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Consideration of protective legislation on family and residential care for older persons in Hong Kong

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**Consideration of Protective Legislation on
Family and Residential Care for
Older Persons in Hong Kong**

by

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Consideration of Protective Legislation on Family and Residential Care for Older Persons in Hong Kong

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Summary

Older persons, like all members of any society, have the right to be free from mistreatment at family care and residential care. Furthermore, older persons are the special collectiveness, different from children or other adults, so elder abuse or neglect is a more complicated issue. Protective legislation aiming at protecting older persons from possible mistreatment as one of the various intervention approaches is essential. By analyzing the pros and cons in applying the legislation on institutional care (i.e. family and residential places) in Hong Kong, for three case examples, plus referencing to China's experience, the goals and contents of the legal response to elder mistreatment are deduced. Legislative council should enact the comprehensive elder protective legislation not only addressing elder mistreatment but also protecting other older person's rights, and build the fully-functioning protective services program.

Keywords

Protective Legislation - Family Care - Residential Care - Older Persons - Hong Kong

1. Background

Like many other countries and regions in the world, Hong Kong is facing an ageing population. The result of the 2001 Census confirmed that the population had grown older during the last ten years. A projection on the population of older persons made by Census and Statistics Department revealed that by the year 2031, elders aged 65 or above will account for 24.3 percent of the whole population (Figure 1).

To meet the rising challenges of an ageing population in 1997, the Chief Executive, the Head of the Hong Kong Special Administrative Region, designated “Care for Elders” as one of his strategic policy objectives, with the aim of improving the quality of life of our elders and providing them with a sense of security, a sense of belonging, and a feeling of health and worthiness.

However, underneath all these policy initiatives, there is a concern on how the present older persons are cared for in Hong Kong. Some of older persons are frail, disabled and vulnerable to mistreatment. The problem of elder mistreatment is gaining an international profile, which has many similar characteristics, irrespective of race, ethnic, or socioeconomic background (Steuer & Austin 1980). But the predominant Chinese population, such as Hong Kong, has more different complicated reactions to elder abuse.

Countries have taken many steps to combat the problems; typically, intervention protocols include a variety of approaches, such as legal, therapeutic, educational, and advocacy complements (Reis & Nahmiash 1995; Wolfe 2003). As for legal intervention, different practices exist, for example, special legislation, just as the USA; and no single legislation but through existing remedies from statute and common law, representative of the United Kingdom. Furthermore, in Chinese communities, for example, China, Singapore and Taiwan have enacted legislation related to elder care. But in Hong Kong, only mentally incapacitated older persons can be protected by the Mental Health Ordinance if they are abused, such as applying for guardianship (Guardianship Board 2001). Other older persons with mental capacity suffering abuse have currently no single piece of applicable protective legislation.

The special situation gives rise to a number of key questions in this paper:

1. Should Hong Kong enact single law to protect elder care? If so, what should be considered particularly in the process of legislation?
2. What are the effects of protective legislation on family and residential care for older persons in Hong Kong?

3. Is there the most desirable method to protect older persons? If so, what is it?

The paper reviews the impact of legislation on elder mistreatment in caring and considers if a protective legislation is essential, and then tries to find a better way to protect older persons in caring.

2. Elder Mistreatment

2.1 The definition of “elder mistreatment”

“Elder abuse” as a term appears to have developed from the work of Baker (1975), following which it has steadily gained a presence in the field of health and social welfare as well as academic social gerontology (Hugman 2000).

Elder abuse is not easily identified, in part of misconceptions about just what constitutes mistreatment (Strauss & Lederman 1996). However, the American Medical Association defines elder mistreatment to include (American Medical Association 1992):

1. Physical abuse. This includes acts of violence that may result in pain, injury, impairment or disease.
2. Physical neglect. This is characterized by a caretaker’s failure to provide goods or services necessary for optimal functioning or to

avoid harm. This may include not providing eyeglasses or hearing aids.

