

1st February 2024

Department of Health and Aged Care - New Aged Care Act Consultation
GPO Box 9848
Canberra ACT 2601
Australia

By Email; AgedCareLegislativeReform@health.gov.au

Dear Sir/Madam

Thank you for providing an opportunity to contribute feedback for the new Aged Care Act Exposure Draft, by means of the attached SUBMISSION 1 which focuses on Elder Mediation as a specialisation and SUBMISSION 2 which focuses on Confidentiality.

The two separate submissions are from the Elder Mediation Australasian Network (EMAN) and the Resolution Institute (RI), in consultation with Relationships Australia, and recommends critical additions and changes to the new Aged Care Act.

About the Resolution Institute

Resolution Institute is the largest membership organisation of dispute resolution (DR) professionals within Australia and Aotearoa New Zealand. Resolution Institute is a NFP organisation and has over 50 years of experience in developing and operating mediation services, training, and accreditation in a wide range of different sector and dispute types.

Resolution Institute members engage in mediation, adjudication, arbitration, expert determination, facilitation, conflict coaching, conciliation and restorative justice and has a membership base of over 3,000 dispute resolution (DR) professionals, across a diverse range of industry sectors. Resolution Institute focuses on excellence in standards of DR practice, support services to members and developing an environment in which DR services are frequently used, aligned to our vision of 'enabling meaningful access to justice and dispute resolution, effectively resolving conflict in any situation'.

Resolution Institute is registered by the Australian Charities and Not-for-Profits Commission (ACNC) as a not-for-profit organisation. Resolution Institute website:

www.resolution.institute

About the Elder Mediation Australasian Network (EMAN)

THE ELDER MEDIATION AUSTRALASIAN NETWORK (EMAN) was formed in 2013 and is a network of professionals dedicated to

- raising awareness of elder mediation
- building knowledge about elder mediation
- developing training, professional ethics, standards and certification for elder mediators
- encouraging referrals to relevant services, including elder mediation and other services tailored to the circumstances of older people (our elders) in Australasia.

Elder mediators can assist older people, their families and significant others with difficult conversations, to make plans and to reach outcomes to disagreements – outcomes that work for the older persons, respect their rights and enhance their safety.

EMAN aims to be the network of choice for matters relating to Elder Mediation in the Australasian region. EMAN website: www.elder-mediation.com.au

Since 2013, the EMAN Board has collaborated with the *Elder Mediation International Network* (EMIN) Board and EMIN Certification Committee and has made significant contributions to the development of a 'Code of Ethics for Elder Mediators', 'Safeguarding Vulnerable Adults: Guidelines for Elder Mediators' and the EMIN Elder Mediator Certification (Basis and Advanced), which is the international 'gold standard' for elder mediator certification.

EMAN has also collaborated with the *Resolution Institute* (RI) and *Relationships Australia* (RA) for over 10 years. The EMAN Board consists of accredited mediators from most Australian States, who are also specially trained elder mediators. In 2022, the Resolution Institute's 'Facilitative Elder Mediation Subcommittee' was formed and this committee and the EMAN Board have progressed joint initiatives integral to assisting, protecting and safeguarding our older community. (See Appendix A in Submission 1 for EMAN/RI board/committee members).

The two submissions contain recommendations that are critical to the safety, health and wellbeing of older people in the creation of a rights-based, person-centred legislative framework. They look to ensure older people's needs, rights and preferences are prioritised with agency and transparency and without fear of reproach.

These Submissions make recommendations in relation to:

1. The inclusion of 'Elder Mediation' and 'Elder Mediator Practitioner' within the Act and Rules, using accredited Elder Mediators as critical, specialised service providers. Trained Elder mediators offer a rights-based, person-centred approach when interventions involve older people, their families, aged care providers and/or significant others, including support persons and advocates for the older person.
2. To include Elder Mediation/Elder Mediator Practitioners within the Complaints mechanism.
3. To consider 'Eldercaring Coordination' in future reviews of the Act as a specialised approach for complex, high conflict situations/complaints which are not suitable for mediation.
4. To expand Chapter 7 (part 2) to recognise Confidentiality of information to ensure rights to privacy as a key element in the Code of Conduct for Aged Care.
5. To include processes that are appropriate within aged care services that recognise the prevalence and complexities of varied ethnicities, cultures and languages.

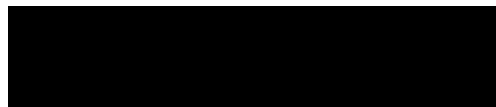
One of our EMAN Board members, who is a Lawyer and Family Dispute Resolution Practitioner (FDRP) and a trained elder mediator, has provided detailed '**DRAFT Aged Care (Elder Mediation Practitioners) Regulations 2024**' for inclusion in the Act (see Submission 1, Appendix B).

These recommendations are submitted after extensive consultation with many professionals who are committed to safeguarding and preventing vulnerability of older people.

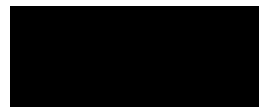
Should you require further information or consultation regarding the two submissions please immediately contact Professor Dale Bagshaw by phone [REDACTED] or by email [REDACTED].

We look forward to receiving your formal response and feedback on this submission.

Kind regards



Professor Dale Bagshaw PhD
(on behalf of members of the EMAN Board and RI
Elder Mediation Subcommittee –
see Appendix A)
Chair, Elder Mediation Australasian Network
Chair, Resolution Institute Facilitative
Subcommittee



Amber Williams,
CEO Resolution Institute



Resolution
Institute

Excellence in dispute resolution
across Australia and Aotearoa

Elder Mediation

Submission 1

February 2024

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Table of Contents

PART 1.1: RECOMMENDED CHANGES/ADDITIONS TO THE NEW AGED CARE ACT	4
1.1 (i) Preliminary.....	4
1.1 (ii) Definitions and Key Concepts:	4
1.1 (iii) Statement of Rights	4
1.1 (iv) Chapter 1:.....	4
1.1 (v) Chapter 7: The Complaints Framework.....	5
1.1 (vi) Eldercaring Coordination (EC).....	10
1.2 (i) WHAT IS ELDER MEDIATION?.....	11
1.2 (ii) ELDER MEDIATION ACCREDITATION IN AUSTRALIA	13
1.2 (iii) ELDER MEDIATOR EDUCATION AND TRAINING IN AUSTRALIA	13
PART 2. RECOMMENDED EXPANSION OF CHAPTER 7 (PART 2) – CONFIDENTIALITY OF INFORMATION	16
PART 3. THE IMPORTANCE OF ACKNOWLEDGING ETHNICITIES AND CULTURE IN AGED CARE SERVICES AND COMMUNICATION IN LANGUAGES OTHER THAN ENGLISH	17

Appendices

Appendix A: MEMBER LIST - Elder Mediation Australasian Network EMAN and Resolution Institute Elder Mediation Facilitative Subcommittee.....	19
Appendix B: DRAFT Aged Care Act (Elder Mediation Practitioners) Regulations 2024.....	20
Appendix C: What is Eldercaring Coordination.....	73
Appendix D: Eldercaring Coordination Brochure.....	76
Appendix E: Eldercaring Coordination Packet.....	82
Appendix F: Overview Elder Mediation Certification EMAN & EMIN.....	83
Appendix G: Elder Mediation Case Studies.....	88
Appendix H: Elder Mediation Slides.....	93

This submission is from the *Elder Mediation Australasian Network* (EMAN) Board and the *Resolution Institute Elder Mediation Committee* (see APPENDIX A for members) and recommends additions and changes to the new Aged Care Act which are detailed below.

In this submission we make recommendations with reference to the Aged Care Act Exposure Draft.

PART 1.1: RECOMMENDED CHANGES/ADDITIONS TO THE NEW AGED CARE ACT

1.1 (i) Preliminary – Objects in the new Act 5(e) -including accessible complaints mechanisms *and Elder Mediation and Elder Mediator Practitioners* for individuals

1.1 (ii) Definitions and Key Concepts: the words ‘*safety*’ and ‘*gender/identity*’ need to be added in many places

1.1 (iii) Statement of Rights

- **Equitable access (2)(a)** culturally safe, culturally and *gender/identity* appropriate ...
- **Quality and safe funded aged care services: (3) (c) and (d)** – add *gender/identity*

(ACON’s Silver Rainbow Aged Care training refers to difficulties for transgender people wishing to live an alternate identity to their biology within aged care settings. Many fear they will be persecuted and/or forced to present and conform to their biology, especially if they lose cognition.)

- Addition to the title: **Advocates, Elder Mediation Practitioners, other significant persons and social connections**
- Add a statement about the right to have a supporter or representative who is known and trusted by the older person, where possible.

1.1 (iv) Chapter 1: Older people can make decisions and receive the support they require to make decisions when they need it.

In summary, this submission argues that Elder Mediation is one essential and relevant approach which should be named and included in various sections of the new Aged Care Act. Elder Mediation Practitioners are required when older people need support to make their own decisions, in particular where there are conflicts and/or complaints and family members and significant others are involved. Older people often rely or depend on their family members and their decisions can be strongly influenced, and sometimes overridden, when families are involved in planning and decision making about their care, in particular where there are imbalances of power, or threats of abuse or neglect. Research indicates that older people can also be distressed when there are family conflicts, or conflict with providers which involve them, and are averse to seeking legal solutions.

Recognised Elder Mediators in Australia are specially educated and trained in issues of ageing (see the definition, elder mediation training outline and accreditation below and the case studies attached) and are educated and trained to use a person-centred, rights-based approach when interventions involve older people. Trained and accredited elder mediators can involve the older person, their family, carers and significant others, and a range of service providers (including support persons, representatives or advocates) in planning, decision-making and the management of complaints, ensuring that the voice of the older person (with or without capacity) is heard (directly or indirectly) and respected. Access to Elder Mediation from a trained, accredited Elder Mediator should be mentioned in this and other sections of the Act with a requirement to provide access to a trained, accredited Elder Mediator when requested by an older person and/or their family members.

Unlike other traditional forms of mediation, elder mediation is on a continuum from prevention to intervention and conflict may or may not be at the centre of concern when first contact is made. Rather it could be a need for support and sharing with the intent of participating in planning and outcomes that are preventive and proactive. With a wellness component, whether conflict driven or not, the focus is on helping all who attend to contribute towards finding new ways to promote effective, inclusive, and respectful behaviours, decisions and actions.

Where there are allegations or suspicions of elder abuse, complex family and intergenerational dynamics, family pressure and/or family conflicts, older people often need support to make their own decisions. Elder Mediators take a holistic approach and are educated and trained to screen for capacity and elder abuse, facilitate family meetings, handle complex intergenerational and family dynamics, ensure the voice of the older person (with or without capacity) is heard (directly or indirectly) and respected by family members and significant others, and their will and preferences are upheld in any outcomes or agreements.

Elder Mediators are also trained to work with larger groups and often include known and trusted support people and/or advocates or representatives, other service providers and experts in the mediation, when required, and make appropriate referrals to other service providers to ensure that older people are supported in an informal and/or formal collaborative network.

See APPENDIX B for detailed DRAFT Aged Care (Elder Mediation Practitioners) Regulations 2024

1.1 (v) Chapter 7: The Complaints Framework

There needs to be a clear and consistent complaints mechanism for older people to raise breaches of rights. However, the section on the new Complaints framework appears to be focussed on the compliance of providers, not the aged persons who may have complaints or who are involved in conflicts or disputes with family members, aged care staff, informal or formal carers, services providers and/or other residents.

The new complaints framework does not mention ‘Elder Mediation’ or ‘Elder Mediator’. Given that Elder Mediators are highly likely to be accredited with the National Mediation Standards Board as one of the new specialisations and do have additional education and training in elder law, ageing and age-related issues, as outlined in this submission, we strongly suggest that ‘Elder Mediation’ and ‘Elder Mediator’ or ‘Elder Mediation Practitioner’, along with a clear Definition and Rules (see APPENDIX B), be included in this and other sections of the Act.

Because of the power differentials between the older person and the provider, Elder Mediation services, which can include a support person, representative or advocate, family members and significant others, should be available if individuals are in conflict with a provider or wish to raise a complaint, including a complaint about a breach of rights.

In 2024, the National Mediation Standards Board (NMSB) will be including specialisations in their revised dispute resolution standards, and we have submitted a proposal that ‘Elder Mediation’ be a specialisation and that accredited mediators receive an additional 30 hours of special education and training over and above their mediation training and then register and complete the requirements to be certified with the Elder Mediation International Network (EMIN), which is the ‘gold standard’ certification trusted by health professionals and aged care providers in Canada, Ireland and other Western countries (see APPENDIX C for the EMIN certification requirements).

Elder mediation training by EMIN recognised trainers has been occurring in all Australian States since 2015 and there is currently an EMIN pilot program which is encouraging those who have been trained to register for EMIN certification. In line with changes to the Act, this ensures that they are competent to intervene when mediation involves an older person (directly or indirectly).

Just as Family Dispute Resolution (FDR) services expanded and became more accessible when FDR was included in the Family Law Act as a pre-filing requirement for matters involving children, we are certain that Elder Mediation by specially trained and accredited Elder Mediators will be more available and accessible if included in the new Aged Care Act, along with the suggested Rules. Making Elder Mediation more available and accessible would be a powerful mechanism by which to operationalise the autonomy and human rights of older people and to mitigate asymmetries of power.

In **APPENDIX B**, we have suggested detailed Rules for specially trained and accredited ‘Elder Mediators’ or ‘Elder Mediation Practitioners’ who have specialist training in ageing and age-related issues and can provide a professional service and reporting when there are difficult conversations, planning issues, conflicts, complex decisions, complaints or disputes involving older people and/or their families.

Recommended inclusion of Elder Mediation as the appropriate complaints management process for Aged Care.

For inclusion in a separate division of the *Aged Care Act 2024*

We suggest including the following complaints process using elder mediation. We suggest the following should sit under Part 5—Complaints Commissioner; Division 1—Elder Mediation This division should sit under after section 183.

Part 6—Non-court based aged care services

Division 1—Accreditation of counsellors, elder mediation practitioners and other aged care service providers

184 Accreditation Rules

- (1) The regulations may prescribe Accreditation Rules. These are rules relating to:
 - (a) the accreditation of persons as counsellors; and
 - (b) the accreditation of persons as elder Mediation practitioners; and
 - (c) the accreditation of persons to perform other roles prescribed by regulations made for the purposes of this paragraph.
- (2) Examples of matters that the Accreditation Rules may deal with are:
 - (a) the standards that are to be met by persons who seek to be accredited; and
 - (b) who is responsible for determining whether a person meets the Accreditation Rules; and
 - (c) how accreditation is to be recognised (for example, by establishment of a register or other method); and
 - (d) the standards and other obligations that accredited persons must continue to meet to remain accredited; and
 - (e) who is responsible for monitoring compliance with ongoing requirements in the Rules; and
 - (f) the consequences of accredited persons failing to comply with the provisions of this Act and the Rules; and
 - (g) the obligations of accredited persons in relation to the monitoring of their compliance; and
 - (h) how and by whom an accredited person may have his or her accreditation (or recognition of that accreditation) suspended or cancelled; and
 - (i) review of decisions to refuse, suspend or cancel accreditation (or recognition of accreditation); and
 - (j) the process for handling complaints involving accredited persons; and
 - (k) who may deliver recognised training to accredited persons, and

- (l) dealing with individuals or other persons who make false or misleading representations about a person’s status as an accredited person.

Division 2—Elder Mediation

185 Definition of *Elder Mediation*

Elder Mediation is a focused, preventative, respectful process that usually is multi-party, multi-issue and intergenerational:

(a) in which an elder mediation practitioner:

- (i) utilises a “mediation process model” to facilitate discussions focusing on present strengths to address the stated issues and concerns of an older adult.

Or

- (ii) To reduce or prevent vulnerability of the older person at the heart of the mediation in their present or proposed circumstances.

(b) in which the practitioner is independent of all of the parties involved in the process.

186 Definition of *Elder Mediation practitioner*

An Elder Mediation practitioner is a person who has completed the accreditation requirements of the Elder Mediation International Network (EMIN) as described in our Draft of the Aged Care (Elder Mediation Practitioner) Regulations 2024 Part 2. (APPENDIX B).

187 Confidentiality of communications in *Elder Mediation*

- (1) An elder mediation practitioner must not disclose a communication made to the practitioner while the practitioner is conducting elder mediation, unless the disclosure is required or authorised by this section.
- (2) An Elder Mediation practitioner must disclose a communication if the practitioner reasonably believes the disclosure is necessary for the purpose of complying with a law of the Commonwealth, a State or a Territory.
- (3) An Elder Mediation practitioner may disclose a communication if consent to the disclosure is given by:
 - (a) if the person who made the communication is 18 or over—that person; or
 - (b) if the person who made the communication is a child under 18:
 - (i) each person who has parental responsibility (within the meaning of Part VII) for the child; or
 - (ii) a court.
- (4) An Elder Mediation practitioner may disclose a communication if the practitioner reasonably believes that the disclosure is necessary for the purpose of:

- (a) protecting a person from the risk of harm (whether physical or psychological); or
 - (b) preventing or lessening a serious and imminent threat to the life or health of a person; or
 - (c) reporting the commission, or preventing the likely commission, of an offence involving violence or a threat of violence to a person; or
 - (d) preventing or lessening a serious and imminent threat to the property of a person; or
 - (e) reporting the commission, or preventing the likely commission, of an offence involving intentional damage to property of a person or a threat of damage to property; or
- (5) An Elder Mediation practitioner may disclose a communication in order to provide information (other than personal information within the meaning of section 6 of the Privacy Act 1988) for research relevant to families.
- (6) An Elder Mediation practitioner may disclose information necessary for the practitioner to give an Elder Mediation certificate under subsection XXX(X).
- (7) Evidence that would be inadmissible because of section 188 is not admissible merely because this section requires or authorises its disclosure.

Note: This means that the practitioner's evidence is inadmissible in court, even if subsection (2), (3), (4), (5) or (6) allows the practitioner to disclose it in other circumstances.

- (8) In this section: **communication** includes admission.

188 Admissibility of communications in elder mediation and in referrals from elder mediation

- (1) Evidence of anything said, or any admission made, by or in the company of:
- (a) an elder mediation practitioner conducting elder mediation; or
 - (b) a person (the professional) to whom an elder mediation practitioner refers a person for medical or other professional consultation, while the professional is carrying out professional services for that person;
- is not admissible:
- (c) in any court (whether or not exercising federal jurisdiction); or
 - (d) in any proceedings before a person authorised to hear evidence (whether the person is authorised by a law of the Commonwealth, a State or a Territory, or by the consent of the parties).
- (2) Subsection (1) does not apply to:
- (a) an admission by an adult that indicates that an older person has been abused or is at risk of abuse or neglect; or
 - (c) a disclosure by a child that indicates that the child has been abused or is at risk of abuse or neglect;

unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources.

- (3) Subsection (1) does not apply to information necessary for the practitioner to give an Elder Mediation certificate under subsection XXX(X).
- (4) An elder mediation practitioner who refers a person to a professional (within the meaning of paragraph (1)(b)) must inform the professional of the effect of this section.

189 Elder mediation practitioners must comply with rules

- (1) The rules may prescribe requirements to be complied with by elder mediation practitioners in relation to the elder mediation services they provide.
- (2) The rules may prescribe penalties not exceeding 10 penalty units in respect of offences against regulations made for the purposes of subsection (1).

This inclusion in the Act will be supported by a section in the Rules in line with the Exposure Draft of the Rules of the Aged Care Act.

See APPENDIX B for detailed DRAFT Aged Care (Elder Mediation Practitioners) Regulations 2024 Part 6—Non-court based aged care services.

Finally, another suggestion is that an Elder Mediation Certificate be developed to report issues anonymously by elder persons and naming the aged care provider. This could be a useful tool for the Complaints Commissioner (CC) giving the CC a greater understanding of issues logged against particular providers. It will also aid the CC in determining whether corrective actions are required by the Department or whether the matter needs to go before the Administrative Appeals Tribunal.

1.1 (vi) Eldercaring Coordination (EC) is a new approach which we are currently exploring, used extensively by the courts in the United States for high conflict, complex situations where vulnerable older people are involved, and which are not suitable for mediation. These cases often end up in Courts or Tribunals and are mandatorily referred to a trained EC.

Relationships Australia (SA) and the University of South Australia are currently piloting and researching this case management approach in South Australia. At this stage the research indicates that there may be some advantage for Courts and Tribunals to be able to mandatorily refer high conflict cases, which are adversely affecting the safety and welfare of older people, to a trained Eldercaring Coordinator to ensure that an older person's needs, rights and safety are being addressed (see APPENDICES C, D & E for more information).

We strongly recommend that Eldercaring Coordination be considered in future reviews of the Aged Care Act, in particular where there are high conflict and/or complex complaint situations.

APPENDICES C, D & E provide further information about Eldercaring Coordination (EC), the prerequisites for EC training and practice in Australia, and the research currently taking place in South Australia.

1.2 (i) WHAT IS ELDER MEDIATION?

Mediation is a voluntary, self-determining, facilitative process, in which the mediator works with all the parties to assist them to communicate respectfully, identify and prioritise mutual issues of concern, develop options and arrive at their own decisions about how best they might handle or resolve the issues. The mediator controls the process, does not give advice, does not take sides and does not judge or make decisions. Discussions are confidential and held in a private, safe setting. Any agreement reached must be acceptable to all participants.

Elder Mediation as a specialisation is mediation of any issue or conflict that involves older people, their family members, and/or significant others in their lives. It is a voluntary, cooperative process, in which a *professionally trained* elder mediator helps facilitate discussions that assist people in addressing the myriad of changes and stresses that often occur throughout the family life cycle.

Elder Mediation is based on a wellness model that promotes a person-centred approach for all participants. Elder mediators explore the many ways that can enhance the rights of the older person and ensure that older persons, with or without capacity, have a 'voice' that is heard (directly or indirectly) and respected.

Elder Mediation typically involves larger numbers of participants including older people, family members, friends and others who are willing to provide support. Depending on the situation, it is not uncommon to include paid caregivers, hospital staff, aged care, nursing home and or community care representatives, doctors, social workers, support persons, advocates and other professionals.

Screening in the initial process of Elder Mediation can identify suspicions of elder abuse or neglect that have previously been unrecognised or unnamed and are sometimes difficult, if not impossible, to prove. Trained elder mediators can provide a safe, trusting environment where any suspected or actual abuse can be identified and named, and referrals and/or plans can be safely put in place to prevent any future abuse or neglect and to support the remediation of past abuse and neglect.

