2. Concepts and Context

Contents

Summary

2.1 This chapter frames and situates the issue of elder abuse, both demographically and conceptually. The first section provides a picture of the diversity of older people in Australia—who they are, where they live, and the fact that older people will make up an increasing proportion of all Australians in the coming years. Next, the chapter considers the issue of abuse of older Australians, and explores the concept of 'elder abuse', as well as setting out available evidence about the level of elder abuse in Australia. The chapter then considers how legal responses to elder abuse are framed by Australia's federal division of responsibilities for issues affecting older people, and human rights considerations.

2.2 Finally, the chapter sets out the interrelationship of the ALRC's framing principles for this Inquiry—dignity and autonomy and protection and safeguarding—and outlines the conceptual underpinnings of the terminology used in this Report.

Who are older Australians?

2.3 The idea of someone being an 'older' person is a relative concept—chronologically, medically and culturally. It does not have a precise definition and specific ages may be used for particular purposes. For example, the Australian Bureau of Statistics (ABS) groups people into population age cohorts, and differentiates between '15–64', '65 years and over' and '85 years and over'. People over 65 are generally classified as 'older' for ABS purposes.[1]

2.4 Australia's population is ageing as a result of the combination of increasing life expectancy and lower fertility levels.[2] The proportion of Australians aged 65 or over is increasing. By 2054–55, it is projected that 22.6% of the population will be aged 65 or over. This compares to 15% of the population in 2014–15.[3]

2.5 The life expectancy for Australians has increased significantly since the early 20th century. In 2013–2015, life expectancy at birth for males was 80.4 years and females 84.5 years.[4] Residual life expectancy (the average number of additional years that a person at a certain age can expect to live) for males aged 65 years was 19.5 years and females 22.3 years.[5] By comparison, in 1901–10, the life expectancy at birth for males was 55.2 years and for females 58.8 years. Residual life expectancy for males aged 65 years was 11.3 years and females 12.9 years.[6]

2.6 'Healthy life expectancy'—that is, the extent to which additional years are lived in good health—is also increasing.[7] According to the Australian Institute of Health and Welfare (AIHW):

> Men aged 65 in 2012 could expect to live 8.7 additional years disability-free and 6.7 further years with a disability, but without severe or profound core activity limitation. Women aged 65 in 2012 could expect 9.5 additional years disability-free and 6.7 years with a disability, but without severe or profound core activity limitation.[8]

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1 This is also the age reference for 'older' used by the Australian Institute of Health and Welfare and incorporated into the Terms of Reference for House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) Terms of Reference. In an earlier ALRC Inquiry, into barriers to work for older Australians, the Terms of Reference defined 'older persons' as anyone over the age of 45 years, which is consistent with the ABS definition of 'mature age worker': Australian Law Reform Commission, *Access All Ages—Older Workers and Commonwealth Laws*, Report No 120 (2013).

2 Australian Bureau of Statistics, *Reflecting a Nation: Stories from the 2011 Census, 2012–2013: Who are Australia's Older People? Cat No 2071.0* (2012). Population ageing is also a global phenomenon. In 1950, 8% of the world's population was 60 years or older. In 2011, this rose to 11%, and it is projected to rise to 22% by 2050: World Economic Forum, Global Agenda Council on Ageing Society, *Global Population Ageing: Peril or Promise?* (2011) 5.

3 Commonwealth of Australia, *2015 Intergenerational Report: Australia in 2055* (2015) table 1.3.

4 Australian Institute of Health and Welfare, *Life Expectancy* <www.aihw.gov.au/deaths/life-expectancy/>.

5 Ibid.

6 Australian Institute of Health and Welfare, *Australian Trends in Life Expectancy* (2012).

7 Ibid 82.

8 Australian Institute of Health and Welfare, *Australia's Welfare 2015* (2015) 237.

2.7 However, there are significant variations in life expectancy among different groups in the population. For example, Aboriginal and Torres Strait Islander persons have a significantly lower life expectancy than other Australians:

> For the Aboriginal and Torres Strait Islander population born in 2010–2012, life expectancy was estimated to be 10.6 years lower than that of the non-Indigenous population for males (69.1 years compared with 79.7) and 9.5 years for females (73.7 compared with 83.1).[9]

2.8 Older people aged 85 years and over need significantly more assistance and care than those aged 65–84. The AIHW summarises:

> - the need for assistance with cognitive and emotional tasks was four times greater for Australians aged 85 and over (28%) than Australians aged 65–84 (7%)
> - over one-half (59%) of Australians aged 85 years and over reported a need for assistance with health-care compared with one-fifth (20%) of Australians aged 65–84
> - a higher proportion of women aged 85 and over (69%) reported the need for assistance with personal activities than men in the same age group (56%); these figures compare with 38% and 41% of women and men aged 65–84 needing assistance, respectively
> - in terms of personal activities, the most common type of assistance required for both men and women in this age group was mobility assistance (39% and 54% respectively) followed by self-care (33% and 44%) and communication (14% and 19%). This was a similar pattern to that for Australians aged 65–84, although this younger group had less need for assistance overall.[10]

Diversity among older people

2.9 There is significant diversity among older people including in relation to gender, culture and language and disability.

Gender

2.10 Gender significantly affects experiences of ageing. Women have a longer life expectancy than men, but older women have relatively lower incomes and fewer assets than men.[11] Contributing factors to this include lower average weekly ordinary time earnings for women (a 17.3% 'gender pay gap' at November 2015), as well as career breaks to undertake unpaid care work.[12] Women tend to have lower superannuation balances and retirement payouts than men.[13] Approximately 60% of women aged 65–

9 Australian Institute of Health and Welfare, above n 4.
10 Australian Institute of Health and Welfare, above n 8, 234.
11 Australian Human Rights Commission, *Accumulating Poverty? Women's Experiences of Inequality Over the Lifecycle* (2009) 7.
12 Workplace Gender Equality Agency, *Gender Pay Gap Statistics—March 2016* (2016).
13 R Clare, 'Developments in the Level and Distribution of Retirement Savings' (Research Paper, Association of Superannuation Funds of Australia, 2011) 3. This is likely to continue to be the case for older women for some time into the future: Men aged 55–64 in 2013–14 had a much higher average superannuation balance than women the same age: $321,993 compared with $180,013: Australian Bureau of Statistics, *Gender Indicators, Australia, Feb 2016: Economic Security* (2016).

69 in 2009–10 had no superannuation.[14] Women also make up a greater proportion of Age Pension recipients. At June 2013, women comprised 55.6% of recipients. Of these, 60.8% received the full rate of Age Pension.[15]

Aboriginal and Torres Strait Islander people

2.11 In 2011, there were an estimated 76,300 Aboriginal and Torres Strait Islander people aged 50 years and over, making up 12% of the total population of Aboriginal and Torres Strait Islander people.[16] Older Aboriginal and Torres Strait Islander people occupy an important place in their communities, maintaining traditions and links to Aboriginal and Torres Strait Islander culture, and acting as 'role models, supporters and educators for the young'.[17]

2.12 However, Aboriginal and Torres Strait Islander people aged 50 years and older tend to have poorer health, higher levels of socioeconomic disadvantage and lower life expectancy than the broader Australian population.[18]

Culturally and linguistically diverse Australians

2.13 In 2011, over 1.34 million people aged 50 years and older in Australia were born in non-English speaking or culturally and linguistically diverse (CALD) countries, almost 20% of the total Australian population in this age group.[19] Of those aged 80 years and over, 18.5% were born in non-English speaking background countries.[20]

2.14 Some CALD groups in Australia have very high proportions of older people:

> For example, 88.4% of all Australians born in Italy and 87.9% of Australians born in Greece are now aged 50 years and over. Those aged 80 years and over account for more than 15% of all Australians born in Latvia, Estonia, Lithuania, Ukraine, Italy, Poland, Slovenia and Hungary compared to 3.9% aged 80+ years for the total Australian population.[21]

2.15 While there are differences among CALD populations, in general older people from CALD backgrounds have poorer socioeconomic status compared to the older Anglo-Australian population.[22]

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14 Clare, above n 13, 3.
15 Department of Social Services (Cth), *Income Support Customers: A Statistical Overview 2013. Statistical Paper No 12* (2014).
16 Australian Institute of Health and Welfare, *Older Aboriginal and Torres Strait Islander People* (2011) v, 1.
17 Ibid 1.
18 Ibid v.
19 Federation of Ethnic Communities' Council Australia, *Review of Australian Research on Older People from Culturally and Linguistically Diverse Backgrounds* (2015) 6.
20 Ibid.
21 Ibid.
22 Ibid 10.

