

# PROTECTING OLDER PERSONS FROM LIFE-THREATENING AND FATAL ABUSE: SHOULD WESTERN AUSTRALIAN CRIMINAL LAW DO MORE?

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*The criminal law has a fundamental role in protecting bodily integrity and specifically the value of human life. This paper examines the role which the criminal law has played in addressing life-threatening and fatal abuse of older persons by others. It does so in light of the recent recommendations from the Australian Law Reform Commission and the Western Australian Parliamentary Inquiry Report on this issue. These reports acknowledge that elder abuse takes a variety of forms, but is commonly characterised by the breach of trust in an existing relationship. The paper reviews existing criminal protections in Western Australian criminal law and reflects upon several coronial inquiries. It submits that the moral distinctions characterising abuse which involve a life-threatening or fatal harm to an older person requires that the criminal law responds specifically to this abuse, and that such a response could be led by the inclusion of provisions in the Criminal Code (WA) which target those who facilitate this form of abuse of older persons.*

## INTRODUCTION

We live in an ageing society. Statistics from the Australian Institute of Health and Welfare indicate that in 2016, 15% of the population constituted older persons (persons aged 65 years and over), with that proportion expected to steadily rise.<sup>1</sup> Global ageing is claimed to have led to ‘a corresponding increase in the number of older persons living in vulnerable and dependent circumstances, making them particularly vulnerable to abuse and neglect’.<sup>2</sup> However being older is not inherently associated with vulnerability; the World

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<sup>1</sup> Australian Institute of Health and Welfare, *Older Australia at a glance* (10 September 2018) <<https://www.aihw.gov.au/reports/older-people/older-australia-at-a-glance/contents/demographics-of-older-australians>>. The growth of this sector has been partially attributed to longer life expectancies.

<sup>2</sup> Wendy Lacey, ‘Neglectful to the Point of Cruelty?’ (2014) 36(1) *Sydney Law Review* 99, 100.

Health Organisation, while noting the increased vulnerability of older persons to harm,<sup>3</sup> also described the diversity found within the older population as a 'hallmark of older age'.<sup>4</sup> Moreover, older persons have usually developed a strong sense of personal identity and preferences, if only by virtue of having lived a long life. Promoting the rights and protecting the interests of older persons should therefore be a fundamental concern of the law which has a key role in protecting persons from harm and promoting the autonomy rights of persons.<sup>5</sup> This paper asks what part Western Australian criminal law does and should play in addressing instances where older people are the victims of life-threatening and fatal harm, where that harm is associated with the actions or inactions of others.

The protection of human life and bodily integrity remains one of the foremost functions of the criminal law system.<sup>6</sup> Homicide and offences against the person are regarded as the most serious of the criminal law offences and are associated with significant penalties. In this sense the criminal law has a particular focus on a human being's 'life interest', and offences which penalise the extinction of life, and the endangering of it therefore feature prominently in criminal systems worldwide.

In both Australian Code and common law jurisdictions there is a hierarchy of homicide offences, with most jurisdictions now boasting an assault causing death offence.<sup>7</sup> Recent years has seen an increased number of offences relating to violence against the person, emphasising that the protection of bodily integrity remains a central concern of the criminal law. However, these new offences appear to populate a space dedicated to anti-social behaviour, particularly violence linked with alcohol consumption.<sup>8</sup> Legislative activity in this area has been associated with a strong media narrative and a political rhetoric which has particularly surfaced in connection with alcohol-fuelled

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<sup>3</sup> World Health Organisation, *World Report on Ageing and Health* (World Health Organisation, 2015) 7-8.

<sup>4</sup> *Ibid* 7 in which it is noted that 'some 80 year-olds will have levels of both physical and mental capacities similar to that of many 20 year-olds'.

<sup>5</sup> See recent comments in the editorial of the West Australian newspaper - 'Fatal elder neglect is unpunishable', *The West Australian* (Perth) 24 January 2018, 30.

<sup>6</sup> See the discussion in Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 6<sup>th</sup> ed, 2009) [7.1].

<sup>7</sup> For example, see; *Crimes Act 1900* (NSW) ss 314A, 25A; *Criminal Code Act 1899* (QLD) s 23(1)(b); *Criminal Code Act Compilation Act 1913* (WA) s 281.

<sup>8</sup> For example see Roger Magnusson, *A short review of the NSW Government's "one-punch" alcohol control reforms* (28 March 2016) Sydney Health Law <<https://sydneyhealthlaw.com/2016/03/28/a-short-review-of-the-nsw-governments-one-punch-alcohol-control-reforms/>>.

violence.<sup>9</sup> There has been relatively little legislative action in relation to violence in the private domain, although this, too, has been the subject of significant media and political attention.<sup>10</sup> Therefore, while specific crimes have been introduced to address public violence, we have not witnessed the same political appetite for specific crimes addressing vulnerable victims of physical abuse in the domestic or community care environment.<sup>11</sup>

The limited existing evidence indicates that elder abuse generally occurs in this environment, what has been called ‘the silent epidemic in our suburbs’.<sup>12</sup> However, protecting older persons from life-threatening abuse in a familial or institutional environment<sup>13</sup> is particularly challenging for the criminal law. Older persons are more likely to have developed enduring relationships involving children and grandchildren, which increases opportunities for support, but also the potential for family conflict.<sup>14</sup> Older persons are also likely to have a highly developed sense of self and values that makes it all the more important that their choices and preferences be at the forefront of decision-making. This has been explicitly recognised by the Australian Human Rights Commission, which has noted that the United Nations Convention on the Rights of Persons with Disabilities ‘requires an approach that moves away from

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<sup>9</sup> Greg Smith (Member of Parliament), ‘Unlawful Assault Laws Proposed’ (Media Release, 12 November 2013).

Also see then Premier Campbell Newman’s statement in relation to the Safe Night Out Legislation Amendment Bill 2014 (Qld) Campbell Newman (Former Premier), ‘Safe Night Out Strategy’ to stop the violence’ (Media Statement, 23 March 2014).

<sup>10</sup> For example, see Rebecca Turner, *The shocking tales of elder abuse victims* (4 March 2018) ABC News

<<https://www.abc.net.au/news/2018-03-04/the-shocking-tales-of-elder-abuse-victims/9504798>>;

*Unions call for domestic violence leave* (2 October 2018) SBS News

<<https://www.sbs.com.au/news/unions-call-for-domestic-violence-leave>>.