Elder Mediation promotes positive, respectful communication and the involvement of a range of informal and formal supports for older people and their families. The following are typical issues of aging that can be addressed in elder mediation. The potential for abuse or neglect is present within each of them.

- Health and medical care (at home, in the community, in the hospital, continuing care and long-term care communities)
- Aged care issues and complaints
- Progressive dementias and other memory, cognitive and neurological, impairments
- Informal and formal caregiving
- Financial issues
- Guardianship issues
- Housing issues
- Living arrangements
- Intergenerational relationship issues

- New marriages and step-relative issues
- Religious issues
- Cultural issues
- Gender and LGBTIQ+ issues
- Indigenous issues
- Family business issues
- Driving issues
- Abuse, safety issues, self-neglect
- Legal issues (estate, inheritance, living will, power of attorney etc.)
- End-of-life planning and decision-making

Unlike other traditional forms of mediation, Elder Mediation is on a continuum from prevention to intervention and conflict may or may not be at the centre of concern when first contact is made. Rather it could be a need for support and sharing with the intent of participating in planning and outcomes that are preventive and proactive. With a wellness component, whether conflict driven or not, the focus is on helping all who attend to contribute towards finding new ways to promote effective, inclusive, and respectful behaviours, decisions and actions.

Elder Mediation provides an opportunity for older people to talk frankly with family members and significant others about their wishes and preferences, values they hold and risks they are or are not willing to take. They can acknowledge their needs for assistance during mediation without fearing that it will lead to a ruling of incapacity. If physical, mental or legal capacity is in question, trained elder mediators can make appropriate accommodations and, if necessary, explore effective ways to enhance supported decision making, including by involving a trusted, known support person or advocate for the older person.

Finally, Elder Mediation can provide the elder law system with a resource to deal effectively with underlying issues the legal system cannot, for example: ageist, gendered and cultural attitudes and values; family history and intergenerational dynamics; issues of autonomy, safety and trauma and the dignity of risk; interpersonal estrangement or conflict, and quality-of-life choices. The mediation process can help to add, improve, preserve, or restore relationships. It provides a non-adversarial model of communication and opportunities for therapeutic and practical discussions, meetings and interventions, where all parties are able to contribute their concerns and ideas freely and without prejudice (see our Submission B on Confidentiality), with the intention to protect the rights and wishes of the older person and maintain family/carer and other supportive relationships¹.

¹ Bagshaw, Dale. (2020). "Elder Mediation. An Emerging Field of Practice". Chapter 13 in Maria-Frederica Moscati, Michael Palmer, and Marian Roberts (eds), *Comparative Dispute Resolution: A Research Handbook*, (Research Handbooks in Comparative Law Series, eds Francesco Parisi & Tom Ginsburg), Cheltenham, UK & Northampton, MA: Edward Elgar Publishing, pp 202-217.

Bagshaw, Dale (2016). "Elder Mediation: Context, Opportunities and Challenges". Chapter 6 in Ian Macduff (editor): *Essays on Mediation. Dealing with Disputes in the 21st Century*. Wolters Kluwer: The Netherlands & US, pp 63-79.

1.2 (ii) ELDER MEDIATION ACCREDITATION IN AUSTRALIA

The National Mediation Standards Board outlines the accreditation requirements for mediators in Australia, which are currently being revised. Under the new accreditation scheme there are opportunities for Specialisations and the EMAN Board and the Resolution Institute have submitted a preliminary proposal for an accreditation scheme for ‘Elder Mediators’, using the Elder Mediator Certification process provided by the Elder Mediation International Network (EMIN), which is the international ‘gold standard’ certification for Elder Mediators and has a well-defined *Code of Ethics for Elder Mediators* and companion document - *Safeguarding Vulnerable Adults: Guidelines for Elder Mediators* - <https://elder-mediation-international.net/>

The EMIN two-level Elder Mediator certification requirements (Basic and Advanced) and the above documents have been developed in partnership with members of the Elder Mediation Australasian Network (EMAN) Board to suit Australasian conditions and to satisfy the requirements of health care and aged care professionals in this field in Canada, Ireland and other countries.

The current Elder Mediation training program, outlined in the next section, is recognised by EMAN, the Resolution Institute and Relationships Australia and also forms part of the certification requirements for the Elder Mediation International Network’s (EMIN’s) Elder Mediator certification - <https://elder-mediation-international.net/become-elder-mediator/>.

1.2 (iii) ELDER MEDIATOR EDUCATION AND TRAINING IN AUSTRALIA

The current Elder Mediation training program in Australia - *Elder Mediation: Essential Knowledge, Values and Skills* – offers 30 hours of additional age-related training to experienced mediators who are accredited with the National Mediation Standards Board or as Family Dispute Resolution (FDR) practitioners.

Since 2015, face-to-face Elder Mediation training programs have been successfully delivered by experienced EMIN certified Elder Mediators (Advanced), in most Australian States and New Zealand, for Relationships Australia, the Resolution Institute and other groups of experienced mediators. An enhanced, popular online training program was introduced in 2020 - 2023, with excellent feedback from participants. Many have continued to meet and practice online.

This tailored, professional development program is designed to expand and enhance accredited mediators present knowledge of age-related issues and develop specialised intervention skills in this fast-emerging field. A central theme of this program is to sensitise participants to the rights of older people and the needs, experiences and challenges facing older people, their families, service providers and communities, along with the implications for mediation.

The recent pandemic and Royal Commission into Aged Care Quality and Safety have increased awareness of the circumstances of vulnerability that can be experienced by older people and

Bagshaw, Dale; Adams, Valerie; Zannettino, Lana; and Wendt, Sarah. (2015). Elder Mediation and the Financial Abuse of Older People by a Family Member, *Conflict Resolution Quarterly*, Vol 33, 4.

McCann-Beranger, Judy, (2012). *Exploring the Role of Elder Mediation in the Prevention of Elder Abuse - Final Report*. Department of Justice, Canada.

has identified the risks, stresses and conflicts faced by older people, in particular those who are experiencing cognitive or physical decline or an age-related illness, are in aged care, dependent on their families for care, or separated from their families and significant others, and those who are at risk of or experiencing abuse or neglect.

The person-centred approach to Elder Mediation, which focuses on the impact of ageism and elder abuse and the rights of older people, has inspired a willingness and enthusiasm in many prior participants in this program to invest and further develop proficiency in this field.

Mediators who have completed 30 hours of this training are encouraged to complete the Elder Mediation International Network's (EMIN's) Elder Mediation certification requirements.

As an outcome of negotiations with the EMAN Board and the Resolution Institute, the EMIN Board has developed a pilot program in Australia (from February 2024 to January 2026), with reduced fees and additional supports, to encourage people who have completed 30 hours of Elder Mediation training with an EMIN Certified (Advanced) trainer to complete the international EMIN certification (APPENDIX C).

Eligibility for the Elder Mediation Training

Applicants for Elder Mediation training are required to have prior mediation training and experience at the Family Dispute Resolution and/or Australian National Mediation Standards Board level.

Outcomes of the Elder Mediation Training

At the end of the elder mediation training, participants are able to:

1. Understand problems and issues faced by older persons and their families, including the intergenerational and family dynamics involved.
2. Have knowledge of the psychosocial and physical effects of aging and how to accommodate those changes to maximize participation in the mediation process and ensure that the older person's voice is heard, directly or indirectly, and respected.
3. Be aware of ageism and other societal and participant biases, including family, generational, gendered and cultural attitudes to, and experiences of, aging and the possible effects on the older person, other participants, the mediator and the mediation process, and intersectionality with other circumstances of marginalisation.
4. Engage in a self-assessment of any aging or disability-related perceptions or biases that might impact mediator competency.
5. Understand and recognise factors affecting capacity to mediate and accommodations that may be needed for persons with cognitive or other disabilities.
6. Understand the nature and effects of elder abuse and the mediator's responsibility to provide a safe and effective process including:
 - definitions and signs of elder abuse
 - dynamics within the family or caregiver relationship

- how to screen for abuse prior to and throughout the mediation process
- when to rule out mediation and how to refer
- accommodations to enhance safety and prevent abuse
- the relationship of mediation to adult protective and other services
- confidentiality and mandated reporting
- EMIN's *Safeguarding Vulnerable Adults: Guidelines for Elder Mediators*.

7. Understand appropriate intake and pre-mediation procedures and factors that make thorough screening for capacity and for elder abuse essential in elder mediation.

8. Recognise and address the ethical issues, as outlined in EMIN's *Code of Ethics for Elder Mediators*, and the unique challenges of elder mediation.

9. Develop and apply specialised skills related to mediation involving older people.

10. Have knowledge of elder law, aged care provision and community resources (in your area) related to older persons.

11. Engage in multi-party mediations and understand the role and use of support persons, advocates, representatives, medical professionals and other resource persons in the mediation process.

12. Recognise when participants may benefit from consulting with or involving a support person, advocate, lawyer, geriatrician, or other expert.

13. Be aware of legal issues that may arise during elder mediation and understand that additional training may be necessary to competently intervene in certain cases, such as additional training in Eldercaring Coordination.

14. Understand the unique issues presented in identifying and writing down matters agreed upon by participants in elder mediation.

Specialist Trainers

The Elder Mediation International Network (EMIN), which currently provides the certification for elder mediators and is approved by the Resolution Institute, Relationships Australia and the Elder Mediation Australasian Network (EMAN), insist that elder mediation trainers should be experienced elder mediators, have EMIN Elder Mediator Certification (Advanced) and have training experience.

Elder mediation case examples (see APPENDIX G)

Pathways to Elder Mediation - Diagrams (see APPENDIX H).

PART 2. RECOMMENDED EXPANSION OF CHAPTER 7 (PART 2) – CONFIDENTIALITY OF INFORMATION

It is recommended that an additional Division be created in Chapter 7 under Part 2 to recognise the importance of confidentiality in mediation when utilised to resolve conflicts in matters falling within the new Act. It is well established that confidentiality (including legal privilege) is a cornerstone of mediation. We are living in a world that continues to change and especially so when it comes to technology and the influence of social media. It is critical that we honour rights to privacy and protect personal and professional reputations of elder persons, mediators, and other participants in mediation. Acting with the respect to privacy of people is a key element of expected behaviour in the Code of Conduct for Aged Care.

How do we facilitate a context that provides a reasonable expectation of confidentiality and minimises the likelihood that our images, behaviours (including concessions & apologies), emotions and other personal content are not posted online? Acting with respect is paramount if we do not wish to see a growing incidence of adverse mental health consequences pertaining to social media coverage. Future proofing Aged Care legislation (including elder mediation / dispute resolution) is becoming increasingly important as Australians become more assertive (even aggressive) in approaches to their rights in relation to disputes generally and on social media platforms.

A more detailed submission on the issue of confidentiality in elder mediation is in a separate submission (**SUBMISSION 2**).

PART 3. THE IMPORTANCE OF ACKNOWLEDGING ETHNICITIES AND CULTURE IN AGED CARE SERVICES AND COMMUNICATION IN LANGUAGES OTHER THAN ENGLISH

The 2022 AIHW's 'Reporting on the health of culturally and linguistically diverse populations in Australia: An exploratory paper'ⁱ reports that '1 in 10 aged care users report speaking a language other than English'ⁱⁱ. It is a massive 10% for whom the new Act must appropriately cater.

Acknowledging Culture

All older Australians should have an entitlement to aged careⁱⁱⁱ. As part of this, acknowledging ethnicities and culture in aged care services is of paramount importance as it contributes to the provision of culturally competent and inclusive care for elderly individuals. The aging population is becoming increasingly diverse, with people from various ethnic backgrounds requiring care and support. Recognising and respecting the unique cultural identities of older individuals can significantly enhance their overall well-being and quality of life.

It is essential to acknowledge that older adults have rich cultural histories and traditions that have shaped their lives and by incorporating cultural awareness into care practices, caregivers can create an environment where seniors feel understood and valued. This recognition helps to maintain a connection to one's ethnic and cultural roots, promoting a positive sense of self and preserving a person's dignity as they age.

The Aged Care Diversity Framework (2017)^{iv} recognised the Culturally and Linguistically Diverse (CALD) people as a special demographic group requiring appropriate aged care services. In that, the CALD Action Guide (February 2019) specifically provides that aged care services must 'provide you with a Use of Interpreter Services Policy which explains when you are entitled to an interpreter, how to get an interpreter and assist you in getting free interpreting supports where available'^v.

The guidance to the Exposure Draft of the new Act states that 'The new Aged Care Act will impact everyone connected to aged care. It will empower older people to exercise their rights when accessing, or seeking to access, Government-funded aged care services. It will support them to live active, self-determined and meaningful lives as they age.'^{vi} An essential part of this 'exercise of rights' under the new Act must be to use own language in communicating one's needs, wishes or preferences.

Language barriers and the right to use interpreters.

The Exposure Draft of the new Act provides: '(8) An individual has a right to communicate in the individual's preferred language or method of communication, with access to interpreters and communication aids as required.'^{vii} This is the only part where language and interpreting as a factor in designing aged services is mentioned.

Any implementation guides of the Act will have to explore and expand on this for the following reasons:

- Cultural acknowledgment in aged care services facilitates effective communication and understanding. Language barriers and differences in communication styles are a recognised obstacle in providing care for seniors. Recognising and respecting diverse languages and communication norms enables caregivers to establish meaningful connections with elderly individuals. Without appropriate communication channels, individuals with diverse backgrounds and life experiences become invisible^{viii}. Thus, culturally and linguistically appropriate care enhances the overall quality of life by ensuring that important information is conveyed accurately and that CALD seniors can express their needs and preferences effectively: providers of aged care services are recommended to ‘employ bilingual and bicultural staff who can provide you with care that meets your cultural needs and/or using your preferred language’^{ix}.
- Aged care staff who deliver aged care services must be trained in culturally safe and trauma-informed way^x. The obvious reason for this is that different ethnicities have distinct health beliefs, dietary requirements and traditional healing practices. Tailoring care plans to align with these cultural nuances promotes holistic and personalised care. Understanding the significance of cultural practices allows caregivers to incorporate rituals, foods, customs, music and other art forms or activities that hold cultural importance for the elderly, thereby enhancing their emotional and spiritual well-being.
- Creating a culturally inclusive environment in aged care services helps mitigate feelings of isolation and loneliness, which often result in emotional and mental health disturbances^{xi}. Many older individuals in aged care facilities may be far from their families or friends, or their ethnic communities, especially if they have migrated or belong to minority ethnic groups. By acknowledging, embracing and celebrating various cultures, care facilities can create a sense of community and shared understanding among all, and especially CALD residents.
- Ethnic and cultural awareness in aged care services is also crucial for addressing health inequalities among older residents. Certain ethnic groups may be more susceptible to specific health conditions or have unique healthcare, emotional, religious or spiritual needs. Tailoring the services provided to elders with diverse backgrounds and life experiences to consider these specificities would ultimately lead to more appropriate aged care services and an all-inclusive, culturally friendly, accepting and tolerant residential aged care environment.
- Enabling CALD people to access quality and professional interpreting services in all spheres of the aged care system will ultimately improve their experience of those services. Cultural enrichment and exchange at the broadest level depends on appropriate communication: use of qualified interpreters facilitates appropriate and culturally sensitive multicultural exchange by bridging language gaps, allowing older Australians to engage with, and learn from, the diverse cultural heritage of their fellow citizens coming from a CALD background.

In conclusion, the importance of acknowledging ethnicities and culture in aged care services cannot be overstated. It is a key factor in promoting the well-being, dignity, and overall satisfaction of elderly individuals in the aged care system. By embracing cultural and gender diversity, caregivers create environments that celebrate individual identities, result in effective communication, and assist in providing personalised and inclusive care. As the aging population continues to diversify, incorporating cultural awareness into aged care services becomes an imperative step towards ensuring the highest quality of life for all seniors.

Elder Mediation and Interpreters

Finally, a new and improved aged care system in Australia must include specialised Elder Mediation services, which will ultimately incorporate the overall intention of the new Act to employ culturally appropriate, professional interpreters.

This will help prevent, and allow early resolution of, conflicts in all multicultural settings, including the residential aged care facilities.

ⁱ <https://www.aihw.gov.au/getmedia/1e6ff486-91aa-4d9c-a8ba-048fd0cdd067/aihw-phe-308.pdf.aspx?inline=true>

ⁱⁱ <https://www.aihw.gov.au/getmedia/1e6ff486-91aa-4d9c-a8ba-048fd0cdd067/aihw-phe-308.pdf.aspx?inline=true>, p46

ⁱⁱⁱ Royal Commission into Aged Care Quality and Safety, February 2021, Final Report Volume 1, Summary and Recommendations, p96

^{iv} Aged Care Diversity Framework, Commonwealth Department of Health, 2017

^v Actions to support older Culturally and Linguistically Diverse people, February 2019, Outcome for Consumers 1: Making informed choices, p3

^{vi} <https://www.health.gov.au/our-work/aged-care-act/about#what-the-new-act-will-mean-for-you>

^{vii} <https://www.health.gov.au/sites/default/files/2023-12/exposure-draft-aged-care-bill-2023.pdf>, ss20(8)

^{viii} Royal Commission into Aged Care Quality and Safety, February 2021, Final Report Volume 3A, p158

^{ix} Actions to support older Culturally and Linguistically Diverse people, February 2019, Outcome for Consumers 4: A proactive and flexible aged care system, p6

^x Royal Commission into Aged Care Quality and Safety, February 2021, Final Report Volume 3A, p157

^{xi} Royal Commission into Aged Care Quality and Safety, February 2021, Final Report Volume 1, Summary and Recommendations, p105

APPENDIX A
**CURRENT MEMBERS OF THE EMAN BOARD AND THE RESOLUTION INSTITUTE
 FACILITATIVE COMMITTEE - ELDER MEDIATION SUBCOMMITTEE**
EMAN BOARD MEMBERS

	Board Member	Role	Elder Mediation Certification/Training	Location	Email address
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2	Rhonda Whitfield	Secretary	Completed Advanced Elder Mediation Training	Melbourne, Victoria, and Queensland	rhonda@churchillwood.com.au
3	Anna Quinn	Member	Completed Elder Mediation Training	Auckland, NZ	[REDACTED]
4	Gerard Sullivan	Member	Advanced Elder Mediation Certification (EMIN)	Auckland	employee.health@xtra.co.nz
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6	Mike Hyde	Member	Completed Elder Mediation Training	Sydney, NSW	mghyde1@gmail.com
7	Virginia Leeuwenburg	Member	Completed Advanced Elder Mediation Training	Adelaide, South Australia	[REDACTED]
8	Vesna Cvjeticanin	Member	Completed Elder Mediation Training	Canberra, ACT	impactmediations@gmail.com
9	Dr Cate Banks	Member	Completed Advanced Elder Mediation Training	Melbourne, Victoria	cate.banks@monash.edu
10	Fiona Tait	Member	Advanced Elder Mediation Certification (EMIN)	Sydney, NSW	fionatait1@icloud.com

RESOLUTION INSTITUTE FACILITATIVE COMMITTEE - ELDER MEDIATION SUB-COMMITTEE MEMBERS

	Board Member	Role	Elder Mediation Certification/Training	Location	Email address
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2	Rhonda Whitfield	Secretary	Completed Advanced Elder Mediation Training	Melbourne, Victoria, and Queensland	rhonda@churchillwood.com.au
3	Georgina Gardiner	Member	Advanced Elder Mediation Certification (EMIN)	Gold Coast, Queensland	Ggmediation@gmail.com
4	Debbie Dunn	Member	Completed Elder Mediation Training	Hobart, Tasmania	[REDACTED]
5	Mike Hyde	Member	Completed Elder Mediation Training	Sydney, NSW	[REDACTED]
6	Teresa Harm	Member	Completed Elder Mediation Training	Sydney, NSW	teresa.harm@ozemail.com.au

Indicates have attained the Elder Mediation Certification to an Advanced Level (EMIN CERT, EM ADV)



Appendix B

DRAFT Aged Care (Elder Mediation Practitioners) Regulations 2024

Contents

Part 1	Preliminary	4
1	Name of Regulations [see Note 1]	4
2	Commencement	4
3	Definitions	4
Part 2	Accreditation process	8
4	Elder mediation practitioners (Act s 185)	8
5	Criteria for accreditation relating to qualifications and competencies	8
6	Other criterion for accreditation	10
7	Application for accreditation	11
8	Information to be included in application	12
9	Determination on application	12
Part 3	Obligations of accredited elder mediation practitioners	14
10	Conditions of accreditation	14
11	Notification of information	14
12	Education, training and professional development	15
13	Professional standards	15
14.	Training Requirements and Components	26
15	Safeguarding Vulnerable Adults (SVA) Guidelines	26
16	Complaints Commissioner may impose conditions	38
Part 4	Suspension or cancellation of accreditation	39
17	Grounds for suspension or cancellation of accreditation generally	39
18	Grounds for immediate cancellation of accreditation	40
19	Notice to show cause	40
20	Notice of suspension	41
21	Notice of cancellation	41
22	Automatic suspension and cancellation	41

Part 5	Offences	42
23	Offences	42
Part 6	Review of decisions	43
24	Review by AAT	43
Part 7	Elder Mediation Practitioners	44
25	Elder mediation practitioners — assessment of elder mediation suitability	44
26	Elder mediation practitioner certificates	44
27	Certificate by elder mediation practitioner (Act s XXX (X))	45
28	Information to be given to parties before elder mediation	45
29	Obligations of elder mediation practitioner — general	47
30	Obligations of elder mediation practitioner — avoidance of conflicts of interests	47
Schedule 1	Certificate by elder mediation practitioner	49
Notes	to the Aged Care (Elder Mediation Practitioners) Regulations 2024	51

Part 1 Preliminary

1 Name of Regulations [see Note 1]

These Regulations are the *Aged Care (Elder Mediation Practitioners) Regulations 2024*.

2 Commencement

These Regulations commence on 1 July 2024.

3 Definitions

(1) In these Regulations:

accredited elder mediation practitioner means a person accredited as an elder mediation practitioner under Part 2.

Act means the *Aged Care Act 2024*.

Ageism means the stereotyping, prejudice or discrimination against people on the basis of their age. It is widespread and an insidious practice that has harmful effects on the quality of life and wellbeing of older adults.

Ageist ideas are often ingrained and systemic and can inhibit people's objectivity and inform decisions at the individual and family level, the organization and community level, and at government and societal levels.

appropriate qualification means:

- (a) a higher education award in:
 - (i) law; or
 - (ii) psychology or social work (however described); or
 - (iii) conflict management, mediation or mediation (however described); or
- (b) a higher education award in a field or discipline that, in the opinion of the Complaints Commissioner, is relevant to the provision of elder mediation services; or
- (c) a vocational graduate diploma (however described) in a field or discipline that, in the opinion of the Complaints Commissioner, is relevant to the provision of elder mediation services.

certified postgraduate award means a postgraduate degree or diploma (however described) provided by a higher education provider that has been certified by the higher education provider under regulation 7.

