

ELDER ABUSE:

A Global Issue; An Australian Response

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Abstract

This paper explores a fairly new global public health matter – elder abuse, and the introduction of mandatory reporting laws in response to a highly publicised case of sexual elder abuse in Australia.

It is the contention of this paper that the Australian legal response to elder abuse is too narrow, unreasonably limits public attention to abuse in aged care facilities, and continues to leave the vast majority of our older adults vulnerable to the prey of others. Prevention of elder abuse is a social concern, the successful prosecution of it should be a government concern, and to ensure this – much stronger education programs and law reform is required.

Vulnerable Adults

The United Nations has estimated that the number of people over 60 years of age across the globe will reach 1.2 billion in 2025¹.

The impact of this age demographic revolution in Australia is statistically identified with 13% (approx 2.8 million) of our population currently over 65 years of age, and an estimate that 1 in 4 will have reached that age by 2056².

However, as the population grows older, health risks increase including, chronic illness, physical and mental fragility, and vulnerability to abuse. Hence the need for all societies to incorporate a dedicated focus on the care and protection of our older people in future public health planning and government policy development; particularly against abuse.

Elder Abuse

Elder Abuse includes a wide range of behaviours and is commonly defined as:

“A single or repeated act or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person”³.

Inherent in this definition is an exclusion of self neglect and criminal offences against the older person by strangers such as home invasion, assault and theft which are not

addressed in this paper. The “*expectation of trust within any relationship*” gives some insight into who is most likely to prey on the older person. In the first instance, family members, friends, neighbours and paid carers might come to mind. However, relationships between the older person and those working in financial institutions, legal firms and the health care system should also be considered.

Elder abuse presents in various different forms and can be broadly defined as either neglect, physical, financial, psychological or sexual abuse. Physical abuse covers any non accidental acts that cause physical pain, injury or coercion such as kicking, punching, pushing, physical and inappropriate chemical restraint, slapping and other forms of rough handling. Neglect on the other hand, is more an act of omission rather than commission by depriving the older person of the basic necessities of life such as food, fluid, shelter, clothing and access to health services.

Psychological abuse can occur by inflicting mental anguish through behaviour that causes devaluation, feelings of shame, powerlessness, humiliation and fear of violence. Financial abuse of the older person deals with the illegal or improper use of the older person’s assets including money and property. Finally, sexual abuse includes sexual acts where the older person has either not consented to or has consented through coercion, including, sexual contact, sexual assault and molestation.

Whatever form it takes whether it is financial, physical, neglect, psychological or sexual in nature, elder abuse it is a breach of the older person’s civil and human rights and may also be a crime.

Incidence of abuse

Not unlike child abuse and domestic violence, elder abuse was ‘invisible’ in the general community, until the 1970’s, with both health and law enforcement bodies failing to distinguish abuse as the cause of injury, state of neglect or financial hardship in older people. In most cases not even the older person recognised themselves as victims of abuse.

Unfortunately it remains impossible to make an accurate assessment of the incidence of elder abuse, due in part to the lack of consistent international definitions of abuse and abusive behaviours, ineffective reporting systems and the wide variations in laws (where they exist) addressing this form of interpersonal violence across the globe. Research conducted in Australia has consistently identified the incidence of elder abuse to affect about 4.6%⁴ of the elder population, which fits within the parameters of other international reports⁵ that suggest approximately 1% to 35% of people over 65 years of age have or will be a victim of elder abuse.

In an interview with Annie Guest on the ABC in October 2009 the Director of Elder Abuse Prevention Association, Ms Lillian Jeter stated,

'What we "guesstimate" is that just overall there are a 100,000 cases minimum per year throughout Australia and it's not just the fundamental abuse happening by itself, it is always coupled with physical abuse or psychological abuse or neglect'.

Developing a Legal Framework

The global response to the development of mandatory reporting laws for elder abuse has been limited. Whilst many countries including New Zealand, Australia, South America, Africa, Asia and Europe have focused on policy development, research and education programs, the United States of America and some provinces in Canada have established mandatory reporting laws for elder abuse⁶. Their success is evident through a number of criminal and civil prosecutions of elder abuse such as those reported by Heisler in the United States where both individuals and corporations such as nursing homes have been found liable for their abusive and neglectful behaviour that led to injury or death of the older person⁷.