Disability

2.16 Older people with disability include both people who acquired their disability at an early age, as well as those who acquire disability with age. Rates of disability increase with age. The AIHW stated in 2011 that:

> After around 50 years of age the prevalence of disability rose considerably, from 20% in the 50–54 years age group to more than 80% among people aged 85 years or over. Rates of severe or profound core activity limitations were even more strongly associated with ageing. This degree of disability was reported for fewer than one in 20 Australians up to the age of 55 years (excluding the peak in boys aged 10–14 years), but almost one-third of people aged 75 years or over.[23]

2.17 The proportion of people with a disability who are over 65 is likely to increase, as the broader population ages:

> In addition to an increase in disability overall, population ageing changes the composition of the population with disability. In 1981, 10% of all Australians with disability were aged under 15 years and 31% were 65 years or older; in 2009, 7% of the population with disability were aged 0–14 years and 39% were 65 years or over. If this continues, the mix of services and support required by older people with disability will need to increase, relative to those required by younger people.[24]

Dementia

2.18 Dementia is a term that describes a number of different diseases characterised by 'impairment of brain functions, including language, memory, perception, personality and cognitive skills'.[25] The prevalence of dementia increases with age, and from age 65 prevalence doubles every 5 or 6 years.[26]

2.19 It is estimated that, in 2016, there were 400,833 adults living with dementia in Australia.[27] The rate of dementia in people aged 65 years and over was 10% and for those aged 85 and over, 30%.[28] The majority—approximately 75%—of people with dementia live in the community.[29] Approximately half of all residents in residential aged care have a diagnosis of dementia, and their level of dementia is more severe than those living in the community.[30] The number of people with dementia is projected to rise to approximately 1.1 million people by 2056.[31]

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23 Australian Institute of Health and Welfare, *Australia's Welfare 2011* (2011), 11.
24 Ibid 12.
25 Australian Institute of Health and Welfare, *Dementia in Australia* (2012) 2.
26 Ibid 5.
27 Laurie Brown, Erick Hansnata and Hai Anh La, 'Economic Cost of Dementia in Australia 2016–2056' (National Centre for Social and Economic Modelling for Alzheimer's Australia, 2017) 6.
28 Ibid. The AIHW has noted that '[d]ementia is emerging as a problem for Indigenous people at comparatively young ages (under 75 years), probably due to the high rates of chronic disease and other risk factors they experience': Australian Institute of Health and Welfare, *Older Aboriginal and Torres Strait Islander People* (2011) v.
29 Brown, Hansnata and La, above n 27, ix.
30 Australian Institute of Health and Welfare, above n 8, 273. See also Brown, Hansnata and La, above n 27, ix.
31 Australian Institute of Health and Welfare, above n 25, 11.

Where do older people live?

2.20 In 2015, most older people lived in households, and only 5.2% lived in care accommodation. Most older people lived with others; 26.8% lived alone.[32]

2.21 Within Australia, Tasmania and South Australia have relatively older populations. In 2015, Tasmania had the highest proportion of people aged 65 years and over (17.8%), followed by South Australia (16.7%). The Northern Territory had the lowest proportion of persons in this age group (7.6%).[33]

2.22 Most older people (69%) live in major urban areas. Approximately one quarter live in smaller cities and towns, and the remainder in areas where there are populations of fewer than 1,000 people.[34] The age profile of those living in regions outside capital cities is projected to become increasingly older. According to the ABS:

> In the non-capital city areas of New South Wales, Victoria, South Australia and Tasmania, it is projected that by 2056 there will be less than two people of working age for every person aged 65 years and over. In contrast, capital cities such as Sydney, Melbourne, Brisbane and Perth are projected to have considerably younger populations with around three people of working age for every one aged 65 years and over.[35]

Who takes care of older people?

2.23 Some older people require additional care and support. The majority of this care and support is provided in the community by informal carers. Formal aged care is also provided in the home and in residential aged care facilities for those with higher care needs.[36] The Productivity Commission noted in 2011 that around 350,000 primary carers provided assistance to an older person aged 65 or over. The majority of primary carers for older people were their spouse or partner, and about one quarter of primary carers were the older person's son or daughter.[37]

2.24 People with dementia are one group who generally require additional care and support. The National Centre for Social and Economic Modelling (NATSEM) has estimated that '46% of those living in the community receive informal assistance only, 29% receive both informal and formal care, 16% receive formal assistance only and 9% no assistance at all'.[38] Those people with dementia living in residential aged care facilities tend to have much higher care needs than residents who do not have dementia.[39]

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32 Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings, 2015, Cat No 4430.0* (2016).
33 Ibid.
34 Australian Bureau of Statistics, *Reflecting a Nation: Stories from the 2011 Census: Where and How Do Australia's Older People Live? Cat No 2071.0* (2013).
35 Australian Bureau of Statistics, *Australian Social Trends, March 2009, Cat No 4102.0* (2009).
36 See further ch 4.
37 Productivity Commission, *Caring for Older Australians* (Report No 53, 2011) 326–7.
38 Brown, Hansnata and La, above n 27, ix.
39 Ibid.

Abuse of older people

What is 'elder abuse'?

2.25 The most widely known definition of elder abuse is that provided by the World Health Organization (WHO). It defines elder abuse as:

> a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.[40]

2.26 This description is used across a range of government and non-government bodies in Australia.[41] Generally, five forms of elder abuse are distinguished: physical, psychological, financial, sexual abuse, and neglect.[42]

2.27 The definition of elder abuse does not include all abuse of older persons, but is limited by the relationship between the abuser and the older person—that is, when they are in a relationship where there is an expectation of trust. This will include an expectation of trust as a result of an 'affective relationship', such as family members, friends, and informal carers, and those in a 'functional position of trust', such as paid carers and some professionals.[43]

2.28 The Terms of Reference for this Inquiry refer to abuse by 'formal and informal carers, supporters, representatives and others'. The inclusion of 'formal' carers means that abuse by paid carers has been considered in the Inquiry, for example in relation to aged care.

2.29 There is limited evidence available about the extent of elder abuse in Australia. To assist in remedying this, the ALRC recommends in Chapter 3 that there be a national prevalence study of elder abuse.[44] In an Australian Institute of Family Studies research report into elder abuse (the AIFS Report), Dr Rae Kaspiew, Dr Rachel Carson and Professor Helen Rhoades summarise what can be drawn from the currently available information:

> The available evidence suggests that prevalence varies across abuse types, with psychological and financial abuse being the most common types of abuse reported, although one study suggests that neglect could be as high as 20% among women in the older age group. Older women are significantly more likely to be victims than older men, and most abuse is intergenerational (ie, involving abuse of parents by adult

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40 World Health Organization, *The Toronto Declaration on the Global Prevention of Elder Abuse* (2002).

41 See, eg, My Aged Care, *Elder Abuse Concerns* (22 June 2015) <www.myagedcare.gov.au/financial-and-legal/elder-abuse-concerns>; Elder Abuse Prevention Unit, *Elder Abuse: Definition* <www.eapu.com.au/elder-abuse>.

42 J Lindenberg et al, 'Elder Abuse an International Perspective: Exploring the Context of Elder Abuse' (2013) 25(08) *International Psychogeriatrics* 1213, 1213.

43 Thomas Goergen and Marie Beaulieu, 'Critical Concepts in Elder Abuse Research' (2013) 25(8) *International Psychogeriatrics* 1217, 1224. It will also exclude the exploitation of older people through, for example, consumer scams, an issue raised in some submissions to this Inquiry: see, eg, Protecting Seniors Wealth, *Submission 312*.

44 Rec 3–5. At the time of writing this Report, a scoping study for a survey of the prevalence of elder abuse had been completed: Lixia Qu et al, 'Elder Abuse Prevalence Scoping Study' (Australian Institute of Family Studies, unpublished).

