adelaide. As observed by Anderson J of the South Australian Supreme Court when dismissing the appeal against conviction brought by her murderer, Vonne McGlynn was 'independent, intelligent, quite active for her age and in reasonably good health'.⁷⁰ Although a 'private' woman, she travelled frequently, both on daytrips and for longer holidays, would alert the Red Cross when she was planning to be away (and thus unable to answer her scheduled daily call from them), and maintained good relationships with her friends and neighbours. On 4 December 2008, Ms McGlynn failed to answer the scheduled call from the Red Cross. However, it was not until almost three months later that parts of her dismembered body were found in a local creek. She had been murdered by a 35-year-old mother of two who had planned to profit from the sale of Vonne McGlynn's home.⁷¹

Apart from living alone, there is little to suggest that Vonne McGlynn was particularly 'vulnerable' to abuse. She was the unsuspecting victim of a calculated criminal with whom she did not have a relationship of trust or dependence,

⁶⁸ See, eg. Amy Remeikis, 'Secret Shame as Elders Abused by Loved Ones', *Sydney Morning Herald* (online), 17 June 2012 <<http://www.smh.com.au/national/secret-shame-as-elders-abused-by-loved-ones-20120616-20he7.html>>; ABC News (online), 'Elder Abuse Statistics Worry Minister', 15 June 2012 <<http://www.abc.net.au/news/2013-06-05/elder-abuse-statistics-worry-minister/4735800>>.

⁶⁹ Commonwealth, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older Persons and the Law* (20 September 2007) 17–18.

⁷⁰ *R v Gavare* [2012] SASCFC 52 (4 May 2012) [7] (Anderson J).

⁷¹ *R v Gavare* [2011] SASC 142 (31 August 2011).

although it was the initial intention of her attacker to develop such a relationship, as her carer.

In the great majority of cases involving elder abuse, the abuse takes place behind closed doors and often in familial settings where the abuser is a relative or carer. Consequently, abuse is frequently hidden, under-reported and overlooked.⁷² However, the stories of Jorge Coloma, Kevin Jones and Vonne McGlynn make clear that the safeguarding of older persons requires the engagement of communities and not just government officials.⁷³ These cases also demonstrate that government strategies must involve comprehensive approaches to safeguarding older persons that are sufficiently nuanced to accommodate both the complex familial and personal relationships involving trust and dependency (cases of elder abuse as commonly defined), as well as the cases of abuse and neglect that result from the invisibility and isolation of many older Australians. Safeguarding strategies are also needed to assist older persons in being able to self-protect from scammers and those who deliberately target older persons for financial gain.

Not all tragic cases reported in the media involve the commission of elder abuse as defined by international and national organisations. However, such cases often demonstrate the failure of society and governments to support and safeguard vulnerable older persons. The point about definitions is significant: if the cases above do not all constitute elder abuse or neglect, then the commonly used definition may be too narrow to allow for the development of broad and comprehensive government strategies and criminal law provisions to safeguard vulnerable adults. However, through adopting a human rights approach to elder abuse, any act which denies a person's rights to safety, security or dignity should be captured. Thus, there is a distinction between strategies around the safeguarding of vulnerable adults, and strategies that focus purely on the prevention of elder abuse, as commonly defined. The former approach is preferable as a means of protecting from potential vulnerabilities that an older person might face.

IV Human Rights as a Normative Framework for Adult Protection

A person cannot lose the entitlement to enjoy universal human rights and freedoms simply because they fall into the category of 'older' person.⁷⁴ Yet it must be acknowledged that as a person ages, the capacity to realise one's basic rights fully and effectively can be reduced. The death of a partner, dependence on others, declining health, social isolation, and diminishing wealth or poverty, can each have an adverse and contributory impact on people's capacity to live independently and remain engaged with their communities as they age. In addition, ageist attitudes and policies can act as barriers that prevent older persons from remaining as fully

⁷² An American article reports that an estimated 84 per cent of cases in the United States are not reported: Breaux and Hatch, above n 38, 208.

⁷³ Yvan Simonovic, 'Human Rights of Older Persons' (OHCHR, AARP-UN Briefing Series on Global Aging, 9 February 2011) <http://www.ohchr.org/Documents/Issues/OlderPersons/StatementASGStatement_09022011.pdf>.

⁷⁴ *Closing the Gaps*, above n 9, 6.

engaged in their communities as they would like.⁷⁵ Dependence on others and inability to self-protect or advocate on their own behalves can also leave older persons vulnerable to neglect, abuse and exploitation. Subtle exclusions and the invisibility of our vulnerable older people leave open the potential for their basic rights and freedoms to be easily ignored, overlooked or downplayed.⁷⁶

As a senior Commonwealth bureaucrat said in 1992, community expectations around acceptable aged care and quality of life ‘are largely concerned with ensuring that older persons retain the same rights as other members of Australian society’.⁷⁷ However, much of the literature on the rights of older persons has been written by gerontologists and social workers, and lawyers are relative newcomers to the debate.⁷⁸ As Kohn has noted, there are particular benefits to be gained from including a legal perspective and, particularly, a civil rights perspective, when discussing aged policy and its impact on the rights of older persons.⁷⁹ The interests of advocates and service providers whose expertise is in social work or gerontology are frequently aligned with the interests of older persons, particularly when it comes to the provision of services or benefits. As Kohn argues, when it comes to negative rights (that is, the right to privacy), ‘the interest of older adults and service providers are likely to diverge’.⁸⁰

The challenge for lawyers, advocates and policymakers is that the human rights of older persons have not yet been well defined in international human rights law,⁸¹ and governments (national, regional and local) are presently developing law and policy in the absence of a specific treaty with binding obligations to respect and protect the rights of older people. Of course, the International Bill of Rights — consisting of the *Universal Declaration of Human Rights*,⁸² the ICCPR⁸³ and the *International Covenant on Economic, Social and Cultural Rights*⁸⁴ — extend rights and freedoms to all persons, including the elderly. Other conventions which

⁷⁵ See, Elizabeth Broderick, ‘Is it Time for a Convention on the Rights of Older People?’ (Speech presented to the International Federation on Ageing, Melbourne, 6 May 2010) <<http://www.humanrights.gov.au/news/speeches/it-time-convention-rights-older-people-2010>>.

⁷⁶ As has been observed: ‘ageism and discrimination are endemic and older people are invisible’: John Williams, ‘An International Convention on the Rights of Older People’ in Marco Odello and Sofia Cavandoli (eds), *Emerging Areas on Human Rights in the 21st Century* (Routledge, 2011) 128, 140.

