



**Submissions to the Supported Elder Mediation  
Project, Dispute Resolution Branch, Queensland  
Department of Justice and Attorney-General**

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## **AUSTRALIAN DISPUTE RESOLUTION ADVISORY COUNCIL**

### **SUBMISSIONS**

#### **SUPPORTED ELDER MEDIATION PROJECT**

#### **Introduction**

1. The Australian Dispute Resolution Advisory Council (ADRAC<sup>1</sup>) offers submissions set out below in response to the discussion paper questions.
2. ADRAC considers that the Supported Elder Mediation Project is a valuable step in addressing a community problem of growing proportions. ADRAC wishes to emphasise the early stage of research, data gathering and thought in respect of the management of disputes, complaints and distress from, and problems for, elders – an undefined group essentially being those people who may be affected by some of the problems of aging, in our community.
3. ADRAC accepts the term “elder mediation” or “supported elder mediation” for the time being and accepts that elder mediation as currently practised addresses elder problems as currently understood. In future analysis, it may prove that the range of dispute resolution methodologies for elder problems will include to a greater degree other modes of dispute resolution than mediation. For example, conciliation might be extensively used with accepted objective standards and codes that bind conciliators, especially where capacity is in issue.
4. ADRAC considers that elders are a category of person in the community who can require and are entitled to special consideration and suitable arrangements to meet their needs. ADRAC accepts and emphasises that persons who have met later ages whatever those ages might be, are autonomous individuals often with no incapacity or other problem caused by age or any other cause. Such persons may be fully engaged in the

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<sup>1</sup> ADRAC is a voluntary non-profit council of 11 people from across Australia. Its Charter (set out on ADRAC's website at [www.ADRAC.org.au](http://www.ADRAC.org.au)), is to explore, research and encourage best use and practice of all forms of dispute resolution in Australia.

community leading lives just as they wish to lead them and requiring no assistance to do so. ADRAC considers that there is no precise age at which special consideration arises, but that the elderly may include a category of person who meet, or sometimes meet (and perhaps not at other times), well understood indicia recognisable by almost everyone else in the community. Those indicia which may not be permanent in any one case, may, include:

- (i) Some **frailty** brought about by age or a combination of age and other factors;
  - (ii) some **dependence** on family, or on those charged with the care of the elderly and the community, both socially and through its government, because of the frailty of aging;
  - (iii) a **vulnerability** to the demands of daily life including in health, relationships and economic events, because of those frailties and dependencies.
5. ADRAC directs attention to the ancient traditions of society that accord respect, assistance and care to the elders of a community and particularly to those rendered frail by time. ADRAC notes that those traditions have become weaker in advanced western societies that have benefited from prosperity and strong individualism, while more traditional, non-western societies of lesser prosperity and greater communal structure have more strongly maintained support for their elders.
  6. ADRAC considers that a search for the causes of change in levels of support for the elderly in Australian society, may not necessarily assist in meeting their immediate needs. In the longer term, however, research into those areas must benefit society and its elders.
  7. Finally, ADRAC observes that elders in society do not exist in isolation. Families, institutions and the community at large are responsible to ensure so far as possible, and having regard to the means available, there is support which will enable elders to lead the lives they wish to lead. In pursuing those goals and accepting the context within which aged citizens may live, it becomes a matter of importance to address disputes, complaints and distress within that social context, especially the family context, within which elders may live.
  8. ADRAC accepts that the 22 questions in the discussion paper are those which remain as the more difficult or contentious questions concerning elders and that the list of questions does not purport to deal with all questions relating to the problems elders may face.
  9. ADRAC now addresses the 22 questions under the 10 headings set out in the Supported Elder Mediation Discussion Paper as follows.

## ELDER ABUSE

### **Q1. Should supported elder mediation be offered in situations where it is identified that the older person is the subject of abuse?**

