ELDER MEDIATION IN AUSTRALIA

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I OVERVIEW

Until the last few years, there would have been little to report regarding developments in elder mediation in Australia. Whilst the current state of mediation involving elder law matters could hardly be described as burgeoning, it is showing signs of healthy and considered development. The basis for this view will be sourced from three separate but possibly linked developments. They include: the Queensland Law Reform Commission (QLRC) on their review of the guardianship system in Queensland, the more recent Victorian Law Reform Commission (VLRC) review on Guardianship in Victoria, and the recent Sixth Annual World Summit on Mediation with Age-Related Issues ('Elder Mediation Summit'), sponsored by the University of South Australia and the Elder Mediation International Network (EMIN).[1] Whilst the QLRC and VLRC report were comprehensive in their views for reforming the guardianship system, they did include recommendations in relation to mediation and alternative dispute resolution more broadly. Essentially, both of these reports recognised that mediation could have an important role to play in minimising the number of formal appointments made by Tribunals, and also in reducing the scope of orders made. The QLRC also considered that mediation could have a role in reducing family conflict along with the impact of family conflict has in increasing the likelihood of formal orders and statutory agents being appointed. Both reports viewed the development of mediation in the context of guardianship practices and processes more broadly as advantageous, as it was more likely to result in a 'least restrictive' approach by the relevant tribunals.[2] The recent conference[3] heard more detail about what elder mediation may involve, with reports from more experienced international jurisdictions bringing some guidance. Importantly, one of the initiatives from the conference was to recommend the establishment of the Elder Mediation Australian Network (EMAN), to be aligned with the networks in Ireland and Canada, and the international network EMIN.

To be clear, this article is not inferring that older people and the issues that they face are currently deliberately excluded from alternative dispute resolution processes and services that are currently available. Clearly, neighbourhood disputes and family law disputes (eg involving grandparents) are two examples where existing services are adequately known and understood and can accommodate the needs of the parties, regardless of the age of the participants.

Rather, this article will explore the recent developments that are occurring in relation to issues specifically concerning older people, including decision-making for specialist aged care accommodation, service provision, financial decisions around investments to protect

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[1] Elder Mediation International Network, *Home*, (2008), Elder Mediation International Network, <http://www.eldermediation.ca/index.html>.

[2] In Queensland it would be the Queensland Civil and Administrative Tribunal, or QCAT, and in Victoria it would be the Victorian Civil and Administrative Tribunal, or VCAT.

[3] The Elder Mediation Summit was held in Adelaide from 29 April 2013 to 1 May 2013. Presentations and information on presenters can be accessed at http://www.unisa.edu.au/Research/Centre-for-Peace-and-Security/Our-Research/World-Summit-on-Mediation-with-Age-Related-Issues/.

Centrelink benefits, enduring powers of attorney, and healthcare related to ageing and end of life decision-making. One of the issues, clearly of great complexity, is the issue of capacity, which may or may not be relevant in each individual case. In guardianship and administration matters, capacity is a threshold jurisdictional issue.

The issue of capacity, coupled with the matters previously listed, is also not exclusive to older persons, and is obviously similar to issues faced by people with decision-making disabilities that are not age-related. These would include a proportion of people with acquired brain injury, intellectual disability and mental illness.

However, too often the spectre of the capacity issue has been sufficient to find that the option of mediation is closed when a person's capacity is in dispute. The option of mediating agreements when a party may have impaired decision-making capacity is an issue that requires careful consideration. Concerns about consent, influence, power imbalance, individual support or advocacy and conflicts of interest are justifiably expressed in the context of consideration of involving elder mediation. However, as we are increasingly moving toward mediation and alternative dispute resolution as a preferred means for resolving legal disputes, it becomes an issue concerning reduced access to justice and therefore discriminatory (at least in the broadest sense of excluding particular citizens) if accommodations for people with impaired decision-making are, by definition or presumption, excluded from mediation.

II QUEENSLAND LAW REFORM COMMISSION REPORT

In September 2010, an extensive and comprehensive review of Queensland's guardianship system was conducted by the QLRC.[4] To date, this report has yet to be implemented. Amongst the myriad of reforms and recommendations put forward in this review, there was discussion on the role of mediation in this jurisdiction.

The QLRC ultimately recommended that mediation (or alternative dispute resolution) be more readily available prior to a hearing. This was in order to more practically promote the least restrictive options being implemented and to avoid the making of an order wherever possible.[5] For example, if the informal support network or joint enduring powers of attorney can be facilitated to agree on where the person with impaired decision-making shall live, this reduces the extent to which a guardianship order for accommodation purposes is then required.

