



## Submission to the Australian Law Council's Justice Project, Older Persons Discussion Paper

September 2017

### About Aged and Disability Advocacy Australia

Aged and Disability Advocacy (ADA) Australia is a not-for-profit, independent, community based advocacy and education service with more than 25 years' experience in supporting and improving the wellbeing of older people and people with disability.

ADA Australia provides advocacy support to recipients of Queensland Community Care Services and Commonwealth funded aged care services. ADA Australia is a member of the Older Persons Advocacy Network (OPAN) and receives funding under the National Aged Care Advocacy Program (NACAP) to deliver advocacy, information and education services. ADA Australia also has an established Guardianship Advocacy Service which supports people with a decision-making disability and people aged over 65 years, to express their views, wishes and preferences at QCAT and in relation to guardianship, administration and Enduring Power of Attorney matters.

Headquartered in Brisbane, ADA Australia has regional offices in Cairns, Townsville, Mackay, Rockhampton, Hervey Bay, Toowoomba, and the Gold Coast and is active in providing advocacy services in metropolitan, regional, rural and remote communities across Queensland.

### ADA Australia's Guardianship Team

ADA Australia's Guardianship Team was established in 2007 with funding support from the Queensland Department of Justice and Attorney-General. The Guardianship Team offers eligible clients free tribunal support and advocacy services including assistance to complete and lodge new applications and negotiations with formal decision makers.

Clients eligible for this service include people with disability and people aged over 65 years, who may or may not have questionable capacity, associated with a cognitive disability, dementia and/or mental illness and who are:

- Experiencing financial abuse, including the withholding of pensions etc
- Being socially isolated by an abuser, including removal from health and community care services, friends and supports known to the adult or abuser instructing service provider to only follow their orders.
- Subject to controlling and demanding behaviours.

Clients of the Guardianship Team often experience multiple forms of disadvantage. While the core client groups for this service are people with a disability or mental illness and older people, clients may also have low education levels, be financially disadvantaged or abused, unemployed, experiencing or at risk of family violence, living in rural and remote locations, Culturally and Linguistically Diverse (CALD), or Indigenous.

As a result, the barriers faced by clients of the Guardianship Team can be complex and numerous. Common barriers experienced by clients of the Guardianship Team include:

- **Isolation:** Clients can be kept isolated by the perpetrator of abuse, who could also be their decision maker (EPOA or guardian). Clients may have restricted access to mail and telephone or have their phone calls monitored. Therefore, access to this isolated client group is difficult
- **Financial:** Clients often associate accessing advice and support with a cost and assume that they do not have the necessary funds required to access support services. In many cases clients do not have access to their personal funds.
- **Education:** There is a lack of community understanding about possible avenues for resolution. There is also a perception that if a formal decision maker is in place, they can no longer participate in decisions that affect them. In these instances, people are viewed as “legally dead” and become non-citizens.
- **Interpersonal:** Clients may have concerns about damaging relationships through the process of engaging legal and support services. This concern is most prevalent when family members are involved or when the client is dependent on their decision maker for other practical supports. ADAA has found that non-adversarial approaches, such as mediation and education, are key to maintaining supportive relationships and reducing conflict and preventing escalation of legal problems.

The Guardianship Team aims to be flexible in responding to the unique needs of clients, offering face to face, outreach supports with access to ADAA’s specialist advocates (CALD, ATSI, LGBTI) where appropriate.

The Guardianship Team currently receives internal referrals from ADA Australia’s NACAP service, as well as externally from Community Legal Centres, Caxton Legal/Seniors Legal and Support Service (SLASS), Queensland Advocacy Incorporated (QAI), Legal Aid Queensland, The Advocacy and Support Centre (TASC), Carers Queensland, the Elder Abuse Prevention Unit and LawRight.

ADA Australia also has established formal referral pathways with both QCAT and Office of the Public Guardian, a Memorandum of Understanding (MOU) with Redbourne Health Services to receive referrals through the Queensland Police Service (QPS), a MOU with Supportlink to receive referrals through the Queensland Ambulance Service and have also established direct referral pathways with the QPS Family Violence Prevention and Vulnerable Persons Unit.

