

## **DR, older people and Elder Mediation**

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At present, all DR processes are available to any member of the community, regardless of age. This article concentrates on the use of what is called Elder Mediation for disputes involving older people because it is the most widely used DR process in this context.

The vast majority of articles and papers about dispute resolution involving older people have an opening paragraph describing the growth of the ageing population, the increasing duration of family relationships and the consequent growth in the number of problematic family relationships. These are self-evident. What is not self-evident is that the increased duration and complexity in family relationships requires care in the development, selection and application of suitable dispute resolution processes.

Where disputes arise that involve the care, support and overall wellbeing of older people, many people turn to what is called Elder Mediation. Elder Mediation is said to be especially appropriate where there are conflicts or disputes involving older people and their family, or in workplaces and family businesses, or where the older person has an impending, actual or progressive cognitive impairment or a serious illness requiring decisions to be made about future care, and/or issues concerning Guardianship Orders. Where there are concerns about potential or actual elder abuse or neglect, bringing family members and significant others together can help to identify the problem and put preventative plans in place. Elder Mediation is also considered beneficial for disputes between older people in residential or aged care

settings or between older people and/or their family and an institutional carer, such as in residential or nursing home care. Elder mediators can assist older people to have difficult conversations with family members, and others, around enduring powers of attorney, advanced care directives, wills, estate planning and other aspects of elder law.

Elder Mediation, or its equivalent, is used in Canada, the USA, Australia, New Zealand and many countries in Europe for disputes involving older people. Elder Mediation in Australia is a relatively new area of specialisation. The [Elder Mediation Australasian Network \(EMAN\)](#), in close association with the [Elder Mediation International Network \(EMIN\)](#), provides information for practitioners as well as for potential clients on their website, including links to a wide range of publications, resources and practitioners in this field. EMIN and EMAN have developed [mediation competencies, a code of ethics and an international certification process](#) specific to mediation with older people.

There are many complex issues around the practice of Elder Mediation and some may challenge the commonly accepted approaches to mediation.

### **Elder Mediation: Some of the Issues**

The Elder Mediation process:

- What dispute resolution processes do dispute resolution practitioners need to be familiar with in this field of practice to ensure that the process addresses the needs of older people and significant others in their network?
- Because of the special circumstances of vulnerable older people, how could a process be designed so it has the capacity to be multidisciplinary, involving a mediator and other people whose specialist skills enable:
  - reliable assessment of participant capacity,
  - support for the older person's effective participation, and/or
  - the provision of advocacy assistance to the older person?
- Given that elder mediation typically involves a larger number of people, how should confidentiality be addressed in the Elder Mediation process:

- To protect the confidentiality of the participants?
- To take into account disclosures of potential or actual elder abuse?
- To have flexible protections that suit the needs of the variety of potential participants?
- How can the elder mediation process ensure public accountability/scrutiny/systemic reform, especially where institutions are involved in a mediation?
- What checks and balances need to be incorporated to protect the integrity of elder mediation?

#### Models and styles of Elder Mediation:

- Facilitative models of mediation are considered to be the most appropriate forms of mediation involving older people, including therapeutic mediation (Howard Irving). How effective are these forms of mediation from the perspective of older people? Are there other possible approaches such as hybrid processes which can involve talking circles?
- How suitable would a restorative justice model be where it has been found that an older person has been abused – an approach endorsed for family disputes in the recent European Report of the Royal Commission into Family Violence?
- How structured and predictable, or flexible and responsive, should the DR process be when it involves older people?
- How can institutional care facilities be involved in the design of dispute resolution systems in which they might be participants?

#### The role of the Elder Mediator, or facilitator:

- Elder mediators do not assess whether or not an older person has capacity to participate in a mediation or the capacity to make different kinds of decisions. Who should make that assessment? Should a mediator have access to that information, and how?
- What accommodations should an elder mediator make to enhance an older person's capacity?