10. ADRAC accepts the definition of “elder abuse” set out at page 9 of the Discussion Paper but makes the point that the definition does not (and should not) respond only to the criminal law. There are many forms of mistreatment which may not fall within the criminal law—an example is persistent rudeness, persistent criticism or some degree of emotional neglect. Further, there are many instances of behaviour that come to the attention of aged care units, nursing homes, health professionals, friends and relatives which may amount to a form of abuse or mistreatment. Such instances may include behaviour that appear to amount to abuse of a criminal nature, but cannot be proved and might therefore not be prosecuted.
11. It is ADRAC’s view that no abuse of elders whether criminal or in some other form, should be tolerated. Criminal acts should be reported to the police. Forms of abuse that may not fall within the criminal law can be as distressing or more so than some forms of criminal behaviour and need to be addressed wherever they are observed. Mediation and other forms of ADR include techniques that can help to achieve that end.
12. ADRAC submits that those actions which are not criminal but which fall into the description of “elder abuse” may have causes which lie in the problems and strains of carer and family relationships. Assistance with issues which produce the broad category of behaviours that fall into the definition of “elder abuse” may best be resolved in the interests of the abused person by resolving the problems that produced the abuse. However, this approach must not in any way contribute to a continuance of the abuse or be interpreted as implicit acceptance or justification of the abuse.
13. Mediating problems of the elderly frequently constitutes:
  - (i) re-establishing lines of communication among family members;
  - (ii) arriving at agreements about the nature of care to be provided;
  - (iii) the problems caused by a disparity of property between an elderly person and those on whom that elder has become dependent;
  - (iv) unresolved family issues;
  - (v) errant carer behaviours;
  - (vi) errant behaviours by the elder.

Mediation however, requires a degree a mutuality. That is a component that is generally inconsistent with abuse and the criminal process.

14. The process of the criminal law can be slow and operates on an assumption that an accused person is innocent until proven guilty. Restrictive orders such as apprehended violence orders or civil orders that restrain certain types of abusive conduct need to be

put in place, as family or other contact may continue during police or other investigations. If the problem does not call for such action or it is neither sought nor available, the practical problems of day-to-day life must still be addressed. Mediation is not likely to be a good tool to achieve that end. An elder person may be traumatised, controlled or manipulated to the extent that they cannot participate. Participation must be based on assessment of safety, willingness and capacity (some will be so badly emotionally abused they cannot participate).

15. Where prosecution has commenced, issues of active restorative justice (for example in the form of conferencing), may arise as a form of dispute or other form of resolution, if the elder agrees to participate. Restorative justice issues are discussed below.

**Q2. If so, what suitability criteria should be considered when proceeding with matters?**

16. On those occasions when mediation or some similar intervention is to be considered for a situation where abuse has occurred, ADRAC submits that the following criteria would be considered;

- (i) The situation must be one to which mediation can usefully be applied;
- (ii) The elder must be kept safe throughout;
- (iii) The elder must understand the process including whether they will have to confront or even be in the same room as the abuser
- (iv) The elder must agree to the process.
- (v) The elder must have sufficient say in the conduct of the process that they feel safe, including that the form of mediation used can be a shuttle form that does not require them to meet the abuser.
- (vi) The elder may have such support person as they choose and can be arranged.

**Q3. What protection should be in place to ensure the ongoing safety of participants?**

17. ADRAC considers that a person suspected of suffering from elder abuse in any form is a person whose vulnerability may already be under exploration and so there may already be unsafety in person, mind or property, prior to any form of mediation or other intervention.
18. Where intervention through for example, mediation has the risk of further reducing the safety of the abused elder or increasing the risk of danger to the abused person, the mediator or third party intervener should be able to access facilities for triggering police intervention, enabling or initiating apprehended violence orders, and/or warnings to reliable family members, carers, nursing homes or other responsible entities to enable prompt response to the increased risk. Naturally, any step likely to reduce safety is one which ought to be drawn to the attention, where possible, of the abused elder.
19. ADRAC notes that the abused may not necessarily be the only person whose safety and vulnerability needs to be considered in a mediation. Complex situations can develop in

any family and the dynamics of the family may not be fully known to all parties participating and the mediator. Mediators are usually aware of the problems of these dynamics and should be on notice to look for and where detectable, manage the risks of safety for all participants involved in elder mediation. Where the abuse in question is a form of bullying of the elder, the abuse may extend to other persons engaged in the problem and in the mediation.

20. ADRAC notes that there is available to mediators or other third party interveners, the capacity to warn suspected abusers of the consequences of proven abuse and to obtain from them appropriate undertakings at least as an interim measure.