> children), with sons being perpetrators to a greater extent than daughters. For some women, the experience in older age of family violence, including sexual assault, represents the continuation of a lifelong pattern of spousal abuse. Evidence on elder abuse occurring outside of a familial context (eg, in care settings) is particularly sparse.[45]

2.30 The WHO has noted that research in other predominantly high-income countries has found 'wide variation in rates of abuse in the preceding 12 months among adults aged over 60 years, ranging from 0.8% in Spain and 2.6% in the United Kingdom to upwards of 18% in Israel, 23.8% in Austria and 32% in Belgium'.[46]

2.31 The terminology of 'elder abuse' may not be appropriate to some communities. For example, the National Aboriginal and Torres Strait Islander Legal Services said that in the Aboriginal and Torres Strait Islander community, in addition to referring to the age of a person, 'elder' is also 'a title of respect'.[47] Similarly, in CALD communities there may be difficulties in 'translating the term "elder abuse" in different cultural contexts and languages'.[48]

Difficulties of definition

2.32 A number of complexities exist in describing elder abuse, particularly in relation to the concept of 'age', and the relationship of elder abuse with other forms of interpersonal violence.[49] The WHO definition captures a wide range of conduct ranging from intentional to unintentional abuse. As such, it may be said that the term elder abuse 'does not represent a single problem, but many different problems'.[50]

Age

2.33 Using chronological age as a marker for a distinct form of abuse carries with it some difficulties. As Professors Thomas Goergen and Marie Beaulieu have noted, 'it is hard to see how victimization and their consequences should change categorically by reaching a certain minimum age'.[51] Others have argued that the development of the

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45 Rae Kaspiew, Rachel Carson and Helen Rhoades, 'Elder Abuse: Understanding Issues, Frameworks and Responses' (Research Report 35, Australian Institute of Family Studies, 2016) 5.

46 World Health Organization, *Global Status Report on Violence Prevention* (2014) 78.

47 National Aboriginal and Torres Strait Islander Legal Services, *Submission 135*.

48 Ethnic Communities' Council of Victoria Inc, *Submission 52*.

49 However, it has been argued that 'definitional conformity' of elder abuse has developed: Lindenberg et al, above n 42, 1213. Stakeholders provided a number of comments on aspects of the definition of elder abuse, summarised in the Discussion Paper: Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) Ch 1. See also Seniors Rights Victoria, *Submission 383*; Disabled People's Organisations Australia, *Submission 360*; Eastern Community Legal Centre, *Submission 357*; COTA, *Submission 354*; Women's Legal Services Australia, *Submission 343*; SSSL Barristers and Solicitors, *Submission 323*; Protecting Seniors Wealth, *Submission 312*; Speech Pathology Australia, *Submission 309*; Australian Dispute Resolution Advisory Council Inc, *Submission 303*; FamilyVoice Australia, *Submission 300*; Dr Kelly Purser, Dr Bridget Lewis, Kirsty Mackie and Prof Karen Sullivan, *Submission 298*; Mecwacare, *Submission 289*; T Ryan, *Submission 276*; W Bonython and B Arnold, *Submission 241*; S Biggs, *Submission 235*.

50 Joan Harbison et al, 'Understanding "Elder Abuse and Neglect": A Critique of Assumptions Underpinning Responses to the Mistreatment and Neglect of Older People' (2012) 24(2) *Journal of Elder Abuse & Neglect* 88, 89.

51 Goergen and Beaulieu, above n 43, 1220.

concept of 'elder abuse' should be seen in the context of broader understandings about ageing:

> the concept of 'elder abuse and neglect' was developed in an era when older people were identified as a homogenous group based on chronological age and were marginalized by an understanding of their declining capacities that was associated with their exclusion from the labor market and with a perception that their roles in society should be increasingly limited.[52]

2.34 Increasing diversity over the life course, particularly with regard to shifts in expectations about retirement from paid work, has implications for distinguishing 'elder' abuse as a specific form of abuse. Moreover, the abuse of older people shares some characteristics with the abuse of other groups of people who may be at heightened risk of abuse, such as people with disability. Such groups are often referred to as 'vulnerable', although the Law Commission of England and Wales has expressed a preference for the term 'adults at risk', because of

> concerns that the term vulnerable adult appears to locate the cause of abuse with the victim, rather than placing responsibility with the actions or omissions of others. It can also suggest that vulnerability is an inherent characteristic of a person and does not recognise that it might be the context, the setting or the place which makes a person vulnerable.[53]

2.35 However, there may be some factors that are associated with ageing, particularly entering into very old age, which mean that a person is more at risk of a specific kind of abuse. Locating these risks as being *intrinsic* to ageing, rather than the result of a more complex interplay between 'personal, interpersonal and systemic factors', is difficult.[54] Nonetheless, Goergen and Beaulieu have contended that it is important to maintain a distinction between elder abuse and the abuse of other groups of adults, arguing that

> [p]henomena of abuse, quantity and quality of risks, vulnerability indicators, coping resources and approaches to intervention are too distinct to synthesise all these fields under a heading of 'abuse of (vulnerable) adults'.[55]

2.36 As Goergen and Beaulieu have noted, the very old 'generally have a reduced exposure to risks of becoming a victim of violent acts in public spaces and by strangers', mirroring 'age-related changes in lifestyle, interpersonal contacts, mobility outside the home, and spatial environments often insufficiently adapted to older persons' needs'.[56] While risks of 'public sphere' victimisation may reduce, the increased prevalence of functional limitations, and the need for assistance with

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52 Harbison et al, above n 50, 90–91.

53 The Law Commission, *Adult Social Care*, Report No 326 (2011) 114. Others use 'vulnerable' more broadly to include both intrinsic and extrinsic factors. See further Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press, 2016) ch 2.

54 Simon Biggs and Ariela Lowenstein, *Generational Intelligence: A Critical Approach to Age Relations* (Routledge, 2013) 100.

55 Goergen and Beaulieu, above n 43, 1226.

56 Ibid 1222.

activities of daily living, may heighten the risk of abuse by those in a relationship of trust with the older person.[57]

2.37 There are advantages to retaining a focus on elder abuse as a distinctive social problem that requires targeted research, prevention and response strategies. However, in this Inquiry, the ALRC has generally avoided making law reform recommendations that are targeted *solely* at 'older' people. Instead, it has recommended that a National Plan be developed to combat elder abuse, to provide national leadership and coordination of strategies (including legal reforms) to prevent and respond to elder abuse.

Relationship with family violence

2.38 Elder abuse is often committed by a family member of the older person—notably, by adult children, but also the older person's spouse or partner. The essence of elder abuse in the WHO definition is the harm or distress caused by a person in a position of trust. Family violence exhibits similar dynamics. It is defined in the *Family Law Act 1975* (Cth) as meaning 'violent, threatening or other behaviour by a person that coerces or controls a member of the person's family or causes the family member to be fearful'.[58]

2.39 The approach reflected in the WHO definition is wider than the concept of 'family violence', in that the relationships of trust extend more widely than 'family'. However, elder abuse is closely related to family violence and, as Dr John Chesterman observed, 'elder abuse is often also an instance of family violence'.[59] The Victorian Royal Commission into Family Violence included specific coverage of violence against older people, noting that elder abuse and family violence are often used interchangeably in policy documents and statistics.[60]

2.40 Like family violence, elder abuse can be physical, sexual, psychological or financial in nature, and is usually committed by a family member; and available research also suggests that women are more likely to experience elder abuse than men.[61] Some instances of elder abuse may be a continuation of family violence that began when the perpetrator and victim were not old. In other cases, while the perpetrator may be a family member, and thus the abuse could also be described as 'family violence', ageism, cognitive impairment of the victim, social isolation or relationships of dependence as well as gender may be important factors in the abuse.[62]

2.41 There may be some differences in the dynamics of family violence and elder abuse.[63] Family violence is often characterised as a manifestation of power and

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57 Ibid.

58 *Family Law Act 1975* (Cth) s 4AB(1). This provision was introduced in 2011.

59 John Chesterman, 'Taking Control: Putting Older People at the Centre of Elder Abuse Response Strategies' (2016) 69(1) *Australian Social Work* 115, 117.

60 Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 68.