⁷⁷ A L Howe, Director, Office for the Aged, Commonwealth Department of Health, Housing and Community Services, ‘An Overview of Commonwealth User Rights Strategies’, *Proceedings of the Conference on Dignity and Security: The Rights of Older Persons*, Taskforce on the Prevention of Intimidation and Abuse of the Elderly, 30–31 October, 1992.

⁷⁸ See, eg, Kohn, ‘Elder Rights’, above n 41, 321–8; Mégret, above n 41, 37–66; Kohn, ‘The Lawyer’s Role’, above n 41, 58.

⁷⁹ Kohn, ‘The Lawyer’s Role’, above n 41, 58.

⁸⁰ *Ibid.*

⁸¹ A fact which has been described as ‘remarkable’: see further Yeung Kang John Yeung Sik Yuen, *African Commission on Human and Peoples’ Rights: Report of Focal Point on the Rights of Older Persons in Africa*, African Commission on Human and Peoples’ Rights, 43rd Ordinary Session (7–22 May 2008) <http://www.achpr.org/files/sessions/43rd/inter-act-reps/yeung-sik-yuen/achpr43_specmec_older_actrep_2008_eng.pdf>. See also Mégret, above n 41, 38–9.

⁸² GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 1007).

⁸³ ICCPR, above n 43.

⁸⁴ Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976).

deal specifically with women,⁸⁵ disability,⁸⁶ and torture,⁸⁷ also have application to older persons. However, the only instruments specifically concerned with older persons reflect non-binding, soft law. They include the 1991 United Nations Principles for Older Persons ('UN Principles'),⁸⁸ and the 2002 *Madrid International Plan of Action on Ageing* ('MIPAA').⁸⁹ Thus, the most pertinent instruments are cast in aspirational terms which do not always speak to older persons in terms of conferring positive 'rights', but rather to their carers or those providing services to them, particularly governments. As Rodriguez-Pinzón and Martin wrote in 2003:

There are very few provisions in international law that directly address elderly rights. There are isolated efforts by certain international bodies to systematically refer to the rights of the elderly when interpreting their corresponding conventions. Some declarations and other isolated statements by international fora have tried to fill this vacuum. However there is no specific international body with the mandate to focus on the rights of the elderly. Nor is there an elderly convention in place. It is, in fact, the only vulnerable population that does not have a comprehensive and/or binding international instrument addressing their rights specifically.⁹⁰

According to Doron and Spanier,⁹¹ the study by Rodriguez-Pinzón and Martin in 2003 paved the way for further scholarly articles pushing for a convention. Nevertheless, these articles were often written from an 'elder law' or gerontology perspective, as opposed to a human rights approach.⁹² The MIPAA, signed by 156 Member States (including Australia), was developed in 2002, 20 years after the Vienna International Plan of Action on Ageing had been adopted and 11 years following the adoption of the UN Principles in 1991. However, as the OHCHR has observed, the first two instruments, 'while of critical importance in the further realization of welfare of older persons do not have a human rights focus, are non-binding in nature and do not substitute legally binding standards'.⁹³ While the UN Principles are implicitly human rights-based, they are also written in aspirational terms and speak to others (that is, carers and policymakers) rather than older persons. Further, the UN Principles do not speak of 'rights' at all, although they are framed around five core themes reflective of a human rights-based approach: independence, participation, care, self-fulfilment and dignity.

⁸⁵ *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

⁸⁶ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 Mar 2007, 2515 UNTS 3 (entered into force 3 May 2008).

⁸⁷ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

⁸⁸ *Implementation of the International Plan of Action on Ageing and related activities*, GA Res 46/91, UN GAOR, 74th plen mtg, UN Doc A/RES/46/91 (16 December 1991);

⁸⁹ United Nations, Ageing: Social Policy and Development Division, *Madrid International Plan of Action on Ageing*: (adopted at a conference held 8–12 April 2002) <<http://undesadspd.org/Ageing/Resources/MadridInternationalPlanofActiononAgeing.aspx>>.

⁹⁰ Diego Rodriguez-Pinzón and Claudia Martin, 'The International Human Rights Status of Elderly Persons' (2003) 18 *American University International Law Review* 915, 1008.

⁹¹ Doron and Spanier, above n 31, 8.

⁹² *Ibid.*

⁹³ OHCHR, above n 27, 35.

In terms of binding human rights instruments, only two treaties make any direct reference to 'age'. The *Migrant Workers Convention* includes 'age' as an explicit and prohibited ground of discrimination,⁹⁴ and the CRPD⁹⁵ includes two relevant articles: art 25(b) dealing with the right to health, and art 28(2)(b) dealing with the right to an adequate standard of living. Obviously the latter instrument excludes many older persons, but it provides important protections those older persons who have, or who later develop, disabilities in advanced age.⁹⁶ Treaty Committees have also used the words 'other status' or 'any other social condition' in the list of prohibited grounds of discrimination to recognise a convention's prohibition of discrimination on the basis of age.⁹⁷ However, concerns have been expressed with the use of 'other status', given that practice among treaty bodies is inconsistent and the standard of scrutiny is variable.⁹⁸

The OHCHR recently completed a comprehensive review of the extent to which the rights of older persons are currently protected under international law.⁹⁹ The purpose of that review was to provide a legal analysis of the applicable normative standards at the international level, aimed at informing the Third Working Session of the OEWSGA in August 2012.¹⁰⁰ The analysis conducted by the OHCHR clearly demonstrated that 'there is a demonstrable inadequacy of protection arising from normative gaps, as well as fragmentation and a lack of coherence and specificity of standards as they relate to the experience of older persons'.¹⁰¹ The *OHCHR Report* detailed the many comments and concluding observations of the various Committees where age has been considered in the context of treaty obligations. Clearly, the core human rights treaties apply equally to all, including older persons. However, the silent and fragmented way treatment of age takes place at the international level means that the system is ill-suited to addressing or exposing multiple or intersectional discrimination, particularly as it affects women.¹⁰² As the OHCHR has acknowledged, certain areas related to the experience of older persons 'are all but completely overlooked by the human rights system such as the rights issues arising in the delivery of home, institutional or residential care services, or the rights engaged at the end of life and access to palliative care'.¹⁰³ Thus, some of the key settings where the rights of older people are easily breached are simply not addressed under international human rights law. The *OHCHR Report* concluded by suggesting that:

⁹⁴ *Migrant Workers Convention*, above n 29, art 7.

⁹⁵ CRPD, above n 29.

⁹⁶ See further, OHCHR, *Human Rights of Older Persons: International Human Rights Principles and Standards, Background Paper: OEWSGA (18–21 April 2011)* b4 <<http://social.un.org/ageing-working-group/firstsession.shtml>>.