## **RESTORATIVE JUSTICE**

### **Q4. Should restorative justice approaches be specifically available to older people in the context of elder abuse?**

21. Where the elder abuse constitutes an objectively provable criminal act, restorative justice is not, in the submission of ADRAC, an appropriate course prior to report to the police. Report to the police is the appropriate course.
22. Conferencing is the principal tool of restorative justice that is currently in use. An elder who complains of abuse should not be brought to conferencing without receiving an explanation of the process and without having consented to the process.
23. Where the elder abuse consists of an action by a family member and it is likely that there has been a failure of communication; managed conferencing may produce a beneficial outcome where restoration of a family relationship is regarded by the abused person as desirable.
24. Where family abuse is criminal in nature and has led to prosecution, it is ADRAC's submission that involvement in a restorative justice process prior to trial or sentencing is a matter which should be within the realm of decision of the affected elder where possible.
25. Where the abused elder prefers to restore a family relationship and is prepared on terms to encourage the withdrawal of charges or some other resolution to which prosecution authorities consent, a restorative justice approach might be encouraged by a third party intervener, family or other interested persons who are acting with authority and in the interests of the elder.
26. Any person trained in elder mediation or restorative justice intervenor would be conscious of and would warn of the dangers of accepting an apology as the only response to abuse.

### **Q5. What protection should be provided to ensure the ongoing safety and wellbeing of older people?**

27. ADRAC reiterates that a person suffering elder abuse in any form is a person whose vulnerability is probably already being explored and the elder remains unsafe in some way either in person, mind or property.

28. Where intervention through mediation has the risk of further reducing the safety of the abused elder or increasing the risk of danger to the abused person, the mediator or third party intervener should be able to have available access to the facility for triggering police intervention, enabling of initiating apprehended violence orders, and/or warning to reliable family members, carers, nursing homes or other responsible entities to enable prompt response to the increased risk. That can most easily occur when there is a reliable support person present at an elder mediation. Naturally, any step likely to reduce safety is one which ought to be drawn to the attention, where possible, of the abused elder.
29. ADRAC notes again that there is available to mediators or other third party interveners the capacity to warn suspected abusers of the consequences of proof of abuse and to obtain from them appropriate undertakings if only as an interim measure.

## CAPACITY

- Q6. What existing processes, sources of advice, tools or techniques would be useful to assist mediators in assessing:**
- (a) what accommodations are required to maximise participation;**
  - (b) whether a party has sufficient capacity to participate in mediation and to make decisions?**
30. ADRAC accepts without reservation that elder mediation is a process which not only can, but ought, assist any elder with a dispute, complaint, issue or cause of distress or discomfort, even where there is impaired capacity. If number of years alone is not a factor that renders a person necessarily an “elder” but the frailties of age might do so, then reduced capacity should not disentitle an elder to the benefits of mediation or other forms of intervention. Compromise of capacity can be varied in its effects both in nature and time. Exploring the best prospects of capacity is one of the roles of an elder mediator.
31. A range of accommodations are available to a mediator to maximise participation. They may depend on the circumstances, the level, the nature and the timing of incapacity. They may involve time, patience, the cooperation of others, preliminary discussions, repetition, the use of objects including photographs and notes, access to records, discussion with others or whatever other factor is required to enable the elder to participate in a mediation intended to address whatever problem becomes the subject of a mediation. ADRAC considers that the accommodation made should, as exactly as possible, meet the circumstances and the needs of the elder, and would take account of the following factors:
- (i) identification prior to the mediation so far as possible of the problem between the parties by speaking to all parties in advance;
  - (ii) spending time with the elder person prior to any mediation, to explore possible forms of resolution that may meet their needs;

- (iii) ensuring that the elder person understands the process being undertaken and who will be physically present (and whether that causes any difficulty);
  - (iv) exploring with the elder any possible problems they might have in mediated meetings, including:
    - (a) best time of day for mediation;
    - (b) whether they wish to speak at any mediation session and what they would like to say;
    - (c) whether they have opinions as to why the problem exists and why the other party may think as they do;
    - (d) optimal duration for a mediated session for that elder;
    - (e) whether the elder would like a support person;
    - (f) whether the mediator can have the elder's (or the Guardian's), consent to speak with carers, health care professionals including doctors, or any other person to whom the mediator may be directed, or understand the nature of any impairment as well as the problem of which the elder complains;
    - (g) what the elder would like to achieve by involvement in the process;
    - (h) whether the elder would like to signal to the mediator during the mediation, the desire to terminate a session;
    - (i) whether the elder would like to proceed by way of shuttle negotiation;
    - (j) where and when the first mediated session might be conducted.
32. It is ADRAC's submission that where an elder shows a sign of some capacity and a willingness to participate in a process addressing their dispute, conflict or distress, they should be assisted to participate in a way that optimises their capacity to respond (for example by adoption of the factors above in paragraph 31).
- (b) Whether a party has sufficient capacity to participate in mediation and to make decisions**
33. A mediator must understand the nature of the issues to be mediated before assessing a question of capacity. Where legal rights to housing, money, pensions<sup>1</sup> bank accounts or any other form of property might be affected, a mediation should not purport to discuss those assets unless:
- (i) the elder has full capacity; or
  - (ii) the elder is assisted by a lawyer acting solely in the interests of the elder; or

