



## Vulnerable victims: homicide of older people

This Research and Issues Paper reviews published literature about suspected homicide of older people, to assist in the investigation of these crimes by Crime and Misconduct Commission (CMC) or police investigators. The paper includes information about victim vulnerabilities, nature of the offences, characteristics and motives of offenders, and investigative and prosecutorial challenges.

Although police and CMC investigators are the paper's primary audience, it will also be a useful reference for professionals such as clinicians, ambulance officers or aged care professionals who may encounter older people at risk of becoming homicide victims.

This is the second paper produced by the CMC in a series on "vulnerable" victims. The first paper, *Vulnerable victims: child homicide by parents*, examined child homicides committed by a biological or non-biological parent (CMC 2013).

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### Background to CMC investigation of vulnerable victims

Vulnerable victims are those who are susceptible to becoming victims of violence because of their limited capacity to protect or remove themselves from danger.

On 30 January 2013 the CMC was granted a new "general referral" in relation to vulnerable victims. This streamlines the process by which the Queensland Police Service (QPS) can access the CMC's investigative powers in Queensland cases of suspected homicide, grievous bodily harm and torture,<sup>1</sup> where the victim is:

- unborn, or
- under the age of 16 years, or
- over the age of 70 years, or
- in a position of particular vulnerability because of a physical disability or mental impairment.<sup>2</sup>

The new referral also enables violent crime "cold cases" (those committed since 1 January 1970) to be investigated.

The CMC's vulnerable victims research program was established to help the CMC conduct coercive hearings under the new referral. Papers in the program review published literature from a range of subject areas, including law enforcement, criminology, psychology and pathology.<sup>3</sup>

1 Criminal Code, sections 300, 302, 303, 306, 307, 309, 313, 317, 320 and 320A.

2 Mental impairment means senility, intellectual disability or brain damage.

3 We did not scrutinise the methodological rigour of each study referred to in this paper.

## Scope of this paper

There is no universally accepted definition of “older people”. The term is not defined in Australian legislation<sup>4</sup> and the research literature applies different age brackets depending on the nature of the study.<sup>5</sup> Because the new CMC referral relates to victims aged 70 years and older, we use this age bracket as a guide for this paper.

The National Homicide Monitoring Program (NHMP) of the Australian Institute of Criminology (AIC) is Australia’s primary data source on homicides.<sup>6</sup> Between 1 July 2000 and 30 June 2010 there were 162 homicides in Australia where the victim was aged 70 years and older. This represents an average of 16 homicides of older people per year (AIC NHMP [computer file]). It is likely that this figure under-represents the true homicide rate, however, because of the difficulties in differentiating between a natural death, self-neglect and homicide. Given that the population of older people in Australia is rapidly increasing, we may see an increase in the number of older people falling victim to homicide in the future. It is estimated that one-quarter of Australia’s population will be aged over 65 by the year 2056, compared to 13 per cent in 2007 (Office of the Public Advocate & Queensland Law Society 2010).

This paper explores the following:

**Victim vulnerabilities:** We examine the vulnerabilities associated with older people, specifically:

- physical disabilities and mental impairment
- increased likelihood of death after being assaulted
- dependency
- unwillingness or inability to report prior abuse.

**Homicide offences:** We examine the nature of the offence, characteristics of offenders and motives for offending for each of the following offender–victim relationships:

- intimate-partner homicide
- intimate-partner homicide-suicide
- parricide
- other family homicide
- homicide by strangers
- friend/acquaintance homicide.

We do not specifically discuss informed consent and voluntary euthanasia, because they do not constitute victimisation of vulnerable people and are therefore not covered by the new referral.

**Investigative challenges:** We examine the difficulties in differentiating between a natural death, self-neglect and homicide when the victim is an older person.

**Prosecutorial challenges:** We discuss the difficulties associated with convicting offenders, especially in cases where causation is disputed. Furthermore, a range of possible criminal defences may come into play, including automatism, insanity, diminished responsibility, provocation, self-defence and palliative care.

**Crime prevention opportunities:** We discuss opportunities for crime prevention as gleaned from the research literature. These include education, training, screening and support of carers, and mandatory reporting of elder abuse.

4 Under neither Australian Commonwealth law nor the laws of any Australian state and/or territory.  
 5 For example, 50–55 years of age is a published definition for older Aboriginal and Torres Strait Islanders (AIHW 2011). The World Health Organization (WHO 2013) recognises that people aged 65 years and over are generally accepted as older people in most developed countries, which is associated with the age of retirement.  
 6 The NHMP project is funded by the Australian Government. The data used in this publication were made available through the Australian Institute of Criminology (AIC). The AIC does not bear any responsibility for the analyses or interpretations presented herein.

## Terminology

Throughout this paper, we use the terminology listed below. These definitions are derived from the research literature and are not legal definitions. Furthermore, they are not mutually exclusive. For example, a son who kills his 80-year-old father has committed parricide as well as patricide.

**Parricide:** killing of a parent by a biological or non-biological offspring (the age of the victim and offender are irrelevant).

**Matricide:** killing of the mother by a biological or non-biological offspring (the age of the victim and offender are irrelevant).

**Patricide:** killing of the father by a biological or non-biological offspring (the age of the victim and offender are irrelevant).

**Intimate-partner homicide:** killing of a current or previous spouse, de facto partner, boyfriend or girlfriend.

**Intimate-partner homicide-suicide (IPHS):** killing of an intimate partner and then self.

**Other family homicide:** killing by an offender related to the victim. Perpetrators in the broad category of “other family” may include grandchildren, siblings, cousins, nieces, nephews, aunts and uncles.

**Friend/acquaintance homicide:** refers to situations where the victim and the offender know each other before the offence, in the absence of a relationship between the two by either blood or marriage.

**Stranger homicide:** refers to situations where the offender is unknown to the victim.

## Victim vulnerabilities

**Physical disabilities and/or mental impairment in older victims lead to an increased risk in the following vulnerabilities: likelihood of death after being assaulted, dependency, and unwillingness or inability of the victim to report prior abuse.**

### Physical disabilities and mental impairment

Nearly 60 per cent of people aged 70 and over in Australia have a physical or mental disability (Australian Bureau of Statistics 2011);<sup>7</sup> and the prevalence of maltreatment and homicide is higher for older people with mental impairments and/or physical disabilities (World Health Organization 2011). The presence of a physical disability and/or mental impairment is also likely to result in exposure to one or more of the vulnerabilities discussed below: increased likelihood of death after being assaulted, dependency, and unwillingness or inability to report prior abuse.

### Increased likelihood of death after being assaulted

The likelihood of death from assault is greater for older people than for younger people (Chu & Kraus 2004). This may be because the victims' lack of strength and/or physical impairment impede their capacity to defend themselves while under violent attack or remove themselves from danger (Chu & Kraus 2004; Nelsen & Huff-Corzine 1998).

### Dependency

Older people with physical disabilities and/or mental impairments may find it difficult to perform daily tasks and have to rely on carers or family members to meet their everyday needs. This dependency has the potential to result in the abuse of an older person (Office of the Public Advocate & Queensland Law Society 2010). However, research suggests that when elder abuse does occur it is more likely to be at the hands of an adult dependant than an adult caregiver (Malley-Morrison & Hines 2004).

7 The proportion of people with a disability increases for each age group over 70; from 48 per cent in people aged 70–74 years to 88 per cent in people aged 90 and over (ABS 2011). The main disabling conditions for older Australians are osteoarthritis, rheumatoid arthritis, osteoporosis, back pain, heart disease, stroke, hypertension, asthma, emphysema, bronchitis, diabetes, psychoses, mood affective disorders, dementia, Alzheimer's disease, depression, nervous tension and stress (ABS 2011, *Disability, Australia, 2009*, Canberra, viewed 19 July 2013, <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4446.0Main+Features12009?OpenDocument>>).

## Unwillingness or inability to report prior abuse

There are a number of reasons why older people do not report prior abuse, including:

- fear of exposing themselves to further violence or punishment
- impaired mental capacity, making them unaware that they are experiencing abuse
- feelings of shame or betrayal due to their pre-existing relationship with the perpetrator
- unawareness of the support services available
- isolation from the community, limiting their opportunity to alert others to the abuse (Office of the Public Advocate & Queensland Law Society 2010).