61 Kaspiew, Carson and Rhoades, above n 45, 5.

62 Ibid ch 3. See also Women's Legal Services Australia, *Submission 343*.

63 See also Seniors Rights Victoria, *Submission 383*; Eastern Community Legal Centre, *Submission 357*; St Vincent's Health Australia, *Submission 345*; Dr Kelly Purser, Dr Bridget Lewis, Kirsty Mackie and Prof

control.[64] There is less agreement about the dynamics of elder abuse.[65] The AIFS Report noted that

> [p]rogress towards understanding elder abuse and developing effective response and prevention measures, are recognised to be considerably less well developed than in other areas of interpersonal violence, including family violence and child abuse.[66]

2.42 A particular manifestation of elder abuse is financial abuse, which appears to be one of the most common forms of elder abuse. Changing social attitudes to intergenerational wealth transfer in families are important considerations in developing an understanding of elder financial abuse. As the AIFS Report noted:

> generational attitudes and expectations in relation to asset transfers before or after death, and the broader question of attitudes and expectations in relation to mutual or non-mutual intergenerational support in terms of material resources and care, form an important part of the backdrop to the social and economic dynamics that may influence the conditions in which elder abuse occurs.[67]

2.43 Whether abuse of an older person is described as elder abuse or family violence can have an impact on services available to the older person to respond to the abusive behaviour. For instance, family violence services, such as crisis accommodation, that largely cater for women and children may not be suitable for older victims.[68]

Definition and measurement

2.44 Consensus on a definition of elder abuse is important for developing an evidence base about it. As the AIFS Report observed, having identified the similarity of elements in a number of definitions, 'the absence of a precise agreed definition is considered problematic for a range of reasons, not the least of which is the difficulty in measuring elder abuse'.[69] Commenting on previous international studies that sought to measure the prevalence of elder abuse, the authors of a 2007 report on a study of prevalence of elder abuse in the UK noted that '[v]ariation in prevalence estimates is heavily influenced by differences in methodology', including differences in definition.[70]

2.45 The A:RC considers that, to obtain a full picture of the abuse of older people, a broad description of elder abuse needs to be used, like the WHO definition. This can serve a range of purposes, including to gain a better understanding of the experiences of older Australians. The information obtained through using a wide definition can

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Karen Sullivan, *Submission 298*; Women's Domestic Violence Court Advocacy Services NSW Inc, *Submission 293*; FMC Mediation & Counselling, *Submission 284*; S Biggs, *Submission 235*; Caxton Legal Centre, *Submission 174*; Office of the Public Guardian (Qld), *Submission 173*; Protecting Seniors Wealth, *Submission 111*.

64 Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 18.

65 Women's Legal Services Australia Women's Legal Services Australia, *Submission 343*.

66 Kaspiew, Carson and Rhoades, above n 45, 4.

67 Ibid 19.

68 Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 92.

69 Kaspiew, Carson and Rhoades, above n 45, 4. Definitional questions are also considered in Qu et al, above n 44.

70 Madeleine O'Keeffe et al, 'UK Study of Abuse and Neglect of Older People: Prevalence Survey Report' (Comic Relief and the Department of Health, 2007) 11.

inform the development of a wide range of policy responses, form community education to criminal offences.

Categories of elder abuse

2.46 Commonly recognised categories of elder abuse include psychological or emotional abuse, financial abuse, physical abuse, neglect, and sexual abuse. These types of abuse are considered throughout this Report. A short overview is set out below.

Psychological abuse

2.47 Psychological or emotional abuse appears to be one of the most common types of elder abuse,[71] and includes verbal abuse, name calling, bullying and harassment.

2.48 Over a third of calls that reported abuse to a Victorian elder abuse helpline over two years were related to emotional abuse.[72] Verbal abuse was the most common complaint,[73] followed by 'pressuring, intimidating or bullying/harassment',[74] and 'name calling, degrading, humiliating or treating the person like a child, in private or public'.[75]

2.49 Other examples of psychological abuse include: repeatedly telling an older person that they have dementia; threatening to withdraw affection; and threatening to put an older person into a nursing home.[76] Stopping an older person from seeing family and friends may also be psychological abuse or 'social abuse'.

2.50 A US national study found that being ignored, humiliated or verbally abused were commonly reported types of 'emotional mistreatment' of older people living in the community.[77]

Financial abuse

2.51 Financial abuse appears to be the other most common type of elder abuse, accounting for over a third of the calls that reported abuse to the Victorian helpline.[78] Common types of financial abuse were: someone incurring bills for which the older

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71 Kaspiew et al state that the available evidence suggests that psychological and financial abuse are the most common types of abuse reported: Kaspiew, Carson and Rhoades, above n 45, 5.

72 National Ageing Research Institute and Seniors Rights Victoria, *Profile of Elder Abuse in Victoria. Analysis of Data about People Seeking Help from Seniors Rights Victoria* (2015). Helpline data does not provide a complete picture of the incidence of elder abuse, but the data may be indicative of both the level and possible manifestations of different types of abuse. As discussed in Ch 3, Australia needs a national study of the prevalence of elder abuse.

73 36% of calls that reported abuse: Ibid.

74 25% of calls that reported abuse: Ibid.

75 19% of calls that reported abuse: Ibid.

76 Department of Health and Human Services (Tas), *Responding to Elder Abuse: Tasmanian Government Practice Guidelines for Government and Non-Government Employees* (2012) 22.

77 Ron Acierno et al, 'National Elder Mistreatment Study (US)' (Final Report, National Institute of Justice, 2009) 38–39.

78 National Ageing Research Institute and Seniors Rights Victoria, above n 72. After psychological and financial abuse, the next most commonly reported type of abuse, physical abuse, was reported in approximately 10% of calls that reported abuse.

person is responsible;[79] someone living in the older person's home for reasons other than for the benefit of the older person;[80] someone stealing the older person's goods;[81] 'threatening, coercing or forcing an older person into handing over an asset';[82] and abusing power of attorney arrangements.[83]

2.52 The US study found that spending money without permission, forging signatures, and forcing someone to sign something, were commonly reported types of financial elder abuse.[84]

2.53 Other behaviours that may, in some circumstances, be financial abuse include: refusing to repay a loan; living with someone without helping to pay for expenses; failing to care for someone, after agreeing to do so, in exchange for money or property; and forcing someone to sign a will, contract or power of attorney instrument.[85] Many similar examples were provided by stakeholders, and are discussed throughout this Report.

Physical abuse

2.54 Calls to the Victorian helpline reported a range of physical abuse, including: pushing or shoving;[86] kicking, punching, slapping, biting or burning;[87] and rough handling.[88]

2.55 Australian crime statistics suggest that older people are less likely to be murdered, robbed or physically assaulted than younger people.[89] But some types of physical abuse of older people may not be caught by these statistics—for example, the improper use of 'restrictive practices' in hospitals and residential care facilities. Examples of restrictive practices include restraining a person with ropes or belts, locking someone in a room, or unnecessarily giving someone a sedative.

Neglect

2.56 The WHO definition considers that elder abuse can be the result of intentional or unintentional neglect.[90] Neglect includes failing to provide an older person with such things as food, shelter or medical care. Family members may be responsible for

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79 14% (64/455) of the calls that reported abuse: Ibid.
80 9% of calls that reported abuse: Ibid.
81 8% of calls that reported abuse: Ibid.
82 8% of calls that reported abuse: Ibid.
83 7% of calls that reported abuse: Ibid. Many examples were provided in submissions: see, eg, Seniors Rights Service, *Submission 169*.
84 Acierno et al, above n 77, 53–54.
85 Peteris Darzins, Georgia Lowndes and Jo Wainer, 'Financial Abuse of Elders: A Review of the Evidence' (Protecting Elders' Assets Study, Monash University, 2009) 9.
86 9% (39/455) of the calls that reported abuse: National Ageing Research Institute and Seniors Rights Victoria, above n 72.
87 6% of calls that reported abuse: Ibid.
88 4% of calls that reported abuse: Ibid.
89 For example, of the 413 reported victims of homicide and related offences in 2015, 60 victims were aged 0–19, 138 were 20–34, 145 were 35–54, and 62 were 55 or over: Australian Bureau of Statistics, *Recorded Crime—Victims, Australia, Cat No 4510.0* (2015) Table 23. In relation to assault, see Australian Bureau of Statistics, *Crime Victimisation, Australia, 2014–15, Cat No 4530.0* (2016) Table 14.
90 World Health Organization, *The Toronto Declaration on the Global Prevention of Elder Abuse* (2002).

providing such 'necessities of life'. Some may receive a social security payment for providing care to an older relative. Staff in residential care facilities and others who provide in-home care may also be responsible for providing such care.

2.57 Neglect was the subject of relatively few calls to the Victorian helpline: only four people complained of others failing to provide an older person with the necessities of life, and one person said that someone received the carer's allowance but did not provide care.[91]

2.58 Forms of neglect found by the US study included: failing to clean the house or yard; failing to obtain or cook food; failing to obtain medicine; failing to help the person get out of bed, dressed and showered; failing to make sure the bills are paid.[92]

Sexual abuse

2.59 Sexual abuse includes rape and other unwanted sexual contact. It may also include inappropriate touching and the use of sexually offensive language.