The Team have developed a range of innovative resources to educate both individuals and health and aged care professionals on how to recognise and assist in preventing the abuse of vulnerable people who are subject to guardianship, administration and EPOAs. These resources include

- a video titled [How to Act Appropriately as an Attorney under an Enduring Power of Attorney \(EPOA\) in Queensland](#). This video is a great tool for aged care service providers to use to educate both consumers and staff.
- fact sheets on [Duties and Responsibilities as an Attorney under an EPOA in Qld and The General Principles and Health Care Principles](#)
- A [Flowchart and Intake resource](#) was developed for aged care service providers to assist staff to better understand
  - The making of an EPOA
  - Using an EPOA
  - Actions of an Attorney

These resources were officially launched by the Attorney-General of Queensland and are referred to as a useful resource on both the Queensland Government website and Legal Aid Queensland's website.

#### ADA Australia Response to Priorities for Discussion

*1. Inject funding to legal aid commissions and community legal centres to provide specialist advice and support for older persons, and expand community legal education, with a focus on older persons. Without additional funding and resources, many legal assistance services do not have the time or resources to build the appropriate level of trust and rapport with older clients.*

Historically, Legal Aid Queensland (LAQ) has not been involved in legal issues for older persons at the individual or systemic level. Whilst this has started to change in more recent times, with LAQ assisting in an increasing number of older persons mental health cases, ADA Australia would argue that expertise in older persons legal advice in Queensland primarily lies with the following government departments and community based organisations:

- Office of the Public Guardian
- Office of the Public Advocate
- Public Trustee of Queensland
- Seniors Legal and Support Service (SLASS)
- Elder Abuse Prevention Unit (EAPU)
- Aged and Disability Advocacy Australia.

ADA Australia recommends future funding for specialist advice and support for older persons focus on enhancing collaborative and multidisciplinary approaches between legal aid commissions, community legal centres and existing specialist services (such as those listed above).

ADA Australia maintains that a targeting of funding in this direction would be more beneficial than simply injecting additional funds into mainstream legal services that often lack the skills necessary to build trust and rapport with vulnerable and diverse client groups.

ADA Australia notes that law degrees do not necessarily skill graduates in understanding and empathising with vulnerable audiences and as a result, law graduates are often not confident engaging with marginalised cohorts in a meaningful way.

ADA Australia believes that collaborative/multidisciplinary approach will assist in making legal services more accessible to vulnerable older persons and will also allow for underlying social concerns such as housing and health to be addressed in a more holistic manner.

ADA Australia suggests that community legal education for older people may also benefit from enhanced collaboration with the health and community sectors. There are several community based organisations that are already connecting with older persons on a regular basis and have the potential to significantly increase the reach of community legal education. For example, in 2015/16 the Older Persons Advocacy Network (OPAN) delivered rights based education sessions to approximately 42,000 aged care recipients and service providers across the nation.

## ***2. Invest in the development of additional programs and services for older persons in regional, rural and remote areas.***

ADA Australia supports the proposal to invest in the development of legal supports for older persons in regional, rural and remote areas.

ADA Australia recommends that any new programs be closely networked with existing specialist agencies.

## ***3. Continued development and dissemination of professional development and legal education resources that focus on elder law issues, particularly elder abuse.***

ADA Australia supports this proposal and recommends that these types of resources be developed in conjunction with universities and ensure that resources remain evidence based.

ADA Australia also recommends the development of a range of resources targeted at health and aged care workers. As noted in the *Older Persons Discussion Paper*, health and aged care workers are often problem noticers and would be well placed to connect vulnerable older persons with appropriate legal supports, if they were equipped with the appropriate resources.

ADA Australia developed a Seniors Legal Diary (modelled on the popular NSW diary produced by Legal Aid NSW). ADA Australia observed that community based aged care services were purchasing these diaries for their staff who used the diary as a tool to refer clients that raised legal concerns during home visits.

*4. The Commonwealth Government should consider adopting the recommendation made by the House of Representatives Standing Committee on Legal and Constitutional Affairs regarding 'the establishment of a central resource or referral service that older people can utilise to obtain basic information about where to go to obtain legal assistance'*  
*This could be in the form of a free telephone number (recognising that an online service may exclude many older people experiencing isolation and disadvantage).*

ADA Australia supports this proposal.

ADA Australia notes that older people often don't identify their concerns as legal problems and may therefore be dismissive of available legal supports. In addition to this, vulnerable older people are often reluctant to engage with lawyers or the legal system. As highlighted in the *Older Persons Discussion Paper*, many older people are more likely to raise and discuss their legal concerns with a trusted health or community service. With this in mind, ADA Australia suggests that the frontline of an older person's information and referral service does not necessarily have to be a legal service.