Co-mediation means the harmonious working of two complementary elder mediators who each have a clear idea of their role and responsibilities within the mediation process. The elder mediators work as a team and offer a diversity of skills, experience and personality.

Complaints Commissioner means a member of the staff of the Commission who has the function of assisting the Commissioner in the performance of the Commissioner's complaints functions.

Confidentiality elder mediation is a confidential process, and both the participants and the elder mediator are bound to maintain confidentiality in relation to all information arising during, as a result of, or in connection to, the mediation, unless agreed otherwise by all participants and the elder mediator. This allows the participants to engage in conversations, both with the elder mediator and between each other, that they may otherwise be reluctant to engage in.

However, to ensure safety and to prevent unintended consequences, there are conditions and qualifications to this confidentiality, as outlined in Section 13(5) Confidentiality below.

Culture means a set of values, norms, behaviours, and symbols shared by a group of people and influenced by ethnicity, gender, age, socio-economic status, national origin, religion, immigration status, sexual orientation, disability, physical appearance, occupation or profession, geographic setting and unique family norms.

Elder Abuse means a single or repeated act, or lack of appropriate action, occurring in any relationship where there is an expectation of trust that causes harm or distress to an older person.

There are several forms of abuse, any or all of which may be perpetrated as the result of deliberate intent, negligence or lack of insight and ignorance. A person may experience more than one form of abuse at any one time.

Elder Mediator means a person who is professionally trained and certified in elder mediation theories and practices including its preventive and wellness aspects. The elder mediator facilitates communication among the participants and assists them toward mutually beneficial outcomes.

Elder Mediator Training means the process through which a person acquires the knowledge and skills required for carrying out the best practices of Elder Mediation.

Family Conflict means as a potential or actual conflict or dispute within any family structure. It may involve intimate or

separated partners, husbands and wives, parents and children, siblings, and/or extended family members (grandparents, aunts, uncles, nieces, nephews, cousins) and significant others involved with a family member, such as a legal guardian or staff from hospitals, care homes, agencies or organisations.

higher education award means:

- (a) a degree of at least bachelor level; or
- (b) a postgraduate award of a diploma (however described) of at least 12 months full time study or the equivalent part time study.

higher education provider has the meaning given in the Dictionary to the *Higher Education Support Act 2003*.

legal practitioner has the meaning given in regulation 3 of the *Family Law Regulations 1984*.

Mediation means a co-operative, interest-based process in which the mediator assists participants in establishing open communication and understanding about the issue/concern and supports efforts for the achievement of voluntary, mutually agreeable and sustainable outcomes.

Mild Cognitive Impairment (MCI) means a level of cognitive and/or memory impairment beyond that expected for normal aging but not sufficiently advanced to be called "dementia" or "Alzheimer's disease". Studies show that 10 to 40 per cent of people with MCI will go on to develop dementia. For this reason, MCI is considered a risk factor for the dementia. Researchers believe that abnormal changes in the brain may begin as early as 5-10 years before there are signs of Alzheimer's disease.

National Mediator Approval Standards means the Australian National Mediator Standards — Approval Standards for Mediators Seeking Approval Under the National Mediator Accreditation System (September 2007).

other Regulations means the *Aged Care Regulations 2024* as in force on 1 July 2024.

Participant means a person involved in the Elder Mediation process who has equal standing in contributing to mutually acceptable solutions.

registered training organisation has the meaning given in subsection 3 (1) of the *Skilling Australia's Workforce Act 2005*.

Shuttle mediation means a process in which the participants, with the assistance of a mediator, endeavour to reach an agreement without being physically brought together. The mediator may move between parties, who are located in

different rooms or meet different parties at different times for all or part of the process.

Wellness, Through the lens of elder mediation, means a multidimensional process that encompasses all of who we are – physically, emotionally, intellectually, socially, spiritually, etc. It includes the interconnectedness we have to each other and to our communities. It embodies the conscious awareness and intention to be actively engaged in facilitating essential conversations that are often transforming for the family. This will promote heightened balance of these life forces while moving participants toward optimal health and well-being with regard to how they interact and participate with each other. The elder mediation process unlocks the potential for heightened wellbeing and improved communication when people are willing to support each other in an interconnected way.

Unlike other traditional forms of mediation, Elder Mediation is on a continuum from prevention to intervention and conflict may or may not be at the centre of concern when first contact is made. Rather it could be a need for support and sharing with the intent of participating in planning and outcomes that are preventive and proactive. With a wellness component, whether conflict driven or not, the focus is on helping all who attend to contribute towards finding new ways to promote effective, inclusive, and respectful behaviours, decisions and actions.

- (2) For these Regulations, the ***specified units of competency*** are either of the following 2 units required to be considered an elder mediator approved by the Elder Mediation International Network:
 - (a) Cert.EM — see subregulations 5 (2);
 - (b) Cert.EM Advanced — see subregulations 5(3) and (4);
- (3) For these Regulations, the ***accreditation criteria*** are:
 - (a) the criterion mentioned in subregulation 5 (1), (2), (3) or (4); and
 - (b) the criterion mentioned in regulation 6.

Part 2 Accreditation process

4 Elder mediation practitioners (Act s 185)

For paragraph (a) of the definition of *elder mediation practitioner* in subsection 185 of the Act, a person is accredited as an elder mediation practitioner if the Complaints Commissioner determines, in accordance with this Part, that the person meets the accreditation criteria.

5 Criteria for accreditation relating to qualifications and competencies

Person holding elder mediation practitioner certification

(1) **It is an accreditation criteria that the person is a registered member of the Elder Mediation International Network (EMIN).**

(2) **A person has satisfied Certified Elder Mediator ('Cert. EM') requirements:**

- (a) The person holds a current formal accreditation to practice as an Alternative Dispute Resolution (ADR)/Mediation practitioner in Australia.
- (b) The Person provides evidence of 70 hours of Elder Mediation specific training in specified subject areas (see Section (4)(b) below).
- (c) Experience: a minimum of 3 elder mediation role-plays and/or actual elder mediation cases.
- (d) Recording of an elder mediation role play and completed self-assessment (guidelines provided for the self-assessment provided by EMIN).
- (e) Payment of an application and certification fee.

Or

(3) **A person has satisfied Certified Elder Mediator Advanced ('Cert.EM Advanced') requirements (for applicants who already have 'Cert.EM status:**

- (a) Maintain yearly EMIN membership and certification maintenance.
- (b) Complete an additional 30 hours of Elder Mediation training (linked to specified subject content areas (see section (4)(b) below).
- (c) Experience: 2 Additional elder mediation role plays or actual elder mediation cases.
- (d) Pass a three (3) hour invigilated examination.
- (e) Pay an additional application fee plus an assessment fee.

Or

(4) ‘Cert.EM Advanced’ – Requirements for applicants who directly enter the certification process at the Advanced level:

- (a) Current formal accreditation to practice as an ADR/Mediator practitioner in Australia.
- (b) Provide evidence of completed 100 hours of age-related elder mediation education and training in the following subject areas:
 - i. Current and future profiles of seniors in Australia.
 - ii. Family life cycle, family dynamics, and integrational dynamics.
 - iii. Recognising and responding to elder abuse and neglect.
 - iv. Knowledge of Australian legislation relevant to elder mediation, capacity, and elder abuse.
 - v. Identifying and dealing with power dynamics involving and affecting older people with and without capacity.
 - vi. The nature and impact of bereavement, grief, and loss.
 - vii. The impact of ageism, sexism, and cultural diversity.
 - viii. Understanding dementia and age-related diseases and how to assess, manage, and accommodate capacity issues.
 - ix. Financial and estate issues for identifying areas of concern and referral.
 - x. Ethics and ethical issues relevant to elder mediation.
 - xi. Facilitating and writing agreements in elder mediation.
 - xii. Advanced care directives, power of attorney and guardianship in Australia.

- (b) Current formal accreditation to practice as an ADR/Mediator practitioner in Australia.
- (c) Provide evidence of completed 100 hours of age-related elder mediation education and training in the following subject areas:
 - i. Current and future profiles of seniors in Australia.
 - ii. Family life cycle, family dynamics, and integrational dynamics.
 - iii. Recognising and responding to elder abuse and neglect.
 - iv. Knowledge of Australian legislation relevant to elder mediation, capacity, and elder abuse.
 - v. Identifying and dealing with power dynamics involving and affecting older people with and without capacity.
 - vi. The nature and impact of bereavement, grief, and loss.
 - vii. The impact of ageism, sexism, and cultural diversity.
 - viii. Understanding dementia and age-related diseases and how to assess, manage, and accommodate capacity issues.
 - ix. Financial and estate issues for identifying areas of concern and referral.
 - x. Ethics and ethical issues relevant to elder mediation.
 - xi. Facilitating and writing agreements in elder mediation.
 - xii. Advanced care directives, power of attorney and guardianship in Australia.
- (d) Experience: 5 elder mediation role plays and/or actual elder mediation cases.
- (e) Elder mediation role plays recording and self-assessment (guidelines provided by EMIN).
- (f) Pass a three (3) hour invigilated exam.
- (g) Pay a certification fee for the application and assessment.

Note: Evidence provided of previous training in the age-related subject areas specified above in (4)(b) will not be required to repeat this training if evidence is provided of the training.

6 Other criterion for accreditation

- (1) It is an accreditation criterion for a person that the certified elder mediator:
 - (a) Must have current membership and accreditation with EMAN and Resolution Institute and adhere to the *EMIN Code of Ethics for Elder Mediators*.
 - (b) Must also provide evidence that they hold liability insurance for the practice of mediation.

- (c) has access to a suitable complaints mechanism to which persons who use the applicant's services as an elder mediation practitioner may have recourse if they wish to complain about services provided; and
- (d) is suitable to perform the functions and duties of an elder mediation practitioner; and
- (e) is not disqualified from accreditation.

Examples of complaints mechanism for paragraph (c)

- internal complaints mechanism established by an organisation of which the person applying for accreditation as an elder mediation practitioner is an affiliate or employee or on whose behalf the elder mediation applicant provides services
- complaints mechanism established by a professional association of which the person applying for accreditation is a member
- complaints procedures of statutory bodies established by the Commonwealth, a State or Territory.

- (2) A person is disqualified from accreditation if the person has been convicted of:
 - (a) an offence involving violence to a person; or
 - (b) a sex-related offence, including rape, sexual assault, indecent assault, unlawful sexual acts with or upon minors, child pornography, procuring or trafficking of a child for indecent purposes or being knowingly concerned with the prostitution of a child.

Note Part VIIC of the *Crimes Act 1914* includes provisions that, in certain circumstances, relieve persons from the requirement to disclose spent convictions and require persons aware of such convictions to disregard them.

7 Application for accreditation

- (1) A person may apply to the Complaints Commissioner to be accredited as an elder mediation practitioner.
- (2) The application must:
 - (a) be in writing and in a form approved by the Complaints Commissioner; and
 - (b) include the information mentioned in regulation 10.
- (3) The form may require the applicant:
 - (a) to make a statutory declaration about information, documents or other matters given by the applicant in or with the application; and
 - (b) to give consent to the Complaints Commissioner to verify information, documents or other matters given by the applicant in or with the application (including information about the applicant's criminal history).

8 Information to be included in the application

- (1) The following information must be included in an application for accreditation:
 - (a) the name and contact details of the applicant;
 - (b) a statement about how the applicant meets the accreditation criteria;
 - (c) any other matter required by the Complaints Commissioner by notice given to the applicant.
- (2) The Complaints Commissioner may ask the applicant, by written notice, to give the Complaints Commissioner additional information within the period specified in the notice, to assist in determining whether the applicant meets the accreditation criteria.
- (3) If the Complaints Commissioner asks the applicant to give additional information, the Complaints Commissioner is not required to consider the application while waiting for the information to be given.
- (4) If the applicant does not reply to the notice within the period specified in the notice, the application is taken to have been withdrawn.

9 Determination on application

- (1) On receiving an application for accreditation as an elder mediation practitioner, the Complaints Commissioner must determine that the applicant:
 - (a) meets the accreditation criteria; or
 - (b) does not meet the accreditation criteria.
- (2) In making the determination, the Complaints commissioner:
 - (a) must have regard to:
 - (i) the information included in the application; and
 - (ii) evidence, documents and other matters accompanying the application; and
 - (iii) any additional information given under subregulation 9(2); and
 - (b) may have regard to any other relevant information.
- (3) If the Complaints Commissioner determines that the applicant meets the accreditation criteria, the Complaints Commissioner must give the applicant written notice of:
 - (a) the determination; and

- (b) the obligations of accredited elder mediation practitioners under Part 3.

Note If the Complaints Commissioner imposes a condition on the applicant's accreditation under subregulation 15 (1), the Complaints Commissioner must also give notice of that condition and the reasons for it — see subregulations 15 (1) and (2).

- (4) If the Complaints Commissioner determines that the applicant does not meet the accreditation criteria, the Complaints Commissioner must give the applicant written notice of:
 - (a) the determination and the reasons for it; and
 - (b) the applicant's review rights under regulation 23.

Part 3 **Obligations of accredited elder mediation practitioners**

10 **Conditions of accreditation**

A person who is accredited as an elder mediation practitioner must comply with regulations 13 to 15 and any additional conditions, or variations to conditions, imposed by the Complaints Commissioner under regulation 16.

11 **Notification of information**

A person who is accredited as an elder mediation practitioner must:

- (a) comply with any request for information by the Complaints Commissioner; and
- (b) notify the Complaints Commissioner about any change in the person's name and contact details within 28 days after the change; and
- (c) notify the Complaints Commissioner about any matter that may affect the person's accreditation, within 7 days after the occurrence of the event, including:
 - (i) whether the person has been prohibited under a law of a State or Territory from working with children; and
 - (ii) whether the person has failed to comply with a law of a State or Territory relating to employment of persons working with children; and
 - (iii) whether the person has been charged with an offence that, if the person is convicted, will result in either of the circumstances mentioned in subparagraphs (i) and (ii) arising; and
 - (iv) whether the person has been charged with, or convicted of, an offence mentioned in subregulation 6 (2); and
 - (v) whether the person has ceased to provide elder mediation services and the reasons for doing so; and
 - (vi) whether the person has ceased to have access to a complaints mechanism mentioned in paragraph 6 (1) (c).

12 Education, training and professional development

- (1) A person who is accredited as an elder mediation practitioner must undertake at least 8 hours of training and professional development and 10 hours of elder mediations/co-mediations/coaching per year, starting on the day of the person's accreditation as an elder mediation practitioner.
- (2) If the Complaints Commissioner becomes aware that an accredited elder dispute practitioner has failed to comply with subregulation (1), the Complaints Commissioner may, by written notice, give the person a specified period within which to comply with the requirement.

13 Professional standards

A person who is accredited as an elder mediation practitioner must uphold reasonable professional standards in the provision of elder mediation services as described in the *EMIN Code of Ethics for Elder Mediators*.

- (1) Goals of the Elder Mediation Process
 - (a) To maximize the quality of life and the quality of relationships for all participants, including the older person.
 - (b) To be person-centred.
 - (c) To have conversations in mediation that result in fair and workable agreements that consider the participants' shared needs while addressing immediate concerns.
 - (d) To be preventive in nature while promoting wellness.
 - (e) To recognise the responsibility of all participants to honour their agreements/commitments.
 - (f) To help the participants to communicate openly and to come to a deeper understanding about the situation(s) being addressed.
 - (g) To recognize that not all mediations will lead to mutually agreeable outcomes.
- (2) Guiding Principles
 - (h) Person-centred - Support and honour the people and partnerships amongst all concerned participants while ensuring the preservation of self-determination, dignity and quality of life at all times.

- (i) Respect - Ensuring integrity and fairness and that all participants are respected and valued during the mediation process. Mediators are committed to using respectful, inclusive language.
 - (j) Wellness and Prevention - Promoting overall wellness through preventative interventions.
 - (k) Responsibility - Maintaining accountability for achieving a viable outcome within the Elder Mediation process.
 - (l) Equity - Promoting equity of all participants in the mediation process regardless of gender, age, culture, religion or socio-economic status.
 - (m) Collaboration - Working in partnership with others to support the best outcome as determined by the participants.
 - (n) Quality - Ensuring the Elder Mediation process is based on the results of evidence-based research.
 - (o) Timeliness - Conducting the mediation process in an efficient and timely manner.
- (3) Professional Responsibility
- (a) Relationship with participants –
 - i. Where there is a pre-existing personal or professional relationship between a participant and the mediator, this relationship must be kept entirely separate from the relationship in the mediation process.
 - ii. Where the elder mediator considers mediating an issue involving persons in a close relationship with the elder mediator, there must be full disclosure and all participants must be in agreement for the elder mediator to conduct the elder mediation.
 - iii. The elder mediator works with all of the participants to establish acceptable agreements/outcomes for all the participants.
 - iv. The elder mediator has a responsibility to ensure, as far as possible, that all participants are fully aware of the interests of everyone involved in the mediation enabling them to appreciate separate and individual needs.
 - v. 6.1.5 The elder mediator has a responsibility to keep in mind the abilities and capacities of participants to engage in the process.

(b) Impartiality

- i. The elder mediator has a duty to maintain impartiality with respect to the participants and their issues.
- ii. Notwithstanding the above, the elder mediator's responsibility is to ensure, as far as possible, that all participants needs and positions are clearly and fairly presented so that participants appreciate the circumstances of all those involved.
- iii. The elder mediator must ensure that, as far as possible, a vulnerable person has an equal voice and a fair hearing. This may require an advocate and/or agreement as to who will represent the vulnerable person.
- iv. The elder mediator must disclose to the participants any biases they have relating to the issues to be mediated and any circumstances that may constitute or cause a conflict of interest, real or perceived, to arise. Such disclosure must be made as soon as the mediator recognizes the potential for any bias or conflict of interest arising.
- v. The elder mediator must always disclose any prior or current professional or personal involvement that they have had, or have, with any of the participants.
- vi. The elder mediator must refrain from mediating unless every participant expressly consents to the mediation after there has been full disclosure. In this case, the role of the mediator should be carefully distinguished from the prior relationship.

(c) Confidentiality

The elder mediator shall not disclose to anyone who is not a participant to the mediation any information obtained through the mediation process except:

- i. When the information discloses an actual or potential threat to human life or safety.
- ii. When participants agree for the information to be shared with another/other person(s).
- iii. When the information discloses actual or potential abuse.
- iv. When ordered to do so by a judicial authority with jurisdiction to compel such disclosure, or required to do so by legislation or other law.

- v. When the participants have provided written consent as part of the mediation contract for the release of non-identifying information for research or educational purposes.
- vi. When it is necessary for the elder mediator to respond to ethical complaints and inquiries initiated against them.

Furthermore:

- vii. Any information so divulged shall be limited to what is absolutely necessary or agreed.
- viii. The elder mediator shall inform the participants at the outset of mediation of the limitations to confidentiality and under what circumstances confidentially would be breached.
- ix. The elder mediator must clarify with the participants that confidentiality extends not only to the information disclosed during mediation, but also to documents prepared specifically for or resulting from mediation except where otherwise agreed by all participants and the mediator.
- x. When appropriate, the elder mediator must ask the participants to sign a release form that allows the mediator to share information with professionals but who may or may not be involved in the process at the outset.
- xi. With the participants' consent, the elder mediator may discuss the mediation with the participants' lawyer, and other expert advisors.
- xii. Where the participants reach an agreement, the substance of the proposed agreement may be disclosed to their respective advisors as requested.
- xiii. The elder mediator must ensure that the storage and disposal of client records respects the confidentiality such records require and be in accordance with the mediators' professional association standards and local legislation.
- xiv. Agreements arising from an Elder Mediation should only be disclosed with the express permission of participants to the proposed agreement, unless required by local legislation or court practice.

(d) Ability to Participate

- i. Elder mediators must recognize the ethical and human right of each person to make choices for themselves where possible.
- ii. Elder mediators need to recognize each participant's capacity to give consent or agreement to mediation services and maximise opportunities for people to participate by making appropriate modifications to the process. When providing mediation services to people who have been assessed by an expert as having diminished capacity or as being unable to give voluntary consent, elder mediators must find appropriate ways to include their voice in decision-making or
- iii. indirectly via their representatives or advocates.
- iv. Elder mediators must recognize the need to balance the ethical rights of participants to make choices. When providing mediation services to people who are unable to give voluntary consent, elder mediators must include them or their representatives in decision-making as appropriate. elder mediators need to recognize participants' capacity to give consent or agreement to mediation services.
- v. The elder mediator must explore whether the participants are cognitively capable of engaging in the mediation process or if there is/are a family member(s), advocate, professional advisor or other, who are able and appropriate to represent the person's wishes. If the elder mediator believes that any participant is unable to participate meaningfully, and if there is no appointed guardian to act on their behalf in a lawsuit or there is no agreement on who could be the spokesperson, they must suspend or terminate the mediation and encourage the participants to seek appropriate professional help. The elder mediator ensures, as far as possible, that all voices are represented in the mediation process.
- vi. The elder mediator must ensure that each participant has an opportunity to understand the implications of available options. Should a participant need additional information or assistance for negotiations to proceed in a fair, orderly and inclusive manner or for an agreement to be reached, the mediator must refer the person to appropriate resources.

- vii. If an advocate has been appointed for a participant who is not capable of consent, the elder mediator has a responsibility to that person (the person who is not capable of consent). The elder mediator and the advocate will establish the level of participation in the mediation process. (Depending on the jurisdiction concerned, the mediator must inquire as to the provisions of a living will, Power of Attorney or similar legal documents that protect the wishes of the vulnerable person.)

(e) Cultural Sensitivity

- i. Elder mediators must communicate information in ways that are both developmentally and culturally appropriate through the use of clear and understandable language. When discussing issues where participants have difficulty understanding the language used by the mediator, the necessary services should be arranged (e.g., a qualified interpreter or translator) to ensure comprehension by participants. In collaboration with participants, elder mediators must consider cultural implications on the proceedings and, where possible, adjust their practices accordingly.
 - a) The elder mediator must be sensitive to cultural influences and try to develop a mediation process that is sensitive to their cultural circumstances.
 - b) Elder mediators may withdraw from mediation when participants' cultural values are in conflict with their personal values; and must withdraw when the participants' cultural values are in conflict with this Code.