3. Psychological abuse. Psychological abuse involves conduct that causes mental anguish. This includes verbal berating, harassment, or intimidation, threats of punishment or deprivation, treating the older person like an infant, or isolating the older person from family, friends, or activities.
4. Psychological neglect. Psychological neglect is the failure to provide a dependent elderly person with social stimulation.
5. Financial or material abuse. This is the misuse of a person's assets or income for the personal gain of another, i.e. the caretaker. This includes stealing money or possessions, either directly or by forcing the older person to sign contracts or assign power of attorney or change a will.
6. Financial or material neglect. This is failure to use available resources needed to sustain or restore the health and well-being of the older person.
7. Violation of personal rights. This occurs when caretakers and providers ignore the older person's capacity and desire to make decisions about his or her life, and to otherwise assert autonomy as a human being. This includes denying privacy, denying

participation in health care and other personal decisions, and forcible eviction and/ or placement in a nursing home.

In this paper, reference to the above basic principles, “elder mistreatment” in family and institutional care is defined to refer to actions committed or omitted by a person in a relationship of trust, which result in an injury or harm to older persons, whether physical, psychological, sexual, financial, or neglect. This definition obviously excludes self-neglect and victimization of older persons by strangers.

However, in real life abuse does not break down onto neat categories. The types of abuse combine and overlap (Hurme 2002). Older person simultaneously suffers from the multi-faceted abuse including, but not limited to, psychological abuse, neglect, physical abuse, etc. This enlarges the degree of difficulty related to theoretical and practical work.

2.2 The general characteristics of elder mistreatment

The number of elder abuse incidents is increasing in the world. According to a WHO survey (2002) results, 5 percent of older persons aged sixty or above all over the world are violently abused at home and elder abuse in some institutional settings often occurs while few people know it.

Elder abuse is often underreported. According to Informal Essay of Director of Social Welfare Department (2002), 110 incidents of

abuse that were suspected had been processed in 18 months after launching of the first Elder Abuse Project and 50 percent of abusers were their children. In addition, another 80 older persons suspected abuse were refused to accept services, which indicated that there were difficulties in dealing with elder abuse. What is seen is only the tip of the iceberg.

In fact, elder mistreatment is more often a family problem. More than 80 percent of abusers were family members (Guardianship Board 2001). According to the older persons' investigation by Chinese University of Hong Kong in the past two years, while interviewing more than three hundred older persons aged between sixty and ninety-two, 20.1 percent of them was abused in 2002. Of these cases, more than 20 percent were of psychological abuse, for example verbal berating, harassment, or intimidation, 4 percent physical negligence and 2 percent physical abuse. Most of abusers are their children, accounted for 75 percent and among of them living together with older persons are pervasive, and then the spouse and grandchildren (Xinbao 2003).

2.3 Special psychological contradiction between the abuser and older person in Hong Kong

In Hong Kong, older persons may prefer to get support from the informal support network rather than formal support.¹ Living arrangements can be a significant indicator of levels of direct family support in Hong Kong. Census data indicate that, in 2001, the composition of the household with older persons aged 60 and above in Hong Kong was 78.5% with spouse and/or children, 11.4% living alone and 10.0% with other persons (Table 1). As a society made up predominantly of the Chinese race, it is only natural for traditional culture to exert an influence on how older persons respond to be abused in Hong Kong. The victim is often ashamed to admit victimization by family members, a feeling which is further complicated by guilt as a parent. According to Questionnaire Investigation by Society for Community Organization in Hong Kong, older persons who absolutely agreed that family internal affairs not to be known by strangers were accounted for 51.9 percent, the total number of agreement was 68.6 percent (Table 2). The poverty status of older persons causes them to depend on the family members. The poverty rate of Hong Kong people is 18.5 percent, but older persons were accounted for 26.9 percent, which was highest of all persons

¹ Social support can be broadly divided into formal support and informal support. In this paper, formal support is provided by government and non-government organizations (NGOs), and informal support will be classified into four sources, that is, spouse, adult children, relatives, friends and neighbors or community.

(S.O.C.O. 2001). Add to that apprehension about unknown alternatives, such as removal to an institutional setting. To the victimized elderly person, the devil you know is often preferable to the devil you don't know (Strauss and Lederman 1996).

