

Additional Submission to the Select Committee Inquiry into Elder Abuse

Older Adult Mental Health Sub-Network

Introduction

The Older Adult Mental Health Sub-Network (OAMHSN) welcomes the opportunity for an additional submission and appreciates the focus of this committee on this important issue. This additional document addresses the relevance of substitute decision making and supported decision making to the issue of elder abuse

This document is prepared by Dr Helen McGowan, who is clinical co-lead of the Mental Health Network after consultation with members of the faculty of Psychiatrists of Old Age and the Older Adult Mental Health Subnetwork.

Elder Abuse and Decision-Making Disability

It is well-established that an older person with decision-making disability is at increased risk of elder abuse. This is related to a number of possible scenarios:

1. The older person does not have anyone making decisions or providing appropriate support or advocating in the individual's best interest. This can result in neglect or exploitation by others and/or other forms of elder abuse.
2. The older person has an informal arrangement of support provided by a family member or carer and the support person does not act consistently in the person's best interest. This may occur because the support person is not fulfilling the obligations of the role or there is conflict within the family regarding the decisions and/or the support person. This can result in the older person having inadequate care, support and/or protection.
3. The older person has a legally appointed guardian and/or administrator and the person acts as a substitute decision-maker and does not act in the person's best interest. In worst case scenarios the guardian or administrator is the perpetrator of the elder abuse.

Role of Guardian and Administrator

In the experience of network members, there is often a lack of understanding in the community regarding the obligations of an individual who takes on the responsibility to be a Guardian or Administrator, particularly if the role is assumed via less formal arrangements.

The key concepts to consider here are

1. Acting in best interests of an elderly person
2. Supported decision-making- Provision of support for decision-making for an elderly person
3. Substitute decision-making for an elderly person

Acting in an individual's **best interest** is a complex concept. It requires balancing a range of risks and ethical principles. It can be misinterpreted as a solely paternalistic process "a guardian knows best approach" that undermines an individual's autonomy and therefore a violation of human rights. However, the concept of "best interests" includes taking into account the individual's right to dignity and autonomy and right to have wishes considered. This includes considering the decision from the perspective of the elderly person in light of current wishes as well as previously expressed views behaviours and values (prior to the onset of the decision-making disability).

Scenario

For example, an elderly person with moderate dementia may express the wish to remain at home as they "need to prune the roses" and won't discuss the issue further. However, the considered view of the patient's family, clinical services and the guardian is that this is not practically possible or safe within the constraints of current resources – as he is doubly incontinent, is intermittently physically aggressive towards the wife, doesn't remember these events and is insightful about his behaviour. At times he doesn't recognise his wife and becomes distressed when incontinent. The wife is frail, and too unwell to provide the level of care required; community aged care services are insufficient and family not able or willing to provide enough support to bridge the gaps in care provision. Before the onset of the dementia, the husband had often expressed the view that he didn't want to be a burden on his family and wanted his children to "live their lives to the full" and "focus on the grandchildren". The substitute decision-maker can reasonably decide that admission into residential care is necessary, but is still required to take the patient's wishes and dignity into account and attempt to find a compromise solution – e.g. admission to a care facility close to home, so patient can visit, or facilitate access to gardening and organise frequent contact with family.

Substitute Decision-maker

A Substitute decision-maker is a person, authorised by law, to make decisions on behalf of someone who does not have capacity to make a particular decision. They are ethically required to act in the person's best interest and take into account a person's wishes. Assessment of capacity requires delineation of the particular decision as some individuals may not have capacity to make a decision regarding a complex issue, but can make a decision regarding a simpler issue. A substitute decision-maker should optimise the person's autonomy and dignity by ensuring they can make decisions where it is in their best interests to do so (e.g. a person with mild dementia may not have capacity to manage a complex share portfolio, but able to make decisions regarding day to day expenses. In this case, an administrator should make decisions that are in the patients best interest and this

would probably mean managing the complex financial decisions but ensuring that the older person has access to money for day to day expenses.)

The Australian Law Reform Commission (ALRC) has articulated a set of National Decision-Making Principles and recommends shifting away from “substitute decision-making” to “supported decision-making” and advises the use of terms as “supporter” and “representative” rather than “substitute decision-maker”.

These guidelines have been developed in the context of the **United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)** while noting that the formal arrangements for appointments of guardians and administrators occurs under state and territory laws.

OAMHSN Advice

In the experience of OAMHSN members, the views of ALRC are somewhat extreme and impractical if considering scenarios that involve elderly people with significantly impaired cognition and judgement. Whilst human rights are acknowledged and strongly supported, it is not reasonable to require supported decision-making when substitute decision-making would deliver a better outcome for the individual and their family. The views expressed by the ALRC seems to champion the human right to autonomy and not sufficiently considering rights to good care, dignity, maintenance of important relationships, good health and the rights of other family members and the broader community to a just share of available resources. If considering the previous scenario, supported decision-making would seem to require spending time attempting to help the elderly man understand a range of issues that he does not have capacity to understand or otherwise acceding to the elderly man’s wishes to stay in his home and prune the roses, despite the likely adverse consequences to his health, his wife’s health, relationships with his family, and his dignity.

The OAMHSN would advise that the law should continue to allow substitute decision-making for people with decision-making disabilities where significant risks apply and less restrictive alternatives are not practical or safe. Where this occurs, however, the substitute decision-maker should always seek to act in a person’s best interest. This includes considering their wishes, and supporting them to make their own decisions wherever possible.

The OAMHSN would also advise consideration of a resourcing and legislative response to ensure that substitute decision-makers are fully aware of their responsibilities to act in an individual’s best interest, which includes supporting their autonomy and dignity. This may require targeted education and support for substitute decision-makers and a system to

ensure accountability of those who take on this role. A community education program would also assist with this approach.

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References

Office of the Public Advocate webpage

<http://www.publicadvocate.wa.gov.au>

Australian Law Reform Commission

<https://www.alrc.gov.au/publications/2-conceptual-landscape%E2%80%94context-reform/supported-and-substituted-decision-making>