⁹⁷ See, eg, Committee on Economic, Social and Cultural Rights, *General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights*, 42nd sess, UN Doc E/C.12/GC/20 (2 July 2009); Human Rights Committee, *Views: Communication No 855/1999*, 72nd sess, UN Doc CCPR/C/72/D/855/1999 (16 July 2001) ('*Schmitz-de-Jong v The Netherlands*'); *X v United Kingdom* ECHR App No 7215/75 (5 November 1981). See further OHCHR, above n 27, 8.

⁹⁸ OHCHR, above n 27, 8–9.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid* 3.

¹⁰¹ *Ibid.*

¹⁰² *Ibid* 11–12.

¹⁰³ *Ibid* 4, 24–6.

An overarching framework and dedicated measure at the international level would have the greatest geographic reach and prominence providing the necessary coherence to an otherwise fragmented landscape of legal standards.¹⁰⁴

In the absence of specific legal obligations that protect them, there exists the potential for the elderly to be seen as a burden on the medical and welfare systems, rather than as rights-holders deserving of respect and dignified treatment. Without the adoption of a strong rights-based approach, ageing continues to be constructed as a ‘problem’ requiring solutions,¹⁰⁵ rather than as requiring positive strategies aimed at enabling older persons to realise their inherent human rights. It is not surprising then that calls for a new international convention on the rights of older persons have gathered pace in recent years,¹⁰⁶ although not all the commentary has offered unqualified support for a new convention.¹⁰⁷ Divergent views around the need for a new convention have also been evident at meetings of the OEWGA.

The United Nations General Assembly established the OEWGA in February 2011 with the following purpose:

[To strengthen] the protection of the human rights of older persons by considering the existing international framework of the human rights of older persons and identifying possible gaps and how best to address them, including by considering, as appropriate, the feasibility of further instruments and measures.¹⁰⁸

While the same Resolution also called upon Member States to ‘develop their national capacity for monitoring and enforcing the rights of older persons’,¹⁰⁹ the creation of the OEWGA implicitly recognised that existing international human rights instruments do not expressly or specifically address the rights of older persons as a group. The OEWGA has met on four occasions since its initial Organisational Session on 15 February 2011.¹¹⁰ However, from the First Session division was evident between delegations (including Europe, Canada, the United States and New Zealand) that believed that the critical issue was an implementation gap with regard to existing instruments, and those delegations of the view that significant normative gaps exist in the protection of older persons’

¹⁰⁴ Ibid 35.

¹⁰⁵ See Mégret, above n 41, 38; Jan Jařab, ‘What Can the EU Do to Help against Elder Abuse or Neglect?’ (Speech delivered at Ageing in Dignity — EU Conference on Elder Abuse, Brussels, 28 November 2011) <http://www.europe.ohchr.org/Documents/Speeches/Ageing_in_Dignity_Brussels_22_November_2011.pdf>; Chinsung Chung, ‘The Necessity of a Human Rights Approach and Effective United Nations Mechanism for the Human Rights of the Older Person’ (Working Paper A/HRC/AC/4/CRP, Human Rights Council, 25–29 January 2010).

¹⁰⁶ Rodriguez-Pinzón and Martin, above n 90; Tang and Lee, above n 49; Mégret, above n 41; Robert N Butler, ‘Declaration on the Rights of Older Persons’ (2002) 42 *The Gerontologist* 152.

¹⁰⁷ See, eg, Williams, above n 76, 142–3; Mégret, above n 41, 41.

¹⁰⁸ United Nations General Assembly, *Follow-up to the Second World Assembly on Ageing*, GA Res 65/182, 65th sess, 71st plen mtg, Agenda Item 27(c), UN Doc A/RES/65/182 (4 February 2011) [28] <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/523/46/PDF/N1052346.pdf?OpenElement>>.

¹⁰⁹ Ibid [15].

¹¹⁰ See, *Chair’s Summary: Open-Ended Working Group on Ageing for the Purposes of Strengthening the Protection of the Human Rights of Older Persons: General Assembly Resolution 65/182* (Third Working Session, New York, 21–4 August 2012) 1 <<http://social.un.org/ageing-working-group/documents/Chairsummary3rdsessionOEWGfinal.pdf>>.

rights (particularly those from Latin-American states).¹¹¹ The Australian statement made at this Session was non-committal on the issue, but highlighted the key achievements of the federal government in protecting the rights of older persons, and stated that ‘we remain committed to ensuring older persons are able to live in dignity and security and be free of exploitation and physical or mental abuse’.¹¹²

At the OEWGA’s Third Session (at which Australia’s Age Discrimination Commissioner participated in a panel discussion on discrimination), the divisions on the normative versus implementation gap question were still evident.¹¹³ However, constructive discussions took place around the possibility of a Special Rapporteur or independent expert of the Human Rights Council being appointed to examine, monitor and advise on the situation of older persons and their rights.¹¹⁴ In addition, many delegations referred to the possibility of:

mainstreaming the rights of older persons within existing frameworks, including treaty bodies, universal periodic review processes, special mandate holders, as well as within the activities of United Nations entities that have adopted a rights-based approach.¹¹⁵

A Fourth Session of the OEWGA took place in August 2013. On 20 December 2012, the General Assembly had passed Resolution 67/139, giving the OEWGA a mandate to consider proposals for a new international legal instrument on the rights of older persons.¹¹⁶ However, 118 member states abstained from voting (including Australia), 56 voted in favour and five voted against (Canada, Israel, Seychelles, South Sudan, United States).¹¹⁷ The United States has promoted the view that there is insufficient support for a new convention (a view held by many developed nations including Canada, Japan and the European Union).¹¹⁸ Nonetheless, while as many as 123 nations are either opposed to or unsupportive of a new convention, their positions indicate that these states are

¹¹¹ See, *Chair’s Summary: Open-Ended Working Group on Ageing for the Purposes of Strengthening the Protection of the Human Rights of Older Persons: General Assembly Resolution 65/182* (First Working Session, New York, 18–21 April 2011) <<http://social.un.org/ageing-working-group/documents/chairmans%20-%205%20May.pdf>>.

¹¹² *Australian Statement: Rights of the Older Persons* (First Working Session of the United Nations OEWGA, New York, 18–21 April 2011) 2 <http://social.un.org/ageing-working-group/documents/Australian%20national%20statement%2018%20April%202011_OWEG%20Ageing.pdf>.

¹¹³ Compare, for example, the *Closing Statement of the European Union* <<http://social.un.org/ageing-working-group/govstatementthird.shtml>> with the statements of Brazil <<http://social.un.org/ageing-working-group/documents/Brazil.pdf>> and Ghana <<http://social.un.org/ageing-working-group/documents/Ghana.pdf>> (Third Working Session of the United Nations OEWGA, New York, 21–24 August 2012).