2.60 Sexual abuse of older people may be uncommon compared to other types of elder abuse.[93] Australian crime statistics also suggest that older people are significantly less likely to be the victims of sexual assault than younger people, particularly younger females.[94] Sexual assault was also the smallest category of assault found in the US study. However, a 2014 research study stated that, while the 'idea of older women as victims of sexual assault is relatively recent and little understood … it is becoming increasingly evident that, despite the silence that surrounds the topic, such assaults occur in many settings and circumstances'.[95]

Risk factors for abuse

2.61 Risk factors for elder abuse may be said to arise out of the interaction of features relating to individuals, their relationships, and community and society.[96] As with other evidence about elder abuse, more research is needed on risk factors for abuse. However, the WHO has assessed that there is strong evidence for the following risk factors in elder abuse, in relation to the person experiencing the abuse:

- dependence;
- significant disability;
- poor physical health;
- mental disorders (such as depression);

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91 National Ageing Research Institute and Seniors Rights Victoria, above n 72.
92 Acierno et al, above n 77, 48–49.
93 Kaspiew, Carson and Rhoades, above n 45, 11.
94 Australian Bureau of Statistics, *Recorded Crime—Victims, Australia, Cat No 4510.0* (2015).
95 Rosemary Mann et al, 'Norma's Project: A Research Study into the Sexual Assault of Older Women in Australia' (Monograph Series No 98, Australian Research Centre in Sex, Health and Society, La Trobe University, 2014) 1.
96 Etienne G Krug et al, 'World Report on Violence and Health' (World Health Organization, 2002) 131.

- low income or socioeconomic status;
- cognitive impairment; and
- social isolation.

2.62 For the perpetrator, there is strong evidence that the following are risk factors:

- depression;
- substance abuse: alcohol and drug misuse; and
- financial, emotional, relational dependence on the abused.[97]

2.63 There is strong evidence that living alone with the perpetrator is a risk factor for violence. Other risk factors for which there is some evidence are social isolation, and being aged older than 74 years. There is also some evidence that women are more at risk of elder abuse than men.[98]

Elder abuse in particular communities

2.64 The nature and dynamics of abuse experienced by older people may be influenced by their being part of one or more particular communities. However, limitations in available research about elder abuse also exist for research into the dynamics of abuse in particular communities. The AIFS Report noted:

> As the dynamics of elder abuse are context dependent, there remains much to be understood about the extent to which the dynamics of elder abuse are different or similar in varying contexts, and the extent to which different responses may be required.[99]

2.65 There has been limited research on elder abuse in Aboriginal and Torres Strait Islander communities. The AIFS Report concluded that 'substantially more work is required to understand and conceptualise elder abuse in the Aboriginal context, especially among different groups in different circumstances, given the diversity among ATSI communities'.[100]

2.66 A Western Australian study has suggested that most concerns about abuse in Aboriginal communities relate to taking advantage of an older person's financial resources. However, cultural expectations relating to kinship structures and sharing and reciprocity may complicate the way in which abuse is experienced and understood in those communities.[101]

2.67 For CALD groups, cultural expectations relating to family responsibilities may inform the way in which abuse is experienced and understood in different communities. For example, it may be that a cultural norm in some communities exists

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97 World Health Organization, *World Report on Ageing and Health* (2015) table 3.1.
98 Ibid.
99 Kaspiew, Carson and Rhoades, above n 45, 12–13.
100 Ibid 12.
101 Office of the Public Advocate (WA), *Mistreatment of Older People in Aboriginal Communities Project: An Investigation into Elder Abuse in Aboriginal Communities* (2005) 25.

that adult children are responsible for decision making concerning their elderly parents.[102] Additionally, 'cultural expectations around family privacy may prevent older people from recognising, disclosing, and/or reporting abuse, particularly when it is perpetrated by family members'.[103]

2.68 For some older CALD people, limited English skills may contribute to social isolation, increase dependence on family members, and in turn increase vulnerability to exploitation and abuse.[104]

2.69 For people living in rural areas there may be distinct dynamics at play, particularly in the context of farming families. The AIFS Report noted that there may be 'complex and potentially conflictual dynamics around farming properties with the multi-generational interests involved where the farm is the family business':

> These included complications about the treatment of farms as inheritance, and the balance between providing for children and maintaining the family business, placing one child in a different position from the others, and the treatment of labour and other contributions to the improvement of the farm in estates.[105]

2.70 In the context of family violence, it has been suggested that in rural and regional areas, issues such as social and geographic isolation, limited access to support and legal services, as well as complex financial arrangements and pressures, including limited employment opportunities, may heighten vulnerability and shape the experience of violence.[106]

2.71 Older lesbian, gay, bisexual, transgender and intersex (LGBTI) people may experience abuse related to their sexual orientation or gender identity. For example, an LGBTI older person may be abused or exploited by use of threats to 'out' a person. Abuse may be motivated by hostility towards a person's sexual orientation or gender identity. Additionally, LGBTI people may rely on 'families of choice' rather than biological family members—and may face either abuse by these people, or a failure by services to recognise and include these people as family members.[107] Older LGBTI people may also be reluctant to disclose their sexual orientation or gender identity to services for fear of discrimination.

2.72 Additionally, older LGBTI people have a higher exposure to other risk factors for abuse: for example they have a higher likelihood of diagnosis of treatment for a

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102 Ethnic Communities' Council of Victoria, *Reclaiming Respect and Dignity: Elder Abuse Prevention in Ethnic Communities* (2009) 14.

103 Lana Zannettino et al, 'The Role of Emotional Vulnerability and Abuse in the Financial Exploitation of Older People From Culturally and Linguistically Diverse Communities in Australia' (2015) 27(1) *Journal of Elder Abuse & Neglect* 74, 77.

104 Kaspiew, Carson and Rhoades, above n 45, 12.

105 Ibid 13. The complexity of family relationships over farms and farming assets is noted by Cheryl Tilse et al, 'Managing Older People's Assets: Does Rurality Make a Difference?' (2006) 16(2) *Rural Society* 169, 180.

106 Amanda George and Bridget Harris, 'Landscapes of Violence: Women Surviving Family Violence in Regional and Rural Victoria' (Centre for Rural and Regional Law and Justice, 2014) 46–63.

107 See, eg, the US research in National Center on Elder Abuse, *Research Brief: Mistreatment of Lesbian, Gay, Bisexual, and Transgender (LGBT) Elders*.

'mental disorder' or major depression than the general population of older people.[108] They may also be at increased risk of social isolation, which may increase their vulnerability to abuse.

2.73 People with cognitive impairment or other forms of disability have been identified as being more vulnerable to experiencing elder abuse. Where a person has a disability, this will often be correlated with other risk factors: the need for support and assistance, as well as an increased likelihood of social isolation and lower socioeconomic resources.[109]

Framing legal responses to elder abuse

Elder abuse in the federal context

2.74 Issues surrounding elder abuse relate to areas of Commonwealth, state and territory and possibly local government responsibility. For example, the Commonwealth makes laws relating to financial institutions, social security, superannuation and aged care. Laws relating to substitute decision making, including guardianship and powers of attorney, and most criminal laws, are the province of the states and territories. In part this is because the Commonwealth's powers to legislate are limited, and do not extend to areas such as guardianship, powers of attorney, wills and estates, and general criminal law.[110] In the 2007 report, *Older People and the Law*, the House of Representatives Standing Committee on Legal and Constitutional Affairs described the legal landscape in this way:

> Among the nine legal jurisdictions within Australia there are a number of laws that have particular relevance to older Australians. At the Commonwealth level, legislation in the areas of aged care, superannuation, social security and veteran's entitlements is of particular relevance as we age. In state and territory jurisdictions, legislation relating to substitute decision making, guardianship, retirement villages, wills and probate affects the population as it ages. Criminal matters, such as fraud and other forms of financial abuse, are dealt with primarily at the state and territory level, although Commonwealth legislation covers certain criminal matters. Unlike a number of overseas jurisdictions, there are no specific laws in Australia dealing with what might be broadly classed as 'elder abuse'.[111]

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108 National LGBTI Health Alliance, *The Statistics At a Glance: The Mental Health of Lesbian, Gay, Bisexual, Transgender and Intersex People in Australia* <http://lgbtihealth.org.au/statistics/>.

109 *National Disability Strategy 2010–2020 Evidence Base* (2011) 14–7; Department of Families, Housing, Community Services and Indigenous Affairs (Cth), *Report to the Council of Australian Governments 2012: Laying the Groundwork 2011–2014* (2012) 96.

110 The Commonwealth's power to legislate is limited to those powers specifically listed in the *Australian Constitution.* It has no enumerated power to legislate with respect to the welfare of adults generally. In the context of this Inquiry, the Commonwealth's legislative power is generally understood to be limited to aged care, superannuation, banking, and social security. There is some suggestion that the external affairs power (s 51(xxix)) or the executive power of the Commonwealth (s 61) might support Commonwealth legislation on elder abuse generally. However, the extent to which these powers might support general elder abuse legislation is not settled: Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' (2014) 36 *Sydney Law Review* 99.