## Homicide offences

**In this section, we discuss homicides committed by intimate partners, intimate partners who also commit suicide, children, and other family members. We then examine homicides perpetrated by strangers and friends/acquaintances.**<sup>8,9</sup>

### Intimate-partner homicide

**Intimate-partner homicides occur when a person is killed by their current or previous spouse, de facto partner, boyfriend or girlfriend (Carcach & James 1998). Most commonly, intimate-partner homicide involves a husband killing his wife in the context of a domestic altercation.**

### Nature of the offence

Australian data in 2001–2010 shows that 14 per cent ( $n = 23$ ) of homicides involving victims aged 70 years and older were committed by an intimate partner (AIC NHMP [computer file]). Six of these involved the suicide of the perpetrator, so are discussed separately on page 4. Of the 17 intimate-partner homicides (without suicide):

- there were more female victims (65%,  $n = 11$ ) than male victims (35%,  $n = 6$ )
- 82 per cent of deaths ( $n = 14$ ) occurred in the victim's home
- causes of death were stab wounds (29%,  $n = 5$ ), beatings (24%,  $n = 4$ ), strangulations/suffocations (18%,  $n = 3$ ) and drug overdoses (12%,  $n = 2$ ).<sup>10</sup>

8 According to AIC NHMP data, from 1 July 2001 to 30 June 2010 there were 162 homicide victims aged over 70 years in Australia. The categories include intimate-partner homicide ( $n = 17$ ), intimate-partner homicide-suicide ( $n = 6$ ), parricide ( $n = 36$ ), other family homicide ( $n = 16$ ), homicide by strangers ( $n = 33$ ), homicides by friends/acquaintances ( $n = 31$ ), other ( $n = 6$ ) and unknown ( $n = 17$ ).

9 As previously mentioned, euthanasia is outside the scope of this paper.

10 The remaining causes of death were smoke inhalation/burns ( $n = 1$ ), poisoning/injections ( $n = 1$ ) and electrocution ( $n = 1$ ).

## Offender characteristics

Australian data shows that of the 17 intimate-partner homicide offenders (AIC NHMP [computer file]):

- 70 per cent ( $n = 12$ ) were male
- 29 per cent ( $n = 5$ ) were known to be suffering from a mental illness<sup>11</sup>
- only one was known to be affected by drugs or alcohol at the time of the offence.

## Motive for the offence

Australian data reveals the most commonly recorded precursor to an intimate-partner homicide (41%,  $n = 7$ ) to be a domestic argument (AIC NHMP [computer file]).<sup>12</sup> The Australian case of *R v. Goodwin* (see Case 1) provides an example of how a general domestic altercation between an elderly couple can result in homicide.

## Intimate-partner homicide-suicide

**Although occurrences are rare, intimate-partner homicide may also involve the suicide or attempted suicide of the offender. Since 2001, only six such cases have been recorded in Australia.**

## Nature of the offence

Australian data reveals that six homicides committed by an intimate partner also involved the suicide of the perpetrator. Four of these occurred in the victim's home and two in a public place. Three of the homicide-suicides were carried out using a gun (AIC NHMP [computer file]).<sup>13</sup>

In analysing over 200 cases of intimate-partner homicide-suicide (IPHS) in the United States, where either the victim or the offender was over the age of 60, Salari (2007) found that 87 per cent were carried out using a firearm. Sometimes the IPHS events also resulted in injury or death to secondary victims (e.g. children, friends, neighbours).

### Case 1: *R v. Goodwin* [2001] VSC 519

Albert Goodwin, aged 83 at the time of the offence, pleaded guilty to the manslaughter of his wife Anne Jessie Goodwin, aged 82. Albert and Anne had been married for almost 60 years.

On 4 April 2001 the couple had a domestic argument that led to Mrs Goodwin's death. According to Mr Goodwin, he was outside reading the newspaper when his wife said, "I've made a cup of tea for the mong" (the term "mong" being a contraction of mongrel bastard). There was then an argument over money and a set of keys. Mr Goodwin lost his temper and grabbed his wife by the jumper, causing her to drop the dinner plate she was holding. He then asked his wife, "Are you going to put that money back and the keys?", to which she replied, "No, I'm going." Mrs Goodwin managed to pull away and run out the back door of the house. Mr Goodwin grabbed a knife from the kitchen and chased after her. He was able to catch her and grab her, again asking for the money and the keys. She replied, "No, mong." Mr Goodwin then suggested that his mind went blank; however, it is known that he stabbed his wife five times in the upper chest. Multiple stab wounds and associated haemorrhaging were found to be the cause of death.

In sentencing, Justice Coldrey made the following remarks: "A violent death caused by the hand of an elderly person is no less terrifying or permanent. Mrs Goodwin, herself an elderly lady, might reasonably have expected that the end of her long life would be peaceful and not traumatic. [However] your conduct ... has to be seen in the context of the tense and volatile relationship you had with your wife. The incident of the money and keys, although trivial in itself, was the culmination of what you regarded as years of verbal abuse, ingratitude and humiliation ... This is a unique case and one which presents difficult sentencing problems for any judge. But balancing as best I can the sentencing principles enunciated in the Sentencing Act, and being as merciful as I can in the circumstances that I have outlined, I have concluded that the appropriate sentence be that you be imprisoned for a period of six years" [at 21, 18 & 43].

## Offender characteristics

According to the Australian data (AIC NHMP [computer file]) all six instances of IPHS were carried out by male offenders, of whom:

- four were known to be suffering from an intellectual disability or mental illness
- one was under the influence of alcohol or drugs at the time of the homicide-suicide.

A history of substance abuse has also been found to be a strong predictor of IPHS involving older people. Despite this, the research literature suggests that most offenders are not affected by alcohol at the time of the offence (Salari 2007).

11 Assessment of mental or psychopathic condition is based on a known history of psychiatric condition or as agreed upon by judge at trial.

12 Other motives were recorded in the NHMP data as no apparent motive ( $n = 3$ ), mercy killing/consent ( $n = 2$ ), money/drugs ( $n = 1$ ), alcohol-related argument ( $n = 1$ ), other argument ( $n = 1$ ), desertion/termination ( $n = 1$ ), not stated/unknown ( $n = 1$ ).

13 The causes of death for the remaining three homicide victims were recorded under the categories of strangulation/suffocation ( $n = 1$ ), drug overdose ( $n = 1$ ) and poisoning/injection ( $n = 1$ ).

## Motive for the offence

Given the very small number of recorded IPHS occurrences in Australia ( $n = 6$ ),<sup>14</sup> we examined the research literature from elsewhere, which suggested that the motives associated with IPHS differ from those associated with intimate-partner homicide. These motives appear to fall most commonly into one of three categories: suicidal primary intent, domestic violence and homicidal primary intent, and mutual consent.

- *Suicidal primary intent.* It is estimated that three-quarters of IPHS events involve a perpetrator whose primary motive is suicide. The decision to also kill their intimate partner may be due to concerns that the partner would not be able to handle the suicide, or because they view their intimate partner as an extension of themselves (Salari 2007). Cohen (2000) views these IPHS scenarios as “dependent-protective”; he suggests that there is a high level of interdependence between the partners, and that depression, isolation and hopelessness experienced by the perpetrator may contribute to the decision to commit the offence.
- *Domestic violence and homicidal primary intent.* For the remaining one-quarter of IPHS, the primary intent is homicide (Salari 2007). There may be a known history of domestic violence or conflict within the intimate-partner relationship. Cohen (2000) refers to this type of IPHS as “aggressive”.
- *“Suicide pacts” and “mercy killings”.* These types of motive, where there is mutual consent from both parties, are relatively rare. In studying 225 IPHS events involving persons over the age of 60, Salari (2007) found evidence of a suicide pact in only 4 per cent of cases ( $n = 9$ ). Cohen (2000) drew similar conclusions, finding that most IPHS victims (usually female) did not consent to the IPHS act.

## Parricide

**Half of all Australian parricide offenders have a pre-existing intellectual disability or mental illness. The majority of these homicides occur within the victim’s own home and result from a stabbing or a beating (AIC NHMP [computer file]).**

## Nature of the offence

Parricide refers to instances where an offender kills one or both of their parents. Just over one-fifth (22%,  $n = 36$ ) of homicides committed against Australians aged 70 years and over were carried out by the victim’s biological or non-biological child (AIC NHMP [computer file]). Over three-quarters ( $n = 28$ ) of these homicides occurred within the victim’s own home, with the majority of the deaths being attributed to either stab wounds ( $n = 12$ ) or a beating ( $n = 11$ ) (AIC NHMP [computer file]).<sup>15</sup>

In Australia, there have been more occurrences of matricide (64%,  $n = 23$ ) than of patricide (36%,  $n = 13$ ) (AIC NHMP [computer file]). Similar findings have also been reported in the research literature. For example, an analysis of 828 homicides<sup>16</sup> in the United States determined that women were significantly more likely than men to be killed by their child (Krienert & Walsh 2010). The case of *The State of Western Australia v. Silich* (see Case 2) provides an example of a parricide offence in Australia.<sup>17</sup>

### Case 2: *The State of Western Australia v. Silich* [2011] WASCA 135

In April 2010, Vernon Robert Silich was found guilty and sentenced to 15 years’ imprisonment for murdering his parents, Faye Lorraine Silich and Robert George Silich (both aged 65). The facts of the case, as accepted by the jury, were that on the night of 8 April 2008 Vernon Silich visited his parents’ house for dinner. During the course of the evening both the accused and his father consumed a substantial amount of alcohol. His parents retired to the bedroom around midnight, and sometime after this Vernon entered his parents’ bedroom and attacked both his mother and father while they were sleeping. Wearing steel-capped boots, he kicked his parents with sufficient force to cause unconsciousness and ultimately death.