¹¹⁴ Chair’s Summary, above n 111, 2.

¹¹⁵ *Ibid.*

¹¹⁶ *Towards a Comprehensive and Integral International Legal Instrument to Promote and Protect the Rights and Dignity of Older Persons* GA Res 67/139, 67th sess, 60th plen mtg, Agenda Items 27(b) and (c), UN Doc A/RES/67/139 (20 December 2012) <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/139>.

¹¹⁷ *Towards a Comprehensive and Integral International Legal Instrument to Promote and Protect the Rights and Dignity of Older Persons* GA Res 67/139, 67th sess, 60th plen mtg, Agenda Items 27(b) and (c), UN Doc A/67/PV.60 (20 December 2012) 3–4 <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/67/PV.60>.

¹¹⁸ *United States’ Letter to the United Nations Department of Economic and Social Affairs*, OHCHR <<http://social.un.org/ageing-working-group/documents/fourth/US.pdf>>.

still willing to engage with the OEWGA for the purpose of improving the implementation of existing instruments, including MIPAA. However, the argument that a normative gap exists in international law with respect to the rights of older persons has clearly been rejected by a number of very influential states that would prefer to see the issue as an implementation gap in international human rights law. Thus, the prospects for a new convention currently appear slim, although there now appears to be support for reviewing and updating the UN Principles, which is a significant development.¹¹⁹ In the meantime, domestic law and policy will need to draw upon existing human rights instruments when framing new strategies for safeguarding older persons. Governments (both national and sub-national) should be encouraged to use innovative approaches in the formation of laws and policies that draw upon existing human rights conventions better to promote and protect the rights of older people.¹²⁰ In Australia, this means complying with a written constitution and the limits attached — through the jurisprudence of the High Court — to the exercise of the external affairs power.

V Adult Protection and Elder Abuse Strategies in Australia

The marginalisation of older persons' rights in international law may partly, if not largely, explain why there exists an implementation gap when it comes to the domestic protection of older persons' rights. That gap exists in Australia,¹²¹ despite the many significant supports which are already extended to seniors, including the protection afforded by the *Age Discrimination Act 2004* (Cth). Elder abuse strategies is one area where Australia's implementation of human rights protection for older persons contains significant gaps. Although the experience of health and community care workers indicates that elder abuse is a significant and growing problem,¹²² there is a lack of comprehensive data.¹²³ Even where data is collected, there is little information regarding how, or even whether, cases are mediated, prosecuted or resolved in some other way.¹²⁴ This may be a consequence of the soft frameworks in place, where the agency responsible for receiving enquiries or claims of elder abuse essentially coordinates referral and/or advocacy services rather than operating as a coordinator of agencies with investigative responsibilities.¹²⁵ The fact that different definitions of abuse have been adopted within Australia could also cause inconsistencies in the recording of information around elder abuse. However, the data available generally indicates similar trends:

¹¹⁹ See, eg, *Closing Statement of the European Union* (Fourth Working Session of the United Nations OEWGA, New York, 12–15 August 2013 <<http://social.un.org/ageing-working-group/gov-statementfourth.shtml>>.

¹²⁰ See, eg, *Closing the Gaps*, above n 9.

¹²¹ See, eg, Michael Barnett and Robert Hayes, 'Not Seen and Not Heard: Protecting Elder Human Rights in Aged Care' (2010) *University of Western Sydney Law Review* 40; Kohn, 'Elder Rights', above n 41; Kohn, 'The Lawyer's Role', above n 41.

¹²² Victorian Government, *Elder Abuse*, above n 8, ix.

¹²³ *Ibid* 3.

¹²⁴ See further Elder Abuse Prevention Unit, above n 8, 6.

¹²⁵ Both the Elder Abuse Prevention Unit in Queensland and the Aged Rights Advocacy Service in South Australia operate in such a manner.

- up to five per cent of persons over the age of 65 have experienced abuse;
- financial and psychological abuse are the most common forms of abuse;
- the most vulnerable age for abuse occurring appears to be between the ages of 75 and 85;
- up to 80 per cent of abuse is perpetrated by family members and more than half by the children of the abused;
- women are twice as likely to be abused than men.¹²⁶

In the past two decades, but particularly in the last five years, policymakers at state and territory level have increasingly developed strategies (in the form of policy instruments) to prevent and provide adequate responses to elder abuse. However, like domestic violence, practitioners and advocacy groups believe that elder abuse is significantly under-reported. The situation is exacerbated by the absence of comprehensive human rights legislation across all but two of Australia's nine jurisdictions.¹²⁷ Such legislation would provide at least some legal protection for the rights of older persons, and a framework for the development of policies and protocols around aged care and elder abuse that would hopefully avoid ageist and paternalistic practices.¹²⁸ The absence of such legislation means that human rights do not provide a normative framework for service delivery and workplace practices, nor directly inform (at least in a statutorily mandated fashion) the processes of law and policy development. And, while the lack of a binding human rights treaty dedicated to the protection of older persons' rights does not mean that rights are completely ignored, without clear obligations specifically targeted at addressing the issues and vulnerabilities of older persons, their rights are unlikely to be given the priority or attention they deserve. The situation in Australia is, however, better following the enactment of the *Age Discrimination Act 2004* (Cth) and the establishment of the Age Discrimination Commissioner in 2010.

The premise here adopted, and that is also supported by the most recent reports conducted in Australia,¹²⁹ is that elder abuse strategies should be framed with the rights of older persons at the forefront and must include human rights-based approaches to both preventing and providing responses to elder abuse.¹³⁰ When elder abuse frameworks are viewed from a rights-based perspective, it is apparent that Australia lags behind many comparable nations, despite our relatively strong record in prioritising ageing policy and the funding of aged care and aged pensions, and the existence of comparatively strong health and superannuation systems.¹³¹ Both the 2011 *Closing the Gaps Report*¹³² and the 2013 *Chesterman*

¹²⁶ See, eg, South Australian Government, above n 8, 6; Victorian Government, *Elder Abuse*, above n 8, 3; Boldy et al, above n 8; Clare, Blundell and Clare, above n 8, 27–30, Elder Abuse Prevention Unit, above n 8, 7–22. Similar statistics can be found in the United States: see further Santo, above n 8, 816–17.

¹²⁷ Victoria and the Australian Capital Territory have human rights charters in the form of legislation: *Charter of Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT).

¹²⁸ See, eg, *Closing the Gaps*, above n 9, 67.

¹²⁹ *Ibid*; Chesterman, above n 34, 14–16.

¹³⁰ AHRC, above n 6, 1.

¹³¹ Some of Australia's stronger initiatives were outlined in the *Australian Statement*, above n 112.