The QLRC also reviewed the sparse Australian literature available on mediation relevant to guardianship.[6] In particular, the QLRC relied upon a paper[7] presented at the 2009 Australian Guardianship and Administration Conference by Robyn Carroll and Anita Smith entitled 'Mediation in Guardianship Proceedings for the Elderly: An Australian Perspective'.[8]

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[4] Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws,* Report No 67, vol 3 (2010).
[5] Ibid 20 (for discussion on the 'least restrictive' principle), 53 for application of the least restrictive principle in guardianship mediation).
[6] Ibid 51, see footnote 188 for literature review.
[7] Ibid 51.
[8] Robyn Carroll and Anita Smith, 'Mediation in Guardianship Proceedings for the Elderly: An Australian Perspective' (2010) 28(1) *Windsor Yearbook of Access to Justice* 53.

Carroll and Smith explored the suitability of the various models of mediation available in the guardianship context.[9] They promoted a facilitative model of mediation to be employed in order to reduce the need and scope of appointments. However, they also noted scope for an arbitration approach, where the mediator has a stronger role, and can determine the matter (this can occur in Queensland using the compulsory conferencing processes available to QCAT Tribunal members).[10] Carroll and Smith note that the evaluative style of mediation is a type of second-tier response, and best performed by tribunal members with the appropriate authority. Whilst they explore the role for mediation in guardianship in some depth, Carroll and Smith ultimately find that a tribunal can provide everything that mediation can provide, with the advantage of producing an order.[11] The QLRC review was more supportive of a role for mediation, either within the tribunal context, or exterior to it.[12]

For the purposes of consistency, a facilitative model of mediation is envisaged and used in relation to this discussion of elder mediation.

One of the main barriers to the use of mediation, as outlined in the QLRC Report, is the view that the guardianship regime is not a 'consent' jurisdiction.[13] That is, the parties cannot consent or agree to the appointment of a guardian or administrator, nor (and probably more importantly) can parties consent whether the adult lacks capacity to make their own decisions. This view was also recently maintained at the Elder Mediation Summit in Adelaide by members of the Queensland Civil and Administrative Tribunal (QCAT).[14] Forde and Goodman asserted that pure mediation is not considered practical in the guardianship system as 'most matters require a formal decision to be issued after a hearing of the matter'.[15] This view perhaps discloses a reluctance to promote a least restrictive approach, i.e. the possibility that an informal network, or the person themselves, can make decisions with collaborative support, facilitated through mediation, without a restrictive order.

Whilst the issue of capacity may be seen as a threshold feature of elder or guardianship mediation, the difficulties the concept of capacity presents for mediators should not be viewed as some type of inoculation against the benefits of mediation in these matters. For some broader perspective on this issue, it is helpful to consider the recent research conducted by the Canadian Centre for Elder Law in conjunction with the British Columbia Law Institute, entitled *Elder and Guardianship Mediation: A Report Prepared by the Canadian Centre for Elder Law*.[16] This report was essentially in response to British Columbian guardianship law reforms. These reforms required mandatory mediation prior to a formal hearing for a guardianship matter. The report also focused upon the complexity of legal and ethical issues that confront the mediator when mediating elder and guardianship matters that involve the issue of capacity. This report was extensive in its scope, which can be

[9] Ibid.
[10] See *Queensland Civil and Administrative Act 2009* (Qld) ss 67-74.
[11] Carroll and Smith, above n 8.
[12] Queensland Law Reform Commission, above n 5, 60-61.
[13] Ibid.
[14] Julie Ford and Pam Goodman, 'Integrating Mediation Techniques with Formal Tribunal Processes to Advance the Protection and Welfare of Elderly Persons' (Presentation delivered at the Sixth Annual World Summit on Mediation with Age-Related Issues, Adelaide, 1 May 2013) <http://www.unisa.edu.au/Research/Centre-for-Peace-and-Security/Our-Research/World-Summit-on-Mediation-with-Age-Related-Issues/>.
[15] Ibid.
[16] Canadian Centre for Elder Law, *Elder and Guardianship Mediation: A Report Prepared by the Canadian Centre for Elder Law*, Report No 5 (2012).

immediately gleaned from the detailed recommendations. In particular, recommendations in regard to mediation that was connected to court (or tribunal) processes included:

- Starting mediation services via an initial independently evaluated pilot project,
- Use of collaborative processes with key participants in the overall process,
- Adhere predominantly to a facilitative model of mediation,
- Establish a panel of mediators who are required to fulfil professional development requirements and adhere to a unified code of ethics,
- Mediators should be from the private sector and hired on a contract basis,
- Mediators should focus pre-mediation intake or screening, and
- Mandated mediation requires attendance, and not compulsory settlement.[17]

