



RESEARCH REPORT

**Legal Definitions of
Elder Abuse and Neglect**

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Legal Definitions of Elder Abuse and Neglect

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TABLE OF CONTENTS

EXECUTIVE SUMMARY	iii
1.0 INTRODUCTION	1
1.1 Project overview.....	1
1.1.1 “Legal” definitions of elder abuse	1
1.1.2 Scope of research and methodology	3
1.2 Summary of findings	4
2.0 CANADA	7
2.1 Legislation.....	8
2.1.1 Provinces and territories	8
2.1.2 Federal Legislation—An overview of the <i>Criminal Code</i> framework	12
2.2 Court decisions	14
2.2.1 Criminal Neglect: Failure to provide the necessities of life.....	16
2.2.2 Acts of violence against elders: The home invasion and assault cases.....	20
2.2.3 Fraud and undue influence—civil and criminal jurisprudence.....	23
2.2.4 Conclusion	29
2.3 Policy.....	30
2.3.1 Elder abuse and relationships of trust	31
2.3.2 Alternatives to the term “elder”	37
2.3.3 Types of abuse	41
2.4 Conclusion.....	44
3.0 THE UNITED KINGDOM.....	45
3.1 Legislation	45
3.1.1 England & Wales	45
3.1.2 Scotland.....	48
3.2 Policy.....	49
3.2.1 Alternatives to the category “elder abuse”.....	51
3.2.2 Types of abuse	52
3.3 Court decisions	53
3.3.1 Vulnerability and older adults.....	55
3.3.2 Targeting elderly victims	56
3.4 Conclusion.....	56
4.0 AUSTRALIA	57
4.1 Legislation	57
4.2 Policy.....	58
4.2.1 Emphasis on relationships of trust	58
4.2.2 “Elder” abuse and indigenous cultures—Problems with the term.....	61
4.3 Conclusion.....	62

5.0	NEW ZEALAND.....	63
5.1	Legislation.....	63
5.2	Policy.....	64
5.2.1	Relationships of trust.....	64
5.2.2	Elder abuse as a form of family violence.....	67
5.2.3	Cultural aspects to elder abuse.....	69
5.3	Court Decisions.....	69
5.3.1	Vulnerable elderly victims of crime.....	70
5.4	Conclusion.....	71
6.0	SOUTH AFRICA.....	73
6.1	Legislation.....	73
6.2	Policy.....	75
6.3	Court decisions.....	77
6.4	Conclusion.....	79
7.0	THE UNITED STATES.....	81
7.1	Legislation.....	81
7.1.1	The federal framework: The <i>Older Americans Act</i>	81
7.1.2	State legislative responses to elder abuse.....	82
7.2	Policy.....	87
7.2.1	National.....	87
7.2.2	The state level.....	89
7.3	Conclusion.....	91
	APPENDIX A: Canadian Legislation—Comparative Chart.....	97

EXECUTIVE SUMMARY

Definitions of elder abuse and neglect are abundant and varied. Legal definitions are complex: they are buried in lengthy and complicated statutes; implied, rather than stated directly, in the language of court decisions; and contradicted between policies. This report brings together these diverse sources of definitions of elder abuse and neglect, providing a comparative review and analysis of the legal definitions of elder abuse and neglect that exist in Canadian legislation, policy and case law, as well as in other countries with similar justice systems to that of Canada.

This paper is designed for a mixed audience. Anyone interested in learning more about definitions of elder abuse and the legal systems from which they emerge may find value in this study. This international review should provide policy analysts with a clearer perspective on how and where elder abuse and neglect is defined in existing legislation, policy and case law. For individuals with expertise in this area, this paper encapsulates themes and controversies in defining elder abuse and neglect, serving as a springboard for further critical discussion and problem-solving.

This study used both traditional and non-traditional legal research strategies in order to thoroughly investigate the subject of elder abuse and neglect. Our approach involved an exhaustive review of materials from a wide range of legal sources, including: federal and provincial legislation; policies, protocols and practice guidelines; civil and criminal case law; academic literature; government strategy documents, consultation papers and reports; and conference papers and other teaching materials.

Our legal research involved contacting government, crown, public guardians and trustees, police and health authorities regarding existing policies, procedures and protocols, as well as interviews with select leading practitioners and academics working in the area of elder abuse and neglect.

This paper reveals a number of key findings:

1. Legal definitions of elder abuse and neglect vary greatly both between and even within countries. One of the central controversies in defining elder abuse is whether the concept is limited to mistreatment that occurs in the context of a relationship of trust, or captures harms committed by strangers as well.
2. Legislation using the specific language of “elder abuse” or “elder neglect” is rare. A number of the legal frameworks that exist to address this issue address elder abuse and neglect as part of the larger problem of mistreatment of vulnerable adults. Though still widely used, the expression “elder abuse” is losing currency in some countries, such as the United Kingdom, raising the question of whether “elder abuse and neglect” is the appropriate expression to work with. In a number of jurisdictions, the term “elder” has been replaced by the term “older adult”.

3. Of all the legal systems we reviewed, only the United States has legislation specifically criminalizing elder abuse. Nearly every U.S. jurisdiction that we reviewed has enacted legislation creating specific crimes against older adults and uses the term “elder abuse”. In other countries, crimes against older adults are captured by general crimes, such as failure to provide the necessities of life (criminal neglect—Canada), manslaughter, assault and sexual assault, theft, robbery, breaking and entering, and fraud.
4. Case law does not provide explicit definitions of elder abuse and neglect in any of the countries that formed part of this review. However, decisions do clarify what distinguishes elder abuse from other crimes. In most of the countries that formed part of this review, the courts emphasize the targeting of elderly victims, breach of trust, and vulnerability. Canada follows this approach.
5. All countries reviewed have passed non-criminal legislation in response to, or in order to address, elder abuse and neglect. However, the statutes vary and the legal frameworks are diverse. In Canada, for example, provinces and territories have responded to the abuse and neglect of adults through a variety of approaches, including, adult protection and guardianship legislation, legislated protection for adults living in residential care, domestic violence legislation and human rights legislation.
6. Although more difficult to locate, one of the richest sources of definitions of elder abuse and neglect are policies, practice guidelines, protocols and strategy documents.
7. The internal structure of definitions is also varied. A number of sources rely on a general statement of the meaning of elder abuse and neglect. Other definitions construct a definition of elder abuse out of examples. Lists of types of abuse (psychological, physical, sexual) figure prominently in definitions but the lists are not consistent. Although physical abuse appears in every list, other categories of abuse, such as social abuse, institutional abuse, systemic abuse, isolation and exploitation are rarer. At the country level there are some patterns in terms of what categories of abuse are included. For example, social abuse is cited often in Australia; exploitation comes up in U.S. material.

While approaches to defining and addressing elder abuse and neglect vary across jurisdictions, there are many similarities between existing legal definitions as well as recurring themes. Although the focus of this paper is definitions, by illustrating the diversity in legal approaches to elder abuse and neglect, this study raises challenging questions about how to craft a legislative response to the issue of elder abuse and neglect.

This study concludes with more questions than answers, culminating in a comprehensive list of questions policy-makers would be advised to consider prior to adopting or drafting a legal definition of elder abuse. Readers focused on this problem may choose to fast forward to the final pages of this report. For those interested in a broader introduction to the subject, country profiles form the bulk of this paper and provide a more detailed comparative analysis of legal definitions of elder abuse and neglect.

It is difficult in a relatively new and changing field to find agreement on a generic term to describe the phenomenon of Elder Abuse. Definitions are not only needed for “academic” purposes, definitions are needed in legislation and policy where they can compel certain action and direct resources. Cultural diversities complicate the debate on defining abuse even further.¹

1.0 INTRODUCTION

1.1 Project overview

1.1.1 “Legal” definitions of elder abuse

This project assembles, analyses and compares legal definitions of elder abuse and neglect in order to lay a foundation for further law and policy development in this area in Canada. What are legal definitions of elder abuse? Legal definitions are documented in the diverse sources that create, or impact on, law and government policy. They may emerge out of, or be refined by, court cases. They may be stated explicitly in laws. They may be created by governments and appear in strategy documents and policy papers. They may come from law-related fields of practice, such as legal advocacy, criminal justice, human rights and police procedure.

Elder abuse and neglect is an interdisciplinary field of practice: it involves doctors, nurses, social workers, gerontologists, lawyers, trustees, bankers, police officers—just to name some of the professionals who come into contact with older adults who have been neglected or mistreated and are called upon to come up with some kind of appropriate response. The distinction between legal and other definitions of elder abuse—such as those emerging from a medical or health context—is fuzzier than one might expect at first glance, likely in part due to the interdisciplinary nature of the work. Legal definitions often borrow from definitions that are not strictly speaking legal.

Take, for example, the definition that appears in the *Toronto Declaration on the Global Prevention of Elder Abuse (the Toronto Declaration)*:

¹ Government of South Africa, Department of Health, *National Strategy on Elder Abuse—Baseline Document* (2000), online: <<http://www.doh.gov.za/docs/factsheets/guidelines/elders/>>. Over the years “elder abuse and neglect” has emerged as the umbrella term used to denote the mistreatment of older adults, especially in international forums. However, the term “elder” has particular connotations in First Nations and Aboriginal cultures, referencing not strictly old age but rather a wisdom or leadership associated with age. In this sense, it may be a problematic term to speak of older adults broadly. This problem is not explored in this review of legal definitions of elder abuse and neglect. Rather, this paper examines existing definitions of this challenging concept, albeit noting alternative language that has developed to replace “elder abuse and neglect”. The problem of unearthing a more inclusive term remains a worthy enterprise beyond the scope of this project.

Elder abuse is a single or repeated act, or a lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harms or distress to an older person.²

The *Toronto Declaration* is an international call to action jointly authored by the World Health Organization (“WHO”), the University of Toronto, and the International Network for the Prevention of Elder Abuse (“INPEA”). It was developed in a multi-disciplinary context. The *Toronto Declaration* adopts the definition originally developed by the U.K. organization Action on Elder Abuse.³ This definition does not emerge from a strictly legal source; however, this definition has been cited in a number of legal sources, such as court decisions and government documents.⁴ Moreover, the WHO is an agency of the United Nations, an international legal organization, and this definition is currently referenced in UN materials. Therefore, this definition is too significant and influential to ignore.

For the purpose of this project we adopt the following approach to “legal”: if a definition emerges from a source that is not clearly legal, but is cited with authority in a legal source, then it is included as a legal source in this study.

On a more micro level, this dynamic relationship between legal definitions and social policy exists in the various countries we have examined. Thus we have included the definitions emerging from other influential elder abuse and neglect prevention networks in this paper. Law does not exist in a social vacuum. Rather, lawmakers are influenced by various communities and in fact have consulted broadly to inform policy in relation to elder abuse and neglect.⁵ This study reflects this dynamic.

² *Toronto Declaration on the Global Prevention of Elder Abuse*. 2002.

online: <http://www.who.int/ageing/projects/elder_abuse/en/> or <<http://www.inpea.net/reportsresources/reports.html>> [Toronto Declaration].

³ *Action on Elder Abuse Bulletin*, May-June 1995, No. 11. Cited in *Missing Voices: Views of older persons on elder abuse* WHO and INPEA, Geneva: World Health Organization, 2002 at 3; see also Action on Elder Abuse, online: <http://www.elderabuse.org.uk/What%20is%20abuse/what_is_abuse%20define.htm>.

⁴ Government of the Australian Capital Territory. *Meeting the Challenge of Elder Mistreatment: A Resource Guide for Home and Community Care Service Providers in the ACT*, Government of Victoria; ONPEA, “What is Elder Abuse?”, online: <<http://www.onpea.org/english/elderabuse/index.html>>. The definitions of the Ontario Seniors’ Secretariat and the Yukon Department of Health and Social Services’ definition incorporate and expand upon this definition. See Ontario Seniors’ Secretariat, online: <http://www.ontario.ca/en/your_government/009886> [OSS]; and Yukon Department of Health and Social Services, Seniors, Seniors and Elder Abuse, “What is Abuse of Older Adults?” online: <http://www.hss.gov.yk.ca/programs/social_services/seniors/elder_abuse/>.

⁵ Government of Saskatchewan, *Steering Committee on the Abuse of Vulnerable Adults Report* (Saskatchewan, 1997) at 2, online: <<http://www.justice.gov.sk.ca/vasc/>>; Conseil des aînés, online: <<http://www.conseil-des-aines.qc.ca/>>; Nova Scotia Department of Seniors, *Strategy for Positive Aging in Nova Scotia* (Halifax: Communication Nova Scotia, 2005), online: <<https://www.gov.ns.ca/seniors/positiveaging.asp>> [Positive Aging Strategy]; U.K. Department of Health, *Safeguarding adults: a consultation on the review of the ‘No Secrets’ guidance* (2008), online: <http://www.dh.gov.uk/en/Consultations/Closedconsultations/DH_089098> [Consultation].

1.1.2 Scope of research and methodology

Sources of material reviewed in the course of this study include:

- court decisions (civil and criminal);
- codified laws (statutes and regulations);
- policies, protocols and practice guidelines;
- academic literature;
- government strategy documents, consultation papers and reports;
- conference papers and other teaching materials.

The focus of this project is Canada, including all thirteen jurisdictions; however, this paper also compares and contrasts the Canadian approach with selective English-speaking jurisdictions with which we share colonial histories, social values and legal frameworks. The international review includes Australia, New Zealand, the United Kingdom, and South Africa—as well as Florida, Arizona, Illinois, California, New Mexico, Massachusetts and New York—American states known to be at the vanguard in terms of responding, and legislating in relation, to elder abuse and neglect.

This study melds traditional and non-traditional legal research strategies in order to thoroughly investigate the interdisciplinary field of elder abuse and neglect. Our approach involved legal research through print and electronic sources, contacting government, crown, public guardian and trustee, police and health authorities regarding existing policies, procedures and protocols, and interviews with select leading practitioners and academics working in the area of elder abuse and neglect.

While this paper is comparative in terms of approach, it is intended to be neutral in terms of commenting on the relative value of the diverse approaches to defining and responding to elder abuse and neglect encompassed within this report. The various jurisdictions reviewed differ widely in terms of the system they use to respond to abuse and neglect. Some governing bodies define and respond to abuse within the context of adult guardianship laws; others criminalize and define elder abuse through the creation of specific laws created to capture exclusively crimes involving older adults, effectively creating a crime (or crimes) of “elder abuse”. Some regions within the countries reviewed prosecute crimes against older people utilizing existing general crimes (such as fraud, assault, sexual assault) and in those jurisdictions, the advanced age of the victim often becomes a factor relevant to the sentencing of the offender. Some jurisdictions define elder abuse and neglect in the context of laws that apply only to an institutional care setting, such that the relationship between older adults living somewhat independently

and their abusers is governed by a completely distinct statutory framework. Even across Canada there is a great deal of variety in approach. Moreover, multiple approaches can be reflected in a single jurisdiction. For example, both the federal law (the *Criminal Code*) and provincial laws (such as adult guardianship legislation) apply in the British Columbia.

In each case the individual legal framework is the product of the particular social history of that community in a unique period of time in the history of agitation around elder abuse and neglect. A relative assessment of the merit of each legal framework is beyond the scope of this project. This study raises challenging questions about how to approach laws designed to respond to a similar phenomenon in unique social contexts. The systems are presented in order to situate definitions in context and will hopefully provide the reader with an introduction to legal aspects of elder abuse and neglect. However, the descriptions are cursory and by no means provide a thorough introduction to each institutional response to adult abuse and neglect. That would be a much larger, though worthy, project. This paper concentrates on definitions.

As this paper will demonstrate, regardless of the differences between communities and government systems, there exist a great number of similarities between existing legal definitions of elder abuse and neglect. Certain themes reappear across countries and legal system. One of the central questions is whether elder abuse is conceptually limited to relationships of trust. The INPEA definition cited at the beginning of this report illustrates a breach of trust approach. However, the scope of this paper is broader, including definitions that capture the abuse of strangers. Differences such as these, where they appear, illustrate the significant challenge an exhaustive and inclusive definition presents, and capture the controversies hidden within this umbrella term, which encompasses such diverse harms and victims.

1.2 Summary of findings

One of the richest sources of explicit definitions of elder abuse and neglect are policies, practice guidelines, protocols and strategy documents. At least one of those types of document exists in each of the countries we investigated. International human rights declarations are one of the oldest examples of statements regarding elder abuse. These definitions tended to be referenced in the more thorough discussions of elder abuse and neglect emerging out of the countries that were part of this review.⁶

Legislation that uses the specific language of “elder abuse” or “elder neglect” is rare. It appears to be found only in the United States, and largely in criminal laws. All but one of the U.S. jurisdictions we reviewed had passed legislation creating specific crimes against older adults and each of them used “elder abuse” in at least one statute. Outside the

⁶ See the discussion in 1(a)(i) of this paper.

United States the same criminal behaviour would be captured by more general crimes, such as failure to provide the necessities of life (criminal neglect), manslaughter, assault, sexual assault, theft, robbery, breaking and entering, and fraud. In those legal systems, the legal definition of elder abuse and neglect is implied in the language of judicial decision-making; however this source provides only a very partial definition.

All countries reviewed have passed non-criminal laws in response to, or in order to address, elder abuse and neglect. However, these statutes are either more broad or narrow in application: they apply to the larger category of “vulnerable adults” or “adults at risk” of abuse⁷—a category that includes adults with developmental disabilities, people with serious illnesses and brain injury survivors—or apply strictly to residents of care facilities. The broader adult protection rules are generally located within adult guardianship legislation. As guardianship frameworks and other substitute decision-making regimes come into play only once an adult lacks the capacity to make her own decisions, these laws often do not apply to mentally capable vulnerable adults, and of course, a great number of older adults remain competent decision-makers.

In some jurisdictions, domestic violence legislation is the only legislation that uses the language of abuse. Evidently such legislation was drafted to address the more particular category of spousal violence. However, their scope of application includes harms committed on older adults in the context of family relationships and therefore these types of legislation become relevant to this project.

Most of the countries that formed part of this study were federations in which the power to pass laws connected to elder abuse and neglect exists at both the state and national level. Elder abuse does not fall exclusively to either domain. As a function of this overlap in powers in many countries both the federal and provincial or state legislatures have created laws that impact on the meaning of elder abuse and neglect. However, even at the state level, multiple definitions can be found. As a result of this diversity in legislative responses to the issue of elder abuse and neglect a number of laws and legal definitions relevant to elder abuse and neglect may co-exist within the same jurisdiction. For example, an assault committed by an elderly man against his elderly wife is an offence under Canada’s *Criminal Code* (which applies to every province and territory), and where it exists within a province or territory, relevant domestic violence legislation would also apply to the same assault.

⁷ This category could be characterized as larger or smaller than “elder abuse.” Although a number of court decisions contain quotations to the effect that all older adults are vulnerable, some people working in this area would take issue with the statement that all older adults are at risk of abuse. In this sense the category is narrower, rather than broader, than the category of vulnerable adults.

2.0 CANADA

Canada is a federal state, meaning that the responsibility for making laws in specific areas is divided between the federal and provincial and territorial governments (this is often referred to as the “division of powers”). These powers are “exclusive”, with each level of government restricted to the areas of jurisdiction conferred to it by the *Constitution Act, 1867* and enumerated in sections 91 (federal powers) and 92 (provincial or territorial powers).⁸

While in theory the powers conferred by sections 91 and 92 are “exclusive”, in practice there is considerable overlap between federal and provincial legislation. Section 91 (27) gives the federal government exclusive jurisdiction over the enactment of criminal law and it is under this authority that the federal government enacted and amends the *Canadian Criminal Code*. However, section 92(14) gives the provinces and territories jurisdiction over the administration of justice within the province, which among other things allows them to prosecute offences under the national *Criminal Code*. So while criminal laws impacting on elder abuse are federal; criminal justice policy is created by all three jurisdictions, the federal, provincial and territorial governments.

The provinces and territories have the exclusive power to legislate in the area of “property and civil rights in the province” under section 92(13), a power that has been interpreted broadly to give the provinces and territories jurisdiction over a wide range of legal rights in areas such as labour relations, health and social services, family law and consumer protection. There is also overlap between federal and provincial/territorial jurisdictions in those areas. For example, the federal government is responsible for legislating the *Canada Health Act*, while the provinces and territories are responsible for the administration of health care services. The federal government is also responsible for income tax legislation, old age security, and the national Pension Plan.

In the context of defining elder abuse and neglect, the result of the overlap between federal and provincial powers is that relevant legislation falls within both jurisdictions. This has led to considerable variation and inconsistency across the country, with different legislative approaches in each province and territory with respect to a number of relevant areas, including adult protection, family relations, marriage, property rights, health and human rights.

⁸ *Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3 at s. 91 and 92.

2.1 Legislation

2.1.1 Provinces and territories

2.1.1.1 Adult protection and guardianship legislation

In Canada, adult protection is primarily addressed at the provincial and territorial level and the various jurisdictions have taken different approaches to addressing the problem of adult abuse and neglect. Appendix A to this paper contains a table that summarizes the most relevant statutory provisions in each of the thirteen Canadian jurisdictions.⁹ A number of the provinces and territories have responded to the abuse and neglect of adults through adult protection and guardianship legislation.

None of these laws contain a broad definition of elder abuse and neglect *per se*. Some guardianship regimes define “abuse” in the context of a system intended to protect vulnerable or incapable adults. The definitions that fall into this category do not differ significantly from each other. The Yukon defines “abuse” and “neglect” as follows:

Abuse means the deliberate mistreatment of an adult that (a) causes the adult physical, mental or emotional harm, or (b) causes financial damage or loss to the adult, and includes intimidation, humiliation, physical assault, sexual assault, overmedication, withholding needed medication, censoring mail, invasion or denial of privacy, denial of access to visitors, or denial of use or possession of personal property.

Neglect means any failure to provide necessary care, assistance, guidance, or attention to an adult that causes, or is reasonably likely to cause, within a short period of time, the adult serious physical, mental or emotional harm, or substantial financial damage or loss to the adult, and includes self-neglect.¹⁰

These comprehensive definitions capture physical, mental, emotional, sexual and financial abuse as well as neglect and self-neglect. For the purposes of comparison the most interesting aspect of these definitions other than their breadth is that British Columbia and the Yukon limit abuse to “deliberate” or intentional mistreatment.

Adult protection regimes, that do not include guardianship, follow unique approaches. Nova Scotia defines an “adult in need of protection” to include an adult who is a victim of abuse. Newfoundland and Labrador’s *Neglected Adults Welfare Act*—the only neglect specific statute in Canada—defines neglect but not abuse. The statute states:

⁹ Saskatchewan appears twice in the table because financial and physical abuses are addressed in different statutes. Nova Scotia appears twice as it possesses both adult protection legislation and a statute dealing with the care of adults 16 years of age and older living in care facilities under the *Homes for Special Care Act* and residential facilities under the *Child and Family Services Act*. See Appendix A for greater detail.

¹⁰ The *Adult Protection and Decision Making Act* being Schedule A to the *Decision-Making Support and Protection to Adults Act*, S.Y. 2005, c. 21, Part Four: Adult Protection, s.58.

Neglected adult means an adult:

- (i) who is incapable of caring properly for himself or herself because of physical or mental infirmity,
- (ii) who is not suitable to be in a treatment facility under the *Mental Health Care and Treatment Act*,
- (iii) who is not receiving proper care, and
- (iv) who refuses, delays or is unable to make provision for proper care and attention for himself or herself.¹¹

Although New Brunswick's definition is particularly relevant in that it references the elderly, its tautological structure essentially defines an abused adult as an adult victim of abuse:

Where an adult is a disabled person or an elderly person, or is within a group prescribed by regulation, and is a victim of or in danger of (a) physical abuse; (b) sexual abuse; (c) mental cruelty; or (d) any combination thereof, that person is an abused adult...¹²

Saskatchewan and the Northwest Territories define family violence within their respective adult protection legislations, without guardianship—only an aspect of what would be captured by the concept of elder abuse and neglect.

These adult protection regimes do not show the same consistency as those that include guardianship, but rather are quite distinct from one another.

2.1.1.2 Legislated protection for adults living in residential care

Other responses include legislated protection for adults living in residential care. Manitoba's care facility recipient statute contains a similar definition.¹³ Alberta's very broad definition of "abuse" also requires intention but is tailored more to the experience of recipients of care, and in this sense it captures some of the specific vulnerabilities of an older adult. The definition states that abuse means:

- (i) intentionally causing bodily harm,
- (ii) intentionally causing harm, including, but not limited to, threatening, intimidating, humiliating, harassing, coercing or restricting from appropriate social contact,
- (iii) intentionally administering or prescribing medication for an inappropriate purpose,
- (iv) subjecting to non-consensual sexual contact, activity or behaviour,
- (v) intentionally misappropriating or improperly or illegally converting money or other valuable possessions, or
- (vi) intentionally failing to provide adequate nutrition, adequate medical attention or other necessity of life without a valid consent.¹⁴

¹¹ *Neglected Adults Welfare Act* R.S.N.L., 1990, c. N-3, s.2.

¹² *Family Services Act*, S.N.B. 1980, c. F-22, Part III., s.34(2).

¹³ *Protection for Persons in Care Act*, C.C.S.M., c. P144, s.1.

¹⁴ *Protection for Persons in Care Act*, R.S.A. 2000, c. P-29, s.1.

Nova Scotia's care facility resident regulation also contains a lengthy definition but it omits the requirement of intention.¹⁵ Saskatchewan defines "financial abuse" under its *Public Guardian and Trustee Act*.¹⁶ No other jurisdiction defines "abuse" let alone "elder abuse". These combined adult protection and guardianship regimes consistently focus on more general definitions of "abuse", and include types of abuse with examples of behaviour that would fit each type.

2.1.1.3 Domestic violence legislation

Several provinces (Alberta, Manitoba, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Saskatchewan) and all three territories (Northwest Territories, Nunavut and Yukon) have enacted domestic violence legislation that provides civil remedies, such as emergency protection orders, to victims of family violence. Such legislation was drafted to address the more specific subcategory of spousal violence and does not refer specifically to older adults. However, as these statutes apply to various types of relationships (ie. marital, intimate, familial), their scope of application will implicitly include harms committed on older adults in the context of these relationships. The Nunavut legislation provides the most expansive list of types of relationships whereby it includes a "care relationship" defined as existing "between two persons, whether or not they have ever lived together, if one person is or was dependent on the other person for assistance in his or her daily life activities because of disability, illness or impairment."¹⁷ The terminology "daily activities" is defined as follows: "daily activities include personal grooming, preparing meals, shopping for groceries, taking care of financial affairs, making appointments and arranging transportation to appointments."¹⁸

Every Canadian statute of this kind uses the term "violence", with the exception of Nunavut where the word "abuse" is used. Different forms of violence are enumerated within most acts including physical abuse, damage to property, sexual abuse, an act, threat or omission causing reasonable fear of bodily harm or damage to property and forced confinement. Some acts also include psychological or emotional abuse (Manitoba, Yukon, Northwest Territories and Nunavut) with only the Nunavut legislation providing a definition:

(a) means a pattern of behaviour of any kind, including verbal statements, the purpose of which is to deliberately undermine the mental or emotional well-being of a person, and

¹⁵ *Protection for Persons in Care Regulation*, R.S.N.S. 2004, c. 33, s.3(1).

¹⁶ In Saskatchewan, *The Public Guardian and Trustee Act*, S.S. 1983, c-P-36.3, s.40.5(1) defines "financial abuse" as "the misappropriation of funds, resources or property by fraud, deception or coercion".

¹⁷ *Family Abuse Intervention Act*, S.Nu. 2006, c. 18, s.2(6).

¹⁸ *Ibid.*, s.2(7).

(b) includes repeated threats made with the intent to cause extreme emotional pain to a person, a child of or in the care of a person or a family member of a person.¹⁹

Four domestic violence statutes (Prince Edward Island, Yukon, Newfoundland and Labrador and Nunavut) include the deprivation of food, clothing, medical attention, shelter, transportation or other necessities of life as a form of family violence. The Nunavut act also provides that “conduct of any kind the purpose of which is to control, exploit or limit a person’s access to financial resources for the purpose of ensuring the person’s financial dependency” is a form of family violence.²⁰

2.1.1.3 Human rights legislation

All provinces and territories have enacted protections from discrimination on the basis of age in human rights legislation. Québec takes a somewhat more expansive human rights approach to defining and addressing elder abuse and neglect in their human rights legislation by adding a protection against exploitation. Section 48 of Québec’s *Charte des droits et libertés de la personne* contains this broad statement on the rights of older adults:

Every aged person and every handicapped person has a right to protection against any form of exploitation.²¹

Exploitation is defined by the Commission as when:

- you are an elderly or handicapped person and have suffered a moral or material prejudice from another person or an organization;
- your old age or handicap affects you physically, mentally or psychologically to the extent that it places you in a situation of dependence.