Moreover, some older persons are in poor health, according to one investigation in Hong Kong in 2000, older persons aged 60 and above suffer from chronic illness are occupied by 71.8 percent (Table 3). They need being cared but do not know how to protect themselves, for fears of being left without proper care. At the same time, long-term care aggravates the stress and burden of carers, which in turn intensifies the psychological confliction between carer and older person. The same as the residential setting, the older person is reluctant to report the abuse.

3. Abuse in Residential Care

In the year 2001, more than five percent of older persons in Hong Kong were living in residential settings (see Census and Statistics Department 2002; Social Welfare Department 2002). The government enacted the Residential Care Homes (Elderly Persons) Ordinance in 1995, which only regulates the hardware or infrastructure of residential care, not involves software conditions, such as legal duty is placed on carers.

As told by one social worker, there are inadequate carers to provide services in some residential settings, and they are always too overworked to lower care quality to practice an abusive component, most of them are emotional abuse and neglect. When several carers took bath for older persons, older persons were only back-to-back sitting; there was no personal privacy at all. Even those sitting the wheelchair were bind by rope in order to prevent them to slip off. But there is no specific regulation upon the carer's behavior, attitude and how to respect older person's rights. Here I take a case example to illustrate how the burden of proof in residential setting is difficult.

Case Example 1

Apple Daily of Hong Kong received a request from a reader that her sixty-eight-year-old mother who has mentally sound but suffered from severe apoplexy, was beat up by the carer in one institutional setting and was hospitalized to cure the injury. The Police and Social Welfare Department investigated the incident and had no result yet. Mother did not tell the violence to her, but her daughter by herself found her mother to be idle and slow action, and then went to see the doctor to know several swellings on mother's legs and feet. When the reporter asked the mother why not tell the injury in public, she said she was afraid of injury again. But the institutional carer said that the old person was easy to care and there was no violence at all.

On the one hand, by using legislation, older persons' rights at residential care can be protected, the carer should take responsibilities to care for older persons, and if the carer violates law to abuse older persons, he or she should be penalized. But do we need a special legislation to regulate elder abuse at residential care? There are the criminal law and civil law systems in Hong Kong.

But the use of criminal law presents a number of obvious drawbacks. To start the process it is normally necessary for the victim to make a complaint and to press charges. As some older persons are in poor health and lack of self-protection, and even when they are involved in the case, their mind and body condition are too frail to bear the pressure. Furthermore, a number of different factors will influence the decision to involve the criminal law. Therefore, law should make special consideration in order to place older person in residential care at a safe and respectful situation. Proxy prosecution laid on inspectors is a good practice, for example, the independent residential inspector as the third person finds the residential abuse, and then he or she should assume the burden of prosecution representative of older person.

Generally speaking, there is no need to enact a separate legislation to regulate residential care; government should do other legal supplements coordinate with criminal law and the Residential Care Homes Ordinance. Much of the arrest to abuse in residential care relies on professional care training.

4. Abuse in Family Care

Family care has so many complicated situations that applying legal remedies needs more consideration. In any case when legal intervention is being considered, the key question must be what the purpose is and what the consequence is. Sometimes a person may be more at risk if action is taken. How to balance the interests between older persons and government, and the interests between abusers and victims? A major issue in working with cases of elder abuse is to consider what resources provided by government are appropriate to help both victim and abuser.

The primary focus is on balancing the need to protect the victim against the desire to maintain the family. Generally speaking, in order to keep victim safe, government probably separates victim and abuser, but it destroys the integration of family unit and maybe violates older person's choice. Then the question is, do we do something or leave things as they are?

Another two cases will be discussed later.

Case Example 2²

It's not uncommon that an old father had been laid up by tracheitis for almost twenty years, and his son had always lived with

² The case is assumed by the author.

his father and looked after him carefully. But when the son was in his fifties, he had to work late into night under heavy work pressure. He was almost sleepless at night because of his father's continuous coughing to interrupt him, he was vexed, and at last he did not control his behavior and blew a gasket to injure father's leg unconsciously, which caused to leg fracture by chance.