- (iii) the elder is acting through an attorney acting under a power of attorney.
  - (iv) The elder is subject to a guardianship order.
34. Where the problem being addressed by the mediation concerns services to the elder (e.g. services by nursing home or health care professional), or behaviour (e.g. by health care attendants in a nursing home or family members), and no decision is to be made about the disposition of any property or legal rights of the elder, the mediator should proceed with the consent of the elder, unless there is evidence of an absence of any form of capacity. In that case, the task of the mediator is to determine whether it is possible to alleviate the problem in dispute, the distress or the discomfort through interaction with other parties to the mediation.
35. If no property or legal right is to be affected by the mediation, the issue is not whether there is legal capacity but whether there is sufficient capacity to articulate and manage a response to a dispute, complaint or discomfort the subject of the mediation.

## **GUARDIANSHIP**

### **Q7. Given the differing views regarding the use of ADR in the Guardianship Jurisdiction, what benefits or drawbacks exist for its inclusion?**

36. ADRAC considers that frailties of age can have detrimental effects on matters of very substantial importance to any elder. For many elders one such effect may be to the loss of personal autonomy. That loss of autonomy may extend to the need to have others assist with or make decisions; inability to absorb the material necessary to make decisions; dependence and reliance upon others for daily needs; and vulnerability to those providing care or managing important aspects of the life of the elder. While frailties of age may make dependence an increasing problem, it will also lead to a loss of personal autonomy and a sense of control by the elder over their own life and environment.
37. Another substantially important matter that arises with frailties of age is the need to preserve and protect relationships regarded by the elder as of value – usually family and friends, but frequently extending to nursing home staff, known health care professionals and others.
38. Inevitably, and despite all sound efforts by Guardianship Tribunals, guardianship processes and proceedings will involve:
- (i) formality;
  - (ii) loss of personal decision-making by the elder;
  - (iii) loss of autonomy;
  - (iv) a degree of complexity;
  - (v) compulsory submission by the elder to the process, thoughts and decisions of the tribunal;

- (vi) a focus away from engaging with valued relationships to the decisions of a third party tribunal;
  - (vii) absence of engagement with those in a valued relationship;
  - (viii) a sense of alienation from the decision made by the guardianship entity.
39. Accordingly, any process which preserves a degree of personal autonomy, preserves an involvement of the elder in decision-making and the preservation and focus upon valued relationships, is of greater value than a clear decision by an external authority, no matter to what degree that decision is focused on the interests of the elder and even if favourable. It is possible that, any agreement arrived at during mediation could be given formal ratification by a Tribunal.
40. Mediation is a process which enables:
- (i) The problem to be addressed.
  - (ii) participation by the elder;
  - (iii) engagement with those in valued relationships;
  - (iv) preservation of some form of personal autonomy through engagement and decision-making;
  - (v) the avoidance of the imposition of an external authority other than by endorsement at the outcome of a successful mediation;
  - (vi) the avoidance of complete submission to an external authority;
  - (vii) the avoidance of the complexity and technicality of statutory proceedings.
41. Naturally, engagement in any mediation requires some degree of capacity to comprehend. Wherever such capacity exists, it is the submission of ADRAC that the capacity ought to be explored in a way that preserves personal autonomy, encourages engagement and preserves relationships. That means that mediation or some form of appropriate ADR should wherever possible, precede or where feasible and appropriate, accompany, tribunal determination.
42. ADRAC acknowledges that the question of whether some degree of mediation is appropriate is a matter first, for the guardianship entity, but notes too that a desire to participate in a mediation or some similar form of engagement, suggests a degree of capacity to do so. The option should be provided to the elder and encouraged wherever appropriate.
43. The drawbacks of mediation in guardianship proceedings are the drawbacks that arise wherever there is limited capacity. An inconclusive outcome may result. The mediation, unless carefully handled, may increase the distress of an elder if the outcome they desire is not achieved or is not achievable.