<sup>11</sup> Although there has been recent activity in the area of domestic violence – see, for example, the introduction of a new strangling in NSW, and the increase in the length of time apprehended domestic violence orders (ADVOs) from one year to two years. The development of the National Plan for the Reduction of Violence Against Women and Their Children 2010-2022 is regarded as providing insight into how elder abuse might be approached – Rae Kaspiew, Rachel Carson and Helen Rhoades, ‘Elder abuse: Understanding issues, frameworks and responses’ (Research Report No 35, Australian Institute of Family Studies, February 2016) 7. At the time of writing the Office for the Ageing (Adult Safeguarding) Amendment Bill 2018 (SA) was under Parliamentary consideration.

<sup>12</sup> See Turner, *The shocking tales of elder abuse victims*, above n 10.

<sup>13</sup> For example, the abuses documented in Aaron Groves et al, *The Oakden Report* (Government of South Australia Department of Health and Ageing, 2017). Issues such as workplace stressors, and routines, systems and regimes in institutional care have been identified as factors relevant to the increased risk of elder abuse – see Bill Mitchell, ‘Identifying Institutional Elder Abuse in Australia through Coronial and other Death Review Processes’ (2018) 18 *Macquarie Law Journal* 35.

<sup>14</sup> See the examples given in Meredith Blake, Olivia Nicole Doray and Craig Sinclair, ‘Advance Care Planning for People with Dementia in Western Australia: An Examination of the Fit Between the Law and Practice’ (2017) 25(2) *Psychiatry, Psychology and Law* 197.

a paternalistic view of an older person with a disability, to an approach that centres on respecting the will and choices of a person and ensuring that they are supported in decision-making'.<sup>15</sup> The importance of the law reflecting a wills and preferences approach is particularly important given that older persons are far more likely to be afflicted with dementia, which often interferes with the sufferer's conception of their sense of self, and is associated with a prolonged terminal decline.<sup>16</sup>

Recent parliamentary inquiries and law reform commission inquiries and reports have identified the impact of the ageing population as being a significant trigger for law reform. The recent publication of the ALRC Report on Elder Abuse (2017) recommends the development of a National Plan to combat elder abuse.<sup>17</sup> The Report states that the Plan will be led by the goals of promoting the autonomy and agency of older people. It also notes that the recommendations of the Report seek to balance two framing principles: dignity and autonomy on the one hand: and protection and safeguarding, on the other.<sup>18</sup> These goals are also reflected in the Western Australian Parliamentary Committee's Report which explicitly recommends that a human rights approach be taken in introducing measures to address elder abuse.<sup>19</sup>

This balance has been regularly identified by those caring for older persons, exemplified in the following comment:

I think there will always be that inner battle between safety and duty of care, and the individual's right to make their own decisions.<sup>20</sup>

This binary narrative – one which places the interests of protecting older persons against the interest of preserving their 'dignity of risk' - emerged in the debate on the NSW Assisted Dying Bill 2017 which was narrowly defeated in November 2017; the risk posed to older persons through the legalisation of assisted dying was an argument used in opposition to the Bill, demonstrating

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<sup>15</sup> *Respect and Choice* (Australian Human Rights Commission, 2012) 17 available at <<https://www.humanrights.gov.au/human-rights-approach-ageing-and-health-aged-care-reforms-and-human-rights>>.

<sup>16</sup> Australian Institute of Health and Welfare, *Older Australia at a glance*, above n 1.

<sup>17</sup> Australian Law Reform Commission, *Elder Abuse – A National Legal Response (Final Report)*, Report No 131 (2017) 9 Recommendation 3 – 1.

<sup>18</sup> *Ibid* 20 [1.17].

<sup>19</sup> Select Committee into Elder Abuse, *'I never thought it would happen to me': When Trust is Broken*, Final Report (2018) iv Recommendation 1.

<sup>20</sup> Blake, Doray and Sinclair, 'Advance Care Planning for People with Dementia in Western Australia: An Examination of the Fit Between the Law and Practice', above n 14 citing community nurse.

the perceived conflict between the interests in protecting older people from harm and promoting their autonomy in end of life choices.<sup>21</sup>

## I CURRENT PROTECTIONS OFFERED BY THE WA CRIMINAL LAW

In Western Australia the older person is protected by the general laws pertaining to bodily integrity. The Criminal Code protects persons against assault, aggravated assaults, wounding and grievous bodily harm, amongst other non-fatal offences.<sup>22</sup> There are three tiers of homicide offences, as well as an associated offence of aiding or abetting suicide.<sup>23</sup> Older age is a circumstance of aggravation<sup>24</sup> for assault,<sup>25</sup> assault with intent,<sup>26</sup> grievous bodily harm<sup>27</sup> and wounding.<sup>28</sup> Violence restraining orders,<sup>29</sup> while not in the form of an offence, are also relevant to the form of elder abuse under consideration, and are made by way of application to the Magistrates Court.<sup>30</sup> There is, however, no offence which is specifically targeted at protecting older persons from violence or abuse. Recent developments in WA homicide offences indicate a move towards greater protections for the taking of human life. For example, the interpretation of murder under section 279(1)(b) of the Code (WA) is satisfied by proof of there being an objective assessment of a risk of bodily harm, absent a subjective awareness of this risk.<sup>31</sup> Similarly the accident defence is not available to the third tier homicide offence of assault causing death, denying the relevance of the subjective assessment of risk. The scope of homicide offences, in particular,

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<sup>21</sup> Opposition leader Luke Foley stating that: "I worry about the message it sends to a society where some old and frail people feel that they are too much of a burden on their loved ones that they have to end it all," *NSW assisted dying bill narrowly defeated* (17 November 2017) SBS News <<https://www.sbs.com.au/news/nsw-assisted-dying-bill-narrowly-defeated>>.

<sup>22</sup> *Criminal Code Act Compilation Act 1913* (WA) ss 313, 317, 318, 301, 297.

<sup>23</sup> Murder under *Criminal Code Act Compilation Act 1913* (WA) s 279(1); manslaughter under s 280, assault causing death under s 281. Aiding suicide is penalised under s 288.

<sup>24</sup> *Criminal Code Act Compilation Act 1913* (WA) s 221(d) where the victim is 60 years old or over.

<sup>25</sup> *Ibid* s 313(1)(a).

<sup>26</sup> *Ibid* s 317A(d).

<sup>27</sup> *Ibid* s 297(3).

<sup>28</sup> *Ibid* s 301(2)(a).