Significantly, as with the protections from discrimination in other provincial and territorial human rights statutes, the protections enshrined in the Québec Charter have quasi-constitutional status, as it is considered a framework statute whereby other laws adopted in Québec must respect the text and spirit of the Charter unless they are specifically exempted from that law. Québec thus adds a quasi-constitutional status to this additional protection from exploitation. The Québec approach raises the question of whether there is value in imbedding somewhat broader rights to protection from elder abuse into human rights law: in other words, is elder abuse a form of discrimination that should also be seen as a human rights issue?

¹⁹ *Ibid.*, s.1.

²⁰ *Ibid.*, s.3(1)(g).

²¹ *Charte des droits et libertés de la personne*, R.S.Q., c. C-12, s.48.

One of the most pressing issues emerging from these provincial and territorial definitions in the various legislations is whether elder abuse and neglect are by definition intentional acts or omissions.

2.1.2 Federal Legislation—An overview of the *Criminal Code* framework

2.1.2.1 Offences related to elder abuse

With respect to criminal law in Canada, as in most of the countries we reviewed, there is no specific crime of elder abuse under the Canadian *Criminal Code*, the federal statute that creates criminal offences. Nor is there any other Canadian statute that criminalizes the mistreatment of elderly people in particular. In comparison, as discussed in later sections of this paper, most American jurisdictions have chosen to criminalize elder abuse by passing legislation creating specific crimes against older adults using the term “elder abuse”. This does not mean it is legal to harm older people in Canada; it means that the mistreatment of older adults must be captured by general criminal law provisions within the *Criminal Code* in order to be considered crimes.

Criminal cases invoking the language of elder abuse for the most part involve the following criminal offences:

- (a) Neglect cases prosecuted under the “failure to provide the necessaries of life” (s. 215);
- (b) Manslaughter (s. 236);
- (c) Home invasion cases prosecuted under the robbery and breaking and entering provisions of the *Criminal Code* (ss. 344(b) and 349(1));
- (d) Sexual assaults (s. 271(1)); and
- (e) Fraud (s. 380(1)).

2.1.2.2 Sentencing and older adult victims

Most of the reported criminal cases discussed in the next section of this paper involve a sentencing hearing where the age of the victim is a factor relevant to sentencing. Canadian judges maintain broad discretion with respect to sentencing; although the *Criminal Code* contains maximum and minimum punishments for various crimes, in Canada sentencing is fact driven and the judge is required to fashion a sentence tailored to the offender and the offence. Sentencing hearings generally involve consideration of the details of the crime, the history of the offender and of the impact of a crime on the victim and society at large.

According to section 718.1 of the *Criminal Code*, a sentence “must be proportionate to the gravity of offence and the degree of responsibility of the offender.” The vulnerability

of a victim by virtue of age, disability or other similar factors goes to gravity²² and thus has a significant impact on sentencing.

The *Criminal Code* further states under sentencing principles:

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,

...

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim...²³

2.1.2.3 Criminal neglect

The offence in the *Criminal Code* that comes the closest to creating an offence of elder neglect is section 215. Section 215(1)(a) of the *Criminal Code* creates an explicit duty on the part of a parent or guardian to provide a child under the age of 16 with the necessities of life. Subsection (b) creates a parallel duty as between spouses. Although there exists no particular duty on the part of an adult child to provide for a parent or elder family member under the language of section 215, under s.215(1)(c) a duty of care arises when one person is *under the charge*²⁴ of another and that person is unable to provide for himself/herself. The *Criminal Code* states:

Duty of persons to provide necessities

215. (1) Every one is under a legal duty

(a) as a parent, foster parent, guardian or head of a family, to provide necessities of life for a child under the age of sixteen years;

(b) to provide necessities of life to their spouse or common-law partner; and

(c) to provide necessities of life to a person under his charge if that person

²² *R v. J.A.L.*, 2005 CanLii 47835 (NL P.C.) at para. 32.

²³ *Criminal Code*, R.S.C. 1985, c. C-46, s.718.2.

²⁴ [emphasis added]

(i) is unable, by reason of detention, age, illness, mental disorder or other cause, to withdraw himself from that charge, and

(ii) is unable to provide himself with necessaries of life.

Offence

(2) Every one commits an offence who, being under a legal duty within the meaning of subsection (1), fails without lawful excuse, the proof of which lies on him, to perform that duty, if

(a) with respect to a duty imposed by paragraph (1)(a) or (b),

(i) the person to whom the duty is owed is in destitute or necessitous circumstances, or

(ii) the failure to perform the duty endangers the life of the person to whom the duty is owed, or causes or is likely to cause the health of that person to be endangered permanently; or

(b) with respect to a duty imposed by paragraph (1)(c), the failure to perform the duty endangers the life of the person to whom the duty is owed or causes or is likely to cause the health of that person to be injured permanently.

All the Canadian criminal neglect cases we unearthed in our research were prosecuted under subsection 215(2).

In Canada the meaning and scope of crimes are refined through judicial interpretation. These general crimes do not define elder abuse even indirectly. They figure as part of this study by way of background to understanding any judicial statements regarding the meaning of elder abuse, much of which has come out of the language of sentencing appeals on general crimes involving older adult victims. The following section fleshes out aspects of the definition of elder abuse and neglect that have emerged out of Canadian case law.

2.2 Court decisions

To date there is not a single reported Canadian court decision containing a definition of elder abuse. There does exist, however, a number of documented criminal and civil cases involving elderly victims in which the advanced age of the victim is highlighted. Often the victim's age emerged as a factor germane to sentencing (in the criminal context) or the assessment of damages (in the civil context), rather than being relevant to the issue of guilt or liability. Although a formal definition remains absent from these decisions, they do shed a small amount of light on the meaning of elder abuse and neglect in Canadian law.

This case law review focuses on decisions made in the last decade for a number of reasons: one, the language of “elder abuse” figures more prominently in these more recent cases such that if one highlighted only the decisions with the richest discussions of elder abuse and neglect these cases would be chosen for analysis; two, the sheer volume of decisions involving elderly victims would amass a thick collection of summaries of marginal utility to the project of understanding the judicial perception of elder abuse; three, the nature of judicial decision-making and the reliance on past decisions is such that more recent cases reflect on older decisions and incorporate principles that continue to be of value in contemporary society. Therefore, although this list is not exhaustive, it does provide a thorough summary of the judicial perspective on elder abuse and neglect. Given that a large number of cases involve elderly victims and very few mention elder abuse and neglect specifically, this approach becomes the best means to navigate the jurisprudence effectively and efficiently.

The failure to provide cases largely involve adult children who reside with an aged and ill parent and allow that parent to die or devolve to a state of extreme malnourishment, personal hygiene and filth.²⁵ In most cases the accused pled guilty and in determining what sentence to impose, s.718.2 of the *Criminal Code* was invoked because of the age of the neglected vulnerable adult and/or the offender abused his/her position of trust.

Although subsection 718.2(a)(i) makes reference to “bias”, our review indicates that in practice the judiciary drew attention to age and vulnerability without concern as to the presence or absence of prejudice toward elders, except insofar as crimes that target elders for victimization might be described as demonstrating bias. In this sense the restrictive language of “bias, prejudice or hate” in relation to age was not a limiting factor.

Alternatively, in the majority of the decisions we reviewed, in contexts where there was an elderly victim, the courts referred to the requirement in subsection 718.2(a)(iii) that “evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim” be deemed an aggravating circumstance for the

²⁵ *R v. Chappell*, Oral Decision April 17, 2000 (S.C.T.D.) (P.E.I), is the exception to this pattern. It involves a woman simply characterized by the Trial Court Judge as a “lay caregiver”. As this case garnered local media attention we know that it involved the neglect of a 62- year old woman with multiple sclerosis by her 35- year old paid caregiver in a private home setting. See: “*Woman Facing Elder Abuse Trial*”, The Journal-Pioneer (Summerside) Saturday, December 11, 1999 p. A3; Armstrong, Nigel “*City Woman Faces Charges of Elder Abuse in Death*”, The Guardian (Charlottetown), The Province, Saturday December 11, 1999, p.A2; “*Woman Pleads Guilty for Failing to Take Care of Elderly Person Under her Charge*”, The Guardian (Charlottetown), the Province, February 16, 2000, p. A2; “*Tearful Accused Apologizes to Family of Dead Woman*”, The Guardian (Charlottetown), the Province, April 18, 2000, p. A8; Ryder, Ron, “*Negligent Caregiver Sentenced to One Year in Jail and Probation*”, The Guardian (Charlottetown), the Province, April 20, 2000; Armstrong, Neil “*Judge Rules Chappell Stays in Jail Pending Appeal in Death of Senior*”, The Guardian (Charlottetown), the Province, May 2, 2000, p. A3; “*Relatives of Elderly City Woman Sue Caretakers Over Death*” The Guardian (Charlottetown), the Province, May 4, 2000, p. A5; “*Chappell Withdraws Appeal to Island Court: Woman had been sentenced to a year in jail for failing to provide the necessities of life to Isabel Gerrard who died*”, The Guardian (Charlottetown), the Province, May 20, 2000, p. A2.

purposes of sentencing. This emphasis on “breach of trust” is consistent with definitions of elder abuse and neglect most often found in Canadian (both federal and provincial/territorial) and international policies, reports, consultations and strategy documents that limit the concept to relationships of trust.

2.2.1 Criminal Neglect: Failure to provide the necessities of life

As the following summaries illustrate, the word “neglect” fails to capture the extreme living circumstances of the older adult giving rise to the offense at issue:²⁶

R. v. Noseworthy²⁷: Noseworthy was convicted of manslaughter on the basis that his abuse and neglect of his elderly mother contributed significantly to her death and also, upon his plea of guilty, of failing to provide her with the necessities of life. Noseworthy lived with his 78-year-old mother in her home. She suffered rapid onset Alzheimer’s disease, and was cognitively and communicatively impaired and incontinent. Noseworthy admitted to physically assaulting his mother. Almost every room of the house, including the furniture, was covered in urine and feces. Despite the fact that his mother was extremely malnourished and in need of physical and medical assistance, Noseworthy took no steps to attend to her. In the final days of her life, he left her lying motionless and starving on the floor.

The court decision states that she died as a result of congestive heart disease and “elder abuse and neglect.” The aggravating factors predominated in this case. The unrelenting abuse and neglect in this case, the moral culpability of Noseworthy, as well as his breach of trust, were all aggravating factors. Noseworthy was sentenced to imprisonment for seven years for manslaughter and to two years for failing to provide the necessities of life, to be served concurrently.

R. v. Peterson²⁸: This case involved an appeal by Peterson from his conviction and sentence for failing to provide necessities of life to his 84-year-old father, who was diagnosed with dementia (Alzheimer’s). Peterson occupied the second floor of the three-story family home he shared with his father, who lived in the first floor and basement of the house. Peterson kept the doors between the apartments locked when he was out, but had access to his father’s living space. The father’s apartment was filthy, filled with cockroaches and lacked both a working kitchen and toilet. The dirt floor of the basement was covered in dog feces. The father’s clothing was unwashed, as was his person, and he dressed inappropriately for the weather. He was often disoriented and frequently locked himself out of the house. Police found the father dirty, hungry and incontinent. Peterson’s father was unable to provide himself with the necessities of life. Peterson owed a duty to

²⁶ These briefer summaries of fact appear here to illustrate the legal meaning of neglect and in particular the degree of poor treatment required to attract this label.

²⁷ *R. v. Noseworthy*, 2007 CarswellOnt 9604 (Ont. S.C.J.) [*Noseworthy*].

²⁸ *R. v. Peterson*, [2005] O.J. No. 4450 (C.A.), 203 O.A.C. 364, 201 C.C.C. (3d) 220 [*Peterson*].

provide his father with the necessities of life and he failed in his duty. Peterson was sentenced to a period of six months incarceration, two years probation and 100 hours of community service.

R. v. Nanfo²⁹: This case involved the sentencing of Mary Nanfo, upon her plea of guilty to a charge of failing to provide the necessities of life to her elderly mother. Nanfo had always lived with and relied on her parents. After her father's death, Nanfo's mother became increasingly dependent on Nanfo. The elderly woman was obese, suffered from health problems including heart attacks, was almost completely blind, was diagnosed with dementia, and was incontinent of urine and stool. Nanfo was a poor caregiver and the living conditions in the home were unsanitary: the floors, walls, furniture, and bedding were covered in feces, and garbage was piled everywhere. The staircase to the upper level had no barrier, creating a safety hazard for the virtually blind woman. Nanfo was often absent from the home for long periods of time leaving her mother alone with no supervision. Nanfo's mother had not seen a doctor for years. The woman died of a heart attack and her daughter waited more than 24 hours before calling the police. The police found the elderly woman on the floor, covered in human feces.

While acknowledging the grotesque circumstances of this case, the Court considered as pivotal the absence of intentional cruelty or intentional physical abuse and the defendant's acceptance of responsibility through her guilty plea, in concluding that a conditional sentence was adequate to meet the recognized sentencing objectives. Nanfo was sentenced to imprisonment for one year to be served as a conditional sentence in the community.

R. v. Grant³⁰: Margaret Grant pled guilty to a charge of failing to provide the necessities of life to her ill 78-year-old mother. Grant called 9-1-1 emergency services reporting that her mother wasn't feeling well and that she needed help. The paramedics found the elderly woman seated on a chair, wearing nothing but shorts and a camisole, looking pale and thin. When they lifted her from the chair, they found that she was sitting in feces and urine that had clearly been there for some time. There was also a pool of liquid on the floor under the chair from the "oozing" rotten flesh on the woman's legs. There were wounds on her arms, elbows and ear. She was admitted to hospital suffering from "multiple decubitus ulcers, profound malnutrition, sepsis, extensive wet gangrene and dehydration". Doctors noted the gangrene in her legs was so advanced that her leg bones and tendons were exposed and her flesh was rotting. Her legs were bent into a sitting position and she had lost the ability to walk. There were massive sores on her buttocks.

²⁹ *R. v. Nanfo*, 2008 ONCJ 313, 78 W.C.B. (2d) 580, [2008] O.J. No. 2742 (Ont. S.C.J.) [*Nanfo*].

³⁰ *R. v. Grant*, 2009 NBPC 17 [*Grant*]; see also [http://www.theglobeandmail.com/servlet/story/RTGAM.20090415.wmother15art2151/BNSStory/National; Tuesday, April 14, 2009: www.cbc.ca/canada/new-brunswick/story/2009/04/14/nb-sentencing-grant-547.html](http://www.theglobeandmail.com/servlet/story/RTGAM.20090415.wmother15art2151/BNSStory/National;Tuesday, April 14, 2009: www.cbc.ca/canada/new-brunswick/story/2009/04/14/nb-sentencing-grant-547.html)

Some of her organs were exposed. She was also suffering from malnutrition. Due to her poor condition on admission she died of heart failure a few days later.

As aggravating factors, the Court considered the abuse of Grant's position of trust in relation to her mother, the age of the victim, the daughter-mother relationship, that Grant knew or ought to have known that her mother was suffering from conditions requiring medical attention, that Grant was financially benefiting from living with her mother, the period of time during which the offence took place, and that Grant chose not to call community services for assistance. The Court held that where an individual has a legal duty to care for a dependant, but he or she is unable to provide the necessities of life to the dependant, he or she is required to inform the proper authorities. Grant was sentenced to four years in prison.

R. v. Chappell³¹: While in Chappell's care, Isabel Gerrard developed septic bedsores and ulcers, became malnourished and dehydrated, and she was not seen by a medical doctor, as required. Chappell did not seek medical treatment for Gerrard's bedsores, despite the fact that such treatment was clearly necessary. Gerrard died in hospital a few days after being removed from Chappell's care. Chappell failed to seek medical assistance when it was clearly necessary; it was her duty to summon assistance if she could not fulfill her responsibility of caring for Gerrard. Chappell was in a position of trust with Gerrard, who as a result of her age and mental and physical ill health was dependent upon Chappell for care; the abuse of trust in this case was an aggravating factor.

The Court held that the necessity of denouncing Chappell's conduct and deterring others from committing the same offence called for a custodial sentence. A period of incarceration, followed by a period of probation was the most appropriate sentence in this case, and was necessary to 'bring home' to Chappell her responsibility for her offence. Chappell was sentenced to 12 months incarceration followed by 18 months of probation.

In each of the above cases the decision-makers considered the behaviour at issue an example of elder abuse or neglect, as evidenced by the following words of condemnation:

The sentence must bring home to other like-minded persons that abuse of elderly helpless parents in their care will not be tolerated. The imposition of a term of imprisonment has a denunciatory component in that it not only condemns the particular offender's conduct, but communicates and reinforces a shared set of values...[T]he need to ensure that this offence carries the required stigma would not be met by a conditional sentence in this case.³²

On the whole of these circumstances, I am of the view that the sentence, which I have to impose on the accused, must be sufficient to denounce the fact that

³¹ *R. v. Chappell*, Oral decision April 17, 2000 (S.C.(T.D.)) [*Chappell*]. Note: This decision has been appealed.

³² *Petersen*, *supra* note 28 at para. 57.

Margaret Grant committed a serious breach of her legal duty to care for her elderly sick mother, as well as serve as general deterrence to any other like-minded individual who has been or might be in a similar position... This society is not prepared to tolerate such abuse or neglect of our most vulnerable.³³

2.2.1.1 The conceptual relationship between abuse and neglect

Despite invoking the language of adult abuse and neglect, none of the five cases reviewed in this section—the most vocal cases on record with respect to adult abuse and neglect—contains an explicit definition of elder abuse. Notable in terms of the lexicon of elder abuse is that abuse and neglect are not treated as different types of mistreatment, rather they appear to fall on a continuum with extreme neglect being so grievous as to transform neglect into a form of abuse. With the exception of the *Noseworthy* decision, the section 215 cases do not involve behaviour described as physical violence. However, in *Nanfo*, the judge refers to the neglected elderly man in *Petersen* as “the abused senior,”³⁴ and goes on to state:

It is clear from the Peterson decision that, in similar cases, a sentence of imprisonment is appropriate and necessary in order to properly reflect the gravity of the offence, to denounce the abuse of elderly helpless parents and to satisfy the principles of deterrence.³⁵

His words characterize both *Nanfo* and *Petersen* as abusive, not strictly neglectful, caretakers. Similarly, in our earlier quotation, the judge in *Petersen* described *Petersen*'s treatment of his father as abusive. Assault and abuse are not equivalent in the judicial lexicon: though not exhaustively defined, abuse denotes a broader concept than assault or deliberate acts of violence, and an omission may be abusive. Although the cases fail to define elder abuse, this aspect of the meaning is clear from the criminal jurisprudence.

2.2.1.2 Vulnerability and abuse

Implicit in the definition of elder abuse is the notion of vulnerability and dependence. In the *Noseworthy* decision the judge states, in drawing parallels between the neglect and abuse of elders and children, “in each case, the victims are innocent, utterly vulnerable and defenceless.”³⁶ In considering the appropriate sentence the judge adds:

The elderly who are frail and cognitively impaired and vulnerable to attack and neglect and are powerless to prevent such treatment deserve the special protection of the court by the imposition of a sentence that will deter other likeminded

³³ *Grant*, *supra* note 30 at para. 60.

³⁴ *Nanfo*, *supra* note 29 at para. 21.

³⁵ *Nanfo*, *ibid.*, para. 22.

³⁶ *Noseworthy*, *supra* note 27 at para. 29.

individuals and which will make it clear that such conduct is not only inexcusable but will not be tolerated.³⁷

In *Petersen* the judge insists “the abuse of elderly *helpless* parents in their care will not be tolerated”.³⁸

These and other references to vulnerability raise the issue of whether, conceptually, vulnerability is an aspect of the definition of abuse or a characteristic ascribed to the circumstances of seniors broadly. If elder abuse is so reprehensible because it is a harm committed upon a vulnerable person, is an act of violence or a criminal omission only elder abuse if that particular individual was vulnerable by virtue of advanced age and associated illness? For certainly many older adults remain hardy into their advanced years, while others are especially vulnerable due to age associated illnesses.

What distinguishes elder abuse from other wrongs committed against older persons? The above cases suggest it is not just age but also “vulnerability”. However, the conceptual relationship between vulnerability and elder abuse and neglect, like the definitions of elder abuse and neglect, can only be inferred from the jurisprudence; the relationship between vulnerability and abuse is not explicitly stated. Rather, the decisions appear grounded in a well-meaning paternalism toward at least a subset of seniors, arguably a form of ageism itself barely cloaked in the language of “vulnerability”.

2.2.1.3 Dependency and abuse

Dependence is another emergent theme. The “failure to provide” cases tend to contain detailed analyses of the relationship between the elderly person and neglectful caregiver, as the nature of the relationship is key to whether a duty of care arises and has been breached. Dependency and breach of trust are certainly relevant to a crime involving a failure to care for someone in the charge of another; however, dependency may not necessarily be a component of a definition of elder abuse that would be relevant in all situations involving the abuse of an older adult. It seems possible to abuse an individual not under one’s care. Put another way, caretakers are not the only people who can abuse older adults. The review of home invasion cases in the following section provides us with examples of non-caretakers (in most cases strangers) committing violence against older adults in a manner that may meet a definition of elder abuse.

2.2.2 Acts of violence against elders: The home invasion and assault cases

Another cluster of reported decisions involving elderly victims are the home invasion cases prosecuted under the breaking and entering and robbery provisions of the *Criminal Code*. Like the sexual assault cases (discussed further in this report), they differ from the section 215 cases in that they involve an action rather than an omission. They involve

³⁷ *Noseworthy, ibid.* para. 38.

³⁸ *Peterson, supra* note 28 at para. 57 [emphasis added].

acts of physical violence against older adults. Unlike the section 215 cases, they do not mention abuse.

2.2.2.1 The community as victim

The home invasion jurisprudence underscores the particular vulnerability of seniors, characterizing the targeting of a single elderly person for attack as a crime that impacts the community of seniors more broadly—either all seniors living in a particular community or all the older adult residents in Canada. Judge Gorman states in *R. v Lasaga* that, “the elderly are often terribly vulnerable and offences of this nature cause alarm and fear to all of them that live alone”.³⁹ There is a sense that a crime against one senior may affect all seniors, suggesting that elder abuse may present a complex abuser-victim relationship and that a narrow conception of only one victim and one offender may obscure the true harm affected by one particular act of violence. Elder abuse may be a broad category capturing diverse and indirect harms.

2.2.2.2 Vulnerability and age-related harms

The notion of vulnerability is again reflected in the home invasion cases. The strongest statement to this effect is contained in the following French quotation from the decision in *R. c. Riendeau*:

Ces séquelles démontrent suffisamment, à mon avis, les conséquences malheureuses et inacceptables que des événements qui nous intéressent peuvent avoir chez des victimes innocentes, particulièrement pour des personnes âgées, par définition, vulnérables et sans défense.⁴⁰

In *R v D.A.W.*, a case involving a weapon (a knife) and the sexual assault of the female victim, the judge states:

[T]his incident has resulted in a change of attitude in the residents of a peaceful, rural community. This sort of activity, unfortunately, has the capacity to considerably damage the fabric of our society...It is all too often directed at people, like the victims in this case, who are essentially defenceless against such violence.⁴¹

In *R v. Harris*, an especially violent home invasion had particularly serious consequences for the elderly couple victimized due to the age of the victims: the woman broke her hip when she was pushed to the floor and the man suffered such severe injuries that he lost the ability to live independently.⁴² *R. v Billings*, which also involved an elderly female victim, similarly resulted in a loss of the ability to live independently.⁴³ These cases

³⁹ *R. v. Lasagna*, [2005] N.J. O. 398 (PC) at para. 9.

⁴⁰ *R. c. Riendeau* 2007 QCCQ 921 at para. 40 [*Riendeau*].

⁴¹ *R v. D.A.W.*, 2002 BCCA 336, [2002] B.C.J. No. 1156 at para. 34.

⁴² *R. v Harris*, 2000 NSCA 7, 181 N.S.R. (2d) 211, 142 C.C.C. (3d) 252 [*Harris*].

⁴³ *R v. Billings*, 1997 O.J. No. 6058 (Gen. Div.) [*Billings*].

reflect the somewhat unique stakes at issue in the context of elder abuse: a human fragility and a tenuous relationship with independence. This points to another potential component to the definition of elder abuse: impact. There is a sense from these cases that the consequences of a behaviour may be one of the features that marks an action or set of actions as elder abuse. *R. c. Bikao* contains similar language:

On parle d'une vie anéantie, du rêve brisé d'une retraite dorée. Monsieur Papillon doit maintenant s'occuper de sa femme en perte d'autonomie suite à l'AVC. Cet accident vasculaire cérébral n'était peut-être pas prévisible pour l'accusé, mais lorsqu'on s'attaque à des personnes âgées, tout peut arriver et on doit en assumer les conséquences.⁴⁴

*R. v Okumu*⁴⁵ is the single recently reported sexual assault case involving an older person. In this case, an elderly women resident of a care facility was sexually assaulted by one of her male caretakers. She suffered from dementia. The breach of trust element of this crime, the assault of a very vulnerable human being under his care, is what lends this offence to particularly severe condemnation by the judge. Justice Brooker categorizes the incident as falling into the category of serious sexual assaults, regardless of whether any penetration had occurred.⁴⁶

In sentencing the judge in the *Harris* case was concerned with deterring offenders from “preying” on the elderly:

I think the primary emphasis in imposing sentence today has to be to denounce unlawful conduct, to deter Mr. Harris and other persons from committing similar offences and by similar offences I mean the type of offence where people prey on elderly people in their own home with actual or potential for violence.⁴⁷

In each of the above cases the notion of the elderly person’s vulnerability again emerges as a notable aspect of the crime in the eyes of the decision-maker, characterizing elder abuse as an abuse of power. In terms of the facts, vulnerability or perceived vulnerability renders the senior a target of violence; in terms of sentencing, vulnerability makes the crime particularly despicable. This notion of power may be key to a definition of elder abuse. The undue influence cases discussed below explore this notion further.

Riendeau, a case from Québec, is notable for its reference to the language of rights. The judge frames violence against the elderly as the violation of a right to peace and security:

Il me semble pourtant que les personnes âgées ont le droit de vivre les dernières années de leur vie dans la sécurité, dans la paix et dans la quiétude de leur domicile,

⁴⁴ *R. c. Bikao* 2007 QCCQ 7297 at para. 35 [*Bikao*].

⁴⁵ *R. v. Okumu* 2000 ACQB 856 [*Okumu*].

⁴⁶ *Okumu, ibid.*, paras. 9-10.

⁴⁷ *Harris, supra* note 24 at para. 34 [emphasis added].

sans des séquelles semblables à celles qui marqueront à tout jamais les victimes de l'accusé.⁴⁸

This language makes sense insofar as the closest thing to a definition of elder abuse in Québec's provincial laws is in the *Charte des droits et libertés de la personne*, though interestingly, this case, prosecuted like all home invasion cases under the federal *Criminal Code* of Canada, does not cite the Québec *Charte des droits et libertés de la personne*.

2.2.3 Fraud and undue influence—civil and criminal jurisprudence

Fraud and undue influence—the tort and the criminal offense—are the legal embodiment of the concept of financial abuse. In Canada there are a number of reported financial abuse decisions involving older adults, the most recent summarized below. The cases largely fall into two categories. Most of the civil cases involve family members alleging that another family member has manipulated an older person into transferring funds, changing a will or signing a power of attorney, resulting in funds being transferred to the benefit of the defendant family member. These are abuse of power cases. The second category of financial abuse cases are the civil and criminal court decisions involving business schemes that make false representations, many specifically targeting seniors.

2.2.3.1 The undue influence jurisprudence: vulnerability and abuse of power

Below, a selection of the undue influence decisions is summarized:

Kapacila (Litigation Guardian of) v. Otto⁴⁹: This was an action by the 94-year-old plaintiff Kapacila's litigation guardians, her niece and grandniece, against the defendant Ottos, Kapacila's niece and her husband, to recover \$220,000 that the Ottos allegedly wrongfully took from Kapacila in 1999. Kapacila suffered from a progressive mental infirmity that negatively impacted her mental capacity. The action was for breach of trust, undue influence, conversion, negligence, breach of fiduciary duty and unjust enrichment. The Ottos submitted that \$18,000 of the money was a gift, and they held the rest in trust for Kapacila to look after her expenses and funeral arrangements pursuant to a trust agreement that the defendants wrote out as Kapacila was illiterate. The defendant niece was not very close to Kapacila, having occasionally visited and corresponded with Kapacila throughout her life. The litigation guardians were close to Kapacila and had regular contact with her, including driving her to appointments and caring for her during illnesses.