44. ADRAC submits, however, that where there is some capacity and any demonstration of a desire to express personal autonomy or engagement with the person with whom there is conflict, that should translate into some form of ADR, before the imposition of directions or orders by a tribunal.
45. ADRAC considers that the expression of personal autonomy and the preservation of relationships is of such importance that it should weigh strongly when considering the administrative benefits of speedy guardianship orders.
46. Some disputes in the Guardianship area do not involve the elder person because the appointed Guardian has commenced undertaking their responsibilities and decision-making on behalf of the elder person; in such situations, dispute can arise between members of the elder person's family and the Guardian. Mediation is eminently suitable for these disputes.

**Q8. What criteria should be used to assess the suitability of matters in the guardianship jurisdiction for ADR (e.g. supported elder mediation)?**

47. In the submission of ADRAC, ADR should be the preferred first approach where any of the following criteria exist:
- (i) evidence of **interest** by the elder in whatever is the issue before the guardianship entity;
  - (ii) evidence of some **capacity** to participate in the decision being made, even if that capacity is impaired;
  - (iii) there is evidence of **dispute, conflict or distress** on the part of the elder and a desire to express themselves on the issue at hand;
  - (iv) there is evidence of a desire to participate in the **decision-making** as a matter of personal autonomy;
  - (v) it is considered that engagement with the other parties to the dispute, conflict, complaint or distress may produce an outcome which preserves either or both of personal **autonomy and relationships**.

**Q9. What options are there for effectively linking a supported elder mediation service with the guardianship jurisdiction?**

48. ADRAC submits that the guardianship jurisdiction is a vital venue for the provision of Supported Elder Mediation for all the reasons set out in the Discussion Paper.
49. However, ADRAC wishes to emphasise that only a tiny minority of elder problems reach the guardianship jurisdiction. The problems that reach the tribunal are usually legal in nature rather than social. Ideally, elders would be supported sufficiently to continue living in the community without submission to the control and authority of guardianship orders. For that reason, mediation annexed to tribunal services and role is of great, even if not widespread, importance.

50. The problems confronting elders, as they may arise from for example, a combination of the frailties of age and their isolation, require address at a broad social level beyond guardianship services, and government services to the aged. They must therefore extend into the social culture in which the community develops its regard for the aged. ADRAC submits that formal directions to use mediation services are of great importance, especially where there is a power to make orders in respect of an elder against their wishes. Nevertheless of even greater importance is an “attitude” of mediation, engagement, conciliation, communication and participation of the elderly in conflict dispute and distress must also extend into aged facility and nursing home management and staff, health care professionals, school education, government services, community ethics and the source of any attitude likely to impact on the treatment of the elderly.
51. In practical terms, it is submitted that in addition to mediation services and the provision of mediators, an extensive program of elder mediation education is required in aged care and nursing home education and management levels, as well as among aged care health professionals and for families living with or involved in the care of an elder. The inculcation of values affecting treatment of the aged in the form of education programs, codes of conduct, Charters, agreements, clauses in contracts, orientation programs, handouts, advertising, statements by authoritative persons and in notable and headland public speeches, cannot be over-emphasised.
52. Techniques aimed at the preservation of such personal autonomy in decision-making as may be desired and valued relationships need to be developed as a community attitude rather than solely as a mediation or ADR service provided by government.
53. The third point in the Carol & Smith (2010) article referred to in the discussion paper is that the Guardianship Tribunal is the best place to address the unique aspects of the guardianship jurisdiction. The three points concern:
- balancing personal liberty with the best interests and protection of the person, which are not subject to the consent of the parties;
  - providing procedural protections, which support the rights of the elder that may not ordinarily be available in mediation;
  - the availability of, and ability to compel, evidence from expert witnesses to support sound decision-making.
54. ADRAC points out that any tribunal decisions, no matter how sensitively arrived at, deprive the elder of autonomous decision-making and therefore have the capacity reduce the person as a full and free member of the community. Any such decision would only be made after an attempt to preserve personal autonomy through mediation or some related ADR process. Further, it is not an answer to the loss of autonomy resulting from a tribunal decision that the elder can make submissions (however informally and however informal the proceedings) and can be heard. When submissions are made or the elder is heard by an entity who has the power to make a decision adverse to the elder, it is procedurally fair to hear from the elder but the decision is not that of the elder. A tribunal decision may be necessary but it deprives an

elder of autonomy or at least recognises a lack of autonomy. A submission to influence an overriding authority is a lesser act of autonomy than the engagement involved in mediation, even if unsuccessful.