*Report*¹³³ outlined comparative practice in several overseas jurisdictions, demonstrating a number of innovative frameworks for dealing with elder abuse. The most comprehensive legal model is that adopted in Scotland, where the *Adult Support and Protection Act* was enacted in 2007.¹³⁴ The Act has a number of important features including the following:¹³⁵

- The Act addresses ‘harm’ as opposed to ‘abuse’, and is aimed at safeguarding all ‘adults at risk’ of harm (people who are unable to safeguard their own wellbeing, property, rights or other interests, are at risk of harm, and, 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).¹³⁶
- The Act confers powers on councils to conduct inquiries, investigations and visits and to seek formal assessment, removal, banning and protection orders from the courts.¹³⁷
- Intervention can only be carried out where it will provide benefit to the adult and must involve an approach which is the least restrictive option to the adult’s freedom.¹³⁸
- Certain bodies and office holders must, so far as is consistent with the proper exercise of their functions, cooperate with a council conducting inquiries.¹³⁹ If a public body or office-holder believes that a person is an adult at risk of harm and that action needs to be taken under Part I of the Act, then the facts and circumstances of the case must be reported to the council for the area in which it considers the person to be located.¹⁴⁰
- The Act is accompanied by a Code of Practice for Local Authorities and Practitioners Exercising Functions under Part I of the Act, which provides practical guidance for implementation of the Act.

Scotland’s model provides a framework within which all vulnerable adults can be protected and its implementation must also be consistent with the *Human Rights Act 1998* (UK). The adoption of a comprehensive adult protection legislation similar to that in Scotland was one of the key recommendations made in the *Closing the Gaps Report*.¹⁴¹ However, an alternative model has been adopted in British Columbia. This approach, which is more closely reflected in the recommendations made for Victoria in the recent *Chesterman Report*,¹⁴² involves

¹³² *Closing the Gaps*, above n 9, 31–45.

¹³³ Chesterman, above n 34, 27–69.

¹³⁴ *Adult Support and Protection Act 2007* (Scot).

¹³⁵ *Closing the Gaps*, above n 9, 36–42. See also Chesterman, above n 34, 47–57.

¹³⁶ *Adult Support and Protection Act 2007* (Scot) pt I, ss 3, 7–10.

¹³⁷ *Ibid* s 4.

¹³⁸ *Ibid* ss 1–2.

¹³⁹ *Ibid* s 5. These include the Mental Welfare Commission for Scotland, the Care Commission, the Public Guardian, all councils, chief constables of police forces, the relevant Health Board and any other body or office-holder specified by the Minister..

¹⁴⁰ *Adult Support and Protection Act 2007* (Scot) s 5(3).

¹⁴¹ *Closing the Gaps*, above n 9, 12.

¹⁴² Chesterman, above n 34, 78–86.

the amendment of existing guardianship laws to include provisions for dealing with elder abuse. While not contained in a separate statute, this model can include a relatively detailed framework and one that also highlights the importance of developing strong community networks for adult protection.¹⁴³ However, it must be recalled that Canadian models also operate against the backdrop of a human rights charter.¹⁴⁴ Both the Scottish and British Columbian models do, however, provide suitable options for Australian jurisdictions, as recent reports have outlined.¹⁴⁵

Adult protection in Australia rests primarily with the states, where laws dealing with adult protection have developed in a piecemeal and incremental fashion. As Chesterman noted: 'Australia has never had a named 'system' of adult protection so much as a slowly evolving range of services provided within particular social policy arenas.'¹⁴⁶ State guardianship laws developed in the 1980s and 1990s, are, according to Chesterman, the closest thing Australia has to adult protection legislation.¹⁴⁷ However, these laws were developed at a time when the practice of institutionalising disabled people in large facilities was discontinued and guardianship laws were frequently needed for persons with high support needs.¹⁴⁸ Further, Australian guardianship laws provide a relatively blunt instrument for dealing with the complex and varied needs of older persons. A more nuanced approach to capacity warrants a supported decision-making model, rather than the widespread use of guardianship orders. However, the absence of legal provisions which are better tailored to the needs of vulnerable older persons who have capacity, or partial capacity, means that guardianship orders are all too frequently used in cases involving older Australians.¹⁴⁹

Beyond the application of state guardianship, mental health laws (where mental illness or mental incapacity is present), and state criminal laws (where elder abuse constitutes a crime), there are no specific legal measures for the protection of older persons from abuse under state law. However, for the minority of older Australians who access federally funded services (which no doubt includes many of Australia's most vulnerable and dependent older people), additional legal protections apply. Yet, even where abuse occurs in residential care settings, the *Aged Care Act* operates on the basis that existing state agencies will be engaged. Thus, even where the Commonwealth provides a legal framework for dealing with elder abuse, that framework relies on the services provided by local advocacy groups, state police departments and guardianship boards and the application of state criminal laws. An international convention, ratified by Australia, would have the potential to expand the Commonwealth's power to deal with adult protection more generally, although the practical realities involved with implementing an adult protection regime would inevitably involve the state and territories in any national framework.

¹⁴³ *Closing the Gaps*, above n 9, 42–5.

¹⁴⁴ *Canada Act 1982* (UK) c11, sch B pt 1 ('*Canadian Charter of Rights and Freedoms*').

¹⁴⁵ *Closing the Gaps*, above n 9; Chesterman, above n 34.

¹⁴⁶ Chesterman, above n 34, 17.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.* 19.

¹⁴⁹ See *Closing the Gaps*, above n 9; Chesterman, above n 34.

A *Relevant Commonwealth Law*

The responsibility for aged care is generally considered to reside with the Commonwealth and reforms introduced by the Gillard Labor government in 2012 extended the Commonwealth's control and funding of aged care services.¹⁵⁰ However, the legislative powers of the Commonwealth with respect to ageing and aged care are principally limited to the following subjects, as listed in s 51 of the *Constitution*:

- (xxiii) Invalid and old-age pensions;
- (xxiiiA) The provision of ... widows' pensions ... pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorise any form of civil conscription) ...

