Resolving Aged Care Disputes

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Introduction: The Context

The aged care sector is probably one of the more interesting fields of law for legal practitioners.² This is for a number of reasons including the breadth of legislation and case law involved, the growth of the field and not least its highly politicised nature³. In this paper I want to first provide an overview of some of these aspects because they are having an impact upon the way in which disputes will be managed in this field. I will then review several significant pieces of legislation in so far as they relate to managing aged care disputes before briefly looking at some micro aspects of mediation practice.⁴

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‡ Sometimes now referred to as “elder law”.
³ In Australia at the present time there are about 2.3 million people, approximately 12% of the population aged 65 years and over. Between 2011 and 2031, as the baby boom generation ages, this group of people will account for almost one quarter of the total population.
⁴ Commonwealth Legislation: The most significant piece of legislation in the field regulating aged care is the Commonwealth Aged Care Act 1997 (ACA). It derives from the Commonwealth’s power to make laws in respect to “old age and widows’ pensions and to regulate corporations”. All approved providers of aged care are required to be incorporated (s.8.1). Before the Commonwealth can pay for the provision of aged care to a provider of those services, the provider needs to be approved (Pt.2.1) places must have been allocated to the aged care service in question (Pt.2.2), and the care recipient must be approved for care. There are three kinds of care. These are residential care, community care and flexible care. Persons in residential care are classified according to the level of care they need, based on frailty and functional disability, and funding is varied accordingly (Ch.2, Pt.2.4). Part 4.2 of the Act lists an extensive range of user rights and s.56.1 describes the responsibilities of approved providers in some detail. The ACA stipulates in further detail the content of the agreements that must be offered to the care recipient (s.59.1).

Victorian Legislation: There are particular issues affecting elders that are the legislative reserve of the state. In Victoria the following legislation is most relevant to the practice of law in this area.

- The Administration Probate Act 1958 regulates the application and grant of administration of deceased estates.
- The Wills Act 1997 deals in detail with formal requirements for a valid will.
- The Trustee Act 1958 regulates power and duties of trustees and the power and advancement of capital for maintenance, education and benefit of beneficiaries.
- The Health Services Act 1988 regulates public health systems in Victoria. This Act applies only to those aged care facilities which stand outside the ACA.
- Discrimination is covered by the Equal Opportunity Act 1995.
- The Retirement Villages Act 1986 applies to all existing and new villages.
- The Guardianship Administration Act 1986 establishes the functions, powers, duties and staff of the Public Advocate.
Recent Controversies

Many of you would have no doubt seen the news stories in the Victorian media in early December 2006 reporting that the Commonwealth Aged Care Standards and Accreditation Agency had reported that 23 Victorian nursing homes, with 1,308 residents, had failed clinical care standards since July of the previous year. Fourteen of these homes had inadequate staffing levels at some time over that period. An eastern suburbs nursing home was reported as feeding residents on a budget of $5 a day. The Federal Minister for Ageing, Santo Santoro, replied that the homes failure to meet standards did not mean that residents were at risk. Whilst the opposition aged care spokeswoman said a shortage of qualified staff was the sector’s biggest problem.\(^5\)

These media stories followed upon an official report from the Office of the Commissioner for Complaints (Cth.) that Victoria had the highest number of complaints about nursing homes of any state.\(^6\) If one looks at that report it shows that the number of complaints and information calls to Commonwealth funded facilities were greater in the quarter under consideration than in the previous quarter which was thought to be due, according to the Commissioner, to continued media interest in aged care. The heightened media interest that the Commissioner noted related to several notorious cases which were reported in the media in February of 2006.\(^7\) The Herald Sun had reported that Victoria was the worst state when it comes to looking after its elderly citizens, making up almost half the

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\(^5\) Source Herald Sun Wednesday 13 December 2006, Reporter Ben Packham.
\(^7\) The ABC news, Tuesday 28 February 2006; Herald Sun, Monday 27 February 2006, Reporter Nicolette Burke.
official sanctions on nursing homes, and one third of all complaints. This newspaper made some gloomy predictions that the problems in Victorian nursing homes were expected to worsen because of the rapidly aging population and the doubling of the number of people aged over 65 in the next forty years. These predictions followed reports that four dementia patients aged in their 90s had been raped and assaulted at a nursing home in Mt Eliza.