(f) Inter-Professional Relations

The elder mediator should respect and invite complementary relationships between mediation, legal, mental health and other service providers, and be aware of community resources appropriate for referral. The elder mediator should promote co-operation and awareness with other professionals and be aware of their ethical responsibility to encourage participants to use other professional resources when appropriate.

(g) Where Abuse is Identified or Suspected

- i. When in doubt, the proper course of action is to assume that face-to-face, facilitated Elder Mediation will be inappropriate in cases involving past or present abuse. Alternatives to mediation such as shuttle mediation may be offered in serious abuse cases, but only by practitioners who have specialised education and training in this area.
 - ii. Elder mediators should inform all participants that mediators are not neutral in issues of abuse and have a duty – in many jurisdictions a legislative duty – to report past and present abuse (if relevant that a vulnerable person is in need of protection under relevant legislation) and threats of future abuse or harm.
 - iii. Elder mediators have a duty to step out of a neutral role and to act to protect the vulnerable if a formerly abusive partner engages in intimidation or abuse during a mediation or shuttle negotiation process. Usually such behaviours will result in ending the mediation and referral to a service or process that offers additional protection.
 - iv. The Elder mediator must take special care to ensure that any agreements reached in a case involving abuse are products of genuine agreement and not merely the product of financial or psychological vulnerability.
- (h) Fair Negotiations
- i. The elder mediator must endeavour to ensure that the participants reach agreements with informed consent, freely, voluntarily, and without undue influence.
 - ii. The elder mediator has a duty to ensure procedural fairness — that each participant, as far as possible, has an opportunity to speak, to be heard and to articulate their own needs, interests and concerns.
 - iii. The elder mediator has a duty to ensure balanced conversations and must not permit manipulative or intimidating tactics on the part of any participant.
 - iv. The elder mediator has a duty, within the limits of his or her competence, to help the participants assess the feasibility and practicality of any proposed agreement in the long and short term, taking cultural differences into account.

(i) Information and Advice

- i. It is the duty of the elder mediator to actively encourage the participants to make decisions based upon available information, knowledge and advice.
- ii. Elder mediators have an ongoing obligation to advise participants of the desirability and availability of independent legal advice. While legal information may be available to the participants, each should be encouraged, in appropriate circumstances, to obtain independent legal advice.

(j) Agreement to Mediate

- i. The elder mediator must explain the mediation process clearly to the participants before agreeing to mediate their issues. In particular, the elder mediator should:
 - a) define and explain mediation and distinguish it from reconciliation, counselling, conciliation, therapy, assessment, advocacy, adjudication and arbitration;
 - b) discuss the potential benefits and risks of mediation for the participants in light of their particular circumstances and the alternatives available;
 - c) discuss the confidentiality of mediation and the limitations of confidentiality;
 - d) advise the participants that they or the mediator have the right to withdraw from the process at any time;
 - e) make explicit the costs of mediation, and reach an agreement with the participants regarding payment;
 - f) advise the participants of the role and importance of advocacy and legal advice;
 - g) discuss with the participants the mediator's specific procedures and practices, such as caucusing:
 - a. when and why separate sessions for individual participants may be held, including any rules relating to the confidentiality of such sessions;

- b. when and why there are to be separate communications with the participants and their counsel;
 - c. when and why other persons are to be involved in the mediation.
- ii. Any agreement regarding the confidentiality of the mediation sessions or any waiver of such confidentiality must be acknowledged by all participants.
 - iii. If the elder mediator feels, at any point, that a mediation process is beyond the scope of his or her professional abilities, s/he must inform the participants of that fact and discuss how best to proceed.

(k) Multi-Party Mediation

- i. The elder mediator has a responsibility to ensure that all family members who are interested in providing support and/or significant others, including key caregivers to a dependent person, representatives or advocates, are invited to partake in the mediation process.
- ii. The elder mediator has a responsibility to encourage reluctant participants to participate by making them aware of the benefits of participation. However, not all participants need to be part of the whole mediation process: there may be an ebb and flow of participation.
- iii. The elder mediator should facilitate the use of technology so that participants who cannot attend in person can still contribute to the sessions.

(l) The Written Summary

- i. Where appropriate, the mediator will scribe, or support the parties and/or their representatives in drafting, a written summary of the agreements reached.

- ii. The elder mediator must encourage the participants to seek independent legal advice before entering a binding mediation agreement. In some jurisdictions, for example the Republic of Ireland, where a mediation agreement is reached, the agreement has the effect of a contract between the parties unless it is expressly stated otherwise. The elder mediator must ensure that they are aware of any jurisdictional requirements pertaining to mediation agreements.
- iii. The mediator must have the appropriate training and knowledge so that they have an awareness and understanding of the importance of referral to legal and/or specialist advice.

(m) Suspension or Termination of Mediation

- i. It is the duty of the elder mediator to suspend or terminate the mediation whenever continuation of the process is likely to harm one or more of the participants, such as when mediation is being misused - e.g. to dissipate or conceal assets - or where, in the opinion of the elder mediator, one or more participants are acting in bad faith.
- ii. The elder mediator may withdraw from mediation when they believe that any agreement being reached by the participants is unconscionable.
- iii. The elder mediator recognises that each participant has the right to withdraw from the mediation. If the proposed withdrawal of a participant is due to a concern(s) in relation to the process, it is the elder mediator's duty to address this/these concerns, as far as possible, and to respect the decision of the participant to remain with, or to withdraw from, the mediation.
- iv. Given that many Elder Mediations are multiparty, the elder mediator should explore with those parties remaining within the mediation process whether there can be a benefit to continuing the mediation without the participants who have left.

(n) Mediation Fees

- i. The elder mediator will explain the fees to be charged for mediation, as well as any related costs at the beginning of the contact. The mediator must also obtain agreement from the participants as to how the payment of fees is to be shared and the method of payment.
- ii. No commissions, rebates or similar forms of remuneration shall be given or received for referral of people for mediation services.
- iii. It is inappropriate for the mediator to base fees on the outcome of the mediation process.
- iv. When a retainer has been collected before mediation services were rendered, any unearned fees should be returned promptly to the clients upon termination of mediation.

(o) Outreach and Promotional Activities

- i. The purpose of outreach concerning Elder Mediation should be to:
 - a) educate the public about the elder mediation process;
 - b) present the process of mediation objectively as one of several methods of dispute resolution.
- ii. When advertising professional services, publicity should be restricted to describing the mediator and the services offered: name, contact co-ordinates, office hours, relevant academic degree(s), relevant training and experience in mediation, appropriate professional affiliations and membership status, advantages of the mediation process and any additional relevant or important consumer information.
- iii. elder mediators are not allowed to make reference to their "success rate" in mediations.

(p) Advocacy

Advocacy refers to speaking or acting on behalf of an individual or a group of persons to ensure their rights are protected.

An elder mediator may not act as an advocate to a party in a case that they themselves are mediating.

Where there is a need for an advocate(s) to ensure that the rights of all are protected or to enable a vulnerable person a voice, it is the responsibility of the mediator to identify this need and to modify the process to allow for the inclusion of an appointed advocate.

14. Training Requirements and Components

Mediators who are trained in the specialty of elder mediation are sensitized and oriented to helping families navigate the intricate life issues facing older people and their families.

Elder mediators require specific knowledge and training to enable them to sensitively and skilfully support families and individuals in these important conversations. (For information in relation to the EMIN Certified elder mediator training and accreditation requirements, see <http://elder-mediation-international.net/become-elder-mediator/>.)

Elder mediators must be knowledgeable of, and comply with, the EMIN Safeguarding Vulnerable Adults: Guidelines for Elder Mediators - see <https://elder-mediation-international.net>.

Elder mediators are entitled to use the Cert.EM designation and the EMIN and EMAN logos indicating to those who use their service that they are knowledgeable in aging and age-related issues, have highly developed competencies, are sensitive and empathic and that their practice is informed and underpinned by an appropriate range of models and styles of mediation.

15 Safeguarding Vulnerable Adults (SVA) Guidelines

(1) Purpose and Scope of Guidelines

The purpose of these Safeguarding Vulnerable Adults (SVA) Guidelines is to enable a consistent and appropriate approach by EMIN Certified elder mediators to ensure that vulnerable adults are supported and enabled in the Elder Mediation process and protected from actual and potential abuse.

These Guidelines apply to all EMIN certified elder mediators and should be followed in tandem with the EMIN Code of Ethics to guide and inform elder mediators in practice.

(2) Definitions and Descriptions

EMIN understands that different jurisdictions may have specific definitions in relation to relevant terms and that these jurisdictional terms may differ from EMIN definitions. Where

this is the case, the jurisdictional definition will apply to elder mediators practicing in that jurisdiction. Where there is no jurisdictional-specific definition of a term, the EMIN definition will apply.

(a) Abuse and Elder Abuse

Abuse may be defined as any act, or failure to act, which results in a breach of a vulnerable person's human rights, civil liberties, physical or mental integrity, dignity or general well-being, whether intended or through negligence, including sexual relationships or financial transactions to which the person does not or cannot validly consent, or which are deliberately exploitative. Abuse involves an abuse or misuse of power and may take a variety of forms.

The World Health Organization defines elder abuse as a single or repeated act, or lack of appropriate action, occurring in any relationship where there is an expectation of trust that causes harm or distress to an older person.

There are several forms of elder abuse, any or all of which may be perpetrated as the result of deliberate intent, negligence or lack of insight and ignorance. A person may experience more than one form of abuse at any one time.

The following are the main categories/types of abuse:

- i. **Physical abuse** includes any inappropriate physical contact – including pushing, slapping, hitting, kicking – misuse of medication, restraints or inappropriate sanctions.
- ii. **Sexual abuse** includes any form of unwelcomed verbal, non-verbal or physical conduct of a sexual nature or sexual acts to which the vulnerable person has not freely consented, and may consist of acts, requests, gestures or the display of written words or other media.
- iii. **Psychological abuse** includes emotional abuse, threats of harm or abandonment, deprivation of contact, humiliation, blaming, controlling, intimidation, coercion, harassment, verbal abuse, isolation or withdrawal from services or supportive networks.
- iv. **Financial or material abuse** includes theft, fraud, exploitation, pressure in connection with wills, property, inheritance or financial transactions, or the misuse or misappropriation of property, possessions or benefits.
- v. **Neglect and acts of omission** includes ignoring medical or physical care needs, failure to provide access to appropriate health, social care or educational services, the withholding of the necessities of life such as medication,

- adequate nutrition, clothing and heating or cooling (depending on climate).
- vi. **Discriminatory abuse** includes ageism, racism, sexism, that based on a person's disability, and other forms of harassment, slurs or similar treatment.
 - vii. **Institutional abuse** may occur within residential care and acute settings including nursing homes, acute hospitals and any other in-patient settings, and may involve poor standards of care, rigid routines, inadequate responses to complex needs or poor medical / clinical care.

(3) Ageism

Ageism is the stereotyping, prejudice or discrimination against people on the basis of their age. It is widespread and an insidious practice that has harmful effects on the quality of life and wellbeing of older adults.

Ageist ideas are often ingrained and systemic and can inhibit people's objectivity and inform decisions at the individual and family level, the organization and community level, and at government and societal levels.

(4) Elder Mediation

Elder Mediation is a focused, respectful process – usually multi-party, multi-issue and intergenerational - whereby a trained elder mediator facilitates discussions focusing on present strengths and assists participants in exploring any issues or concerns to enhance the quality of life and wellness of the older person(s), while respecting the needs of each participant. This form of mediation often involves many people related to the issues, including family members, caregivers, organizations, agencies and a variety of service providers and networks.

Elder Mediation is based on a wellness model that promotes a person-centred approach for all participants; it is mindful of the older person(s) while respecting the rights of each person participating. Through the Elder Mediation lens, aging is viewed as part of a continuing process of development and change, rather than just a period of physical and cognitive decline.

(5) Elder Mediator

An elder mediator is a person who is professionally trained and certified in Elder Mediation theories and practices including its preventive and wellness aspects. The elder mediator facilitates communication among the participants and assists them toward mutually beneficial outcomes.

(6) Empowerment

Empowerment means actively upholding the right to self-determination of the vulnerable adult and / or the older person by using proactive interventions to enable their voice and to ensure that their wishes and preferences are understood and honoured.

(7) Safeguarding

Safeguarding means to prevent harm and reduce the risk of abuse or neglect, including self-neglect, of adults with care and support needs in a manner that supports the individual in having control over how they live their lives and which enhances their quality of life on a physical, emotional, intellectual, social or spiritual level.

(8) Self-neglect

Self-neglect is the inability or unwillingness to provide for oneself the goods and services needed to live safely and independently or to perform essential self-care tasks.

(9) Vulnerable adult

For the purposes of these Guidelines, a vulnerable adult is an adult who may be vulnerable to abuse due to a compromised capacity on their part to guard themselves against harm or exploitation. A person's capacity may be compromised due to many reasons, for example, due to a particular diagnosis or due to the nature of their relationship with a family member. It must not be assumed that an adult with a disability, or an older adult, is necessarily vulnerable. However, it is important to identify any added risk factors that may increase a person's vulnerability.

Context and/or individual circumstances may contribute to vulnerability to abuse.

3. The Role of the elder mediator in Safeguarding Vulnerable Adults

The role of the elder mediator is to enable and empower all of the participants in the elder mediation process and to promote wellbeing through preventative measures. The role of the elder mediator in safeguarding vulnerable adults in the elder mediation process has a number of elements including:

- (1) To actively promote the dignity and quality of life, and the human and civil rights, of the vulnerable adult
- (2) To be aware of, and adhere to, any relevant jurisdictional procedures and/or protocols in relation to safeguarding vulnerable adults – particularly in relation to the reporting of suspected and/or identified abuse of a vulnerable adult.
- (3) To embed preventative measures and strategies in the elder mediation process so as to safeguard vulnerable adults from future abuse and/or abusive practices.
- (4) To fully comply with the EMIN Code of Ethics and these EMIN SVA Guidelines to ensure the safeguarding of vulnerable adults from all forms of abuse and, where the jurisdictional SVA requirements exceed those of EMIN, to work in accordance with those requirements.

3.1 Boundaries of the Elder Mediator Role

As the elder mediator must not provide expert advice within the elder mediation process – financial, legal, clinical etc. – they should be aware of community resources appropriate for referral. For example, where capacity or abuse assessment is required, the elder mediator should refer on to an appropriate service or process rather than potentially compromise their role as elder mediator, so that they can continue or reconvene the elder mediation process, where appropriate.

3.2 Clarity and Transparency

At the outset of the Elder Mediation process, the elder mediator must make it clear to all participants in the mediation that confidentiality does not apply to information that discloses actual or potential abuse of vulnerable adults and that they, as elder mediators, are not neutral in issues of abuse.

The elder mediator should refer to the EMIN Code of Ethics and SVA Guidelines in their Agreement to Mediate and, if there are any particular SVA jurisdictional requirements that exceed EMIN requirements, these too should be referred to in the Agreement to Mediate and discussed with the participants at the outset of the process.

3.3 Where Abuse is Identified or Suspected

Where an elder mediator is informed of, or suspects, the possible abuse of a vulnerable adult:

- (1) They should listen carefully if a vulnerable adult or third party describes or discloses apparent abuse.
- (2) They should use appropriate questions to surface issues and/or explore the situation

- (3) They should observe, listen for and ask about risk factors for abuse
- (4) They are bound to step out of a neutral role and to act to protect the vulnerable adult in the event that they become aware of abuse or suspected abuse.
- (5) They have a duty – in many jurisdictions a statutory duty – to report past and present abuse, and threats of future abuse or harm, of a vulnerable adult.
- (6) If they become aware of, or suspect, abuse of a vulnerable adult, they should terminate the mediation, without naming the abuse, and contact the appropriate service or authority to ensure the protection of the vulnerable adult. Where appropriate, and where the elder mediator has appropriate education and training to mediate in matters concerning the lower end of abuse, they may adapt their process to continue with the elder mediation. See 4 *Preventative Measures* below for further information.
- (7) They must ensure that any agreements reached in a case involving abuse are products of genuine agreement and not merely the product of financial or psychological vulnerability.

3.4 SVA Guiding Principles

The following guiding principles underpin the role of the elder mediator in supporting vulnerable adults in Elder Mediation.

(1) Respect for the vulnerable adult

Respect for the personal values, priorities, goals and lifestyle choices of the vulnerable adult.

(2) Self-determination

Vulnerable adults have the right to make decisions, including choices others might consider risky or unwise. The elder mediator must find appropriate ways to include the voice of the vulnerable adult in any decisions that that may impact them.

(4) Confidentiality and privacy rights

In most situations, you should seek consent before sharing another person's personal information or taking action on their behalf.

(4) Counter ageism

Ageism is often at the heart of abuse or neglect and can present in Elder Mediation in explicit and implicit ways. elder mediators counter ageism by modelling respect, inclusion and equality and ensuring the voice of the older person is heard and respected.

(5) Uphold rights

An appropriate response to abuse, neglect, or risk of abuse or neglect should respect the legal and civil rights of the older adult, while addressing the need for support, assistance, or protection in practical ways.

(6) Be informed

The elder mediator should have a good working knowledge of elder abuse, neglect, and exploitation and be knowledgeable of the warning signs. (See 4 *Preventative Measures* below). They must also be knowledgeable of any relevant jurisdictional requirements.

(7) Do no harm

‘Do no harm’ is to avoid additional risks to the vulnerable adult through our action or inaction as an elder mediator, thus the focus is on outcome rather than intention of action or inaction. ‘Do no harm’ means taking a step back from an intervention to look at the broader context including the involvement of relevant stakeholders to mitigate potential negative effects and encourage positive effects on the dignity and wellbeing of the vulnerable adult.

Harm can result from the lack of action and so, in Elder Mediation, doing no harm requires lifelong learning on the part of the elder mediator so that they are equipped to appropriately support and enable the participants to make informed decisions that promote the quality of life and wellbeing of the vulnerable adult.

4. Preventative Measures

4.1 Aim of preventative measures

The aim of these preventative measures is to ensure the safety and dignity of vulnerable adults both during and outside of the Elder Mediation process, especially in relation to caregiving and support and in their day-to-day relationships and activities.

4.2 Measures to Detect and Prevent Elder Abuse

(1) Creating a ‘frame’ and opportunities

Creating an environment or frame where all participants, in particular the vulnerable adult, can express themselves freely and safely and supporting them in voicing feelings of unease or fear or concerns about harm or abuse.

(2) Treating the vulnerable adult with dignity while providing security and safety

Treating the vulnerable adult with dignity while taking account of their wishes, abilities, and needs in a person-centred approach, while also respecting the needs of the other participants and adopting an attitude and behaviour that supports all participants in feeling safe and secure within the process.

(3) Observing

Observing the behaviour of the vulnerable adult and of all the participants and their interactions. This requires being on the outlook for signs of unease, anxiety, fear or shame on the part of the vulnerable adult, and signs of harm done or of abuse including verbal, physical, and cognitive or emotional signs.

(4) Questioning and clarifying

When signs at the lower end of the harm or abuse scale are visible and the vulnerable adult does not or cannot address or express their concerns, questioning them sensitively and individually about how they feel about the situation and the behaviour of the involved persons and participants may be required or/and undertaking further clarifications depending on the situation.

(5) Intervening to provide or (re)establish security and dignity during mediation

Intervening in order to ensure, as far as possible, or to (re)establish the security, safety and dignity of the vulnerable adult if signs at the lower end of the harm or abuse scale or lack of dignity or safety become visible and apparent.

(6) Checking the suitability of the case for mediation

During the initial conversations, exploring the concerns of each participant to establish if the case is suitable for mediation.

(7) Formally intervening to stop elder abuse and (re)establish security and dignity

In cases where there are visible signs of elder abuse or harm to a vulnerable adult at the higher end of the scale, the mediator is required, under EMIN policy, to report the case and to initiate the formal or legal procedures as required in their jurisdiction. Where they can do so without jeopardising the safety of the vulnerable adult, the elder mediator should stop the mediation, or they may continue without the abusive person(s) present if appropriate and in the interests of the vulnerable adult.

(8) Engaging others

To generally prevent elder abuse, EMIN encourages other private and professional support, and caregivers who engage with vulnerable adults, to draw on these preventative measures as appropriate.

4.3 Elder Abuse Warning Signs (red flag Indicators)

(1) Preamble

Abuse of vulnerable adults takes many different forms and types. Signs of elder abuse can be difficult to recognise and may be similar to symptoms of dementia or frailty of the elderly person. Some signs and symptoms of elder abuse do overlap with symptoms of mental deterioration, but that does not mean they should be dismissed.

There are warning signs to look for if elder abuse is suspected. The following sampling of warning signs can help the elder mediator to decide if the case needs to be referred for a professional abuse assessment. It is important that elder mediators work in a network and have access to a resource team where trusted experts can be called upon for specialised expertise.

Please note, the following samples of red flag issues are not a diagnostic instrument. There are warning signs to help the elder mediator to decide if a vulnerable adult may have suffered abuse and, if so, to identify which experts and/or authorities the case should be referred to by the elder mediator.

The elder mediator should refer a case to appropriate experts and/or health professionals for a professional abuse assessment if the elder mediator has reason to suspect that medium to high-level abuser may have occurred.

In severe elder abuse cases the elder mediator must inform social and/or jurisdiction services or the police without delay.