While Silich did not suffer from a mental illness or intellectual disability it was argued that his actions were not voluntary because he was sleepwalking when he killed his parents. On this basis the defence argued that he was entitled to a full acquittal. Silich, found guilty and sentenced to 15 years’ imprisonment, appealed against his conviction. At the same time the state launched a cross-appeal, on the basis that his sentence was too lenient for a double murder.

In his ruling, Chief Justice Martin made the following remarks: “Having regard to the jury’s finding that the appellant intended to kill each victim, that there were two victims of separate assaults, and that each victim was elderly and frail and bludgeoned to death in their own home by a family member they were entitled to trust, these homicides could not be said to be at the lower end of the range, notwithstanding the personal circumstances of the appellant and the mitigating factors found by the trial judge. The aggravating circumstances to which I have referred necessarily place these offences around the middle of the range of the homicides to which we were referred, rather than within the lower end of that range. It follows that the specification of a minimum period prior to parole which is at the lower end of the range was manifestly inadequate, and manifests error” [at 100].

The Court of Appeal dismissed Silich’s application and instead allowed the state’s cross-appeal, extending his minimum prison term by four years and taking the sentence to 19 years.

14 The motives for the six IPHS occurrences in Australia are recorded as: jealousy ( $n = 1$ ), domestic, ( $n = 1$ ), no apparent motive ( $n = 2$ ), and unstated/unknown ( $n = 2$ ) (AIC NHMP [computer file]).

15 Other recorded causes of death were strangulation/suffocation ( $n = 6$ ), gunshot wounds ( $n = 5$ ), drug overdose ( $n = 2$ ).

16 Victims were aged 60 years and older in this study.

17 Although the victims in this case were both 65 years of age, it has been included because the judge specifically referred to the victims as “elderly and frail”.

## Offender characteristics

Examination of Australian data reveals that:

- sons were the most likely parricide offenders (31 of the 36 parricide offenders were male)
- about one-quarter of parricide offenders ( $n = 10$ ) had a prior criminal record
- half of all parricide offenders ( $n = 18$ ) had an intellectual disability or mental illness (AIC NHMP [computer file]).

The prevalence of mental illness in these offenders has led some researchers to refer to parricide as the “schizophrenic crime” (West & Feldsher 2010).

## Motive for the offence

The two most common motives reported in Australian data and research literature are domestic arguments and mental illness:

- *Domestic argument.* According to the Australian data, 42 per cent ( $n = 15$ ) of parricide offenders were motivated by a domestic argument (AIC NHMP [computer file]). Block (2013) determined that arguments about living arrangements (e.g. sons or daughters being asked to leave the home) or about money and property, were contributing factors to the domestic altercations resulting in death.
- *Mental illness.* Despite recording that half the parricide offenders had an intellectual disability or mental illness, Australian data only attributes two of these homicides to apparently delusional<sup>18</sup> motives (AIC NHMP [computer file]). In the research literature, a much larger proportion of parricides involving older victims tend to be attributed to motives associated with mental illness. For example, Bourget, Gagne and Labelle (2007)<sup>19</sup> in analysing 11 parricides involving victims aged 75 years and older, found nine to involve a depressive or psychotic motivation.

## Other family homicide

Ten per cent ( $n = 16$ ) of Australian homicides committed against those aged 70 years and over were carried out by a family member of the victim other than their son or daughter (AIC NHMP [computer file]). Further examination of the data revealed that:

- there were equal numbers of male ( $n = 8$ ) and female ( $n = 8$ ) victims, although there were more male offenders ( $n = 13$ ) than female offenders ( $n = 3$ )

- the most common cause of death was stab wounds ( $n = 7$ ); the remaining victims died from strangulation/suffocation ( $n = 4$ ), a beating ( $n = 3$ ), gunshot wounds ( $n = 1$ ) or criminal neglect ( $n = 1$ )
- all but one of the homicides were committed in a public place
- the most common motive was recorded as a domestic argument ( $n = 5$ ), followed by drugs/money ( $n = 3$ )
- around one-third of the offenders ( $n = 6$ ) had an intellectual disability or mental illness at the time of the offence.

The research literature adds little to our understanding of homicide of older people by family members other than intimate partners or children.

## Homicides by strangers

**When an older person is killed by a stranger, the killing usually occurs during the commission of another crime, most commonly a robbery or break and enter. The offender is likely to have a criminal record and to kill their victim by beating them.**

### Nature of the offence

One-fifth of Australian homicides (20%,  $n = 33$ ) committed against those aged 70 years and over were carried out by a stranger (AIC NHMP [computer file]). Of these:

- 52 per cent ( $n = 17$ ) were committed in the victim’s own home, with the remainder occurring in a public place or other location, such as a hospital or care facility
- beating was the most common cause of death (39%,  $n = 13$ )<sup>20</sup>
- 73 per cent ( $n = 24$ ) occurred during the course of another crime, with offending patterns similar to those reported internationally, the most commonly recorded crimes associated with these homicides being robberies ( $n = 9$ ) and break and enter ( $n = 8$ )
- four of the 19 women killed by strangers were subjected to a sexual assault.

Official homicide data may under-report the number of older victims who are subjected to sexual assault because homicide investigations involving older victims are not always conducted in a thorough manner (Safarik, Jarvis & Nussbaum 2002).<sup>21</sup> The Queensland case of *R v. Ray* (see Case 3) illustrates how the violence used during a sexual assault can result in the death of an older person. (See pages 8–9 for further discussion of investigative challenges.)

18 The AIC NHMP motive code “apparently delusional” is based on the definition of mental illness under the *Mental Health Act 2007* (NSW).

19 Parricide offences involving victims aged 75 years and older were analysed by Bourget, Gagne and Labelle (2007) as a subset of a large sample of parricide offences ( $n = 64$ , where the victims ages ranged from 40 to 95).

20 Other causes of death were stab wounds ( $n = 5$ ), gunshot wounds ( $n = 4$ ), strangulation/suffocation ( $n = 4$ ), other (e.g. hit by a car,  $n = 6$ ), unstated/unknown ( $n = 1$ ).

21 The remaining three homicides (committed in the context of another crime) that were carried out by strangers were recorded as involving a theft, a drug offence and another violent crime.

## Case 3: *R v. Ray* [2011] QCA 365

Iris Temperley was an 82-year-old woman who lived alone. On 26 January 2010, she was tending her garden when she was attacked by Mr David Samuel Aubrey Ray. He bashed her around the head and the face and repeatedly raped her. Ms Temperley was found unconscious and was rushed to the Royal Brisbane and Women's hospital. She died sometime later due to a loss of blood from the head and anal–genital injuries.

At the time of the offence the offender was 18 years of age. He claimed that he could not remember sexually assaulting the deceased as he was extremely intoxicated. During the course of the trial it was revealed that he had previous criminal convictions, largely for stealing and for break and enter.

The primary judge, in commenting on the “appalling” nature of the crime, sentenced Ray to life imprisonment for murder and for two counts of rape. Ray then appealed the sentences. Justices McMurdo, White and Mullins, in considering similar cases involving violent rapes, allowed the appeal on the grounds that the sentences for rape were manifestly excessive. However, the sentence of life imprisonment for murder was upheld.

## Offender characteristics

Of the 33 Australian stranger-homicide offenders (AIC NHMP [computer file]):

- 94 per cent ( $n = 31$ ) were male
- 85 per cent ( $n = 28$ ) had a criminal history
- 27 per cent ( $n = 9$ ) were under the influence of drugs and/or alcohol at the time of the offence
- 15 per cent ( $n = 5$ ) suffered from a mental illness or intellectual disability.

