

AUSTRALIAN DISPUTE RESOLUTION ADVISORY COUNCIL
(ADRAC)

SUBMISSION TO AUSTRALIAN LAW REFORM COMMISSION

ELDER ABUSE

Introduction

ADRAC wishes to contribute to the work of the ALRC on the important topic of elder abuse.

The Attorney-General Senator the Hon. George Brandis QC Attorney-General of Australia has referred to the Australian Law Reform Commission for inquiry and report pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996* (Cth) for consideration of:

1. Existing Commonwealth laws and frameworks which seek to safeguard and protect older persons from misuse or abuse by formal and informal carers, supporters, representatives and others. These should include, but not be limited to, regulation of:
 - Financial institutions
 - Superannuation
 - Social security
 - Living and care arrangements, and
 - Health
2. The interaction and relationship of those laws with State and Territory Laws.

The referral to the ALRC seeks to promote and support older people's ability to participate equally in their community and access services and advice to protect older people against misuse or advantage being taken and to provide specific protections against elder abuse.

The reference involves a rights-based approach with an emphasis on legislative structures but it is plainly intended to produce a system designed to improve the lot of older people and to protect those of them who may suffer abuse.

The ALRC is enjoined by this reference to look at prior reports and specifically to consider best practice laws, as well as legal frameworks. It is unclear whether there is contained in the reference an assumption that a rights-based approach is the best way to address elder abuse or simply that the ALRC is asked to limit its work to that form of remedy. Either way, in the view of ADRAC, the content of any legislation intended to reduce elder abuse must include interest-based approaches.

Those approaches would include the far cheaper and more effective options of encouraging mediation, conciliation, facilitation and other dispute resolution methods. That is particularly the case because it is likely and critical to recognize that most abuse is in a form that is non-justiciable. There are three reasons for this; firstly, the abuse is often in a form that cannot be addressed by legal sanction or remedy; secondly, as the ALRC discussion paper acknowledges, elders can be very reluctant to use the law to address abuse and thirdly, a great deal of abuse may be justiciable in a theoretical sense but for reasons of cost, relative smallness of breach, difficulty and delay, a legal pursuit of rights is not practical.

ADRAC compliments the ALRC on its extensive and detailed discussion paper. Perhaps consistent with its reference, its proposals are largely based around rights enforceability rather than around the complex, and often dependent, relationship factors that can lead to elder abuse and the focus on interests that can inform its prevention. A rights-based approach can address wrongs already committed. An interests-based approach will act as a preventative.

ADRAC welcomes the opportunity to make a submission on the important topic of elder abuse. In particular it wishes to advance a perspective additional to those important rights-based matters detailed in the ALRC Discussion Paper and in the proposed National Plan.

Not all aspects of the proposed National Plan will be addressed in this submission. Primarily because ADRAC agrees with many aspects of the ALRC's proposals concerning Enduring Powers of Attorney and Enduring Guardianship, banks and superannuation, family agreements, Wills and social security.

A further reason that ADRAC does not make submissions on all aspects of the discussion paper and the proposed National Plan arises from the purpose and areas of work of ADRAC.

What is ADRAC?

ADRAC (Australian Dispute Resolution Advisory Council) is an eleven member independent unaligned think tank focussed on the public interest in use of the full range of dispute resolution mechanism.

ADRAC's charter, its membership and its work can be viewed on its website at www.adrac.org.au.

ADRAC's membership consists of the following:

- Jeremy Gormly SC (Chair)

- Andrew Bickerdike (CEO Relationships Australia – Victoria)
- Tom Howe QC (Chief Counsel, Dispute Resolution, Australian Government Solicitor)
- Margaret Halsmith (Chair, Resolution Institute)
- Adrian D'Amico (Defence General Counsel, Department of Defence)
- Shirli Kirschner (Principal, Resolve Advisors, mediator facilitator and dispute system designer)
- Debbie Hastings (Deputy Commissioner for Review and Dispute Resolution (RDR) in the Australian Taxation Office)
- Alysoun Boyle (Mediator)
- Craig Pudig (Macquarie Group)
- Associate Professor Kathy Douglas (RMIT University)
- The Hon Denis Cowdroy OAM QC (Currently on leave)

ADRAC regards its heritage as stemming from Commonwealth Attorney-General's former advisory council on ADR, known as NADRAC (National Alternative Dispute Resolution Advisory Council). It operated from 1996 until 2013 when its work was to be absorbed into the Attorney-General's Department. The new body ADRAC was formed by a number of the members of the abolished NADRAC who together with additional members constitute the Council. The Council is assisted by an executive secretary Mr Matthew Varley, Solicitor.