In case 2, the son's abuse behavior should be penalized without doubt, but it is obviously different from the flowing case, does legislation need to consider special details? The old person will be likely to transfer to live in institutional setting. His son will have been blamed for his offence and the old parent will not be happy, either. Clearly, legislation should involve the intention and frequency of behavior, its consequence, and the causality between behavior and consequence. That is what we do about it.

But if things are left as they are, older persons are more dangerous, maybe they continue to be abused by carer, such as case 3.

Case Example 3

During the period of Christmas Holiday, an old woman aged more than eighty was forced to beg by his son, she had been begging for almost a whole day at Six Celsius in the street, only because her son wanted to squander money (Takung Bao 2002).

In this case, applying legislation on the unfilial son's behavior is essential, but how to penalize the abuser? Different opinions exist in case example 3 (Takung Bao 2002). A scholar proposes the police to quote Article 26 of Simple Accusation Ordinances, which stipulates that begging is violated, but older person has no body injury, it is difficult to ascribe elder abuse to one crime. At the same time, if the victim does not cooperate with the tribunal to take burden of proof, the abuser will avoid punishment. Social Welfare Department has no choice but to persuade her son not to force her old mother to beg again and take care of her well, and if the effect is not good, the old mother will be arranged in a safe place under the agreement of her.

In conclusion, there are obvious gains and losses about enacting protective legislation on family care. On the one hand, legislation by stipulating normal procedure can penalize the abuser's deed, to a degree prevent elder abuse at risk to happen and the older person's right can be protected.

However, older persons maybe fall into contradiction. They want to separate themselves from abuse, but they are reluctant to report the abuse and do not cooperate with court on basis of many reasons. As we have discussed above, they are shamed for the family abuse to the public, they have no enough pension so that they have to depend on family members, and they do not want to remove to an unfamiliar institutional setting and continue to stay at family and so on. If they are forced to file a lawsuit against family member by legislation, their

autonomy will be violated. Then the question is whether older person's right is protected by law.

Furthermore, there are more difficulties about law enforcement. After disposed of the case, always causing to penalize the abuser, is the institutional carer the best person? Is older person most likely to get the outcome? Why choose law at first? Why not seek other ways to solve elder abuse? Legal intervention is the last resort in family abuse.

5. What Should Legislation Do in Hong Kong: Referencing to China's Experience?

In China, although no single elder care law exists, there are the Law Protection the Rights and Interests of older persons, Constitutional Law, General Principles of the Civil Law, Criminal Law, Marriage Law and Adoption Law related to older persons' care. Although elder law in China per se is imperfect and needs more modification and supplementation, it may give enlightenment to legislation on elder care in Hong Kong.

In Hong Kong, responsibilities are imposed on parents to care for their children, and it is an offence to neglect or mistreat them. In contrast, adult children have no clear legal responsibilities to care for their parents or other family members. But in China, Article 49 of the

1982 Constitution of the People's Republic of China states that parents have the duty to rear and educate their minor children and children who have come of age have the duty to support and assist their parents.

The Law on the Protection the Rights and Interests of older persons of People's Republic of China enacted in 1996 defines the rights of older persons in family life, social life and participation in social activities.

In order to illustrate the legal practice on elder abuse in Mainland China, I will introduce several articles of **the Law on the Protection the Rights and Interests of older persons of People's Republic of China related to the above family cases.**

Chapter 5 (Legal Responsibility), Article 45 states: *When older persons have disputes with their family members over their support, or over housing or property, they may ask the organizations where their family members are employed, the neighborhood committees or the villagers' committee to mediate. They may also bring a lawsuit directly to the People's Court.*

If the family members are found to be in the wrong through mediation of the disputes mentioned in the preceding paragraph, they shall be educated through criticism and ordered to correct their mistakes.