There were also allegations revealed by the ABC television program, Lateline, that the Victoria police were investigating rape allegations against a male carer at another Melbourne facility. This program reported that the initial allegation came from a 73 year old woman, who had dementia, in March 2005. However, instead of contacting the woman’s family or the police, Lateline reported that the facility manager questioned the woman and dismissed her claim. This program also revealed allegations of sexual abuse by a male assistant nurse at a nursing home on the Queensland Sunshine Coast.

**The Government Response**

Following these revelations by the media the Minister for Ageing announced a review of the aged care system and in April 2006 announced compulsory background checks for aged care staff and volunteers, and a significant increase in random, unannounced inspections of aged care homes. In response to the ongoing bad publicity, the Howard government announced a $90.2 million package of reforms for the residential aged care sector on 27 July 2006. The reforms, its details yet to fully emerge, include the creation of a new Aged Care Commissioner, more rigorous complaints and investigation procedures, a regime of compulsory reporting of abuse and legislative protection for whistleblowers. The Minister announced that, “The government has moved to significantly strengthen the complaints handling powers available under the *Aged Care Act*
1997 by introducing the capacity to investigate complaints, as opposed to the former conflict resolution role that relied on mediation. Some complaints are just unamenable to mediation.”

Features of the New Regime under the ACA

There will apparently be three principal features of this new scheme. First, the creation of a dedicated Aged Care Commissioner position which will have wide ranging powers to conduct and initiate investigations into the quality of care provided in residential facilities. Second, a new Office for Aged Care Quality and Compliance will replace the Aged Care Complaints Resolutions Scheme (ACCRS) and its core key staff will now be trained investigative personnel given greater powers to examine complaints. Finally, there will be the introduction of compulsory reporting by approved providers of incidents of sexual and serious physical assault.

One could question the underlying premise that the Minister has made suggesting that the existing scheme relies on mediation. Approximately only 2% of complaints referred to the ACCRS are finalised via mediation and a further 3% finalised via determination by a Complaints Resolution Committee. Of these mediations around 90% reach agreement. The balance of cases, around 95%, is dealt with by negotiation and/or referral by Complaints Resolution Officers. Most of these are resolved through the provision of information and the negotiation of improvements and procedures by aged care service providers. Satisfaction ratings kept by the Commissioner would indicate that there is a high level of satisfaction by users of the present processes.

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8 Office of the Minister for Ageing, Senator Santo Santoro, Media Release reference SS 68/06.
9 Hon Rob Knowles, Commissioner for Complaints, Speech to the Association of Gerontology Annual General Meeting, 2001. The Commissioner reported that:
Informal reports would indicate that despite these stated earlier Ministerial misgivings mediation is retained in the new proposed system whilst the system of determination through the Complaints Resolution Committee has been done away with.

The proposal apparently under the new scheme is to treat all calls as complaints worthy of investigation. The present complaints system was designed to be heavily outcome oriented and resident focused. Its focus was built around a user rights strategy balanced with the Commonwealth’s regime of compliance. The new scheme would seem to place greater emphasis upon an inquisitional model of engagement. This will necessarily affect the delicate balance between service providers, residents and their representatives and relatives. It could be speculated that the present framework which is built around a context of encouraging the

“….. some 16 performance indicators have been developed for the Scheme and satisfaction surveys are sent to both complainants and service providers as each complaint is finalised. Completed forms are sent directly to the Commissioner's Office for collation, analysis and reporting. Between 1 January and 30 June 2001, 161 completed surveys were received from complainants and 189 from service providers.

A total of 88% of complainants responding to the survey were mostly satisfied or more with the service provided by the Scheme. 86% said they were assisted to make their complaint and 8% said they were assisted to some extent.

77% of complainants found the Scheme to be very helpful and a further 20% said the Scheme was helpful - a total of 97% in all.

90% of service providers were satisfied with the service provided by the Scheme. (71% satisfied, 19% mostly satisfied) 62% of providers found the Scheme very helpful and 35% said the Scheme was helpful - Overall this means that a total of 95% of service providers who responded to the survey found the Scheme helpful. 88% of service providers indicated that they had the opportunity to contribute to the resolution of the complaint and 68% indicated that there would be an improvement to their business as the result of the complaint.

While these figures are encouraging there is room for improvement. Respondents have indicated that the Scheme would be more effective if areas such as communication and timeliness can be improved”.

10 The Commissioner’s report for the quarter ending 30 September 2006, (Op. cit.) noted that 79% of all calls to the Aged Care Complaint Resolution Scheme were information calls and only 21% were registered as complaints.
maintenance of relationships may be more difficult to achieve under the new system.

