**Relationships Australia Victoria**

Submission to the Australian Law Reform Commission

Elder Abuse Discussion Paper (DP83)

6th of March 2017

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# Relationships Australia Victoria

Relationships Australia Victoria (RAV) is a leading, long-term provider of relationship and family support services throughout Victoria. RAV offers a diverse range of core therapeutic services including individual, couple, parent and family counselling, dispute resolution services, including family dispute resolution and elder mediation. RAV also contributes to community building capacity through training and education. RAV encompasses 13 centres across Victoria, additional outreach sites and a telephone counselling service. RAV currently employs 255 staff, delivering programs to over 24,000 people annually, including more than 1400 older Australians per year.

# Elder Relationship and Mediation Services

Our Elder Relationships Service program provides counselling and mediation for a range of issues affecting older Australians. These include substituted decision-making, wills and estates, living arrangements, financial management, unresolved family conflict, and managing disputes between families and aged care providers. Screening for and responding to Elder Abuse is an essential aspect of service delivery in this area.

In 2015-2016, RAV provided 211 counselling cases within this program, 213 older adults were involved in mediation, and eight clients over 65 received counselling under our specialised family violence service.

Last year RAV participated in a national Elder Services pilot with other Relationships Australia organisations in other states and territories, which is currently being evaluated.

# Our Response to the Discussion Paper

Introduction

RAV welcomes the Australian Law Reform Commission’s (ALRC) discussion paper on Elder Abuse. RAV would like to add its support to the ALRC’s focus on improving legal safeguards to further protect older Australians from abuse, particularly financial abuse. In our experience there is often confusion and conflict about Powers of Attorney’s (both enduring and other), and concerns about both their creation and use/abuse. The ALRC’s proposals to provide clarity and education about the responsibility of attorneys and guardians, as well as the scope and content of these instruments, are welcomed as protective factors. Further proposals that increase the scope of court and tribunal’s jurisdiction, along with remedies to address losses caused by non-compliance of attorneys and guardians, are also useful.

RAV’s experience in providing counselling and mediation services to older adults and their families has also clarified that alongside or as part of this strengthened legal framework, there is a need for alternative processes such as mediation, conciliation, and restorative models for addressing the disputes arising between the older person and their families, or between family members caring for the older person. A range of processes, both formal and less formal are necessary to respond to the varied and complex nature of elder abuse, to both protect and maintain family relationships (often the main priority for the older person), and because of reluctance or incapacity to access legal processes.

RAV sees these alternative responses sitting alongside and augmenting both the substantive law and the legal system, as it does in other jurisdictions such as Family Law.

# 5. Enduring Powers of Attorney & Guardianship

In particular, RAV supports in principle the creation of an online register of enduring documents for Enduring Powers of Attorney & Guardianship. RAV also supports the proposal for enhanced witnessing requirements and increased responsibilities, including record keeping for enduring attorneys and guardians, as well as identifying key transactions that cannot be completed by an enduring attorney or guardian. We discuss our views in more detail below.

## Registration of Enduring Documents

*5-1 A national online register of enduring documents and court and tribunal orders for the appointment of guardians and financial administrators should be established.*

RAV supports establishing a national register of enduring documents and court and tribunal orders as it offers a recognised framework for monitoring the extensive powers these documents confer. It will provide much needed certainty and transparency about who has decision making authority, in what circumstances it can be exercised, and the scope and nature of this authority.

We are concerned that a national approach, though desirable will take a long time to implement as it will require agreement between all the states.

 *5-2 The making or revocation of an enduring document should not be valid until registered. Subsequent documents should automatically revoke the previous document of the same type.*

RAV agrees that enduring documents should not be valid until registered as this reinforces the authority and practicality of the register. As long as the process of registering new documents is overseen by the appropriate authorities/witnesses, subsequent documents should automatically revoke previous documents of the same type.

## Enhanced Witnessing

*5-4 Enduring documents should be witnessed by two independent ‘SEPARATE’ witnesses, one of whom must be as per a statutory declaration, e.g. lawyer, GP, JP, police officer.*

RAV agrees that enduring documents should be witnessed by two independent witnesses, with one being appropriately qualified. Firstly, this gives more assurance that an older person is not being coerced into the agreement, and secondly provides reassurance for other family members who may be concerned about the legitimacy of the document.

This protection could also usefully be extended to more general Powers of Attorney which are a common source of dispute and confusion amongst our older clients and their families.

## Compensation

*5-5* *State and territory tribunals should be vested with the power to order that enduring attorneys and enduring guardians or court and tribunal appointed guardians and financial administrators pay compensation where the loss was caused by that persons’ failure to comply with their obligations under the relevant Act*.

RAV supports this increase in jurisdiction and remedies available to the courts to redress these types of losses. Financial compensation is by far the most useful remedy to those impacted not only by fraud, but by negligence or inappropriate use of assets.

The conflict of interest provisions in *Recommendation 5-6* are also useful. However, many would need education about this concept, particularly in the family arenas where these issues regularly play out.

## Eligibility and Prohibited Decisions

*5-7 A person should be ineligible to be an enduring attorney if the person is:*

 *a. is an undischarged bankrupt*

 *b. is prohibited from acting as a director under the Corporations Act 2001*

 *c. has been convicted of an offence involving fraud or dishonesty, or*

*d. is, or has been, a care worker, health provider or accommodation provider for the principal*

RAV agrees that monitoring eligibility reflects the importance and financial responsibilities undertaken in the role of an enduring attorney.