[ADRAC's Interest in Elder Abuse](#)

ADRAC has a history of work on elder issues including the specialist field of elder mediation.

On ADRAC's website may be viewed the current projects of ADRAC including a mapping of ADR in Australia. Included in that mapping project, is a paper by ADRAC which focuses on elder rights. It especially focusses on elder mediation as a means of resolving elder problems. The paper was endorsed by Associate Professor Dale Bagshaw a world authority on elder abuse and elder mediation.

Furthermore, one of ADRAC's members Margaret Halsmith (Chair of Resolution Institute, the largest ADR membership body in Australia), is also a Director of EMAN¹. Margaret Halsmith also mediated and conducted determinations under the *Aged Care Act 1997 (Cth)* and has extensive experience in the field of elder ADR.

ADRAC recently completed a detailed submission to the Queensland Government reference on elder abuse which can viewed on ADRAC's website.

ADRAC has an interest in the use of ADR to address elder abuse and elder problems generally. It notes that most elder problems arise from a context of tension, conflict and

¹ EMAN -- Elder Mediation Australasian Network

dispute within the family (often due to changing roles as families evolve), other influential and often dependent relationships including with carers and in institutions. ADRAC seeks to address those problems for elders. ADRAC considers that addressing elders' interests and needs by use of ADR, prevents abuse. ADRAC also considers that ADR should precede rights-based solutions except where there is provable criminal conduct.

The focus of elder abuse must remain on the elder and on the prevention of abuse as well as on the offender and achieving a punishment or redress. Important as the latter matters are they do not address the cause of elder abuse. It is widely recognized that elders are reluctant to report problems as abuse; once made, any report will also suffer the problems of proof that meet all covert bad behaviours as well as other problems listed below.

A rights-based approach is a valuable corner-stone of the rule of law, but, unfortunately, it is not sufficiently effective in actually stopping, or preventing, abuse. Legal approaches will act as a deterrent. They will not generally act as a preventative. Additional means are needed to address elder abuse. In fact, it is their own assertion of so-called rights and entitlements that might be relied upon by abusers to justify their behaviour.

Acknowledgement of Elder Abuse

ADRAC agrees that elder abuse is widespread, under reported and damaging. ADRAC agrees with the ALRC that elders have rights which they are entitled to have respected and enforced. ADRAC considers that criminal conduct, which in relation to elders, generally consists of various forms of assault, theft, fraud and neglect should be approached on a zero tolerance basis and should always be referred to the criminal system.

ADRAC recommends the adoption of the DULUTH approach to describing abuse including emotional, financial, sexual, privilege, ageist and physical abuse. That model can be found at <http://goo.gl/images/ZTW4Ln>.

ADRAC notes *but does not agree with* the apparent assumption underlying the terms of reference to the ALRC that strengthening rights enforcement by techniques of investigation, allegation, proof of wrongdoing, redress or punishment, is the best solution to the varied problems of elder abuse. ADRAC addresses this issue in its submissions below.

Definitions

ADRAC considers that the ALRC's working definition of elder abuse as behaviour "causing harm to an older person²" is not unreasonable but ADRAC emphasises that the term "elder abuse" is a basket which contains a very wide range of behaviours, some initiated with criminal intent (sexual assault, theft, fraud) while others may result from family pressures, institutional indifference, financial stress and imbalances of power that adversely affect the older person.

² P.17 of the ALRC Discussion Paper

ADRAC points out that the basket of behaviours broadly termed “elder abuse” consists of behaviours of which there would be widespread social/community disapproval but most of which is neither justiciable (see below), nor capable of criminal prosecution.

Assault, fraud, theft and other offences may be pursued in the criminal law. Interference with property, bank accounts or other assets, interference with contracts or living arrangements may be capable of remedy in the civil courts yet non-justiciable abuse, which cannot be pursued or remedied by either of those legal paths, is the most common form of abuse.

Non-Justiciable Abuse

Non-justiciable abuse is any form of elder abuse that falls outside the law or reasonable access to the law. The abuse may be in a form that would be disapproved by anyone but it is not illegal. It may be both disapproved and illegal but would not be provable. Alternatively, it may be capable of criminal prosecution or of redress by civil action would never occur for reasons of cost, complexity or its objectively minor nature (but measured relatively). Most elder abuse cannot be remedied by a rights-based approach.