111 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) [1.7].

2.75 This makes responding to elder abuse a complex issue—both from the perspective of laws, but also in terms of practical responsibility. The AIFS Report commented that

> responses to the management and prevention of elder abuse sit within a range of complex policy and practice structures across different levels of government, and various justice system frameworks within the private sector and across non-government organisations.[112]

2.76 As Professor Wendy Lacey has noted, this has had the effect that, 'in the absence of a national framework, the states and territories have developed strategies for co-ordinated interagency approaches to responding to elder abuse, but these are presently contained in variable and relatively weak policy instruments if they exist at all'.[113]

2.77 The ALRC is well placed to consider reforms in this fragmented legal landscape, given that its legislative functions include considering proposals for uniformity between state and territory laws, as well as proposals for complementary Commonwealth, state and territory laws.[114] In the ALRC's 2010 Family Violence Inquiry, the ALRC considered the complex interactions across the federal landscape, particularly between the *Family Law Act 1976* (Cth) and state and territory family violence and child protection laws.[115] In that context the ALRC identified, as a key policy goal, the aspiration of 'seamlessness'. In this Report too, the ALRC has made recommendations directed at both Commonwealth and state and territory laws and legal frameworks, in order to comprehensively address the range of legal mechanisms available to safeguard older people from abuse.

Elder abuse as a human rights issue

2.78 In its 2016 report, *Elder Abuse in New South Wales*, the New South Wales Legislative Council set out as its first recommendation that the approach to elder abuse should include 'a rights based framework that empowers older people and upholds their autonomy, dignity and right to self-determination'.[116]

2.79 Professor Wendy Lacey urged that human rights should be the 'normative framework' for adult protection.[117] Similarly, the Law Council of Australia, for example, said that 'it is vital that all legal responses are based on a rights based approach in which the will and preference of the older person is given primacy'.[118]

2.80 Existing human rights instruments, including the International Covenant on Civil and Political Rights and the International Covenant on Economic*, Social and*

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112 Kaspiew, Carson and Rhoades, above n 45, 1.
113 Lacey, above n 109, 102.
114 *Australian Law Reform Commission Act 1996* (Cth) ss 21(1)(d)–(e).
115 Australian Law Reform Commission, *Family Violence—A National Legal Response*, Report No 114 (2010).
116 Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) rec 1.
117 Lacey, above n 109, 113.
118 Law Council of Australia, *Submission 61*.

Cultural Rights, protect the rights of older persons equally with other persons.[119] The *Universal Declaration of Human Rights* specifically protects the right to security in old age.[120] Some instruments, such as the *Convention on the Rights of Persons with Disabilities* (CRPD) may be particularly relevant to older persons, given that the rates of disability increase with age.[121]

2.81 There is no Convention specifically relating to the rights of older persons. However, the Open-Ended Working Group on Ageing is currently considering whether there should be new human rights instruments relating to older persons.[122] A number of non-binding international instruments, including the *United Nations Principles for Older Persons*[123] and the *Madrid International Plan of Action on Ageing*,[124] relate to the human rights of older persons.

2.82 Developing responses to elder abuse through a rights-based lens is not entirely straightforward, however. As Lacey points out:

> 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, 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. … [t]he only instruments specifically concerned with older persons reflect non-binding, soft law. … While the UN Principles [for Older Persons] 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.[125]

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119 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2(1), 26; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) arts 2(2), 3; Office of the High Commission for Human Rights, *Normative Standards in International Human Rights Law in Relation to Older Persons: Analytical Outcome Paper* (August 2012) 8, 11–12.

120 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948) art 25(1).

121 The CRPD states that 'State Parties undertake to adopt measures to combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life': *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008). Other conventions that may apply include: *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1980, 1249 UNTS (entered into force 3 September 1981); *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). For a discussion of age and disability, see Australian Institute of Health and Welfare, *Australia's Welfare 2011, Cat No AUS 412* (2011) 11–12.

122 United Nations General Assembly Open-Ended Working Group on Ageing, *Report of the Open-Ended Working Group on Ageing*, UN Doc A/AC.278/2015/2 (29 July 2015) 7.

123 *United Nations Principles for Older Persons*, GA Res 46/91, UN GAOR, 46th Session, 74th Plen Mtg, Agenda Item 94(a), UN Doc A/RES/46/91 (16 December 1991) annex 1.

124 Second World Assembly on Ageing, *Political Declaration and Madrid International Plan of Action on Ageing*, Madrid, Spain (8–12 April 2002).

125 Lacey, above n 109, 114–115.

Framing principles for this Inquiry

2.83 The objective expressed in the Terms of Reference is to identify best practice laws and legal frameworks that: promote and support older people to participate equally in their community and access services and advice; protect against misuse or advantage taken of formal and informal supporter or representative roles; and to provide specific protections. To meet this objective, and to express a rights-based framework, the ALRC has utilised two key principles to frame the recommendations in this Report: dignity and autonomy; and protection and safeguarding.

Dignity and autonomy

2.84 The right to enjoy a dignified, self-determined life is an expression of autonomy. The *UN Principles for Older Persons* state this principle as requiring that:

> Older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse.
>
> Older persons should be treated fairly regardless of age, gender, racial or ethnic background, disability or other status and be valued independently of their economic contribution.[126]

2.85 Dignity is a key principle in a number of international human rights instruments.[127] In Australia, the National Disability Strategy prioritised the concept of dignity in its principles.[128] Similarly, the Productivity Commission identified human dignity as 'an inherent right' of persons with disability and suggested that dignity as a human being is linked to self-determination, decision making and choice.[129]

2.86 The UN Principles for Older Persons also expressly include dignity as a principle in the context of older persons 'in any shelter, care or treatment facility', combined with the right to be self-determining: 'full respect for their dignity, beliefs, needs and privacy and for the right to make decisions about their care and the quality of their lives'.[130]

2.87 Dignity is a principle which acknowledges diversity. The preamble to the UN Principles for Older Persons acknowledges an appreciation of 'the tremendous

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126 *United Nations Principles for Older Persons*, GA Res 46/91, UN GAOR, 46th Session, 74th Plen Mtg, Agenda Item 94(a), UN Doc A/RES/46/91 (16 December 1991) [17]–[18].

127 See *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948) art 25(1); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

128 Australian Government, *National Disability Strategy 2010–2020*, 22.

129 Productivity Commission, *Review of the Disability Discrimination Act 1992 (Cth)* (Report No 30, 2004) 182.

130 *United Nations Principles for Older Persons*, GA Res 46/91, UN GAOR, 46th Session, 74th Plen Mtg, Agenda Item 94(a), UN Doc A/RES/46/91 (16 December 1991) [14].

diversity in the situation of older persons, not only between countries but within countries and between individuals, which requires a variety of policy responses'.[131]

2.88 Autonomy is a significant aspect of a number of the United Nations Principles for Older Persons that underlie the ability of persons to make decisions and choices in their lives: particularly the principles of 'independence', 'participation' and 'self-fulfilment'. For example, the principle of self-fulfilment includes that '[o]lder persons should be able to pursue opportunities for the full development of their potential'.[132] Autonomy is also enshrined in the general principles of the CRPD, to which Australia was one of the original signatories.[133] It is a key principle of the National Disability Strategy;[134] and is reflected in the objects and principles of the National Disability Insurance Scheme.[135]

2.89 Dignity in the sense of the right to enjoy a self-determined life is particularly important in consideration of older persons with impaired or declining cognitive abilities. The importance of a person's right to make decisions that affect their lives was a fundamental framing idea throughout the ALRC's *Equality, Capacity and Disability* Inquiry. It reflects the paradigm shift towards supported decision making embodied in the CRPD and its emphasis on the autonomy and independence of persons with disabilities, so that it is the will and preferences of the person that drives decisions they make or that others make on their behalf, rather than an objective notion of 'best interests'.

Protection and safeguarding

2.90 This Inquiry requires a particular focus on safeguards and protections for the rights of older persons, reflected in the title of the Terms of Reference: 'Protecting the Rights of Older Australians from Abuse'. It is also the clear objective of the Inquiry. Safeguarding against elder abuse requires addressing a range of points of intervention, including those related to preventing abuse, and providing appropriate responses and redress where abuse has occurred.