If one looks at the totality of the recorded information and complaint calls as recorded by the Commission at the beginning of 2001 (when it first began to publish such records) to September 2006, there has in fact been a steady decline of approximately 25% in both the number of information calls and complaint calls being made. The proportion of complaints to information calls has remained constant at around 20%. During the last quarter of 2006 the ACCRS finalised a total of 223 complaints nationwide. It dealt with a total of 1,650 calls. Victoria accounts for 42% of all calls (information and complaint calls). Of the complaints made, the majority (95%) related to aged residential services and 2% related to community aged care packages (CACPs) and the other (3%) related to flexible care services.\(^\text{11}\)

The Commissioner for Complaints uses 13 key words to record complaint issues. Current practice is to create second issues only if necessary and only where a different key word is applied. Of the 354 complaints recorded in the period, these related to 416 identified issues. As in most reporting quarters, health and personal care and consultation communication were the most frequently recorded complaint issues.\(^\text{12}\) Approximately 11% of complaints lodged were not accepted.

\(^{11}\) Consistent with previous statistics kept by the Commissioner, the relatives of residents lodge the majority of complaints (64%). 13% of the complainants were extra care recipients, whilst only 3% were staff, 2% were friends and ex-staff 1%. During the quarter, 70 facilities were visited and there was 74 site visits.

\(^{12}\) The 13 categories are:

- Health and personal care consultation and communication, medication, falls, choice/dignity, environment, specified care, food catering, personnel, financial, personal property, security of tenure, abuse, restraint. This is the order of frequency of complaints which occurred.
Whilst local media reports, noted previously, indicate that Victoria has a higher proportion of calls into the ACCRS system than other States and they appear disproportionate to the percentage of services provided here the conclusion that this would indicate greater problems in services here does not necessarily follow. It may rather indicate that residents and their relatives in Victoria are more aware of or feel more comfortable in making queries and complaints. In fact the greater incidence of queries and complaints in Victoria could indicate that the system is working better here than in other jurisdictions. If this were the case it would be an ironic outcome given that it was the Victorian cases that precipitated the changes.

The new scheme will depend heavily upon the recruitment of suitably qualified individuals who will require training especially in interviewing, investigation and negotiation skills as well as substantive aspects of the Aged Care Act 1997 (ACA). Informal reports from the ACCRS indicate that the new scheme will be expected to be operational from April of this year.

The Risk/Perception Paradox

Whilst there is much concern in the community about the vulnerability of older people and this is something that require constant monitoring it is worth keeping in mind the research in Australian and overseas which consistently indicates that older people are overwhelmingly less at risk of criminal victimization than other age groups. Despite this, old people tend to have higher levels of fear of crime than the general population. This is called the “risk/perception paradox”. Older people do not appear to be more vulnerable to crime such as burglary, robbery and assault, but do appear to have increased vulnerability to abuse from both family members and professional carers. This includes not only abuse in private homes; it can also include negligence, fraud by professionals, including health care, legal

and financing professionals. For example the Australian Institute of Criminology (AIC) for example reports that, among older Australians, consumer fraud is 2.2 times more prevalent than assault, which is the most common of the violent offences. This contrasts with younger persons among whom fraud is as common as assault.

**The Focus of Disputing**

Many disputes in the aged care sector revolve around the provision of accommodation and related services to the elderly. Keeping in mind that the majority of the elderly live at home, the Commonwealth government has two major programs to assist those who remain at home. These are the Home and Community Care (HACC) program. These services can include meals, health care, nursing, social and other support services. For those who require more intensive care equivalent to low level (nursing home) care receive support through the Community Aged Care Packages (CACP) program. Another program, The Extended Aged Care at Home (EACH) program commenced in 2000 and offers support for persons who prefer to remain at home when their nursing and support needs escalate to the level normally provided by an accredited residential care provider. The other major accommodation types are retirement village community living which is governed by its own legislation in Victoria.

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14 For summary of these issues see Carlos Carcach, Adam Greycar and Glen Muscat, *The Victimisation of Older Australians*, Australian Institute of Criminology, Transient Issues in Crime and Criminal Justice no. 212, June 2001.