Article 46 states: *Whoever insults the elderly in public by violence or other means, slanders them or maltreats them, if the case is not serious, shall be punished in accordance with the relevant provisions of the Regulations on Administrative Penalties for Public Security; if the case constitutes a crime, his criminal responsibility shall be pursued according to law.*

Article 47 states: *Whoever interferes with the freedom of marriage of the elderly by violence or refuses to provide for or support the elderly whom he has the duty to provide for or support, if the case is serious and thus constitutes a crime, shall be investigated for criminal responsibility according to law.*

In Case Example 2 and 3, the neighborhood committees have the right to mediate the elder abuse, older person can choose between mediation in charge of neighborhood committee and a lawsuit brought to the People's Court. If the family members are found to be in the wrong through mediation of the disputes, they shall be educated through criticism and ordered to correct their mistakes. If older person is not satisfied with the result of mediation, he or she can bring the case to the court, too. The court may investigate the facts whether are serious to make judgment: if the case is not serious, shall be punished in accordance with the relevant provisions of the Regulations on Administrative Penalties for Public Security; if the case constitutes a crime, his criminal responsibility shall be pursued according to law.

Overall speaking, in China, many cases of elder abuse are settled by the neighborhood or community committee, if not dealt satisfactorily, older person can seek legislation. Most of older persons can accept the practice in which consider their demands firstly and differentiate specific conditions.

The law is based on the premise that older persons require special statutory protection-in addition to other laws-because of the association between age and increased vulnerability to abuse (Hurme 2002). However, the philosophy of law is the minimum intervention and maximum autonomy of older persons (Clough 1995). How to provide proper safeguards against elder abuse? Inherently they are legal and ethical issues.

Ethical decision-making involves balancing goals with facts, balancing the needs and desires of the victim with the defendant's interests and seeking the achievement of justice for all parties. While Candace and Mary once state the goals of the legal response to elder mistreatment are to (Heisler & Quinn 1995):

1. stop the unlawful, improper, or exploitive conduct that is being inflicted on the victim;
2. protect the victim and society from the perpetrator and further inappropriate or illegal acts;

3. hold the perpetrator accountable for the conduct and communicate a message that the behavior is unacceptable and exceeds societal norms;
4. rehabilitate the offender, if possible;
5. make the victim whole by ordering restitution and/or the return of property as well as the payment of expenses incurred by the victim as a result of the perpetrator's conduct.

In my opinion, the legal intervention should be as limited as possible and should be concerned to achieve what the person himself would have wanted. In fact it is difficult to practice the principle. However, legislation on family care is indispensable and government should grasp firmly the purpose and content of legislation.

The purposes of legislation on elder care are to protect all kinds of older persons' rights, consequently, to respect their autonomy³ is first, and limited legal intervention and fully legal remedies are supplementary.

The contents of elder care abuse law should at least include two main components: provide services for older persons abused or at

³ The UN Principles for Older Persons (December 1991 – Resolution No.46/91) set a clear framework for working with and for older persons: independence, participation, care, dignity, and self-fulfillment. But they are not legally binding, and have not led to any systematic monitoring of government or other bodies' policy and practice in relation to older people.

risks, including prevention, support, and remedy services; intervene and punish the abuser.

Thus, the government should enact comprehensive elder protective services legislation not only addressing elder mistreatment but also protecting other older person's rights. On the base of legislation, government should provide enough protective services, for example, facilitate the identification of elder abuse, the mandatory reporting and mandatory counseling services, enhance public education to respect older persons and train carers and so on.

6. Conclusions

Consideration on both gains and losses in applying legislation on elder care in Hong Kong, we may draw the conclusions as follows:

According to residential care, there is no need to enact the separate legislation to regulate elder abuse; government should do other legal supplements coordinate with criminal law and the Residential Care Homes Ordinance in Hong Kong.

Legislation on family care for older persons is essential. But Hong Kong government should draft the comprehensive elder protective legislation not only addressing elder mistreatment but also protecting other older person's rights. Relying on the opportunity that elder abuse given rise to society, all rights of elder person should be

clearly stipulated by law, not limited legislation on elder care. Moreover, during the period of law formulating, legislative council should consider the complicated situation that differentiates from other law, and make clear the dividing line between the minimum intervention and maximum autonomy of older persons.