<sup>29</sup> Which include family violence restraining orders.

<sup>30</sup> *Restraining Orders Act 1997* (WA) ss 24A, 25, 38. Figures presented to the Select Committee into Elder Abuse (WA) indicated that WA Police rarely apply for FVRO in the case of persons over 65 years because the person does not consent to the order being made – see Select Committee into Elder Abuse, *'I never thought it would happen to me': When Trust is Broken*, above n 19, 64 [6.38] – [6.39].

<sup>31</sup> Under *Criminal Code Act Compilation Act 1913* (WA) s 279(1)(b) – see interpretation of this in *Schmidt v The State of Western Australia* [2013] 42 WAR 91.

demonstrates a political and legislative appetite for penalising active and public violations of a person's bodily integrity in the form of the most serious offences.

While there is a paucity of prevalence studies in relation to the extent and actual circumstances of elder abuse,<sup>32</sup> there is no doubt that it is occurring on a widespread basis.<sup>33</sup> Moreover there is evidence of the higher incidence of physical abuse perpetrated against older women, and the relationship of this to domestic violence, in circumstances where older women are the victims of physical violence perpetrated by their partners.<sup>34</sup> The United Nations referred to the intersection between the different forms of abuse in such cases,<sup>35</sup> while an Australian Institute of Criminology Report of 2009 found that:

Older women experience violence and abuse at a rate two and a half times higher than older males (Boldy et al. 2002). Between one-fifth and one-quarter of elderly abuse incidents are committed by the victim's spouse or partner (Boldy et al. 2002).<sup>36</sup>

This suggests that for older persons, the more significant risks to their lives and bodily health lie in the private, rather than the public, sphere, and are associated with actions or inactions by persons with whom the older person has an established relationship of trust.<sup>37</sup> Moreover, another study suggests that

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<sup>32</sup> Australian Law Reform Commission, *Elder Abuse – A National Legal Response (Final Report)*, above n 17, ch 3 has recommended a nation-wide prevalence study. Calls for this began many years ago – see John B Breaux and Orrin G Hatch, 'Confronting Elder Abuse, Neglect and Exploitation: The Need for Elder Justice Legislation' (2003) 11(1) *Elder Law Journal* 207.

<sup>33</sup> The Australian Law Reform Commission recommended national prevalence study will probably be most helpful in understanding the relationship between elder abuse and the abuse of vulnerable adults more generally. For a discussion of the vulnerable adults approach to elder abuse see Emily Muir et al, 'Best practice for Estimating Elder Abuse Prevalence in Australia: Moving towards the Dynamic Concept of 'Adults at Risk' and away from Arbitrary Age Cut-Offs' (2017) 29(2) *Current Issues in Criminal Justice* 181.

<sup>34</sup> Diane Taylor, *Older domestic violence victims feel helpless in the face of long-term abuse* (24 December 2011) *The Guardian* <<https://www.theguardian.com/society/2011/dec/23/older-domestic-violence-victims-helpless>>.

<sup>35</sup> Specifically elder abuse, abuse of vulnerable adults and intimate partner violence – *Neglect, Abuse and Violence Against Older Women*, UN Doc ST/ESA/351 (18 December 2013).

<sup>36</sup> Anthony Morgan and Hannah Chadwick, *Key issues in domestic violence* (December 2009) Australian Institute of Criminology <<https://aic.gov.au/publications/rip/rip07>>.

<sup>37</sup> Lacey, 'Neglectful to the Point of Cruelty?', above n 2, 113 citing Breaux and Hatch, 'Confronting Elder Abuse, Neglect and Exploitation: The Need for Elder Justice Legislation', above n 32, 208. Australian Law Reform Commission, *Elder Abuse – A National Legal Response (Final Report)*, above n 17, 20 [1.14] identifies social isolation and the victim living alone with the perpetrator as risk factors for elder abuse.

abuse as a result of neglect could be as high as 20% for older women,<sup>38</sup> indicating that harm suffered by older women in particular is often associated with a failure to care rather than a positive act of violence. The act/omission distinction, supported by deontological theory and adopted into much Western law,<sup>39</sup> becomes relevant to the operation of the criminal law here; difficulties arise in proving both causation of harm and the accused's state of mind in cases where the alleged offender has failed to act to prevent harm.<sup>40</sup> The ethical and legal narrative around an individual's duty to care for another person has emerged as a potential solution to these challenges.<sup>41</sup>

In this respect, those sections of the Code (WA) which impose duties on persons to act might appear best suited to address the situation where the older person who is the victim of physical harm, fatal and non-fatal, particularly through neglect. Sections 262 – 267 of the Code (WA) purport to facilitate proof of causation in circumstances where that is challenging because the alleged perpetrator has not directly attacked the victim, but omitted to take care. The duties impose a legal obligation to take steps to prevent harm in certain situations; where that obligation is breached by, at a minimum, 'criminal' negligence, a causal connection will be established between the omission of the accused and the harm suffered by the victim.<sup>42</sup> As such these are not offence-creating sections – the relevant offence is directly linked to the nature of the harm caused; the sections specify that the accused:

...will be held to have caused any consequences which result to the life or health of the other person by reason of any omission to perform that duty.

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<sup>38</sup> Leigh Tooth et al, 'From Child Care to Elder Care: Findings from The Australian Longitudinal Study on Women's Health' (Research Report, Australian Longitudinal Study on Women's Health, May 2018); World Health Organisation, *World Report on Ageing and Health*, above n 3, 74 estimated that for high to middle income countries elder abuse as a result of neglect varied between 0-6%, and physical abuse between 0-5%.

<sup>39</sup> See Raanan Gillon, 'Acts and Omissions: Killing and Letting Die' (1986) *British Medical Journal* 126 and the decision in *Airedale NHS Trust v Bland* [1992] 1 All ER 821.

<sup>40</sup> Discussed in Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing, 2013).

<sup>41</sup> While this paper is concerned with the operation of the criminal law, it is important to note that older persons are clearly contemplated as falling within the scope of international duties referred to in the *Convention on the Rights of Persons with Disabilities* (adopted by the General Assembly, 24 January 2007, A/RES/61/106). Australia ratified the Convention in July 2008 and the Optional Protocol in 2009. Attempts to progress a UN Convention on the Rights of Older Persons, which would provide more specific duties in relation to older persons, have yet to be successful.

<sup>42</sup> The working of the sections was explained by the West Australian Supreme Court of Appeal in *Heaton v The State of Western Australia* (2013) 234 A Crim R 409.