15 The AIC’s 2000 Crime Victim Survey reported that victimization rates among older people were well below the rates among the rest of the population, in particular for the offences of assault and theft and consumer fraud. Robbery was an exception to this pattern. Also persons aged 65 years and over were almost three times more likely than persons in other age groups to be victims of consumer of fraud. Interestingly, among older people victimization rates of males were not significantly different to those of females which contrast with those under 65 and males were much more likely to be victimized. Also, as with younger people and separated or divorced persons in the older age groups are more vulnerable.

The Aged Care Act

Prior to the introduction of the ACA there were two systems of aged care residencies. Hostels catered for low level dependency and nursing homes for high level dependence. The two systems merged into one residential system under the ACA and everyone was then classified in terms of their need for support services. In 1989 a report *Residents Rights in Nursing Homes and Hostels*, was produced by Chris Ronalds. This report contained recommendations for a charter of residents’ rights and responsibilities, which was introduced in 1989 and is the basis for the User Rights Principles (URP) which are a fundamental part of the ACA. Major parts of the ACA include:

- Accommodation bonds (Division 57).
- Charges for care and services/provision of itemised accounts as required. (Division 58).
- Security of tenure (URP).
- Extra service agreements (Division 36).
- Residential Care Agreements (Division 59).
- Privacy (Division 62).
- Complaints resolution arrangement (s.56).

It is interesting to note that one of the main fears of residents and relatives is that to do with the security of place. This right is not found in the Residential Care Agreement or in the Act but rather in the URP. Residents may only be moved if the move is at their request; the move is agreed after full consultation and without pressure; the move is necessary on medical grounds assessed by an Aged Care Assessment Team or two medical (or other health) practitioners both being

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competent and independent of the provider; or the place becomes an extra service place and the care recipient declines to pay the extra service fee.\(^\text{18}\)

The ACA provides for the responsibility of providers in s.54.1. These include the provision of care and services specified in the Quality of Care Principles (QOCP) and to maintain adequate human resources to ensure care needs are met.\(^\text{19}\) The QOCP spells out the living and care needs of residents in some details. These are not required to be included in the Resident Agreement. This important obligation is thus displaced from the relationship between the provider and the resident and rests between the provider and the funding authority.\(^\text{20}\) Rodney Lewis comments that, “Since there is such an absence in the legislation of mechanisms for enforcement (as opposed to complaint) of obligation by the provider at the instance of the care recipient, perhaps that is just as well”.\(^\text{21}\)

A representative of a care recipient or resident is not defined in the ACA but an approved provider is advised to allow a representative to have access to the residential care service at any time.\(^\text{22}\) It would appear that the representative’s access is not limited to the part or space occupied by care recipients. A representative may be a person appointed either informally or formally. The representative has useful powers and functions under the ACA, including the power to enter the Residential Care Agreement itself, withdraw from it, access at all times for the purpose of obtaining information and making complaints.\(^\text{23}\)

The approved provider must establish a complaints resolution mechanism, as provided in the resident agreement, and it must be used to address any complaints

\(^{18}\) URP s.23.17.
\(^{19}\) Section 54.1(1)(B).
\(^{21}\) Ibid at p. 231.
\(^{22}\) URP s.1.25.10.
\(^{23}\) See URP s.23; ACA s.96 and ACA s.56.4.
made by or on behalf of a person whose care is provided through the residential care service.\textsuperscript{24} There are four separate interrelated elements of the ACCRS as established by the ACA. These are negotiation, mediation, determination and review. Negotiation and preliminary assessment is handled by the complaints resolution officers employed by the Commonwealth Department of Health and Ageing. If negotiation is unsuccessful a mediation assessment is undertaken and the complaint will either proceed to mediation or directly to determination. Mediation is conducted by approved mediators. If mediation is unsuccessful then the matter will go to determination. Determinations are made by a Complaints Resolution Committee made up of independent members with skills in aged care and dispute management. Review and oversight of the scheme is the responsibility of the Commissioner for Complaints. The scheme does not allow for representation by legal practitioners but complainants are allowed to be represented by others such as advocacy organisations.

The ACA includes a charter of residents’ rights and responsibilities.\textsuperscript{25} In relation to the enforceability of these standards, they are not of much use in terms of enforcement by the user. If they are to be enforced this must be done by the statutory authority charged with that duty. In civil proceedings, the breach of standards is of relevance only in relation to evidence of the appropriate standard of care.