The *Elder and Guardianship Mediation* report acknowledges the complexity of the task of the mediator, but also presents a considered pathway throughout the articulated areas of difficulty. The risks and benefits of mediation in this area are spelt out in the preface of the report.[18]

So whilst it is acknowledged that only a court or tribunal can make appointments or declare someone capable, there is still a role for mediation in order to fill the void of identifying and shaping a least restrictive alternative to full or partial guardianship and administration orders. Further, the existing Queensland legislation anticipates guardianship and administration orders as a last resort,[19] promoting informal arrangements, and use of mediation from the Office of the Adult Guardian. For example, consider section 41 of the *Guardianship and Administration Act 2000* (Qld). This section anticipates that disagreements (other than health matters) between attorneys, administrators and guardians would be firstly handled by mediation prior to hearing by QCAT. The mediation is anticipated to be provided by the Adult Guardian, however, it is noted that the Adult Guardian has the power to delegate their mediation powers.[20] This pathway of conflict resolution, whilst legislated, has rarely been utilised or resourced.

The QLRC identify family conflict as an issue that could particularly benefit from earlier intervention from mediation (or other suitable ADR processes). The mediation process could provide information regarding the possibility of alternative statutory appointments in the event that the conflict was unable to be resolved.[21]

The QLRC made several recommendations in relation to conflict. They recommended that conflict between family members should, in effect, be regarded as an irrelevant consideration for the tribunal in reaching a decision on whether a statutory appointment should be made.[22] The QLRC report raised concerns about the motivations of service providers to 'remove'

[17] Ibid xv-xvii.
[18] Ibid xi-xii.
[19] See *Guardianship and Administration Act 2000* (Qld) (*GAA*), General Principle 7, Maximal Participation, minimal limitation and substituted judgment, 3(c), 'a person or other entity performing a function or exercising a power under this act must do so in the way least restrictive of the Adult's rights', and s 9 includes informal decision makers amongst the range of decision makers for an adult with impaired decision-making capacity. Ultimately, the key section for appointments, s 12, anticipates that an appointment will only be made if there is a need for an appointment, capacity alone is not determinative of an appointment. Need is defined largely in relation to risk of neglect or exploitation, and therefore in relation to protection.
[20] *GAA* s 177 (2).
[21] Queensland Law Reform Commission, above n 5, 60.
[22] Ibid 53-61, 81.

family decision makers with whom they are in dispute, and also made recommendations for greater access to both information and dispute resolution mechanisms for families before, during and after a QCAT hearing.[23]

Essentially, the QLRC saw a greater role for mediation services, but did not form a view as to who should best provide these services.[24] However, they emphasised that in order for the tribunal to operate in the least restrictive manner possible, and to only make orders as a last resort, mediation services are vital.

III VICTORIAN LAW REFORM COMMISSION

The VLRC released its final report on guardianship in 2012.[25] Like the QLRC report on guardianship, it was extremely extensive and comprehensive. The report also considered the role of mediation and alternative dispute resolution in the guardianship system and made recommendations to entrench the role of guardianship in the system.

The VLRC noted that there were several options other than a formal hearing that should be considered shortly after an application had been received. One of the options was triaging to divert suitable matters to mediation, with other responses and options including planning conferences and family conferences.[26] It is clear the VLRC had a preference for the above range of options to be offered, in addition to a formal hearing. This preference was expressed in their recommendation for legislative reform, to encourage less restrictive options to be utilised by the tribunal.

In order to emphasise the identification of 'least restrictive approaches' as alternatives to a guardianship or administration order, the VLRC has recommended legislative changes to highlight when the making of an order may be inappropriate. One example of when an order may be inappropriate would be if decisions could be reasonably made through negotiation or mediation.[27]

Some different proposals that the VLRC (separate to discussions by QLRC) considered were the issue between complaints processes (to the Victorian independent Disability Commissioner) regarding services for adults with impaired capacity and applications for guardianship. The VLRC noted a correlation between complaints processes and tribunal applications, and recommended that mediation offered a more streamlined approach that may also alleviate the need for an appointment. Disputes between carers, persons receiving care and service providers should be 'short-circuited' by the provision of mediation, prior to a guardianship hearing.[28]

Essentially, the VLRC has strongly recommended the use of mediation, negotiation, conferencing and planning as tools available to VCAT to minimise the need for a more restrictive order. They have recommended that this approach be legislated.