In Australia, the Commonwealth Government asserts that it is entitled to exercise jurisdiction over matters related to people living in approved aged care facilities or the beneficiaries of subsidized in-home care services⁸.

However, despite the Commonwealth Government's power to develop national mandatory reporting laws for elder abuse a decision was made not to intervene but to leave the individual States and Territories to provide legislative protection to older citizens through their existing criminal justice frameworks.

Unfortunately these laws proved to be inadequate as they were drafted too narrowly with definitions too specific to capture the unique dynamics present between the older person and perpetrator of elder abuse. As such individual States and Territories undertook substantial reform to their existing domestic violence laws to ensure that were more inclusive to cover all forms of family violence across a broader range of relationships. Although this reform made abusive behaviour toward the older person a criminal offence within these legislative frameworks, it fell short of compulsory reporting and arguably made little impact on the improvement on the safety of the older person.

Law Reform : Good intentions - Ongoing Limitations

Despite the continued efforts of many advocates for older Australians to develop a reporting system similar to that of child abuse there was no further action by any Government until a highly publicised case of elder abuse alleged to have occurred in a Victorian Nursing Home⁹

In *R v Alexander*¹⁰ it was alleged that Henry Alexander, a male staff member had raped one resident and indecently assaulted three others over six months in 2005. The four victims were each over 90 years of age, female and had dementia¹¹.

The investigation into the charges against Alexander in this case also revealed what those working with vulnerable older people had asserted for some time; that there are inadequate reporting systems, case cover ups, bullying of staff who made reports and an inability of management to act on any reports of abuse, with many reports simply disappearing¹².

The substantial media coverage that followed the investigation (particularly during the Committal Hearings) created serious community concern and, in part, galvanised the Commonwealth Government into adopting a new attitude toward the protection and safety of older Australians, exercising their statutory authority and introducing a framework of law reform specifically to address elder abuse.

In June 2007 (but, relevantly, before Alexander had been presented for trial before Judge Bourke at first instance), the Commonwealth Minister for Ageing announced a new government priority: *“the safety of older Australians, including those living in aged care facilities or receiving in-home care”* along with a package of law reform including amendments to the *Aged Care Act*¹³ that made reporting of sexual and serious physical assault in approved residential aged care facilities compulsory as of July 1, 2007¹⁴.

Therefore, from this time, each approved provider providing a service connected with residential aged care became legally compelled under the *Aged Care Act* to report both actual and suspected reportable assaults (if suspected on “reasonable grounds”) within 24 hours to either a police officer¹⁵, or the Secretary of the Department of Health and Ageing¹⁶. Further, each approved provider is required to have systems in place for staff, in appropriate circumstances, to make relevant reports¹⁷.

Alexander was convicted of a single sexual abuse charge by a County Court jury in March 2008. The Director of Public Prosecutions (as later noted by the Court of Appeal)¹⁸, acknowledged that the evidence failed to establish certain of the charges preferred against Alexander, which were withdrawn by the Director, and that as Alexander had only been convicted of one offence, he was entitled to be regarded as innocent of the other charges¹⁹.

Alexander appealed to the Court of Appeal against conviction and the Director of Public Prosecutions²⁰ also appealed to that Court against the leniency of the sentence (3 years imprisonment, suspended but for six months) imposed by the sentencing judge, Judge Bourke.

The Court of Appeal refused Alexander’s appeal against the single charge for which he was convicted and varied Judge Bourke’s sentence to the extent of it being suspended but for 18 months, noting that the original sentence, *“simply did not reflect the seriousness of the conduct involved, or the significance of general deterrence in a case of this kind”*, but for technical legal reasons declined to vary the head

sentence of 3 years imprisonment notwithstanding the Court of Appeal considered it to be inadequate.

There is no doubt that the development of mandatory reporting provisions within the *Aged Care Act* is a step forward toward building the nation's capacity to respond effectively to some forms of elder abuse in some environments. However, it is argued that the reforms are insufficient to meet the Government's objective of providing protection for all older Australians.