An additional head of power used to underpin the *Aged Care Act* is the corporations power (s 51(xx)); all residential care providers are required to be incorporated in order to seek accreditation under the legislation.¹⁵¹ The Commonwealth also has significant powers with respect to banking,¹⁵² the giving of financial grants to the states,¹⁵³ and the ability to enact laws which are incidental to laws falling within each subject matter.¹⁵⁴ Essentially, the Commonwealth's power to control and regulate aged care stems from its power to fund and provide pensions and other benefits to older persons, as well as its capacity to require that residential care providers are incorporated. The Commonwealth has no power to develop laws for 'older persons' or even 'pensioners' in a general sense. The Commonwealth's legislative power is not equivalent to other subject matter powers that authorise any type of law that operates with respect to a particular category of person, such as 'aliens'.¹⁵⁵ This limitation partly explains why the *Aged Care Act* currently provides inadequate protection for the rights of older persons located in residential care settings.¹⁵⁶

As well as providing for the mandatory reporting of physical and sexual abuse in residential care settings, the *Aged Care Act* provides for the establishment

¹⁵⁰ Reforms have included taking greater policy and funding responsibility for community aged care: see *National Partnership Agreement on Transitioning Responsibilities for Aged Care and Disability Services* (2012) <http://www.federalfinancialrelations.gov.au/content/npa/health_reform/transitioning_responsibilities/national_partnership.pdf>; Australian Government, Department of Health and Ageing, Annual Report 2011–12 <<http://www.health.gov.au/internet/annrpt/publishing.nsf/Content/annual-report-1112-toc>>. The Commonwealth has also extended the level of funding for community care support as part of its strategy to assist older people to live at home longer: see Australian Government, Department of Health, *Living Longer. Living Better*. (April 2012) <<http://www.health.gov.au/internet/main/publishing.nsf/Content/ageing-aged-care-review-measures-living.htm>>; Mark Butler, 'More Choice, Easier Access and Better Care for Older Australians' (Press Release, 20 April 2012) <<http://markbutler.alp.org.au/news/2012/04/20/more-choice-easier-access-and-better-care-for-older-australians>>.

¹⁵¹ *Aged Care Act* s (1)(b).

¹⁵² *Constitution* s 51(xiii).

¹⁵³ *Ibid* s 96.

¹⁵⁴ *Ibid* s 51(xxxix); *D'Emden v Pedder* (1904) 1 CLR 91, 109 (Griffith CJ); *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55, 77 (Dixon CJ, McTiernan, Webb and Kitto JJ); *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565.

¹⁵⁵ *Constitution* s 51(xix).

¹⁵⁶ For a detailed discussion of this issue, see Barnett and Hayes, above n 121.

of the Aged Care Commissioner and the Aged Care Complaints Scheme, as well as regulations to which are attached Charters of Rights for both residents of aged care homes and recipients of community care packages. Although these measures are important, they are not without their limitations in terms of safeguarding human rights,¹⁵⁷ and, as Braithwaite, Makkei and Braithwaite have observed, '[n]o group is harder to empower than the institutionalised aged who are more lacking than others in both the muscle and the voice to resist'.¹⁵⁸ Section 63(1AA) of the *Aged Care Act* imposes an obligation on residential care providers to report alleged or suspected 'unlawful sexual contact, unreasonable use of force or assault specified in the Accountability Principles and constituting an offence against a law of the Commonwealth or a State or Territory',¹⁵⁹ to both the Secretary and the police.¹⁶⁰ Thus, while federal law provides for mandatory reporting of physical and sexual assaults in residential care settings, the scheme relies on state police authorities for the investigation and prosecution of offences.

Residents and recipients of aged care services have the benefit of Charters of Rights attached to the *Aged Care Act*. The User Rights Principles 1997 has scheduled to it the Charter of Residents' Rights and Responsibilities (sch 1), and — as a consequence of the User Rights Amendment Principles (2013) (No 1) — the Charter of Rights and Responsibilities for Home Care (sch 2).¹⁶¹ The former includes such rights as the following:

- to be treated with dignity and respect, and to live without exploitation, abuse or neglect;
- to live without discrimination or victimisation, and without being obliged to feel grateful to those providing his or her care and accommodation;
- to live in a safe, secure and homelike environment, and to move freely both within and outside the residential care service without undue restriction;
- to be treated and accepted as an individual, and to have his or her individual preferences taken into account and treated with respect;
- to maintain his or her personal independence;

¹⁵⁷ See, eg, Barnett and Hayes, above n 121.

¹⁵⁸ John Braithwaite, Toni Makkai and Valerie A Braithwaite, *Regulating Aged Care: Ritualism and the New Pyramid* (Edward Elgar, 2007) 3.

¹⁵⁹ *Aged Care Act* s 63(1AA)(9).

¹⁶⁰ *Ibid* s 63(1AA)(1).

¹⁶¹ Residential care providers have various obligations under the *Aged Care Act 1997* (Cth). Those obligations include an obligation to comply with the User Rights Principles (referred to in s 55(1) of the Act). These principles are made by the Minister under s 96(1), as specified in s 55(2). All principles made by the Minister under s 96.1 are done by legislative instrument. The current User Rights Principles were made in 1997, but have been amended on many occasions since, the most recent amendment being on 20 March 2013. Schedule 1 of those Principles is comprised of a Charter of Residents' Rights and Responsibilities. Schedule 2 comprises a Charter of Rights and Responsibilities for Community Care.

- to maintain control over, and to continue making decisions about, the personal aspects or his or her daily life, financial affairs and possessions.

The Charter is laudatory and quite comprehensive. However, when considered alongside the mechanisms for its enforcement, its impact is significantly reduced. The Charters are not enforceable and are not accompanied by any scheme for seeking individual remedies for their breach.¹⁶² The human rights requirements contained in the legislation, and the complaints scheme attached to it, act as mandatory conditions which are attached to accreditation for all providers. However, because they operate as obligations on providers, the failure to comply with them only has consequences for providers in the sense of potentially receiving Notices of Required Action.¹⁶³ There are no remedies for the complainant or victim of the breach other than through the Aged Care Complaints Scheme, which, as commentators have already observed, ‘is not rights focussed and complaints tend to be steered to dispute resolution strategies thereby excluding sanctions and enforcement’.¹⁶⁴ The human rights of residents and recipients of aged care services are not contained within the body of the *Aged Care Act*, signifying the lack of priority given to those rights under the legislative framework. Further, the fact that the Complaints Investigation Scheme (‘CIS’) established under the Act is not independent of the Department that manages the Act is a persistent concern for many.¹⁶⁵ In a review of the scheme in 2009, Marilyn Walton made the following comments about the lack of independence associated with the complaints scheme:

The Department is responsible for the overall management and delivery of aged care services through the allocation of places, approval of providers, payment of aged care subsidies and compliance with the aged care standards. The focus is necessarily on aged care services for the community rather than on any individual complaint of a family or resident ...

The current system in which complaints are part of the bureaucracy responsible for aged care services makes it harder for a complainant to accept the final outcome if it is not favourable to their case. This adds to disquiet in the administration of the complaint scheme, as evidenced by the submissions from consumers and providers who shared their concerns about the impartiality or unreliability of decisions.¹⁶⁶

The government responded to the *Walton Review* by improving natural justice, communication with the parties and the timeframe for the handling of complaints. However, new Complaints Principles adopted in 2011¹⁶⁷ did not respond to concerns about the independence and impartiality of the CIS. While the

¹⁶² See also Barnett and Hayes, above n 121.