The Code states of WA and Queensland (where there are corresponding provisions)<sup>43</sup> are therefore fundamentally different to the common law in their construction of criminal liability for fatal and non-fatal offences through omission; while under the former causation is deemed through proof of breach of a relevant duty, the latter has a discrete offence of gross negligence manslaughter only, and requires the prosecution to prove causation as a distinct offence element.<sup>44</sup>

The most utilised sections in both WA and Queensland are those which impose a duty to provide the necessities of life to those who ‘have the charge of another (ss 262 (WA), 285 (Qld)); and the duty that a person has when dealing with dangerous things (ss 266 (WA), 289 (Qld)).<sup>45</sup> There is a specific duty owed to children (ss 263 (WA), 286 (Qld)).<sup>46</sup> There is no specific duty in relation to older persons. The duty to provide the necessities of life therefore appears to be the most relevant were there to be a prosecution for the death or harm of an older person based on gross neglect (or even intentionally inflicted neglect).<sup>47</sup>

## II PROSECUTIONS FOR LIFE-THREATENING OR FATAL FORMS OF ELDER ABUSE

A limited foray into the reported case law indicates that those duty sections which would appear most relevant to the private and relational nature of elder abuse have not been utilised; there is no reported decision of the WA (or Queensland) section being applied in such a case.<sup>48</sup> This author found only two instances of successful prosecutions for the fatal neglect of older persons – and these were both in the common law, one for gross negligence manslaughter,<sup>49</sup>

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<sup>43</sup> *Criminal Code Act Compilation Act 1913* (WA) ss 285-290.

<sup>44</sup> For example, see *Burns v The Queen* [2012] HCA 35; *R v Taktak* (1988) 34 A Crim R 334.

<sup>45</sup> A survey of reported decisions indicates that most concern these sections – see, eg, *Brightwater Care Group (Inc) v Rossiter* [2009] WASC 229; *Heaton v The State of Western Australia* (2013) 234 A Crim R 409; *R v Dabelstein* [1966] Qd R 411; *Pacino v R* (1998) 105 A Crim R 309.

<sup>46</sup> *State of Queensland v B* [2008] 2 Qd R 562; *R v BBD* [2007] 1 Qd R 478; *Central Queensland Hospital and Health Service v Q* [2017] 1 Qd R 87 (two of these cases involved the termination of pregnancies in young girls).

<sup>47</sup> Such was found to have occurred (in relation to a teenage victim) in *R v McDonald & McDonald* [1904] St R Qd 151.

<sup>48</sup> See Australian Law Reform Commission, *Elder Abuse – A National Legal Response (Final Report)*, above n 17, 106-107 [4.25].

<sup>49</sup> *R v Instan* (1893) 1 QB 450 in which a woman neglected to seek medical treatment for her 73-year-old aunt.

and the other for reckless conduct endangering life.<sup>50</sup> The majority of the cases concerned the duty owed by a parent to a child (younger or adult), prosecuted on the basis of a failure to provide the ‘necessaries of life’, either medical treatment or adequate nutrition.<sup>51</sup>

On this basis it would seem that one of the criminal law mechanisms seemingly most appropriate for prosecuting this form of elder abuse is either not relevant (because this form of elder abuse is not happening) or not being utilised (because it is not being detected or, if detected, not regarded as appropriate for prosecution). This invokes a consideration of the available evidence we have on the occurrence of this type of abuse, but also of the operation of the criminal laws which we have and their effectiveness in addressing this type of harm.

As noted earlier, while there is yet no national data on the prevalence of elder abuse, there is sufficient data from other sources to know that it is occurring. It is also clear that it is fundamentally under-detected and underreported as it happens ‘behind closed doors’; it is described as ‘typically hidden, under-reported and overlooked’.<sup>52</sup> The hidden nature of the abuse, and therefore its under-detection and under-reporting, can be partially attributed to the likelihood that the social, educational and employment structures which bind most children and younger adults do not bind the elderly who have been described as frequently invisible.<sup>53</sup> Children are mandatorily monitored in ways which adults are not, for example through required school attendance. Adults in the workforce are also visible in a way in which older people, particularly the more elderly, are not. However, it has been forcibly argued that lack of community awareness of what constitutes elder abuse and ageism is also a significant factor in this landscape of under-detection and under-reporting.<sup>54</sup>

While these factors are clearly relevant to the rare involvement of the criminal law in elder abuse,<sup>55</sup> there are instances in which the sort of abuse

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<sup>50</sup> Unreported. See Amber Wilson, *‘Inhumane’: Man jailed for extreme neglect of elderly mum left to die in bed* (5 October 2018) *The Age* <<https://www.theage.com.au/national/victoria/inhumane-man-jailed-for-extreme-neglect-of-elderly-mum-left-to-die-in-bed-20181005-p507yb.html>>.

<sup>51</sup> See, for example, *R v McDonald & McDonald* [1904] St R Qd 151; *Nielson v The Queen* (2001) 121 A Crim R 239; *R v Young* [1969] Qd R 417; *Deliu v State of Western Australia* [2016] WASCA 117.

<sup>52</sup> Lacey, ‘Neglectful to the Point of Cruelty?’, above n 2, 113 citing Breaux and Hatch, ‘Confronting Elder Abuse, Neglect and Exploitation: The Need for Elder Justice Legislation’, above n 32, 208.

<sup>53</sup> Lacey, ‘Neglectful to the Point of Cruelty?’, above n 2, 101.

<sup>54</sup> *Ibid.*

<sup>55</sup> Australian Law Reform Commission, *Elder Abuse – A National Legal Response (Final Report)*, above n 17, 369 [13.25] – [13.26] includes evidence from WA Police as to why elder abuse is under-reported, as well as an example from the Eastern Community Legal Centre. The evidence suggests

under consideration here has emerged and been the subject of official reports. A number of these instances are now examined with a view to considering the role which Western Australian criminal law should play in addressing this sort of harm.