Examples of non-justiciable abuse include:

- (a) Humiliating or belittling comments;
- (b) Most forms of verbal abuse;
- (c) Persistent discourtesy or rudeness to an elder;
- (d) Persistent impatience with an elder;
- (e) Failure to engage with the elder;
- (f) Failure to accommodate an elder frailty;
- (g) Controlling behaviour about lifestyle issues or preferences which are not necessities;
- (h) Deprivation of personal preferences (in food, clothing, make-up, entertainment, outings);
- (i) Most forms of neglect short of overt physical or mental harm³

All of these behaviours can occur in a context of conflict, anger or dispute; they can also occur as a result of gradual and careless indifference. They can come with a sense of righteousness, by design or by habit. They can also induce justification and rationalization of abusive behaviour, minimization, denial and blaming for abusive behaviour. On one view they are frequently a form of bullying arising from power imbalance.

³ Examples are countless but might include not enabling an elder to bathe regularly, leaving an elder in bed when they need assistance to get up, not changing an elder into day clothes during the day, not providing suitable or preferred food, failing to visit or engage.

By whatever method these behaviours are assessed, they need to be addressed. Declaring that the individual pieces of conduct that constitute non-justiciable abuse are outside the rights framework is to fail to respond to a major form of elder abuse and suffering, to a pathway to more serious abuse and to a problem being widely recognized in the community.

It ought to be recognized that such behaviours can be (and as matter of common experience usually are), a pathway to more serious and escalating abuse, to criminal behaviour or to other forms of abuse that are addressed by the law. It is ADRAAC's view that non-justiciable abusive behaviours should be treated in themselves as abusive and should be addressed using ADR techniques to prevent any further escalation of the behaviours. If addressed in this way there will be a prevention of criminal and other illegal abuse.

Many of the behaviours listed above as non-justiciable, may not arise from malevolence but from other causes such as frustration, unchosen imposition of the needs of an elder on a family, lack of resources or assistance, ageism, personal resentments or other causes from the past. To fail to note and address non-justiciable abuse is to overlook abuse that arises within the older person's influential relationships, especially in situations where the elder is a dependent; such abuse, can be and usually is, more immediate and more distressing than some forms of criminal abuse.

Non-justiciable abuse is not amenable to a rights-based approach but it is highly amenable to dispute resolution techniques that can operate from legislation designed to make access to ADR easier, less expensive and less accusatory than rights-based approaches can be. What is critical is that access to ADR must not be linked to, and is available independently of, a rights-based approach. ADR can enter an elder's problem much earlier than a rights-based approach and can act to prevent rather than simply to redress, abuse.

It is noteworthy that the ALRC's treatment of ADR is limited to its discussion of low cost options by way of compulsory conferences to be available only after proceedings have commenced in a justiciable matter – see Proposal 8-1⁴ in the discussion paper. Treating ADR as a form of early intervention would enable its more effective application in matters of elder abuse.

Problems with a Rights-Based Approach

ADRAAC submits that while a rights-based approach is valuable and should be further strengthened as recommended by ALRC, its impact on the prevalence and intervention in elder abuse will be minor. Sometimes a rights-based approach can exacerbate abuse – as many elders correctly fear -- compared with what can be achieved through mediation, facilitation, conciliation (including compulsory conferences), reporting and referral systems and the use of community and Official Visitors (recommended by the ALRC), and an Elder Ombudsman.

A list of potential problems arising from a rights based approach can be helpful;

⁴ P.153

- (a) Rights enforcement is necessarily focused on redress and punishment after abuse has occurred. Rarely will interlocutory relief be an available option for an abused elder.
- (b) A rights-based approach will act as a deterrent but not as a preventative.
- (c) A rights-based approach introduces into family, carer and familiar relationships the fracturing process of contest, and may exacerbate the relationship problems which led to the abuse.
- (d) Renders conflict and dispute into accusation and the attempt to establish a wrong-doer when a better course is dispute management.
- (e) High cost of the pursuit of rights.
- (f) Litigation in any form is always limited to elders with full cognitive capacity or an appointed guardian, and who consent to litigation.
- (g) Requires justiciable content.
- (h) Focusses on wrongdoing and the wrongdoer (which can work if provable) rather than on the interests and needs of the elder.
- (i) May result in further emotional isolation of the elder as rights are asserted in an adversarial forum.