## Motive for the offence

Motives attributed to the 33 stranger homicides (AIC NHMP [computer file]) were as follows:

- 42 per cent ( $n = 14$ ) money/drugs
- 39 per cent ( $n = 13$ ) no apparent motive or not stated/unknown
- 6 per cent ( $n = 2$ ) sexual vilification
- 6 per cent ( $n = 2$ ) to prevent victim testifying
- 3 per cent ( $n = 1$ ) other argument
- 3 per cent ( $n = 1$ ) apparently delusional.

### Money/drugs motive

Australian data shows that stranger homicides are most likely to occur during the course of another crime, with the most common motive being drugs and/or money. The research literature explains this in the following ways:

- Older people are seen as “soft targets” or “easy marks” due to their increased vulnerability as a function of age (declining physical and mental health). Older people may also be targets of attempts to acquire money or other personal property (Mouzos 2003).

- In their attempt to acquire property by breaking and entering, offenders may select homes they mistakenly believe to be unoccupied (Maxfield 1989). In doing so they may unexpectedly encounter older residents who then become “double victims”, meaning that the theft victim becomes the homicide victim (Peak 1994 as cited in Mouzos 2003).

In the case of *R v. PDJ* (see Case 4) the offender's motive to steal resulted in the death of an older woman.

## Case 4: *R v. PDJ* [2002] VSCA 211

The victim was an elderly<sup>22</sup> woman, who lived alone. The offender (who was 15 at the time of the offence) and two other youths planned to assault a random victim in order to steal their car. On the night of the offence, the three youths entered the woman's home and the offender attacked her. He bashed her with a garden stake, inflicting fatal wounds. Originally sentenced to 16 years' imprisonment, the offender argued on appeal that the sentence was manifestly excessive.

On appeal, however, the original sentence was upheld, with Justice O'Bryan making the following remarks [at 80]: “This was a very brutal and callous murder calling for most severe punishment. To inflict such horrendous injuries on a defenceless elderly lady in her own home must have been horrifying for the community in which she lived and very distressing indeed for her family. The applicant had no grievance against the deceased; the motive for her death was theft of her car. She became an opportunistic victim.”

### Sexual motive

The literature presents two predominant yet conflicting views regarding the motives of sexual homicide offenders:

- *Unplanned sexual assault*. Sexual homicides are likely to occur impulsively and may be a result of a financially motivated crime gone awry. Snyder (2012) provides the following example: an offender enters a house with an intent to steal, but in doing so he encounters an elderly female and his motive changes, resulting not only in sexual assault but also in murder.
- *Sexual assault as the primary motive*. Sexual-homicide offenders intend all along to sexually assault and murder their older victims (Safarik, Jarvis & Nussbaum 2002). The fact that property was removed from the crime scene is not sufficient evidence to assume a financial motive. Safarik, Jarvis and Nussbaum examined over 600 sexual homicides of elderly people and found that, while 72 per cent of offenders removed property from the crime scene, criminal investigation of these offences revealed the theft of property to be an afterthought.

22 Although the victim was described as elderly, her age was not reported.

## Homicides by friends or acquaintances

Australian data shows that homicides committed by a friend or acquaintance of the victim account for one-fifth of all homicides of people aged 70 and over. These homicides are likely to be committed by male offenders and occur in the victim's home, and older men are at greater risk of being victims than are older women.

### Nature of the offence

About one-fifth ( $n = 31$ ) of Australian homicides were committed by either a friend or acquaintance of the victim (AIC NHMP [computer file]). Of these:

- 87 per cent ( $n = 27$ ) of victims were male (a similar trend to that noted in the research literature: see Krienert and Walsh 2010)
- 74 per cent ( $n = 23$ ) were committed in the victim's own home
- 55 per cent ( $n = 17$ ) of deaths were the result of a beating
- 45 per cent ( $n = 14$ ) occurred during the commission of another crime such as a break and enter ( $n = 6$ ).

### Offender characteristics

Of the 31 Australian offenders recorded as friends/acquaintances (AIC NHMP [computer file]):

- 84 per cent ( $n = 26$ ) were male
- 61 per cent ( $n = 19$ ) had a criminal history<sup>23</sup>
- 32 per cent ( $n = 10$ ) had an intellectual disability or mental illness
- 29 per cent ( $n = 9$ ) were known to have been under the influence of alcohol and/or drugs at the time of the offence.<sup>24</sup>

Despite friends/acquaintances committing around one-fifth of homicides against victims aged 70 years and older in Australia, there is an absence of research on the characteristics associated with these offenders. *R v. Davy* (see Case 5) is a recent example of a friend — in this case a landlord — killing a victim because of a financial motivation.

### Motive for the offence

The most commonly recorded motive in the Australian data was drugs/money (32%,  $n = 10$ ) closely followed by other argument

(26%,  $n = 8$ ). The category of other argument refers to a short-term argument rather than a domestic argument where the conflict is of an ongoing nature (AIC NHMP [computer file]).

#### Case 5: *R v. Davy* [2010] QCA 118

Raymond Paul Davy (40 years old at the time of the offence) pleaded guilty to manslaughter of his landlord,<sup>25</sup> 73-year-old Donald Rogers. The deceased was killed in circumstances in which the applicant was attempting to obtain the deceased's Personal Identification Number (PIN) for his credit cards in order to obtain access to his money.

On 2 December 2009 Davy was sentenced to imprisonment for 11 years and six months. Davy unsuccessfully attempted to appeal his sentence on the grounds that it was manifestly excessive in the absence of violence or intention to harm. Although the applicant was able to rely on his drug-induced condition to argue that he had no intention to kill, that condition in no way acted in mitigation of the offence of manslaughter. The sentencing judge also had regard to the comparative vulnerability of the applicant's older victim.

## Investigative challenges

Homicides of older victims present some investigative challenges, including differentiating between natural death and homicide, and between self-neglect and caregiver neglect.

### Pre-investigative assumptions

Following the death of an older person, there are two assumptions often made by medical staff or family that can prevent the possibility of homicide being investigated. These assumptions are that the death is due to either natural causes or self-neglect.

#### Assumption that death is due to natural causes

When an older person dies it is generally assumed, in the absence of clear indications to the contrary, that death was a result of natural causes (Payne 2009). In general, the assumption has a sound basis, since disease is the leading cause of death for older Australians (AIHW 2010). Consequently, when an older person dies and is known to have had a pre-existing disease, the cause of death may be automatically attributed to that disease.

23 Nineteen offenders were recorded as having a criminal history, six as not having a criminal history and four with criminal history recording as "not stated/unknown". For the remaining two cases no data was supplied and these cases were added to the "not stated/unknown" group for the purposes of calculating the percentage.

24 Nine offenders were recorded as being affected by alcohol/drugs, four as not affected by alcohol/drugs and 13 "not stated/unknown". For the remaining five cases no data was supplied and these cases were added to the "not stated/unknown" group for the purposes of calculating the percentage.

25 Although the victim was the offender's landlord, he was also known to be a friend of the victim. For this reason, the case is presented under this heading of the report. However, it must be noted that the NHMP records the offender-victim relationship of "landlord-tenant" under the category of "other relationship". This case provides an apt example of how an offender may fall into more than one of the categories discussed in this paper.

## Assumption that death is due to self-neglect

A related issue is determining whether the death of an older person resulted from self-neglect or caregiver neglect. This is particularly difficult, even for experts such as coroners and medical examiners, because the signs of self-neglect and caregiver neglect similarly include poor personal hygiene, dehydration and malnutrition (Mosqueda & Wigglesworth 2012).

Training is required for professionals, to improve their ability to recognise potential cases of homicide and fatal abuse and neglect, and thus make better decisions about the need to investigate the death of an older person.

## Implications

Erroneously making one of the above assumptions may result in a lost opportunity to examine the potential crime scene (e.g. the victim's home), an incomplete medical examination and the absence of an autopsy, all of which will adversely affect any subsequent investigation.

## Lost opportunity to examine the crime scene

Law enforcement personnel are unlikely to be called in when the death of an older person is assumed to be due to natural causes or self-neglect. This has negative consequences if the death is later suspected to be a homicide:

- *Loss of forensic evidence.* The preservation of the crime scene is paramount for any homicide investigation. Even a small delay in attending the scene may result in loss of evidence. For example, in attending to the crime scenes of the Australian serial *Granny Murders*, police officers found that the public had washed away blood and other forensic material from the scene (Hagan 1992).
- *Lost opportunity to examine living conditions.* If investigators are trying to differentiate between self-neglect and caregiver neglect, it is often useful to compare the suspect's living conditions to those of the victim and note whether the caregiver is living in cleaner conditions than the victim (New Hampshire Department of Justice 2006). A lapse in time between death and the involvement of law enforcement gives the suspect (of caregiver neglect) time to clean up the victim's living quarters.
- *Lost opportunity to examine body in situ.* First-hand examination of both the position of the body and the extent of any injuries is important. The position of the body may help to establish a probable cause of death: for example, the more contorted the body, the more sudden the death (Gardner & Bevel 2009). First-hand examination will also allow forensic investigators to note the rigor mortis (stiffening of the muscles after death). Once the body is moved, the rigor mortis changes and the opportunity to establish an approximate time of death is lost. If police do not attend the scene, investigators will need to rely on witness statements or photographs (if available) of the body and the crime scene.