### III WHAT DO THE CASE STUDIES SHOW?

A number of case studies give some insight into the application of the criminal law to instances of life-threatening or fatal elder abuse. One of the more disturbing cases, which has been the subject of media attention and scholarly comment, is that of the coronial Inquiry into the death of 89-year-old Cynthia Thoresen (Qld, 2013).<sup>56</sup> Mrs Thoresen died of a pulmonary thromboembolism which resulted from a fractured right femur after she had suffered a fall at home. She was attended to by advanced care paramedics who found Mrs Thoresen covered in faeces; they described her screaming, in their view reflecting a 10 out of 10 pain ratio. One of the attending ambulance officers stated that he had never seen anyone, regardless of their age, that could withstand the level of pain inflicted by a fractured femur 'for five seconds let alone three weeks'.<sup>57</sup> In short, the physical suffering which this elderly woman had endured was shocking to first responders routinely exposed to confronting death and violence.

Cynthia's daughter, her carer, gave evidence that Cynthia had fallen at least three weeks previously. It also emerged that the daughter had not accessed a general practitioner and seemed unconcerned with her mother's condition. An expert medical opinion provided by a representative of the treating hospital noted that the condition in which Mrs Thoresen presented at the hospital suggested 'a severe degree of neglect by family members, particularly by her daughter...who is described as the patient's 'carer'; he described this as 'neglectful to the point of cruelty in a distressed, demented and totally dependent patient'.<sup>58</sup>

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that the older person's reluctance to report was in most cases connected with the fear of harming existing relationships with the abuser and wider family.

<sup>56</sup> *Inquest into the death of Cynthia Thoresen* [2013] Coroners Court of Queensland, File No 2009/3 (22 May 2013) discussed in Lacey, 'Neglectful to the Point of Cruelty?', above n 2.

<sup>57</sup> *Ibid* 4.

<sup>58</sup> Expert medical opinion of Dr Stephen Morrison, Director of Thoracic Medicine, Royal Brisbane and Women's Hospital.

The coroner noted that the daughter's explanation of total absence of medical review of her mother 'unsatisfactory and implausible', and referred the matter to the Attorney-General for consideration for criminal prosecution of the daughter. At the Inquiry, the investigating police officer was of the view that there was insufficient evidence to criminally prosecute the daughter, having regard to other recent prosecutions. The matter was ultimately referred to the Attorney-General for consideration of a prosecution, but ultimately this did not occur.<sup>59</sup> The Coroner also recommended that a recipient of the carer's benefit should be required to submit an annual independent medical review of the person being cared for, concluding that 'this measure may assist in preventing such an appalling decline in wellbeing of another vulnerable elderly person.' At the time of writing no such requirement had been introduced.<sup>60</sup>

*ES* (Qld, 2017)<sup>61</sup> was a coronial Inquiry which involved the death of an 87 year old woman. She was admitted to hospital with breathing problems, and was later discharged into the care of her family, with a diagnosis of congenital heart failure. The family requested a referral to the palliative care team, but this was unavailable. She was therefore in the care of her daughter and her GP, who had provided a written prescription for oral morphine (without having examined her and on the basis of concerns expressed by her family). *ES* passed away 6 days after her discharge from the hospital. On the day following her death nursing staff from a private hospital reported that one of their colleagues (*MB* - a nurse known to be a euthanasia advocate) had made comments to the effect of assisting the death of a family friend, identifying *ES*, leading to a report to the police and a coronial investigation. The police investigation suggested that *MB* had admitted to her employer giving her friend an excessive dose of morphine, and that she had visited the deceased on the day of her death. Relatives of the deceased, however, refused to give statements, leading to the coronial inquest.

The Coroner found that oral morphine was given to *ES* in 'amounts well over what was prescribed', and that *MB* had made a 'reckless decision' to give her friend a substantial dose of morphine in circumstances where she knew two doses had already been given in the previous two hours, and this was

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<sup>59</sup> The Coroner also recommended that a recipient of the carer's benefit should be required to submit an annual independent medical review of the person being cared for, concluding that 'this measure may assist in preventing such an appalling decline in wellbeing of another vulnerable elderly person'.

<sup>60</sup> Carers allowances are provided for under the *Social Security Act 1991* (Cth)

<sup>61</sup> *Inquest into the death of ES* [2017] Coroners Court of Queensland, File No 2014/2590 (7 February 2017).

exacerbated by her administering this dose in the absence of medical advice. It was concluded that ‘it is not by coincidence that Betty (ES) died a short time after a large dose of morphine was provided and this act was a significant factor in her death.’<sup>62</sup> In concluding comments, the coroner noted that palliative care needs to be ‘conducted strictly in accordance with a medical practitioner’s advice and written plan’, and that in this case ‘there was no written plan or written advice’. This was because:

...the family were left to fend for themselves without any education on medication use and what to expect as their loved one deteriorated. This was not the fault of the GP or the palliative care system, as there had not been sufficient time to put plans in place due to the rushed discharge process.<sup>63</sup>

The coroner concluded that while the deceased ‘died in circumstances where she was not provided care that was with reasonable care and skill, and in accordance with good medical practice’, it was provided in good faith and without intention to bring about the death of ES. There was no reference to the Attorney-General for prosecution.

A more recent Inquest, into the death of Maria Clark,<sup>64</sup> found that Mrs Clark, an 83 year old woman with a suspected mental illness and possible dementia, who was cared for by her daughter Nardia, had died as a result of ‘natural causes after a period of being neglected by her carer’. The cause of death was found to be the ‘combined effects of severe malnutrition and infection.’ The case came to the Coroner’s attention because of the concerns that she had been the victim of elder abuse and the subsequent contact with the Elder Abuse Hotline. The evidence from the Inquiry stated that:

...when ambulance officers attended Mrs Clarke’s home...they found her in what may fairly be described as a terrible state. The house was dirty, unkempt and smelt badly but more importantly, when they entered Mrs Clarke’s bedroom the paramedics were assaulted by the smell. They found Mrs Clark to be emaciated; her skin and tongue dry, lying on a dirty bed wet with urine and faeces that the paramedics concluded had accumulated over a number of days.<sup>65</sup>

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<sup>62</sup> Ibid 37.

<sup>63</sup> Ibid 40.

<sup>64</sup> *Inquest into the death of Marcia Clark* [2018] Coroners Court of New South Wales, File No 2014/216538 (30 May 2018).

<sup>65</sup> Ibid 1 [3].

On admission to hospital Mrs Clarke was found to be malnourished, dehydrated, with muscle wastage, bone deformation and pressure sores, one of which was believed to have infected the bone. Mrs Clarke was treated palliatively and died three days later.