2.91 Elder abuse undermines dignity and autonomy. Concerning autonomy and intimate partner violence, Professor Marilyn Friedman has written that 'abuse denies to the abused person ... the safety and security she needs to try to live her life as she thinks she ought to' or 'according to her values and commitments'.[136]

2.92 Autonomy and protection are sometimes seen as opposing considerations that need to be balanced or traded off against each other, particularly when issues of whether and how to intervene to protect a person from abuse arise. However, protecting older people from abuse can be seen to support and enable their ability to

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131 *United Nations Principles for Older Persons*, GA Res 46/91, UN GAOR, 46th Session, 74th Plen Mtg, Agenda Item 94(a), UN Doc A/RES/46/91 (16 December 1991).
132 Ibid [15].
133 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).
134 Australian Government, *National Disability Strategy 2010–2020*, 22.
135 *National Disability Insurance Scheme Act 2013* (Cth) ss 3–4.
136 Marilyn Friedman, *Autonomy, Gender, Politics* (Oxford University Press, 2003) 142.

live autonomous and dignified lives. UK health and social care researcher Angie Ash has argued that there are questions about how far the

> exercise of 'choice' and 'self-determination' is possible if an elder is frail, dependent on their abuser for care, has suffered domestic violence for most of their adult life, or is living in impoverished, isolated circumstances … choice is not an absolute concept, but is shaped by social and cultural factors, inequalities and contradictions.
>
> …
>
> A woolly pre-eminence of 'choice' over a human right to live free from abuse, can result in passive professional head-shaking about the mistaken options vulnerable people may 'choose', and the continuation of abuse for the older person.[137]

2.93 Ash has suggested instead that 'upholding the principle of self-determination may demand … making a judgement of how intervention might *both* uphold individual choice *and* provide protection from harm'.[138] Professor Jonathan Herring has put this in another way, suggesting that the aim of any 'intervention to protect is to restore or support autonomy'.[139]

2.94 Where possible, the ALRC has sought to recommend changes to the law that both uphold autonomy and provide protection from harm. Where this is not possible, greater weight is often given to the principle of autonomy. The autonomy of older people should not be afforded less respect than the autonomy of others. However, in limited cases, where there is serious abuse of vulnerable people, protection is given additional weight.

2.95 For example, in relation to aged care, the ALRC has considered how the move towards greater consumer control for older people must be buttressed by regulatory oversight to ensure accountability and transparency in the provision of quality care, including protections and safeguards against abuse or neglect.

2.96 Reforms related to enduring documents—variously, enduring powers of attorney, enduring guardianship and advance care directives—focus on improving safeguards against misuse of an appointment by a substitute decision maker, thereby promoting people's ability and confidence in planning for a future time at which they may require substantial decision-making support. Appropriate protections related to advance planning are also addressed in chapters concerning will making and superannuation.

2.97 In relation to court and tribunal appointed decision makers, the focus of recommendations has been on maximising the possibilities for involving the person who may be the subject of a guardianship and administration order in the application process, and ensuring that guardians and financial administrators understand their obligations to promote the autonomy and well being of a person who is subject to a guardianship and administration order.

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137 Angie Ash, *Safeguarding Older People from Abuse: Critical Contexts to Policy and Practice* (Policy Press, 2015) 71.

138 Ibid.

139 Herring, above n 53, 35.

2.98 The interrelationship of the principles of autonomy and dignity and protecting and safeguarding has particularly informed the ALRC's approach to adult safeguarding, discussed in Chapter 14. In that chapter, the ALRC recommends that adult safeguarding agencies have a role in safeguarding and supporting 'at-risk' adults. Protecting these people from abuse will serve to support their autonomy and show respect for their dignity, because living in fear of abuse can prevent a person from making free choices about their lives and pursuing what they value.

2.99 Placing further emphasis on the need to respect people's autonomy, the ALRC recommends that the consent of an at-risk adult should be obtained before adult safeguarding agencies investigate abuse or take other actions. Where someone subjected to abuse refuses help, in most cases this refusal should be respected. But the ALRC also concludes that safeguarding agencies should be able to act in particularly serious cases of physical abuse, sexual abuse and neglect of 'at-risk' adults. This may be seen as necessary action to secure people's long-term autonomy interests and their immediate dignity.

Terminology

2.100 Throughout this Report a number of terms are frequently used. These are discussed here.

Supported and substitute decision making

2.101 Assistance in decision making occurs in many different ways and for people with all levels of decision-making ability, usually involving family members, friends or other supporters. 'Supported' and 'substitute' decision making reflect different ideas; and a 'supporter' is different from a 'substitute' decision maker.

2.102 The appointment of a person to make decisions on behalf of another, as a substitute, may be made through:

- pre-emptive arrangements—anticipating future loss of legal capacity or decision-making impairment through appointment of a proxy, for example in enduring powers of attorney (financial/property), enduring guardianships (lifestyle) and advance care directives (health/medical);[140] and
- appointment—where a state or territory court or tribunal appoints a private manager or guardian, or a state-appointed trustee, guardian or advocate to make decisions on an individual's behalf (guardians and administrators).[141]

2.103 There has been a move to prefer the language and practice of supported rather than substitute decision making—described as a 'paradigm shift' in thinking about

140 Sometimes referred to collectively as 'living wills'. See, eg, Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 4th ed, 2013) [4.3].

141 In some cases, such as emergency medical decisions, there are statutory hierarchies of those who may authorise certain actions—'generic lists of suitable proxies in the legislation': Terry Carney and David Tait, *The Adult Guardianship Experiment—Tribunals and Popular Justice* (Federation Press, 1997) 4.

people with disability.[142] Supported decision making emphasises the ability of a person to make decisions, provided they are supported to the extent necessary to make and communicate their decisions. In the *Equality, Capacity and Disability* Report, the ALRC concluded that this preference was best expressed through developing a new lexicon for the roles of supporters and substitutes. The ALRC also considered the standard that should guide the actions of the person appointed to act on behalf of another, as well as the accountability mechanisms that were needed particularly for substitute decision makers. The ALRC considered that the crucial issue was how to advance, to the extent possible, supported decision making in a federal system, recognising that the policy pressure is clearly towards establishing and reinforcing frameworks of support in law and legal frameworks. The momentum is also towards building the ability of those who may require support so that they may become more effective and independent decision makers.

'Supporters' and 'representatives'

2.104 To encourage supported decision making at a Commonwealth level, the ALRC recommended a new model (the Commonwealth Decision-Making Model) based on the positions of 'supporter' and 'representative'. These terms are also part of building a new lexicon for supported decision making. The ALRC was asked to acknowledge the role of family members and carers in supporting people with disability to make decisions and therefore built this recognition into the model in the category of 'supporter'.[143] A supporter is an individual or organisation that provides a person with the necessary support to make a decision.[144] A representative's role is to provide full support in decision making,[145] by first seeking to support a person to express their will and preferences in relation to a decision, or where this is not possible, making a decision on that person's behalf based on their will, preferences and rights.[146] The role of both supporters and representatives is to assist persons who need decision-making support to make decisions in relevant areas of Commonwealth law.

2.105 A 'supporter' does not make decisions for a person who may need decision-making support; the decision remains that of the person. Some Commonwealth laws already make provision for support roles that are not decision-making ones, and the ALRC model would apply to these—such as the designation of a 'correspondence nominee' for Centrelink purposes.[147] Banks may provide facilities for co-signing, allowing designated others to conduct banking along with the account holder.

2.106 A 'representative' does make decisions on behalf of a person and is a 'substitute' decision maker. Examples of substitute decision makers under state and

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142 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) ch 2.
143 Ibid Terms of Reference.
144 Ibid [4.36]–[4.37].
145 Ibid [4.38].
146 Ibid 94.
147 See, eg, *Aged Care Act 1997* (Cth); *Social Security (Administration) Act 1999* (Cth); *Personally Controlled Electronic Health Records Act 2012* (Cth). See, also, Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) ch 6.

territory law are donees of powers of attorney, guardians and financial administrators. In describing the donor of a power of attorney, this Report uses the term 'principal' for self-appointed substitute decision makers.[148]

'Will, preferences and rights' standard

2.107 In the Commonwealth Decision-Making Model in the *Equality, Capacity and Disability* Report, the ALRC set out that the representative must act under a new standard, reflecting the paradigm shift away from 'best interests' models. The standard is embodied in the 'Will, Preferences and Rights Guidelines', which state that, where a representative is appointed to make decisions for a person who requires decision-making support:

> (a) The person's will and preferences must be given effect.
>
> (b) Where the person's current will and preferences cannot be determined, the representative must give effect to what the person would likely want, based on all the information available, including by consulting with family members, carers and other significant people in their life.
>
> (c) If it is not possible to determine what the person would likely want, the representative must act to promote and uphold the person's human rights and act in a way least restrictive of those rights.
>
> (d) A representative may override the person's will and preferences only where necessary to prevent harm.[149]

2.108 'Best interests' language is still found in some laws considered in this Report. While the ALRC recommended that these laws should be amended in the light of the the *Equality, Capacity and Disability* Report, this will take time to implement. As the first recommendation in that Report, the ALRC recommended that reform of Commonwealth, state and territory laws and legal frameworks concerning individual decision making should be guided by National Decision-Making Principles and Guidelines.[150] Where 'best interests' language is used in this Report it is by reference to particular legislative provisions as they stand at the time of writing.