According to the Court, the Ottos' relationship with Kapacila raised the presumption of undue influence, the presumption of which was not rebutted in court. The Court found

⁴⁸ *Riendeau*, *supra* note 40 at para. 78.

⁴⁹ *Kapacila (Litigation Guardian of) v. Otto*, [2003] SJ No. 654, 2003 SKQB 437, 242 Sask R. 119, 4 ETR (3d) 19, 126 ACWS (3d) 509, QBG No. 2976 of 2000 JCS [*Kapacila*].

that the Ottos were aware that Kapacila was completely dependent upon them for food, shelter, transportation, translation and even legal advice. The Ottos were found to be aware that they were dealing with a 90-year-old woman who regularly exhibited signs of confusion, anger and anxiety and took advantage of this for their own financial gain. The action was allowed. The gift and trust were set aside as being void *ab initio*.

Lowery v. Falconer⁵⁰: The deceased's, Kathleen Noreen Pollard, most recent will was dated August 2, 2005; she had signed a previous will on December 23, 2002. The two wills were substantially different: the 2005 will named the deceased's grandniece and the grandniece's husband (the Falconers) as the sole beneficiaries and executors of her will; the 2002 will made provisions for Mrs. Pollard's disabled brother as well as certain charitable organizations. Prior to her death, Mrs. Pollard also transferred her home to the Falconers, which up until then had been intended for her disabled brother. The Falconers subsequently sold that property. Upon learning of the transfer, Mrs. Pollard's sisters commenced an action roughly 8 months before Mrs. Pollard's death alleging, among other things, undue influence by the Falconers and that the transfer was void or voidable. They also alleged that the Falconers fraudulently took money from Mrs. Pollard's bank account and converted Mrs. Pollard's money by using her credit card to withdraw cash. The Falconers failed to meet their burden as the propounders of the 2005 will.

The Court found that Mrs. Pollard's declining mental and physical health, which was exacerbated by her concern to look after her disabled brother, increased Mrs. Pollard's vulnerability to the Falconers' ability to exert undue influence on her. The Court further found that the fact that the lawyer who drafted the 2005 will was incorrectly advised by the Falconers as to why Mrs. Pollard needed the will, coupled with the fact that Mrs. Pollard left her brother completely out of the will, indicated she lacked testamentary capacity at the time the 2005 will was made. The Court set aside the 2005 will and pronounced the 2002 will valid. The Court also ordered the funds of sale of property to be held in trust for the estate. Special costs were awarded against the Falconers.

Sabol (Trustee of) v. Rousseau⁵¹: This was an action by the elderly plaintiff, Mary Sabol, against her sister, brother-in-law and her nephew, for the return of money in the sum of \$320, 750. The plaintiff was currently a dependent adult and was represented by her trustee. The plaintiff alleged that the defendants took all of her funds by undue influence, breach of fiduciary obligation or breach of trust and that the funds rightfully belong to her during the time she lived with them. This included the transfer of her home to the defendants. The defendants denied, claiming she had either lost the money or she had validly gifted the funds to them. The plaintiff did not have a particularly close relationship with the defendants until she began experiencing cognitive issues and subsequent paranoia, at which point she moved in with the defendants.

⁵⁰ *Lowery v. Falconer*, 2008 BCSC 516 [*Lowery*].

⁵¹ *Sabol (Trustee of) v. Rousseau* [1997] AJ No. 476, 201 AR 386, 71 ACWS (3d) 184 [*Sabol*].

The Court found that Sabol was a person of unsound mind during the times that the alleged gifts were made. While the defendants claimed that the gifts were thank-you gifts from the plaintiff in return for them looking after her, the Court found that the amount of the gifts were not in proportion to the services provided by the defendants. The Court found that the defendants abused and took advantage of a person they knew to be vulnerable and one against whom they knew they were in a favourable position to influence. The defendants failed to rebut the presumption of undue influence. The action was allowed and judgment given in favour of Mary Sabol in the sum of \$329,000 (the value of assets deemed to be depleted by the defendants). In partial satisfaction of the judgment, the Court ordered Sabol's home to be transferred back to her at a value of \$120,000 and the sum to be credited to the judgment thereafter.

*Vranic (Re)*⁵²: Mr. Vranic was an elderly man who suffered from dementia. Mr. Vranic was deemed incapable of managing his finances or himself. He was confused as to day and time and did not have an understanding of his health conditions, including diabetes and a previous stroke. Initially placed in a long term care facility, he was removed by his eldest daughter Bernice. Bernice prevented Mr. Vranic from seeing or interacting with his other daughter and son. She also had Mr. Vranic create a power of attorney document naming Bernice as his attorney, although it was established that Mr. Vranic failed to have the mental capacity to execute the document. Bernice also regularly prevented Mr. Vranic from attending medical appointments, including ones with a geriatric social worker. She was also found to be spending Mr. Vranic's money without properly accounting to the estate. Mr. Vranic's other children, Nina and John, commenced an action seeking to be named committee of their father's person.

Based on the evidence before it, the Court found that Bernice would not exercise her duties and powers in a selfless manner demanded of a fiduciary and would not strive to serve her father's best interests emotionally or socially. The Court concluded that Mr. Vranic's best interest was to have John and Nina appointed as co-committees of his person as they had exhibited a genuine concern for his well being throughout the litigation proceedings. The Action was allowed. John and Nina were appointed co-committees of their father's person.

At the heart of the concept of "undue influence" is the notion of an abuse of persuasive authority. In the civil law context undue influence requires the presence of "confidence and dependence on the one side and advice and persuasion on the other"⁵³. In the decision *Kapacila*, the judge relies on the following description of "influence" from *Geffen v. Goodman*:

⁵² *Vranic (Re)* 2007 BCSC 1949.

⁵³ *Csada v. Csada*, [1985] 2 W.W.R. 265 cited in *Kapacila*.

...It seems to me rather that when one speaks of “influence” one is really referring to the ability of one person to dominate the will of another, through manipulation, coercion, or outright but subtle *abuse of power*.⁵⁴

As in the criminal jurisprudence, the notion of vulnerability figures prominently in the undue influence cases, although the language of abuse remains absent. In *Sabol* the judge refers to abuse, stating that the defendants “abused and took advantage of a person they knew to be vulnerable and one against whom they knew they were in a favourable position to influence.”⁵⁵ Mrs. Kapacila is referred to as a “dominated, vulnerable mentally incapacitated 90 year old lady who was easily swayed by whomever was with her”.⁵⁶ Mrs. Pollard was “a vulnerable elderly woman whose health was rapidly declining”.⁵⁷

Justice Macaulay summarizes the undue influence cases as follows:

There is also an aspect of vulnerability in such cases; those with dementia experiencing executive dysfunction ‘may be vulnerable and dependent on others to support them and ensure their protection’. This, in turn, leads to the possibility that such a person is more trusting and suggestible than would otherwise be the case.⁵⁸

These are cases about violations of a trusting relationship and in this respect they recall the neglect cases caught by the failure to provide the necessities of life provisions. They require as a precursor to abuse the existence of a relationship between the abuser and victim. In this sense they differ from the fraud cases discussed below, which involve deceitful strangers. The judicial perception of elder abuse includes both ongoing harms and single incidents. As the discussion of Canadian policy illustrates, this consensus is not reflected in other realms where definitions of elder abuse are created. Among policy-makers the question of whether elder abuse is defined to include offenses occurring outside of relationships of trust, that is by a stranger, is unsettled.

2.2.3.2 Fraud: Preying on older adults

Fraud cases are dealt with in both the criminal and civil context. Below are facts gleaned from a number of cases:

Carrigan v. Peacock⁵⁹: The plaintiff, Carrigan, was an elderly man at the time of the alleged fraud. He read an article in the SeniorsPlus newspaper written by Moran advertising an investment vehicle to seniors. Moran had been promised a fee by other individuals involved in the scheme for promoting the investment scheme to his readers.

⁵⁴ *Kapacila, supra* note 49 at para. 127 [emphasis added].

⁵⁵ *Sabol, supra* note 51 at para. 59.

⁵⁶ *Kapacila, supra* note 49 at para. 149.

⁵⁷ *Lowery, supra* note 50 at para. 121.

⁵⁸ *Lowery, ibid.*, para. 62.

⁵⁹ *Carrigan v. Peacock* [2001] OJ No. 223, [2001] OTC 33, 102 ACWS (3d) 83 [*Carrigan*].

In a meeting with another individual, Peacock, Carrigan was promised high yields and a guaranteed return. Carrigan only received two small cash payments of alleged interest on his investment. Carrigan commenced an action against SeniorsPlus and Moran for damages, including aggravated and punitive damages, for fraudulent misrepresentation. Peacock and another individual were subsequently charged and convicted of fraud in relation to the scheme. The action was allowed.

The Court found that the representations made by Moran in the article, and by Peacock in his personal meeting with Carrigan were patently false. The Court also found that Moran intended for individuals like Carrigan to rely on his representations and the established trustworthiness of SeniorsPlus. Moran made the false representations with reckless disregard as to their truth. He did not make attempts to verify that the investments were insured or that they would generate the promised returns. The Court further found that the stress induced by the transaction caused Carrigan's medical conditions to worsen from a very healthy, alert and active elderly man to a weakened, more anxious person who had suffered two strokes and was, as a result, dependent on daily medication. Carrigan was entitled to damages against Moran and SeniorsPlus representing the amount of his investment, plus aggravated damages of \$30,000 and punitive damages of \$25,000.

R. v. Rockett⁶⁰: This was an application by the Crown for leave to appeal from the 42-month sentence imposed on Rockett following his guilty pleas to 15 charges. Rockett went on a 10 year crime spree across Canada, between 1997 and 2007. He defrauded elderly people of deposits they paid him to do work on their properties. The Court found that the sentencing judge did not give proper weight to the aggravating factor that the respondent deliberately planned to prey on and victimize “the most vulnerable in our society, the elderly”. Leave to appeal was granted and appeal was allowed. A sentence of 62 months was imposed.

R. v. Watson⁶¹: This case involved the sentencing of Hilda Marie Watson, convicted of stealing more than \$5000.00 from her brother, Ernest Leo Clark, contrary to section 334(a) of the *Criminal Code*. Evidence at trial indicated that Mr. Clark showed signs of cognitive impairment and subsequent rapid deterioration, at which point Ms. Watson began looking after Mr. Clark's finances. After suffering a fall, Mr. Clark was admitted to hospital. Shortly thereafter, his bank records indicated large withdrawals. On questioning, Ms. Watson stated that Mr. Clark intended for her to have the money and his account was in fact her “slush fund”. The Court considered, as mitigating factors, the fact that Ms. Watson had no previous criminal record, she was an active and contributing member of her community, she had the strong support of her son and friends, she was unlikely to re-offend, and she provided care for Mr. Clark before he went to the hospital. As aggravating factors the Court considered that Ernest Clark was suffering from

⁶⁰ *R. v. Rockett*, [2009] PEIJ No. 10, 2009 PECA 7 [*Rockett*].

⁶¹ *R. v. Watson* 2007 NBQB 289 [*Watson*].

dementia and therefore vulnerable, that he trusted Ms. Watson and she betrayed that trust, that Ms. Watson did not show any remorse or understanding of the wrong she had done, the large sum of money taken by Ms. Watson, and that the motivation for taking the money appeared to have been greed rather than need. Ms. Watson was sentenced to serve 10 months in the community under house arrest, to be followed by one year of probation.

R. v. Wall⁶²: The accused, Wall, conceived and formulated a fraudulent investment scheme. The primary victims were elderly persons who were deprived of their investment savings. The scheme involved a series of misrepresentations, both verbal and written, designed to mislead investors with respect to the risk of the investment. The Court found that Wall and his co-accused did not make any effort to make sure that only sophisticated investors were solicited. In fact, the Court found that nearly all the investors were naïve and poor and especially dependent upon the little income they had. The Court also found that the exploitation of these investors by the co-accused resulted in increased poor health and psychological stress to the investors. The fact that the investors were elderly or persons planning for their retirement was considered a significant aggravating circumstance, which warranted a harsher punishment. The Court further held that there was breach of trust on the part of the co-accused towards the investors and that the defendants abused and violated these trust relationships with the investors. Wall was sentenced to 18 months imprisonment for a distribution offence and 12 months consecutive for a trading offence.

R. v. Evans⁶³: In April 2000, Stephen Charles Evans began looking after Lester Hoar as a paid caregiver 24 hours a day, 7 days a week. While a caregiver for Hoar, Evans wrote many cheques on Hoar's account. The cheques totalled \$120,416.00 and were all signed by Hoar. Evans was charged with stealing money exceeding \$5000 contrary to the provisions of section 334(a) of the *Criminal Code* and with defrauding an individual in excess of \$5000 by deceit, falsehood or other fraudulent means contrary to section 380(1)(a). Despite the fact that it seemed that Evans had not spent the money for his personal purposes, and that Evan had provided care giving services to Hoar during the 14 month time period for which he would have been compensated, the Court found that the need for deterrence and denunciation of taking money from an elderly person was so great that incarceration was the only suitable way in which to express society's condemnation of Evans' conduct. Evans was sentenced to a term of imprisonment of one year, followed by a one-year probationary period.

The word abuse does not appear often in the fraud cases: only in *R v. Wall* is the fraudulent activity described as abuse.⁶⁴

⁶² *R. v. Wall* [2000] OJ No. 5447 [*Wall*].

⁶³ *R. v. Evans* 2003 NBQB 54 [*Evans*].

⁶⁴ *Wall*, *supra* note 62 at para 96.

A major theme of the fraud cases is the reprehensibility of actions that target seniors, recalling some of the language of the home invasion cases. The case of *Carrigan v. Peacock* involved a claim for aggravated damages with respect to a dishonest investment scheme that precipitated a worsening of the elderly plaintiff's health, including two strokes. Aggravated damages were awarded at least in part from the fact that the defendant "actively participated in the fraudulent scheme using his and his publication's position of trust with elderly readers",⁶⁵ helping "to prey on a vulnerable segment of our society".⁶⁶ Similarly, but in the criminal context, in *R v. Rockett*, an aggravating feature in sentencing was that the offender targeted seniors: "the reality of the situation is that the respondent deliberately planned to prey on and victimize the most vulnerable in our society, the elderly".⁶⁷ In *R. v. Evans*, the judge states, relying on the reasoning in *R. v. Alder*:

If there is no emphasis on general deterrence in this type of case the message is that preying upon the elderly, the frail in body or mind, where their life savings have been stolen and squandered, will result in the offender serving his or her sentence in an extramural setting. This would be the wrong message to the public and to those with like-minded criminal intent.⁶⁸

2.2.4 Conclusion

Although an explicit definition of elder abuse remains absent from the cases involving elderly victims, the analysis of sentencing and damages contained in the decisions suggests the following may be elements of the definition, were it stated directly. Elder abuse:

1. includes extreme neglect;
2. is broader, conceptually, than physical abuse;
3. amounts to an abuse of power;
4. is marked by vulnerability of the older victim;
5. may involve a violation of a trusting relationship;
6. may be made possible by the dependency of the victim;
7. may cause harms specific to older victims (loss of independence, worsening physical frailty);
8. may implicate more older victims than the direct target of an abusive action (a community or part of a community); and
9. may be evidenced by the targeting of older adults for victimization (by strangers, friends, family members, etc.)

⁶⁵ *Carrigan*, *supra* note 59 at para 24.

⁶⁶ *Carrigan*, *ibid.*, para 28.

⁶⁷ *Rockett*, *supra* note 60 at para 18.

⁶⁸ *Evans*, *supra* note 63 at para 64.

2.3 Policy⁶⁹

In every Canadian jurisdiction except Nunavut at least one key organization/agency has developed or adopted a definition of elder abuse and neglect. For the most part, the definitions contain two components: a general definition of elder abuse followed by an enumeration of the types of abuse and neglect (for example psychological and physical). Some also contain lengthy descriptions of each type of abuse. A small number of documents simply define elder abuse with descriptions or definitions of the *types* of abuse. For the purpose of focusing our analysis, in the discussion below we often truncate the definition after the general statement, as it is this component of the definition that illustrates the uniquely “elder” aspect of the definition; whereas the type of abuse descriptions tend to be age-neutral. However, in some instances, the sub-definitions are what characterize the definition as an “elder abuse” definition; here, the list of types is included. This section on policy also contains a discussion of the less common types of abuse as they also shed light on the problem of characterizing elder abuse in an inclusive or exhaustive manner. The discussion below organizes and summarizes the policy definitions by highlighting emergent themes.

Structurally, the Toronto Police adopts a totally unique approach, defining a cluster of terms relevant to the definition:

The Policy & Procedure Manual for the Toronto Police Service (“TPS”) includes a specific procedure for criminal investigations involving the “Abuse of Elderly or Vulnerable Persons,” which outlines the best practices of the TPS for handling complaints of abuse of elderly or vulnerable persons.⁷⁰ The procedure includes the following definitions of “abuse”, “elderly person”, “harm”, “incompetent”, and “vulnerable person”:

<i>Abuse</i>	means harm done to anyone by a person in a position of trust or authority.
<i>Elderly</i>	means a person over the age of 65.
<i>Harm</i>	means physical abuse (includes sexual abuse), psychological abuse, financial abuse, neglect or any combination thereof.
<i>Incompetent</i>	means a person incapable of managing their day-to-day [<i>sic</i>] affairs, thus making them vulnerable to abuse.

⁶⁹ This section includes both policies and documents that inform policy, such as strategy documents, consultation papers, protocols and committee reports.

⁷⁰ Toronto Police Service, *Policy and Procedure Manual*, (R.O. 2007.12.28-1790) at 05-22.

Vulnerable person means any adult who by nature of a physical, emotional, or psychological condition is dependent on other persons for care and assistance in day-to-day [sic] living.

2.3.1 Elder abuse and relationships of trust

One of the key distinctions between the definitions is whether elder abuse is limited to harms occurring in the context of a relationship of trust or applies more broadly to the mistreatment of older adults. The elder abuse definitions we reviewed fall into three categories: some explicitly limit the concept to harms perpetrated within relationships; some include all mistreatment of older adults; some keep the definition broad but include a brief statement of the relevance of relationships of dependency and trust.

2.3.1.1 Narrow definitions

One of the non-governmental agencies in Canada that has been the most active in defining and teaching about elder abuse is the Advocacy Centre for the Elderly in Toronto, (“ACE”). ACE is a charitable, non-government, community-based legal clinic that provides legal services to low-income seniors in Ontario.⁷¹ Their material reveals a number of similar definitions that narrow abuse to a relationship context. For example, their website states:

Elder abuse is harm done to an older person by someone in a special relationship to the older person. Elder abuse includes:

- *physical* abuse such as slapping, pushing, beating or forced confinement;
- *financial* abuse such as stealing, fraud, extortion, and misusing a power of attorney;
- *sexual* abuse as sexual assault or any unwanted form of sexual activity;
- *neglect* as failing to give an older person in your care food, medical attention, or other necessary care, or abandoning an older person in your care;
- *mental abuse* as in treating an older person like a child or humiliating, insulting, frightening, threatening, or ignoring an older person.⁷²

Elsewhere they state:

“Abuse”

Abuse as discussed in this manual and workshop is defined as any action, or deliberate inaction, by a person in a position of trust, which causes harm to an older adult.

A person in a position of trust is someone with whom the older adult has built a relationship with and has come, over time, and because of past actions, to trust. The

⁷¹ The Advocacy Centre for the Elderly, online: <<http://www.advocacycentreelderly.org>> [ACE].

⁷² ACE, *ibid.*, “Elder Abuse”, online: <http://www.advocacycentreelderly.org/elder/index.htm>.

person in a position of trust could be a spouse, a family member, a paid caregiver, a staff member at a long-term care facility or care/retirement home, etc.

Relationships are abusive when a person uses various tactics to maintain power and control over another person.⁷³

The Government of Manitoba relies on a similar definition:

Elder Abuse

Elder abuse is any action or lack of action by someone in a position of trust that harms the health or well-being of an older person. Elder abuse can happen at home, in the community, and in acute and long-term care facilities. Abuse exists in many different forms. Abuse can be physical, psychological, or sexual. It can also exist in the form of neglect and financial exploitation.⁷⁴

The Manitoba definition is somewhat unique in that it expands on the notion of trust by suggesting sites where these relationships may exist.

The Executive Director of British Columbia Centre for Elder Advocacy and Support (“BCCEAS”), an agency that also runs the Elder Law Clinic,⁷⁵ recently defined elder abuse in this manner:

A simple definition of abuse is an action, or deliberate behaviour, by a person(s) in a position of trust, such as an adult child, family member, friend or care-giver, that causes an adult physical, emotional or mental harm or damage to, or loss of, assets or property. Contrary to newspaper headlines that highlight random acts of violence, abuse is most often perpetrated by a person in a position of trust or a family member. Also contrary to common belief, elder abuse is typically not a random act but is a systematic use of tactics to gain power and control over the victim. This applies regardless of the type of abuse, the main types being as follows: 1) physical abuse, 2) sexual abuse, 3) emotional abuse, 4) neglect, and 5) financial abuse.⁷⁶

This definition also includes very lengthy descriptions of physical, sexual, emotional and financial abuse as well as neglect that highlight some older adult specific indicators.

⁷³ Joanne Preston & Judith Wahl, “Abuse Education, Prevention and Response: A Community Training Manual for those who want to address the Issue of the Abuse of Older Adults in their Community” Advocacy Centre for the Elderly (December 2002) at 2, online:

<<http://www.advocacycentreelderly.org/elder/pubs.htm>> [ACE Abuse Education Training Manual].

⁷⁴ Manitoba Seniors & Healthy Agency Secretariat,

online:<<http://www.gov.mb.ca/shas/resourcesforseniors/abuse/factsheets.html>>.

⁷⁵ The British Columbia Centre for Elder Advocacy and Support, online: <<http://www.bcceas.ca/>> [BCCEAS].

⁷⁶ Joan Braun, “Elder Abuse: An Overview of Current Issues and Practice Considerations” (Paper presented to the Continuing Legal Education Society of BC on Elder Law, May 2009) [unpublished].

The Government of the Northwest Territories (“NWT”) provides information and assistance to seniors on elder abuse issues through the Northwest Territories Seniors’ Society. The Seniors’ Society website further provides links to the Canadian Network for the Prevention of Elder Abuse, as well “Aging and the Law in Canada” available at www.canadianelderlaw.ca. Both these websites provide information on various seniors’ issues, including elder abuse.

In considering elder abuse, Aging and the Law in Canada uses the language of “senior abuse” and states the following:

Senior abuse is a generic term referring to a wide variety of harms to older adults that are committed by a person or persons they know and would normally have a reason to trust. It is considered different than harms from strangers.⁷⁷

The definition used by HealthLink BC is unique in terms of the emphasis on a care context and the delineation of categories of abuse:

Elder abuse refers to any of several forms of maltreatment of an older person by a caregiver, family member, spouse, or friend.⁷⁸

There are three separate categories of elder abuse:

- Domestic elder abuse usually takes place in the older adult’s home or in the home of the caregiver. The abuser is often a relative, close friend, or paid companion.
- Institutional abuse refers to abuse that takes place in a residential home (such as a nursing home), foster home, or assisted-living facility. The abuser has a financial or contractual obligation to care for the older adult.
- Self-neglect is behaviour of an older adult that threatens his or her own health or safety. Self-neglect is present when an older adult refuses or fails to provide himself or herself with adequate food, water, clothing, shelter, personal hygiene, medication, and safety precautions.

All of these definitions narrow the concept of elder abuse and neglect to relationships of trust. In some countries, like Australia, this approach is more common. In contrast, in Canada, broader definitions encompassing stranger abuse are just as common.

⁷⁷ Aging and the Law in Canada, “Seniors Abuse”; online at: <http://www.canadianelderlaw.ca/Senior%20Abuse.htm>.

⁷⁸ HealthLinkBC, “Elder Abuse”, online: <http://www.healthlinkbc.ca/kbase/topic/special/aa60933spec/sec1.htm>.

2.3.1.2 Broad definitions

The notion of a breach of trust is absent from a number of other Canadian definitions. The definition supported by the Government of New Brunswick states the following with respect to the abuse of seniors:

*Abuse is defined as any action/inaction, which jeopardizes another's health or well-being.*⁷⁹

The Alberta Seniors Services Division of the Ministry of Seniors and Community uses the same definition.⁸⁰ Similarly, the Public Legal Education and Information Service of New Brunswick ("PLEIS-NB"), a charitable non-profit organization committed to developing public legal educational products and services in order to promote access to and understanding of the legal system,⁸¹ defines abuse and neglect of adults with disabilities and seniors as:

Abuse is any act or behaviour, which harms the person.⁸²

The Seniors' Council (Conseil des aînés)⁸³ is a government agency under the authority of the Minister Responsible for Seniors for the province of Québec. It adopts the following definition of "les abus exercés à l'égard des personnes aînées"⁸⁴:

« une action directe ou indirecte destinée à porter atteinte à une personne ou à la détruire dans son intégrité physique ou psychique, soit dans ses possessions, soit dans ses participations symboliques (Michot, 1993) » et y ajoute la notion suivante:

« Par négligence on entend le manque d'un soignant à répondre aux besoins d'une personne âgée incapable de pourvoir à ses propres besoins. La négligence signifie lui refuser de la nourriture, de l'eau, des médicaments, des traitements médicaux, de la thérapie, des soins infirmiers, de l'aide ou de l'équipement thérapeutique, l'habillement, la visite de personnes importantes pour la personne âgée, ou encore

⁷⁹ New Brunswick, *Adult Victims of Abuse Protocols* (New Brunswick, 2005), online: <<http://www.gnb.ca/0017/Protection/Adult/index-e.asp>> [Abuse Protocols]. This protocol is endorsed by the Ministers of Family and Community Services, Health and Wellness, Justice, Public Safety, Training and Employment Development and Minister Responsible for the Status of Women, and appears on the website of the New Brunswick Senior and Healthy Aging Secretariat.

⁸⁰ Alberta Ministry of Seniors and Community Supports, online: <http://www.seniors.gov.ab.ca/about_ministry/ministry_overview/>. Note, they do say "action or inaction" and avoid the "?".

⁸¹ Public Legal Education and Information Service of New Brunswick, online: <<http://www.legal-info-legale.nb.ca/about-us.asp>> [PLEIS-NB].

⁸² PLEIS-NB, "Abuse and Neglect of Adults with Disabilities and Seniors", online: <<http://www.legal-info-legale.nb.ca/showpub.asp?id=65&langid=1>>.

⁸³ Conseil des aînés, online: <<http://www.conseil-des-aines.qc.ca/>>; *Loi sur le Conseil des aînés*, L.R.Q. 1993, c. C-57.01, article 1, online: <http://www.conseil-des-aines.qc.ca/index.php?option=com_content&task=view&id=16&Itemid=157>.

⁸⁴ Murielle Miller, Conseil des aînés, "Avis sur les abus exercés à l'égard des personnes aînées" (Quebec: Conseil des aînés, 1995), online: <http://www.conseil-des-aines.qc.ca/images/AVIS/199509_av.pdf>.

ses droits. (Podnieks, 1990; Finkelhor et Pillemer, 1988; Pillemer et Wolf, 1986; Kosberg, 1993) ». ⁸⁵

This definition includes neglect.

All of these broad definitions are quite brief. They are comprehensive in that they include all potential harms committed against seniors, but in their brevity they may fail to capture unique aspects of elder abuse. If what distinguishes elder abuse from other forms of mistreatment is more than simply the advanced age of the victim, these definitions are ironically so broad as to become incomplete.

2.3.1.3 The significance of relationships

A number of definitions resolve the conflict between specificity and brevity in favour of an approach involving commenting on the significance of breach of trust in the context of elder abuse but leaving the definition open and broad. The *Strategy for Positive Aging in Nova Scotia* states:

[E]lder abuse is the infliction of harm on an older person. It involves any act, or failure to act, that jeopardizes the health and/or well-being of an older person. Such action or inaction is especially harmful when it occurs within a relationship where there is an expectation of trust. There are several types of abuse: physical abuse; sexual abuse; emotional abuse; violation of human/civil rights; financial abuse; and neglect. ⁸⁶

The Government of Newfoundland and Labrador also treats breach of trust as a type of elder abuse:

Elder abuse refers to actions that harm an older person or puts the person's health or welfare at risk. This often results from the actions of someone who is trusted or relied on by the victim. ⁸⁷

The Seniors Resource Centre of Newfoundland & Labrador ("SRC"), a not-for-profit, charitable organization dedicated to promoting the independence and well being of older adults in Newfoundland and Labrador through the provision of information as well as various programs and services, defines elder abuse as follows:

⁸⁵ *Ibid.*, 6 & 7.

