

***Elder Law in Australia***

**By Rodney Lewis**

**Launch**

**Parliament House**

**Sydney**

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The involvement of our Master of Ceremonies, the Honourable John Dowd, AO QC and the author of the Book we are here to launch, Rodney Lewis, in the International Commission of Jurists has relevance to some matters I would like to touch upon today. Their tireless efforts at a national level and in the international arena, as advocates for Human Rights, is well known and is work for which we are all very grateful.

The topic of Human Rights and whether there is a necessity to define them and enshrine them in an Australian Bill of Rights has been the subject of intense debate over recent years both in the legal and wider community<sup>1</sup>. The experience of Courts in the United Kingdom of having to establish what has been somewhat euphemistically described as “dialogue” with the European Court of Human Rights in Strasbourg over the way in which the Courts approach the interpretation of the rights contained in the European Convention on Human Rights<sup>2</sup> may have adversely affected those that may otherwise have supported such a Bill in this country.

In any event, in countries with established and accessible medical care and hospital systems it is now almost certain that the vast majority of their citizens will reach what has been described as “old age”. That expression has been defined in the *Oxford Dictionary of English* as “the later part of normal life” and “the state

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<sup>1</sup> Bob Carr, “Bill of Rights is the wrong call” *The Australian*, 9 May 2009. Philip Ruddock, “Bills of Rights do not protect freedoms” *Sydney Morning Herald*, 31 August 2007.

<sup>2</sup> *R v Horncastle* [2010] 2 WLR 47 at 97 [111] and 124-125 [108].

of being old” with the Notes “*loneliness affects many people in old age*” and “*old age itself is not a disease*”. These Notations may suggest a number of things but one thing is clear, “old age” is not promoted as the most fulfilling phase of life. Perhaps we need to focus more on the positives of ageing, on the freedoms from the anxieties of youth and the uncertainties of middle age and hopefully to our acceptance as respected elders.

In 2009 the former Chief Justice of the Supreme Court of New South Wales, the Honourable JJ Spigelman AC QC observed that:

Over recent decades legal discourse, at an international level and within nations, has given the language of human rights salience and, in some contexts, dominance.

The concept of freedom from fear has not featured prominently in this development. Indeed, to a very substantial degree, it has disappeared from legal discourse.

Freedom from fear has become the forgotten freedom. Fear is a socially pervasive human emotion and should be restored to a central position in human rights discourse.<sup>3</sup>

These observations were made in the year following the celebrations of the 60<sup>th</sup> Anniversary of the *Universal Declaration of Human Rights* (adopted in Paris in 1948). Article 17 provides for the freedom from unlawful interference with ones privacy, family and home and a freedom from unlawful attacks on one’s honour and reputation. Put another way perhaps - the freedom to maintain one’s dignity.

Article 25 provides:

Everyone has the right to a standard of living adequate for the health and well being of himself and his family, including food, clothing, housing and medical care and necessary social services and the right to security in the event of ... old age.

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<sup>3</sup> James Spigelman, “The Forgotten Freedom: Freedom from Fear”, Lecture delivered to Sydney Law School, University of Sydney 17 November 2009.

In more recent times the United Nations has endorsed the *International Plan of Action on Ageing* (1982) and the *UN Principles for Older Persons* (1991). Those principles fall into 5 categories of human pursuit being – (1) Independence, (2) Participation, (3) Care, (4) Self-Fulfilment and (5) Dignity.

The Principle of *Independence* provides that older persons “should have” access to adequate food, water and shelter, an opportunity to work, appropriate education and training and “should be” able to live in environments that are safe and adaptable to personal preferences and changing capacities. It also provides that Older Persons should be able to reside at home for as long as possible.

The principle of *Participation* includes provision for older persons remaining integrated in society and sharing their knowledge and skills with younger generations.

The Principle of *Care* includes provision that older persons “should benefit” from family and community care and protection in accordance with each society's system of cultural values. It provides that older persons “should be able” to utilise appropriate levels of institutional care in a humane and secure environment and that they should be able to enjoy “human rights and fundamental freedoms when residing in care including “full respect for their dignity, beliefs, needs and privacy”.

The Principle of *Self-Fulfilment* includes provision for older persons to pursue opportunities and have access to educational, cultural, spiritual and recreational resources of society.

The Principle of *Dignity* includes provision for older persons to live in dignity and security and be free of exploitation and physical or mental abuse. It also provides that older persons “should be” treated fairly and valued independently of their economic contribution.

But how do the earlier-mentioned Rights and these Principles translate into the reality of our ageing population with, as recently reported, "dementia rates set to soar"<sup>4</sup>.

As I have said previously, many elderly members of our society are vulnerable and in this regard have needs that are not unlike the needs of children. They require supervision so that they do not hurt themselves and they need love and reassurance so that in this phase of their lives they feel secure;<sup>5</sup> or put another way, so that they are free from fear.

How can we secure that right of freedom from fear for the elderly in Australia? I see that *Alzheimer's Australia* has proposed that the Federal Government should implement a national awareness campaign about planning for the future. It has also suggested that general medical practitioners take a bigger role in providing patients, especially those in the early stages of dementia, with information about the importance of "putting things in order" while they have the capacity to express their wishes.

Putting things in order may not be so easy. Imposing on general medical practitioners the burden of providing information to patients about the importance of "putting things in order" may have serious professional consequences in this modern and complex litigious society. But for one thing. The 2<sup>nd</sup> Edition of the Book we are here to launch *Elder Law in Australia* by Rodney Lewis. It is a resource for all who may be considering "putting things in order" or who are assisting others to do so.

It was a pleasure for me to write the Forward to the book. As I said it confronts some of the most difficult areas of law and equity with an exquisitely practical approach to make it the handbook of choice for any lawyer, indeed for any one, with an interest in understanding and navigating this complex subject.

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<sup>4</sup> Adele Horin, "Time to act as dementia crisis looms, says report", *Sydney Morning Herald*, 29 March 2012.

This occasion provides a most welcome opportunity to recognize the persistence, patience, intellectual and legal scholarship of the author Rodney Lewis and to congratulate him on this wonderful contribution.

It is my privilege to launch the 2<sup>nd</sup> Edition of *Elder Law in Australia*.

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<sup>5</sup> PA Bergin, “A Question of Dignity”, Lecture delivered to the Wills and Estates Accredited Specialist Annual Dinner, 8 November 2010.