## **ENSURING SUPPORTED ELDER MEDIATION IS ACCESSIBLE AND RESPONSIVE TO DIVERSITY IN QUEENSLAND'S POPULATION**

**Q10. What considerations will be relevant in ensuring that a supported elder mediation service will be acceptable for:**

- (a) people living in rural and remote areas;**
- (b) Aboriginal and Torres Strait Islander people;**
- (c) people from culturally and linguistically diverse backgrounds;**
- (d) lesbian, gay, bisexual, transgender, intersex and queer people?**

55. Preliminary note: ADRAC is a national body intended to provide information, advice and thought on matters relating to dispute resolution issues across the Australian community. Some aspects of the questions asked in the discussion paper have clear implications for the particular geography of Queensland. ADRAC provides submissions on this question but does not purport to address specific geographic issues best addressed by those more familiar with the human geography and current service issues arising from that geography of Queensland. ADRAC therefore must limit its submissions on this question, as set out below.

56. As to people living in rural and remote areas and Aboriginal and Torres Strait Islander people, it would plainly be ideal for culturally appropriate mediation services to be available on-site. That may be slightly more possible for Aboriginal and Torres Strait Islander peoples than for remote rural communities but for practical and funding reasons it would be difficult to the point of unlikely, for both groups in the wider community.

57. ADRAC notes the increasing number of indigenous mediation services being piloted and trialled in remote Aboriginal and Torres Strait Islander communities, and recommends that these pilot programs be approached to ascertain their interest in, and capacity for, providing elder mediation services.

58. A feature of the development of modern dispute resolution services is its increasing use of communications technology including immediate voice services such as VOIP, telephone, Face Time, Skype and other related commercial and free electronic communication services. Mediation has been successfully conducted in numerous fields by telephone both in Australia and in other jurisdictions. Inevitably, electronic communication has some limitations, but there are some advantages as well. For example, where electronic meetings of all parties occur, some of the problems of proximity (being too close to parties in conflict) are alleviated. Telephone mediation inevitably involves a degree of shuttle mediation but telephone shuttle mediation has been particularly successful in family law. There is every reason to believe that its extended use for people living in rural and remote areas and for Aboriginal and Torres Strait Islander people would be better than having no mediation service at all.

59. It is notable that the use of electronic communications in the family law field derives a degree of legitimacy from the existence of court family law proceedings. Parties can

be compelled by a court to address the benefits of mediation with the risk of adverse orders for not engaging in mediation.

60. Where the elder is cared for within an institutional setting in a remote area and the dispute is a family dispute rather than an accommodation or service dispute, it may be that the institution (nursing home or aged care facility) can provide the mediation needed by the aged person.
61. Other considerations arise where the aged care facility or the nursing home is the source of the dispute, complaint or distress. Where that occurs, the need for an Ombudsman service for aged persons is particularly compelling. Any such Ombudsman service would inevitably require either industry agreements like that of the Financial Services Ombudsman provided by banks and other financial institutions at national levels, or it would require the creation of a statutory power and the appointment of an Ombudsman to deal with those complaints. As with all Ombudsmen, any such service would involve extensive powers of conciliation and mediation probably under a statutory umbrella.
62. As to Aboriginal and Torres Strait Islander people, the situation is likely to have differences. If the persons involved are institutionalised in the sense for example, that they are in nursing homes or aged care units, possibly in remote areas, then the considerations set out above in respect of rural and remote persons, apply.
63. Where the aged person lives within a community and is engaged in dispute or complaint or distress involving other members of the community, the need for the availability of mediation services is great. It would need to be a service fully attuned to both local cultural requirements and the needs of the aged. Again, the provision of such services should occur at two levels consisting first, of an extension of government service but also secondly, training of community leaders and local community services to include mediation for elders with dispute, complaint or distress.

### **People from culturally and linguistically diverse backgrounds**

64. ADRAC emphasises the importance of ensuring that dispute management among members of the same culture should be addressed by mediators well informed of the cultural norms within that group. Ideally, the mediator would speak the language of those in dispute or of the persons who do not speak English. The practicality of a government service being able to meet such requirements adequately, would be highly questionable, given the diversity of languages spoken within Australia. That consideration again emphasises the need for elder mediation to be inculcated among those with cultural leadership and aged care responsibilities.