⁸⁶ Positive Aging Strategy, *supra* note 5 at 148, online: <<https://www.gov.ns.ca/seniors/positiveaging.asp>>. The same definitions appear in the publication, Nova Scotia Department of Seniors, *Nova Scotia Elder Abuse Strategy: Towards Awareness and Prevention* (Nova Scotia, 2005); online at <http://www.gov.ns.ca/seniors/elderabusestrategy.asp> [Elder Abuse Strategy].

⁸⁷ Government of Newfoundland and Labrador (Department of Health and Community Services), *Healthy Aging Policy Framework for Newfoundland and Labrador* (Newfoundland and Labrador, 2007) at, online: <<http://www.releases.gov.nl.ca/releases/2007/health/0711n04HA%20Policy%20Framework.pdf>>.

Abuse is any act or failure to act, especially within a relationship where there is an expectation of trust, that jeopardizes the health or well-being of an older person.⁸⁸

The website of the Prince Edward Island (“PEI”) Premier’s Action Committee on Family Violence Prevention (“PACFVP”) provides the following narrow relationship-focused definition:

Abuse of older adults is an abuse of power within relationships of family, trust or dependency. It always involves someone using their power over another person in a way that is hurtful. Abuse of older adults can include neglect, self-neglect and denial of civil and human rights.⁸⁹

The definition of the Nova Scotia Department of Seniors defines “senior abuse (or elder abuse or abuse of older persons)” as:

Any action or inaction which endangers the health or well-being of an older individual

and

Any act or failure to act that endangers the health and/or well being of the older person.⁹⁰

The Nova Scotia Department of Seniors definition also provides types of abuse descriptions and adds the following:

Much abuse occurs within relationships where there is an expectation of trust. Some of these relationships include:

- in a family,
- between a husband and a wife,
- between friends,
- between an older adult and someone they rely on such as an accountant, care worker, or
- other paid person,
- when someone is providing services in an older adult’s home.

Not all abuse is a result of individual action and not all abuse occurs within a personal relationship. Sometimes older adults are targeted because the abusers think they will be easier targets.

⁸⁸ SRC-NL, *Strategic Plan to Address Elder Abuse in Newfoundland and Labrador: A Five-Year Plan: 2005 to 2010*, online: <<http://www.seniorsresource.ca/publications.htm>>.

⁸⁹ Premier’s Action Committee on Family Violence Prevention, online: <http://www.gov.pe.ca/pac_on_fvp/index.php3?number=1017042&lang=E> [PACFVP].

⁹⁰ Nova Scotia Department of Seniors, online: <<http://www.gov.ns.ca/seniors/elderabuse.asp>> and <<http://www.gov.ns.ca/seniors/aboutelderabuse.asp#a>> [NS Department of Seniors].

Sometimes abuse is a result of how older people are treated at a societal level. Systemic abuse, for example, can happen when policies or practices take away a person's independence and dignity. This sometimes happens when other people are making decisions for the older person and may be rooted in ageism.⁹¹

In its efforts to raise awareness of elder abuse and elder abuse prevention, the Alberta Government has partnered with the Alberta Elder Abuse Awareness Network and is collaborating with other federal, provincial and territorial departments to develop and distribute information about elder abuse.⁹² The Alberta Elder Abuse Awareness Network ("AEAAN") is a province-wide partnership of several government agencies, organizations, and professionals working collaboratively to address the issue of elder abuse through increased awareness and support of a community response to elder abuse.⁹³

On the AEAAN website, under "What is Elder Abuse", elder abuse is discussed and defined as:

Elder Abuse is any action or inaction by self or others that jeopardizes the health or well-being of an older person. An act of harm or the neglect resulting from a failure to act is especially detrimental when inflicted by those in a position of trust, power or responsibility.⁹⁴

All of these definitions are inclusive, like the broad definitions, capturing wrongs committed by both strangers and people in positions of trust. They are conceptually rich, bringing into further focus the unique aspects of elder abuse.

2.3.2 Alternatives to the term "elder"

The definition on the Yukon Department of Health and Social Services website captures the range of references to older victims of violence:

What is *Abuse of Older Adults*?

Abuse of older adults refers to actions that harm an older person or jeopardize the person's health or welfare. Abuse of older adults is also known as senior abuse or elder abuse.

According to the World Health Organization, abuse and neglect of older adults can be a single or a repeated act. It can occur in any relationship where there is an expectation of trust or where a person is in a position of power or authority.

⁹¹ Nova Scotia Department of Seniors, online: <<http://www.gov.ns.ca/seniors/aboutelderabuse.asp#a>>.

⁹² Alberta Ministry of Seniors and Community Supports, "Elder Abuse Prevention," online: http://www.seniors.gov.ab.ca/services_resources/elderabuse/

⁹³ Alberta Elder Abuse Awareness Network, online: <<http://www.albertaelderabuse.ca/page.cfm?pgID=5>> [AEAAN].

⁹⁴ AEAAN, *ibid.*, online: <<http://www.albertaelderabuse.ca/page.cfm?pgID=1>>.

Abuse can be physical (e.g. hitting), emotional, verbal (e.g. name calling), financial (e.g. taking money or property), sexual and spiritual. Some types of abuse of older adults involve violation of their rights. Financial abuse is considered the most common form of abuse of older adults. Neglect can be part of abuse. Neglect involves not doing something, such as not providing the older person with food, shelter, medication, or care.⁹⁵

Nova Scotia and the Northwest Territories⁹⁶ reference “senior abuse” in their material. However, in government material addressing family violence, the Social Services division of the Department of Health and Social Services of the Northwest Territories speaks of “abuse of older adults”. The Nova Scotia Seniors’ Secretariat defines “senior abuse” as:

Abuse is any act or failure to act that endangers the health and/or well being of the older person. Such action or inaction is especially harmful when it occurs within a relationship where there is an expectation of trust.⁹⁷

The New Brunswick Government speaks of “adult victims of abuse.” PLEIS-NB addresses elder abuse in the context of a publication entitled, “Abuse and Neglect of Adults with Disabilities and Seniors”.

The Prince Edward Island Seniors Secretariat website contains information on World Elder Abuse Awareness Day, which uses the expression “older adult”:

What is Abuse of Older Adults?

Abuse of older adults refers to actions that harm an older person or jeopardize the person’s health or welfare. Abuse can be physical (e.g. hitting), emotional, verbal (e.g. name calling), financial (e.g. taking money or property), sexual and denial of civil and human rights. Some types of abuse of older adults involve violation of their rights. Financial abuse is [*sic*] considered the most common form of abuse of older adults.⁹⁸

Three of the key agencies that respond to abuse of older adults in British Columbia use alternatives to “elder”, likely due to their broader mandates to address abuses against all adults. Vancouver Coastal Health (VCH) launched the adult abuse and neglect response resource, *Re:Act* (**re** cognize, **re** port, **re** sources and **re act** on Adult Abuse and

⁹⁵ Yukon Department of Health and Social Services, Seniors, Seniors and Elder Abuse, “What is Abuse of Older Adults?” online: <http://www.hss.gov.yk.ca/programs/social_services/seniors/elder_abuse/> [emphasis added].

⁹⁶ See page 21 & 24. See for example, http://www.justice.gov.nt.ca/pdf/familyviolence/Booklet_Elders.pdf;

⁹⁷ Seniors’ Secretariat, online: <<http://www.gov.ns.ca/scs/elderabuse.asp>>.

⁹⁸ Government of Prince Edward Island, Department of Social Services and Seniors, Seniors’ Secretariat/Office of Seniors, Seniors’ Website, online: <<http://www.gov.pe.ca/infopei/index.php3?number=1015617&lang=E>>.

Neglect).⁹⁹ Their mandate is to “provide education and clinical support to ensure that frontline care providers are aware of and understand their obligations in relation to the identification, assessment and reporting of situations involving abuse, neglect and self-neglect of vulnerable adults.”¹⁰⁰ They use the language of “vulnerable adults” and define abuse as follows:

Abuse (of vulnerable adults)

Abuse includes the deliberate mistreatment of an adult that causes:

- Physical, mental or emotional harm, or
- Damage to or loss of assets,

Abuse includes intimidation, humiliation, physical assault, sexual assault, over medication, withholding needed medication, censoring mail, invasion or denial of privacy, or denial of access to visitors.¹⁰¹

The British Columbia R.C.M.P., the only accessible R.C.M.P policy, offers this definition:

Abuse of older adults refers to actions that harm an older person or jeopardize their health or welfare. Abuse can be physical, financial or psychological.¹⁰²

The Public Guardian and Trustee (“PGT”) of British Columbia paraphrases the definition of adult abuse, neglect and self-neglect in Part 3 of the *Adult Guardianship Act*¹⁰³ (AGA):

Abuse is deliberate mistreatment that causes physical, mental or emotional harm, or damage to or loss of assets. It includes:

- intimidation
- humiliation
- physical assault
- sexual assault
- overmedication
- withholding needed medication
- censoring mail

⁹⁹ Re:Act, “About Re:Act”, online: <<http://www.vchreact.ca/>>.

¹⁰⁰ Re:Act, *ibid.*, online: <<http://www.vchreact.ca/guardianship.htm>>.

¹⁰¹ Vancouver Coastal Health (Re:Act), *Act on Abuse and Neglect: A Manual for Vancouver Coastal Health Staff*, (British Columbia) at pages 14, 29 and 45, online: <http://www.vchreact.ca/about_program.htm>.

¹⁰² British Columbia R.C.M.P., “Ageless Wisdom: Abuse”, online at: <http://bc.rcmp-grc.gc.ca/ViewPage.action?siteNodeId=87&languageId=1&contentId=770>. [BC-R.C.M.P.]

¹⁰³ *Adult Guardianship Act*¹⁰³, R.S.B.C. 1996, c. 6 at Part 3. This Act applies to abuse, neglect and self-neglect in a public place, the adult’s home, a care facility or any other place except a correctional centre[AGA].

- invasion or denial of privacy, and
- denial of access to visitors.

Neglect is any failure to provide necessary care, assistance, guidance or attention if that failure causes, or is reasonably likely to cause, within a short period of time, serious physical, mental or emotional harm, or substantial damage to or loss of assets.¹⁰⁴

In Saskatchewan, neither legislation nor policy includes an explicit definition of elder abuse. However, in 1994, the Saskatchewan Departments of Justice, Social Services, Health and Labour formed an interdepartmental committee to study the “abuse of adults in vulnerable circumstances.” This committee was later expanded to establish the “Steering Committee on the Abuse of Vulnerable Adults”. In 1997, the Steering Committee released the *Steering Committee on the Abuse of Vulnerable Adults Report*¹⁰⁵, which outlines the following definitions of abuse (as adapted from the B.C. *Adult Guardianship Act*¹⁰⁶):

Abuse

Persons with disabilities and older adults experience various forms of abuse, including neglect.

Abuse occurs in domestic or institutional settings, public places or community environments. An abuser may be anyone in a position of trust or authority in an adult’s life, such as a spouse, a parent, an adult child, another relative, a friend, a neighbour, a professional caregiver or a service provider. The precise definition of this abuse is still being debated and studied. Practical definitions of abuse have emerged from work conducted in Saskatchewan, Manitoba and British Columbia on protocol guidelines relating to the abuse of older adults. These protocol documents use a broad definition of abuse that can also apply to the abuse of persons with disabilities.

¹⁰⁴ The Public Guardian and Trustee of British Columbia *Protecting Adults from Abuse, Neglect and Self Neglect*, online: <http://www.trustee.bc.ca/reports_publications/index.html>.

¹⁰⁵ Government of Saskatchewan, *Steering Committee on the Abuse of Vulnerable Adults Report* (Saskatchewan, 1997) at 1, online at: <http://www.justice.gov.sk.ca/vasc>.

¹⁰⁶ *Adult Guardianship Act*, R.S.B.C. 1996, c. 6.

In an earlier publication ACE rejects the term elder in favour of the expression “older adult,” and defines abuse of older adults as follows:

Abuse as discussed in this manual and workshop is defined as any action, or deliberate or deliberate inaction, by a person in a position of trust, which causes harm to an older adult.¹⁰⁷

The term “elder” is not unilaterally invoked to reference the mistreatment of older adults. Some policies use the term “senior” or “older adult”. Other sources use the potentially broader terms “adult victims of abuse” or “vulnerable adults”.

2.3.3 Types of abuse

A component of most definitions is a list of types of abuse, often accompanied by descriptions of each of the categories of mistreatment. Almost every list includes physical, sexual, emotional and/or psychological and financial abuse. Many also define neglect. Still others add a description of self-neglect, though these descriptions, which necessarily involve harms against oneself, are not captured by the overarching definition of elder abuse emerging out of any of the materials we reviewed in Canada.

In terms of types of abuse the definitions of elder abuse vary greatly. Possibly the most comprehensive list of types of abuse is included in a publication of ACE.¹⁰⁸ A Community Training Manual produced by Joanne Preston and Judith Wahl includes physical, emotional or psychological, and sexual abuse, financial abuse or exploitation, medical and medications abuse, neglect, systemic abuse and violations of civil or human rights. The inclusion of “systemic abuse” is rare. ACE defines this type of abuse as instances “when government or institutional policies and regulations create or facilitate harmful situations”¹⁰⁹. Nova Scotia provides the more lengthy description of systemic abuse:

Not all abuse is a result of individual action and not all abuse occurs within a personal relationship. Sometimes older adults are targeted because the abusers think they will be easier targets.

Sometimes abuse is a result of how older people are treated at a societal level. Systemic abuse, for example, can happen when policies or practices take away a person’s independence and dignity. This sometimes happens when other people are making decisions for the older person and may be rooted in ageism.¹¹⁰

¹⁰⁷ Joanne Preston & Judith Wahl, “Abuse Education, Prevention and Response: A Community Training Manual for those who want to address the Issue of the Abuse of Older Adults in their Community” Advocacy Centre for the Elderly (December 2002), online: <<http://www.advocacycentreelderly.org/elder/pubs.htm>> [Joanne Preston & Judith Wahl].

¹⁰⁸ Joanne Preston & Judith Wahl, *ibid.*, 4-5.

¹⁰⁹ Joanne Preston & Judith Wahl, *ibid.*, 5.

¹¹⁰ Seniors’ Secretariat, “About Senior Abuse”, online: <<http://www.gov.ns.ca/scs/elderabuse.asp>>.

The Yukon Government definition is notable for the inclusion of spiritual abuse:

Spiritual abuse or neglect means restriction or loss of a person's spiritual practices, customs, or traditions. It also includes using an older person's religious or spiritual beliefs to exploit; attacking a person's spiritual beliefs; and not allowing the older person to attend the church, synagogue, or temple of his or her choice.¹¹¹

Spiritual abuse is also defined in British Columbia R.C.M.P. material as:

- Restriction or loss of spiritual practices, customs or traditions
- Using religious or spiritual beliefs to exploit an older person.¹¹²

The Alberta Elder Abuse Awareness Network includes medications abuse and violations of human rights, which it describes in this manner:

Medication

This is the misuse of an older person's medications and prescriptions. It can include:

- withholding medication
- overmedicating
- sedation
- not complying with prescriptions refills

Violation of Human Rights

This is the denial of an older person's fundamental rights according to legislation, the Canadian Charter of Rights and Freedoms or the United Nation's Declaration of Human Rights. Violations of human rights can include:

- withholding information
- denying privacy
- denying visitors
- denying religious worship
- restricting liberty
- unwarranted confining to a hospital or institution
- interfering with mail¹¹³

A reference to human rights violations as a form of abuse appears in the materials of a number of provinces and territories. Given that the source of elder rights in Québec is a charter of rights it is not surprising that Québec includes as a type of abuse the violation of rights, which it described as:

¹¹¹ Yukon Department of Health and Social Services, Seniors, Seniors and Elder Abuse, "What is Abuse of Older Adults?" online: <http://www.hss.gov.yk.ca/programs/social_services/seniors/elder_abuse/>.

¹¹² BC-R.C.M.P., *supra* note 95, online: <<http://bc.rcmp-grc.gc.ca/ViewPage.action?siteNodeId=87&languageId=1&contentId=770>>.

¹¹³ AEAAN, online: <<http://www.albertaelderabuse.ca/page.cfm?pgID=6>>.

Violation des droits de la personne/Violation du droit à la liberté:

Empêcher une personne âgée d'exercer un contrôle normal sur sa vie¹¹⁴

The Justice Department of Nova Scotia also includes abandonment and the “failure to assist in personal hygiene or the provision of clothing for a senior” as forms of abuse in a strategy document that defines abuse strictly according to type descriptions, without a broad summary statement.¹¹⁵ This approach of defining abuse with definitions of the types of abuse is adopted by a number of agencies.

The definition used by the government of Québec includes:

Abus social ou collectif: type d'abus lié à l'organisation sociale véhiculant des valeurs et des comportements âgistes, tels la négation de la violence à l'endroit des personnes âgées, la dévalorisation, le mépris envers les aînés, le langage irrespectueux et parfois infantilisant, le manque de structure et de support aux gens qui sont des aidants naturels, l'absence de politique sociale pour les gens âgés.¹¹⁶

Although the reference to social abuse is very common in Australia this appears to be the only Canadian reference to abuse under this heading.

Canadian policies illustrate the tension within elder abuse communities as to whether the concept of elder abuse is limited to breaches of relationships of trust or includes harms by strangers. They also present a theme evident in the U.K., which is a movement away from using the term “elder” in favour of broader expressions like “vulnerable adult”. However, some policies use the language of seniors, which is not common to other jurisdictions that formed part of this review.

Another notable difference amongst policy definitions of elder abuse is a variety in references to types of abuse. The definitions of types of abuse are useful tools for gaining an understanding of the nature of elder abuse, for they further flesh out the character of older adult vulnerability. In some instances they help answer that question of what, other than chronological age, characterizes elder abuse as calling for a unique legal response.

¹¹⁴ Réseau Internet Francophone Vieillir En Liberté, online: <http://www.rifvel.org/abus/violation.php> and <http://www.rifvel.org/recours/recours7a.php>.

¹¹⁵ Nova Scotia Justice, online: http://www.gov.ns.ca/just/prevention/tips_seniors_elderabuse.asp.

¹¹⁶ Murielle Miller, Conseil des aînés, “Avis sur les abus exercés à l'égard des personnes aînées” (Quebec: Conseil des aînés, 1995), at 8. online: http://www.conseil-des-aines.qc.ca/images/AVIS/199509_av.pdf.

2.4 Conclusion

In Canada the richest source of legal definitions is policy. Criminal legislation does not define elder abuse. Reoccurring themes in court decisions involving older adult victims include an emphasis on dependency and breach of trust, as well as mention of frailty and a vulnerability to age-specific harms, such as a loss of the capacity to live independently. This language hints at aspects of the legal definition of elder abuse in Canada.

The term vulnerability is reflected in adult guardianship legislation which often uses the concept of “vulnerable adult” to frame its scope of application. The expression “elder abuse” is not used in provincial legislation. Rather, abuse is defined in statutes that address a larger or smaller community of victims, such as vulnerable adults, victims of domestic violence, care facility residents, neglect adults, and adults who are abused. Most of these statutes approach a definition by listing types of abuse (such as physical, psychological, or sexual abuse).

3.0 THE UNITED KINGDOM

The United Kingdom (“U.K.”) government has a unitary (or centralized) system of government, with some powers having been devolved to Scotland (Scottish Parliament), Wales (National Assembly for Wales and the Welsh Assembly Government), and Northern Ireland (Northern Ireland Assembly).¹¹⁷ The U.K. government has responsibility for all matters that have not been devolved (“reserved” matters), as well as all policy in England for all matters that have been devolved to Scotland, Wales and Northern Ireland (“N.I.”).¹¹⁸ Although the U.K. Parliament (“Westminster”) may still legislate in devolved areas for any part of the U.K., in practice it will only do so with the agreement of, or upon request by, the devolved governments.¹¹⁹ Consequently, there may be different laws and/or policies in each of these jurisdictions that are relevant to defining and addressing elder abuse and neglect.

3.1 Legislation

The U.K. Parliament has not enacted any legislation that includes a specific definition of “elder abuse”. However, there are a number of more general statutes, which may be applicable to cases involving the abuse of older adults, particularly where an individual is deemed to be “lacking capacity”, “vulnerable” or “at risk”. These statutes include definitions of terms such as “ill-treatment”, “neglect”, and “harm”.

There are also several Guidance documents that have been published in the U.K. dealing with adult protection and care, which include definitions of “abuse” and “vulnerable adult”. Most recently, questions around language and definitions are focusing on the term “vulnerable adult”. There seems to be a shift towards using the language of “safeguarding adults” in areas where other jurisdictions speak of adult protection.

3.1.1 England & Wales

Mental Capacity Act 2005

The *Mental Capacity Act 2005* (“MCA 2005”)¹²⁰ for England and Wales received Royal Assent on 7 April 2005 and was fully implemented on 1 October 2007. The MCA 2005 provides a framework to empower and protect people who (may) lack capacity to make

¹¹⁷ U.K. Government, Directgov (website of the U.K. government for its citizens), “Devolved government in the U.K.”, online: <http://www.direct.gov.uk/en/Governmentcitizensandrights/UKgovernment/Devolvedgovernment/DG_073306> [Directgov].

¹¹⁸ Directgov, *ibid.*

¹¹⁹ Directgov, *ibid.*

¹²⁰ *Mental Capacity Act 2005*, (U.K.), 2005, c. 9, online: <<http://www.opsi.gov.uk/acts/acts2005a>> [MCA 2005].

certain decisions for themselves. Section 44 creates a new criminal offence of *wilful neglect or ill-treatment* of a person lacking mental capacity to make relevant decisions:

44 Ill-treatment or neglect

- (1) Subsection (2) applies if a person (“D”)—
 - (a) has the care of a person (“P”) who lacks, or whom D reasonably believes to lack, capacity,
 - (b) is the donee of a lasting power of attorney, or an enduring power of attorney (within the meaning of Schedule 4), created by P, or
 - (c) is a deputy appointed by the court for P.
- (2) D is guilty of an offence if he ill-treats or wilfully neglects P.
- (3) A person guilty of an offence under this section is liable—
 - (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both;
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine or both.

The MCA *Code of Practice*¹²¹ (“Code”) “provides guidance to those working with and/or caring for adults who may lack the capacity to make particular decisions”.¹²² The Code includes the following definitions of abuse:

What is abuse?

The word ‘abuse’ covers a wide range of actions. In some cases, abuse is clearly deliberate and unkind. But sometimes abuse happens because somebody does not know how to act correctly—or they haven’t got appropriate help and support...

Abuse is anything that goes against a person’s human and civil rights. This includes sexual, physical, verbal, financial and emotional abuse.

Abuse can be:

- a single act
- a series of repeated acts
- a failure to provide necessary care, or
- neglect¹²³

The main types of abuse described in the Code are: financial, physical, psychological, neglect and acts of omission.¹²⁴ The broad category of “acts of omission” is unique to the U.K., and its content is unclear, particularly as to if and how it may differ from neglect.

¹²¹ MCA 2005 *Code of Practice*, online: < <http://www.publicguardian.gov.uk/mca/code-of-practice.htm>>, and <<http://www.opsi.gov.uk/acts/acts2005a>> [Code].

¹²² Code, *ibid.* 1.

¹²³ Code, *ibid.*, 244.

¹²⁴ Code, *ibid.*, 245.

Domestic Violence, Crime and Victims Act 2004

The *Domestic Violence, Crime and Victims Act 2004* (“DVCVA 2004”) provides some additional protection of the rights of “vulnerable” older people.¹²⁵ Section 5 of the DVCVA 2004 creates an offence of causing the death of a child or vulnerable adult:

5 The offence

- (1) A person (“D”) is guilty of an offence if—
- (a) a child or vulnerable adult (“V”) dies as a result of the unlawful act of a person who—
 - (i) was a member of the same household as V, and
 - (ii) had frequent contact with him,
 - (b) D was such a person at the time of that act,
 - (c) at that time there was a significant risk of serious physical harm being caused to V by the unlawful act of such a person, and
 - (d) either D was the person whose act caused V’s death or—
 - (i) D was, or ought to have been, aware of the risk mentioned in paragraph (c),
 - (ii) D failed to take such steps as he could reasonably have been expected to take to protect V from the risk, and
 - (iii) the act occurred in circumstances of the kind that D foresaw or ought to have foreseen.¹²⁶

“Vulnerable adult” is defined in section 5(6) of the DVCVA 2004:

“vulnerable adult” means a person aged 16 or over whose ability to protect himself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old age or otherwise.¹²⁷

In February 2003, pursuant to section 23(1) of the *Care Standards Act 2000*¹²⁸, the Secretary of State for Health (Department of Health) published a statement of national minimum standards entitled, *Care homes for older people: national minimum standards and the Care Homes Regulations*¹²⁹ (“National Minimum Standards”). This statement applies to “care homes”, as defined by section 3 of the CSA 2000, which provide

¹²⁵ *Domestic Violence, Crime and Victims Act 2004*, (U.K.), 2004, c. 28, online:

<http://www.opsi.gov.uk/acts/acts2004/ukpga_20040028_en_1> [DVCVA 2004]. This Act applies generally to England and Wales; sections 5, 7, 9, 17-21, 56 and Schedule 1 apply to Northern Ireland as well.

¹²⁶ DVCVA 2004, *ibid.*, s.5.

¹²⁷ DVCVA 2004, *ibid.*, s.5(6).

¹²⁸ *Care Standards Act 2000*, (U.K.), 2000, c. 14, online: <<http://www.opsi.gov.uk/acts/acts2000a>> [CSA 2000].

¹²⁹ Department of Health, *Care homes for older people: national minimum standards and the Care Homes Regulations: 3rd Edition* (2003), online:

<http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4005819> and

<<http://www.cqc.org.uk/guidanceforprofessionals/socialcare/careproviders/nationalminimumstandards.cfm>> [National Minimum Standards].

accommodation, as well as nursing or personal care, for older people.¹³⁰ The National Minimum Standards includes the following definition of abuse of older people (from Action on Elder Abuse):

Abuse

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 [Action on Elder Abuse] including physical, emotional, verbal, financial, sexual, racial abuse, neglect and abuse through the misapplication of drugs.¹³¹

3.1.2 Scotland

Adult Support and Protection (Scotland) Act 2007

The Scottish Parliament enacted the *Adult Support and Protection (Scotland) Act 2007*¹³² (“the Act”), which introduces a statutory framework for the protection adults of all ages who may be “at risk”. The Act defines “adult at risk” and “harm” as follows:

3 Adults at risk

- (1) “Adults at risk” are adults who—
 - (a) are unable to safeguard their own well-being, property, rights or other interests,
 - (b) are at risk of harm, and
 - (c) because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected.
- (2) An adult is at risk of harm for the purposes of subsection (1) if—
 - (a) another person’s conduct is causing (or is likely to cause) the adult to be harmed, or
 - (b) the adult is engaging (or is likely to engage) in conduct which causes (or is likely to cause) self-harm.

53 Interpretation of Part 1

- (1) In this Part—

“adult” means an individual aged 16 or over,

“harm” includes all harmful conduct and, in particular, includes—

 - (a) conduct which causes physical harm,
 - (b) conduct which causes psychological harm (for example: by causing fear, alarm or distress),
 - (c) unlawful conduct which appropriates or adversely affects property, rights or interests (for example: theft, fraud, embezzlement or extortion),
 - (d) conduct which causes self-harm,¹³³

¹³⁰ National Minimum Standards, *ibid.*

¹³¹ National Minimum Standards, *ibid.*, 41.

¹³² *Adult Support and Protection (Scotland) Act 2007*, A.S.P. 2007, asp 10, online: <<http://www.opsi.gov.uk/legislation/scotland/s-acts2007a>> [ASPA 2007]. In March 2007, the Scottish Executive published a strategy document entitled, “All Our Futures: Planning for a Scotland with an Ageing Population,”¹³² in which they state the intention of the Scottish Government, “to tackle the issue of elder abuse through the implementation of the *Adult Support and Protection (Scotland) Bill*”, now in force.

¹³³ ASPA 2007, *ibid.*, ss. 3 & 53.

While England and Wales are sources of law and policy in relation to adult abuse and neglect, Scotland and Northern Ireland have not yet published any position on how to define elder abuse and neglect.