(a) Physical abuse warning signs

- (i) Vulnerable person's self-report
- (ii) Unexplained signs of injury, such as bruises, welts, wounds, or scars, especially if they appear symmetrically on both sides of the body
- (iii) Open cut wounds, abrasions and injuries, especially untreated ones in various stages of healing
- (iv) Signs of being restrained, such as abrasions or rope marks on wrists
- (v) Broken eyeglasses or frames
- (vi) Hair pulled out

- (vii) Burns
- (viii) Bite marks or wounds
- (ix) Broken bones, sprains or dislocations
- (x) A report of drug overdose or an apparent failure to take medication regularly
- (b) Psychological/emotional abuse warning signs
 - (i) The vulnerable person is upset/agitated
 - (ii) The vulnerable person is withdrawn/non-responsive
 - (iii) The vulnerable person appears scared, or you have reasonable cause to believe them to be scared
 - (iv) The vulnerable person rocks, sucks fingers or a cloth, murmurs to themselves
 - (v) The vulnerable person exhibits (other) unusual behaviour
 - (vi) Persons present show threatening, belittling, or controlling behaviour towards the vulnerable person
- (c) Sexual abuse warning signs
 - (i) Bruises around breasts or genitals
 - (ii) Unexplained vaginal or anal bleeding
 - (iii) Torn, stained, or bloody underclothing
 - (iv) Difficulty walking/sitting
 - (v) Detected sexually transmitted disease
- (d) Elder neglect warning signs
 - (i) Body odour/unwashed/dirty body
 - (ii) Faecal/urine odour in the home/accommodation
 - (iii) Unsanitary living conditions, soiled flat, clothes, bedding
 - (iv) Bugs in the flat/house (Lice, Fleas, Roaches, Rodents)
 - (v) Scalded skin from urine
 - (vi) Untreated physical problems, such as bed sores
 - (vii) Malnutrition/dehydration/unusual weight loss
 - (viii) Lack of medical care
 - (ix) Failure to provide medication
 - (x) Lack of essential equipment or devices
 - (xi) Failure to provide essential services and basic care
 - (xii) Inappropriate clothing/unsuitable clothing or bedding for the climate
 - (xiii) Inadequate heating/cooling

- (xiv) Unsafe living conditions and environment (faulty electrical wiring, other fire hazards)
- (xv) Lock/chains on interior doors
- (e) Financial exploitation and fraud warning signs
 - (i) Vulnerable person's self-report
 - (ii) Financial activity undertaken without the vulnerable person's knowledge or permission, such as withdrawals from banks and ATM's, purchases, bank transfers
 - (iii) Unnecessary services, goods or subscriptions have been purchased
 - (iv) New or additional names on signature card(s) and bank accounts
 - (v) Unpaid bills even if adequate funds are there
 - (vi) Forged signatures for transactions
 - (vii) Suspicious changes to wills, power of attorney and/or in banking habits
 - (viii) Sudden or unexplained changes in the financial situation of the vulnerable person
- (f) Healthcare fraud or abuse warning signs
 - (i) Vulnerable person's self-report
 - (ii) Duplicate billings for the same care or medical service or device
 - (iii) Evidence of inadequate care and support when bills are paid in full
 - (iv) Provision of unnecessary services, care or support
 - (v) Poorly trained staff deployed who cannot provide adequate and or needed care, support or services
 - (vi) Inadequate responses to questions about care of the elderly vulnerable person and/or related persons due to lack of training, knowledge or expertise of the deployed staff.

5. Jurisdictional Considerations

The reporting requirements of suspected or known abuse or neglect of a vulnerable adult varies across jurisdictions.

Many jurisdictions have mandatory reporting requirements where abuse of a vulnerable adult is suspected or known to have occurred, or where a vulnerable adult is believed to be at risk of abuse. However, there are differences in relation to who is required to report abuse/suspected abuse, the context of the abuse/suspected abuse, the type and/or level of abuse that requires reporting, the ability of the adult to protect

themselves, and the capacity of the adult to make a decision in relation to the proposed reporting of abuse.

In most jurisdictions, an adult is considered mentally capable unless the contrary is established in accordance with the provisions of the relevant jurisdictional requirements. Significantly, adults with capacity have a right to make decisions that will affect them, even where that decision involves living with, or associating with, someone who may be abusive.

For example, under Irish law, it is a criminal offence to withhold information in relation to a serious offence against a vulnerable adult. However, there are various defences to the withholding of such information, including where the vulnerable adult has made the person aware of their wish for the local authorities not to be informed, provided the vulnerable adult is ‘capable of forming a view on the matter’.

6. Conclusion

Intervening to protect a vulnerable adult while respecting the autonomy and independence of a person who may be in need of protection is central to the EMIN Standard.

Elder mediators are bound to take a person-centred approach in practise that upholds the rights of all participants in the process, in particular the vulnerable adult, to self determination, dignity and quality of life. The EMIN Code of Ethics explicitly recognises the ethical and human right of each person to make choices for themselves. Therefore, the consent of the vulnerable adult should be sought prior to the reporting of a known or suspected offence against them. If the adult is unable to give informed consent, discussion should take place, where appropriate, with their caregiver/guardian and medical or social work services. A person is presumed to have capacity to make decisions in relation to themselves unless they have been assessed by an expert as being unable to do so, and they have a right to make decisions that may be considered against their best interest, even if this means that they remain at risk.

However, the elder mediator is not neutral in issues of abuse and a person in an abusive relationship may need support and assistance in order to consider leaving or reporting an abusive relationship. Elder Mediation is, at its heart, an enabling process. So, while the elder mediator must respect and honour the right of the vulnerable adult to self-determination, they are required to actively support them or their representative to identify resources and to explore their options. However, if you have reason to believe that serious abuse has taken place

or is likely to take place, EMIN elder mediators are required to formally report the abuse.

16 Complaints Commissioner may impose conditions

- (1) The Complaints Commissioner may, by written notice given to an accredited elder mediation practitioner:
 - (a) add a condition to the accreditation; or
 - (b) vary a condition of the accreditation; or
 - (c) revoke a condition of the accreditation.
- (2) A notice under subregulation (1) must include:
 - (a) the Complaints Commissioner's reasons for adding, varying or revoking the condition; and
 - (b) the practitioner's review rights under regulation 24.
- (3) Failure by the Complaints Commissioner to comply with subregulation (2) does not affect the validity of a condition.

Part 4 Suspension or cancellation of accreditation

17 Grounds for suspension or cancellation of accreditation generally

- (1) The Complaints Commissioner may cancel the accreditation of an accredited elder mediation practitioner if the Complaints Commissioner is satisfied that the practitioner:
 - (a) has failed to comply with the Act or any obligation imposed on the practitioner by the Act; or
 - (b) fails to meet the accreditation criteria; or
 - (c) knowingly gave false or misleading information, or failed to disclose material information, in order to be accredited or in purported compliance with a condition of the practitioner's accreditation; or
 - (d) has failed to comply with any condition of the accreditation; or
 - (e) has engaged in conduct that is likely to bring elder mediation into disrepute.

- (2) The Complaints Commissioner may suspend the accreditation of an accredited elder mediation practitioner if the Complaints Commissioner is satisfied that:
 - (a) at least 1 of the grounds mentioned in paragraphs (1) (a), (b), (d) and (e) applies to the practitioner; and
 - (b) the practitioner's failure or conduct can be remedied or mitigated by the practitioner in a reasonable time.

- (3) The Complaints Commissioner may suspend the accreditation of an accredited elder mediation practitioner if the Complaints Commissioner is satisfied that the practitioner has been charged with:
 - (a) an offence that, if the person is convicted, will result in the person:
 - (i) being prohibited under a law of a State or Territory from working with children; or
 - (ii) failing to comply with a law of a State or Territory relating to employment of persons working with children; or
 - (b) an offence mentioned in subregulation 6 (2).

- (4) If the Complaints Commissioner decides to suspend the accreditation of a person under this regulation, the person is not considered to be accredited under the Accreditation Rules for the duration of the suspension.
- (5) In this regulation:
conduct includes an omission or failure to act.

18 Grounds for immediate cancellation of accreditation

The Complaints Commissioner may immediately cancel the accreditation of an accredited elder mediation practitioner if the practitioner:

- (a) is prohibited under a law of a State or Territory from working with children; or
- (b) has been convicted of an offence the substance of which is a failure by the practitioner to comply with a law of a State or Territory relating to employment of persons working with children; or
- (c) has been convicted of an offence mentioned in subregulation 6 (2).

Note The Complaints Commissioner is not required to undertake the show cause process set out in regulation 19 if satisfied that at least 1 of these grounds applies.

19 Notice to show cause

- (1) Before making a decision under regulation 17 to suspend or cancel a person's accreditation, the Complaints Commissioner must:
 - (a) tell the person, in writing, of the Complaints Commissioner's opinion and the reasons for the opinion; and
 - (b) ask the person to show cause, in writing, within a specified period of at least 28 days after receipt of the notice, why the accreditation should not be suspended or cancelled.
- (2) The Complaints Commissioner must not make a decision under regulation 17 until the earlier of the following:
 - (a) when the person responds to the notice.
 - (b) the end of the period specified in the notice.

20 Notice of suspension

If the Complaints Commissioner decides to suspend a person's accreditation, the Complaints Commissioner must give the person written notice of the suspension stating:

- (a) the reasons for, and the effect of, the suspension; and
- (b) the date when the suspension takes effect; and
- (c) either:
 - (i) the date when the suspension ends; or
 - (ii) what the person must do, or the event that must occur, to end the suspension; and
- (d) the person's review rights under regulation 24.

21 Notice of cancellation

If the Complaints Commissioner decides to cancel a person's accreditation, the Complaints Commissioner must give the person written notice of the cancellation stating:

- (a) the reasons for, and the effect of, the cancellation; and
- (b) the date when the cancellation takes effect; and
- (c) the person's review rights under regulation 24.

22 Automatic suspension and cancellation

- (1) The Complaints Commissioner must suspend a person's accreditation if the person requests the Complaints Commissioner, in writing, to do so, for the period, or until the happening of an event, specified by the person.
- (2) The Complaints Commissioner must cancel a person's accreditation if:
 - (a) the person requests the Complaints Commissioner, in writing, to do so; or
 - (b) the person dies.

Part 5 Offences

23 Offences

- (1) A person is guilty of an offence if the person fails to notify the Complaints Commissioner of a change or matter in accordance with paragraph 13 (b).

Penalty: 10 penalty units.

- (2) A person is guilty of an offence if the person fails to notify the Complaints Commissioner of a change or matter in accordance with paragraph 13 (c).

Penalty: 10 penalty units.

- (3) An offence against subregulation (1) or (2) is an offence of strict liability.

Part 6 Review of decisions

24 Review by AAT

An application may be made to the Administrative Appeals Tribunal for the review of the following decisions:

- (a) a decision, under subregulation 11 (1), that a person does not meet accreditation criteria;
- (b) a decision, under subregulation 16 (1), to add, vary or revoke a condition to an accredited elder mediation practitioner's accreditation;
- (c) a decision, under regulation 17 or 18, to suspend or cancel the accreditation of an accredited elder mediation practitioner.

Part 7 Elder Mediation Practitioners

25 Elder mediation practitioners — assessment of elder mediation suitability

- (1) Before providing elder mediation under the Act, the elder mediation practitioner to whom a dispute is referred must be satisfied that:
 - (a) an assessment has been conducted of the parties to the dispute; and
 - (b) elder mediation is appropriate.
- (2) In determining whether elder mediation is appropriate, the elder mediation practitioner must be satisfied that consideration has been given to whether the ability of any party to negotiate freely in the dispute is affected by any of the following matters:
 - (a) a history of elder violence (if any) among the parties;
 - (b) the likely safety of the parties;
 - (c) the equality of bargaining power among the parties;
 - (d) the risk that a party may suffer abuse;
 - (e) the emotional, psychological and physical health of the parties;
 - (f) any other matter that the elder mediation practitioner considers relevant to the proposed elder mediation.
- (3) If, after considering the matters set out in subregulation (2), the elder mediation practitioner is satisfied that elder mediation is appropriate then, subject to regulations 27 and 29, the elder mediation practitioner may provide elder mediation.
- (4) If, after considering the matters set out in subregulation (2), the elder mediation practitioner is not satisfied that elder mediation is appropriate, the elder mediation practitioner must not provide elder mediation.

26 Elder mediation practitioner certificates

- (1) For subsection **XXX (X)** of the Act, an applicant may file a certificate only within 12 months after the latest elder mediation or attempted elder mediation.
- (2) The practitioner may give a certificate under paragraph **XXX (X) (XX)** of the Act only after having regard to the matters mentioned in subregulation 24 (2).

- (3) An elder mediation practitioner must not give a certificate under subsection **XXX (X)** of the Act to a person more than 12 months after the person last attended, or attempted to attend, elder mediation about the issue or issues that the order, for which the application was made, would deal with.
- (4) An elder mediation practitioner may give a certificate under paragraph **XXX (X) (X)** of the Act only if the practitioner, or a person acting for the practitioner, has, at least twice, contacted each party who has failed to attend, with at least 1 contact in writing:
 - (a) giving the party a reasonable choice of days and times for attendance at elder mediation; and
 - (b) telling the party that, if the party does not attend elder mediation:
 - (i) the practitioner may give a certificate under paragraph **XXX (X) (X)** of the Act; and
 - (ii) the certificate may be taken into account by the Complaints Commissioner to determine whether the dispute should go to the AAT for resolution.
- (5) If the elder mediation practitioner who is entitled to give a certificate under subsection **XXX (X)** of the Act becomes incapable of giving the certificate, the certificate may be given on behalf of the practitioner by an organisation for which the practitioner has provided elder mediation services.

Examples of incapacity

Death of the practitioner, loss of accreditation, inability to be contacted.

27 Certificate by elder mediation practitioner (Act s **XXX (X))**

- (1) A certificate that may be given by an elder mediation practitioner under subsection **XXX (X)** of the Act must be in accordance with the form in Schedule 1.
- (2) The validity of:
 - (a) proceedings on an application for an order under Part VII of the Act; or
 - (b) any order made in those proceedings;is not affected by a failure to comply with subregulation (1).

28 Information to be given to parties before elder mediation

- (1) Before elder mediation is started under subregulation 24 (3), each party to the elder mediation must be given the following information:
- (a) that it is not the role of the elder mediation practitioner to give people legal advice (unless the elder mediation practitioner is also a legal practitioner);
 - (b) the elder mediation practitioner’s confidentiality and disclosure obligations under section XXX of the Act;
 - (c) that, provided section XXX of the Act applies, evidence of anything said, or an admission made, at elder mediation is not admissible:
 - (i) in any court (whether exercising federal jurisdiction or not); or
 - (ii) in any proceedings before a person authorised by a law of the Commonwealth or a State or Territory, or by the consent of the parties, to hear evidence;
 - (d) the qualifications of the elder mediation practitioner to be an elder mediation practitioner;
 - (e) the fees (including any hourly rate) charged by the elder mediation practitioner in respect of the elder mediation;
 - (f) that elder mediation must be attended if required under section XXX of the Act, before applying for an order under Part XXX of the Act;
 - (g) that, if a person wants to apply to the court for an order under Part VII of the Act, the elder mediation practitioner may provide a certificate under subsection XXX(X) of the Act, including a certificate to the effect that the person:
 - (i) did not attend elder mediation due to the refusal, or the failure, of the other party or parties to the proceedings to attend; or
 - (ii) attended elder mediation with the other party or parties to the proceedings but that the person, the other party or another of the parties did not make a genuine effort to resolve the issue or issues;
 - (h) if a certificate under subsection XXX (X) of the Act is filed, the Complaints Commissioner may take it into account in considering whether to send the matter to the AAT for resolution.
 - (i) information about the complaints mechanism that a person who wants to complain about the elder mediation services may use.

Note 1 Paragraphs (b) and (c) outline the general rule that communications during elder mediation are confidential and not admissible in court.

However, sections 10H and 10J of the Act specify exceptions to the general rule when disclosure by an elder mediation practitioner is permitted.

- (2) An elder mediation practitioner must not start elder mediation until subregulation (1) is complied with.

29 Obligations of elder mediation practitioner — general

In providing elder mediation services under the Act, an elder mediation practitioner:

- (a) must ensure that, as far as possible, the elder mediation process is suited to the needs of the parties involved (for example, by ensuring the suitability of the elder mediation venue, the layout of the elder mediation room and the times at which elder mediation is held); and
- (b) must ensure that:
 - (i) elder mediation is provided only in accordance with this Part; and
 - (ii) any record of the elder mediation is stored securely to prevent unauthorised access to it; and
- (c) must terminate the elder mediation:
 - (i) if requested to do so by a party; or
 - (ii) if the elder mediation practitioner is no longer satisfied that elder mediation is appropriate; and
- (d) must not provide legal advice to any of the parties unless:
 - (i) the elder mediation practitioner is also a legal practitioner; or
 - (ii) the advice is about procedural matters; and
- (e) must not use any information acquired from an elder mediation:
 - (i) for personal gain; or
 - (ii) to the detriment of any person.

30 Obligations of elder mediation practitioner — avoidance of conflicts of interests

- (1) This regulation applies if, in relation to a person who is a party to a dispute that is the subject of elder mediation, or any other party to that dispute, an elder mediation practitioner:
 - (a) has acted previously in a professional capacity (otherwise than as an elder mediation practitioner, an elder counsellor or an arbitrator); or
 - (b) has had a previous commercial dealing; or
 - (c) is a personal acquaintance.

- (2) An elder mediation practitioner may provide elder mediation services to a party mentioned in subregulation (1) only if:
- (a) each party to the elder mediation agrees; and
 - (b) the previous professional dealing (if any) does not relate to any issue in the dispute; and
 - (c) the previous commercial dealing or acquaintance (if any) is not of a kind that could reasonably be expected to influence the elder mediation practitioner in the provision of his or her elder mediation services.

Schedule 1 Certificate by elder mediation practitioner

(regulation 27)

Certificate by elder mediation practitioner — section XXX of the Aged Care Act 2024 (Cth)

Dispute about matters that may be dealt with under Part XXX of the Act between

(parties)

in relation to

(issues in dispute)

I, _____, (*Name of elder mediation practitioner)

state (*select only one of the following paragraphs*):

(a) _____ (*party or parties*) did not attend elder mediation with me and the other party or parties to the proceedings but that person's failure to do so was due to the refusal, or the failure, of the other party or parties to the proceedings to attend.

(b) _____ (*party or parties*) did not attend elder mediation with me and the other party or parties to the proceedings because I consider, having regard to the matters mentioned in subregulation 25 (2), that it would not be appropriate to conduct the proposed elder mediation.

(c) _____ (*parties*) attended elder mediation with me and all attendees made a genuine effort to resolve the issue or issues in dispute.

(d) _____ (party or parties) attended elder mediation with me and the other party or parties to the proceedings but _____ (party or parties) did not make a genuine effort to resolve the issue or issues in dispute.

(e) _____ (party or parties) began attending elder mediation with me and the other party or parties to the proceedings but I consider, having regard to the matters mentioned in subregulation 25 (2), that it would not be appropriate to continue the elder mediation.

_____ (*Name of elder mediation practitioner)

_____ (**Signature of elder mediation practitioner)

_____ (Registration number)

_____ (Organisation, if applicable)

_____ (Date of certificate)

_____ (Date of last attempted attendance at elder mediation (for (a) or (b)))

OR

_____ (Date of last attendance at elder mediation (for (c), (d) or (e)))

*The elder mediation practitioner has the discretion to give, or not to give, his or her surname.

**The elder mediation practitioner has the discretion to sign, or not to sign, the certificate.

Notes to the *Aged Care (Elder Mediation Practitioners) Regulations 2024*

Note 1

Aged Care (Elder Mediation Practitioners) Regulations 2024 (in force under the *Aged Care Act 2024*) as shown in this compilation comprise Select Legislative Instrument **XXX** No. **XXX** amended as indicated in the Tables below.

Table of Instruments

Table of Instruments

Year and Number	Date of XXX registration	Date of commencement	Application, saving or transitional provisions
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Year and Number	Date of XXX registration	Date of commencement	Application, saving or transitional provisions
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Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Schedule 1	

APPENDIX C

ELDERCARING COORDINATION

(FROM THE ASSOCIATION FOR CONFLICT RESOLUTION TASK FORCE)

1. DEFINITION OF ELDERCARING COORDINATION

Eldercaring Coordination is a dispute resolution process during which an Eldercaring Coordinator (EC) assists elders, legally authorized decision-makers, and others who participate by court order or invitation to resolve disputes with high conflict levels that impact the elder's autonomy or safety by:

- Enabling more effective communication, negotiation, problem-solving skills
- Offering education about elder care resources
- Facilitating creation, modification, or implementation of eldercaring plans
- Making recommendations for resolutions, and
- Making decisions within scope of court order or with parties' prior approval.

An Eldercaring Coordinator (EC) is a high conflict family dispute resolution specialist.

2. GOALS OF ELDERCARING COORDINATION

1. Safety and well-being of the Elder – *protect the elder from conflict.*
2. Reduce family conflict.
3. Improve family communication and problem solving for best interests of the elder.
4. Develop family support systems.

3. BENEFITS OF ELDERCARING COORDINATION:

- Cost savings
- Fewer motions/Fewer delays
- Focus on safety
- Trauma-informed, person-centered process
- Expanded options
- More efficient service delivery – avoids duplication
- Developing support system
- Potential to reallocate \$ resources
- Self-determination to the extent possible
- Cognitive shifts
- Heightened awareness/use of elder mediation

4. HOW IS ELDERCARING COORDINATION DIFFERENT TO ELDER MEDIATION?

Families suitable for **Elder Mediation** are ***issue driven***: they may need help, but are motivated to come together voluntarily to resolve issues. An elder mediator listens to concerns and interests to assist the family in finding resolutions.

Once the issue is settled in mediation, the conflict will likely subside. If the conflict continues, it may be an indication Eldercaring Coordination may be better suited.

In **Eldercaring Coordination, the dispute is *high level conflict driven***. These family members are not able to move from their personal unresolved issues and are more motivated toward punishment and revenge than reconciliation and resolution.

Eldercaring Coordination shifts the focus from personal agendas to the elder's needs, preferences and wishes by creating series of small doable steps to that recognize the strengths of each individual wanting to help. The process is flexible and changes, responding to the most current circumstances and needs of the older adult. Conflict reduces as the family shares information and sees progress.

Eldercaring Coordinators **do not** provide or arrange for the actual care services. The elder, to the extent possible, and the elder's legally authorized decision-makers, and the family members are responsible to ensure the care and safety of the elder. Eldercaring Coordination provides them with a model to do so more effectively and with less stress.

Eldercaring Coordination does not replace, but complements, the work of other professionals with the family.

ECs help families develop a support system and identify resources to assist them, such as:

- Elder Law
- Mediation
- Therapy
- Aging Life Care Management
- Adult Guardianship/Conservatorship
- Evaluation
- Others

The EC helps the family members understand the differences between processes and makes sure that the professionals are clear about their purpose, roles, and boundaries.

5. SPECIFIC CHARACTERISTICS OF ELDERCARE COORDINATION IN THE UNITED STATES:

- Conflict drives the process.
- **Court ordered for a term of up to 2 years.**
- Addresses non-legal issues.
- Family dynamics are central to elder's care and well-being.
- Primary focus on addressing conflict.
- Ongoing screening.
- Makes sure all voices are heard while elder's remains prominent.
- Recommendations/HOW.
- Process decisions.

6. ADVANTAGES OF COURT ORDER OF REFERRAL FOR ELDERCARING COORDINATION

Provides accountability for the process and is:

- Protective for parties
 - Quality control
 - Complaints procedure
- Protective for the EC
 - Details role
 - Explains limitations
- Protective for the court
 - Expectations managed
 - Reduces time spent on non-legal issues.