### **Lesbian, gay, bisexual, transgender, intersex and queer people**

65. The LGBTIQ segments of the community are themselves developing facilities to meet the needs of their members as life progresses. Some of the problems of ageing for those groups are no different from those affecting the wider population, but those groups can develop problems, both practical and cultural, which are particular to the cultures within which they exist.

66. ADRAC suggests that while precise numbers may never be fully known, the size of the LGBTIQ group appears to be around 10% of the population. That is a minority of substantial size but it is also a minority of diverse culture and groupings. ADRAC submits that in developing a cohort of supported elder mediators there be included training and specialist mediators with expertise in the provision of elder mediation services for the LGBTIQ group.

## **SERVICE PROVISIONS**

### **Q11. What other considerations will be important when determining the most appropriate delivery of a supported elder mediation service?**

67. Elder mediation is a field that requires persons trained in elder mediation, but inevitably with specialist training and experience in the field. Mediation for the benefit of the elderly has the remarkable and unique feature of having at times work with limited or impaired capacity, to determine not whether there is full capacity, but whether there is any capacity or sufficient capacity to engage in mediation. Mediation for a person with reduced capacity is more common in the field of elder mediation than any other dispute resolution field. It requires a degree of training, experience and expertise.
68. Ideally, provision of elder mediation services would initially commence with government support and organisation. In that way, elder mediation standards, education and quality control could be established and maintained. Ensuring that the elderly are as free from unnecessary dispute, conflict or distress as possible, however, is a substantial task, particularly given the growing proportion of the community constituted by the elderly. Ideally, elder mediation would develop as a community attitude or inculcated set of values, rather than as a government service. It would be something provided for the elderly by those with whom they are most in contact or with whom they can easily achieve contact.
69. The provision of any elder mediation government service ought to be accompanied by elder mediation training for officers in nursing homes and aged care facilities. It also ought to be available for those families who seek it and who are carers for an aged person.
70. Maintaining continuity of service through change of government and economic vicissitude, would be an important component of responding to the growth of the aged in the community.

### **Q12. What advantages or disadvantages would you perceive with a government-provided service as against one provided by the NGO sector?**

71. The advantages of a government-provided service are its likely consistency during the period of government support, the maintenance of standards, support for mediator education as well as service to areas that would be unprofitable for profit-making NGOs. The leadership of government in the provision of elder mediation services would be invaluable, particularly in the early stages of the development of such a service.

72. The disadvantages of a government-provided service are that they are more prone to change with changes of government, they tend to have a higher level of administrative cost and a more rigid and structured workforce.
73. Ideally, government would play at least a basic role of ensuring standards, qualifications, nursing home and aged care facility education, disciplinary facilities and regulation. The provision of mediation services might well be distributed to NGOs.
- Q13. Does your organisation have a steady stream of matters suitable for elder mediation and may it be a suitable pilot site?**
74. No. ADRAC is a community advisory council which is prohibited by its Charter from the provision of ADR services. ADRAC is careful not to interfere with the work of membership, commercial and government services. ADR membership bodies are more likely to have a stream of such demand.

### **KEY REFERRAL POINTS**

- Q14. What would be the best methods of engaging referrers, older people and their families to maximise their understanding of elder mediation?**
75. It is ADRAC's consistent position that elder mediation must progress not only by the provision of formal government services but by promoting attitudinal change in the community towards its elders.
76. It is well and widely known that dispute, conflict and distress among the elderly is emerging in ways and in volumes not previously anticipated or understood. There is a difficulty of proof of some types of problem and especially of abuse. The events occur in intimate and isolated environments, the elder is dependent and reluctant to complain.
77. The problems of the elderly will increase as time progresses and as the proportion of the elderly in the community increases. The problems will also become better known and more obviously exposed, as numbers increase and methods of exposing abuse develop.
78. There are widespread problems among the elderly. There is conflict with those who house and care for them, especially with their families. There are also family members who believe they have entitlements to the property, assets and income of the elderly. These are all factors that render the field of elder distress amenable to community messaging especially through advertising. Such advertising may include elder mediation services. Such advertising might not be limited to traditional forms, but might extend to material distributed to the organisations of the capable elderly, including service clubs and sporting clubs, country clubs and other institutions capable of absorbing and spreading the information provided.
79. The nursing home and aged care industry which must confront on a day-to-day basis the problems of elder dispute, elder conflict and distress might be encouraged to generate an Elder Industry Ombudsman scheme. The industry might be required to financially support the institution of a statutory Ombudsman for the elderly. Any such

ombudsman scheme is likely to have a very significant impact on the awareness of the elderly.