¹⁶³ See further Australian Government, Department of Health and Ageing, *Report on the Operation of the Aged Care Act 1997, 2008–09*, (2009) 73–83 <<http://www.health.gov.au/internet/publications/publishing.nsf/Content/ageing-review-cis-09>>; Barnett and Hayes, above n 121, 60–1.

¹⁶⁴ Barnett and Hayes, above n 121, 64.

¹⁶⁵ For a recent example, see COTA, above n 13.

¹⁶⁶ Marilyn Walton, *Review of the Aged Care Complaints Investigation Scheme* (October 2009) 12 (‘*Walton Review*’) <<http://www.health.gov.au/internet/publications/publishing.nsf/Content/ageing-review-cis-09>>.

¹⁶⁷ Australian Government, ComLaw, *Complaints Principles 2011* <<http://www.comlaw.gov.au/Details/F2011L01691>>.

Charters enable the appearance of a rights-based approach to service provision and residential care, when considered alongside the CIS it is apparent that they have absolutely no force as an instrument for safeguarding individuals. The *Aged Care Act* is primarily intended to operate as a regulatory framework for the accreditation and monitoring of residential aged care facilities and, while the Act's regulations include Charters of Rights as part of its 'User Principles', the scheme is highly inadequate as a measure for protecting the human rights of residents.

B State Elder Abuse Frameworks

While most states and territories have demonstrated a clear desire to address the issue of elder abuse, there remain significant weaknesses in existing policy frameworks throughout Australia, including the following:¹⁶⁸

- all strategies, where they exist, are embedded in policy instruments rather than binding laws;
- beyond serious cases where the criminal law is engaged (where the police can intervene), and cases where the victim suffers from mental illness or mental capacity (where mental health and guardianship legislation can be engaged), there is a lack of clear statutory mandates for the investigation of abuse by existing agencies;
- because of the lack of a central, coordinating agency, there is no capacity for early (and statutorily mandated) interventions in suspected and actual abuse cases;
- there is no statutory provision compelling agencies to work collaboratively and to share information in appropriate cases, which would facilitate early intervention and prevention strategies and overcome the restrictions of privacy law;
- criminal provisions have not been reviewed to ensure that elder abuse is legally prohibited and susceptible to criminal prosecution;
- different definitions of elder abuse used throughout the country could inhibit the benefits gained through data collection and the capacity to identify accurate incidence rates across Australia; and,
- some state policies, in focusing very distinctly on elder abuse as abuse within a relationship of trust may be too narrowly framed to operate as comprehensive strategies for safeguarding older persons against all types of abuse (including, for example, scamming, abuse by a stranger), particularly with respect to the framing of criminal provisions and education programs.

With the exception of Queensland and the Northern Territory, every Australian state or territory has some policy framework for addressing elder abuse. Queensland does, however, have a dedicated seniors' legal service and an

¹⁶⁸ See, eg. *Closing the Gaps*, above n 9.

information and referral service with arguably the most sophisticated approach to data collection. Most, but not all, Australian jurisdictions have a non-government agency with responsibility for handling phone enquiries and referrals in cases of elder abuse, but only three states currently have publicly funded legal services for seniors.¹⁶⁹ The majority of helpline and referral services within Australia have only been established in the last five years, although both South Australia and Queensland have had services in place since 1997.

The relevant policy instruments include the following:

- ACT's 'Elder Abuse Prevention Program Policy 2012';¹⁷⁰
- NSW's 'Interagency Protocol for Responding to Abuse of Older People 2007';¹⁷¹
- Tasmania's 'Responding to Elder Abuse: Tasmanian Government Practice Guidelines for Government and Non-Government Employees 2012';¹⁷²
- Victoria's *Elder Abuse Prevention and Response Guideline for Action 2012–2014 and With Respect to Age — Victorian Government Practice Guidelines for Health Services and Community Agencies for the Prevention of Elder Abuse 2009*;¹⁷³
- South Australia's *Draft Strategy for Safeguarding Older South Australians 2014–2021*.¹⁷⁴

Western Australia does not have a government policy, but the Alliance for the Prevention of Elder Abuse ('APEA') has developed a resource: *Elder Abuse Protocol: Guidelines for Action*.¹⁷⁵ In no jurisdiction is there a dedicated agency or unit with the mandate to investigate reported cases of abuse, compel another agency to provide information or cooperate in an investigation, convene multi-agency meetings or to seek specific orders to safeguard a vulnerable older person. Privacy laws around the country pose potentially significant hurdles to the sharing of information between agencies, given the lack of legislative provisions to modify their effect.¹⁷⁶ In all frameworks, the centrality of human rights to the policy is

¹⁶⁹ See Clare, Blundell and Clare, above n 8, 18–22. Queensland, Victoria and Western Australia have specialist seniors' legal services, although all jurisdictions have community legal centres or other agencies which provide legal services to seniors.

¹⁷⁰ Australian Capital Territory Government, *Elder Abuse Prevention Program Policy* (June 2012) <http://www.communityservices.act.gov.au/wac/ageing/elder_abuse_prevention_and_assistance>.

¹⁷¹ New South Wales Government, *Interagency Protocol for Responding to Abuse of Older People* (2007) <http://www.adhc.nsw.gov.au/sp/report_abuse/responding_to_abuse_of_older_people>.

¹⁷² Tasmanian Government, Department of Health and Human Services, *Responding to Elder Abuse: Tasmanian Government Practice Guidelines for Government and Non-Government Employees* (August 2012) <http://www.dhhs.tas.gov.au/_data/assets/pdf_file/0013/112450/120600_Elder_Abuse_Practice_Guidelines_FINAL_0708.pdf>.

¹⁷³ Victorian Government, *Elder Abuse and With Respect to Age*, above n 8.

¹⁷⁴ South Australian Government, above n 8.