7. ELDERCARING COORDINATOR ONLINE TRAINING (28 HOURS) ELIGIBILITY REQUIREMENTS TO PRACTICE IN AUSTRALIA:

- **A minimum of 3 years practical experience** in a profession that provides education, training and expertise in managing high conflict within families.
- **Family Mediation Education and Training:** At least one of the following qualifications:
 - Accreditation by the Australian Attorney-General's Department as a Family Dispute Resolution Practitioner
 - Attainment of a one-year graduate diploma in family mediation
 - An approved Family Dispute Resolution Practitioner in New Zealand.
- Completion of a minimum of **20 hours of elder mediation training** by an Elder Mediation International Network (EMIN) Certified Elder Mediator (Advanced) which contributes to the Elder Mediator Certification requirements of the Elder Mediation Australasian Network (EMAN) and (EMIN).

8. CURRENT ELDERCARING COORDINATION RESEARCH PROJECT IN SOUTH AUSTRALIA (NOVEMBER 2022 - DECEMBER 2024).

A partnership between the University of South Australia and Relationships Australia South Australia – see the brochure in ATTACHMENT D.

Contact Professor Dale Bagshaw (dale.bagshaw@unisa.edu.au) for more information.

Picture a compassionate response to family conflict related to the care and safety of an ageing loved one...

Eldercaring Coordination reduces conflict among family members so they can work together more productively and focus on the ageing person's care.

Anyone can refer a case for Eldercaring Coordination when there are:

- concerns about an ageing person's care and safety
- imbalances of power
- frequent disputes about unsubstantiated issues
- possessive or controlling behaviors toward the ageing person.

Eldercaring Coordination maintains the focus of the family on the ageing person rather than their disputes.

Eldercaring Coordinators can help:

- manage high conflict family dynamics
- support the ageing person's self-determination for as long as possible
- promote safety by monitoring at-risk situations
- develop a support system for the ageing person and family.

How is Eldercaring Coordination initiated?

Eldercaring coordination begins with a referral to:

Eldercaringcoordination@rasa.org.au or by phoning: (08) 8419 2000

Once the EC and family members make contact, the EC conducts an intake to plan for the process and help the participants feel safe and comfortable.

Contact us

Email: Eldercaringcoordination@rasa.org.au

Phone: (08) 8419 2000

Please leave your name and contact number for someone to call you back.

For more information on ECC

www.eldercaringcoordination.com

The Eldercaring Coordination Pilot is a partnership between Relationships Australia SA and University of South Australia. It is serviced by Adelaide and Northern Family Relationship Centres in South Australia.

Eldercaring Coordination

A dispute resolution option for high conflict families that need decisions regarding the care and safety of ageing persons.



Relationships Australia.

SOUTH AUSTRALIA
Page 76 of 96

What is Eldercaring Coordination?

Eldercaring Coordination is a process for ageing persons and their families that helps resolve disputes regarding ageing persons' autonomy and safety.

What does an Eldercaring Coordinator (EC) do?

- Enables more effective communication, negotiation and problem-solving skills
- Offers education about care resources
- Facilitates the creation and implementation of an ageing person's care plan
- Recommends how to resolve non-legal conflict

How often do participants in the Eldercaring Coordination process meet with the EC?

Sessions are scheduled according to the unique needs of each family to help resolve non-legal issues. Session frequency decreases when family members can productively communicate to develop and implement an ageing person's care plan. The EC remains available so that the family can address non-legal issues as needed.

Who pays for the service?

This is currently a free pilot project offered by Relationships Australia SA.

Why shouldn't these families just go to mediation?

While many families can resolve their issues through mediation, high conflict families are unable to concentrate on the issues at hand. These are the cases appropriate for Eldercaring Coordination, where specially trained Eldercaring Coordinators (ECs) help families manage conflict, reduce tension, and overcome entrenched hostilities. Families may use mediation after participating in eldercaring coordination when they are better able to focus on the issues impacting their ageing loved one.



Should parties have a lawyer during the Eldercaring Coordination process?

While participants in eldercaring coordination may have a lawyer, lawyers are not required. Eldercaring Coordination is intended to be a confidential process, meaning that what is discussed during sessions is not to be offered as evidence in any court or tribunal. Lawyers may be invited by the EC to attend sessions, with the understanding that their approach will be collaborative.

Then what happens?

After the intake, the EC helps family members reduce conflict and focus on the needs, wishes, care, and safety of the ageing person. The EC helps the family develop and implement a care plan that is flexible enough to change with the needs of the ageing person and family members. Solutions focus on family strengths to provide for the ageing person's needs. Once family members begin to collaborate, they are better able to work with other resources to care for their ageing loved one. Through the process of Eldercaring Coordination, families can save time and money, preserve their privacy, elevate the ageing person's dignity, and pass on a legacy of peace to future generations.

*Picture a
compassionate court-
alternative response
to family conflict
related to the care and
safety of an ageing
loved one . . .*



ELDERCARING COORDINATION

. . . a dispute resolution option for **high conflict families** that turn to the courts for decisions regarding the care and safety of ageing persons

The court may refer a case for eldercaring coordination when there are:

- Multiple court motions raising non-legal issues
- Concerns about an ageing person's care and safety
- Imbalances of power where only some parties have legal representation
- Frequent disputes about unmeasurable or unsubstantiated issues
- Possessive or controlling behaviors toward the ageing person

FOR YOU AND
YOUR FAMILY

ELDERCARINGCOORDINATION.COM

Eldercaring coordination reduces conflict among family members so they can work together more productively and focus on the ageing person's care.

Eldercaring Coordinators:

- Manage high conflict family dynamics
- Support the ageing person's self-determination for as long as possible
- Promote safety by monitoring at-risk situations
- Develop a support system for the ageing person and family



“Eldercaring Coordination maintains the focus of the family on the ageing person rather than their disputes.”

– Florida Attorney

Eldercaring Coordination can help you avoid a court battle when your ageing loved one and your family most need peace!

Referrals to eldercaring coordination come from the court, although they also may be identified by Adult Protective Services or a similar government office; requested by parties, guardians and attorneys; or recommended by other professionals working with the family.



FOR MORE INFORMATION CONTACT THE ELDERCARING COORDINATION INITIATIVE CO-CHAIRS:

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Association for Conflict Resolution (ACR) Elder Justice Initiative on Eldercaring Coordination

FREQUENTLY ASKED QUESTIONS

What is Eldercaring Coordination?

Eldercaring coordination is a court-ordered process for ageing persons and their families, legally authorized decision-makers, and others who are court-ordered or invited to participate, that helps resolve disputes regarding ageing persons' autonomy and safety.

What does an Eldercaring Coordinator (EC) do?

An EC:

- Enables more effective communication, negotiation and problem-solving skills;
- Offers education about care resources;
- Facilitates the creation and implementation of an ageing person's care plan;
- Recommends how to resolve non-legal conflict; and
- Makes decisions within the scope of a court order or with the parties' prior approval.

Who is an Eldercaring Coordinator (EC)?

An EC is a highly qualified conflict resolution specialist, licensed or certified by a regulatory body of a jurisdiction, state or province, who has completed:

- A master's degree;
- Three years of post-licensure or post-certification practice;
- A family mediation training program certified by the circuit, state or province;
- An elder mediation training program that meets the standards approved and adopted by the Association for Conflict Resolution; and
- An Eldercaring Coordination training program that meets the criteria within the ACR Guidelines for Eldercaring Coordination.

Why is all that training necessary?

Family conflicts about the care of an ageing person delays needed decision-making, impedes medical treatment and increases safety risks for the ageing person. An EC must be well-prepared to help resolve high conflict family situations, which may include family members who escalate disputes, frequently file complaints and initiate adversarial actions. The EC is a conflict resolution specialist who helps participants focus on the ageing person rather than their resentments toward each other so the family can work with appropriate experts to meet the needs of the ageing person.

“This was the best Father’s Day we’d had in a long time!”

– Adult children appreciative of the eldercaring coordination process

Who pays for the work of the EC?

The family shares the cost of the EC, reducing time and money spent compared to frequent litigation. The court determines how the EC's fees are split among the family members and participants, decreasing the overall court-related costs that might be borne by each person in paying for lawyers and experts to litigate the same conflicts. Attorneys continue to represent their respective clients to help with legal issues as needed. Participants are informed if there are grants or scholarships available to defray costs.

How often do participants in the eldercaring coordination process meet with the EC?

Eldercaring coordination may continue for up to two years to assist with the transitions that families may experience in caring for an ageing person. Sessions are scheduled according to the unique needs of each family to help resolve non-legal issues, without the delays and lack of privacy experienced in court. Session frequency decreases when family members can productively communicate to develop and implement an ageing person's care plan. The EC remains available so that the family can address non-legal issues as needed without returning to court.

Who developed the Guidelines for Eldercaring Coordination?

The Guidelines for Eldercaring Coordination were developed by the Association for Conflict Resolution Task Force and the twenty organizations that composed the Florida Chapter of the Association of Family and Conciliation Courts Task Force. This was a ground-breaking collaboration of national and international organizations to improve the lives of ageing persons and families involved in high conflict litigation.

ACR TASK FORCE MEMBERS



Alternative Dispute Resolution Institute of Canada
American Association for Marriage and Family Therapy
American Bar Association Commission on Law and Aging
American Bar Association Dispute Resolution Section
American Psychological Association
Association of American Retired Persons
Association of Conflict Resolution
Association of Family and Conciliation Courts
Elder Justice Coalition
National Academy of Elder Law Attorneys
National Adult Protective Services Association
National Aging Life Care Association
National Association of Area Agencies on Aging
National Association of Social Workers
National Center for State Courts
National Committee on the Prevention of Elder Abuse
National College of Probate Judges
National Council of Juvenile and Family Court Judges
National Guardianship Association
National Guardianship Network

I heard that this project is being researched. Why is research important?

Ongoing research by an independent team at Virginia Tech University ensures that appropriate eldercaring coordination practices are being developed and implemented to meet the needs of ageing persons, their families and the court. Eldercaring coordination participants are asked to complete a survey when entering the eldercaring coordination process and again at the end of the process. These anonymous surveys are shared with the research team to help improve eldercaring coordination. Participants' confidential feedback can make a positive impact for other families who will participate in the process.



FOR MORE INFORMATION CONTACT THE ELDERCARING COORDINATION INITIATIVE CO-CHAIRS:



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**Association for Conflict Resolution (ACR)
Elder Justice Initiative on Eldercaring Coordination**

**FREQUENTLY ASKED QUESTIONS
FOR ATTORNEYS, GUARDIANS AND OTHER PROFESSIONALS**

Why shouldn't these families just go to mediation?

While many families can resolve their issues through mediation, high conflict families are unable to concentrate on the issues at hand. These are the cases appropriate for eldercaring coordination, where specially trained Eldercaring Coordinators (ECs) help families manage conflict, reduce tension, and overcome entrenched hostilities. Families may use mediation after participating in eldercaring coordination when they are better able to focus on the issues impacting their ageing loved one.

Should everyone be represented by counsel during the eldercaring coordination process?

The EC's role is to remove the adversarial perspective from the process of making decisions for the care and safety of an ageing loved one. While participants in eldercaring coordination may have an attorney, attorneys are not required. Eldercaring coordination is intended to be a confidential process, meaning that what is discussed during sessions is not to be offered as evidence at any court proceeding. Attorneys may be invited by the EC to attend sessions, with the understanding that their approach will be collaborative.



How is eldercaring coordination initiated?

Eldercaring coordination begins with a Court Order of Referral to an Eldercaring Coordinator, after which an Administrator will assign the EC. Once the EC and family members make contact, the EC conducts an intake to plan for the process and help the participants feel safe and comfortable.

Then what happens?

After the intake, the EC helps family members reduce conflict and focus on the needs, wishes, care, and safety of the ageing person. The EC helps the family develop and implement a care plan that is flexible enough to change with the needs of the ageing person and family members. Solutions focus on family strengths to provide for the ageing person's needs. Once family members begin to collaborate, they are better able to work with other resources to care for their ageing loved one. Through the process of eldercaring coordination, families can save time and money, preserve their privacy, elevate the ageing person's dignity, and pass on a legacy of peace to future generations.



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APPENDIX F: OVERVIEW OF EMAN & EMIN

Elder Mediation Australasian Network (EMAN) and the Elder Mediation International Network's (EMIN's) Certification of Elder Mediators

The Elder Mediation Australasian Network (EMAN) was formed in November 2013 after a successful World Summit held in Adelaide, April 2013, which was co-convened by Professor Dale Bagshaw at the University of South Australia, and the Elder Mediation International Network (EMIN). This Summit focused on 'Mediation Involving Age-Related Issues'.

EMAN's Board members are from most of the Australian States and from New Zealand. Many Board members are also members of the Resolution Institute, Australia/New Zealand. The Board Chairperson, Professor Dale Bagshaw, is also a member of the Board of EMIN and the EMIN Certification Committee and Chairs the Resolution Institute's Facilitative Elder Mediation Sub-Committee.

Dale is an EMIN-Certified Elder Mediator (Advanced) and an elder mediation trainer. Over the past 9 years, Dale has conducted face-to-face elder mediation training programs at a basic and advanced level in South Australia (x3), Victoria (x2), NSW (x2), Western Australia (x1), Tasmania (x2) and New Zealand (x2). In 2020, 2022 and 2023, Dale also conducted online, elder mediation training (via ZOOM) for nationally accredited mediators (NMAS) from all States and New Zealand. To date, more than 300 mediators and other professionals have been trained in Australasia by Dr Bagshaw in the specialty of elder mediation and some have also completed advanced training with Dale and Judy McCann-Beranger, who is an EMIN Certified (Adv) elder mediation trainer from Canada. Judy has also trained additional staff from Relationships Australia.

The Elder Mediation Australian Network (EMAN) aims to be the network of choice for matters relating to Elder Mediation in the Australasian region and the EMAN Board has worked closely with the Resolution Institute, Relationships Australia, and the Elder Mediation International Network (EMIN) to develop elder mediation as a specialisation in Australia and New Zealand.

Certified, trained elder mediators assist older people, their families, and significant others with difficult conversations, to make plans and to reach outcomes to disagreements – outcomes that work for the older persons, respect their rights, ensure that their voice is heard and respected, and enhance their safety.

The goals of EMAN from the outset have been to:

- raise awareness of elder mediation as a specialisation
- build the knowledge and skills of elder mediators.
- develop professional ethics, standards, and certification for elder mediators.
- encourage referrals to relevant services, including to trained elder mediators and other services tailored to the circumstances of older people in Australasia.

The EMAN Board and comprehensive website aims to:

- raise awareness of elder mediation and the profiles, activities and services of elder mediators
- provide information and knowledge about elder mediation for practitioners, other professionals in the aged care sector and people wishing to access elder mediation services.
- provide links to publications, conferences, and other events and to relevant resources and services.
- promote specialist elder mediation education and training and
- encourage elder mediation certification with the Elder Mediation International Network (EMIN).

Elder Mediation International Network (EMIN)

Elder Mediation Certification

The Elder Mediation International Network (EMIN) was officially formed in 2007 to advance the practice of Elder Mediation as a credible, distinct specialty and to improve the qualifications, knowledge base and effectiveness of mediators working with age related issues through the development of high standards of ethics, education, and skills. EMIN introduced the International Elder Mediation Certification Program in 2008/2009. An internationally endorsed 'Code of Ethics for Elder Mediators' was also developed along with a companion document in 2021, '*Safeguarding Vulnerable Adults: Guidelines for Elder Mediators*', both with input from many countries, including from the EMAN Board in Australasia. EMIN's *Code of Ethics for Elder Mediators* continues to be the 'gold standard' for elder mediators and underpins EMIN's certification program.

The EMIN World Summit, which brings together Elder Mediators from all over the world, currently takes place every two years. The 6th Summit was held at the University of South Australia in Adelaide in 2013. The most recent and successful EMIN 11th World Summit was conducted internationally, online, on November 8th and 9th, 2023.

Since it formed in 2013, the Board of the Elder Mediation Australasian Network (EMAN), comprising key mediators from most Australian States and New Zealand, has been closely involved in the development of the Elder Mediation International Network's

(EMIN) Code of Ethics and Elder Mediation Certification process. The EMAN Board has worked closely with the EMIN Board and EMIN Certification Committee to develop a two-tiered approach to EMIN certification, which the EMAN Board and the Resolution Institute's Elder Mediation Subcommittee deem to be suitable to Australasian conditions.

The Elder Mediation International Network's Certification Program continues to gain international recognition. It reflects the highest standards in education, training, and experience for elder mediators. The Certification Program embodies a comprehensive training process as well as a rigorous assessment of each elder mediation candidate and requires on-going professional development.

Rationale for the EMIN Elder Mediator Certification

EMIN, EMAN and the Resolution Institute have recognised the need for both a national and international standard for certification of mediators specialising in issues of aging – one which assures the competency of mediators and speaks with a strong and credible voice. The goal is to promote a consistent standard for elder mediators through accreditation and continuing education. The general public can be assured that EMIN certified Elder Mediators are both committed and competent to work professionally and ethically in this rapidly developing field of practice.

Health and mental health agencies and government and non-government organisations involved with issues of aging are well positioned to advocate for elder mediation as a valuable service for the older people, families and others utilising their services. Referral to qualified, informed professionals who adhere to a recognised standard of practice is necessary to enhance trust, communication, and the welfare and safety of older people, their families, and significant others in the older persons' networks.

Trainers who wish to offer Elder Mediation training are expected to have completed the EMIN Elder Mediator Certification at the Advanced level.

The EMIN Certification Process

Elder mediation certification candidates will have opportunities to demonstrate their empathic qualities, values, mediation skills, ability, and knowledge. They will demonstrate their commitment to professional development, plus enhance and demonstrate their learning in the general areas of ageing and age-related issues and mediation involving older people.

Requirements to apply

Mediators seeking certification will be required to join EMIN prior to certification.

As an outcome of negotiations between EMAN and EMIN, the EMIN Certification program now provides three possible options for certification as an elder mediator.

Option 1: Candidates can opt to complete the first level (*Cert.EM*) which will provide them with certification as an elder mediator.

Option 2: At a later stage, *Cert. EM* graduates can choose to complete the remaining requirements if they wish to attain the advanced certification designation (*Cert.EM Advanced*).

Option 3: Candidates can choose to enroll directly into the *Cert.EM Advanced* certification process from the outset.

The requirements for each option are as follows:

Option 1: Certified Elder Mediator (“*Cert.EM*”) requirements:

- Current formal accreditation to practice as an ADR/mediation practitioner (or the equivalent) in your Country.
- Be a registered member of EMIN.
- Provide evidence of 70 hours of Elder Mediation specific training in specified subject areas (see the list of subject areas under the third option)
- Experience - a minimum of 3 Elder Mediation role-plays and/or actual Elder Mediation cases
- Recording of an elder mediation role play & completed self-assessment (guidelines provided)
- Payment of an application and certification fee.

Option 2: Certified Elder Mediator Advanced (“*Cert.EM Advanced*”) requirements for applicants who already have “*Cert.EM*” status:

- Maintain yearly EMIN membership & certification maintenance.
- Additional 30 hours of Elder Mediation training (Linked to specified subject content areas – see option 3.)
- Experience: 2 additional Elder Mediation role plays or actual Elder Mediation cases
- Pass a 3-hour invigilated exam (all essay questions provided in advance)
- Pay an additional application fee plus an assessment fee.

Option 3: “*Cert.EM Advanced*” - requirements for applicants who directly enter the certification process at the Advanced level:

- Current formal accreditation to practice as an ADR/mediation practitioner (or the equivalent) in your Country.
- Be a registered member of EMIN.
- Provide evidence of completed 100 hours of age-related Elder Mediation education and training in the following subject areas:

- current and future profiles of seniors in your country/region
 - family life cycle, family dynamics, intergenerational dynamics
 - recognizing and responding to elder abuse & neglect
 - knowledge of legislation in your country relevant to elder mediation, capacity, and elder abuse
 - identifying and dealing with power dynamics involving and affecting older people with and without capacity
 - the nature and impact of bereavement, grief, and loss
 - the impact of ageism, sexism, and cultural diversity
 - understanding dementia & age-related diseases and how to assess, manage and accommodate capacity issues.
 - financial & estate issues for identifying areas of concern and referral.
 - ethics and ethical issues relevant to elder mediation
 - facilitating and writing agreements in elder mediation
 - Advance Care Directives, Power of Attorney & Guardianship – relevant to your country/region/state
- Experience: 5 Elder Mediation role plays and/or actual Elder Mediation cases.
 - Elder mediation role plays recording & self-assessment (guidelines provided)
 - Pass a 3-hour invigilated exam (essay questions are provided in advance)
 - Certification fee: (application fee plus assessment fee)

Candidates who have previously completed training in the age-related subject areas specified above will not be required to repeat this training if they can provide evidence of the same. Certified Elder Mediators must have current membership and accreditation with their local or national mediation accrediting body and adhere to the *EMIN Code of Ethics for Elder Mediators*. They must also provide evidence that they hold liability insurance for the practice of mediation.

To actively encourage and support accredited mediators to become EMIN Certified Elder Mediators, EMIN (in partnership with EMAN and the Resolution Institute Elder Mediation Facilitative Subcommittee) has developed a pilot program in Australia and New Zealand to enable trained elder mediators to apply for EMIN Elder Mediation Certification, with support and a reduced fee. The two-year pilot program will commence in February 2024 and end in January 2026.

For more information about the EMIN pilot program please contact:

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EMIN Registrar, Certification Program, Helen Harnett, Cert.EM Advanced.

Email: Helen Harnett helen.harnett02@gmail.com

Elder Mediation International Network website: <https://elder-mediation-international.net/certification-overview/>

Elder Mediation Australasian Network website: www.elder-mediation.com.au

APPENDIX G: EMAN & RI SUBMISSION

ELDER MEDIATION CASE STUDIES - OLDER PEOPLE AND AGED CARE

Case example 1. John aged 80. Possible transition from home to Aged Care

John (80) lives alone in public housing and receives a Level 4 at home Aged Care package. John is legally blind, suffers some cognitive decline due to frontal lobe dementia and has vascular and respiratory issues. John suffers from depression and his behaviour can be combative and rude.

John has received care in his home for 8 years. Over time his relationship with Delia, who manages his care provision, and her staff, has deteriorated as John's needs increased. John has no living family and has no children. He is isolated, not able to leave home or visit, beyond medical appointments or hospital emergencies. John appointed an acquaintance, Bill, to be his Enduring Power of Attorney and Enduring Guardian some years earlier, but Bill has moved and is difficult to contact, busy with work and a young family.

Delia has strongly recommended to John that he move into aged care, stating that his package cannot be extended further, and despite his constant requests, other resources are not possible. Delia has told John he has two months to make a decision or she will be forced to make a request for the Public Guardian to take over John's care decisions.