**Q15. Which professionals or services may be best placed to make referrals to a service?**

Nursing homes, aged care facilities, GPs, community nurses, community centres, religious bodies that deal with the elderly, clubs and associations that deal with the elderly, service clubs, various support services (such as meals on wheels), charities, bowling clubs, bridge clubs, travel agencies that specialise in the provision of services to the elderly, religious bodies (including churches, mosques and temples), Emergency Departments of hospitals, ambulance services, police stations, government offices.

**Q16. What would be the best method for engaging with referrers, older people and their families to maximise their understanding of elder mediation?**

80. The following are all good methods of engagement;

- (i) PD requirements in the aged care industry,
- (ii) ethics components in health care professional training,
- (iii) aged care facility visits by those being trained in health care,
- (iv) public community advertising,
- (v) an Elder Ombudsman Scheme.

**CHALLENGES**

**Q17. Do you consider that conflicts and disputes involving older people are particularly widespread to justify a supported elder mediation service?**

81. It is the submission of ADRAC that there is an extensive need for supported elder mediation services that is likely to increase as the suspected abuse is more completely uncovered and as the proportion of the aged increases in the community.

82. The increase in longevity, the increase in lifespans of persons heavily disabled by aging and the increase in the numbers of the elderly as a proportion of the population are all factors that suggest that elder problems are more likely to increase significantly rather than reduce. However, it also appears to be emerging that, like sexual assault, child abuse and other forms of family violence, elder abuse, conflict, dispute and distress are all significantly under-reported.

83. Inevitably, the frailty of some elders renders them vulnerable to excess of power, abuse of power, bullying and greed. While such issues may have causes in very small aspects of misbehaviour, they are capable of causing very substantial distress.

**Q18. What barriers may exist to older people, their families or support, and service-providers from accessing such a service?**

- (i) Fear of retribution.
- (ii) Fear of loss of support.
- (iii) Damage to existing relationships.
- (iv) Conflict, confrontations and other behaviours that will cause distress.

**Q19. What may be required to translate the level of community need into demand for a service?**

- 84. ADRAC considers that demand for ADR services will increase as the levels of elder problems become better known, more numerous and when there are known and proven consequences for causing abuse or distress.
- 85. Increased research, data, advertising and media interest should all increase community knowledge and concern.
- 86. ADRAC points out that elder abuse by its nature and by the often-dependent nature of the elder is a hidden behaviour. Reliance cannot be placed by the community or government on report of problems by the elder. It is necessary to recognize the limited power that many elders suffer from and the dependence to which many elders are subject. It is the limited power and the dependence of some elders that can define elder problems but that can also hide the problems. It means that a responsible community must recognize the limited power and the dependence of many elders and act to discover and prevent abuse wherever possible.
- 87. ADRAC recommends that mainstream services for the elderly are provided with sufficient information about recognising elder abuse, and how to take action where elder abuse is suspected.

**NAMING**

**Q20. What should be considered when naming a supportive elder mediation service?**

- 88. The name of the service should either suggest the nature of the service using words such as “elder”, “elderly”, “aged” as well as “ombudsman”, “complaint”, “abuse” and “fair treatment”.

**Q21. What term for older people has been effective in your experience?**

- 89. It is sometimes suggested that the word “elder” belongs solely to the Aboriginal and Torres Strait Islander community. It is submitted that the word “elder” is a useful term for all older persons. It demonstrates some degree of respect. In part because of its use in the Aboriginal and Torres Strait Islander community, it is recognised as a term of respect and it avoids the now damaged expression “senior citizen”. Another possible word is “senior” or “seniors” which is commonly used in respect of various government

concessions for the elderly. It is not, however, a word that carries the same respectful import as “elder”. It does not bring about an artificial distinction between the problems of elders among all communities, in the way confining the word “elder” to Aboriginal and Torres Strait Islander Peoples might do.

## **OTHER**

### **Q22. What other issues do you consider are important for consideration in the development of a supported elder mediation service?**

90. Speed of access to an elder’s problem, access of the mediator to information, capacity of a mediator to encourage attendance (a problem less likely for an Ombudsman).

## **CONCLUSION**

ADRAC applauds the work being done by the Queensland Government, the Department of Justice and Attorney-General and its Dispute Resolution Branch. Work on the elderly and in particular on abuse in its various forms is pressing.

ADRAC offers to assist the Queensland Government on this or any ADR matter in any way it can.