All of these problems with a rights-based approach can themselves be experienced by an elder as abusive.

Effect of an Interest-Based Approach

- (a) Enables early intervention with mediation, facilitation, conciliation or other ADR techniques.
- (b) Speedier application.
- (c) Substantially lower cost both to the elder and to the community.
- (d) Preserves existing relationships, where that is beneficial and at the election of the elder.
- (e) Identifies and solves persisting and underlying problems rather than adjusting conflicting rights.
- (f) If pursued as elder mediation does not require full cognitive capacity and can be adjusted to accommodate varying levels of capacity.
- (g) If pursued as elder mediation maintains and protects elder involvement and self-determination.

- (h) Facilitates identification and resolution of points of conflict.
- (i) Enables address of non-justiciable issues.
- (j) Maintains focus on the elder rather than on punishment or redress against a wrongdoer.

The ADRAC Proposal – Three Principles

1. Adopt zero tolerance for provable criminal abuse.
2. Make indicators of tension, conflict and dispute the signposts for possible abuse rather than await concrete evidence of provable abuse.
3. Use ADR to address elder tension, conflict and dispute and only thereafter resort to enforcement of rights if necessary, and with the elder’s consent.

ADRAC -- Implementation of a System of Elder Care

ADRAC suggests that the content of legislation to protect elders from abuse should adopt the three principles set out above as a guide and should implement those principles as follows;

- (a) Establish charters of rights of those in elder care in aged care facilities to set standards of institutional and individual behaviour that avoid being abusive or patronising, rather than establishing a cause of action.⁵
- (b) Establish a statement of rights of elders, to set standards of behaviour that avoid being abusive or patronising, rather than a cause of action.
- (c) Ensure that breaches of right are addressed through ADR before rights enforcement; ADR should be made available in elder conflict and disputes through aged care facilities where appropriate, through independent Official Visitors, through an Elder Ombudsman (see below) and through any other institution or facility that is able to address dispute or conflict through ADR.
- (d) Maintenance of a voluntary independent community visitor system (as outlined to be maintained by ALRC) in all aged care facilities.
- (e) Enable a system of community visitors conducting visits in the home of the elder (with the consent of the elder or controller of the premises but thereafter, if refused but on

⁵ ADRAC endorses a Charter in a form such as that set out in the Research Report No. 35 by the Australian Institute of Family Studies “*Elder Abuse—Understanding issues, frameworks and responses*” by Rae Kaspiew, Rachel Carson and Helen Rhoades.

notice, suspicion, request or information, through an Elder Ombudsman). Most elders are accommodated at home where abuse is most common and most easily hidden.

- (f) Appoint independent Official Visitors to aged care facilities (as outlined by ALRC).
- (g) Provide statutory protection for independent community and Official Visitors' right to report to the Elder Ombudsman, the Police or to other appointed persons.
- (h) Provide independent Official Visitors with statutory powers of entry, inspection, consultation alone with an elder (as outlined by the ALRC) and rights of referral to Ombudsman, police or ADR.
- (i) Establish an Elder Ombudsman (either separate from or adjunct to Guardianship Tribunals) to whom independent community and official visitors may refer and provide the Ombudsman with a wide range of capacity commencing with interview, mediation or facilitation, investigation, report and referral.
- (j) Provide to the Elder Ombudsman the power to receive and investigate complaints or concerns, meet requests for mediation assistance, compulsory visitation of an elder at any place, conciliation with compulsory conference or any other form of dispute resolution that may assist an elder in a situation of abuse, conflict or dispute. Such powers would be in addition to but would precede use of more coercive methods of addressing abuse.
- (k) Appointment and education of Complaint Officers in all aged care facilities. A complaints officer should record complaints from residents in a form that makes them available for inspection by an Official Visitor. A complaints officer should endeavour to achieve resolution of complaint but should act on any complaint of abuse by referral to police or to the Ombudsman.
- (l) Advertisement and education should occur widely in the aged care and family support sector, especially of staff and carers employed in, and associated with, aged care facilities and institutions.
- (m) Advertisement and public education of new elder care arrangements should also occur.

The National Plan Proposals

ADRAC specifically comments on the following proposals in the Proposed National Plan;

Proposal 3-4 Powers of Investigation

ADRAC agrees that appropriate entities (whether public guardians, public advocates, tribunals exercising an adjunct service, or an Elder Ombudsman), should have powers of investigation but they should not be limited as set out in proposal 3-4. There should be an express power to refer to and encourage the use of ADR and specifically elder mediation

when that is thought likely to assist. All such officers should be encouraged to note and respond to non-justiciable abuse, it being a primary cause of suffering to elders and, due to common power imbalances, frequently akin to, or a form of bullying.