John is terrified of being removed against his will from the home he knows. He contacted Bill to see what options are available, and Bill suggested Elder Mediation.

What did the Elder Mediator do?

- Engaged with all parties to understand their perspectives and ideas for options.
- Engaged with allied health services supporting John to better understand situation/options.
- Assessed John's capacity and appropriateness of the mediation process to address concerns
- Referred John for advocacy, counselling and social supports.
- Arranged a mediation with John, Bill, the Advocate, Delia, and allied medical health support workers.

Outcomes:

With the support of an advocate, John was able to put forward his wishes regarding his on-going care needs and living arrangements to those able to assist him. John voiced his concern that he was vulnerable and isolated, agreeing his physical and mental health was suffering as a result.

- John and the Advocate explored options to change to a care provider whose percentage care cost rate was lower, to facilitate additional care hours. The cost of John's care had been an issue and Delia agreed the administration cost charged to John would be lower with a different provider.
- John was connected to community services/community volunteer groups to take him to activities he enjoyed.
- John was connected to the Older Peoples Mental Health Team for assessment/support.
- John was reconnected with Vision Australia peer support team for weekly telephone support.
- John was connected to Red Cross Telecross service to receive a daily wellbeing call.

- Bill agreed to take a more active role, to call John weekly and to be available to review paperwork with John's new Care Manager.

Case Study 2. Jane (aged 82) and George (aged 89). Residential Village dispute.

Jane 82 and George 89 - married for 10 years after the death of Jane's husband - had recently moved into a new independent living villa, having been asked to leave their previous independent living village due to George's behaviour. George was Jane's informal carer. Jane suffered a stroke two years before and was partially paralysed on her right side, affecting her sight and mobility. Jane was on a Level 2 care package. George was estranged from his family and children from a previous marriage. Jane has two adult children Brenda and Terry. Brenda and her husband have three young children.

Neighbours, Edna and Barry, were initially friendly towards Jane and George but the relationship quickly soured. George enjoyed building projects using noisy power tools, bringing home items from the street, quickly filling his backyard and front of his home. Edna was concerned that Jane was losing weight, did not speak to her and rarely left the home. When Edna asked George how Jane was, George told her it was none of her business.

Edna approached the Village manager, Sylvia, with a concern that Jane might need support, and to complain about George's difficult behaviour. Jane's children had also contacted Sylvia stating George was preventing them from entering the home to visit their mother, causing heated arguments at their doorstep. Sylvia was at a loss to know how best to manage a situation that was becoming very conflicted.

Sylvia contacted George and Jane who agreed to engage in an elder mediated process.

What did the Elder Mediator do?

The Elder Mediator contacted all parties (George and Jane, Edna and Barry, Jane's adult children, and Sylvia). Appropriateness for mediation, including concerns of safety and capacity were assessed. As Jane also received some in-home care, her care manager was also contacted to engage in the process with Jane's permission.

Outcomes:

Within the mediation, Jane was able to assert her social needs, and George was given space to reveal his concerns for himself and Jane moving forward, allowing others to assist.

- Jane stated she wished to see her adult children and grandchildren and a plan acceptable to all was arranged.
- Concerns were raised about George's projects in terms of health and safety risks and the impact on Jane and other villagers. Sylvia organized a special area acceptable to George in a back shed where George could relocate his construction materials and work when he wished.
- George explained he was struggling with Jane's care and his own. Sylvia offered to assist in a request to extend Jane's care package and help George apply for additional care for his needs to alleviate the stress they were both experiencing.
- George stated he felt very isolated, unable to connect with his family or Jane's. With his permission, a counselling referral was made for George to support him in this regard. Jane's

son Terry made the offer to George to act as his next of kin, and to be a person George could contact if he felt he needed to talk with someone.

- George and Jane did not have Power of Attorney, Guardianship or Advance Care Directive Documents in place. They agreed to a referral to the Community Legal Aid Centre to assist them with information.
- Barry was a member of the local Men's Shed and offered to share its information with George.
- Edna requested to pop by weekly to take Jane for a coffee in the Village to meet with other residents. Jane said she would enjoy that.

Case Study 3: Jane (aged 89). Early-stage dementia. Family conflict over her care.

Janice 89 had fallen and broken her pelvis. As she had no help at home, she was transferred to residential care to recover. Prior to the fall Janice had no health issues and had lived independently, however she was diagnosed with early stage dementia three months ago.

Janice's daughters, Jenny 54 and Fran 60, did not agree about the management of Janice's care. Jenny, a busy accountant, married with three children, wanted Janice to remain in residential care, stating she was now incapable of caring or making decisions for herself. Fran, single and unemployed, felt Janice once recovered could return home, with Fran moving into Janice's home as full-time carer.

Whenever Jenny and Fran visited Janice together in the residential care home, they would violently argue, and Janice would become very upset. Jenny and Fran had a fraught relationship. Jenny was Janice's Enduring Power of Attorney and Enduring Guardian and had often accused Fran of financially and psychologically abusing Janice. She made it clear she did not want Fran to care for their mother.

Jenny approached the Care Manager, Beverley, requesting she prevent Fran from visiting Janice, as it was unsettling her. Fran contacted Beverley to request a mediation, stating that the facility had no grounds to prevent her from seeing her mother, and was holding her there against her will.

What did the Elder Mediator do?

Prior to the mediation, the mediator met with all parties separately, including Beverley. Janice had a good understanding of the consequences of her decisions and was supported in the mediation by an advocate from Seniors Rights.

Outcomes:

Janice was able to make her wishes clear to her daughters and to Beverley. Janice was referred to the supports needed for her to organise her future planning.

- Through discussion, Janice agreed it would be best to sell her home to cover some of the costs of care.
- Janice changed her Will, as she wished to give Fran \$50,000 from the sale of her home immediately to support Fran's needs. This money was to be deducted from Fran's 50% share of Janice's estate on her death.
- Janice, with support of a legal referral from Seniors Rights, was able to add Fran and trusted friend Roger, an accountant, as joint Enduring Powers of Attorney and Enduring Guardians with Jenny.

- Family therapy was discussed, and Fran and Jenny agreed to attend an initial meeting with a counsellor.

Case Study 4: Howard (aged 84) and gay partner Martin (70).

Howard (84) had lived with his partner Martin (70) in Martin's apartment in a rural country town for 20 years. Howard came out to his family as a gay man 50 years earlier and divorced his wife Joan (now deceased). Howard has two daughters Margaret and Elenor now 64 and 62 respectively. Martin has no children. Howard has a Will, but no Power of Attorney or nominated Guardian.

Margaret and Elenor, like their mother, never approved of Howard and Martin's relationship and did not like Martin. Howard has dementia which has progressed to moderate, with Howard now requiring more personal care. Martin is Howard's informal carer. Over the past year, Margaret and Elenor have been in conflict with Martin regarding Howard's care, feeling Howard should now be their responsibility. Martin has a good relationship with Howard's only surviving sibling Annie (86).

When Howard was hospitalised following a fall, Margaret and Elenor, as next of kin and against Martin's wishes, organised for Howard to be transferred to a care facility that adhered to their Baptist faith. Margaret and Elenor then made arrangements with the Care Facility to block Martin's visits, saying their father no longer had a wish to see him.

Martin is devastated, wishing to see and support Howard, the partner he loves. Martin has spoken with the Public Trustee and Guardian and is wishing to be appointed Howard's Enduring Guardian. Elder Mediation was recommended.

What did the Elder Mediator do?

- Prior to mediation Martin was referred to Legal and Financial services for information.
- Howard's sister Annie agreed and was accepted by all parties to be Howard's advocate.
- The mediator met with Annie and Howard together prior to the mediation.

Outcomes:

Despite not being able to personally participate, Howard's interests were able to be supported within the mediation. Mediation provided an opportunity for clarity and understanding between the parties when emotions were very high and conflicted.

- Margaret, Elenor, Martin and Annie were able to speak frankly about their love and concerns for Howard.
- Margaret and Elenor explained the hurts and difficulties Joan experienced as a result of Howard's decision to leave the family and communicated their own unresolved feelings of ambivalence towards their father.
- Martin stated he was financially well placed and sought nothing from Howard beyond being able to spend time with and support Howard, whom he loved, as best he could.
- Emotions were high. Annie stated that as difficult as it was for Howard's daughters, she knew Howard would want Martin to visit and care for him and would suffer terribly without being able to see him.
- An initial visiting schedule was arranged with a follow-up review in three months to assess the efficacy of agreements made.

- Margaret and Elenor agreed that Annie and Martin would be invited to future Care Management Conferences regarding Howard's care.

Case Study 5. Zena (aged 88). Isolated Greek woman in Residential Aged Care.

Zena 88, recently widowed, entered residential aged care two months ago following a fall. Her sons, Michael and Dino, had arranged to sell her home for her, and had organised her move into care. Zena spoke little English, preferring to converse in her mother tongue, Greek. While in care, Zena withdrew. She cried often, constantly calling her sons requesting they visit.

Both Michael and Dino worked and had responsibilities for their children. Michael asked the Care facility if they could provide some social, mental, cultural or spiritual support for Zena. Whilst the care manager Kylie was kind, little appeared to be changing.

Michael requested Elder Mediation.

What did the Elder Mediator do?

Zena was connected with a Greek speaking advocate, Zanthi, from the Greek Welfare Association to assist her within the mediation.

Kylie and the facility Recreational Activities Officer, Brenda, attended the mediation with Zena, Michael and Dino.

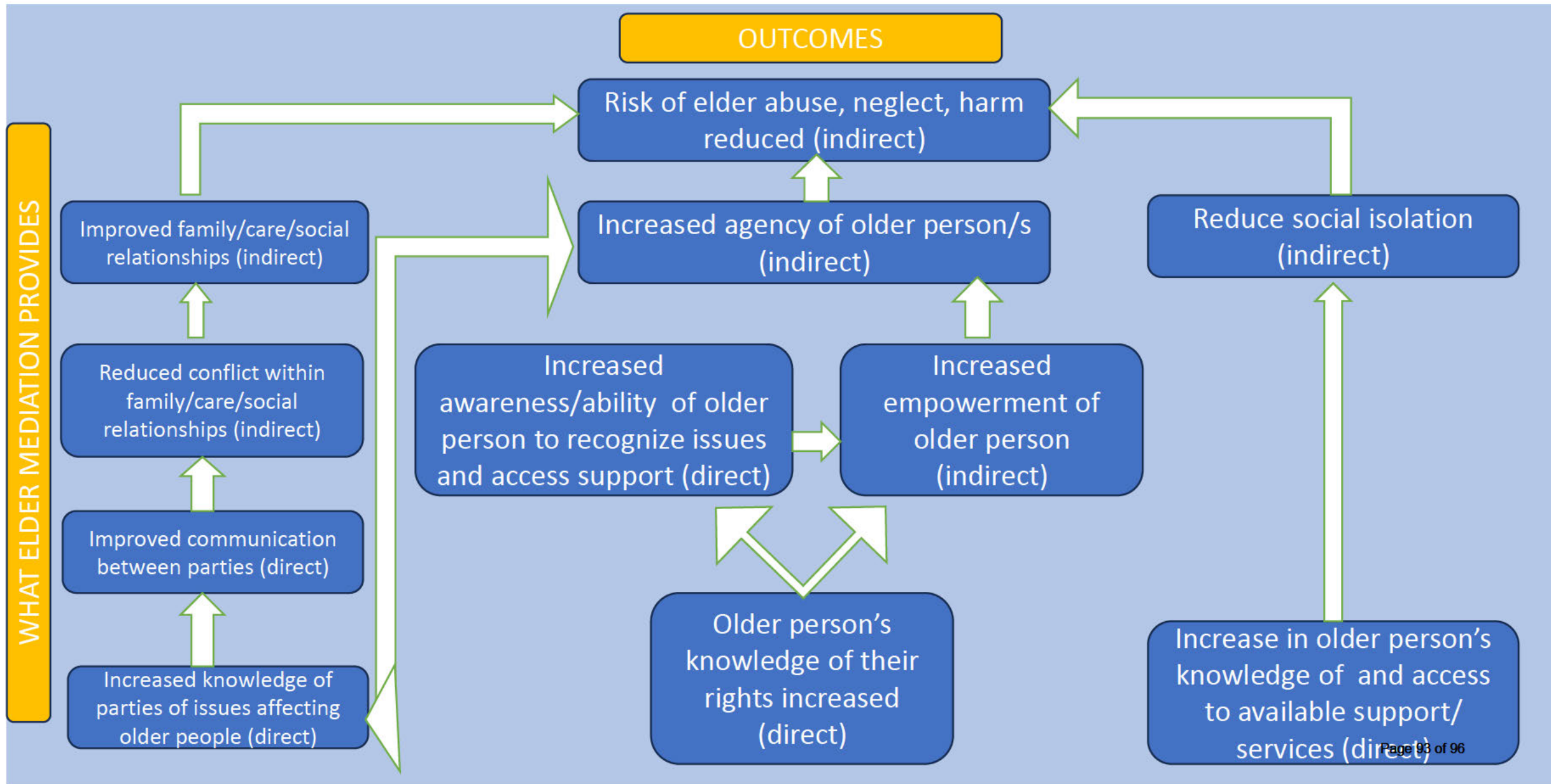
Outcomes:

Zena was able to explain that she was deeply sad, missing her husband, and finding it difficult to adjust to her new surroundings, with nothing around her she could recognize or could connect to. She wanted to speak in Greek, watch Greek television, listen to music in Greek and to enjoy Greek food and Greek Orthodox services.

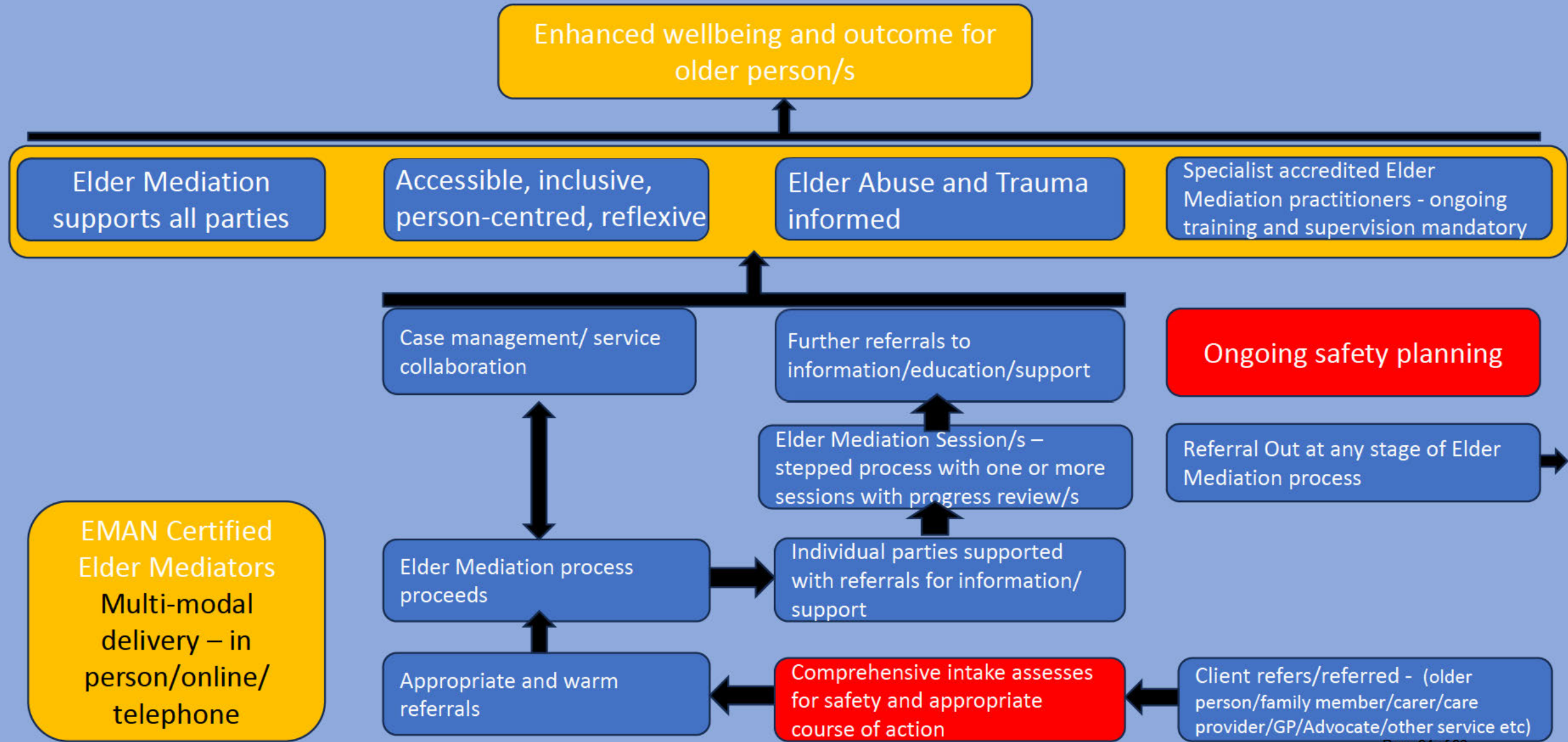
The family, Kylie and the advocate discussed options with Zena that might make her feel more comfortable.

- Brenda explained there were cultural days within the facility and would give Zena dates for the Greek celebrations.
- Michael agreed to provide and set up a laptop for Zena so she could access Greek Television and music when she wanted.
- Michael and Dino agreed to bring in small items precious to Zena to dress her room – photos, linen and a chair from home.
- Zena had been a keen gardener and painter. Brenda agreed to ensure Zena was included in the gardening and painting activities in the facility.
- Brenda agreed to host a morning tea group to introduce Zena to other Greek-speaking residents.
- Kylie agreed to refer Zena for telephone grief support with a Greek speaking counsellor.
- Zanthi agreed to connect Zena with a Greek-speaking community visitor and to arrange spiritual visits for her with the Greek Orthodox priest.
- Michael and Dino agreed to separately take Zena for lunch at a Greek restaurant once a month with their families.

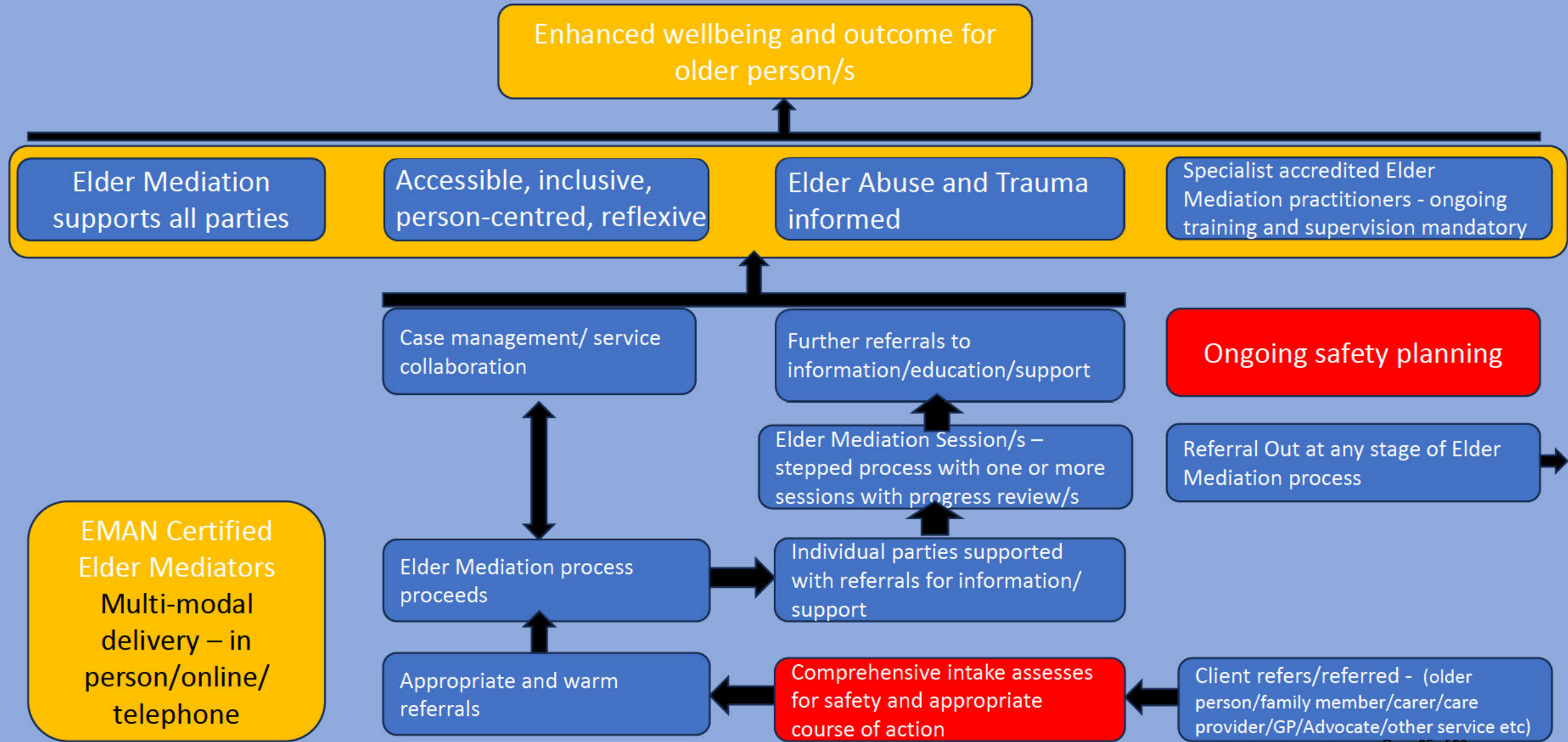
How Elder Mediation supports relationships, decision-making and addresses issues of concern/future planning to enhance safety and well being for older Australians receiving care/support in community or residential care settings