3.2 Policy

Action on Elder Abuse (“AEA”) is a national, non-profit organization, working in all four nations across the U.K. and in Ireland, “to protect and prevent the abuse of vulnerable older adults”.¹³⁴ AEA has been instrumental in shaping the meaning of elder abuse in the U.K. and internationally. AEA developed the definition of “elder abuse” that was subsequently adopted by the World Health Organization (“WHO”) in 2002:

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.¹³⁵

The other focal point of policy development in the U.K. is a guidance document produced by the Department of Health on protecting vulnerable adults from abuse. *No Secrets: Guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse*¹³⁶ (“No Secrets”) is intended to provide guidance to local agencies responsible for investigating and taking action in cases where a vulnerable adult is believed to be suffering abuse. The document also offers a framework for the “development of local inter-agency policies, procedures and joint protocols which will draw on good practice nationally and locally.”¹³⁷ *No Secrets* includes the following definitions of “vulnerable adult” and “abuse”:

“Vulnerable Adult”

2.2 Which adults are vulnerable? In this guidance ‘adult’ means a person aged 18 years or over.

2.3 The broad definition of a ‘vulnerable adult’ referred to in the 1997 Consultation Paper *Who decides?*, issued by the Lord Chancellor’s Department, is a person:

“who is or may be in need of community care services by reason of mental or other disability, age or illness; and

¹³⁴ Action on Elder Abuse, online: <<http://www.elderabuse.org.uk/index.htm>> [AEA].

¹³⁵ AEA, *ibid.*, online:

<http://www.elderabuse.org.uk/What%20is%20abuse/what_is_abuse%20define.htm> [AEA].

¹³⁶ Department of Health and Home Office, “No secrets: Guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse” (2000). *Note*: “This guidance is issued under Section 7 of the Local Authority Social Services Act 1970, which requires local authorities in their social service functions to act under the guidance of the Secretary of State. As such, this document does not have the full force of statute, but should be complied with unless local circumstances indicate exceptional reasons which justify a variation.” Online:

<www.dh.gov.uk/assetRoot/04/07/45/40/04074540.pdf> [*No Secrets*].

¹³⁷ *No Secrets*, *ibid.* online,

<http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4008486>.

who is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation”.

“Abuse”

2.5 What constitutes abuse? In drawing up guidance locally, it needs to be recognized that the term ‘abuse’ can be subject to wide interpretation. The starting point for a definition is the following statement:

Abuse is a violation of an individual’s human and civil rights by any other person or persons.

2.6 Abuse may consist of a single act or repeated acts. It may be physical, verbal or psychological, it may be an act of neglect or an omission to act, or it may occur when a vulnerable person is persuaded to enter into a financial or sexual transaction to which he or she has not consented, or cannot consent. Abuse can occur in any relationship and may result in significant harm to, or exploitation of, the person subjected to it.

2.7 A consensus has emerged identifying the following main different forms of abuse:

- *physical abuse*, including hitting, slapping, pushing, kicking, misuse of medication, restraint, or inappropriate sanctions;
- *sexual abuse*, including rape and sexual assault or sexual acts to which the vulnerable adult has not consented, or could not consent or was pressured into consenting;
- *psychological abuse*, including emotional abuse, threats of harm or abandonment, deprivation of contact, humiliation, blaming, controlling, intimidation, coercion, harassment, verbal abuse, isolation or withdrawal from services or supportive networks;
- *financial or material abuse*, including theft, fraud, exploitation, pressure in connection with wills, property or inheritance or financial transactions, or the misuse or misappropriation of property, possessions or benefits;
- *neglect and acts of omission*, including ignoring medical or physical care needs, failure to provide access to appropriate health, social care or educational services, the withholding of the necessities of life, such as medication, adequate nutrition and heating; and
- *discriminatory abuse*, including racist, sexist, that based on a person’s disability, and other forms of harassment, slurs or similar treatment.¹³⁸

The Office of the Public Guardian (“OPG”) uses the following abbreviated version of the *No Secrets* definition:

What is abuse?

Abuse is the violation of an individual’s human and civil rights by any other person or persons. Abuse of a vulnerable adult may consist of a single act or a series of repeated acts. It may occur as a result of a failure to undertake action or appropriate care tasks.¹³⁹

¹³⁸ *No Secrets, ibid.*, paras. 2.5-2.6, online, <http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4008486>. [emphasis added]

¹³⁹ OPG, “What is abuse?” online: <<http://www.publicguardian.gov.uk/concerns/problems-making-decisions.htm>>.

The differences between the *No Secrets* and Action on Elder Abuse definitions illustrate some of the tensions in developing language to speak of elder abuse. They are encapsulated in the following questions:

- Is it important to maintain a specific definition to name the mistreatment of older adults or would a broader reference to vulnerable adults be more appropriate? Is there value in conceptually isolating the abuse of older adults?
- Does elder abuse occur outside of relationships of trust? In other words, should harms perpetrated by strangers to the older adult be captured by the term elder abuse?
- Structurally, is elder abuse best described through an exhaustive definition that runs through the various types of abuse in detail or is a brief summary more useful?
- Is it important to characterize elder abuse as a human rights violation?

3.2.1 Alternatives to the category “elder abuse”

Much of the policy work in the U.K. subsequent to *No Secrets* moves away from the expression “elder abuse”. In 2000, shortly after the release of England’s *No Secrets* guidance document, the National Assembly for Wales produced a guidance document on protecting vulnerable adults from abuse entitled, *In safe hands: Implementing adult protection procedures in Wales* (2000)¹⁴⁰. The National Assembly for Wales has agreed to the following definitions of “abuse” and “vulnerable adult”:

7.1 For the purpose of both national and local guidance it is important to clarify how we abuse, who is included under the heading of a “vulnerable adult”, and what kinds of abuse are covered.

7.2 For the purposes of this guidance a vulnerable adult is a person over 18 years of age who:

“[I]s or may be in need of community care services by reason of mental or other disability, age or illness and who is or may be unable to take care of himself or herself, or unable to protect himself or herself against significant harm or serious exploitation” Law Commission (Who decides?: making decisions on behalf of mentally incapacitated adults 1997)

7.3 People with learning disabilities or mental health problems, *older people* and disabled people may fall within this definition, particularly when their situation is complicated by additional factors, such as physical frailty or chronic illness, sensory impairment, challenging behaviour, social or emotional problems, poverty or homelessness.

¹⁴⁰ National Assembly for Wales, *In safe hands: Implementing adult protection procedures in Wales* (2000) at paras. 7.4 & 7.6. “This guidance is issued under Section 7 of the Local Authority Social Services Act 1970, which requires local authorities in their social service functions to act under the guidance of the National Assembly for Wales. As such, this document does not have the full force of statute, but should be complied with unless local circumstances indicate exceptional reasons which justify a variation.” Online: <<http://new.wales.gov.uk/topics/health/publications/socialcare/reports/insafehands?lang=en>> [*In Safe Hands*].

7.4 The following definition of abuse provides a basis from which to develop practice: “Abuse is a violation of an individual’s human and civil rights by any other person or persons”

7.5 Abuse may take different forms...¹⁴¹

In partnership with the Association of Directors of Adult Social Services and Association of Chief Police Officers, the Commission for Social Care Inspection¹⁴² published a guidance document entitled, *Safeguarding Adults Protocol and Guidance*¹⁴³ (“Safeguarding Adults Protocol”). This paper “sets out how [they] work with other agencies to make sure people who use care services are safeguarded from abuse”.¹⁴⁴

The Safeguarding Adults Protocol includes the following definitions of abuse and types of abuse (referring to *No Secrets*):

No Secrets (para 2.5) defines abuse in the following terms:

a) “Abuse is a violation of an individual’s human and civil rights by other person or persons. Abuse may consist of single or repeated acts. It may be physical, verbal or psychological, it may be an act of neglect or an omission to act, or it may occur when a vulnerable person is persuaded to enter into a financial or sexual transaction to which he or she has not consented, or cannot consent. Abuse can occur in any relationship and may result in significant harm, or exploitation of, the person subjected to it”.¹⁴⁵

3.2.2 Types of abuse

Borrowing from *No Secrets*, the Safeguarding Adults Protocol includes a description of physical, sexual, psychological, financial or material abuse, neglect and acts of omission, and discriminatory abuse, and adds the following two descriptions that appear to be unique to this document:

Institutional abuse—the term ‘Institutional Abuse’ is sometimes used to describe a type of abuse, which pervades a particular establishment. Institutional abuse may take the form of repeated incidents of poor or unsatisfactory professional practice, at one end of the spectrum, through to widespread and persistent ill treatment or gross misconduct at the other. There may be a variety of underlying factors in relation to poor care standards which could include, for example, inadequate

¹⁴¹ *In Safe Hands, ibid.*, 14-15.

¹⁴² Pursuant to section 1 of the *Health and Social Care Act 2008* (U.K.), 2008, c. 14, the Commission for Healthcare Audit and Inspection, the Commission for Social Care Inspection and the Mental Health Act Commission are dissolved and replaced with the Care Quality Commission, online: <<http://www.opsi.gov.uk/acts/acts2008a>>.

¹⁴³ Commission for Social Care Inspection, Association of Directors of Adult Social Services and Association of Chief Police Officers, *Safeguarding Adults Protocol and Guidance* (2007), online: <http://www.cqc.org.uk/guidanceforprofessionals/socialcare/careproviders/guidance.cfm?widCall1=customWidgets.content_view_1&cit_id=34771> [Safeguarding Adults Protocol].

¹⁴⁴ Safeguarding Adults Protocol, *ibid.*

¹⁴⁵ Safeguarding Adults Protocol, *ibid.*, 21 & 22.

staffing, an insufficient knowledge base within the service, lack of essential equipment, rigid routines or a controlling management regime. (See also para 2.9 of No Secrets).

Restraint—The inappropriate use of restraint is considered a form of physical abuse and could also give rise to criminal charges.¹⁴⁶

The four national Age Concerns¹⁴⁷ in the U.K. have joined together with Help the Aged¹⁴⁸ to form new national charities dedicated to improving the lives of older people.¹⁴⁹ Help the Aged has published a number of documents on elder abuse and crime containing definitions of elder abuse, which can be accessed through their website. For example, in their publication entitled *Putting a Stop to the Abuse of Older People*¹⁵⁰, elder abuse is defined as:

What is elder abuse?

Elder abuse occurs when an older man or woman is harmed, mistreated or neglected—usually by someone they should be able to trust.

‘Abuse’ is a strong word. It makes many people feel uncomfortable.

What it actually means is harm, mistreatment, exploitation or neglect.

Older people can be harmed in lots of different ways.

Forms of abuse

There are many different forms of abuse. Some can be obvious—for example, an older person being physically assaulted (hit, slapped or kicked) but may rarely be witnessed directly.

Other abuses are inflicted in very subtle ways, so it can be difficult to pick up on them. For example, neglect and humiliation are common types of abuse.¹⁵¹

3.3 Court decisions

R. v. Saw & Ors¹⁵²: Saw and five other defendants were found guilty of burglary of occupied premises, including a number of homes. This case involved applications for reduced sentences and an appeal by the defendant McPhee. The defendant Tete-Djawu ransacked the home of a 69-year-old woman, stealing almost £2000 worth of property,

¹⁴⁶ Safeguarding Adults Protocol, *ibid.*, 21 & 22.

¹⁴⁷ Age Concern England, online: < <http://www.ageconcern.org.uk/> > [AC-England].

¹⁴⁸ Help the Aged, online: < <http://www.helptheaged.org.uk/en-gb/> > [HTA].

¹⁴⁹ *Ibid.*, online: <<http://www.helptheaged.org.uk/en-gb/WhatWeDo/AboutUs/AgeConcernandHelptheAged.htm>>.

¹⁵⁰ Jacki Pritchard, *Putting a Stop to the Abuse of Older People* (2006), online: <http://www.helptheaged.org.uk/en-gb/WhatWeDo/Publications/wd_publicat_280206_4.htm>.

¹⁵¹ *Ibid.*

¹⁵² [2009] EWCA Crim 1 [*Saw & Ors*].

including the victim's car keys. The defendant Smith burgled two homes in concert with others. In both cases, the victims were elderly ladies living alone (aged 92 and 88 years) and Smith entered the premises at night while they were in bed. Smith stole the victims' purses and other goods. £9000 worth of charges was racked up on one victim's credit card. The defendant McPhee attempted to enter several homes one night. He rang the bell at the home of an 89-year-old man, who let him in thinking McPhee was a neighbour. McPhee entered the man's bedroom and rifled through the victim's belongings despite the victim's demand for him to leave. The victim had lost his leg and used a wheelchair; he was in bed at the time of the invasion. The Court found that the sentences were appropriate given the particular circumstances of each burglary. The applications for reduced sentences were refused; McPhee's appeal was dismissed.

R. v. Gallagher¹⁵³: This case involved an appeal by Gallagher of his sentence of four and a half years' imprisonment for theft and obtaining property by deception. Gallagher, over a period of almost three years, deceived and stole from elderly persons by posing as a gardening contractor. He specifically targeted elderly individuals. Gallagher would either steal from the victims' homes or purses while "working" on their gardens or he would invent false charges for work, demand payment in advance, and then not perform any work. In first instance opinion, the sole judge stated that Gallagher deserved some credit for pleading guilty to the charges, "but not much."¹⁵⁴ Gallagher's sentence was upheld. The sentence reflected a proper discount for the pleas of guilt.

Attorney-General's Reference Nos. 038 and 039 of 2004¹⁵⁵: Randall and Donaghue were charged with robbery and were each sentenced to three years' imprisonment. The victim was 57 years old and known to the offenders to be frail and have learning difficulties. The offenders and a third man went to the home of the victim one night and confronted him at his doorstep. The men used physical force to restrain the victim, punched him in the face, and at least one of the men demanded money from the victim. The victim directed the men to an envelope containing £100, the victim's total savings, which Randall (and possibly another) retrieved. Randall and Donaghue both pled guilty to the charge of robbery. The Attorney-General submitted that the sentences awarded "failed to mark adequately the gravity of the offence and aggravating features present."¹⁵⁶ The aggravating features were: targeting a vulnerable and frail victim; invading a home at night; using gratuitous violence; causing significant injury to the victim; and acting as a group of three men. The Court held that the three-year sentences were unduly lenient and were substituted with 5½ years and 5 years 10 months for Donaghue and Randall, respectively.

¹⁵³ [2004] EWCA Crim 2334 [*Gallagher*].

¹⁵⁴ *Ibid.*, para. 7.

¹⁵⁵ [2004] EWCA Crim 1820 [*A-G Reference 2004*].

¹⁵⁶ *Ibid.* para. 16.

*Attorney General's Reference Nos. 32 and 35 of 1995*¹⁵⁷: The offenders in this case are Pegg, Martin, and Underhill. The Attorney General takes issue with the sentences of Pegg and Martin alone. Pegg was sentenced to a total of four years' detention and was only charged with aggravated burglary; Martin was sentenced to seven years' imprisonment and charged with aggravated burglary and attempted robbery. The three offenders had heard an untrue rumour that a 73-year-old man in the community was very wealthy, which prompted them to break into his home. At some time before 1:30am, the offenders appeared in the bedroom of the victim, waking him. Underhill kicked and punched the victim while Pegg and Martin searched for money. Underhill used a knife to slash and stab the victim repeatedly, threatening to kill him. Pegg returned and pleaded with Underhill to stop the attack. The offenders left, taking nothing. The victim was severely injured and took five hours to reach the telephone to call the police. He spent over a month in hospital, but recovered from the incident. The victim later had nightmares of the attack and wished to sell his home.

The Court held that the sentences were not reflective of the aggravating factors of the burglary; Pegg's sentence was increased to seven years detention and Martin received ten years imprisonment, taking into account double jeopardy.

3.3.1 Vulnerability and older adults

A major theme in the U.K. jurisprudence is the notion of vulnerability. In the *Attorney General's Reference Nos. 32 and 35 of 1995*, the judge states:

[W]here an elderly victim, living alone, is violently attacked by intruders within the home and is injured the likely sentence will be in double figures. We wish to stress that attacks on elderly people in their own homes are particularly despicable and will be regarded by the court as deserving of severe punishment. Elderly victims living alone are vulnerable, not only because of the lack of assistance but also because of their own weakness and isolation. Any attack on such a person is cowardly and can only be expected to be visited with a very severe punishment indeed.¹⁵⁸

The language of this case suggests that all older adults are vulnerable. This is consistent with U.K. legislative and policy approach discussed above which addresses elder abuse as a subset of the larger category of mistreatment of vulnerable adults. Nine years later the decision in *Attorney-General's Reference Nos. 038 and 039 of 2004* reinforces this approach unequivocally:

We would also emphasize that the real test in these cases is that of vulnerability. The precise age of the victim is of less relevance. It is simply a factor which, along with other factors, may contribute to the victim being a vulnerable person living

¹⁵⁷ [1996] 2 Cr. App. R. (S.) 346 [A-G Reference 1995].

¹⁵⁸ *Ibid.*, 350.

alone. This court has spelt out on many occasions the gravity with which such attacks in the home on elderly or otherwise vulnerable people will be viewed. Such offences cause widespread anxiety amongst the elderly or vulnerable. We entirely accept the point made by the Attorney General that deterrent sentences in such cases are required.¹⁵⁹

3.3.2 Targeting elderly victims

The other theme that runs through U.K. sentencing appeals is the condemnation of crimes in which the offender preys upon older adults—a theme also found in the Canadian jurisprudence discussed above. There is a sense that criminal behaviour characterized as elder abuse, or mistreatment of the vulnerable, may get categorized as such because of the intention to harm a person known to be vulnerable, and the targeting of supposed easy victims. The following quotations illustrate this point:

In any event this was the most serious burglary. The impact on the disabled elderly housebound occupier was considerable. It was committed by a man with a clear track record for preying on the elderly and vulnerable... [T]he judge was entitled to pass a condign sentence, beyond the usual range, because of the persistence of this defendant's repeated offending against vulnerable victims.¹⁶⁰

This sort of offending, where elderly people are targeted because of their vulnerability, is amongst the most serious that can be committed where violence is not actually used. The harm done to the quality of life of the victims by the fear and anxiety these offences cause far exceeds the monetary value to the defendant of the thefts, although the sums of money, sometimes modest, may be very significant indeed to the particular victims. A substantial sentence, both as punishment for the serious offending and as a clear indication to the defendant and others who might be tempted to commit these offences that if they do so substantial punishment will follow, is always required.¹⁶¹

3.4 Conclusion

The U.K. has been a leader in defining elder abuse and neglect, the definition of Action on Elder Abuse serving as a model on the international human rights front and focusing the concept around breaches of trust. However, the tenor of recent law and policy is to move away the term elder abuse altogether. The terms “adult at risk” and “vulnerable adult”—the latter of which can be found in the some Canadian adult protection statutes—are used instead. Moreover, the influential *No Secrets* policy characterizes elder abuse as a human rights issue, an approach, which, based on our review, is not common amongst documents issued by governments.

¹⁵⁹ *A-G Reference 2004*, *supra* note 155 at para. 20.

¹⁶⁰ *Saw & Ors*, *supra* note 152 at paras. 61-63.

¹⁶¹ *Gallagher*, *supra* note 153 at para. 9.

4.0 AUSTRALIA

Australia, like Canada, maintains a federal system of government with powers divided between the central government, known as the Commonwealth government, and a number of states.¹⁶² The federation of Australia is composed of six states—New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia—and two territories—the Australian Capital Territory (often referred to as Canberra) and the Northern Territory.¹⁶³ This structure has had significant implications for the development of law and policy in relation to elder abuse and neglect and adult protection, for in Australia both state and national legislation address an aspect of the mistreatment of older adults. The Australian response has been fragmented in some areas, such as financial abuse, and centralized and integrated in relation to the abuse of adult residents of care facilities.

4.1 Legislation

Australia has not developed a national legislative or policy response to either elder abuse or adult guardianship. Only very recently the Australian national government enacted legislation addressing abuse in the context of residential care facilities. The 2007 *Aged Care Act*—a very lengthy statute that deals with institutional care broadly—requires mandatory reporting of incidents of abuse occurring in institutional care settings.¹⁶⁴ The document, however, does not define elder abuse. Rather its objects include “promot[ing] high quality of care and accommodation ... [and] protect[ing] the health and well-being of recipients of aged care services.”¹⁶⁵ *The User Rights Principles 1997* passed pursuant to the Act includes a *Charter of Residents’ Rights and Responsibilities* at Schedule 1. The Charter codifies the right “to be treated with dignity and respect, and to live without exploitation, abuse or neglect”.¹⁶⁶ However, this statement constitutes the single reference to abuse or neglect in either statute and neither document contains a definition of elder abuse or neglect.

¹⁶² Australian Government. “Our Government” <http://www.australia.gov.au/about-australia/our-government>. Accessed May 26, 2009.

¹⁶³ Australian Government. “State and Territory Government.” <http://www.australia.gov.au/about-australia/our-government/state-and-territory-government>. Accessed May 26, 2009.

¹⁶⁴ Rosslyn Munro of the Caxton Legal Centre in Brisbane (Queensland) describes the broader purpose of the statute as follows, “the primary purpose of this Act is to regulate the use of Commonwealth funds in the provision of aged care services, which includes nursing home care, hostel care, and community aged care packages provided in the older person’s own home. Reform Issue 81 (Spring 2002) at page 42-46.

¹⁶⁵ *Aged Care Act 1997* (Cth), s 2-1(1).

¹⁶⁶ *Ibid.*, Schedule 1 to the User Rights Principles 1997.

The state and territorial governments have each passed adult guardianship or adult protection legislation.¹⁶⁷ None of these statutes contains a definition of elder abuse or neglect. A number of them contain language to the effect that a guardian must exercise her powers in such a manner as to protect the represented person from abuse, neglect or exploitation (Northern Territory, Queensland, Victoria).¹⁶⁸ Others mention abuse or neglect under the investigative powers of the Adult Guardian (Queensland).¹⁶⁹ The New South Wales addresses abuse and neglect under its guiding principles.¹⁷⁰

Southern Australia uniquely criminalizes neglect under the guardianship legislation:

76—Ill treatment or neglect of person with mental incapacity

A person having the oversight, care and control of a person with a mental incapacity who illtreats or willfully neglects that person is guilty of an offence.

Maximum penalty: \$10,000 or imprisonment of 2 years.¹⁷¹

Also unique to Australian states is the tribunal system for adjudicating guardianship matters. To date no appellate review of a guardianship tribunal decision regarding the meaning of abuse has been reported and so in Australia the judiciary has provided no guidance with respect to the meaning of abuse or neglect in the adult protection context. Similarly, although each Australian state has a criminal statute and prosecutes crimes against older adults under age neutral crimes such as assault, failure to provide the necessities of life, and fraud, the concept of elder abuse has not been clarified or refined at the judicial level. In Australia, as in Canada, the richest source of definitions of elder abuse and neglect is policy.

4.2 Policy

4.2.1 Emphasis on relationships of trust

The first mention of elder abuse appears to have been in the 1975 Social Welfare Commission report *Care of the Aged*.¹⁷² The first federal or state policies on elder abuse

¹⁶⁷ *Guardianship and Management of Property Act 1991* (A.C.T.), *Guardianship Act 1987* (N.S.W.), *Adult Guardianship Act 1988* (N.T.), *Guardianship and Administration Act 2000* (Qld), *Guardianship and Administration Act 1993* (S.A.), *Guardianship and Administration Act 1995* (Tas.), *Guardianship and Administration Act 1986* (Vic), *Guardianship and Administration Act 1990* (W.A.).

¹⁶⁸ *Adult Guardianship Act 1988* (N.T.), s. 20(1)(d), *Guardianship and Administration Act 2000* (Qld) at s.27(1)(e), *Guardianship and Administration Act 1986* (Vic) at s.28(2)(d). The Northern Territory does not mention exploitation.

¹⁶⁹ *Guardianship and Administration Act 2000* (Qld) at ss.180 and 181.

¹⁷⁰ *Guardianship Act 1987* (N.S.W.) at s.4.

¹⁷¹ *Guardianship and Administration Act 1993* (S.A.) at s. 76.

¹⁷² Susan Kurrle and Gerard Naughtin, "An Overview of Elder Abuse and Neglect in Australia" (2008), *Journal of Elder Abuse and Neglect*, Vol. 20(2) at 110 [Kurrle and Naughtin].

emerged in the 1990s.¹⁷³ According to Kurrle and Naughtin the term “elder abuse” did not become used until the early 2000s; the issue was originally framed in terms of “the protection of older people,” and later the expressions “aged abuse, abuse of vulnerable adults and abuse of older people” came into usage.¹⁷⁴

The definition of elder abuse most commonly referenced in Australia is the working definition of the Australian Network for the Prevention of Elder Abuse (ANPEA). This definition states:

Elder abuse is any act occurring within a relationship where there is an implication of trust, which results in harm to an older person. Abuse may be physical, sexual, financial, psychological, social, and/or neglect.¹⁷⁵

As compared with Canada, there is remarkable similarity amongst the definitions of elder abuse used in Australia. Many key legal policies reference the definition of ANPEA.¹⁷⁶ Others offer a very slight variation that does not include social abuse. All of the definitions emerging out of Government and key non-profit organizations that inform government policy development situate elder abuse as a form of abuse that occurs in relationships of trust. The definitions tend to be brief, placing less emphasis on descriptions of the types of abuse.

For example, the Alliance for the Prevention of Elder Abuse: Western Australia is facilitated through the Department of Health and funded through the Office for Seniors Interests and Volunteering.¹⁷⁷ It defines elder abuse as:

Any act occurring which causes harm to an older person and occurs within an informal relationship of trust such as family member or friends.¹⁷⁸

A brochure released by the Department for Communities of the Government of Western Australia adds the concept of failure to act within a similar definition of elder abuse:

¹⁷³ Aged & Community Services Australia, *Elder Abuse: A Holistic Response and Background Paper* (March 2006) at 2 [Aged & Community Services Australia].

¹⁷⁴ Kurrle and Naughtin at 110.

¹⁷⁵ Aged Care and Community Services Australia.

¹⁷⁶ Aged & Community Services Australia; Prevention of Elder Abuse Task Force, *The Strategic Plan for the Prevention of Elder Abuse in Queensland* (2001); Government of Southern Australia. *Our Actions to Prevent the Abuse of Older Southern Australians*; Office for the Ageing Department for Families and Communities (2007); Office of Senior Victorians Department of Planning and Community Development. *Victorian Government Elder Abuse Prevention Strategic Implementation Plan 2006-09*. This definition is also the working definition of the Elder Abuse Prevention Unit (Queensland) and Advocacy Tasmania (the Tasmanian government does not have a working definition).

¹⁷⁷ Alliance for the Prevention of Elder Abuse, *Elder Abuse Protocol: Guidelines for Action* (2006), Western Australia.

¹⁷⁸ *Ibid.*, 3. Barbara Black. The Human Rights of Older People and Agency Responses to Elder Abuse. Curtin. 2008 attributes this definition to the Association for the Prevention of Elder Abuse, at iv.

Any abusive or exploitative act (or failure to act) that causes harm to an older person and occurs within a relationship of trust, such as family or friends.¹⁷⁹

New South Wales adds a characterization of elder abuse as a human rights violation. It defines elder abuse as follows:

The abuse can occur in any relationship where there is an expectation of trust between the older person who has experienced abuse or the abuser. Abuse may involve a single act, repeated behaviour or a lack of appropriate action. It may occur when a vulnerable person is persuaded to enter into a financial or sexual transaction to which he or she has not consented, or cannot consent. Many forms of abuse of older people are crimes.¹⁸⁰

Neglect is “the failure of a carer or responsible person to provide the necessities of life to an older person.”¹⁸¹

Most of the definitions coming out of Australia constrain the concept of elder abuse to mistreatment and neglect emerging out of relationships. The following discussion from the *Elder Abuse in the ACT* illustrates and expands on this approach:

2.3 The ACT Government, too, takes a fairly broad view of the term elder abuse. In its submission, the ACT Government noted:

The term elder abuse is often used to describe behaviours or actions which result in harm to an older person where the older person and the person carrying out the action or behaviours are in some relationship which involves trust, dependency or proximity. Elder abuse therefore includes abuse by family, friends, neighbours, paid or volunteer support workers and service-providers, where the abuse happens in the context of this relationship.

2.4 However, all wrongdoings against an older people are not necessarily considered to be elder abuse. The ACT Government submission points out that:

Elder abuse does not generally include action carried out by strangers such as bag-snatching, home invasions, confidence tricks targeting older people or street assault on older people.¹⁸²

¹⁷⁹ Department for Communities, Government of Western Australia. Older People’s Rights.

