35. R Hina Khan

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Elder Abuse Submission

Question One

I am a strong advocate for human rights and I have been the recipient of a scholarship to attend Murdoch Law School’s International Human Rights Program.

I believe as a nation, we have an obligation to ensure our aging population’s right to independence, participation in society, care, self-fulfillment and dignity are safe guarded.[1]

I will address question one from the Elder Abuse Inquiry Paper.[2] My submission will focus specifically on elder neglect, discuss various definitions of elder abuse and neglect and whether intention should play a decisive role in establishing elder abuse.

***Question One***

1. ***What role should intent* *of the care giver play in matters of elder neglect?***

The difficulties of proving intent, the possible access to justice issues that may arise from having a higher evidentiary burden and the lack of inclusion of intent in existing Australian definitions of elder abuse and neglect suggest that whilst the intent could be a relevant factor it should not be a determining factor in cases of elder abuse involving neglect.

The United Kingdom definition of elder abuse,[3] which has been adopted by the World Health Organisation,[4] International Network for the Prevention of Elder and Canada has become the starting point for the Australian analysis of elder abuse.[5]

However, this definition is not universally accepted.[6]

The UK and American definitions differ in regards to the inclusion of intention. The first definition fails to mention intent whilst the later definition includes intent when discussing positive acts that cause harm to an elderly person.

The definition we have adopted does not include intent, suggesting it may not be necessary to prove intent to establish elder abuse. However, this inference does not automatically make intention irrelevant.

WHO recognises there are conflicting views as to whether adverse health and social harm rather than intention should be the focus of elder abuse.[7] WHO notes intention can ‘sometimes be difficult to distinguish, especially in cases of neglect’.[8] Incorporating the element of intent in cases of neglect, which might be difficult to prove, may place an additionally evidentiary barrier on elderly people seeking to enforce their rights and/or protect their interests.

Looking specifically at elder neglect, the Victorian Elder Abuse guideline and the Western Australian Alliance for the Prevention of Elder Abuse definitions do not indicate whether intent is a requisite factor when determining if a carer’s act or omission constitutes elder neglect.[9] The West Australian and Victorian approach to elder neglect is consistent with the UK’s definition of elder abuse, which places negligible weight on the intention of the carer. In contrast, the American definition consciously recognises elder mistreatment can be both passive and active. The American definition is inconsistent with Australian common law which indicates, at least in cases of criminal negligence against an elder causing death, the effects of the career’s conscious or voluntary action/inactions and their duty of care are given weight not the accused’s intention.[10]

1. ***Challenges***

Not all elderly people are vulnerable to harm. Some elderly people may not identify themselves as elderly and perhaps do not believe they warrant additional protection against neglect.

However, elder abuse and neglect can occur in situations where the older person is quite independent, particularly if he/she is in some way isolated from his/her community.[11] These situations heralds one of the challenges surrounding elder abuse, that is, whilst we seek to implement measures to protect the well-being of our elderly, these measures may conversely interfere with an older person’s civil and/or human rights.[12]

Also, the variety of abuse as outlined in the Issue Paper make it hard to deal with elder abuse as a discrete issue. For brevity sake, my paper focuses on elder neglect, touching briefly on criminal negligence and child protection and does not engage in other areas of laws such family law relating to domestic violence. Different types of abuse may interact with a myriad areas of law including family, guardianship and criminal law, all of which will help determine whether intention is relevant and the weight intention should be given.

[1] *The United Nations Principles for Older Persons*, GA Res 46/9 (adopted 6 December 1991).

[2] Australian Law Reform Commission, *Elder Abuse*, Issue Paper No 47 (2016) 5.

[3] *What is Elder Abuse? Action on Elder Abuse* (2002) Action on Elder Abuse. Stating ‘elder abuse is 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’.<http://www.elderabuse.org.uk/Mainpages/Abuse/abuse.html>.

[4] see World Health Organization, *World Report on Violence and Health* (3 October 2002), 126 <http://www.who.int/violence\_injury\_prevention/violence/global\_campaign/en/chap5.pdf>.

[5] World Health Organization, University of Toronto and Ryerson University Ontario and International Network for the Prevention of Elder Abuse, *The Toronto Declaration on the Global Prevention of Elder Abuse* (17 November 2002) <http://www.who.int/ageing/projects/elder\_abuse/alc\_toronto\_declaration\_en.pdf?ua=1 >.

[6] Thomas Goergen and Marie Beaulieu, ‘Critical concepts in elder abuse research’ (2013) 25(8) *International Psychogeriatrics* 1217, 1218.

[7] World Health Organization, *European Report on Preventing Elder Maltreatment* (2011), 1 <http://www.euro.who.int/\_\_data/assets/pdf\_file/0010/144676/e95110.pdf?ua=1>.

[8] Ibid 1.

[9] Department of Health, State of Victoria, *Elder abuse prevention and response guidelines for action 2012–14* (2014), 1 <http://www.easternfamilyviolencepartnership.org.au/sites/default/files/Elder%20Abuse%20Prevention%20and%20Response%20Guidelines.pdf>; see also Mike Clare, Barbara Black Blundell and Joseph Clare, *‘Examination of the Extent of Elder Abuse in Western Australia: A Qualitative and Quantitative Investigation of Existing Agency Policy, Service Responses and Recorded Data*’ (Research Paper, joint initiative with the University of Western Australia and Advocare Inc., April 2011) 4.

[10] *R v George* [2004] NSWCCA 247; see *The Queen v Lavender* (2005) 222 CLR 67 at [17] for the legal principle.

[11] Australia Law Reform Commission*, Final Report: Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 69 [3.26]; see also Wendy Lacey, ‘Neglect to the point of cruelty? Elder Abuse and the Rights of Older Persons in Australia’ [2014] 36(99) *Sydney Law Review* 99, 104.

[12] *The United Nations Principles for Older Persons*, GA Res 46/9 (adopted 6 December 1991); see also Alan Clarke, John Williams and Sarah Wydall, ‘Access to Justice for Victims/Survivors of Elder Abuse: A Qualitative Study’ (2016) 15(2) *Social Policy and Society* 207, 209.