## Incomplete medical examination

Medical examinations may not be thoroughly undertaken if medical examiners assume that the older person's death was due to self-neglect or natural causes. In Mosqueda and Wigglesworth's (2012) study the expert panel found the level of investigation to have been unsatisfactory in 67 per cent of cases. Some deaths were not investigated at all, and some required a more thorough investigation (e.g. physical examination of the body) in order to be sure of the cause of death. Interviews with the medical examiners revealed that they favoured not investigating a death where signs of neglect were present (Mosqueda & Wigglesworth 2012).

It is vital for law enforcement to share any intelligence or evidence gathered during the course of an investigation with the medical examiner or pathologist before they carry out a medical examination (Queensland Courts 2012). Information gathered from the scene examination (if it occurred) and witness/suspect interrogations may help the pathologist determine what to look for. If the suspect was present at the time of death or injury, their typical explanation will be that the older person "fell". Bruises and fractures resulting in death may be indicators of an assault; equally they may result from a fall (Bonnie & Wallace 2003). If the pathologist is fully aware of the circumstances of the "fall", he or she will be able to use forensic testing to prove or disprove it. For example, the localisation of contusions is valuable in distinguishing bruises from a fall from those received from a beating (Hunsaker & Hunsaker 2006).

## The absence of an autopsy

Generally speaking, the older the victim, the less likely it is that an autopsy will be conducted (Collins & Presnell 2006). Research conducted in the United States suggests that deaths occurring in nursing homes are autopsied less than 1 per cent of the time (Collins & Presnell 2006). It has been suggested that health professionals may be more likely to approve death certificates without an autopsy in the case of older people who suffered from chronic illness, based on an assumption that their existing illness is a sufficient explanation for their death (Abrams et al. 2007; Collins & Presnell 2006).

An autopsy provides investigators with the last chance to establish a cause of death consistent with homicide (Hunsaker & Hunsaker 2006). However as autopsies are both costly and invasive, the Queensland State Coroner's Guidelines (Queensland Courts 2012) recommends that they only be carried out where "necessary". The Coroner has the discretion not to order an autopsy in cases where a probable cause of death is already known. This is despite the fact that an autopsy may provide greater understanding surrounding the circumstances and/or cause of death.

## Prosecutorial challenges

Queensland offenders who kill an older person are likely to be charged with either murder or manslaughter under the Criminal Code. The issue of causation and breach of duty to provide the necessities of life may be disputed by the defence.

### Causation

To establish the elements of murder or manslaughter, the prosecution must prove — beyond reasonable doubt — that the accused directly or indirectly caused the death of the older victim. A causal connection is usually established by applying the “but for” test. This involves asking whether the older person’s death would have occurred “but for” the actions of the accused. However, the High Court of Australia has made it clear that the “but for” test is only one of many tests that can be used to establishing causation.<sup>26</sup> Some of the other tests for causation include the following:

- *Commonsense test.* The jury is instructed to use commonsense when deciding the issue of causation, while “appreciating that the purpose of the enquiry is to establish legal responsibility in a criminal matter”.<sup>27</sup>
- *The natural consequences test.* This applies in cases where the victim has in some way contributed to their own death. The main case that sets out this test is *Royall v. The Queen*.<sup>28</sup> In that case, the victim died after jumping out of a window in an attempt to escape the accused.
- *Substantial contribution/significant cause test.* This test applies where death may have resulted from several causes (e.g. an assault committed by the accused and later medical treatment). The test involves looking at whether the contribution of the accused was a substantial one.<sup>29</sup>
- *Reasonable foreseeability test.* This involves asking whether the resulting consequences of the accused’s conduct were reasonably foreseeable.<sup>30</sup>

In Australia, there is no consensus about which of the above causation tests should apply. Rather, the courts are guided by the circumstances of each case (Bronitt & McSherry 2010).

The issue of causation is particularly relevant in cases where the death of the older victim is not immediate. The greater the length of time between the act of the accused and the death, the more chance the accused has of establishing a break in the chain of causation. For example, in the case of *R v. Styman*;

*R v. Taber* (see Case 6), the offenders broke into an elderly woman’s house, bound and gagged her, robbed her of over \$23,000 and then abandoned her. She died some 10 days later. It was argued by the defence that the offenders did not cause the death of the victim because they called 000 and reported the break and enter after they abandoned her. However, the courts disagreed, finding that the acts of the co-accused significantly contributed to the victim’s death.

#### Case 6: *R v. Styman; R v. Taber* [2004] NSWCCA 245

On 19 January 2001 Mrs Joy Golbie Alchin (71 years old) was found dead in her home. She was lying face down on a mattress on her bedroom floor. Her wrists and ankles were tied together with grey duct tape and cable ties. There was a pair of underpants folded to form a wad against Mrs Alchin’s mouth and a pillowcase had been placed over her head. There was duct tape wound tightly around her mouth, lower jaw and neck.

It was the Crown case that the appellants, Ian Styman and Peter Taber, broke into Mrs Alchin’s house in the early hours of 7 January 2001, bound and gagged her, robbed her of over \$23,000 and then left her to die.

Originally convicted of murder, the appellants appealed their conviction on the basis that there was no evidence that their conduct caused the death of Mrs Alchin. The main basis of this claim rests with the fact that Styman, after leaving the scene of the crime, made a 000 telephone call from a pay phone reporting a break and enter at Mrs Alchin’s house. However, this call was not acted upon.

In deciding on the issue of causation, Justices Sheller, Sperling and Adams made the following comments: “The basic proposition relating to causation in homicide is that an accused’s conduct, whether by act or omission, must contribute significantly to the death of the victim. It need not be the sole, direct or immediate cause of the death. It was clear enough that Mrs Alchin’s death would not have occurred but for the omission on the part of the appellants to remove her from danger after the 000 call. It was also clear that, had the operator passed on the call as she should have, Mrs Alchin would have been rescued and would not have died. However, on the facts of this case there was no reasonable prospect that the jury would fail to find that the appellants’ omission caused Mrs Alchin’s death.” [Summary extracted from judgment]

While the appeal was dismissed on the grounds of causation, the appeal succeeded on the ground that the court considered the verdict of murder to be unreasonable. It was held that the evidence could not justify the conclusion, beyond reasonable doubt, that, at the relevant time, the appellants fully realised that Mrs Alchin would probably die. The Justices ordered a new trial of each appellant on the charge of manslaughter. Later both Styman and Taber were convicted of manslaughter (see *R v. Taber and Styman* [2005] NSWSC 1292).

<sup>26</sup> *Royall v. The Queen* (1991) 172 CLR 378.

<sup>27</sup> *Campbell v. The Queen* [1981] WAR 286 at 290. Test was supported by the High Court of Australia in *Royall*.

<sup>28</sup> (1991) 172 CLR 378.

<sup>29</sup> *R v. Hallet* [1969] SASR 141.

<sup>30</sup> *Royall v. The Queen* (1991) 172 CLR 378.

## Breach of duty to provide necessities

A charge of manslaughter may result from a failure to provide the necessities of life to an older person under section 285 of the Criminal Code. While the “necessaries of life” are not defined in the legislation, the common law suggests that it at least covers medical aid, food, shelter and clothing.<sup>31</sup> The relevant legal test is that:

- there was a duty of care — the duty under this provision is voluntary, assumed by taking charge of another, and criminal liability can result from either an act or omission
- the duty was breached — the accused in breaching their duty must have been reckless and careless, rather than merely negligent (Carter 2013).

The matricide case of *R v. Miller* (see Case 7) illustrates the circumstances in which a charge of this type may arise.

### Case 7: *R v. Miller* [2010] QSC 453

Mrs Agnieszka Miller was charged with the manslaughter of her 76-year-old mother on the basis that she failed to provide her with the necessary medical assistance.

Mrs Miller called the ambulance on 27 May 2006 when she found her mother dead. The autopsy concluded that the cause of death was sepsis, due to multiple bedsores, malnutrition, dehydration, as well as her longstanding arthritis. Mrs Miller pleaded guilty to manslaughter.