¹⁸⁰ New South Wales Government, *Interagency Protocol for Responding to Abuse of Older People* (2007) at 5.

¹⁸¹ *Ibid.*, 7.

¹⁸² Australian Capital Territory Standing Committee on Health and Community Care, *Elder Abuse in the ACT* (2001), Legislative Assembly for the Australian Capital Territory, Report Number 11 at 9.

Also as compared with Canadian definitions, the ANPEA definition is notable for the inclusion of social abuse, rarely mentioned in Canadian policy. Social abuse is defined as:

Restricting social freedom and isolation from family and friends.¹⁸³

4.2.2 “Elder” abuse and indigenous cultures—Problems with the term

For many indigenous cultures the term “elder” has a specific meaning, often referring to people who are honoured as having particular wisdom or knowledge to pass on and/or who are political or spiritual leaders in their community. Consequently, in jurisdictions with large Aboriginal populations, such as Canada, New Zealand and Australia, the term “elder abuse” is vulnerable to misinterpretation.

An interesting feature of the ANPEA definition is a footnote stating:

ANPEA recognises that the term ‘elder’ has specific meaning for indigenous people. While the abuse of older people can occur in all communities, the term ‘elder abuse’ does not refer particularly to Aboriginal older people or leaders, individuals and organisations.¹⁸⁴

Relying on the work of Canadian lawyer Charmaine Spencer, the Victorian Elder Abuse Prevention Project points out some of the problems with the term elder:

More recently some jurisdictions have adopted terms such as “the abuse of older people” or “the abuse and neglect of older adults”. This change has occurred because of concerns that the term “elder abuse” may attach a stigma to an older person who has already suffered abuse and that its use may force concentration on only the “oldest of the old”. Another consideration is that the term “elder” has specific meaning in some ethnic and religious communities (Spencer, 1995).¹⁸⁵

In response to problems with the term “elder abuse”, a number of definitions are moving away from the language of elder abuse and neglect and towards the use of “abuse and neglect of older adults.”

¹⁸³ Advocare, “Abuse Prevention” (2005) online: <<http://www.advocare.org.au/app.php>>. Advocare is an independent advocacy agency operating in Western Australia.

¹⁸⁴ Australian Network for the Prevention of Elder Abuse. ANPEA: Preventing elder abuse in an ageing world is everybody’s business. Brochure. Cited in National Aged Care advocacy Program. Preventing Abuse of Older People. <<http://www.agedrights.asn.au/prevent/ANPEA.html>>

¹⁸⁵ Elder Abuse Prevention Project. *Strengthening Victoria’s Response to Elder Abuse* 2005 at 12.

4.3 Conclusion

The primary source of legal definitions of elder abuse in Australia is policies and protocols, the working definition of ANPEA serving as a focal point for the development of further policy amongst non-profit organizations and government alike. This definition mentions social abuse, which does not figure prominently in other jurisdictions. Most of the Australian definitions emphasize the centrality of a breach of a trusting relationship to the concept of elder abuse and neglect. The ANPEA definition notes the potential confusion of using the term “elder”, which has a different meaning in Indigenous cultures, problematizing the appropriateness of the term. Although laws have been passed that address aspects of elder abuse, for example, guardianship legislation, these laws either don’t mention abuse or fail to define “abuse”, let alone “elder abuse”. Like the Canadian experience, a federal structure has resulted in diversity in state responses to the problem.

5.0 NEW ZEALAND

5.1 Legislation

As New Zealand has a single national legislative structure, the same laws apply nationwide. Consequently, New Zealand does not have to deal with the barrier to uniform elder abuse prevention that Canada faces as a result of having different pieces of legislation from province to province.

There is no legislation in New Zealand directed specifically towards the prevention of elder abuse and neglect. However, these issues are addressed through an Elder Abuse and Neglect Prevention system, family violence prevention strategies and initiatives, and similar to Canada, the U.K. and Australia, through the criminal law and civil systems.

Protection of Personal and Property Rights Act 1988

The only legislation in New Zealand directed in some way towards the prevention of elder abuse and neglect, is Part IX of the *Protection of Personal and Property Rights Act 1988*¹⁸⁶ (“PPPRA”). The Act was amended in 2007 by the *Protection of Personal and Property Rights Amendment Act 2007*¹⁸⁷, to provide better protection for older people in the way enduring powers of attorney (“EPA”) are set up and how an attorney can act under them.¹⁸⁸ The target of this part of the PPPRA is the financial abuse of older adults. However, the PPPRA, does not include any definitions of abuse or neglect.

Mental Health (Compulsory Assessment and Treatment) Act 1992

The *Mental Health (Compulsory Assessment and Treatment) Act 1992*¹⁸⁹ creates an offence of intentional neglect or ill-treatment of proposed patient and patients; however, this Act does not define neglect or ill-treatment:

¹⁸⁶ *Protection of Personal and Property Rights Act 1988* (N.Z.), 1988/4, online: <<http://www.legislation.govt.nz/act/public/1988/0004/latest/096be8ed803c3445.pdf>> [PPPRA].

¹⁸⁷ *Protection of Personal and Property Rights Amendment Act 2007* (N.Z.), 2007/90, online: <<http://www.legislation.govt.nz/act/public/2007/0090/latest/DLM968897.html>> [PPPRA-AA].

¹⁸⁸ Office of Senior Citizens, “Keeping You Protected - Enduring Powers of Attorney”, online: <<http://www.osc.govt.nz/enduring-powers-of-attorney/index.html>>.

¹⁸⁹ *Mental Health (Compulsory Assessment and Treatment) Act 1992* (N.Z.), 1992/46 (as at 18 May 2009), online: <<http://www.legislation.govt.nz/act/public/1992/0046/latest/DLM262176.html>>.

114 Neglect or ill-treatment of proposed patients and patients

- (1) This section applies to—
 - (a) The person in charge of a hospital or service at which a proposed patient attends for an assessment examination; and
 - (b) The person in charge of a hospital in which a patient is an inpatient; and
 - (c) A person employed in any such hospital or service and engaged—
 - (i) In the conduct of an assessment examination of a proposed patient; or
 - (ii) In the assessment or treatment of a patient; and
 - (d) The person in charge of a home, house, or other place where a proposed patient or patient resides.
- (2) Every such person who intentionally ill-treats or intentionally neglects any such proposed patient or patient commits an offence and is liable on conviction on indictment to imprisonment for a term not exceeding 2 years.

Although not specifically targeted at older adults, the *Domestic Violence Act 1995*¹⁹⁰ does provide protection for older adults who may be victims of domestic abuse. This Act does not define elder abuse or neglect.

5.2 Policy

5.2.1 Relationships of trust

The emphasis on breach of trust in New Zealand mirrors the Australian approach to elder abuse and neglect.

In 1990 the New Zealand government established the Office for Senior Citizens¹⁹¹ (“OSC”), which is administered by the Ministry of Social Development.¹⁹² “The Office for Senior Citizens provides policy advice on issues affecting older people; promotes and monitors the New Zealand Positive Ageing Strategy and provides services to the Minister for Senior Citizens.”¹⁹³

Following every general election, the OSC produces a briefing document to the incoming Minister. Chapter 7 of their 2002 briefing entitled, *Overview: Briefing To The Incoming Minister For Senior Citizens 2002*¹⁹⁴ (“Briefing Document 2002”) includes the following definitions of elder abuse and neglect:

¹⁹⁰ *Domestic Violence Act 1995* (N.Z.), 1995/86, online:

<<http://www.legislation.govt.nz/act/public/1995/0086/latest/viewpdf.aspx>>.

¹⁹¹ Office for Senior Citizens, online: <<http://www.osc.govt.nz>> [OSC].

¹⁹² Ministry of Social Development, online: <<http://www.msd.govt.nz>> [MSD].

¹⁹³ MSD, online: <<http://www.msd.govt.nz/about-msd-and-our-work/about-msd/our-structure/policy-cluster.html>>.

¹⁹⁴ OSC, *Overview: Briefing To The Incoming Minister For Senior Citizens 2002* (2002), online: <<http://www.osc.govt.nz/publications/briefing-incoming-minister/2002/index.html>> [Briefing Document 2002].

Elder abuse and neglect is any act occurring within a relationship where there is an existing degree of trust on the part of an older person which results in harm to that older person.

Categories of elder abuse may be identified as:[1- from Age Concern New Zealand]

- physical abuse infliction of physical pain, injury or force;
- psychological abuse behaviour that causes mental or emotional anguish or fear;
- sexual abuse sexually abusive and exploitative behaviours involving threats, force, or the inability of a person to give consent;
- material/financial abuse the illegal or improper exploitation and/or use of funds or other resources;
- active neglect conscious and intentional deprivation by a carer of basic necessities resulting in harmful effects; and
- passive neglect refusal or failure by a carer, because of inadequate knowledge, infirmity or disputing the value of the prescribed service, to provide basic necessities resulting in harmful effects.¹⁹⁵

Their 2008 briefing entitled, *Briefing to the Incoming Minister for 2008—New Zealanders: getting older, doing more*¹⁹⁶, provides some discussion about the challenges of the issue of elder abuse and neglect but does not provide any definitions.

Family and Community Services¹⁹⁷ is responsible for a number of family violence prevention programmes, including Elder Abuse and Neglect Prevention Services (“EANPS”).¹⁹⁸ FCS funds 24 community-based EANPSs in New Zealand, which are coordinated by Age Concern New Zealand.¹⁹⁹ Age Concern New Zealand (“ACNZ”)²⁰⁰ also provides “support and advice to service providers, develop resources and increase community awareness through regional forums and a national conference. They also work with providers to encourage nationally consistent outcomes for older people who experience elder abuse and neglect.”²⁰¹

The Elder Abuse and Neglect Prevention section on the FCS website includes the following description of elder abuse and neglect:

¹⁹⁵ Briefing Document 2002, *ibid.*, Chapter 7, online: <<http://www.osc.govt.nz/publications/briefing-incoming-minister/2002/chapter-7.html>>.

¹⁹⁶ OSC, *Briefing to the Incoming Minister for 2008 - New Zealanders: getting older, doing more* (2008), online: <<http://www.msd.govt.nz/about-msd-and-our-work/publications-resources/corporate/briefing-incoming-minister/index.html#NewZealandersgettingolderdoingmore7>>.

¹⁹⁷ Family and Community Services, online: <<http://www.familyservices.govt.nz/>> [FCS].

¹⁹⁸ FCS, “Elder Abuse and Neglect Prevention”, online: <<http://www.familyservices.govt.nz/our-work/preventing-violence/eanp.html>>.

¹⁹⁹ FCS, *ibid.*

²⁰⁰ Age Concern New Zealand, online: <www.ageconcern.org.nz>.

²⁰¹ FCS, *supra* note 197.

Elder Abuse and Neglect occurs within a relationship of trust. The victim and the abuser are people who know each other well. Often the abuser is a member of the older person's family. Other abusers can include people employed in positions of trust—residential facility staff or paid carers. Elder abuse and neglect is a significant social issue.²⁰²

For more information on elder abuse and neglect, the Elder Abuse and Neglect Prevention section of the FCS website provides direction to the Agewell New Zealand website. Agewell²⁰³ is administered by Age Concern North Shore and funded by the New Zealand Ministry of Health. Agewell provides information on elder abuse and neglect, including adding for the first time a distinction between active and passive neglect in the following definitions:

What is Elder Abuse and Neglect?

Elder Abuse and Neglect occurs within a relationship of trust. The victim and the abuser are people who know each other well. Statistics from services in New Zealand show that the majority of abusers are members of the kaumatua/older person's family/whanau (partners, sons, daughters, in laws, siblings, grandchildren). Other abusers include people employed in positions of trust—residential facility staff or paid carers.

Definitions

Elder Abuse

Elder Abuse occurs when a person aged 65 or more experiences harmful physical, psychological, sexual, material/financial or social effects caused by the behaviour of another person with whom they have a relationship implying trust.

Elder Neglect

Elder Neglect occurs when a person aged 65 or more experiences harmful physical, psychological, sexual, material/financial or social effects caused by the behaviour of another person with whom they have a relationship implying trust.

Neglect

Neglect occurs as a result of another person failing to meet the physical and emotional needs of an older person/kaumatua.

- ACTIVE NEGLECT is conscious and intentional deprivation.
- PASSIVE NEGLECT is the result of the carer's inadequate knowledge, infirmity or lack of trust in prescribed services.

²⁰² FCS, *ibid.*

²⁰³ Agewell, online: <<http://www.agewell.org.nz/index.htm>> [Agewell].

The Families Commission²⁰⁴ is a Crown agency that was established in 2004 pursuant to section 6 of the *Families Commission Act* (“FCA”)²⁰⁵. In January 2008, the Families Commission published their report entitled, *Elder Abuse and Neglect—Exploration of risk and protective factors*²⁰⁶. This report includes the following discussion and definitions of elder abuse and neglect:

For the purposes of this research project the definition used by New Zealand Age Concern Elder Abuse and Prevention Services was adopted. Age Concern New Zealand (Age Concern New Zealand Inc, 2005) says that elder abuse and neglect is usually committed by a person known to the victim and with whom they have a relationship implying trust. A person who abuses an older person usually has some sort of control or influence over him/her. Family members, friends, staff in residential facilities or anyone the older person relies on for basic needs, may be abusers....

This definition is widely accepted and used in New Zealand. It was ratified at the National Strategic Research Planning day in 2006 as the agreed definition of elder abuse and neglect (Age Concern New Zealand Inc, 2006).

The interpretation of neglect is as problematic as that of abuse. Neglect has been shown to be the most common form of mistreatment of older people. In New Zealand, neglect is generally defined as a result of another person failing to meet the physical and emotional needs of an older person. Neglect is often further classified as passive or active. Passive neglect is the result of the carers’ inadequate knowledge, illness or lack of trust in prescribed services. Active neglect is the conscious and intentional deprivation of an older person of care (Age Concern New Zealand Inc, 2005).²⁰⁷

5.2.2 Elder abuse as a form of family violence

In New Zealand, definitions and discussions of elder abuse and neglect appear primarily within the context of analyses of family violence, a sub category of the larger category of breaches of relationships of trust.

In December 2004, the Minister of Social Development and Employment released a social development strategy entitled, *Opportunity for All New Zealanders*²⁰⁸ (“Opportunity for All”). Part 2 of Opportunity for All sets out five critical social issues that have been identified by the New Zealand government as priorities for interagency

²⁰⁴ The Families Commission, online: <<http://www.nzfamilies.org.nz/>>

²⁰⁵ *Families Commission Act 2003* (N.Z.), 2003/128, online: <<http://www.legislation.govt.nz/act/public/2003/0128/latest/viewpdf.aspx>>.

²⁰⁶ Families Commission, *Elder Abuse and Neglect—Exploration of risk and protective factors* (2008), online: <<http://www.nzfamilies.org.nz/publications/research.php>> [*Elder Abuse and Neglect*].

²⁰⁷ *Elder Abuse and Neglect*, *ibid.*, 12.

²⁰⁸ Ministry of Social Development, *Opportunity for All New Zealanders* (2004), online: <<http://www.msd.govt.nz/about-msd-and-our-work/publications-resources/planning-strategy/opportunity-for-all/index.html>> [*Opportunity for All*].

action, including the priority of “minimising family violence, and abuse and neglect of children and older persons”. In their discussion of this priority, Opportunity for All defines “family violence” and “elder abuse and neglect”. The definition of family violence mentions elder abuse specifically:

Family violence is violence or abuse of any type, perpetrated by one family member against another family member. It includes physical, sexual and psychological abuse.

Common forms of violence include:

- partner or spouse abuse
- child abuse and neglect (including serious sibling abuse)
- elder abuse and neglect (including abuse of parents by adult children) (from *Te Rito*²⁰⁹)

Elder abuse and neglect is when a person aged 65 years or more experiences harmful physical, psychological, sexual, material or social effects caused by the behaviour of another person with whom they have a relationship implying trust. This may occur in many different settings including private homes, rest homes and hospitals. (at 76)

The above definition of family violence is taken from the publication *Te Rito, the New Zealand Family Violence Strategy* (“*Te Rito*”), released by the Ministry of Social Development in 2002, which deals with the prevention of all forms of family violence, including “intra-family elder abuse and neglect.” *Te Rito* is a collaborative approach between government and non-government organizations, which sets out key principles, goals and a framework for actions for family violence prevention.²¹⁰

Te Rito includes a description of family violence, as well as the common forms of family violence (with specific reference to “elder abuse and neglect”):

What is family violence?

Family violence covers a broad range of controlling behaviours, commonly of a physical, sexual, and/or psychological nature which typically involve fear, intimidation and emotional deprivation. It occurs within a variety of close interpersonal relationships, such as between partners, parents and children, siblings, and in other relationships where significant others are not part of the physical

²⁰⁹ New Zealand, *Te Rito: New Zealand Family Violence Prevention Strategy*, (Wellington: Ministry of Social Development, 2002) online:

<http://www.msd.govt.nz/about-msd-and-our-work/publications-resources/planning-strategy/te-rito/>

²¹⁰ *Te Rito, ibid.*

household but are part of the family and/or are fulfilling the function of family. Common forms of violence in families/wha-nau include:

- spouse/partner abuse (violence among adult partners);
- child abuse/neglect (abuse/neglect of children by an adult);
- elder abuse/neglect (abuse/neglect of older people aged approximately 65 years and over, by a person with whom they have a relationship of trust);
- parental abuse (violence perpetrated by a child against their parent); and
- sibling abuse (violence among siblings).²¹¹

5.2.3 Cultural aspects to elder abuse

The Agewell discussion of abuse and neglect addresses briefly the challenge of defining elder abuse across cultures:

Abuse and Neglect for Maori

Maori recognise the types of elder abuse and neglect defined here but responds to this in a way which considers the context of the four cornerstones of health—Taha Wairua (Spiritual), Taha Whanau (Family), Taha Hinengaro (Mental), Taha Tinana (Physical). In this context, definitions of abuse and neglect may also include the lack of culturally appropriate services, preventing contact with Whanau and non-practice of traditional ways.

In responding to elder abuse and neglect Maori promote a holistic approach involving whanau, traditional cultural values including decision making processes, and the four cornerstones of health to restore manaakitanga.²¹²

5.3 Court Decisions

As is the case in Canada, crime against older adults is addressed through general crimes; elder specific criminal offences do not exist in New Zealand. As such, appellate level jurisprudence involving elderly victims of crime often are sentencing appeals with consideration of aggravating factors. Below the key facts of three noteworthy cases are summarized:

The Queen v. Simpson²¹³: The offender Simpson committed four offences of deceiving elderly victims for monetary gain. Three of the offences were committed while he was out on bail for similar offences; he was on parole when all of the offences occurred. Simpson posed as a roofer and knocked on the doors of elderly men and women, offering to do roof repairs. Three of the victims lived alone; all were between 70 and 88 years of

²¹¹ *Te Rito, ibid*, 8.

²¹² Agewell, “What is elder abuse and neglect”, <http://www.agewell.org.nz/elder_abuse_and_neglect.htm#What_is_Elder_Abuse_and_Neglect>.

²¹³ *The Queen v. Simpson* [2008] NZCA 467 [Simpson].

age. Simpson gained the victims' confidence and convinced them to give him deposits for the work. The repairs were not carried out, except for some minor work in two instances. The victims often invited Simpson into their homes and some even allowed him to go with them to the bank to withdraw the funds. Simpson's scams resulted in embarrassment and loss of trust and confidence on the part of the victims. All were on fixed incomes and could not afford the loss. Simpson was sentenced to four years imprisonment.

*The Queen v. Nixon*²¹⁴: Nixon chose his victim, a 67-year-old man, in advance. He went to the home of the victim and identified himself as a representative from a company investigating sexual complaints. Nixon informed the victim that a complaint was received from a young girl, alleging that the victim had raped and indecently assaulted the complainant, which the victim denied. Nixon later telephoned the victim and informed him that the complainant would agree not to go to the police if the victim paid her money. Nixon collected \$40 from the victim, and later requested \$650 on the basis of the complainant not being satisfied with the original sum.

*The Queen v. Goodman*²¹⁵: Goodman was a career burglar who regularly preyed on elderly victims living alone, who were easy to steal from whether they were home or not, and easy to escape from. Goodman entered the home of Mrs. Morriss, an 83-year-old widow living alone. While Goodman was in the bedroom sorting through belongings, Mrs. Morriss entered the room and likely blocked the doorway, barring Goodman's exit. Goodman knocked Mrs. Morriss to the ground and stabbed her five or six times near the heart. There was also evidence of blows to the head, possibly by kicks, punches, or a blunt object. The victim bled to death as a result of the stab wounds. Goodman was sentenced to life imprisonment.

5.3.1 Vulnerable elderly victims of crime

The language of the above decisions, emphasizing the vulnerability of "elderly victims" and denouncing crimes in which vulnerable victims are specifically targeted, resembles the Canadian jurisprudence.

In *Goodman* the judge emphasizes that the victim was "a frail, elderly lady" stating:

Brutal crimes such as this, committed against defenceless elderly people in their homes cannot be tolerated. It is conduct that must be denounced in the strongest terms.²¹⁶

In *Nixon* the judge held that the vulnerability of the victim and the trauma he or she sustains will be considered aggravating factors in sentencing. In this case the victim's age and the fact that he lived alone in public housing made the vulnerability of the victim

²¹⁴ *The Queen v. Nixon* [2008] NZHC 163 [Nixon].

²¹⁵ *The Queen v. Goodman* [2007] NZHC 1405.

²¹⁶ *Ibid.*, para. 3.

readily apparent to Nixon, who sought the victim out deliberately. The judge uses the language of “preying” on the elderly, reminiscent of the Canadian jurisprudence, in concluding, the “community is entitled to know that people who prey on elderly victims, like you did, are likely to go to jail in consequence of that offending.”²¹⁷

Both the planning and the vulnerability of the victims were identified as the aggravating factors in sentencing at first instance in the *Simpson* case. The appellate level decision affirms this approach. The judge declares “the protection of the community assumes added importance in cases of recidivist offending against vulnerable members of the community.”²¹⁸

5.4 Conclusion

As a result of its unitary government structure, the New Zealand response to elder abuse is less complex than that of Australia, Canada or the United States. New Zealand law contains power of attorney legislation, domestic violence and mental health legislation that impact on elder abuse, capturing, respectively, financial abuse, family violence and abuse of care facility residents; however, none of these laws define “elder abuse” *per se*.

In policy, the New Zealand approach parallels the Australian emphasis on breach of trust, with an expanding focus on elder abuse as a form of family violence—an approach taken in a number of Canadian jurisdictions. Recognition of cultural aspects to the problem of defining elder abuse also appears in New Zealand material, with a particular concern for the Maori people.

²¹⁷ *Ibid.*, para. 33.

²¹⁸ *Ibid.*, para. 15.

6.0 SOUTH AFRICA

6.1 Legislation

Aged Persons Act, 1967 and Aged Persons Amendment Act, 1998

The *Aged Persons Amendment Act, 1998*, No. 100 of 1998²¹⁹ (“APAA”), as amended from time to time, was assented to 19 November 1998 and is currently in force. The APAA amends the *Aged Persons Act, 1967*, No. 81 of 1967²²⁰ (“APA”), which focuses on protection of older person in residential care. Section 1 of the APAA amends the APA to include the following definition of “abuse”:

‘abuse’ means the maltreatment of an aged person or any other infliction of physical, mental or financial power on an aged person which adversely affects that person.²²¹

The APA will likely be repealed when the *Older Persons Act* no. 13 of 2006 comes into force.

Older Persons Act, 2006

The *Older Persons Act, 2006*, No. 13 of 2006²²² (“OPA”) was assented to on 29 October 2006 but has not yet come into force. Section 1 of the OPA defines “older person” as, “a person who, in the case of a male, is 65 years of age or older and, in the case of a female, is 60 years of age or older.”²²³ It codifies a narrower concept of elder abuse that limits it to relationships of trust. Section 30 of the OPA creates an offence of abuse of an older person and establishes “that a person convicted of any crime or offence has abused an older person in the commission of such crime or offence must be regarded as an

²¹⁹ *Aged Persons Amendment Act, 1998*, No. 100 of 1998, online:

<<http://www.info.gov.za/view/DownloadFileAction?id=70635>> [AAPA].

²²⁰ *Aged Persons Act, 1967*, No. 81 of 1967.

²²¹ AAPA, *supra* note 219 at s.1.

²²² *Older Persons Act, 2006*, No. 13 of 2006, online:

<<http://www.info.gov.za/view/DownloadFileAction?id=67839>> [OPA].

²²³ OPA, *ibid.*, s.1. This section has been a source of controversy due to its unequal application to men and women, which is considered by many to be discriminatory.

aggravating circumstance for sentencing purposes.”²²⁴ Section 30 includes the following definition of abuse:

(2) Any conduct or lack of appropriate action, occurring within a relationship where there is an expectation of trust, which caused harm or distress or is likely to cause harm or distress to an older person constitutes abuse of an older person.

(3) For the purposes of subsection (2), ‘abuse’ includes physical, sexual, psychological and economic abuse and—

(a) ‘physical abuse’ means any act or threat of physical violence towards an older person;

(b) ‘sexual abuse’ means any conduct that violates the sexual integrity of an older person;

(c) ‘psychological abuse’ means any pattern of degrading or humiliating conduct towards an older person, including—

(i) repeated insults, ridicule or name calling;

(ii) repeated threats to cause emotional pain; and

(iii) repeated invasion of an older person’s privacy, liberty, integrity or security;

(d) ‘economic abuse’ means—

(i) the deprivation of economic and financial resources to which an older person is entitled under any law;

(ii) the unreasonable deprivation of economic and financial resources which the older person requires out of necessity; or

(iii) the disposal of household effects or other property that belongs to the older person without the older person’s consent.²²⁵

In November 2007, the Department of Social Development published in the Government Gazette a Publication for Comment entitled, *Draft Regulations Under the Older Persons Act, 2006 Relating to Chapter 5 of the Act* (“OPA Draft Regulations”)²²⁶. Annexure B of the OPA Draft Regulations is a National Elder Abuse Protocol based on:

- The National Elder Abuse Strategy of the Department of Health;
- The report and recommendations of the Ministerial Committee of Enquiry on the abuse of Older Persons;
- Elder abuse protocols from Australia, England, New Zealand and Canada;

²²⁴ OPA, *ibid.*, s. 30(4).

²²⁵ OPA, *ibid.*, ss. 30(2) & (3).

²²⁶ *Draft Regulations Under the Older Persons Act, 2006 Relating to Chapter 5 of the Act*, online: <<http://www.info.gov.za/view/DownloadFileAction?id=73720>> [OPA Draft Regulations].

- The efforts and work of a Steering Committee in Kwa Zulu Natal under Chairperson, Ms. Sibongile Dube²²⁷

Section 5 of Annexure B of the OPA Draft Regulations defines a number of terms including elder abuse:

This Protocol uses the terms “older person” and “elder” interchangeably. No specific age limit has been applied as this could exclude adults who experience chronic disease, physical or psychological disability, or premature ageing. Elder abuse is defined; as are elder protection and also different forms of abuse...

Elder Abuse refers to a single or repeated act, or lack of appropriate action, which causes harm or distress to an older person, occurring within any relationship where there is an expectation of trust. Harm includes physical, psychological, financial and material abuse, and sexual abuse, as well as neglect, violation of rights and systemic abuse. In terms of Article 30 (2 + 3) of the Older Persons Act 13 of 200, abuse means:

(2) Any conduct or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress or is likely to cause ham or distress to an older person constitutes abuse of an older person.

This Protocol contains the only reference to the notion of systemic abuse as a type of abuse in South Africa.

6.2 Policy

In 1998, in partnership with other relevant government departments and non-governmental organizations, the Department of Health formed a committee to develop a National Elder Abuse Strategy. Two years later, the Department of Health published, *National Strategy on Elder Abuse—Baseline Document* (“National Strategy”).²²⁸ Chapter 1 of the National Strategy includes the following definition of “elder abuse”, unique for its explicit reference to power imbalances in the discussion of relationships of trust:

3. WHAT IS ELDER ABUSE?

It is difficult in a relatively new and changing field to find agreement on a generic term to describe the phenomenon of Elder Abuse. Definitions are not only needed for “academic” purposes, definitions are needed in legislation and policy where they can compel certain action and direct resources. Cultural diversities complicate the debate on defining abuse even further.

²²⁷ OPA Draft Regulations, *ibid*, Annexure B.