The obligation of government is to protect vulnerable adults, and so government should respect older person's choice, interventions must be family oriented and focus on the role of carer and victim. Only when an emergency situation exists or the older person is declared incompetent, legal intervention can be involved.

Most importantly, legal options are left with older persons. Legislation is not the purpose, but older person should be acquainted with orders of protection and guardianship and accessible to legal counsel. Knowledge of legal options guarantee older person to seek appropriate and timely use of available legal inventions.

In Hong Kong, the family is depicted as the key source of caring for older persons in community care, but there is little evidence of concrete services to support families in fulfilling such functions (Chan & Phillips 2002). Therefore, government should establish the fully-functioning protective services program to make family care as the foundation, while the community and government step in to support the effects of the family, furnish the infrastructure for financial, health

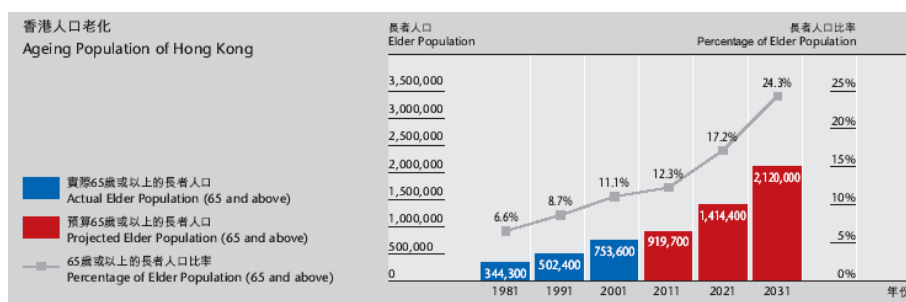
and social care, and provide institutional care for the poor and destitute elderly.

Hong Kong government should request mandatory reporting of elder abuse system to protect older persons far away from elder abuse, despite the impact of reporting is in controversy. Mandatory reporting rules in USA many states cover doctors and other health care providers, professionals and paraprofessionals. Members of a total of fifty professional groups are required to report. All states grant some legal immunity for making a complaint or report (Strauss & Lederman 1996).

The last but definitely not the least factor is that resources ought to be also provided to the abuser. In the case of the carer who abuses it may come as a great relief to be able to talk openly about the stress which he or she has been under. Or, if the abuser has a specific problem, some specialist help may be offered (Pritchard 1995). Government should allocate more resources to enhance the mandatory counseling services, and provide carers more support services including respite services in order to make carer take a rest.

In conclusion, only by doing so, the fully-functioning protective services program are more accessible to older persons and can improve the welfare of older persons indeed.

Figure 1: Ageing Population of Hong Kong



Source: Social Welfare Department of Hong Kong, 2001 Report.

Table 1: Hong Kong: Living Arrangements of the Population Aged 60 and Above, 2001

| Living Arrangement | Percentage % |
|---|--------------|
| Living alone | 11.4 |
| Living with spouse and/or children only | 78.5 |
| Living with other persons | 10.0 |

Source: Census and Statistics Department, 2002a.

Table 2: Hong Kong: the Elder Idea about Family Internal Affairs Not to Be Known by Strangers

| Attitude | Numbers | Proportions % |
|---------------------|----------------|----------------------|
| Absolutely disagree | 2 | 3.7 |
| Disagree | 2 | 3.7 |
| Less disagree | 13 | 24.1 |
| Less agree | 7 | 13.0 |
| Agree | 2 | 3.7 |
| Absolutely agree | 28 | 51.9 |
| Total | 54 | 100.0 |

Source: Questionnaire Investigation by Society for Community Organization Hong Kong: life quality and satisfaction of older persons living with family members, 2002.

Table 3: Number of Chronic Illness of Older Persons (Aged 60 and above)

| Answers | Proportions % |
|----------------|----------------------|
| Yes | 71.8 |
| No | 28.2 |

Source: “Socio-demographic, health and economic profiles of elderly people and soon-to-be old people” from Special Topics Report No. 27, Census and Statistics Department, 2000.

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