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[23] Ibid.
[24] Ibid 60-61.
[25] Victorian Law Reform Commission, 'Guardianship' (Final Report No 24, Victorian Law Reform Commission, January 2012).
[26] Ibid 489.
[27] Ibid 261.
[28] Ibid 490.

This approach is similar to the recommendations for mediation made by the QLRC.

IV ELDER MEDIATION SUMMIT 2013 – ADELAIDE

This year saw the first Australian Elder Mediation Summit held at the University of South Australia. The conference was the 6th Annual World Summit on Mediation with Age-Related Issues. The conference was international, with speakers from Canada, Ireland, Scotland, the USA and Switzerland.[29]

The conference had a range of presenters, from consumers of elder mediation services, as well as elder mediators, service providers and tribunal members.

Themes of the conference explored the various phases of development of elder mediation internationally, as well as various individual case studies illustrating the role of mediation in promoting transparency in relation to possible situations of abuse.[30] Debates about the promotion of a human rights focus, mediating with elderly people with cognitive impairment, the promotion of mediation incorporating issues of planning for future needs, including end of life care, became familiar themes of the conference.

Importantly, Judy Beranger, Chair of the Elder Mediation International Network, and a pioneer of elder mediation in Canada, gave an overview of elder mediation that included prevention, intervention and follow-up and also gave an extensive list of topics that may be covered in an elder mediation.[31] These topics include:

- Housing,
- Safety,
- Services,
- Care for the caregiver,
- Intergenerational conflict,
- New relationships,
- Loss of dignity,
- Abuse and neglect,
- Financial and business issues,
- Estate planning,
- Guardianship, and
- End of life decisions.[32]

Consumers of elder mediation services presented, as did an unwitting consumer of cognitive testing. Marie Mune's[33] paper, entitled 'The Use and Abuse of Cognitive Function Tests',[34]

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[29] For full conference program, see http://www.unisa.edu.au/Research/Centre-for-Peace-and-Security/Our-Research/World-Summit-on-Mediation-with-Age-Related-Issues/.

[30] Judy M Beranger, 'Implications for Legislation: The Role of Mediation with Age-Related Issues in the Prevention of Elder Abuse' (Presentation delivered at the Sixth Annual World Summit on Mediation with Age-Related Issues, Adelaide, 30 April 2013) <http://www.unisa.edu.au/Research/Centre-for-Peace-and-Security/Our-Research/World-Summit-on-Mediation-with-Age-Related-Issues/>.

[31] Judy M Beranger, 'Introduction to the Summit' (Presentation delivered at the Sixth Annual World Summit on Mediation with Age-Related Issues, Adelaide, 29 April 2013) <http://www.unisa.edu.au/Research/Centre-for-Peace-and-Security/Our-Research/World-Summit-on-Mediation-with-Age-Related-Issues/>.

[32] Ibid.

highlights the risks involved in needlessly screening for impairment to satisfy management rather than clinical requirements.

Subsequent to the conference, conference participants indicated their preparedness to join and support an Australian Elder Mediation Network (EMAN). The network would be loosely based upon the EMIN. It is envisaged that the network would offer accreditation standards, mediator training, an ethical code of conduct and an ongoing peer support network for members. This is certainly an important and welcome development for practitioners of elder mediation.

V CONCLUSION

Australia (or at least two of its Law Reform Commissions) is taking its first steps toward developing a cohesive approach to elder mediation. The focus has been primarily to promote the use of a facilitative model of mediation that can be promoted to reduce the restrictive impact of formal orders and appointments by Tribunals. Elder mediation offers to help fill the void of 'least restrictive' options. The VLRC in particular has outlined a range of options to be employed prior to having a tribunal hearing in order to 'flesh out' least restrictive options other than tribunal ordered appointments. In short, mediation offers a way to bolster an individual's own support network, that may be affected by conflict, and thereby reduce the need and the impact of a formal appointment.

Elder mediation is not without its skeptics, and the development of EMAN will help promote a set of standards for mediators to ethically respond to the complex issues involved in elder mediations. These standards will assist in deciding the training requirements, ethical codes of conduct, ongoing professional development and peer support needs that elder mediators in Australia will require.

[33] Marie Mune is a retired social work academic.
[34] Marie Mune, 'The Use and Abuse of Cognitive Function Tests' (Presentation delivered at the Sixth Annual World Summit on Mediation with Age-Related Issues, Adelaide, 1 May 2013) <http://www.unisa.edu.au/Research/Centre-for-Peace-and-Security/Our-Research/World-Summit-on-Mediation-with-Age-Related-Issues/>.