In the first instance, the amendments to the *Aged Care Act* only apply to approved residential care facilities and subsidized in-home care services. More than 75% of older people live outside such environments leaving them unprotected by the Act despite considerable evidence that abuse of older people occurs not only in approved residential care facilities but also in the community²¹.

Further, the mandatory reporting obligations do not apply to those working in privately owned residential aged care facilities, where residents continue to rely on "good Samaritans" to report any form of abuse against them to such agencies as Health Care Complaints Commissions. The incidence of elder abuse in privately run nursing homes was recently made public through media reports of women in nursing homes 'being raped and trading sex for cigarettes'²². Whilst some employees may take the step to make such reports, it is highly likely that many will not, particularly as the statutory provisions that provide protection for mandated reporters under the *Aged Care Act*²³ would not apply to those making a report voluntarily.

Secondly, the Act narrowly defines abuse as either sexual assault or excessive physical force in the following terms²⁴:

reportable assault means unlawful sexual contact, unreasonable use of force, or assault specified in the Accountability Principles and constituting an offence against a law of the Commonwealth or a State or Territory, that is inflicted on a person when:

- (a) the person is receiving residential care in respect of which the provider is approved; and
- (b) either:
 - (i) subsidy is payable under Chapter 3 for provision of the care to the person; or
 - (ii) the person is approved under Part 2.3 as the recipient of that type of residential care.

It is submitted that this definition is too narrow as there is significant evidence indicating that neglect and financial abuse, often accompanied by psychological abuse are the most frequently committed forms of abuse against the older person²⁵. In fact in the year 2007-2008 there were almost 7,500 complaints about nursing homes investigated by The Department of Health of Ageing Complaints Investigation Scheme. Nearly 2,000 of these were referred on to the Aged Cared Standards and Accreditation Agency, Nursing and Medical Registration Boards, Health Care

Complaints Commissions, the Coroner or the Police for further investigation²⁶. Few of these reports concerned physical or sexual assault, and it is thought that neglect in some form underpinned many of these reports often secondary to inadequate staffing levels and failure to provide adequate nutrition, hydration and health care services in these environments.

A third limitation, which has been addressed to some extent, concerns the impact of the abrupt introduction and implementation of the legal reform agenda on the aged care workforce in the absence of any effort made to prepare them to meet their mandatory reporting obligations. Previous studies have identified a number of factors that prevent health care providers from identifying and reporting elder abuse, despite mandatory reporting laws including, a lack of confidence in accurately identifying abuse - fear of retribution and retaliation by the older person, family members or the alleged perpetrator and a strong desire to avoid involvement that could lead to court proceedings²⁷.

Formal education on elder abuse is very limited in any health professional curricula and there are very few gerontic forensic specialists who can distinguish between normal aging and disease processes and abuse. Therefore, it is argued that to ensure that reported cases of abuse lead to successful prosecutions and act as a deterrent against future abuse it is essential that a sustained multidisciplinary education program focused on the unique and complex factors associated with the assessment and screening of older people for signs of abuse is made available to all mandated reporters to develop their skills and expertise in this field and to build confidence in reporting identified or suspected abuse.

Furthermore, whilst it is imperative that those obliged to report cases of elder abuse receive appropriate education it is also important that those working within the criminal justice system understand the unique and complex nature of elder abuse so that these cases do not pass through the courts disguised as other case types.

This is particularly important where, as in most cases, abuse of the older person is not one single act or omission but a series of acts or omissions over a period of time such as those when the older person is a victim of predatory lending (which may, for example, appear before the Courts in the civil jurisdiction when default in payments is a consequence of predatory lending), but such cases would not generally come within the scope of the criminal justice system (other than where, as an example, the circumstances of a civil complaint following predatory lending led to a fraud charge against the perpetrator).

Prosecutors and Judges unaware of the phenomenon of elder abuse are generally required to only deal only with the facts of the case before them in respect of charges against an accused. An accused is only present on the facts of the specific case relied upon by the Prosecution and may not necessarily include evidence of systematic abuse.