**The Retirement Villages Act**

In Victoria the other major piece of legislation is *The Retirement Villages Act* 1986 regulates these living arrangements for the elderly. Section 3 defines a retirement village as a community where a majority are retired persons who are

\textsuperscript{24} ACA s.56.4.  
\textsuperscript{25} URP ss.23.14-23.16.
provided with accommodation and services and at least one is required to pay an “ingoing” contribution. This means either a donation to become a resident, buying shares with residents’ rights attached, or paying a lump sum or instalments to become a resident (not paying rent). All Victorian retirement villages were required to have an internal dispute resolution scheme in place by 30 January 2006. This followed a review of the Act in 2004. One of the concerns raised in the review was retirement village residents’ access to an affordable and effective dispute resolution regime. The objective of the amendments was to ensure that residents have an accessible in-house process, particularly so that minor problems can be addressed early so that they don’t develop into major disputes.26

The dispute resolution scheme applies to complaints about management and complaints about another resident or residents. Residents are not required to use the internal dispute resolution scheme. Management complaints can also go to Consumer Affairs Victoria (CAV), the Victorian Civil and Administrative Tribunal (VCAT) or another external service or dispute resolution body. For resident versus resident complaints they may go to the residents committee or seek the advice of CAV.

The retirement village must put in writing the process for handling management complaints and mediating resident versus resident disputes. They should also inform residents of the procedures and make copies of the documented procedures readily available. They are required to record the date, nature of the complaint, parties’ dispute and the outcome or action taken of all complaints. For any complaint not resolved within 72 hours management must establish a separate record and keep it up to date. They are also required to present a report on complaints at the annual meeting of residents. Retirement villages must not:

26 The Retirement Villages (Amendment) Act 2005 (Pt.6A, div.3).
• Require residents to make complaints in writing.
• Take action without consent of the parties.
• Deal with resident versus resident complaints if it has already been dealt with by the residents committee.
• Deter a resident from complaining.
• Cause a detriment to a resident because they made a complaint or plan to make a complaint.
• Prevent a resident from being represented.
• Put in place a procedure that is inconsistent with or overrides existing law or the terms of the residents’ contract.
• Identify parties to a dispute in the report to the annual meeting of residents.

From 23 May 2005 terms in retirement village contracts that provide for arbitration of disputes are void.

Living with the Family

Older people still rely on family and relatives for not only care and support but for accommodation as well. In the 1996 Commonwealth Census, it was revealed that of the 2.3 million people then over 65 years, 77% had private accommodation. Of that population, 20% lived in family households with their children, relatives or friends. These are the people whose living arrangements can give rise to risks which have been described in some details in the “granny flat” cases. For these people a family agreement may be a prudent arrangement. The type of agreement that can be made is almost infinite and can take the form of a deed, a co-ownership agreement for a particular property, granny flat type of agreement, a contract to
make a will which may be conditional upon carer services being provided or a care in residence agreement.

Resolving Aged Care Disputes

The title of this talk “Resolving Aged Care Disputes” leaves me with an uncomfortable feeling. I prefer the more inclusive term of “management”. Whilst the aim of much conflict management is the resolution of that conflict, it is perhaps more realistic and logical to accept that this will not always be achievable or indeed possible. This is especially so in the difficult dynamics often presented by cases involving older people their families and provider services, management is often conceptually the better objective to aim for rather than resolution in my view.

Having said this the management of aged care disputes is, in many ways, like the management of any other type of dispute. For example, I use the same mediation agreement in these types of disputes as I do in other types of disputes and I usually use similar preliminary information to send to parties. However, there are some differences which stand out from my review of the cases I have been involved in this area and which are worth some consideration.

(1) Mediation Approach and Process

In conflicts involving the relatives of an aged person and/or the aged person themselves, where legal proceedings have not been initiated, the best approach to mediation I have found is a facilitative one. In other words a process that maximises party input in the mediation itself. This contrasts with the shuttle negotiation/assisted negotiation/bargaining process that most lawyers are familiar with in the context of commercial mediations. The facilitative process in these
types of negotiations has three particularly important elements which lend themselves to the ultimate success of the process. These are:

(a) The development of the parties’ narratives at the beginning of the mediation. Rather than just listening to a recitation of the parties respective positions in relation to the issues at hand I am generally more active in drawing them out in relation to, not only the substantive content of the issue, but the procedural and psychological aspects as well. Unlike in other mediations where there are often skilled advisers informing and framing the issues in dispute, in these mediations parties are often unaware of the intricacies of the other sides position and interests and the way in which to respond to them. Also fractionating (i.e. reducing the dispute to a range of interest, issues or proposals) the dispute in these ways can negate aspects of the dispute which can be useful in a more complete settlement of the matter. During this phase of the mediation one can often observe some non-verbal acknowledgement of the usefulness of this tactic. The parties will sometimes afterwards comment that they did not understand what had been happening from the other party’s point of view until they had heard it explained in the mediation. From my experience complainants under the present Commonwealth scheme have essentially three objectives when they lodge a complaint with the ACCRS. These are firstly to obtain knowledge and information about what has happened or what the requirements of service provision are. Secondly, to seek validation of their grievance/s so that there is an acknowledgement by the provider that the complaint has some justification and thirdly, that something will be done about the
problem or some undertaking made to take corrective action. In these cases the facilitative approach is the most effective in my view.

(b) The second element which gives some emphasis to this type of mediation is transitional questioning. This occurs throughout the mediation after the initial statements to explore elements of concern that both parties may have expressed. The questions are called “transitional” because they are addressed in such a way as to require one party to talk to the other. In this way the parties start to begin to talk directly with each other and to re-establish communication which has often broken down in previous encounters and which will stand them in some good stead for future engagements.

(c) The other element which stands out in these sorts of mediation is enabling the parties to work on and develop options together. For some reason I find working off the whiteboard, in these mediations, works best. Usually working up a number of options in relation to each issue, and refining them in summary on the board before writing them up into agreements, usually works well in these situations.

(2) Whose Complaint
Another aspect of these types of disputes is that one is often dealing with not only the aged person themselves, but also with their relatives and/or friends. This is obviously often necessary as the aged person themselves may be infirm or incompetent. It often means that one is not necessarily dealing with the aged person’s particular needs and issues, but rather with those of the relatives which can lead to particular issues for the mediator or advisor. For example, in cases involving issues of accommodation the service provider is focused of course on
providing services to the aged person. This dynamic can set up contradictions within the mediation. Often the mediation is not principally about the aged person but instead about repairing the relationship, particularly the way in which the relatives and the aged care provider communicate with each other.

Sometimes, one or both of the parties are also assisted by an advocacy organisation. This is more often likely to be the service provider. Almost always I have found these persons to be helpful in the process, particularly in explaining terms and providing information, sometimes of a technical nature. It is important however that their role is carefully defined within the context of the mediation. Parties in these mediations are usually very sensitive to the presence of “advocates.”

(3) Family and Organisational Dynamics

In these cases one is sometimes managing family dynamics and relationships, as well as attempting to obtain instructions or the story from the aged person themselves. When service providers are involved, often the employees of the provider seem to be adhering to a corporate line which sometimes impedes progress of the mediation. In separate sessions it is often possible to get behind these dynamics and fronts to obtain a fuller picture of what is happening and then assist the parties to bring this back into joint sessions.

(4) Managing Loss

In some cases the aged person has died or is about to die. The person’s relatives and sometimes staff of the service provider are experiencing a stage of mourning or pre-mourning. Therefore, they are often attempting to attach meaning to their loved ones death or impending death. Associated with this process are often intense feelings of guilt and anger. When I was preparing for this talk I reviewed some of the cases that I had had in this area over the last 12 months. There were a
total of about 14 mediations. In two of those cases the resident had died before mediation had commenced. In two other cases, the resident was obviously dying or did not have much more time to live. In these mediations one therefore has to provide for a range of emotions which are not normally present in other settings.

(5) Limitation of Issues
When the dispute occurs within the context of the ACA, the parameters of negotiation are limited to the specific complaints made. For example, if one had a complaint about the quality of food, then one is limited to a discussion about this issue. One cannot go onto a discussion about wound management or the inadequacies of the facility laundry. My approach to this is to develop broad initial statements that enable the parties to talk about the “background” to the complaints that are made. This enables the exploration and usually the better management of underlying issues which are often concentrated around a series of incidents and/or miscommunication leading up to an “event” that triggers and is the subject of the complaint.

(6) The Role of the Lawyer
The role of the legal practitioner is usually crucial. From my position as a mediator, the abilities of a lawyer to present a solid case for their client without cloaking it in aggressive foreplay can make the difference between an early and late settlement. Given the cost of litigation, the earlier the settlement for most clients the better, so long as they can get within their “negotiation range”. Recent considered analysis by Andrew Robertson, a partner with Piper Alderman, of how lawyers “play tough” when confronted with mediation is instructive in this regard.27 He argues that lawyers use this tactic as a strategic ploy because it is perceived as improving the parties negotiating stance. While this may or may not

be so it does often lead to further delay, and costs, and makes the job of the mediator more difficult. Also, in true tit for tat style the other party is just as likely to adopt a similarly hard headed approach rather than cave in as the adversary plans or demands.