National Decision-Making Principles

2.109 In the *Equality, Capacity and Disability* Report, the ALRC's Commonwealth Decision-Making Model was framed by the National Decision-Making Principles. The Principles identify four central ideas in all recent law reform work on capacity. These are that:

- everyone has an equal right to make decisions and to have their decisions respected;

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148 This is partly to avoid the linguistic confusion that is regularly seen in this context of referring to abuse 'by the power of attorney', rather than referring to abuse *of* the power of attorney by the donee of the power.

149 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) rec 3–3.

150 Ibid rec 3–1.

- persons who need support should be given access to the support they need in decision making;
- a person's will and preferences must direct decisions that affect their lives; and
- there must be appropriate and effective safeguards in relation to interventions for persons who may require decision-making support.[151]

2.110 The emphasis is on the autonomy and independence of persons with disability who may require support in making decisions—their will and preferences must drive decisions that they are supported in making, and that others may make on their behalf. The National Decision-Making Principles provide a conceptual overlay, consistent with the CRPD, for the Commonwealth Decision-making Model.

2.111 Each Principle was accompanied by a set of guidelines to guide reform of Commonwealth laws and reviews of state and territory laws.

Legal capacity

2.112 A recurrent theme in discussions of elder abuse is the issue of impairment or loss of 'capacity'. As explained in the *Equality, Capacity and Disability* Report, capacity in a general sense refers to decision-making ability, which may cover a wide range of choices in everyday life, such as personal matters, financial and property matters, and health and medical decisions.[152] 'Legal capacity' sets the threshold for individuals to take certain actions that have legal consequences and goes to the validity, in law, of choices and being accountable for the choices made. 'Those who make the choice', Emeritus Professor Terry Carney states, 'should be able to provide valid consent, and make decisions for which they can be held accountable. They should, in short, be legally competent'.[153]

2.113 'Capacity' questions arise in both the legal and medical contexts. Professors Carmelle Peisah and Nick O'Neill observed that

> [t]he field of capacity and decision-making is a truly 'medico-legal' field, representing an interface between the legal and medical (actually health professional) disciplines. Much major decision-making involves execution of legal documents and is regulated by the common law and legislation. It requires the involvement of legal professionals, while the relationship between decision-making and health and well-being often necessitates the involvement of health care professionals.[154]

2.114 At common law there is a presumption of legal capacity, which is also embodied in some guardianship legislation.[155] In the Commonwealth context, the *National Disability Insurance Scheme Act 2013* (Cth) states:

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151 Ibid.
152 See the discussion of legal capacity in Ibid [2.37]–[2.50].
153 Carney and Tait, above n 140, 3.
154 Carmelle Peisah and Nick O'Neill, *Capacity and the Law* (Australasian Legal Information Institute (Austlii) Communities, 2nd ed, 2017) [1.1].
155 See, eg, *Guardianship and Administration Act 2000* (Qld) sch 1 cl 1; *Guardianship and Administration Act 1990* (WA) s 4(3).

> People with disability are assumed, so far as is reasonable in the circumstances, to have capacity to determine their own best interests and make decisions that affect their own lives.[156]

2.115 Tests of legal capacity—in terms of levels of understanding for particular legal transactions—have been developed through the common law, for example in relation to contracts and wills.[157] Where a lack of the required level of understanding is proved in the particular circumstances, the transaction may be set aside. The focus of such tests is on a transaction and the circumstances surrounding it. They are decision-specific and involve assessments of understanding relevant to the transaction being challenged.

2.116 The recommendations in the *Equality, Capacity and Disability* Report addressed the issue of legal capacity in two principal ways. The first was to move away from the 'presumption of capacity'; the second was to place the emphasis on support needs in decision making. The ALRC considered that it was not appropriate in the context of the CRPD to disqualify or limit the exercise of legal capacity because of a particular status, such as disability. As National Disability Services remarked in a submission to the Equality, Capacity and Disability Inquiry, '[t]he crux of the issue is seen in historic legal frameworks that place constraints on the exercise of legal capacity based solely on disability status'.[158] The approach should therefore be on the support needed to exercise legal agency, rather than an assumption or conclusion that legal agency is lacking because of an impairment of some kind. Laws should be 'disability neutral, yet disability responsive, with a firm focus on promoting, protecting and upholding the human rights of all older people', as Disabled People's Organisations Australia submitted.[159]

2.117 However, there are clearly times when assessments of decision-making ability are required. Capacity assessments are the trigger for formal arrangements for decision-making support through, for example, the appointment of guardians and administrators, or the commencement of some enduring powers of attorney. They are also made in a range of health care decisions. In the *Equality, Capacity and Disability* Report, the ALRC recommended that the emphasis of such assessments should be on the support needed to exercise legal agency, rather than an assessment of 'capacity'.[160] It is an approach that is a functional one (focused on the ability to make the particular decision in question); it is not outcomes-based (that is, it does not consider the result or wisdom of the decision), nor status-based (that is, it does not determine that a person has 'lost' capacity because of a condition). A functional approach of this kind 'seeks to

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156 *National Disability Insurance Scheme Act 2013* (Cth) s 17A(1). See also *Mental Capacity Act 2005* (UK) s 1, which addresses this explicitly by providing that individuals are assumed to have capacity to make decisions unless otherwise established.

157 See, in relation to contracts: *Blomley v Ryan* (1954) 99 CLR 362. In relation to wills, see: *Banks v Goodfellow* (1870) LR 5 QB 549, and see ch 8. See also the common law approach to capacity in Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) ch 7.

158 National Disability Services, *Submission 49*. See also PWDA, ACDL and AHR Centre, *Submission 66*.

159 Disabled People's Organisations Australia, *Submission 360*.

160 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) rec 3–2(2). The approach set out in the *Support Guidelines* is a functional one.

maximise the circumstances in which the right of autonomy is protected';[161] and has been supported in other law reform inquiries.[162]

2.118 As Peisah and O'Neill have explained, 'operational definitions of the cognitive elements of capacity usually comprise combinations of the following abilities':

1. To understand the specific situation, relevant facts or basic information about choices
2. To evaluate reasonable implications or consequences of making choices
3. To use reasoned processes to weigh the risks and benefits of the choices
4. To communicate relatively consistent or stable choices.[163]

2.119 In this Report there are threshold moments where a consideration of decision-making ability may arise, for example: where the appointment of a guardian or financial administrator is being considered by a tribunal; where a person is seeking to make a will or enter a range of financial transactions; where a person is in residential aged care and health and financial decisions may need to be made. The consideration of questions of decision-making ability continues the ALRC's emphasis on the importance of embedding the principles and practices of supported decision making from the *Equality, Capacity and Disability* Report. For example, this Elder Abuse Report considers the need for frontline staff and professionals to understand the dynamics of elder abuse and the pressures that might be brought to bear upon older people; as well as the need to ensure that those in the role of substitute decision makers understand their roles as 'representatives' of the person.

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161 Mary Donnelly, *Healthcare Decision-Making and the Law—Autonomy, Capacity and the Limits of Liberalism* (Cambridge University Press, 2010) 92. In recommending such an approach that was subsequently incorporated in the *Mental Capacity Act 2005* (UK), the Law Commission of England and Wales deliberately rejected status-based assessments: Law Commission, *Mental Incapacity*, Report No 231 (1995) [3.5]–[3.6]. In that inquiry, the Law Commission received a 'ringing endorsement' of the functional approach: [3.6].

162 See, eg, Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 27(a); Legislative Council Standing Committee on Social Issues, Parliament of NSW, *Substitute Decision-Making for People Lacking Capacity* (2010) [4.56]. With respect to para (f), compare, eg, Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 27(b); Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) rec 7-14(d). See also Legislative Council Standing Committee on Social Issues, Parliament of NSW, *Substitute Decision-Making for People Lacking Capacity* (2010) rec 1.

163 Peisah and O'Neill, above n 153, [1.3].