The Inquiry canvassed the treatment provided by the general practitioner; it was conceded that inadequate record keeping precluded a full picture of this, although it was evident that the year previously Mrs Clarke did not attend a medical appointment, although it was apparent that she had experienced prior to this bouts of diarrhoea and problems with bed sores. The Inquiry noted that:

Nardia was unwilling or unable to recognise the serious health implications for her mother if these conditions were not properly managed...Nardia ultimately told the Hospital that her mother had been bed bound since November 2013 and it is clear from all the evidence that Mrs Clark was not being properly cared for at home.<sup>66</sup>

Ultimately the Inquiry concluded that there was no 'malicious intent' on the part of Nardia:

Rather, the evidence suggests that she simply was not up to the very difficult task of caring for her elderly mother alone.<sup>67</sup>

The focus of the coroner's comments indicate a concern with the burden that falls to carers, and the absence of safeguards to ensure that both the carer and the older person are coping.

In all of these cases the facts suggested conduct which could fall within existing criminal provisions; yet in none of these was there even a recommendation to prosecute. A case of non-fatal injury which was the subject of prosecution in the Western Australian courts was unsuccessful. The case related to allegations made by care staff in a Perth residential facility concerning the treatment of an elderly woman with dementia. The allegations were the subject of an ABC Four Corners program<sup>68</sup> and included a secretly obtained video demonstrating the staff's physical interactions with the woman. The police laid charges against the carers, which were dismissed by the magistrate who reportedly said that the carers were run off their feet, and that the woman

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<sup>66</sup> Ibid 8 [48].

<sup>67</sup> Ibid 8 [51].

<sup>68</sup> Who Cares? Part Two: Four Corners (Australian Broadcasting Corporation, 24 September 2018).

was often violent and abusive towards staff. The magistrate likened the situation to that of dealing with a difficult child for example when being firmly placed in a car seatbelt, and concluded that the evidence would not be enough for a conviction.

A different result was reached in a case heard in the Victorian County Court in early 2018 when a man was convicted of reckless conduct endangering the life of his elderly mother who died in 2013 in terrible conditions in his house.<sup>69</sup> She had suffered a stroke and was found wearing a soiled nappy that had not been changed in a week. She was covered in scabs and died of bronchopneumonia. Judge Carmody commented that: 'To have her living in the squalid conditions was inhumane and severe neglect of a person who was old, frail and dependent on both of you'.<sup>70</sup>

In this instance, however, the man pleaded guilty to the charge, and so, while it is an example of charges being laid, there was no trial, and as such no testing of the operation of the offence in the context of elder abuse. Notably, despite both the defence and prosecution asking for a non-custodial sentence, the judge sentenced the man to an 18-month period of imprisonment.

A number of observations can be made from these case studies, relating to both the decision to prosecute and the outcomes of prosecutions for life-threatening and fatal abuse of older persons. One is that elder abuse can be viewed through a public health lens, the effect of which may detract from the identification of any contributing conduct as being criminal in nature (the Clark Inquiry). Another is that, even when the conduct is identified as being potentially criminal in nature, there are aspects of the relevant criminal law which are perceived as presenting obstacles for successful prosecutions (Thorensen, ES Inquiries). A third observation is that ageist attitudes can affect the chances of a successful prosecution – as seen above in the Western Australian magistrate's decision, where the older person is equated to a child, and subjected to responses which are not appropriate, but nonetheless justified as lawful.

The perceived relevance of the criminal law, as well as its capacity to successfully respond to these sorts of cases is at the heart of the question being asked by this paper. The Thorensen and ES Inquiries are of particular relevance to the Western Australian criminal law, given the similarity of the Code provisions in both jurisdictions. It has been noted that the duty to provide the

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<sup>69</sup> Wilson, *Inhumane: Man jailed for extreme neglect of elderly mum left to die in bed*, above n 49.

<sup>70</sup> *Ibid.*

necessaries of life appears in the same terms, the purpose of this section being to facilitate proof of causation where the accused has the ‘charge of another’ who is unable to provide these for him/herself.<sup>71</sup> Given the appalling state in which Mrs Thorensen was found and the clear evidence of failure to obtain medical care for her, this would appear to be a case appropriate for prosecution; this was recommended but not acted upon. Moreover, the coroner’s identification of the systematic failure of the carer’s benefits system to require accountability in that case, and his recommendation to put in place a basic reporting process, has not been progressed, compounding the failure of the protective legal frameworks in enabling Mrs Thorensen’s abuse. While in the ES Inquiry there was no recommendation for prosecution of those involved in ES’s death, it is arguable that the evidence could have supported prosecutions for gross negligence manslaughter. As noted, in ES the coroner referred to MB’s decision to give ES a ‘substantial dose of morphine in circumstances where she knew two doses had been given in the preceding two hours or so’ as ‘reckless, exacerbated by the level of the dose.’<sup>72</sup> The decision of the coroner not to refer the case for criminal prosecution, however, seems to have resided in the belief that the family confusion around the appropriate levels of medication, and the feeling that the medication was given in ‘good faith’, reflected an absence of criminal culpability.

#### IV THE RESPONSES OF THE REPORTS

The ALRC Report concluded that the criminal justice system does not need to fundamentally change in the quest to prevent and address elder abuse. Chapter 13 of the Report deals with Criminal Justice Responses, and is notably short compared to the addressing of financial harm suffered by older persons. The Report concluded that ‘existing criminal laws generally adequately cover conduct which constitutes elder abuse’, and recommended against the introduction of a specific offence, stating that this would ‘risk duplicating existing offences.’<sup>73</sup> It noted that in all Australian jurisdictions the fact that the

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<sup>71</sup> *Criminal Code Act 1899* (Qld) s 285; *Criminal Code Act Compilation Act 1913* (WA) s 262.

<sup>72</sup> The coroner referred to the amount of morphine given as ‘well over the level set on the bottle of at least twice the amount prescribed’ and ‘likely to be even greater than that amount’ – see *Inquest into the death of ES* [2017] Coroners Court of Queensland, File No 2014/2590 (7 February 2017), 36 [176].

