

Elder Abuse & Autonomy

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ROCK THE BOAT

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Foundational Underpinnings

- Why is Elder Abuse a key topic in an AGAC conference?
 - Is the guardianship framework too convenient as the first go-to response?
- Understand our emotional responses to Elder Abuse
 - Stressful situations can trigger the fight or flight response in us.
- Absent a clear human rights framework for older people, which incorporates key aspects of UNCRPD, our responses can lack consideration of the person's own views, wishes and preferences.

Elder Abuse – Definition troubles

Elder abuse is often defined as *any act or lack of action, within a relationship where there is an expectation of trust that harms a senior and causes them distress or risks their health or welfare*.

Elder abuse can:

- take place in the home, other residential settings or in the community
- be caused by family, friends, paid care providers, landlords, staff or any person in a position of trust and authority.

Or, more broadly

Abuse is any act or behaviour, which harms the person

<https://www.ontario.ca/page/information-about-elder-abuse#foot-1>

Mid-way definition

Elder abuse refers to *actions that harm an older person or puts the person's health or welfare at risk.*

This often results from the actions of someone who is trusted or relied on by the victim.

From Government of Newfoundland, contained in discussion on narrow vs broad definitions of elder abuse, above definition viewed as a mid-point.

<https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/elder-aines/def/p23.html>

What is the harm of too narrow a definition?

De-legitimises experiences of older people who have otherwise suffered harm, adding to their disempowering experience

Examining Our Responses to Elder Abuse

Stressful circumstances trigger our own fight or flight response.
Focusing on fight response (Survival mode)

Our “fight” against Elder Abuse:

- ↓ Ability to take in subtle cues (less individualised approaches)
- ↑ Return to familiar responses (eg. paternalism or best interests)
- ↓ Ability to notice particular patterns of behaviour or events
- ↓ Ability for higher order thinking skills (analysis)
- ↓ Memory
- ↑ Reaction to stimuli, to almost phobic extreme (Jhensen, 1995)

Autonomy

Recent years - increased application of 'views, wishes and preferences' over the traditional 'best interests' approach.

Brennan J, in *Marion's Case*:

- Everyone has unique dignity (Blackstone 1830 & adopted in Universal Declaration of Human Rights)
- Welfare or best interests principle was improvement on paternalism
- Risk of best interests approach:
 - Unexaminable discretion by powerful decision makers
 - Cannot question decisions by powerful parties without agreed rules or values to scrutinise decisions
 - *Department of Health and Community Services v JWB & SMP* [1992] HCA 15
 - Shows need for greater clarity for National and International Human Rights frameworks regarding Older People.

Criminal Framework and Elder Abuse

- Right to Integrity of the Person.
- Criminal sanctions send basic message that society holds this right to bodily integrity as fundamental.
- Specific criminal responses in respect of Elder Abuse would send broader societal messages, upholding the right to integrity of the person in a way understood by most.
- Better tailored criminal response then becomes another possible response.

Bob

Consider Bob who is in rural Queensland in aged care. Bob is lonely and isolated, and tells everyone who will listen that he wants to be near his friends and daughter on the Sunshine Coast, still in care if necessary.

He feels abused and betrayed by his attorney (son) who made the decision to remove him from his family and social supports on the coast.

Family and friends are scared of his attorney and don't want to upset him.

Do we tell Bob that what he is experiencing is not abuse, as he is receiving basic care?

Joan

What about Joan, who was in hospital facing a QCAT application. When Joan opposed the application, the application was withdrawn by hospital, and she was found to have capacity to execute an EPOA as long as she appointed an attorney who the hospital approved of.

A few days later, the attorney was advised that Joan no longer had capacity.

Joan was placed in aged care, against her will. She subsequently sought a re-assessment of capacity, and the geriatrician gave her a positive report, noting the poor practice of the hospital.

Is this abuse by inappropriate use of the guardianship framework, to remove people of their right to make their own decisions?

“Heads I win, tails you lose” approach to capacity in order to utilise guardianship framework.

What do Bob and Joan want?

Ask them what would they want?

- Individualised approach. Brainstorm options before settling on doing what we always do.

Just because you have a hammer in your hand does not mean the object in front of you is a nail!

Does Bob want:

- A move be negotiated with the attorney?
- Further education on supported decision making assistance for everyone?
- Does Bob want his attorney removed, or their powers limited?
- To make his own decisions?

Does Joan Want:

- To return home, understanding any barriers to her return?
- Other trusted people to “step up” and be included in decision making?
- To understand options and be included in decision making

Move beyond our current practice

Our current approach is embryonic, unsophisticated and not nuanced. Driven by survivalist thinking.

Not every older person wants to protect their children above all else.

Not every older person is content with the property transfer that leaves their will a futile document.

Restitution and remedies need to be available as options and if necessary, in as simple a process as possible, and outside the guardianship framework.

Not everyone is vulnerable because of capacity impairment

But it's really efficient...

Question:

Need to understand the de-legitimising that occurs when people become non-citizens by virtue of them being found to have impaired capacity?

Observation:

Placing someone within “scope” of guardianship provisions may be short term gain.

- In Queensland, our Public Guardian has wonderfully wide powers of investigation for people with impaired decision making.
- Queensland definition of capacity does not require pre-existing disability. It does include making decisions *voluntarily*.

This often leaves the question of “*Undue Influence*”

Undue Influence Defined

- Excessive persuasion
- Resulting in overcoming free will
- Resulting in inequity

INCLUDES:

- Vulnerability of the victim (broader than mental capacity)
- Apparent authority of the abuser
- Actions of the abuser
- Inequity of the result (this alone will not prove undue influence)

Assessing Undue Influence

- Daniel A. Plotkin, James E. Spar and Howard L. Horwitz; Journal of the American Academy of Psychiatry and the Law Online September 2016, 44 (3) 344-351

First steps – Do's and Don'ts

1. Don't assume the person is not abused because it does not fit within a narrow definition of abuse
2. Don't assume that the guardianship framework is always the first option to use
3. Do listen intently to the person and ask them what help are they seeking
4. Do respond accordingly
5. Don't act from survival mode

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Thank you