- Should the Elder Mediator have a quasi-evaluative or advocacy role to ensure consistently informed participation and decision-making or does this conflict with the principle that a mediator is always impartial?
- What are the Elder Mediator's obligations concerning the 'empowerment' of the older person?
- How can an Elder Mediator protect the rights of an older person, while maintaining impartiality?
- Do elder mediators' require clear guidelines for handling intrinsically complex issue such as:
  - Elder abuse from persons or institutions outside of the older person's family?
  - Elder abuse by a member of the older person's family?

#### Codes of Practice and of Ethics for Elder Mediators:

- The EMAN was formed in 2013 and has worked closely with the EMIN in the development of an international Code of Ethics for elder mediators, which have been accepted by EMAN Board members from Australia and New Zealand and by equivalent Boards in Canada and a range of European countries. Australia is represented on the EMIN Board and on the EMIN Certification sub-committee and a number of NZ and Australian accredited mediators are currently working toward their own EMIN certification. EMIN specifies the required content of elder mediation training in their Certification process and these requirements are in addition to the requirements of the National Mediation Standards Board and those for FDR practitioners in Australia (and the equivalent in other countries).
- How effective are the EMIN certification requirements at making elder mediators in Australia accountable?
- Should additional national certification requirements be put in place and if so, how and by whom?

#### Training of Elder Mediators:

- Should elder Mediation be treated as a specialist area of mediation practice?

- What specific knowledge and skills should be included in the training of elder mediators?<sup>1</sup>
- Do elder mediators need to have knowledge of elder law and which aspects of elder law are important?
- Do elder mediators in Australia currently practice without having been specially trained?

When the older person is the subject of the conflict:

- How can the mediator ensure that the voice of the older person, with or without capacity, is heard and respected in Elder Mediation?
- How should the elder mediator address the issue of ageism in themselves, the older person, significant others and the community?
- How can the elder mediator empower older people, ensure they are aware of their rights and foster their right to self-determination?
- What approaches and safeguards need to be considered by an elder mediator where the older person is at risk of, or experiencing elder abuse or neglect?
- When the DR process focuses on the older person's vulnerability rather than on how to ensure the process can accommodate different styles of participation, the older person's right to self-determination may be denied. Can this be seen as discriminatory?

### **What is the scope of topics raised in Elder Mediation?**

housing and living arrangements	medical decisions
residential care	end of life decisions
workplace disputes	safety: physical, emotional, cognitive
retirement	caregiver relationships
health care	family businesses
general care	business planning
religious observation	estate planning
driving	family law and elder law
mental health	advanced care directives

cognitive decline  
respite care  
grandparenting  
separation/divorce  
community participation  
family relationships  
intergenerational relationships

enduring powers of attorney  
guardianship  
elder abuse and neglect

### **Elder Mediation – What needs to happen?**

Elder Mediation can involve a particularly vulnerable, sometimes significantly dependent, group of people. It is the responsibility of the mediation industry to ensure that, when older people participate in mediation, both the process and the practitioner protect every participant's right to participate in decisions about her or his own life. In 2009, the then United Nations High Commissioner for Human Rights was the first person to publicly use the phrase: 'nothing about us without us'.<sup>2</sup> This should apply equally to older people in Elder Mediation, or older people in any other DR process.

The EMAN and EMIN websites list research reports, peer reviewed papers and conference papers that focus on elder mediation and issues of elder abuse, including a growing number that have been published by Australian researchers and practitioners.<sup>3</sup> ADRAC encourages researchers to continue to investigate this growing area of practice, through rigorously designed empirical as well as theoretical research.

1. See the [EMIN Certification requirements](#).

2. N. Pillay, [United Nations High Commissioner for Human Rights Statement](#) (Speech presented at the First Interactive Debate on the Human Rights of Persons with Disabilities, Geneva, Switzerland, 6 March 2009), p 3.

3. See [www.elder-mediation.com.au](http://www.elder-mediation.com.au) and <http://elder-mediation-international.net>.