<sup>73</sup> Australian Law Reform Commission, *Elder Abuse – A National Legal Response (Final Report)*, above n 17, 364 [13.7].

victim is over 60 is regarded as an ‘aggravating circumstance.’<sup>74</sup> Instead, the ALRC recommended an increased role for adult safeguarding agencies in supporting ‘at risk’ adults, working in a complementary approach with police. To this extent, the Report recognises that elder abuse is part of an approach to all vulnerable adults more generally, and should be addressed through a multi-agency response. Finally, the Report recommended against introducing mandatory reporting of elder abuse, noting that a human rights approach based in respect for dignity was not consistent with equating older people with children.<sup>75</sup>

One of the reasons which the Report gave for not recommending a specific offence is based on submissions which note that offences which are ‘limited to abuse against ‘elders’ have the potential to be paternalistic and discriminatory’,<sup>76</sup> and the difficulties in drafting an offence with the necessary specificity.<sup>77</sup>

Specifically in relation to neglect, the Report found that ‘Criminal prosecution for neglect should be limited to the most grievous instances’ and that supporting carers was a preferable option.<sup>78</sup> It rejected the suggestion that prosecution for neglect offences would be assisted through the introduction of a specific duty to care for older persons, concluding that ‘existing approaches which focus on the victim’s inability to care for themselves or remove themselves from the care of another are preferable’.<sup>79</sup>

The recently released Final Report of the Select Committee in Elder Abuse (WA) agreed with the ALRC in finding that the creation of a new offence was not the solution but instead that ‘more needs to be done to expand the existing criminal law to provide greater protection for older people who experience elder abuse’.<sup>80</sup> It recommended that specialist elder abuse units should be

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<sup>74</sup> Aggravating factors are not an issue of sentencing but allegations of fact which needs to be proven beyond a reasonable doubt.

<sup>75</sup> Australian Law Reform Commission, *Elder Abuse – A National Legal Response (Final Report)*, above n 17, 415 – 416 [14.189].

<sup>76</sup> *Ibid* 364 [13.7].

<sup>77</sup> *Ibid* 365 [13.8].

<sup>78</sup> *Ibid* 366 [13.16].

<sup>79</sup> Although note that the interpretation of a person’s ability to remove themselves from care has been interpreted in Western Australia as a reference to the person’s capacity to make a decision about withdrawing from the care rather than the physical capacity to execute that choice – see, *Brightwater Care Group (Inc) v Rossiter* [2009] WASC 229, [40].

<sup>80</sup> Select Committee into Elder Abuse, *‘I never thought it would happen to me’: When Trust is Broken*, above n 19, 68 [6.52]. Note that the development of specific resources overseas on collaborating to prosecute elder abuse provide an example of relevant policy guidance which could be utilised in Australia- see *Prosecution Guide to Effective Collaboration on Elder Abuse* (National Center for State

created within the Western Australian Police (presumably similar to the multi-agency response recommended by the ALRC). It also recommended against the mandatory reporting of elder abuse based on human rights considerations of the older person's right to privacy and dignity.<sup>81</sup>

## V A PROPORTIONATE RESPONSE TO A PARTICULAR SOCIAL HARM

The ALRC Report noted, at the beginning of its chapter on safeguarding at-risk adults that 'properly enforced criminal law is perhaps the primary state protection against elder abuse'.<sup>82</sup>

While clearly envisaging a role for criminal law in elder abuse, both Reports recommend against the creation of a new offence to deal specifically with this. The first reason appears to be based on the need to respect the autonomy and dignity of older persons, and to avoid equating older persons with children, who for reasons of their inherent vulnerability and immaturity merit specific protection. The wider societal concern with the protection of children is served by a scaffolded system which includes mandatory reporting of suspected abuse,<sup>83</sup> specific offences<sup>84</sup> and specialist child protection governmental services. That concern does not attach to adults who are seen as benefitting from the general reticence in western liberal societies to intrude into the autonomous ideal of the self-governing citizen.<sup>85</sup> The reluctance to introduce a new offence is also based on perceived difficulties in drafting.<sup>86</sup> Drafting challenges are not a new phenomenon, and should not, in and of

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Courts, Williamsburg, VA, 2012) available at <https://www.bja.gov/Publications/NCSC-Prosecution-Guide-to-Effective-Collaboration-on-Elder-Abuse.pdf>

<sup>81</sup> Ibid 69 – 70 [6.58].

<sup>82</sup> Australian Law Reform Commission, *Elder Abuse – A National Legal Response (Final Report)*, above n 17, 377 [14.15].

<sup>83</sup> See, eg, *Children and Community Services Act 2004* (WA). John Chesterman has noted that: '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' in John Chesterman, 'Responding to violence, abuse, exploitation and neglect: Improving our protection of at-risk adults' (Report, Winston Churchill Memorial Trust of Australia, 30 July 2013) 17.

<sup>84</sup> For example, child exploitation (*Criminal Code Act Compilation Act 1913* (WA) ch XXV) and sexual assaults against minors constitute specific offences and are attended by a reverse onus of proof on the matter of the victim's age (*Criminal Code Act Compilation Act 1913* (WA) ss 320-322). Note that the fact that the victim is or over the age of 60 is a circumstance of aggravation in relation to offences against the person (*Criminal Code Act Compilation Act 1913* (WA) s 221).

<sup>85</sup> For discussion of this see Ashworth, *Positive Obligations in Criminal Law*, above n 40.

<sup>86</sup> See Australian Law Reform Commission, *Elder Abuse – A National Legal Response (Final Report)*, above n 17, 365 [13.8]; Select Committee into Elder Abuse, *'I never thought it would happen to me': When Trust is Broken*, above n 19, 67 [6.48].

themselves, be used to impede the development of a new offence where that is needed.

In assessing whether the criminal law needs to do more, either through the development of a new offence, or the inclusion of other measures, it is helpful to consider Victor Tadros's 'moral distinctiveness' approach.<sup>87</sup> His argument, made in support of a specific offence for domestic abuse, points to the distinctiveness of this harm, through its characterisation of the erosion of a particular type of freedom, and a 'violation of an expectation of trust'.<sup>88</sup> He submits that domestic violence is distinctive from other violence because it is 'much more likely to be repetitive and systematic' than violence in other contexts, and therefore requires a particular social response. At the heart of his argument is the need for the criminal law to reflect the moral distinctions between different forms of violence. The sort of elder abuse which is the focus of this paper shares many of the features which Tadros identifies. However, it is arguably 'distinct' from domestic violence in other ways: elder abuse which is life-threatening or fatal appears from the limited evidence to be more likely a result of neglect rather than purposive active violence.<sup>89</sup> Moreover, older persons are more likely to be affected by cognitive decline associated with dementia which is also associated with co-morbidities, both resulting in increased dependency on family members, and difficulties in establishing the cause of any harm perpetrated. Life-threatening or fatal elder abuse therefore arguably demonstrates a distinct moral wrong which should be specifically reflected in the criminal law.