In sentencing, the court considered Mrs Miller’s own mental health issues (chronic depression), the absence of a criminal history and the absence of an intention to harm: “Having considered the authorities, I consider a period of imprisonment of five years is the appropriate head sentence. However, given the particular factors in your case, I consider that a period of imprisonment of 12 months should be served. I will suspend the period of imprisonment after a period of one year” [41].

## Possible criminal defences

**When an offender is charged with homicide, one or more of the following defences may be raised: automatism, insanity, diminished responsibility, provocation, accident, self-defence and palliative care.**

### Automatism

One of the fundamental principles of criminal law is that an accused is not criminally responsible for an act unless it is performed voluntarily.<sup>32</sup> Automatism is “a term most often used to refer to involuntary conduct in the sense of it being conduct performed in a state of impaired consciousness” (Colvin, Linden & McKechnie 2005, p. 374). Australian courts have recognised

that automatism may be the result of a range of causes including a knock to the head, sleep disorders and dissociation arising from external stress. In the previously discussed case of *The State of Western Australia v. Silich* (see page 5), the defence argued that the actions of the accused were involuntary because Silich was sleepwalking at the time of the offence. Although the jury held that there was not enough evidence to support the fact that Silich was sleepwalking, the case illustrates how automatism may be argued in court.

Offenders who kill older victims may also be affected by drugs and/or alcohol. However, Queensland Courts have considered intoxication to be irrelevant when determining voluntariness.<sup>33</sup> It is more common for evidence of intoxication to be introduced by the defence to negate intention.

### Insanity

The defence may argue that the accused should be relieved of criminal responsibility due to mental illness. This defence is particularly relevant for those who commit parricide, given that about half of all parricide offenders in Australia have a pre-existing intellectual disability or mental illness at the time of the offence (AIC NHMP [computer file]).

The insanity defence is concerned with an accused’s mental condition at the time of the alleged offence, not at the time of the trial. Nevertheless, an accused must be mentally fit to stand trial before there can be any inquiry into criminal responsibility. In Queensland, section 613 of the Criminal Code provides for a separate trial to determine whether, for any reason, the accused is incapable of understanding the proceedings so as to be unable to make a proper defence. If the reason for a finding of incapacity is “unsoundness of mind”, there is a special verdict to this effect. The offender is then dealt with under the relevant provisions of the *Mental Health Act 2000* (Qld).

If the accused is deemed fit to stand trial, the defence of insanity may be open on the ground that the accused was mentally ill at the time of the offence. As set out in section 27 of the Criminal Code, for the insanity defence to apply the accused must have been suffering a mental disease or a natural infirmity that deprived them of one of the following capacities at the time of the offence:

- the capacity to understand what he or she is doing,
- the capacity to control his or her actions, or
- the capacity to know that he or she ought not to do the act or make the omission (see Appendix A).

A finding of insanity results in an acquittal on the grounds of unsoundness of mind and the offender is dealt with under the *Mental Health Act 2000* (Qld). The offender is subject to indeterminate detention, subject to periodic review.

<sup>31</sup> *MacDonald and MacDonald* [1904] St R Qd 151.

<sup>32</sup> Section 23(1)(a) Criminal Code; see Appendix A.

<sup>33</sup> *R v. Kusu* [1981] Qd R 136.

## Diminished responsibility

The defence of diminished responsibility is concerned with less serious mental infirmities (e.g. personality disorders and intellectual impairment) than those associated with insanity. One of the same three capacities must be deprived, but this defence requires only substantial deprivation (rather than total deprivation). It is available only for the offence of murder and, if successful, will result in a conviction for manslaughter.<sup>34</sup>

In cases where the accused is also an older person (see the intimate-partner homicide case *R v. Albert James Paddock* in Case 8), there may be grounds for the defence of diminished responsibility based on impaired capacity due to the effects of ageing.

### Case 8: *R v. Albert James Paddock* [2009] NSWSC 369

Albert James Paddock was charged with the murder of his partner Barbara Ingram (70 years old); he was 78 years old at the time of the offence. Before her death Ms Ingram had been planning to leave Mr Paddock. The evidence presented in court revealed that he was becoming increasingly difficult to live with and was convinced that Ms Ingram was having an affair.

Justice Rothman explained the facts of the case as follows: “On being interviewed, Mr Paddock was, to say the least, confused. He initially stated that Ms Ingram came at him with her hands raised and a knife above her head. It is clear from the nature of the injuries and the cause of death that this is not so ... Mr Paddock explained that his poor old brain was mixed up” [at 14].

The evidence showed that Mr Paddock had in fact strangled Ms Ingram to death. Mr Paddock pleaded not guilty to murder but guilty of manslaughter based on substantial impairment of mind.<sup>35</sup> Psychiatric evidence was tendered to show that Mr Paddock suffered from dementia, which was complicated by delusions resulting from sensory impairment (something not uncommon in the elderly).

## Provocation

As with the defence of diminished responsibility, the accused may rely on the defence of provocation to reduce a charge of murder to manslaughter.<sup>36</sup> Section 304 of the Criminal Code provides that the defence of provocation may be successful in circumstances where the actions of the accused occurred:

- *in the heat of passion* — where passion refers to “any intense emotion or any mix of intense emotions such as anger, jealousy, fear, or vengeance” (Queensland Law Reform Commission 2008, p. 18)

- *in circumstances where the passion was caused by a sudden provocation* — the test here is whether the action of the victim was sufficient to provoke an ordinary person to retaliate in the way in which the defendant did (Colvin, Linden & McKechnie 2005)
- *before there is time for the defendant’s passion to cool* — while the killing need not immediately follow the provocation, the defendant must have still been affected by the loss of self-control (“heat of passion”) at the time of the offence.

The case of *R v. Enright* (see Case 9) is an example of a parricide homicide. Justice Coldrey reaffirmed the trial Judge’s decision not to leave defence of provocation open to the jury, because the actions of the deceased would not provoke an ordinary person to lose control in the way the accused did.

### Case 9: *R v. Enright* [1961] VR 663

On 21 May 1959, Mr Enright (36 years old at the time of the offence) was convicted of the murder of William Victor Robertson. The basis for the appeal was that the trial judge was wrong in refusing to leave to the jury the questions of insanity and provocation.

As far as the appellant knew, Mr Robertson was 62 years old at the time of death; however, there was other evidence to suggest he was in his seventies.

As a child, Mr Enright had understood Mr Robertson to be his biological father; but when he was 10–12 years old he had discovered this was not the case. Since that time, Mr Robertson had often called the appellant “bastard”, as he knew it would infuriate him. On the day of Mr Robertson’s death, the two of them were walking through Shepparton when the Mr Robertson again began calling Mr Enright “bastard”. The appellant then picked up a piece of wood and hit Mr Robertson across the shoulders with it. Mr Robertson fell down and kept calling out “bastard”. The appellant kept hitting him until he stopped repeating the word. The appellant then realised that Mr Robertson was dead.

On the issue of provocation, Justice Coldrey made the following remarks: “It is true that it was open to the jury to consider that what Robertson did was not merely to abuse the appellant but to try with malice and persistence to hurt and enrage him. It is also true that the case was not one of provocation by words alone. On the evidence, Robertson assaulted the appellant twice, and although the force used and threatened was slight, any resort to force in such circumstances might, quite naturally, trigger off a reaction of some violence. But even when all this is borne in mind the facts remain that the provocation was primarily in words, that the slight assault was met by a full measure of retaliation ... In our opinion it was not open to the jury to take the view that any ordinary man could have been provoked by such slight means to lose his self-control so far as to commit such an act” [at 671].

34 Section 304A Criminal Code; see Appendix A.

35 In New South Wales the defence of “diminished responsibility” was replaced in 1997 by “substantial impairment of mind” and as such its operation is slightly different from the defence of diminished responsibility in Queensland.

36 Section 304 Criminal Code.

## Accident

Under section 23 of the Criminal Code, the accused may raise the defence of accident. To qualify as an accident, the event must neither have been reasonably foreseen by the accused as a possible outcome nor have been foreseeable as a possible outcome to an ordinary person in the place of the accused. The event need only be foreseen as a possible outcome, and excludes possibilities that are “no more than remote or speculative”.<sup>37</sup>

In Queensland, the defence of accident is further complicated by the “eggshell skull” rule. Originally only existing in common law, this is now codified under section 23 (1A) of the Criminal Code. It provides that the accused is not excused from criminal responsibility for death resulting from a defect, weakness or abnormality, even though the death was not reasonably foreseeable.