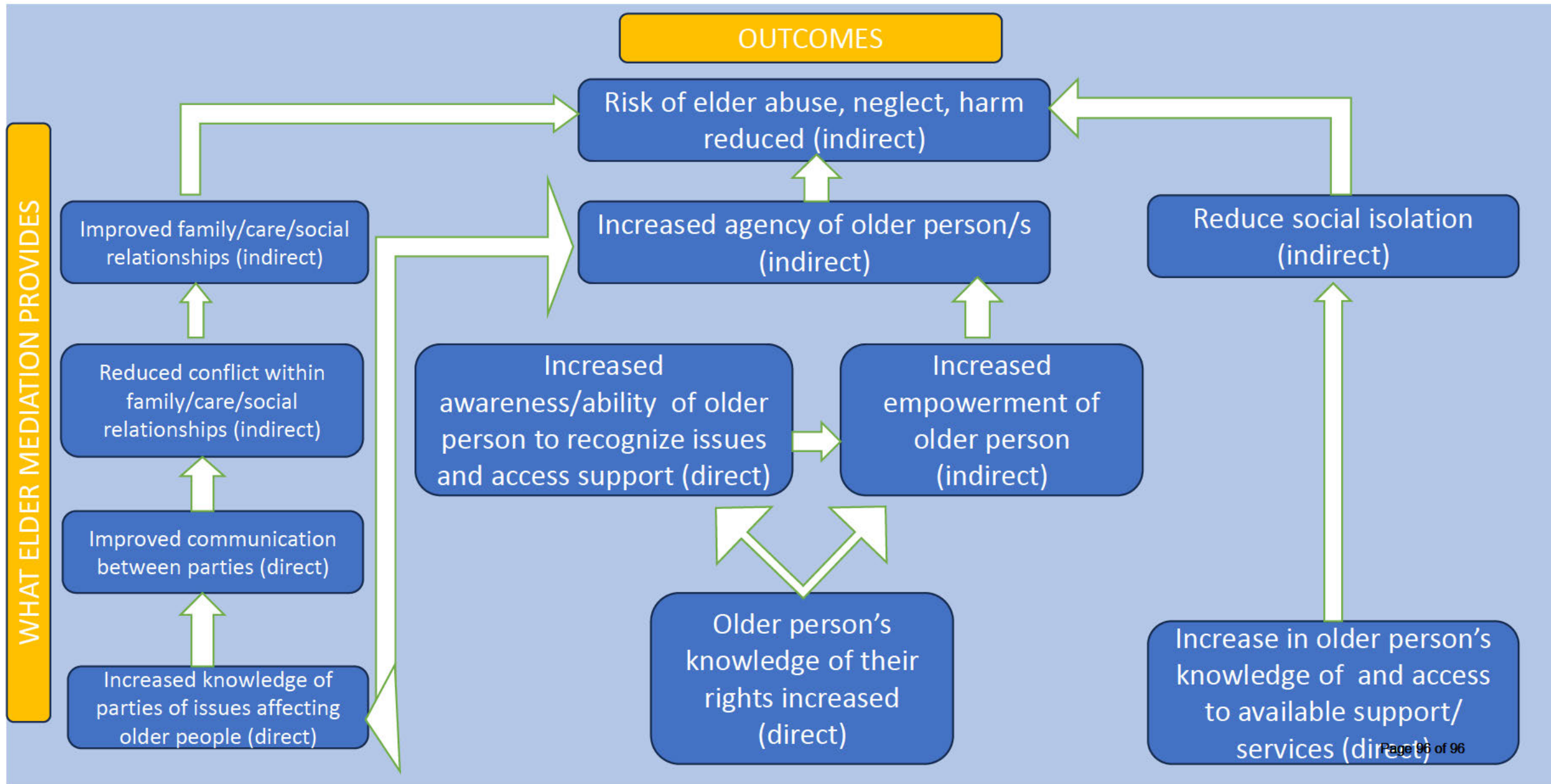
Elder Mediation to support Older people in community in-home and residential care settings to address issues of concern, dispute, relational conflict, decision-making and future planning



Elder Mediation to support Older people in community in-home and residential care settings to address issues of concern, dispute, relational conflict, decision-making and future planning



How Elder Mediation supports relationships, decision-making and addresses issues of concern/future planning to enhance safety and well being for older Australians receiving care/support in community or residential care settings





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Confidentiality in Elder Mediation

Submission 2

January 2024

EMAN/Resolution Institute Submission

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Table of Contents

About Resolution Institute.....	3
About Elder Mediation Australasian Network (EMAN)	3
Contact details	4
Executive Summary	4
Confidentiality in Elder Mediation	5
Employment Mediation and Confidentiality.....	6
How can Elder Mediation Strengthen Confidentiality?	7
Appendix 1	8
Appendix 2	10
Appendix 3	13

About Resolution Institute

Resolution Institute is the largest membership organisation of dispute resolution (DR) professionals within Australia and Aotearoa New Zealand. Resolution Institute is a NFP organisation and has over 50 years of experience in developing and running mediation services, training, and accreditation in a wide range of different sector and dispute types.

Resolution Institute members engage in mediation, adjudication, arbitration, expert determination, facilitation, conflict coaching, conciliation and restorative justice and has a membership base of over 3,000 dispute resolution (DR) professionals, across a diverse range of industry sectors. Resolution Institute focuses on excellence in standards of DR practice, support services to members and developing an environment in which DR services are frequently used, aligned to our vision of ‘enabling meaningful access to justice and dispute resolution, effectively resolving conflict in any situation’.

Resolution Institute is registered by the Australian Charities and Not-for-Profits Commission (ACNC) as a not-for-profit organisation. Resolution Institute website: www.resolution.institute

About Elder Mediation Australasian Network (EMAN)

THE ELDER MEDIATION AUSTRALASIAN NETWORK (EMAN) is a network of professionals dedicated to

- raising awareness of elder mediation
- building knowledge about elder mediation
- professional training, ethics, standards and certification for elder mediators
- encouraging referrals to relevant services, including mediation and other services tailored to the circumstances of older people (our elders) in Australasia.

Elder mediators can assist older people, their families and significant others with difficult conversations, to make plans and to reach outcomes to disagreements – outcomes that work for the older persons, respect their rights and enhance their safety – See attachment 4

EMAN aims to be the network of choice for matters relating to Elder Mediation in the Australasian region. EMAN website: www.elder-mediation.com.au

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Executive Summary

This is a joint response prepared by The Elder Mediation Australasian Network (EMAN) and Resolution Institute.

Confidentiality in Elder Mediation

This paper was initially prepared for a New Zealand context but has been reproduced and slightly modified so that the learnings can be applied to the new Aged Care Act in Australia.

We all know that confidentiality (including legal privilege) is a cornerstone of mediation (reference Appendix 1 below). The Elder Mediation Australasian Network (EMAN) and the Elder Mediation International Network (EMIN) promote the importance of confidentiality in their code of ethics (<https://elder-mediation-international.net/code-professional-conduct/>) explaining that “Elder Mediation is a confidential process, and both the participants and the Elder Mediator are bound to maintain confidentiality in relation to all information arising during, as a result of, or in connection to, the mediation, unless agreed otherwise by all participants and the Elder Mediator” (more detail is provided in the above website link). Confidentiality is also discussed in the Resolution Institute Code of Ethics, Mediation Rules, and standard mediation agreement template (<https://resolution.institute/web/default.aspx>).

How do we ensure confidentiality or at least facilitate a context that provides a reasonable expectation of confidentiality?

We are living in a world that continues to change and especially so when it comes to technology and the influence of social media. People today often feel more impacted by their situations and show less reluctance about clearly expressing their anger and other emotions. This can increase the attraction / desire to record and share aspects of a mediation, particularly when feeling disgruntled, unfairly treated, upset at the outcome, frustrated with the process / mediator / family / others involved, eager to increase prominence on social media or for any number of reasons. Not drawing attention to confidentiality could increase the risk that participants in mediation assume that it is ok to post on social media as it is an accepted normal behaviour and response to frustration, sharing life events.

What mechanisms do we have as Mediators to protect our personal and professional reputations in the event of a breach of confidentiality on social media? To what extent can we have confidence in our ability to explain to participants that mediation is confidential and for this to have actual meaning or effect? If an apology or a concession is made and then shared on social media it could be highly embarrassing for the mediation participant(s) that did not want it made public. For the mediator, any clip taken out of context or manipulated could place the mediator in a seemingly unfavourable light.

Now would seem an appropriate time to consider the aforementioned points as we increase the use of video online mediation whereby, not just audio, but significantly our images can be spread on various social media platforms. Once this happens, we have no control over what happens next and such images can be manipulated, taken out of context, and be very distressing for those involved (for the participants in mediation as well as the mediator). Increasingly, some people are deliberately harsh on social media and intend to provoke others, increase notoriety. The best that we can do therefore is to

minimize the chances that such a breach would happen in the first place. How do we do this? We could look at the legislation that provides protection for Employment Mediators in NZ (Employment Relations Act (2000), Sections 148, 149, 135 – Refer Appendix 2 below). It is acknowledged that Aged Care legislation has aspects that make it quite different from Employment Legislation, discussing the latter is intended to generate ideas, final legal wording would need to be appropriate for the Aged Care context and Elder Mediation.

Employment Mediation and Confidentiality

One of the biggest concerns that parties have about agreeing to terms at mediation, is whether it will be kept confidential. In most NZ Employment Mediations there is a settlement agreement which outlines what has been agreed to and, importantly, will nearly always require confidentiality and have a non-disparagement clause. This could be a statement that reads: The parties agree that the confidentiality of this agreement and non-disparagement extend to all forms of social media including Facebook (Meta).

The key to the clause requiring confidentiality is that it is also made clear in the settlement agreement that the Mediator has explained the penalties for breaching an agreed term (clause). The penalty can be up to \$10,000 per penalty for individuals but wouldn't normally be the maximum allowable. That said, there is a case currently in NZ (although it is under appeal), where there was a penalty of \$30,000 for breaching confidentiality. Essentially, breaches of confidentiality should not be taken lightly.

Employment mediations are frequently undertaken with the involvement of lawyers who can thoroughly explain the importance that employment legislation gives to confidentiality. Furthermore, the presence of a lawyer in the same room as a participant greatly limits the ability of the participant to record the mediation, particularly helpful in video online mediations.

In contrast, confidentiality in other mediation areas is strongly encouraged but not clearly enforceable. For video online mediations and/or when a lawyer is not present (as is often the case), there may be an increase in the opportunity for recording the mediation using a secondary device other than the approved technology. Without a strong (financial) penalty or deterrent, a pre mediation acknowledgement or even agreement regarding confidentiality means little or nothing for a person who doesn't respect the mediation process or the people involved. People will not always act in good faith just because we request it.

How can Elder Mediation Strengthen Confidentiality?

We are currently considering updating legislation regarding Aged Care, including dispute resolution processes. It would seem therefore an appropriate opportunity to future proof our profession and safeguard both mediators and participants from the stress of confidentiality breaches. We would also be honouring rights to privacy and protecting personal and professional reputations. We could do this by providing in the legislation a penalty (amount for unlawful act, fine or infringement fee?) for all involved (mediator, participants, representatives etc) for breaching confidentiality (e.g., up to \$10,000.00). It would need to be made clear that the confidentiality of mediation extends to visual, audio, live stream material, documents, screenshots and that mediation content is not to be recorded and posted on social media. The wording of the legislation would require further legal input, but there could be an emphasis on making explicit the financial consequence of posting mediation content on social media. Likely a clause would need to clarify that, despite the confidentiality requirement, a mediation agreement may be admissible for the purpose of enforcing an order. As an example, in New Zealand reference is made to Section 57 (3)(d) of the evidence Act 2006 (Appendix 3 below). Perhaps some of the legislation could include wording that is adapted from the Employment Relations Act 2000 (e.g., from Sections 148, 149 and 135).

In the Australian context, Section 323 of the Exposure Draft of the Aged Care Bill 2023 states that: A person commits an offence if: 1 (a) the person records, uses or discloses information; and (b) the information is protected information.

Furthermore, the Code of Conduct for Aged Care which outlines 8 elements of expected behaviour <https://www.agedcarequality.gov.au/for-providers/code-conduct>, includes the importance of acting with respect to the privacy of people.

Legislation within the Aged Care Act regarding confidentiality would make it clear to participants in mediation the importance of maintaining the integrity of the mediation process. This would help to better inform the general public about mediation principles, grow an appreciation of what elder mediation can achieve, add to the gravitas and respect of elder mediation, and maybe even increase uptake of dispute resolution services. Future proofing Aged Care legislation (including elder mediation / dispute resolution) is becoming increasingly important as Australians become more assertive (even aggressive) in approaches to their rights in relation to disputes generally and on social media platforms.

Appendix 1

Confidentiality in Mediation

As reported by Kay Hewitt in her research paper on Critical Mediation Issues in New Zealand: Confidentiality goes to the heart of mediation and is vital to its integrity. The very nature of a mediation requires that, in principle, it be conducted on a confidential basis, with the parties encouraged to “lay bare their souls” for the purpose of facilitating a resolution of their dispute. In discussing this aspect of mediation Hewitt cites a case from the New Zealand Court of Appeal (Carter Holt Harvey Forests Ltd v Sunnex Logging Ltd [2001] 3 NZLR 343 at [24]). Obligations of confidentiality enhance trust in a mediator and promote confidence in mediation. Without this trust and confidence, people may not perceive mediation as a viable alternative to litigation (NADRAC, 2006).

The confidentiality of mediation is justified on the following grounds (Boulle, Jones & Goldblatt, 1998):

- It makes mediation attractive to parties who want to avoid publicity.
- They know what is said cannot be used against them in another forum including the courts.
- It makes mediation more effective by encouraging parties to be open and candid and to disclose their real needs and interests, increasing the chances of settlement.
- It protects the reputation of mediators, reinforcing their impartiality by excluding them from pressure to make disclosures either during or after mediation.

Goldblatt (2000) suggests that while there may be risks for the mediator where confidentiality is breached by the parties, the greatest damage is to mediation itself – its reputation, its effectiveness and its value. Where confidentiality of either process or outcome is breached, we all lose ...

For parties to continue to have faith in mediation and to continue to freely and meaningfully participate, it must not be possible for any admissions or apologies made in attempt to reach agreement to be subsequently used against them (NADRAC, 2006).

Karin Hobbs explains why confidentiality is so important: Confidentiality is a critical element of successful mediation. In order for the mediator, the attorneys and the clients to understand the central issues, the motivations, the pressure points and the risks of litigation, the participants must be assured the discussions cannot and will not be disclosed to others so they can talk openly. Frequently, some of the motivating forces behind lawsuits are legally irrelevant and yet exceptionally important to understanding the conflict and facilitating resolution. Frequently, clients disclose private events, perceptions or issues in mediation they would not want disclosed to anyone. Explaining their concerns and fears is often critically important to them in order to resolve the conflict. If discussions with the mediator are not confidential and privileged, the mediation process, the mediator’s role and the potential for resolution are significantly diminished.

As reported in NZ Lawyer, the question is asked as to whether parties to a mediation can subsequently agree to waive confidentiality without the mediator’s agreement to this, or whether indeed they should ever be allowed to do so. “Confidentiality is one of the fundamental principles underpinning mediation; it promotes free and frank discussion between the parties, safe in the knowledge that views expressed

in the mediation cannot be used against them if the dispute is not settled at mediation. It should not be lightly undermined”.

Professor Phillip Green is Founding President and a Fellow of the Arbitrators’ and Mediators’ Institute of New Zealand (AMINZ), a barrister with over 30 years active experience in alternative dispute resolution (ADR), and is a former Adjunct Professor in the Department of Management (Dispute Resolution), Massey University. Professor Green explains in his article on confidentiality and mediator ethics, that for the mediator deprived of control of consequences once a (confidentiality) breach is made, even if initially on a limited basis, the breach or not, decision making needs to assume total breach consequences when planning / delivering mediation services.

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Appendix 2

Example of Legislation (NZ) for Confidentiality in Mediation

Employment Relations Act 2000

<https://www.legislation.govt.nz/act/public/2000/0024/latest/DLM60918.html>

148 Confidentiality

(1) Except with the consent of the parties or the relevant party, a person who—

(a) provides mediation services; or

(b) is a person to whom mediation services are provided; or

(c) is a person employed or engaged by the department; or

(d) is a person who assists either a person who provides mediation services or a person to whom mediation services are provided—

must keep confidential any statement, admission, or document created or made for the purposes of the mediation and any information that, for the purposes of the mediation, is disclosed orally in the course of the mediation.

(2) No person who provides mediation services may give evidence in any proceedings, whether under this Act or any other Act, about—

(a) the provision of the services; or

(b) anything, related to the provision of the services, that comes to his or her knowledge in the course of the provision of the services.

(3) No evidence is admissible in any court, or before any person acting judicially, of any statement, admission, document, or information that, by subsection (1), is required to be kept confidential.

(4) Nothing in the [Official Information Act 1982](#) applies to any statement, admission, document, or information disclosed or made in the course of the provision of mediation services to the person providing those services.

(5) Where mediation services are provided for the purpose of assisting persons to resolve any problem in determining or agreeing on new collective terms and conditions of employment, subsections (1) and (3) do not apply to any statement, admission, document, or information disclosed or made in the course of the provision of any such mediation services.

(6) Nothing in this section—

- (a)** prevents the discovery or affects the admissibility of any evidence (being evidence which is otherwise discoverable or admissible and which existed independently of the mediation process) merely because the evidence was presented in the course of the provision of mediation services; or
- (b)** prevents the gathering of information by the department for research or educational purposes so long as the parties and the specific matters in issue between them are not identifiable; or
- (c)** prevents the disclosure by any person employed or engaged by the department to any other person employed or engaged by the department of matters that need to be disclosed for the purposes of giving effect to this Act; or
- (d)** applies in relation to the functions performed, or powers exercised, by any person under [section 149\(2\)](#) or [section 150\(2\)](#).

149 Settlements

(1) Where a problem is resolved, whether through the provision of mediation services or otherwise, any person—

- (a)** who is employed or engaged by the chief executive to provide the services; and
- (b)** who holds a general authority, given by the chief executive, to sign, for the purposes of this section, agreed terms of settlement,—

may, at the request of the parties to the problem, and under that general authority, sign the agreed terms of settlement.

(2) Any person who receives a request under subsection (1) must, before signing the agreed terms of settlement,—

- (a)** explain to the parties the effect of subsection (3); and
- (b)** be satisfied that, knowing the effect of that subsection, the parties affirm their request.

(3) Where, following the affirmation referred to in subsection (2) of a request made under subsection (1), the agreed terms of settlement to which the request relates are signed by the person empowered to do so,—

- (a)** those terms are final and binding on, and enforceable by, the parties; and
- (ab)** the terms may not be cancelled under [sections 36 to 40](#) of the Contract and Commercial Law Act 2017; and
- (b)** except for enforcement purposes, no party may seek to bring those terms before the Authority or the court, whether by action, appeal, application for review, or otherwise.

(3A) For the purposes of subsection (3), a minor aged 16 years or over may be a party to agreed terms of settlement, and be bound by that settlement, as if the minor were a person of full age and capacity.

(4) A person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Authority.

135 Recovery of penalties

(1) Any action for the recovery of a penalty may be brought,—

(a) in the case of a breach of an employment agreement, at the suit of any party to the employment agreement who is affected by the breach; or

(b) in the case of a breach of this Act, at the suit of any person in relation to whom the breach is alleged to have taken place; or

(c) if permitted in the particular penalty provision, by a Labour Inspector.

(2) Every person who is liable to a penalty under this Act is liable,—

(a) in the case of an individual, to a penalty not exceeding \$10,000:

(b) in the case of a company or other corporation, to a penalty not exceeding \$20,000.

(3) A claim for 2 or more penalties against the same person may be joined in the same action.

(4) In any claim for a penalty the Authority or the court may give judgment for the total amount claimed, or any amount, not exceeding the maximum specified in subsection (2), or the Authority or the court may dismiss the action.

(4A) The Authority or the court may order payment of a penalty by instalments, but only if the financial position of the person paying the penalty requires it.

(4B) In determining whether to give judgment for a penalty, and the amount of that penalty, the Authority or the court must consider whether the person against whom the penalty is sought has previously failed to comply with an improvement notice issued under [section 223D](#).

(5) An action for the recovery of a penalty under this Act must be commenced within 12 months or, for a penalty for non-compliance with [section 69ABE](#), within 6 months after the earlier of—

(a) the date when the cause of action first became known to the person bringing the action; or

(b) the date when the cause of action should reasonably have become known to the person bringing the action.

(6) Despite subsection (5), if a court refuses to make a pecuniary penalty order under [section 142E](#), an action for the recovery of a penalty under this Act in relation to the same matter must be commenced within 3 months after the refusal.

Appendix 3

S57 Evidence Act 2006

57 Privilege for settlement negotiations, mediation, or plea discussions

(1) A person who is a party to, or a mediator in, a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person who is a party to the dispute if the communication—

(a) was intended to be confidential; and

(b) was made in connection with an attempt to settle or mediate the dispute between the persons.

(2) A person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of a confidential document that the person has prepared, or caused to be prepared, in connection with an attempt to mediate the dispute or to negotiate a settlement of the dispute.

(2A) A person who is a party to a criminal proceeding has a privilege in respect of any communication or document made or prepared in connection with plea discussions in the proceeding.

(2B) However, the court may order the disclosure of the whole or any part of a communication or document privileged under subsection (2A) if the court considers that—

(a) the disclosure is necessary for a subsequent prosecution for perjury; or

(b) the disclosure is necessary to clarify the terms of an agreement reached, if the terms are later disputed or are ambiguous; or

(c) after due consideration of the importance of the privilege and of the rights of a defendant in a criminal proceeding, it would be contrary to justice not to disclose the communication or document or part of it.

(3) This section does not apply to—

(a) the terms of an agreement settling the dispute; or

(b) evidence necessary to prove the existence of such an agreement in a proceeding in which the conclusion of such an agreement is in issue; or

(c) The use in a proceeding, solely for the purposes of an award of costs, of a written offer that—

(i) is expressly stated to be without prejudice except as to costs; and

(ii) relates to an issue in the proceeding; or

(d) the use in a proceeding of a communication or document made or prepared in connection with any settlement negotiations or mediation if the court considers that, in the interests of justice, the need for the communication or document to be disclosed in the proceeding outweighs the need for the privilege, taking into account the particular nature and benefit of the settlement negotiations or mediation.

Compare: 1908 No 89 Schedule 2 r 48G

Section 57 heading: amended, on 8 January 2017, by [section 21\(1\)](#) of the Evidence Amendment Act 2016 (2016 No 44).

Section 57(2A): inserted, on 8 January 2017, by [section 21\(2\)](#) of the Evidence Amendment Act 2016 (2016 No 44).

Section 57(2B): inserted, on 8 January 2017, by [section 21\(2\)](#) of the Evidence Amendment Act 2016 (2016 No 44).

Section 57(3)(c)(ii): amended, on 8 January 2017, by [section 21\(3\)](#) of the Evidence Amendment Act 2016 (2016 No 44).

Section 57(3)(d): inserted, on 8 January 2017, by [section 21\(4\)](#) of the Evidence Amendment Act 2016 (2016 No 44).