Proposal 11-6 Code of conduct for aged care workers

ADRAC endorses specifically the proposal for Codes of Conduct for aged care workers. This group of people are of great importance to the community and conduct invaluable work but can suffer great strain in their work. It would always be of benefit to set standards of conduct and inculcate them in aged care training and orientation.

Proposal 11-9 Community visitors

ADRAC endorses the proposal but points out that the ALRC Elder Abuse Discussion Paper⁶ paragraph 11.264 is inconsistent with the proposal and with the sound concepts of mandatory reporting. ADRAC supports the proposal as it is presented. ADRAC appreciates the importance of not burdening voluntary community visitors with tasks beyond their supportive and companionship purpose. They are not trained and should not have imposed upon them duties more consistent with formal roles. Nevertheless, all people, including voluntary community visitors, who deal with elders, should be educated in the signs and symptoms of elder abuse. Voluntary community visitors should also be directed, aided and protected by Codes of Conduct. They should have statutory protection for reporting to Official Visitors or an Elder Ombudsman and should be both encouraged and entitled to report a concern.

Note that ADRAC proposes an extension of the community visitor scheme to elders in private homes.

Proposals 11.10 and 11.11 Official Visitors

ADRAC agrees with this proposal.

ADRAC Proposals

1. ADRAC recommends that the proposed National Plan be adjusted to elevate an interests-based approach to elder problems with a view to introducing prevention as a primary goal. ADR should be available independent of, not tied to, rights-based claims, litigation, formal complaint or commencement of proceedings.
2. ADRAC recommends that the proposed National Plan be adjusted to accommodate avenues for address of non-justiciable abuse. That is best achieved through forms of ADR which can be provided when an elder issue comes to notice through a family member/friend of the elder, a community visitor, an Official Visitor, a medical practitioner, a community nurse or other health care worker, an aged care facility or any other person reporting to an Official Visitor or to an Elder Ombudsman. Persons in all recognised offices and services should be enjoined by legislation to report any evidence of abuse.

⁶ DP83

3. Wherever proceedings are commenced in tribunals or courts, ADR should be given primary consideration.
4. ADRAC recommends the widespread use of ADR in elder issues as an effective preventative measure and a cost control mechanism.
5. ADRAC recommends that ADR be made available for use in elder conflict and dispute problems by;
 - a. training appointed aged care facility staff in elder mediation (including the “complaints manager” – see below).
 - b. making persons trained as elder mediators available through Guardianship facilities including as an adjunct to Guardianship Tribunal functions, but independent of proceedings, as well as,
 - c. by operation of dispute resolution schemes administered through an Elder Ombudsman.
6. ADRAC proposes as an adjunct to the Official Visitor scheme, that all aged care facilities should be obliged to appoint a **complaints manager**, who should be required to;
 - a. maintain a record of patient or family complaint for inspection by the Official Visitor
 - b. Direct families to the availability of mediation including mediation by the complaints officer, if trained in elder mediation, when on notice that an elder appears to be suffering from conflict or dispute with another person other than nursing home staff.
7. ADRAC supports the appointment of Elder Ombudsman offices who should have the powers and duties suggested by the ALRC but who should specifically be encouraged by legislative direction to attend to;
 - a. Non-justiciable abuse that is causing suffering to an elder;
 - b. Make full use of mediation, conciliation, compulsory conferences, facilitation and any other applicable dispute resolution methods that may assist elders particularly in their valued relationships.

Ombudsman organisations have shown an ability to absorb and satisfy large numbers of complaint, conflict and dispute at low cost and without contribution to a complaints culture.

Conclusion

ADRAC agrees that establishment and pursuit of rights of the elderly should occur and that action should be taken to stop and prevent abuse.

A rights-based approach requires people to adopt a position and defend it. On the other hand, an interests-based approach enables people to cooperate. Cooperation puts less strain on all people and on the public purse.

No system designed to address elder rights, elder care and elder abuse can be effective unless it is designed according to the principles of ADR and incorporates the means of addressing conflict, dispute and most forms of abuse in the context of the complex relationships within which the events are most likely to occur.

Jeremy Gormly

Chair of ADRAC

On behalf of the ADRAC Council

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