## Self-defence

An accused may claim that they were acting in self-defence when they killed their victim. Codified under sections 271 and 272 of the Criminal Code, use of force is authorised in response to a provoked or unprovoked assault, provided that the force used is both a necessary and reasonable response to the attack. For example, the accused may claim that the victim had Alzheimer’s disease and was combative, as a result of which they had to resort to force to defend themselves (Uekert et al. 2012). The patricide case of *R v. Zlatko Svetina* (see Case 10) provides a case example of how self-defence may be argued by the accused.

## Palliative care

Section 282A of the Criminal Code relieves criminal responsibility in cases where death has accidentally been hastened by palliative care, contingent on the care being:

- provided in good faith and with reasonable care and skill; and
- reasonable, having regard to the other person’s state at the time and all the circumstances of the case; and
- provided or ordered by a doctor (see Appendix A).

### Case 10: *R v. Zlatko Svetina* [2011] VSC 392

Zlatko Svetina was convicted of the defensive homicide<sup>38</sup> of his father, Tomislav Svetina (74 years old). The facts of the case, as accepted by the jury, were that Zlatko arrived at his father’s house around 8 pm on 8 July 2010 and on his arrival cut the power to the house. This resulted in Tomislav getting out of bed to investigate, taking with him a tomahawk, which he kept next to his bed for protection. According to Zlatko, his father took him by surprise and hit him in the mouth with the blunt end of the tomahawk, causing a bloody nose, loose tooth and bruised shoulder. Zlatko managed to prise the tomahawk away from his father and then struck him with it at least 10 times on the head and face.

In sentencing the offender Justice Nettle made the following remarks: “The Crown case at trial was that you murdered your father because he was attempting to cut you out of your financial entitlements and because of the objectionable way in which he was behaving towards you and your mother. By acquitting you of murder and finding you guilty of defensive homicide, I take the jury to have concluded that you killed your father with murderous intent but that it was reasonably possible that you believed it necessary to act as you did in order to respond to a threat of death or really serious injury. Plainly, however, the jury were also satisfied that you did not have reasonable grounds for any such a belief” [at 25].

The application of section 282A is strict, and would not provide a defence in the following situations:

- *Mercy killings*. The intention to kill an older person can be present even when the purpose is to relieve pain and suffering.
- *Consensual homicide*. There is no defence available on the grounds that the person consented to death.<sup>39</sup>
- *Aiding suicide*. It is an offence to aid another person to commit suicide.<sup>40</sup>
- *Euthanasia*. This is not legal in any Australian state or territory. The relationship between euthanasia and palliative care is complex. Generally speaking, the goal of euthanasia is to end a patient’s life, whereas the goal of palliative care is to relieve suffering. For the defence of palliative care to apply, death must have been an incidental effect of the care (Bronitt & McSherry 2010; White & Willmott 2012).

In the Victorian case of *DPP v. Rolfe* (see Case 11) an elderly couple entered into a suicide pact, but only the wife died; consequently the husband was charged with manslaughter.

37 *R v. Taiters, Ex p Attorney-General* [1997] 1 Qd R 333.

38 Section 9AD *Crimes Act 1958* (Vic) applies in cases where the complete defence of self-defence is likely to fail as the evidence does not suggest, beyond reasonable doubt, that the actions of the accused were necessary.

39 Section 284 Criminal Code.

40 Section 311 Criminal Code.

## Case 11: *DPP v. Rolfe* [2008] VSC 528

Mr William Rolfe (81 years of age), pleaded guilty to the manslaughter<sup>41</sup> of his wife Janetta Rolfe (85 years of age). On 17 November 2007 the police, after receiving reports of the smell of gas coming from the Rolfes' residence, found Mr and Mrs Rolfe in the master bedroom lying on the bed under a doona and blankets. There was a gas bottle on the floor beside the bed with a short hose leading into the bed under the doona. Mrs Rolfe was dead and Mr Rolfe unconscious. It was determined that Mr Rolfe and his wife had entered into a suicide pact.

When sentencing Mr Rolfe, Justice Cummins made the following remarks: "The law should be vigilant and resolute in protecting life and in protecting the vulnerable and the dependent. Even whereas here, the motives of the offender are pure ... From all the evidence, and from my observation of you, it is established that you are a good and decent man who loved your wife and acted upon a motive of love a conviction of the crime of manslaughter ... having balanced the elements of general deterrence and of mercy, I consider that the proper sentence to be imposed is a wholly suspended sentence of imprisonment of two years" [at 27, 23 & 33].

## Crime prevention opportunities

**The prevention of homicides discussed in this paper is most likely to be achieved through education, training, carer screening, carer support and mandatory reporting of elder abuse.**

### Education and training

Community education programs need to target potential victims, likely offenders and the wider community. They should aim to raise awareness about:

- the prevalence of abuse against older people, and focus specifically on the risk factors associated with homicide
- the risks older people face when relying on others for their everyday needs
- support services available for older people experiencing abuse (United Nations 2013; World Health Organization 2011).

It is especially important that health clinicians, ambulance officers and aged care professionals receive good training in the detection of abuse (Karch & Nunn 2011). This includes training for nursing home staff to help them deal appropriately with any conflicts that may occur between residents, and to preserve the

location where any elderly victim has died so that a medical examiner or police officer can investigate (Bachman & Meloy 2008; World Health Organization 2011).

### Carer screening

In Australia, around 80 per cent of older people requiring care are looked after by family members and other informal carers such as friends and neighbours (Productivity Commission 2011).

Crime prevention efforts should revolve around screening carers for the following risk factors:

- history of substance abuse
- mental health problems
- physical health problems (e.g. Karch & Nunn 2011).

These risks factors can best be monitored through home visits by health care agencies. Where risk factors are identified, appropriate support and counselling services should be offered (American Psychological Association 2012; Karch & Nunn 2011).

### Carer support

Carers may experience stress due to an inability to cope with the needs and wishes of the older person in their care (Carers NSW 2003), and such stress can lead to elder abuse or even homicide. For example, providing respite to carers can prevent them from becoming overwhelmed by their care-giving duties (Bachman & Meloy 2008).

### Mandatory reporting of elder abuse

In Queensland there is no legal requirement for health or aged care professionals to report suspected cases of elder abuse. There is federal legislation requiring such reporting (*Aged Care Act 1997* (Cwlth)), but it is applicable only to those facilities that receive federal funding. Public advocacy bodies claim that mandatory reporting provides protection to vulnerable older people and prevents future abuse. Others, however, have argued that mandatory reporting undermines the rights of older people to self-determination and autonomy in decision making (Office of the Public Advocate & Queensland Law Society 2010).

<sup>41</sup> In Victoria, section 6B of the *Crimes Act 1958* specifically provides that the survivor of suicide pact who kills another is guilty of manslaughter.

## Conclusion

The CMC's new referral enables the CMC's special investigative powers to be used in cases of violent crimes against vulnerable victims who are unborn, younger than 16 years, older than 70 years, or physically disabled or mentally impaired. This paper has examined the homicide of vulnerable victims aged 70 years and older.

A search of the literature revealed a limited number of studies dealing exclusively with the homicide of older victims. Australian data revealed that between 1 July 2001 and 30 June 2010:

- there were 162 recorded homicides of victims aged 70 years and over in Australia, and males ( $n = 79$ ) and females ( $n = 83$ ) were almost equally represented
- gender differences emerged when the victim–offender relationship was examined, with men accounting for 87 per cent of victims killed by friends or acquaintances and women accounting for 64 per cent of parricide victims
- the majority of homicides were carried out in the victim's own home (61%,  $n = 88$ );<sup>42</sup> parricides were most likely to take place in the victim's home, while homicides by other family members were the least likely to occur there
- some offenders were recorded as having a mental illness or intellectual disability at the time of the offence — for example, 29 per cent of intimate-partner homicide offenders ( $n = 5$ ) and 15 per cent of stranger homicide offenders ( $n = 5$ )
- the large majority of homicides were attributed to either a beating ( $n = 51$ ) or stab wounds ( $n = 36$ ); this held true for almost all of the offender–victim relationships
- 44 victims were killed during the course of another crime, and this pattern of offending was most common when the offender was a stranger to the victim ( $n = 24$ ).

This paper has explored the investigative challenges associated with the homicide of an older victim, including the difficulties associated with distinguishing homicide from a natural death or self-neglect. Prosecutorial challenges were also discussed, in particular, the issue of causation and the range of criminal defences.

Crime prevention opportunities highlighted in this paper include community education, professional training, mandatory reporting and carer support, all of which are particularly relevant in view of Australia's rapidly ageing population.

