

Response to ALRC Issues paper Elder Abuse

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Question s 29-31. Appointed Decision Makers.

Anecdotally finance abuse via the use/misuse of powers of attorney and guardianship is prevalent. This is often detected or suspected by other members of the family who do not know how to address /stop it. Some ideas to prevent and respond to financial abuse are:

Mandatory online Education of those both giving and receiving decision making powers to clarify

- The powers being assigned,
- In what circumstances they can be exercised
- The responsibility /accountability of those appointed.
- What you can do is you suspect or have evidence of a breach.
- Risk and protective factors of Elder Abuse

Also facilitated processes to assist families and particularly older persons, to have the difficult conversation and make these decisions in an informed and consensual manner.

In principle we support the proposal of a registry for decision makers and extend it this to carers especially if in receipt of an allowance. Whilst the concept of mandatory reporting is fraught with difficulty in this area since it casts elders essentially as children reinforcing ageist attitudes, establishing a duty of care framework defines the family member as a ‘service provider’ with fiduciary obligations. Professionals, such as doctors, social workers and other family members would not have a duty to report, but ‘may’ report or disclose if they had a reasonable belief that a breach of duty had occurred. At a recent forum, a family member was deeply upset that a doctor, aware that her mother had been abusing her father, had not informed her or other family members.

As to who should manage the registry, we do hold a strong view at this stage, perhaps Commissioners for Seniors should be considered. The real question is what action would then flow? Especially given that many Elder Abuse victims are reluctant to pursue legal remedies. If a breach of a duty of care occurred the family member could be mandated to attend a community service to help address the behavior and restore family relationships.

Question 41. What alternative dispute resolution mechanisms are available or respond to elder abuse? How should they be improved, is there a need for additional services and where should they be located?

Generally speaking, there is not existing funding for ADR in the areas where elder abuse is present or a risk to an older person. Conflict and disputes between an older person and family members and others would not come within funding to provide Family Dispute Resolution (FDR) under the Family Law Act 1975 unless an aspect of the dispute concerns access to grandchildren, or if separation between older couples is part of the mix.

Some elder ADR may be being provided through private or legal mediators. Also some institutions such as aged care facilities may have internal processes to discuss abuse concerns that arise with family and carers. In Victoria RAV Kew is part of a national pilot of Elder Services and providing elder mediation and counseling (which screens for elder abuse) at minimal cost until the end of 2016, which is internally funded. To our knowledge there is no funded service currently available.

ADR processes are particularly useful in elder abuse prevention and risk reduction because older persons often do not wish to use legal processes and criminal law against those abusing them due to the negative impact on important relationships with their children and grandchildren, reluctance to incriminate family members and incapacity to access formal legal systems. Preserving relationships and fear of losing them or the care they provide can override the risk/difficulty of living with the abuse. A person who becomes aware of the risk/presence of elder abuse is often another family member who is likewise constrained.

The ADR process referred to is a mediation model involving facilitated negotiation /discussion between parties, with an emphasis on enabling and supporting the participation and self determination of the older person. There may be other models such as a combination of counseling/mediation and restorative justice that warrant consideration.

Features of ADR pertinent to this area are:

- Helps repair/ preserve relationships and can enhance communication.
- Less formal and expensive (more accessible)
- Can be flexible in many ways; location, parties etc.
- Problem solving, a greater range of outcomes are possible than just legal remedies

Qualities of ADR necessary

- Adequate training in elder mediation and elder abuse and effective screening for abuse
- Assessing the impact of elder abuse to ascertain if the older person still has capacity and willingness to participate in an ADR process.
- Use of advocates, support persons to enhance/support capacity of older persons
- Flexible models of service, where , when , how long, cost etc. to maximize the capacity and participation of the older person

Given the aging population and prevalence/risk of elder abuse, combined with the suitability of ADR to many of the conflict and disputes in this area, funding of ADR is warranted.

However those providing such a service need to be appropriately trained. Further this service should be located in areas that promote greatest access for an older population, in homes, aged care facilities etc. as well as more traditional venues.

Q40 what role might restorative justice play in responding to elder abuse?

There is an identified need for restorative approaches in this area, given that many Elder Abuse victims are reluctant to pursue legal remedies. In our view restorative approaches are better indicated where the elder abuse is situational, that is arising from the context of poorly planned co-habitation and financial arrangements, as a result of ill-conceived, often well-intentioned protective control by adult children, and from unresolved relationship issues. It would be less well-indicated if the abuse is occurring in a family with a history of intimate partner and family violence occurring in earlier life stages unless it occurred in conjunction with behavior change programs. Likewise Elder Abuse occurring in the context of alcohol and drug dependency or significant mental illness would not be appropriate for restorative approaches unless the underlying addiction or illness had been treated and stabilized. Whilst RAV sees great potential for structured restorative mediation or family conferencing in moderate presentations of abuse, the challenge is engaging the ‘perpetrator’ in the process. For example, mediation may have been initiated by an adult child, whose sibling is co-habiting with an elderly parent. The concern maybe about financial exploitation, over controlling behavior restricting the autonomy and social connection of the elder, or emotional abuse. In these circumstances the initiating adult child and the older parent may both be willing to attend mediation but the cohabiting sibling frequently does not.

The problem requires innovative thinking. One possible solution (as posed in Q 30) would be to make it mandatory for all those assuming power of attorney for an elder, or who is identified as a family carer of an older person, to attend training (possibly online) identifying duties of care, and protective and risk factors of Elder Abuse, and to be placed on a registry. If a breach of a duty of care occurred the family member would be mandated to attend a service to help address the behavior and restore family relationships. Whilst the concept of mandatory reporting is fraught with difficulty in this area since it casts elders essentially as children reinforcing ageist attitudes, the duty of care framework defines the family member as a ‘service provider’ with fiduciary obligations. Professionals, such as doctors, social workers and other family members would not have a duty to report, but may report or disclose if they had a reasonable belief that a breach of duty had occurred.

The legal framing and the resourcing of such a scheme are clearly significant challenges, but in our view worth investigating.

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