¹⁷⁵ APEA:WA, *Elder Abuse Protocol: Guidelines for Action* (November 2006) <<http://www.communities.wa.gov.au/Documents/Seniors/APEA%20Elder%20Abuse%20Protocols.pdf>>

¹⁷⁶ See, eg. *Closing the Gaps*, above n 9, 60–4.

generally embedded in principles underpinning the document.¹⁷⁷ However, South Australia's *Draft Strategy*, released for public consultation in June 2013, and containing a new 'Charter of Rights and Freedoms of Older Persons', is the most human rights-focused document of the existing or proposed policies. The report that triggered both the review of the previous South Australian framework¹⁷⁸ and the development of the new *Draft Strategy* — the *Closing the Gaps Report* — highlighted the systemic weaknesses in the existing framework within South Australia:

The present legal framework therefore provides protective frameworks for serious cases of abuse and for those who are particularly vulnerable due to mental illness or incapacity, but it does not provide a framework for less intrusive methods of intervention, or early intervention, and at a time when serious abuse or neglect could be avoided. In these respects, the current legal system is not preventative in nature and fails to provide an incremental approach to intervention that recognises degrees of vulnerability falling short of complete incapacity. In addition, there is presently a vacuum within which agencies and organisations operate, for the purposes of providing complementary and coordinated services to older persons. The lack of a legal or policy framework which requires or promotes inter-agency collaboration, together with information sharing guidelines, creates a vacuum within which providers must operate. The result is that any collaboration and coordination between agencies is largely left to the goodwill of individuals working within those agencies and can involve instances where an agency's legal mandate is being creatively stretched beyond its actual limits. In such cases, workers can expose themselves and their employers to considerable risk, but in these instances such action can also reflect the only possible option for supporting an older person who is vulnerable to abuse. The potential can also arise for guardianship orders to be used, as an option of last resort, where less intrusive measures would have been more appropriate and more respectful of an older person's rights and freedoms.¹⁷⁹

None of these systemic issues — which apply equally to other jurisdictions where policy frameworks are in place — have been addressed in the new South Australian *Draft Strategy*. *Closing the Gaps* presents a compelling argument for the enactment of adult protection legislation at state level in Australia. However, the *Draft Strategy* is positive in that human rights are incorporated into the document, and it has the potential to encourage further innovation in the policies and protocols that are intended to be developed on the basis of it. Nonetheless, *Closing the Gaps* suggests that a policy framework is merely an interim option for South Australia and that only legislation in the form of adult protection legislation would effectively 'close the gaps' in elder abuse prevention and response protocols. Until then, any elder abuse strategy will suffer from major limitations in the capacity to intervene early in preventing — or at least preventing the escalation of — elder abuse, and in the capacity to respond effectively in reported or known cases of abuse. In Victoria, the recent *Chesterman Report*, while not going so far as the recommendations made in the *Closing the Gaps Report*, also made

¹⁷⁷ See, eg, Tasmanian Government, above n 172, 10.

¹⁷⁸ Office for the Ageing, Department of Families and Communities, *Our Actions to Prevent the Abuse of Older South Australians* (November 2007).

¹⁷⁹ *Closing the Gaps*, above n 9, 23.

recommendations that would ultimately require expanding the role of the Public Advocate via legislative amendment.¹⁸⁰

A recent session at a national conference held to mark World Elder Abuse Awareness Day included a national scan of strategies to prevent elder abuse by state and territory governments.¹⁸¹ The presentations highlighted a significant level of goodwill, yet vast differences in priority and funding accorded to the issue of elder abuse. The policy frameworks in existence in the majority of states and territories are simply inadequate in setting up a legal framework where the *rights* of older persons can be effectively protected. It would appear that there exists a lack of political will at the state level to drive legislative reform that would provide a legally effective framework for safeguarding vulnerable older persons, and a framework that would equip agencies effectively and lawfully to respond in cases of elder abuse. This lack of political will is partly, perhaps even principally, explained by the perception that the Commonwealth controls ageing as a portfolio and that the responsibility of the states is limited to implementing federally funded programs. This perception is based on a flawed understanding of the scope of both the Commonwealth and state legislative responsibilities with respect to older Australians. There is no constitutional or legal reason why the states cannot unilaterally develop stronger legal frameworks. As public awareness of elder abuse grows, it is just as likely that the gaps in state elder abuse frameworks will be exposed, as it is likely that the Commonwealth's *Aged Care Act* will be criticised¹⁸² for failing to prevent the abuse of vulnerable older Australians. Recent reports from both South Australia and Victoria have demonstrated alternative ways in which legislative reform can achieve significant improvements, but without significant associated costs. Thus, there are clear reform options open to the states that would provide significant improvements in the extent to which vulnerable older persons could be supported in cases of abuse, and which need not require Commonwealth funding.

One strategy that might assist in generating greater awareness of both the prevalence of elder abuse throughout Australia and options for reform or changes in practice, would be the commencement of an inquiry into elder abuse by the AHRC. The AHRC has the power to 'inquire into any act or practice that may be inconsistent with or contrary to any human right' under s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth), along with the power to conduct research and educational programs that promote human rights.¹⁸³ While the Commonwealth could certainly use its financial powers to fund a national scheme that would be implemented by the states and territories, one area where it should assume a leading role is through a concerted focus on the human rights of older

¹⁸⁰ See Chesterman, above n 34, 78–86.

¹⁸¹ Second National World Elder Abuse Awareness Day Conference, Adelaide, 17–18 June 2013, <http://www.sa.agedrights.asn.au/page/view_by_id/39>.

¹⁸² The ABC's *Lateline* program recently featured such a story: ABC Television, 'Aged Care Crisis', *Lateline*, 15 July 2013 (Margot O'Neill) <<http://www.abc.net.au/lateline/content/2013/s3803710.htm>> See also ABC Television, 'Outrage over the Treatment of Nursing Home Patients', *Lateline*, 16 July 2013 (Emma Alberici) <<http://www.abc.net.au/lateline/content/2013/s3804571.htm>>.

¹⁸³ *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(h).

persons. This could be effected through the AHRC assuming a lead role in ensuring that all Australians, particularly vulnerable persons, continue to enjoy their fundamental rights — for life, and not only while they can self-advocate and self-protect. The benefits of such an inquiry would lie in providing a more accurate picture of the true prevalence of elder abuse within Australia and a platform for a national education campaign on elder abuse and the signs of elder abuse.

VI Conclusion

Elder abuse is a real and growing problem in Australia. However, while there exists a plethora of public strategies, policies and plans which deal with matters such as health and superannuation, there is almost nothing heard about abuse perpetrated against our most vulnerable and dependent older Australians. It is only when the media brings tragic cases like that of Cynthia Thoresen's to light that we even hear about this problem. However, rarely are those stories told against a backdrop of wider, systemic abuse and neglect. That Australia's legal and policy frameworks for dealing with elder abuse are so weak is a national disgrace and it is time that lawyers joined the calls for a better system of adult protection in Australia. However, any system must be framed from a rights perspective to ensure that ageist and paternalistic approaches are not adopted, thereby avoiding the erosion of the rights and freedoms of vulnerable adults under the guise of safeguarding or protecting those people. We should adopt a progressive approach to the interpretation and implementation of existing international human rights norms. However, at the same time, Australians should be encouraging the federal government to change its position with regard to a new convention, recognising that there is both a normative as well as an implementation gap when it comes to older persons and international human rights law.