*5-8 Legislation governing enduring documents should explicitly list transactions that cannot be completed by an enduring attorney/guardian including:*

*a. making or revoking the principal’s will*

*b. making or revoking enduring documents*

*c. voting in elections*

*d. consenting to adoption, marriage, divorce or entering into a sexual relationship*

RAV has found that the parameters of a Power of Attorney’s responsibilities are one of the main issues raised in Elder Mediation. RAV also hears concerns from the older person’s family members that a will may have been altered unlawfully.

## Record Keeping

*5-9 Enduring attorneys and enduring guardians should be required to keep records. Enduring attorneys should keep their own property separate from the property of the principal.*

Mandatory financial record keeping is particularly advantageous in situations where there is conflict and distrust, and also as a preventative factor in financial Elder Abuse. It provides a legitimate method of monitoring transactions and creating greater accountability. These amendments would enable authorities to identify breaches and provide proof to obtain consequences for those who do not fulfill their responsibilities. Increased formality of the process may also reduce the likelihood of these agreements being entered into lightly.

However, RAV highlights that successfully implementing the processes for monitoring and enforcing this proposal is critical for this to be an effective regulation.

*5-13 Representatives should be required to support and represent the will, preferences and rights of the principal.*

This principle is the cornerstone of RAV’s approach to working with older adults, and needs to be highlighted and reiterated. In our experience ageism is prevalent, with family members and other stakeholders often quick to discount an older person’s viewpoint, or to not seek it in the first place.

# 6. Guardianship & Financial Administration Orders

*6-1 Newly appointed non-professional guardians and financial administrators should be informed of the scope of their roles, responsibilities and obligations.*

RAV proposed in a previous submission to the ALRC’s issues paper on Elder Abuse that mandatory online education for those **both** giving and receiving decision making powers could help clarify the roles and responsibilities of enduring attorney’s and guardians. It would also provide information about responding to breaches, and the risk/ protective factors involved in Elder Abuse cases.

# 8. Family Agreements

*8-1 State and territory tribunals should have jurisdiction to resolve family disputes involving residential property under an ‘assets for care’ arrangement.*

RAV supports an increase in the jurisdiction and remedies available in the tribunal system and their ability to address problematic family arrangements. For example, in Victoria VCAT is the single governing body responsible for responding to families who wish to make a complaint or enquire about current Powers of Attorney and their responsibilities.

Additional measures to encourage the documentation and informed negotiation of family agreements are required to afford better protection for older persons, and help families think through the many issues involved, particularly what will happen if the arrangement breaks down. This is a useful place for facilitated conversations between family members, and is an important way to prevent and mitigate Elder Abuse.

# Alternative Dispute Resolution Options: Part of an Integrated Solution

## Barriers to Accessing Legal Processes

RAV would like to highlight the research, along with our own experience, that many older adults and families affected, or at risk of being affected by Elder Abuse, are reluctant to use formal processes to find solutions, except as a last resort in more extreme cases. We believe that the work we have undertaken in providing families with alternative dispute resolution strongly indicates the need for such processes to compliment improved legal frameworks and warrants more consideration by the ALRC.

The Law and Justice Foundation of New South Wales stated that barriers for older people in accessing legal services includes “a lack of awareness of their legal rights, a lack of confidence in enforcing those rights, a reluctance to take legal action, and a perception that the law is disempowering and cannot solve their problems”, along with “the high cost of legal services”.

Similar results were found in other countries with older victims unwilling to report abuse due to fear of not being believed, fear of the criminal justice system and the possible consequences for themselves and the abusers (often adult children), Mark Brnovich, Arizona Attorney General.

## Maintenance of Family Relationships

As stated in our submission to the ALRC’s Issue paper, “While additional legal safeguards may be put in place, clients presenting at our services are unlikely to access civil or criminal remedies as they do not wish to further damage their family relationships. These situations suggest a role for restorative processes that achieve positive outcomes for older victims, including healing, and preserving or improve family relationships that need to endure past the abuse.”

RAV suggests a wide range of responses/solutions are urgently required to deal with Elder Abuse, due to the complex, sensitive, and varied nature of the problem. These have been outlined in our prior submission to the ALRC issues paper.

From our experience gained during the twelve month Elder Mediation program, RAV found that the party whose conduct was in question (often the sibling living with or caring for the older person) is often unwilling to attend a voluntary process. As in Family Law, compulsory pre-application or pre-hearing mediation or conciliation processes may be useful in addition to more voluntary options.

## Participation and Voice of Older Persons

Another key benefit of Alternative Dispute Resolution processes and facilitated conversations are their flexibility and capacity to give the older person a voice. Processes can be adapted to support and enable the older person to participate in a meaningful way. Some examples are shorter sessions, breaks, a support person, separate time, having the meeting at a time of day most conducive to participation, and an accessible physical environment.

# Conclusion

Proposals that strengthen the regulatory framework for enduring Powers of Attorneys and court appointed guardians and administrators are an important step in protecting older people from Elder Abuse, particularly financial abuse. As are the proposed change to the jurisdiction and remedies available to courts and tribunals to both enforce the obligations of such representatives and afford compensation where there are breaches. This is also very pertinent in the area of family agreements.

However, it is our submission to the ALRC that other dispute resolution and facilitative processes have a vital role to play in underpinning and supporting this system by providing more accessible and appropriate processes for both resolving disputes and making appropriate plans in the first instance. They are also flexible processes that enable and support an older person’s agency and participation in the decisions impacting their lives in a variety of ways. Further education for both those assigning and receiving financial and medical powers is vitallyimportant in the making of informed decisions, and ultimately in Elder Abuse prevention**.**

# References

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