Conclusion

In the first year of mandatory reporting there were 925 reports made under the amendments to the *Aged Care Act*. Two hundred of these reports were for sexual assault and 725 were for excessive physical force, although it is understood that only six charges have been laid by police and even fewer have made it to the criminal courts. As in other jurisdictions, charges made under this Act are not classified as elder abuse, but²⁸ rather as, assault, aggravated assault or sexual assault (as the case may be). This makes it extremely difficult to follow these cases and build a case load of precedents for future judicial consideration (which would be relevant to penalties imposed on conviction) leading to a sentencing judge having to consider any requirement to address "general deterrence" as referred to by the Court of Appeal in *Alexander's Case*²⁹.

According to the Department of Health's Annual Report, in 2008-09 the Department received notification of 1,411 alleged reportable assaults. Of those, 1,121 were recorded as alleged unreasonable use of force, and 272 as alleged unlawful sexual contact and 18 as both. It must be stressed that there were notifications of "alleged" incidents. How many were substantiated or otherwise made out is a separate question as is how many, if any of these will result in police action.

In fact, had it not been for the persistence of the Australian media in drawing public attention to the few cases prosecuted in Australian courts so far, it is likely that both the general public and those involved in law enforcement would continue to be unaware of the suffering our older folk experience at the hands of someone they should be able to trust.

Whilst the Commonwealth Government has identified one of their priorities to be "*the safety of older Australians, including those living in aged care facilities or receiving in-home care*", it is clear that their initial efforts have fallen short of achieving this leaving some older Australians still unprotected by the legislation and that further consideration of the *Aged Care Act* is required.

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- ¹ United Nations Elder Population Division [UNEPD], 2002
 - ² Australian Bureau of Statistics, 2008
 - ³ World Health Organisation (WHO), 2005
 - ⁴ Kinnear & Graycarr, 1999
 - ⁵ UNEPD, 2002, p. 6
 - ⁶ Paul Sadler, 2006
 - ⁷ Candace Heisler, 2000
 - ⁸ Commonwealth jurisdiction would appear based on a combination of the corporations power (contained in s.51(xx) of the Constitution, given the extended operation of the corporations power – including the potential to legislate with respect to directors, officers and servants of a corporation – based on the authorities following *Strickland v Rocla Concrete Pipes Ltd* [1971] 124 CLR 468 and subsequent cases) and also the social security powers (contained in s.51(xxiiiA) of the Constitution). To give effect to Commonwealth powers, for approved aged care facilities, if required to be a corporation, then s.51(xx) applies and if payments related to recipients of subsidized services, then s.51(xxiiiA) should also apply, allied to the ancillary power in s.51(xxxix)
 - ⁹ Macey, 2006
 - ¹⁰ *R v Alexander* (589/2008) [2008] VSCA 191
 - ¹¹ Chapman & Chilianis 2006
 - ¹² Chapman & Chilianis 2006
 - ¹³ Part 4.3, Division 63; section 63-1AA *Responsibilities relating to alleged and suspected assaults*
 - ¹⁴ Minister, the Hon C. Pyne, June 15, 2007
 - ¹⁵ Part 4.3, Division 63; section 63-1AA(2)(a)
 - ¹⁶ Part 4.3, Division 63; section 63-1AA(2)(b)
 - ¹⁷ Part 4.3, Division 63; section 63-1AA(5)(a)-(e)

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- ¹⁸ Vincent, Neave & Weinberg, JJA, September 2008
- ¹⁹ [2008] VSCA 191, para 78
- ²⁰ *DPP v Alexander* (138/2008) [2008] VSCA 191 (reported in conjunction with *R v Alexander*)
- ²¹ Kinnear & Graycarr, 1999
- ²² Nine News, 2009
- ²³ Chapter 7; Division 96; section 96-8
- ²⁴ Part 4.3, Division 63; section 63-1AA(9)
- ²⁵ UNEPD 2002
- ²⁶ Rachel Browne, 2009
- ²⁷ G Wei & J Herbers ,2004
- ²⁸ Department of Health and Aging, Annual Report for 2008-9, Section 9.5
- ²⁹ [2008] VSCA 191, para 81