The distinctive wrong argument is consistent with fundamental principles associated with a fair and proportionate criminal law. For example, Andrew Ashworth has long emphasised the importance of fair labelling,<sup>90</sup> while others have pointed to the significance of the declaratory function of the criminal law.<sup>91</sup> Tadros also makes a point which has particular resonance for elder abuse:

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<sup>87</sup> Victor Tadros, 'The Distinctiveness of Domestic Abuse: A Freedom Based Account' (2005) 65(3) *Louisiana Law Review* 989, 989.

<sup>88</sup> *Ibid* 990.

<sup>89</sup> Kaspiew, Carson and Rhoades, 'Elder abuse: Understanding issues, frameworks and responses', above n 11, points out that while 'elder abuse is often also an instance of family violence', there are 'some differences in the dynamics of family violence and elder abuse; family violence is often characterised as a manifestation of power and control, but there is less agreement about the dynamics of elder abuse'.

<sup>90</sup> Ashworth, *Principles of Criminal Law*, above n 6, 78 – 80.

<sup>91</sup> For example, see Jonathan Herring, *Great Debates in Criminal Law* (Macmillan International Higher Education, 3<sup>rd</sup> ed, 2015) 21 – 22; Cass R Sunstein, 'On the Expressive Function of Law' (1996) 144 *University of Pennsylvania Law Review* 2021.

‘A lack of public recognition of the wrong perpetrated, or of the consequences of that wrong, can [therefore] be as much a reason to criminalize as public recognition’.<sup>92</sup>

Do these points, which speak to fundamental conceptions of criminal liability, support a change to the existing criminal law in Western Australia? It is here argued that it does, but that this should not necessarily take the form of a specific elder abuse offence. Firstly, elder abuse is not susceptible of generalisation. While there may be commonalities across the different types, there are also different causes and features. The financial abuse of older people, for example, can be the result of predatory behaviour, opportunism or a simple failure to understand that ‘Having to wash Mum’s dishes doesn’t give you the right to clean out her savings’.<sup>93</sup> Abuse of a sexual or physical nature may arise from quite different circumstances. The widely accepted World Health Organisation’s broad definition of elder abuse recognises this variation; notably it identifies the ‘expectation of trust’ as being a common element of the context in which elder abuse occurs, and is arguably not best addressed through the creation of a separate offence.<sup>94</sup>

Secondly, the recognition by the Reports of the rights of autonomy of the older person, also expressed in the term ‘dignity of risk’, speaks to the different lens through which elder abuse can be viewed: that it is a social harm, and is inextricably associated with often complex, established personal relationships. This has been recognised as a significant factor in the under-reporting and lack of prosecution of elder abuse.<sup>95</sup>

It is suggested here that a proportionate response, and one which is aligned with the above arguments around moral distinctiveness, should take the form of the creation of a specific duty owed by those who have the care of older persons. This article has focused on action and inaction which is life-threatening or fatal to an older person, recognising that this is associated as much with neglect as with direct violence. At the outset, the protection of

<sup>92</sup> Tadros, ‘The Distinctiveness of Domestic Abuse: A Freedom Based Account’, above n 85, 1013.

<sup>93</sup> *Elder Abuse Helpline Posters* (2018) Government of Western Australia Department of Health and Department of Local Government and Communities <[https://www.advocare.org.au/wp-content/uploads/2018/07/ElderAbuseHelplinePosters\\_3.pdf](https://www.advocare.org.au/wp-content/uploads/2018/07/ElderAbuseHelplinePosters_3.pdf)>.

<sup>94</sup> ‘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’, World Health Organisation, *Toronto Declaration on the Global Prevention of Elder Abuse* (2002) <[https://www.who.int/ageing/projects/elder\\_abuse/alc\\_toronto\\_declaration\\_en.pdf](https://www.who.int/ageing/projects/elder_abuse/alc_toronto_declaration_en.pdf)>.

<sup>95</sup> Note Australian Law Reform Commission, *Elder Abuse – A National Legal Response (Final Report)*, above n 17, 369 [13.25], 370 [13.28]; Select Committee into Elder Abuse, *‘I never thought it would happen to me’: When Trust is Broken*, above n 19, 68 – 70 [6.56] – [6.58].

human life was identified as a central purpose and focus of the criminal law, recognising the value which life and bodily integrity is accorded in human society. Express recognition of the older person as the victim of life-threatening or fatal harm perpetrated by others who have the care of them would effect a public message of the importance of the problem, and perhaps perform a deterrent function.<sup>96</sup> This recognition does not require the creation of a new offence. Duties of care under the Criminal Code exist because persons have assumed responsibility for another or should recognise that they have this responsibility. They therefore embed the moral narrative which accompanies the imposition of criminal liability. A specific duty owed to older persons addresses the moral distinctiveness which characterises this form of elder abuse, but does so in a context where the law has recognised that protection from harm is the trumping consideration.<sup>97</sup>

#### CONCLUSION

Western Australian criminal law, consistently with other jurisdictions, places a priority on the protection of a person's bodily integrity, particularly where the harm perpetrated is life-threatening or fatal. Where the victim is an elderly person, the limited evidence suggests that this sort of harm is likely to occur in a private, familial and ultimately 'hidden' context. While this may explain the low rate of detection of such occurrences, it does not wholly account for the lack of involvement of the criminal law in this space. An examination of a number of coronial inquiries reveals the complexities associated with (fatal) harm suffered by older persons who are in the care of others. However, it also indicates a perception that the current criminal law presents obstacles to successful prosecution even where there would appear to be clear evidence supporting a decision to prosecute. The ALRC and Western Australian Parliamentary Reports, while rightly identifying the need for a combined services' approach to the physical abuse of older persons, recommend against changes to the criminal law which would specifically address this and other forms of elder abuse. This article suggests that the moral distinctiveness of life-threatening and fatal abuse of elderly persons requires its recognition as a distinctive wrong, and that a

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<sup>96</sup> Tadros, 'The Distinctiveness of Domestic Abuse: A Freedom Based Account', above n 85, 1013.

<sup>97</sup> This is consistent with finding 35 on the operation of restraining orders in Select Committee into Elder Abuse, *'I never thought it would happen to me': When Trust is Broken*, above n 19, 65.

proportionate response would be the creation of an additional duty provision directed at the carers of older persons. The duty would promote fundamental principles of criminal liability, facilitate the recognition of the worst cases of this sort of abuse, and, potentially, increase awareness of and deter such conduct.