(7) Propensity to Settle
It is my experience that some older people want to settle too early. The stereotype is that older people will roll over easily. Sometimes I think this is a stereotype that is correct. Older persons often present as fearful of change and of possible retribution against them. Like some clients in family law cases, they are often focused on maintaining relationships and either want to settle too early or for too little. These are valid concerns and it is entirely legitimate for a client to trade off something to maintain harmony within a family, or another important set of relationships. The important part here is that the person is advised and understands what they are doing. This type of circumstance should not be confused with the situation pertaining to a range of older people who, because of their infirmity, are finding it difficult to follow and understand what is happening. In this situation it is important that the older person be properly represented.

(8) Resources
Older people have fewer resources than the general population. About three quarters depend upon Social Security for their main income source. Therefore, they are less able to sustain costly disputes. They often have fewer resources in terms of social networks and contacts. This makes them relatively more isolated and reliant upon their family, formal and professional relationships and fearful of loss in these areas.

(9) Prevention
Most conflicts in this area start small and build towards large disputes. They are usually not anticipated and in many cases could have been prevented. For example, in cases involving private commitments between older people and their relatives, friends and carers designed to provide them with accommodation and care in their final years, they usually get into difficulties for two types of reasons. First, they don’t anticipate emerging problems in family relationships, and second it is very difficult to quantify the contribution which a carer makes over time. In these cases many disputes can be prevented or lessened by a thorough canvassing of all contingencies. Often parties in these sort of disputes have not initially obtained proper legal or other advice.

(10) Situational Entrapment

In mediations involving family provision or private commitment disputes one or both parties are usually entrapped in the dispute. Most lawyers could correctly presume that one of the major reasons for the entrapment is the cost factors involved in the litigation or potential litigation. However, probably just as important in these situations is the social context in which these disputes are played out. Most disputants in these situations will lose considerable face in their familial and social relationships if they should lose or withdraw their claims. As the entrapment continues the explanation of why such involvement is necessary moves from clear and rational justifications to ones with a greater degree of emotional content. That is, as the entrapment proceeds, parties may simply want to achieve the intended goal to meet psychological needs, save face or to justify their previous investment. Their motives shift from the rational to rationalising. Certain behavioural tendencies emerge, the most important of which is self perpetuating tendencies which cause further commitment. Parties’ motivation to compromise changes to one of aggression against the adversary. More and more investment in the dispute is made making it increasingly difficult to withdraw
and/or compromise. In other words there is a tendency for conflict in such situations to escalate. These elements make these types of disputes some of the most difficult to manage. This is because, firstly, there is structural change in the situation. That is the parties cannot go back to the way they were before. Even if the matter is resolved, the parties usually are left with a residue of resentment. Secondly, participants usually suffer from “selective perception”. That is, they will think the worst (or the best), distort information and hear only what they want to hear. Thirdly, these tendencies result in playing out of number of “self fulfilling prophecies”, that is, one party expects the other party to act in certain ways and accordingly adjust their own behaviour, thus resulting in the expected behaviour to occur as predicted.  

Preventing this sense of entrapment from taking over the case involves a need for advisors to help the parties set limits, help parties understand the process and its limitations, provide accurate information about costs and avoid public (or even familial) displays of commitment to a certain course.

Conclusion

It is clear that the field of elder law will continue to expand as our population continues to age. The management of disputes within this expanding area presents particular challenges. Not least is coming to terms with the plethora of government legislation and regulation which will also continue to increase. Recent reforms to the ACA indicate the highly politicised nature of the field. This will also become more evident as the aged care sector becomes a larger and more organised part of our society. The role of lawyers as dispute managers within this framework will necessarily have to adapt and change. This will be particularly so in the area of conflict prevention. The careful production of wills and other instruments effecting the estates and future living of persons planning their old age

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will become more and more important as people continue to live longer lives. Building in appropriate dispute resolution clauses into such arrangements will be imperative. The role of mediation, conciliation and similar processes will continue to be important. The proper training, supervision and preparation of those involved in the management of conflict in this area will be imperative.

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