²²⁸ Department of Health, *National Strategy on Elder Abuse—Baseline Document* (2000), online: <<http://www.doh.gov.za/docs/factsheets/guidelines/elders/>> [National Strategy].

Abuse may be summarised as harm inflicted on an individual usually by someone in a position of power, trust or authority over the individual. It may happen “once-off” or become a regular feature. Others may be unaware that abuse is taking place and for that reason abuse may be difficult to detect.²²⁹

Action on Elder Abuse South Africa (“AEASA”)²³⁰ is a national non-governmental organization focused on elder abuse prevention. AEASA defines elder abuse as:

[A]ny act of commission or omission, intentional or unintentional, that causes an older person to experience distress, harm, suffering, victimization or loss that usually occurs within a relationship where there is an expectation of trust.²³¹

Finally, following public outcry in 2000, in response to media reports about the abuse of older people in residential care, pension line-ups and the community, the Minister of Social Development commissioned an investigation into the abuse, neglect and ill-treatment of older persons. The investigation, which included public hearings before a Ministerial Committee, culminated in the release of the two-volume report, *Mothers and Fathers of the Nation: The Forgotten People—The Ministerial Report on Abuse, Neglect and ill-treatment of Older Persons* (“*Mothers and Fathers*”).²³² Although this publication does not clearly define “elder abuse” it includes rich discussion on definitions of abuse and neglect, aspects of which are worth mentioning:

1.3 DEFINING ABUSE:

In 1987 the term “abuse and neglect of the elderly” was used to describe situations in which individuals over the age of 65 experienced battering, verbal abuse, exploitation, denial of rights, forced confinement, neglected medical needs or other types of personal harm, usually at the hands of someone responsible for assisting them in their activities of daily living...

O’Malley sought to place abuse and neglect within the wider context of inadequate care, defining it as “...The wilful infliction of physical pain...mental anguish...or deprivation by a carer of services which are necessary to the maintenance of mental and physical health”. But Hudson & Hudson maintained that the label of abuse could only be applied if it was clear that the carer or the caregiver intended no harm. According to them, O’Malley’s definition excluded independent older people who could also be victims of abuse.

²²⁹ National Strategy, *ibid.*, 8.

²³⁰ Action on Elder Abuse South Africa, online: <<http://www.actiononelderabusesa.co.za>> [AEASA].

²³¹ AEASA, in Monica Ferreira & Pat Lindgren, “Elder Abuse and Neglect in South Africa: A Case of Marginalization, Disrespect, Exploitation and Violence” (2008) 20:2 J. of Elder Abuse & Neglect 91 at 92, online: <<http://www.informaworld.com/smpp/content~content=a902298180~db=all~jumptype=rss>>.

²³² Department of Social Development, *Mothers and Fathers of the Nation: The Forgotten People—The Ministerial Report on Abuse, Neglect and ill-treatment of Older Persons* (2003), online: <<http://www.welfare.gov.za/Documents/2001/March/elder.htm>> [*Mothers and Fathers*].

Bennett & Kingston ask: What about the carer who inflicts pain, but has no wilful intent (perhaps because of lack of caring skills)?

An interesting argument comes from Pillemer & Wolf who see a tautological problem of using the word abuse to define itself. Even though forms of abuse are distinguished, neglect and abuse are basically defined as neglect and abuse. They prefer the term “elder mistreatment.”

Elder abuse remains a taboo subject and professionals and the general public often do not believe that it exists. Pritchard feels that it will take many years before any meaningful agreement is reached on an all-embracing definition of abuse, during which time the problem will be getting worse.

6.3 Court decisions

The South African appellate level court decisions we located which involved an elderly victim and language potentially relevant to shaping the legal definition of elder abuse were characterized by extreme violence. Each of the three cases contained in this review involved a deceased victim and the appellant was charged with murder. The facts, decisions and sentence are summarized below:

*S. v. Brandt*²³³: Brandt travelled to the home of his parents with the intent to kill them in order to elevate his status in a satanic sect. He purchased a knife on the way. He backed out of his plan upon arrival at the family home. Brandt then consumed brandy and smoked dagga. He needed a car and money to get back. He decided to rob his parents’ neighbour, a 75-year-old woman. Brandt pretended to borrow a recipe; once in the house, he allegedly decided to kill the woman to appease members of the sect. Brandt stabbed the woman in the neck and staged the scene to look like a suicide. He took her car keys, money, etc. and attempted to drive away, but the car wasn’t there. At the time of the offence, Brandt was seventeen years old and thus below the age of majority. At trial the judge applied the minimum sentencing provisions and Brandt was sentenced to life imprisonment. At issue on appeal was whether, given all the circumstances surrounding the crime and the appellant, including Brandt’s youth and personal history, the sentence of life imprisonment was appropriate. The judge substituted a sentence of eighteen years.

*S. v. Francis*²³⁴: Francis was sentenced to death for the murder of a man (“the deceased”), along with charges for aggravated robbery and attempted murder (of “the complainant”, the deceased’s wife). The deceased, 82, and the complainant, 79, lived alone on a farm. Francis and another, Khanyile, accosted the deceased one night when he went to get something from his car. Khanyile used to work for the couple. Francis entered the house and ushered the complainant at gunpoint out to where the deceased was with Khanyile. The offenders took the victims back into the house; on the way, Francis said to

²³³ *S. v. Brandt* [2004] ZASCA 120.

²³⁴ *S. v. Francis* [1993] ZASCA 63.

Khanyile that they would have to kill the couple to protect themselves from being identified. The complainant tried to escape twice, but was stopped; Khanyile threatened to kill her both times and eventually shot and killed the deceased. Khanyile also attempted to rape the complainant. The appeal concerned whether the sentence of death was appropriate. The sentence was upheld on appeal.

*S. v. Shandu*²³⁵: The deceased was an elderly man (69) living in a retirement village. The appellant and others (number of assailants not stated in judgment) took the deceased's home by force at night. They ransacked the home, loaded the stolen goods into the deceased's car. They forced the deceased into the car, drove him 70km to a secluded spot, and shot him in the head. The deceased's body was covered in an inflammable substance and set on fire.

As these summarizes should illustrate, comparing these cases to decisions coming out of other jurisdictions may be of marginal utility. However, they do emphasize the vulnerability of an elderly victim as a factor relevant to sentencing. In *Brandt* the judge states, "...the offence itself is particularly heinous. The deceased, a defenceless elderly lady, was murdered in the sanctity of her home by the appellant who entered under some false pretext in order to perpetrate a robbery."²³⁶ *Francis* contains the following recitation of sentencing principles:

While regard must be had to all the main objects of punishment when determining an appropriate sentence, it has repeatedly been emphasised [*sic*] by this Court that in cases of murder of elderly victims in their own homes with robbery as the motive, the factors of retribution and deterrence inevitably tend to come to the fore.²³⁷

The *Shandu* decision includes the targeting of the elderly victims as an aggravating factor, noting "[it was likely the appellant's brother] had 'earmarked and targeted' the deceased's house".²³⁸ *Shandu* was sentenced to death at trial for the murder charge. The appeal of his death sentence was dismissed.

²³⁵ *S. v. Shandu* [1993] ZASCA 29.

²³⁶ *Ibid.*, para. 26.

²³⁷ *Ibid.*, 11-12, citing *S. v. Tloome* [1992] (2) SACR 30 (A).

²³⁸ *Ibid.*, 4.

6.4 Conclusion

South Africa is one of the few jurisdictions we reviewed to have created a national statute specifically addressing older adults. The *Aged Persons Act* of 1967, which addresses abuse in residential care, contains a broad definition of abuse. However, the *Older Persons Act* of 2006, assented to but not yet law, codifies a definition emphasizing breach of trust and applies to the more general South African population. South African policy generally follows this more narrow approach of limiting abuse to relationships of trust.

7.0 THE UNITED STATES

In the United States, legal definitions of elder abuse and neglect exist at both the national and state level. This study surveys seven American states: Florida, Arizona, Illinois, California, Massachusetts, New Mexico and New York. These states were selected because they are known to have been particularly responsive in terms of enacting legislation to address elder abuse and neglect.

7.1 Legislation

Elder abuse and neglect legislation—in the three areas of civil, criminal and adult protection—has been created in each of the states at different rates and in different ways, with all states proceeding with some kind of legislated response to the problem. As a result, each state has a slightly different set of definitions for the term “elder abuse” and other related concepts. At the federal level, the U.S. has the *Older Americans Act*.²³⁹ Each of the seven jurisdictions we researched has some form of elder abuse crime, except for New Mexico, which has adult protection legislation in place to address elder abuse and neglect.

7.1.1 The federal framework: The *Older Americans Act*

The U.S. Code contains the *Older Americans Act*, an act that recognizes the value of elderly Americans and reinforces various objectives in relation to protecting their rights. Although the Code does not list elder abuse as a crime, section 3001 sets out the congressional objectives of Chapter 35: Programs for Older Americans and provides definitions of relevance to this project. The objectives are based on the entitlement of older adults to the traditional American concept of individual dignity. Congress notes that it is the duty and responsibility of both federal and state governments to ensure that the objectives are met and to assist in securing “equal opportunity to the full and free enjoyment” of the objectives.

Ten objectives are listed, but the last line of subsection 10 is most relevant for our purposes:

“...protection against abuse, neglect, and exploitation.”

Section 3002 provides definitions of several terms that are linked to the definition of elder abuse and neglect.

²³⁹ 42 U.S.C. 35 §3001 et seq.

“abuse” means the willful—

(A) infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm, pain, or mental anguish; or

(B) deprivation by a person, including a caregiver, of goods or services that are necessary to avoid physical harm, mental anguish, or mental illness.

“elder abuse” means abuse of an older individual

“older individual” means an individual who is 60 years of age or older.

“neglect” means

(A) the failure of a caregiver (as defined in paragraph 18(B)) or the fiduciary to provide the goods or services that are necessary to maintain the health or safety of an older individual;

or

(B) self-neglect.

Section 13925 is unique in that it provides a separate definition for “elder abuse” in the context of violence against older women.²⁴⁰ In this subchapter (Violence Against Women), an elder is a person over 50 years of age. The definition of abuse mirrors the definition in section 3002.

7.1.2 State legislative responses to elder abuse

Of the seven states researched, Arizona, California, Florida, Illinois, Massachusetts and New York all have criminal legislation in place under which elder abuse may be specifically prosecuted, in lieu of crimes of general application such as assault, fraud, or criminal negligence. With the exception of Arizona, all of these jurisdictions explicitly use the term “elder abuse” in defining the crime. Each of the seven US jurisdictions has adult protective services legislation (APS) in place. As is the case in other countries, mistreatment of older adults is sometimes dealt with under the concept of vulnerable adult abuse rather than elder-specific legislation. In terms of the seven state responses we reviewed, New Mexico is unique in that it deals with elder abuse exclusively in an adult protection context and has not criminalized elder abuse or abuse of vulnerable adults (as in Arizona), as a specific offence.

7.1.2.1 What is an “elder”?

What constitutes an elder varies across the U.S. jurisdictions. An elder in California and Florida is any person 65 or older. In Illinois, New York and Massachusetts an elder is 60 years or older, in keeping with the *Older Americans Act* definition. Arizona does not have specific elder abuse legislation; it uses the term “vulnerable adult” in its APS and criminal legislation. An elder may be a vulnerable adult if his or her “advanced age” constitutes “an impairment” or he or she suffers from some other physical or mental

²⁴⁰ 42 U.S.C. 136 §13925.

incapacity.²⁴¹ Thus there is no minimum age for elder abuse; rather, a victim must be at least over 18. A claim for vulnerability due to “advanced age” implies a typical senior (60 to 65 years or older); however, no case law was found interpreting this incapacity due to advanced age.

7.1.2.2 The criminalization of elder abuse: Complex, lengthy, fragmented definitions

The structure of the American definitions is very different from anything appearing in the other jurisdictions reviewed as part of this study. A complete picture of what constitutes elder abuse and neglect for each state requires a cross referencing of the criminal offences and the definitions contained therein with the various definitions appearing elsewhere in the state’s legislation, such as in public welfare and adult protection schemes. In this sense the definitions are complex and heavily codified in a fragmentary manner. In addition, each state has taken its own approach to defining the crime of elder abuse.

The Illinois Criminal Code contains a section on elder or disabled adult abuse and neglect,²⁴² which includes the crimes of “criminal abuse or neglect of an elderly or disabled person” and “financial exploitation of an elderly person”. Abuse and neglect are effectively defined together in three areas of the statute: (1) the definitions section of the Act describes a number of key terms including “abuse”, “abuser”, “caregiver”, “eligible adult” and “neglect”; (2) a number of relevant definitions exist in the sections setting out the offenses (“abandonment” and “elderly person”); and (3) a final component of the definition is the description of the offense. In a sense, the Illinois definition of elder abuse in the criminal context emerges out of the interplay between these elements. For example, consider the following abuse and neglect provision:

5/12-21. Criminal abuse or neglect of an elderly person or person with a disability.

- (a) A person commits the offense of criminal abuse or neglect of an elderly person or person with a disability when he or she is a caregiver and he or she knowingly:
- (1) performs acts that cause the elderly person or person with a disability’s life to be endangered, health to be injured, or pre-existing physical or mental condition to deteriorate; or
 - (2) fails to perform acts that he or she knows or reasonably should know are necessary to maintain or preserve the life or health of the elderly person or person with a disability and such failure causes the elderly person or person with a disability’s life to be endangered, health to be injured or pre-existing physical or mental condition to deteriorate; or
 - (3) abandons the elderly person or person with a disability; or
 - (4) physically abuses, harasses, intimidates, or interferes with the personal liberty of the elderly person or person with a disability or exposes the elderly person or person with a disability to willful deprivation.

²⁴¹ Ariz. Rev. Stat. §46-451.

²⁴² 720 Ill. Comp. Stat. 5/12-21 et seq.

(b) For purposes of this Section:

(1) “Elderly person” means a person 60 years of age or older who is incapable of adequately providing for his own health and personal care. [...]

The abuse and neglect provision also provides a lengthy definition for “caregiver”; the term extends to any person who, by contractual, voluntary, familial, or fiduciary relationship, stands in a position of responsibility toward the elderly individual.²⁴³

Massachusetts has created the offense “assault or battery of an elderly person”.²⁴⁴ In addition to defining terms such as “assault”, “physical harm”, and “mistreatment”, this offense lists the term “abuse” in the definitions section as:

...physical contact which either harms or creates a substantial likelihood of harm.²⁴⁵

Florida has created a number of elder-specific crimes, including abuse and exploitation. Both definitions place a great deal of emphasis on intent:

(1) “Abuse of an elderly person or disabled adult” means:

- (a) Intentional infliction of physical or psychological injury upon an elderly person or disabled adult;
- (b) An intentional act that could reasonably be expected to result in physical or psychological injury to an elderly person or disabled adult; or
- (c) Active encouragement of any person to commit an act that results or could reasonably be expected to result in physical or psychological injury to an elderly person or disabled adult.²⁴⁶

(1) “Exploitation of an elderly person or disabled adult” means:

(a) Knowingly, by deception or intimidation, obtaining or using, or endeavoring to obtain or use, an elderly person’s or disabled adult’s funds, assets, or property with the intent to temporarily or permanently deprive the elderly person or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person or disabled adult, by a person who:

1. Stands in a position of trust and confidence with the elderly person or disabled adult; or

2. Has a business relationship with the elderly person or disabled adult; or

(b) Obtaining or using, endeavoring to obtain or use, or conspiring with another to obtain or use an elderly person’s or disabled adult’s funds, assets, or property with the intent to temporarily or permanently deprive the elderly person or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person or disabled adult, by a person who knows or

²⁴³ *Ibid.*

²⁴⁴ Mass. Gen. Laws c. 265, §13K et seq.

²⁴⁵ *Ibid.*, §13K (a).

²⁴⁶ Fla. Stat. §825-102(1).

reasonably should know that the elderly person or disabled adult lacks the capacity to consent.²⁴⁷

California groups elder and disabled adult abuse together under one penal provision.²⁴⁸ The crime has an important knowledge component—an offender will know or reasonably should know that the victim is an elderly person. Certain factors will affect the severity of punishment: if the victim is over 70 years of age; if the offender is a caregiver; if the crime is committed under circumstances likely to produce great bodily harm or death.²⁴⁹ Physical harm, mental harm, endangerment, false imprisonment, misuse of identity, fraud, embezzlement, and theft as committed against an elder are all included under this provision.

7.1.2.3 Elder abuse and vulnerability

New York has adopted an approach to crimes against elders similar in structure to California's, although it does not use the language of elder abuse explicitly. For example, the Penal Code, under Offences Relating to Vulnerable Elderly Persons, states:

A person is guilty of endangering the welfare of a vulnerable elderly person in the second degree when, being a caregiver for a vulnerable elderly person:

1. With intent to cause physical injury to such person, he or she causes such injury to such person; or
2. He or she recklessly causes physical injury to such person; or
3. With criminal negligence, he or she causes physical injury to such person by means of a deadly weapon or a dangerous instrument; or
4. He or she subjects such person to sexual contact without the latter's consent.

[...]²⁵⁰

The Code further defines the terms “physical injury”, “caregiver”, “sexual contact”, and “consent”. A definition emerges out of the relationship between these various terms and the crime description. Of note is the definition of “vulnerable elderly person”:

... a person sixty years of age or older who is suffering from a disease or infirmity associated with advanced age and manifested by demonstrable physical, mental or emotional dysfunction to the extent that the person is incapable of adequately providing for his or her own health or personal care.²⁵¹

²⁴⁷ *Ibid.*, §825-103(1).

²⁴⁸ Cal. Pen. Code §368 et seq.

²⁴⁹ *Ibid.*, §368(a)-(e).

²⁵⁰ NY Pen. Law §260.32.

²⁵¹ *Ibid.* §260.30(3).

Arizona’s criminal legislation speaks of “child or vulnerable adult abuse”, and defines abuse as:

- (a) Intentional infliction of physical harm.
- (b) Injury caused by criminally negligent acts or omissions.
- (c) Unlawful imprisonment, as described in section 13-1303.
- (d) Sexual abuse or sexual assault.²⁵²

As noted previously, an offender may be prosecuted under this provision if the victim was vulnerable as a result of the advanced age impairment. This is similar to the definition of “vulnerable elderly person” under New York penal law.

One of the unique aspects of the U.S. criminal decisions is their structure. Emerging as they do of the interplay between the meaning of different statutorily defined terms as well as the description of offences, these definitions are complex. As a function being located within a criminal framework, within which intent becomes key, the language of knowledge and intention is common.

7.1.2.4 Adult protection legislation

Adult protective services and associated legislation exist throughout the United States. These definitions apply to adults in general, although some regions use the language of “vulnerable adult”. These definitions tend to be much simpler than their criminal counterparts, but contain the same core principles, although they do go beyond intent to also include negligence. Definitions of exploitation also figure prominently, likely in part due to the reference to exploitation in the federal *Older Americans Act*. New Mexico, which has no criminal provision for elder abuse, defines abuse in the APS context as follows:

“Abuse” means:

- (1) knowingly, intentionally or negligently and without justifiable cause inflicting physical pain, injury or mental anguish;
- (2) the intentional deprivation by a caretaker or other person of services necessary to maintain the mental and physical health of an adult; or
- (3) sexual abuse, including criminal sexual contact, incest and criminal sexual penetration.²⁵³

Most definitions of elder abuse in the APS context include deprivation of necessities as a component of abuse or neglect, but fail to spell out what the necessities entail. California’s APS legislation is unique in that it provides an open-ended definition for necessary goods or services:

²⁵² Ariz. Rev. Stat. §13-3623.

²⁵³ N.M. Stat. §27-7-16 (B).

“Goods and services necessary to avoid physical harm or mental suffering” include, but are not limited to, all of the following:

- (a) The provision of medical care for physical and mental health needs.
- (b) Assistance in personal hygiene.
- (c) Adequate clothing.
- (d) Adequately heated and ventilated shelter.
- (e) Protection from health and safety hazards.
- (f) Protection from malnutrition, under those circumstances where the results include, but are not limited to, malnutrition and deprivation of necessities or physical punishment.
- (g) Transportation and assistance necessary to secure any of the needs set forth in subdivisions (a) to (f), inclusive.²⁵⁴

Like the criminal definitions of elder abuse, the adult protection definitions coming out of the U.S. emphasize knowledge and intention.

7.2 Policy

7.2.1 National

7.2.1.1 Emphasis on intention to inflict harm

The Administration on Aging (AoA) is a department of the U.S. federal government established to manage the affairs of older adults. The AoA website provides elder abuse resources and links to external sources. In addition, the following definitions are offered as a starting point for recognizing and understanding elder abuse. Like the statutory definitions referenced above, the definitions emphasize intent, although like the APS, they also include negligence. Abandonment is included as a category of abuse separate from neglect:

In general, elder abuse is a term referring to any knowing, intentional, or negligent act by a caregiver or any other person that causes harm or a serious risk of harm to a vulnerable adult.²⁵⁵

Broadly defined, abuse may be:

- *Physical Abuse*—Inflicting, or threatening to inflict, physical pain or injury on a vulnerable elder, or depriving them of a basic need.
- *Emotional Abuse*—Inflicting mental pain, anguish, or distress on an elder person through verbal or nonverbal acts.
- *Sexual Abuse*—Non-consensual sexual contact of any kind.

²⁵⁴ Cal. Welf. & Inst. Code §15610.35.

²⁵⁵ U.S. Administration of Aging, “What is Elder Abuse?”, online: <http://www.aoa.gov/AoARoot/AoA_Programs/Elder_Rights/EA_Prevention/whatIsEA.aspx>. The U.S. Department of Health and Human Services uses the same definition. See Department of Health and Human Services, “About HHS”, <http://www.hhs.gov/about/>

- *Exploitation*—Illegal taking, misuse, or concealment of funds, property, or assets of a vulnerable elder.
- *Neglect*—Refusal or failure by those responsible to provide food, shelter, health care or protection for a vulnerable elder.
- *Abandonment*—The desertion of a vulnerable elder by anyone who has assumed the responsibility for care or custody of that person.²⁵⁶

By contrast, the National Institute of Justice defines elder abuse and mistreatment in more general terms as either:

- a) intentional actions that cause harm or create a serious risk of harm to a vulnerable elder by a caregiver or other person who stands in a trust relationship to the elder, or
- b) failure by a caregiver to satisfy the elder’s basic needs or to protect the elder from harm.²⁵⁷

7.2.1.2 No emphasis on intention

The National Center for Elder Abuse (NCEA), established in 1988 by the US Administration on Aging as a resource center concerned with abuse, neglect, and exploitation of older Americans, adopts an approach that at first appears closer to that of the AoA, but incorporates examples that are much more specific.²⁵⁸ The NCEA definition is fragmented into definitions of types and categories. It recognizes three general categories of elder abuse: domestic, institutional, and self-neglect or self-abuse. The Center also provides definitions of the major types of abuse that are identical to those used in the National Elder Abuse Incidence Study discussed below, which NCEA and the National Adult Protective Services Association (NAPSA) participated in: physical, sexual, emotional or psychological, neglect, abandonment, financial or material exploitation, and self-neglect. The descriptions of the types of abuse are very detailed. The absence of intention is noteworthy for an American definition. Here is an example:

Physical abuse is the use of physical force that may result in bodily injury, physical pain, or impairment. Physical abuse may include but is not limited to such acts of violence as:

- striking (with or without an object)
- hitting
- beating
- pushing
- shoving
- shaking
- slapping
- kicking

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*, citing the National Research Council’s definition.

²⁵⁸ NCEA, “What We Do”, online:

<http://www.ncea.aoa.gov/NCEAroot/Main_Site/About/What_We_Do.aspx>.

- pinching
- burning
- unwarranted administration of drugs and physical restraints
- force-feeding
- physical punishment of any kind

The National Committee for the Prevention of Elder Abuse (NCPEA) is a non-profit organization devoted to preventing elder abuse and neglect; it is one of the three partners constituting the National Center on Elder Abuse (NCEA).²⁵⁹ NCPEA was established in 1988 “to achieve a clearer understanding of abuse and provide direction and leadership to prevent it”.²⁶⁰ NCPEA uses the following definition of elder abuse, which is different from the NCEA definition, followed by brief descriptions of specific examples:

Elder abuse is any form of mistreatment that results in harm or loss to an older person.

The NCPEA definition resembles a number of the human rights focused definitions that appear on the international front. The brief statement leaves out intention, stating its definition more broadly so that it would potentially encompass both intentional and unintentional acts. In the American context, where intent is often a key element of a definition of elder abuse and neglect, this approach is somewhat unusual.

7.2.2 The state level

From a comparative perspective, the same themes appear at the state level in the seven states reviewed, namely, the question of whether elder abuse is by definition limited to intentional or unintentional abuse or mistreatment and the inclusion of varied and unique categories of abuse.

7.2.2.1 Types of abuse

Rather than provide an overarching definition of elder abuse such as that provided by the NCPEA, state policy definitions focus on describing types of abuse, perhaps because abuse itself is often thereby exhaustively codified. The types described are rather consistent. They include physical abuse, emotional abuse, sexual abuse, neglect and self-neglect. Almost every region defines exploitation, an approach uncommon to other jurisdictions. Other less common descriptions that appear in state material are discussed below.

²⁵⁹ NCPEA, “About NCPEA”, online: <<http://www.preventelderabuse.org/about/>>.

²⁶⁰ *Ibid.*

California's Attorney General hosts a SafeState website dedicated to crime and violence prevention in California.²⁶¹ Its list of types of abuse includes:

Abduction means the removal from this state and/or the restraint from returning to this state of any elder or dependent adult who does not have the capacity to consent to the removal from or restraint from returning to this state.

Abandonment means the desertion or willful forsaking of an elder or a dependent adult by anyone who has care or custody of that person under circumstances in which a reasonable person would continue to provide care and custody.

Isolation means prevention from receiving phone calls or mail, false imprisonment or physical restraint from meeting with visitors.²⁶²

This appears to be the only reference to abduction in elder abuse material. The Illinois Department on Aging's Elder Abuse and Neglect Program also defines:

Confinement—restraining or isolating an older person for other than medical reasons.²⁶³

The above types of abuse referenced in U.S. policy seldom appear in non-American jurisdictions.

7.2.2.2 The role of intention

Intention is a key element of American definitions of elder abuse, likely stemming from the criminal law approach to elder abuse and neglect taken in the U.S. Florida provides an example of the use of intention in abuse definitions. Unlike the fragmented statutory definitions reviewed early on in this chapter, the policy approach is much more accessible by virtue of being integrated. Florida Department of Elder Affairs—Elder Services Directory hosts an elder resources website which contains a glossary of relevant terms, including those pertaining to elder abuse:

Abuse:

The willful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm, pain, or mental anguish; or deprivation by a person including a caregiver of goods or services that are necessary to avoid physical harm, mental anguish or mental illness.

²⁶¹ SafeState, "Focus Areas", online: <<http://safestate.org/index.cfm?navid=2>> [SafeState].

²⁶² *Ibid.*, "Types of Elder and Dependent Adult Abuse", online: <<http://safestate.org/index.cfm?navId=1166>>.

²⁶³ Illinois Department on Aging, "What is Elder Abuse?", online: <http://www.cbrx.il.gov/aging/1abuselegal/abuse_what-is.htm>.

Exploitation:

A person who stands in a position of trust and confidence with a disabled adult or an elderly person and knowingly by deception or intimidation, obtains or uses or endeavors to obtain or use a disabled adult's or an elderly person's funds, assets or property with the intent to temporarily or permanently deprive a disabled adult or an elderly person of the use, benefit or possession of the funds, assets or property for the benefit of someone other than the disabled adult or elderly person.

Frail Elder:

A person 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age of organic brain damage, or other physical, mental or emotional dysfunctioning to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired.

Neglect:

The failure or omission on the part of a caregiver of a disabled adult or elderly person to provide the care, supervision, and services necessary to maintain the physical and mental health of the disabled adult or elderly person, including, but not limited to food, clothing, medicine, shelter, supervision and medical services that a prudent person would consider essential for the well-being of a disabled adult or elderly person.

Older Individual:

An individual who is 60 years of age or older²⁶⁴

The focus on caregivers is also noteworthy. It captures the breach of trust element emphasized in Australia.

7.3 Conclusion

The most unique aspect of the American approach to elder abuse is the criminalization of the mistreatment of older adults through older adult specific crimes. This approach has resulted in codified definitions of elder abuse. However, it has also meant for complex definitions that only become evident once one reviews all the relevant statutory provisions, including definitions of key terms and descriptions of the elder abuse crimes. Court decisions are not discussed in the U.S. section: the meaning of elder abuse is already so exhaustively set out in legislation that jurisprudence in this area fails to capture any significant components to the legal definition of elder abuse and neglect in the U.S.