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*Aged Care Act 1997* (Cwlth)

*Crimes Act 1958* (Vic)

*Criminal Code* (Qld)

*Mental Health Act 2000* (Qld)

## Abbreviations

|      |  |
|------|--|
| AIC  | Australian Institute of Criminology        |
| AIHW | Australian Institute of Health and Welfare |
| CMC  | Crime and Misconduct Commission            |
| IPHS | Intimate-partner homicide-suicide          |
| NHMP | National Homicide Monitoring Program       |
| Qld  | Queensland                                 |
| QPS  | Queensland Police Service                  |
| WHO  | World Health Organization                  |

## Appendix A: Extracts from the Criminal Code (Qld)

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| s. 293 | <p><b>Definition of killing</b></p> <p>Except as hereinafter set forth, any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person.</p>   |
| s. 300 | <p><b>Unlawful homicide</b></p> <p>Any person who unlawfully kills another is guilty of a crime, which is called murder or manslaughter, according to the circumstances of the case.</p>   |
| s. 302 | <p><b>Definition of murder</b></p> <p>(1) Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say—</p> <ul style="list-style-type: none"> <li>(a) if the offender intends to cause the death of the person killed or that of some other person or if the offender intends to do to the person killed or to some other person some grievous bodily harm;</li> <li>(b) if death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;</li> <li>(c) if the offender intends to do grievous bodily harm to some person for the purpose of facilitating the commission of a crime which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such crime;</li> <li>(d) if death is caused by administering any stupefying or overpowering thing for either of the purposes mentioned in paragraph (c);</li> <li>(e) if death is caused by wilfully stopping the breath of any person for either of such purposes;</li> </ul> <p>is guilty of <i>murder</i>.</p> <p>(2) Under subsection (1) (a) it is immaterial that the offender did not intend to hurt the particular person who is killed.</p> <p>(3) Under subsection (1) (b) it is immaterial that the offender did not intend to hurt any person.</p> <p>(4) Under subsection (1) (c) to (e) it is immaterial that the offender did not intend to cause death or did not know that death was likely to result.</p> |
| s. 303 | <p><b>Definition of manslaughter</b></p> <p>A person who unlawfully kills another under such circumstances as not to constitute murder is guilty of <i>manslaughter</i>.</p>   |
| s. 285 | <p><b>Duty to provide necessaries</b></p> <p>It is the duty of every person having charge of another who is unable by reason of age, sickness, unsoundness of mind, detention, or any other cause, to withdraw himself or herself from such charge, and who is unable to provide himself or herself with the necessaries of life, whether the charge is undertaken under a contract, or is imposed by law, or arises by reason of any act, whether lawful or unlawful, of the person who has such charge, to provide for that other person the necessaries of life; and the person is held to have caused any consequences which result to the life or health of the other person by reason of any omission to perform that duty.</p>  |
| s. 23  | <p><b>Intention—motive</b></p> <p>(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for—</p> <ul style="list-style-type: none"> <li>(a) an act or omission that occurs independently of the exercise of the person’s will; or</li> <li>(b) an event that— <ul style="list-style-type: none"> <li>(i) the person does not intend or foresee as a possible consequence; and</li> <li>(ii) an ordinary person would not reasonably foresee as a possible consequence.</li> </ul> </li> </ul> <p>(1A) However, under subsection (1) (b), the person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness, or abnormality.</p> <p>(2) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.</p> <p>(3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.</p>   |

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| s. 27   | <p><b>Insanity</b></p> <p>(1) A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission the person is in such a state of mental disease or natural mental infirmity as to deprive the person of capacity to understand what the person is doing, or of capacity to control the person's actions, or of capacity to know that the person ought not to do the act or make the omission.</p> <p>(2) A person whose mind, at the time of the person's doing or omitting to do an act, is affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of subsection (1), is criminally responsible for the act or omission to the same extent as if the real state of things had been such as the person was induced by the delusions to believe to exist.</p>  |
| s. 304A | <p><b>Diminished responsibility</b></p> <p>(1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair the person's capacity to understand what the person is doing, or the person's capacity to control the person's actions, or the person's capacity to know that the person ought not to do the act or make the omission, the person is guilty of manslaughter only.</p> <p>(2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section liable to be convicted of manslaughter only.</p> <p>(3) When 2 or more persons unlawfully kill another, the fact that 1 of such persons is by virtue of this section guilty of manslaughter only shall not affect the question whether the unlawful killing amounted to murder in the case of any other such person or persons.</p>  |
| s. 304  | <p><b>Killing on provocation</b></p> <p>(1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool, the person is guilty of manslaughter only.</p> <p>(2) Subsection (1) does not apply if the sudden provocation is based on words alone, other than in circumstances of a most extreme and exceptional character.</p> <p>(3) Also, subsection (1) does not apply, other than in circumstances of a most extreme and exceptional character, if—</p> <ul style="list-style-type: none"> <li>(a) a domestic relationship exists between 2 persons; and</li> <li>(b) one person unlawfully kills the other person (the <i>deceased</i>); and</li> <li>(c) the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done—             <ul style="list-style-type: none"> <li>(i) to end the relationship; or</li> <li>(ii) to change the nature of the relationship; or</li> <li>(iii) to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship.</li> </ul> </li> </ul> <p>(4) For subsection (3)(a), despite the <i>Domestic and Family Violence Protection Act 2012</i>, section 18(6), a domestic relationship includes a relationship in which 2 persons date or dated each other on a number of occasions.</p> <p>(5) Subsection (3)(c) (i) applies even if the relationship has ended before the sudden provocation and killing happens.</p> <p>(6) For proof of circumstances of a most extreme and exceptional character mentioned in subsection (2) or (3) regard may be had to any history of violence that is relevant in all the circumstances.</p> <p>(7) On a charge of murder, it is for the defence to prove that the person charged is, under this section, liable to be convicted of manslaughter only.</p> <p>(8) When 2 or more persons unlawfully kill another, the fact that 1 of the persons is, under this section, guilty of manslaughter only does not affect the question whether the unlawful killing amounted to murder in the case of the other person or persons.</p> |
| s. 271  | <p><b>Self-defence against unprovoked assault</b></p> <p>(1) When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.</p> <p>(2) If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using</p>   |

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|         | <p>force by way of defence believes, on reasonable grounds, that the person can not otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm.</p>  |
| s. 272  | <p><b>Self-defence against provoked assault</b></p> <p>(1) When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults the person with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce the person to believe, on reasonable grounds, that it is necessary for the person's preservation from death or grievous bodily harm to use force in self-defence, the person is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous bodily harm.</p> <p>(2) This protection does not extend to a case in which the person using force which causes death or grievous bodily harm first begun the assault with intent to kill or to do grievous bodily harm to some person; nor to a case in which the person using force which causes death or grievous bodily harm endeavoured to kill or to do grievous bodily harm to some person before the necessity of so preserving himself or herself arose; nor, in either case, unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable.</p>   |
| s. 282A | <p><b>Palliative care</b></p> <p>(1) A person is not criminally responsible for providing palliative care to another person if—</p> <p>(a) the person provides the palliative care in good faith and with reasonable care and skill; and</p> <p>(b) the provision of the palliative care is reasonable, having regard to the other person's state at the time and all the circumstances of the case; and</p> <p>(c) the person is a doctor or, if the person is not a doctor, the palliative care is ordered by a doctor who confirms the order in writing.</p> <p>(2) Subsection (1) applies even if an incidental effect of providing the palliative care is to hasten the other person's death.</p> <p>(3) However, nothing in this section authorises, justifies or excuses—</p> <p>(a) an act done or omission made with intent to kill another person; or</p> <p>(b) aiding another person to kill himself or herself.</p> <p>(4) To remove any doubt, it is declared that the provision of the palliative care is reasonable only if it is reasonable in the context of good medical practice.</p> <p>(5) In this section—</p> <p><b>good medical practice</b> means good medical practice for the medical profession in Australia having regard to—</p> <p>(a) the recognised medical standards, practices and procedures of the medical profession in Australia; and</p> <p>(b) the recognised ethical standards of the medical profession in Australia.</p> <p><b>palliative care</b> means care, whether by doing an act or making an omission, directed at maintaining or improving the comfort of a person who is, or would otherwise be, subject to pain and suffering.</p> |
| s. 284  | <p><b>Consent to death immaterial</b></p> <p>Consent by a person to the causing of the person's own death does not affect the criminal responsibility of any person by whom such death is caused.</p>   |
| s. 311  | <p><b>Aiding suicide</b></p> <p>Any person who—</p> <p>(a) procures another to kill himself or herself; or</p> <p>(b) counsels another to kill himself or herself and thereby induces the other person to do so; or</p> <p>(c) aids another in killing himself or herself;</p> <p>is guilty of a crime, and is liable to imprisonment for life.</p>   |



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