The other notable feature of the U.S. approach is an emphasis on intention in the legal definition. This is almost certainly of function of criminalization of elder abuse, for this sets the concept within a criminal analytical framework, in which the presence of intent becomes key to establishing guilt.

²⁶⁴ Florida Elder Resource, "Glossary of Terms", online:
<<http://www.floridaelderresource.com/Definitions01.php>>.

8.0 CONCLUDING REMARKS

Legal definitions of elder abuse and neglect vary significantly as do the legal frameworks that exist to address this vast and complex problem.

In Canada, the United Kingdom, Australia and New Zealand, where elder abuse and neglect is defined mainly at the policy level, many themes are present. Australian agencies tend to limit the concept to mistreatment that occurs in the context of relationships of trust (family, friend, caregiver, financial representative). In New Zealand and some Canadian jurisdictions elder abuse is often characterized as a sub-class of family violence. In the United Kingdom, law and policy is moving away from the term “elder abuse and neglect”, addressing elder abuse as part of the larger problem of mistreatment of vulnerable adults. Some Canadian provinces have also taken this route. In Québec and the Australian commonwealth elder abuse is often characterized as a human rights violation.

The exception to this rule appears to be America. Although adult protection services and associated legislation exists in most states, most of the American jurisdictions reviewed have criminalized elder abuse and neglect, and the terms “elder”, “abuse” and other words that appear in offence descriptions are virtually exhaustively defined by legislation. Although this creates some certainty absent in other legal systems, it also results in fragmented definitions that may only become clear upon cross-referencing a number of statutory provisions, resulting in lengthy, complex definitions inaccessible to someone who is not a lawyer. American definitions, associated as they are with criminal offences, tend to require intention, whereas the definitions in other jurisdictions, which stem more from health-related and other arenas, tend to be silent on this issue, likely thereby encompassing both intentional and non-intentional acts.

As criminal law is generally a state responsibility, each American jurisdiction has been largely free to craft its own response to the problem of mistreatment of older adults. Similarly, as most of the countries we reviewed were federations, with powers devolved to states, province and territories, there is also a proliferation of divergent responses to adult protection.

Categories of abuse play an important role in definitions of elder abuse, with some laws and policies defining only types of abuse and containing no overarching definition. While there is some uniformity in the types—most lists include physical, sexual, emotional or psychological, financial and neglect—some categories appear less consistently: social abuse (usually Australia); systemic abuse (Canada and South Africa); abandonment (the United States); medical (the U.K.). Exploitation is also a key term in many U.S. penal codes, perhaps as a function of its reference in the federal *Older Americans Act*. In any event, the differences speak to the particular context out of which these definitions grew

but also help to paint a picture of what might be the components of an exhaustive definition.

In terms of legislation, definitions of elder abuse are actually quite rare. In most jurisdictions the richest source of legal definitions of elder abuse and neglect is policy.

Judicial decision-making does not define elder abuse and neglect in any of the countries that formed part of this review. However, it does help to clarify what might distinguish “elder abuse” from the potentially broader category of all mistreatment of older adults— if there is indeed any distinction to be made. In Canada, the U.K. and South Africa, targeting vulnerable elderly victims and breach of trust responsibilities figured prominently in the jurisprudence.

Generally, the meaning of elder varies from age 50 to 65. In other jurisdictions where age is not mentioned, the term “elder” is not used, replaced by “older adult”, “senior”, “vulnerable adult” or “vulnerable elderly person”.

This paper began with a single question and concludes with a great many more. The following questions may require consideration before selecting or drafting a definition of elder abuse and neglect:

1. Does elder abuse occur outside of relationships of trust? In other words, should harms perpetrated by strangers on an older adult be captured by the term elder abuse?
2. What is the conceptual relationship between elder abuse and neglect and dependency?
3. Should an elder abuse definition name elder abuse as an abuse of power more broadly?
4. Is it important to maintain a specific definition to name the mistreatment of older adults or would a broader reference to vulnerable adults be more appropriate? Is there value in conceptually isolating the abuse of older adults under the umbrella term “elder abuse” or “elder abuse and neglect”?
5. What is the conceptual link between vulnerability and elder abuse and neglect? Is elder abuse limited to harms against only those older adults who are vulnerable? Or are all older adults somehow by definition vulnerable? Or is the notion of vulnerability strictly connected to the reprehensibility of crimes against older adults?
6. Given its meaning in First Nations and Aboriginal communities, is “elder” an appropriate term for denoting older adults?

7. Does “elder abuse” include all actions and inactions that harm older adults?
8. What is the place of age in a concept of elder abuse? Should the concept be limited to victims aged 50, 60, 65 or is another approach more appropriate?
9. Is neglect included in the concept of elder abuse? What about self-neglect?
10. Is it important to characterize elder abuse as a human rights violation or is the language of harm or mistreatment adequate?
11. Should elder abuse be limited to intentional actions?
12. What is the conceptual relationship between elder abuse and domestic violence?
13. Is the notion of targeting older adults for victimization key to a definition of elder abuse that will have relevance in a criminal context?
14. Is the meaning of elder abuse reflected in types of harm specific to older victims, or to which older adults are especially vulnerable, such as a loss of independence, or a worsening of a physical frailty?
15. Structurally, is elder abuse best described through an exhaustive definition that runs through the various types of abuse in detail or is a brief summary more useful?
16. What types of abuse should be included in a thorough definition of elder abuse?

APPENDIX A: CANADIAN LEGISLATION—COMPARATIVE CHART

Jurisdiction	Scope of Application	Definition of Abuse	Types of Abuse	Designated Agency	Comments	Other Relevant Legislation
British Columbia <i>Adult Guardianship Act, R.S.B.C. 1996, c. 6.</i>	Adults who are abused or neglected and who are unable to seek support or assistance. ⁱ Adults who are abused or neglected in a public place, in the adult's home, a relative's home, a care facility, or any other place except a correctional centre. s.45(1)	The deliberate mistreatment of an adult that causes the adult (a) physical, mental or emotional harm or (b) damage to or loss of assets, and includes intimidation, humiliation, physical assault, sexual assault, overmedication, withholding needed medication, censoring mail, invasion or denial of privacy or denial of access to visitors Part 1, s.1	Physical Mental Emotional Sexual Financial Neglect Self-neglect	The Ministry of Children and Family Development, and the five Health Authorities in British Columbia <i>(Designated Agencies Regulation, B.C. Reg. 19/2002)</i>	The provincial government has passed the <i>Adult Guardianship and Planning Statutes Amendment Actⁱⁱ</i> , which when it comes into force, will repeal the <i>Patients Property Act</i> and replace it with a new Part 2 of the <i>Adult Guardianship Act</i> , shifting from a committee system to a guardianship system with more imbedded rights.	<i>Representation Agreement Act, R.S.B.C. 1996, c. 405.</i> <i>Health Care (Consent) and Care Facility (Admission) Act, R.S.B.C. 1996, c. 181.</i> <i>Public Guardian and Trustee Act, R.S.B.C. 1996, c. 383.</i> <i>Patients Property Act, R.S.B.C. 1996, c. 349.</i> <i>Power of Attorney Act, R.S.B.C. 1996, c. 370.</i> <i>Family Relations Act, R.S.B.C. 1996, c. 128.</i> <i>Human Rights Code, R.S.B.C. 1996, c. 210.</i>

Jurisdiction	Scope of Application	Definition of Abuse	Types of Abuse	Designated Agency	Comments	Other Relevant Legislation
<p>Alberta</p> <p><i>Protection for Persons in Care Act, R.S.A. 2000, c. P-29.</i></p>	<p>Adults who receive services from an “agency”, which is defined in s. 1(b) to mean an approved hospital as defined in the <i>Hospitals Act</i>, a lodge accommodation as defined in the <i>Alberta Housing Act</i>, a nursing home as defined in the <i>Nursing Homes Act</i>, a facility as defined in the <i>Social Care Facilities Review Committee Act</i>, or any institution organization designated by regulation as an agency.</p>	<p>(i) intentionally causing bodily harm, (ii) intentionally causing harm, including, but not limited to, threatening, intimidating, humiliating, harassing, coercing or restricting from appropriate social contact, (iii) intentionally administering or prescribing medication for an inappropriate purpose, (iv) subjecting to non-consensual sexual contact, activity or behaviour, (v) intentionally misappropriating or improperly or illegally converting money or other valuable possessions, or (vi) intentionally failing to provide adequate nutrition, adequate medical attention or other necessity of life without a valid consent. (s.1)</p>	<p>Physical Emotional Sexual Financial Neglect Abuse of medications</p>	<p>Ministry of Seniors and Community Supports. s.1(h)</p>	<p>The Act is being considered for amendment in 2009 following a review of the Act in 2006 (which was based on results of an earlier consultation process and the report prepared by the former legislative review committee in 2003).</p>	<p><i>Protection Against Family Violence Act, R.S.A. 2000, c. P-27.</i> <i>Dependent Adults Act, R.S.A. 2000, c. D-11.</i> <i>Personal Directives Act, R.S.A. 2000, c. P-6.</i> <i>Powers of Attorney Act, R.S.A. 2000, c. P-20.</i> <i>Mental Health Act, R.S.A. 2000, c. M-13.</i> <i>Maintenance Order Act, R.S.A. 2000, c. M-2</i> <i>Human Rights, Citizenship and Multiculturalism Act, R.S.A. 2000, c. H-14.</i></p>

Jurisdiction	Scope of Application	Definition of Abuse	Types of Abuse	Designated Agency	Comments	Other Relevant Legislation
Saskatchewan <i>Victims of Domestic Violence Act, S.S. 1994, c. V-6.02.</i>	Cohabitants, defined as persons who reside or resided together in a family, spousal or intimate relationship or parents (s.2).	None. Defines “domestic violence”.	Physical Sexual Property damage Forced confinement	Emergency intervention order may be granted by a justice of the peace. s.3(1) Victim’s assistance order may be made by the Court of Queen’s Bench. s.7(1)	This is a domestic violence statute. Saskatchewan has not enacted a comprehensive adult protection statute.	<i>Adult Guardianship and Co-decision-making Act, S.S. 2000, c. A-5.3</i> <i>Powers of Attorney Act, 2002, S.S. 2002, c. P-20.3</i> <i>Health Care Directives and Substitute Health Care Decision Makers Act, S.S. 1997, c. H-0.001</i> <i>Personal Care Homes Regulation, 1996, c.P-6.01</i> <i>Public Guardian and Trustee Act, S.S. 1983 c. P-36</i> <i>Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1.</i>
Saskatchewan <i>The Public Guardian and Trustee Act, S.S. 1983, c-P-36.3</i>	“ vulnerable adult ” means an individual, 16 years of age or more, who has an illness, impairment, disability or aging process limitation that places the individual at risk of financial abuse. (s.19)	“ financial abuse ” means the misappropriation of funds, resources or property by fraud, deception or coercion. s. 40.5(1)	Financial		<i>The Public Guardian and Trustee Actⁱⁱⁱ</i> was amended in 2001 to protect vulnerable adults. Section 40.5 allows a financial institution to act on its own initiative and freeze assets for five business days. Section 40.6 permits the Public Guardian and Trustee to freeze assets for up to thirty days, and s. 40.7 gives the Public Guardian and Trustee powers to investigate financial abuse.	

Jurisdiction	Scope of Application	Definition of Abuse	Types of Abuse	Designated Agency	Comments	Other Relevant Legislation
<p>Manitoba</p> <p><i>Protection for Persons in Care Act, C.C.S.M., c. P144.</i></p>	<p>An adult resident, in— patient or person receiving respite care in a health facility.^{iv}</p>	<p>Mistreatment, whether physical, sexual, mental, emotional, financial or a combination of any of them, that is reasonably likely to cause death or that causes or is reasonably likely to cause serious physical or psychological harm to a person, or significant loss to the person’s property (s.1).</p>	<p>Physical Sexual Mental Emotional Financial</p>	<p>Ministry of Health, Protection for Persons in Care Office (s.1).</p>		<p><i>Domestic Violence and Stalking Act, C.C.S.M., c. D93.</i> <i>Mental Health Act, C.C.S.M., c. M110.</i> <i>Vulnerable Persons Living with a Mental Disability Act, C.C.S.M., c.V90.</i> <i>Powers of Attorney Act, C.C.S.M., c. P97.</i> <i>Health Care Directives Act, C.C.S.M., c. H27.</i> <i>Human Rights Code, C.C.S.M., H175.</i></p>
<p>Ontario</p> <p><i>Nursing Homes Act, R.S.O. 1990, c. N.7.</i></p>	<p>Adults residing in a nursing home.^v</p>	<p>None. Residents’ bill of rights includes the right “to be free from mental and physical abuse... [and] and properly sheltered, fed, clothed, groomed and cared for in a manner consistent with his or her needs.” s.2(2)</p>	<p>Mental Physical Neglect</p>	<p>The Director at the Ministry of Health^{vi}.</p>	<p>This Act will be repealed once <i>Bill 140, An Act Respecting Long-term Care Homes</i>^{vii} comes into force. The <i>Nursing Homes Act</i> is currently the only legislation in Ontario dealing with the reporting of abuse. However, Ontario government policies found in the Long-Term Care Standards Manual may extend the reporting requirement across all Long-Term Care Facilities.</p>	<p><i>Homes for the Aged and Rest Homes Act, R.S.O. 1990, c. H.13.</i> <i>Charitable Institutions Act, R.S.O. 1990, c. C.9.</i> <i>Long-Term Care Act, 1994, S.O. 1994, c. 26.</i> <i>Substitute Decisions Act, 1992, S.O. 1992, c. 30.</i> <i>Health Care Consent Act, 1996, S.O. 1996, c. 2, Schedule A.</i> <i>Human Rights Code, R.S.O. 1990, c. H.19.</i></p>

Jurisdiction	Scope of Application	Definition of Abuse	Types of Abuse	Designated Agency	Comments	Other Relevant Legislation
Québec <i>Charte des droits et libertés de la personne,</i> R.S.Q., c. C-12 (s.48)	Aged or handicapped persons who may be exploited.	Every aged person and every handicapped person has a right to protection against any form of exploitation.	Financial Physical	Commission des Droits de la Personne et des Droits de la Jeunesse (s.57).		<i>Civil Code of Québec</i> L. Q. 1991, c. 64., Title IV: Capacity of Persons; Chapter III: Protective Supervision of Persons of Full Age. <i>Public Curator Act,</i> R.S.Q. c. 81.
Nova Scotia <i>Adult Protection Act</i> R.S.N.S. 1989, c. 2.	Adults ^{viii} who are physically or mentally incapable, not living in a care facility and in need of protection. ^{ix}	None. However, “in need of protection” is defined to include abuse, cruelty and neglect (s. 3(b)).	Physical Sexual Mental Neglect Self-neglect	Minister of Health ^x	This Act is currently under review. The <i>Homes for Special Care Act</i> , R.S.N.S. 1989, c. 203 covers care facilities; however, it is silent on the subject of abuse in care facilities.	<i>Homes for Special Care Act</i> , R.S.N.S. 1989, c. 203. <i>Domestic Violence Intervention Act</i> , S.N.S. 2001, c. 29. <i>Incompetent Persons Act</i> , R.S.N.S. 1989, c. 218. <i>Powers of Attorney Act</i> , R.S.N.S. 1989, c. 352. <i>Human Rights Act</i> , R.S.N.S. 1989, c. 214.

Jurisdiction	Scope of Application	Definition of Abuse	Types of Abuse	Designated Agency	Comments	Other Relevant Legislation
<p>Nova Scotia</p> <p>Protection for Persons in Care Regulation R.S.N.S. 2004, c. 33.</p>	<p>Patients and residents 16 years of age and older who are receiving care from hospitals, residential care facilities, nursing homes, homes for the aged or disabled persons under the <i>Homes for Special Care Act</i>, or group homes or residential centres under the <i>Children and Family Services Act</i>.</p>	<p>a. the use of physical force resulting in pain, discomfort or injury, including slapping, hitting, beating, burning, rough handling, tying up or binding;</p> <p>b. mistreatment causing emotional harm, including threatening, intimidating, humiliating, harassing, coercing or restricting from appropriate social contact;</p> <p>c. the administration, withholding or prescribing of medication for inappropriate purposes;</p> <p>d. sexual contact, activity or behavior between a service provider and a patient or resident;</p> <p>e. non-consensual sexual contact, activity or behaviour between patients or residents;</p> <p>f. the misappropriation or improper or illegal conversion of money or other valuable possessions; or</p> <p>g. failure to provide adequate nutrition, care, medical attention, or necessities of life without valid consent. s.3(1)</p>	<p>Physical Emotional Sexual Financial Neglect Abuse of medications</p>	<p>Department of Health and Community Services</p>		<p><i>Protection of Persons in Care Act</i>, S.N.S. 2004, c. 33.</p>

Jurisdiction	Scope of Application	Definition of Abuse	Types of Abuse	Designated Agency	Comments	Other Relevant Legislation
<p>New Brunswick</p> <p><i>Family Services Act</i> S.N.B. 1980, c. F-22, Part III.</p>	<p>Physically or mentally disabled or elderly adults. s.1. “elderly” means sixty-five years of age and over; s.34(1).</p>	<p>An adult is a disabled person or an elderly person, or is within a group prescribed by regulation, and is a victim of or in danger of (a) physical abuse; (b) sexual abuse; (c) mental cruelty; or (d) any combination thereof. s. 34(2)</p>	<p>Physical Sexual Mental Neglect Self-neglect</p>	<p>Minister of Family and Community Services (s.1)</p>	<p>New Brunswick is considering developing substitute decision-making legislation.</p>	<p><i>Mental Health Act</i>, R.S.N.B. 1973, c. M-10.</p> <p><i>Infirm Persons Act</i>, R.S.N.B. 1973, c. I-8.</p> <p><i>Nursing Homes Act</i>, S.N.B. 1982, c. N-11.</p> <p><i>Human Rights Act</i>, R.S.N.B. 1973, c. H-11.</p>
<p>Prince Edward Island</p> <p><i>Adult Protection Act</i> R.S.P.E.I. 1988, c. A-5.</p>	<p>Adults who are physically, mentally, or otherwise incapable.</p>	<p>Means offensive mistreatment, whether physical, sexual, mental, emotional, or material, or any combination thereof, that causes or is reasonably likely to cause the victim severe physical or psychological harm or significant material loss to his estate. Neglect means a lack of or failure to provide necessary care, aid, guidance or attention which causes or is reasonably likely to cause the victim severe physical or psychological harm or significant material loss to his estate. s.1</p>	<p>Physical Sexual Mental Emotional Material Neglect Self-neglect</p>	<p>Minister of Health and Social Services. s.1(j)</p>	<p>This Act is currently under review.</p> <p>An assessment to determine what, if any, assistance or protection is necessary must be a comprehensive investigation of the person’s condition, circumstances and needs, and include a number of factors related to the individual’s needs and abilities.^{xi}</p>	<p><i>Adult Protection Act</i>, R.S.P.E.I. 1988, c. A-5.</p> <p><i>Victims of Family Violence Act</i>, R.S.P.E.I. 1988, c. V-3.2.</p> <p><i>Community Care Facilities and Nursing Home Act</i>, R.S.P.E.I. 1988, c. C-13.</p> <p><i>Nursing Home Regulation</i>, P.E.I. Reg. EC10/88.</p> <p><i>Mental Health Act</i>, R.S.P.E.I. 1988, c. M-6.1.</p> <p><i>Powers of Attorney Act</i>, R.S.P.E.I. 1988, c. P-16.</p> <p><i>Human Rights Act</i>, R.S.P.E.I. 1988, c. H-12.</p>

Jurisdiction	Scope of Application	Definition of Abuse	Types of Abuse	Designated Agency	Comments	Other Relevant Legislation
<p>Newfoundland and Labrador</p> <p><i>Neglected Adults Welfare Act</i> R.S.N.L. 1990, c. N-3.</p>	<p>Adults^{xii} who are mentally or physically incapable of caring properly for themselves, but not suitable to be in a treatment facility under the <i>Mental Health Care and Treatment Act</i>. s.2(i)</p>	<p>Neglected adult means an adult (i) who is incapable of caring properly for himself or herself because of physical or mental infirmity, (ii) who is not suitable to be in a treatment facility under the <i>Mental Health Care and Treatment Act</i>, (iii) who is not receiving proper care, and (iv) who refuses, delays or is unable to make provision for proper care and attention for himself or herself (s.2).</p>	<p>Neglect Self-neglect</p>	<p>Director of Neglected Adults (Ministry of Health and Community Services).^{xiii}</p>	<p>Newfoundland is looking at revising its legislation</p>	<p><i>Mental Health Act</i>, R.S.N.L. 1990, c. M-9. <i>Mental Health Care and Treatment Act</i>, S.N.L. 2006, c. M-9.1. <i>Mentally Disabled Persons' Estates Act</i>, R.S.N.L. 1990, c. M-10. <i>Advance Health Care Directives Act</i>, S.N.L. 1995, c. A-4.1. <i>Health and Community Services Act</i>, S.N.L. 1995, c. P-37.1. <i>Personal Care Home Regulations Under the Health and Community Services Act</i>, N.L.R. 15/01. <i>Human Rights Code</i>, R.S.N.L. 1990, c. H-14. <i>Family Violence Protection Act</i>, S.N.L. 2005, C. F-3.1.</p>

Jurisdiction	Scope of Application	Definition of Abuse	Types of Abuse	Designated Agency	Comments	Other Relevant Legislation
<p>Yukon</p> <p><i>The Adult Protection and Decision Making Act being Schedule A to the Decision-Making Support and Protection to Adults Act, S.Y. 2005, c. 21, Part Four: Adult Protection.</i></p>	<p>Adults who are abused and neglected and who are unable to seek support or assistance.^{xiv}</p> <p>Adults who are abused or neglected in a public place, in the adult's home, a care facility, or any other place except a correctional centre. s.60(1)</p>	<p>The deliberate mistreatment of an adult that (a) causes the adult physical, mental or emotional harm, or (b) causes financial damage or loss to the adult, and includes intimidation, humiliation, physical assault, sexual assault, overmedication, withholding needed medication, censoring mail, invasion or denial of privacy, denial of access to visitors, or denial of use or possession of personal property.</p> <p>Neglect means any failure to provide necessary care, assistance, guidance, or attention to an adult that causes, or is reasonably likely to cause, within a short period of time, the adult serious physical, mental or emotional harm, or substantial financial damage or loss to the adult, and includes self-neglect. (s.58)</p>	<p>Physical Mental Emotional Financial Sexual Neglect Self-neglect</p>	<p>Subject to Regulations. s. 84(1)(o).</p>	<p><i>The Adult Protection and Decision Making Act</i> being Schedule A to the <i>Decision-Making Support and Protection to Adults Act, S.Y. 2005, c. 21</i> also consists of three other Parts that may help to protect adults from abuse: Part One consists of Supported Decision-Making Agreements, Part Two consists of Representation Agreements, and Part Three consists of Court-Appointed Guardians.</p>	<p><i>Family Violence Protection Act, R.S.Y. 2002, c. 84.</i></p> <p><i>Care Consent Act</i>, being Schedule B to the <i>Decision-Making Support and Protection to Adults Act, S.Y. 2003, c. 21.</i></p> <p><i>Public Guardian Trustee Act</i>, being Schedule C to the <i>Decision-Making Support and Protection to Adults Act, S.Y. 2003, c. 21.</i></p> <p><i>Enduring Power of Attorney Act, R.S.Y. 2002, c. 73.</i></p> <p><i>Human Rights Act, R.S.Y. 2002, c. 73.</i></p>

Jurisdiction	Scope of Application	Definition of Abuse	Types of Abuse	Designated Agency	Comments	Other Relevant Legislation
Northwest Territories <i>Protection Against Family Violence Act, S.N.W.T. 2003, c. 24.</i>	Spouse, former spouse, persons resided or who are residing together in a family or intimate relationship, parents or grandparents. s.2(1)	None. Defines family violence.	Physical Sexual Emotional Psychological Financial Property damage Forced confinement, s.1(2)	Emergency protection order may be made by a justice of the peace. s. 4(1). Protection order may be made by the Supreme Court. s. 7(1).	This is a domestic violence statute. The Northwest Territories has not enacted a comprehensive adult protection statute.	<i>Guardianship and Trusteeship Act, S.N.W.T. 1994, c. 29</i> <i>Mental Health Act, R.S.N.W.T. 1988, c. M-10</i> <i>Human Rights Act, S.N.W.T. 2002, c. 18.</i>
Nunavut <i>Family Abuse Intervention Act, S.Nu. 2006, c. 18.</i>	Spouse, former spouse, person with whom an intimate relationship exists or existed, person with whom a family relationship exists, person with whom a care relationship exists or existed. s.2	Defines mental or emotional abuse. s.1	Physical Sexual Emotional Psychological Property damage Forced confinement Neglect	Emergency protection order may be made by a justice of the peace. s.7(1). Assistance order may be made by a judge. s.18(1) Compensation order may be made by a judge. s.20(1) Community intervention order may be made by a justice of the peace. s.17(1)	This is a domestic violence statute. Nunavut has not enacted a comprehensive adult protection statute. This Act was proclaimed in force March 1, 2008.	<i>Guardianship and Trusteeship Act, R.S.N.W.T. 1994, c. 29 as duplicated for Nunavut by s. 29 of the Nunavut Act</i> <i>Mental Health Act; R.S.N.W.T. 1988, c. M-10 as duplicated for Nunavut by s. 29 of the Nunavut Act.</i> <i>Human Rights Act, S. Nu. 2003, c. 12.</i>

ⁱ s. 44. Reasons for being unable to seek support include: “physical restraint”, “a physical handicap that limits their ability to seek help”, or “ an illness, disease, injury or other condition that affects their ability to make decisions about the abuse or neglect”.

ⁱⁱ Bill 29, *Adult Guardianship and Planning Statutes Amendment Act, 2007*, 3rd Sess., 38th Parl., British Columbia, 2007, (assented to 22 November, 2007), S.B.C. 2007, c. 34.

http://www.leg.bc.ca/38th3rd/3rd_read/gov29-3.htm

ⁱⁱⁱ *The Public Guardian and Trustee Act*, S.S. 1983, c. P-36.3; amended in 2001, c. 33, s. 19.

^{iv} s. 1, definition of patient, the definition does not include a vulnerable person within the meaning of *The Vulnerable Persons Living with a Mental Disability Act*. Health facility is defined in s. 1 to mean a hospital designated by regulation under *The Health Services Insurance Act*, a personal care home designated by regulation under *The Health Services Insurance Act* or an institution or organization designated as a health facility by regulation.

^v “Nursing home” is defined in s. 1 as any premise maintained and operated for persons requiring nursing care or in which such care is provided to two or more unrelated persons. This definition does not include private or public hospitals, municipal homes or charitable homes.

^{vi} Appointed under s. 3(2)

^{vii} Ontario. *Bill 140, An Act Respecting Long-term Care Homes*, 2nd Sess., 38th Leg., 2007 (Royal Assent on 4 June, 2007).

^{viii} “Adult” is defined in s. 3(a) as a person who is or is apparently sixteen years of age or older.

^{ix} The *Homes for Special Care Act*, R.S.N.S. 1989, c. 203 covers care facilities; however, it is silent on the subject of abuse in care facilities.

^x Under s. 3(e) of the Act, the Minister of Community Services is the responsible Minister. In 2000 responsibility was transferred to the Minister of Health by Order in Council.

^{xi} The factors to be taken into consideration enumerated in s. 6(2) are: health, social, residential, economic, vocational, and educational, as well as conditions related to the person’s abilities to cope with circumstances, make reasonable judgments and provide for his or her own security and needs.

^{xii} Defined in s. 2(a) as a person who is not a child within the meaning of the *Child, Youth and Family Services Act*.

^{xiii} The Minister of Social Services is named in s. 2(h), however responsibility is now with the Ministry of Health and Community Services. Per s. 3, the responsibility for administration and enforcement of the Act falls to an appointed Director of Neglected Adults under the control and direction of the minister.

^{xiv} s. 59(b) Reasons for being unable to seek support include: “physical or chemical restraint”, “a physical or intellectual disability that limits their ability to seek help”, “an illness, disease, injury, or other condition that affects their ability to seek help”, or “any similar reason”.file://localhost/message/%253Cf5oAaLz4CaOQYIzSx9dUUgNuB.1227056708.74@XRX_0000AA65FB31.bcli.lan%253E