ADA Australia suggests that the model adopted by OPAN would be an effective way to deliver a nationally consistent service for older people seeking information and advice on accessing legal supports.

OPAN delivers the National Aged Care Advocacy Program (NACAP) through 9 state and territory based member organisations which combined employ over 50 experienced staff across 21 locations.

The combined national reach of OPAN enables the annual delivery of

- Advice to 9,000 individual advocacy consumers,
- Information to over 21,000 consumers and family members, and
- Education to over 40,000 people on elder persons rights and responsibilities

The OPAN model delivers information and referrals via a single free call 1800 phone number, online via a website equipped with online referral and face to face through education and advocacy casework, providing access to specialist Aboriginal and Torres Strait Islander, Culturally and Linguistically Diverse and Lesbian, Gay, Bisexual, Transgender and Intersex advocates where appropriate.

OPAN would be well placed to deliver a new information and referral service for older people requiring support to access legal services. For more information on OPAN visit [www.opan.org.au](http://www.opan.org.au).

*5. A National Plan, accompanied by a national prevalence study on elder abuse, should be developed in accordance with the recommendations made by the ALRC.216*

ADA Australia supports this proposal and would welcome the opportunity to contribute to the development of a national plan and prevalence study on elder abuse.

ADA Australia has extensive experience in supporting Queenslanders at risk of elder abuse. In 2016, ADAA's Guardianship Team provided assistance with over 300 cases, 70% of which reported cases of abuse.

In addition to this, the Commonwealth Department of Health has provided an additional \$1 million in funding to OPAN in 2017/18 to design and deliver elder abuse advocacy services nationally within the broader aged care system. As part of this, OPAN is

- reviewing existing state based models of response that have the potential to be rolled out nationally
- exploring opportunities to research and develop an appropriate model of response to people who live in regional, rural & remote Australia, and
- Considering the development of a national website providing information on elder abuse within the aged care system.

The collective knowledge and experience of both ADA Australia and OPAN would be invaluable to any future developments in the elder abuse space.

*6. The Commonwealth Government should invest in further research on the legal needs and capabilities of older persons, and analysis of access to justice strategies, including commissioning independent evaluations of existing projects and initiatives.*

ADA Australia supports this proposal. Australia has recently taken the lead in researching this topic in Queensland and would welcome to opportunity to be participate in any further research projects.

In 2016, ADA Australia engaged in a collaborative research project with Queensland University of Technology's Australian Centre for Health Law Research, and Crime and Justice Centre. This small, exploratory project was undertaken to identify and explore enablers and barriers to accessing justice for those who have experienced alleged abuse as a result of a breach of the obligations under a valid EPA. The study involved an analysis of 120 case files of clients who had sought assistance from ADA Australia for alleged financial abuse between November 2014 and November 2016.

The findings were documented in a report titled *Examining access to justice for those with an enduring power of attorney (EPA) who are suffering financial abuse*. The data presented in this report has sought to highlight some of the issues that are faced by those who have an operative EPA and who allege financial abuse. The report highlighted

- the need for an improvement in the effectiveness of the education and awareness efforts made to inform people about EPAs.
- the negative impacts that an EPA can have on an individual.
- the pivotal role that families and friends have in the lives of those under an operative EPA.
- That a collaborative response needed to address many of the issues highlighted in this report
- a need to better understand the concept of capacity, including how it is understood from within both a legal and health perspective and how this influences actions taken by attorneys, service providers and professionals.

The full report is available at <https://adaaustralia.com.au/wp-content/uploads/2016/07/Access-to-Justice-EPOA-Project-Report-QUT.pdf> .

*7. Given the barriers outlined above, including older persons' reluctance to initiate or engage in court proceedings, State and Territory governments could consider developing supported elder mediation programs as a form of alternative dispute resolution for older people.*

ADA Australia is supportive of elder mediation programs, particularly when they are used as a precursor to tribunal/court. For example, a tribunal guardianship hearing should not be offered unless elder mediation has been trialled first.

In ADA Australia's experience, current processes reward people who want to be adversarial in their approach. There is currently no incentive for people to work through issues in a conciliatory manner. ADA Australia maintains that elder mediation will not be as relevant as it could be, if it is not a prior requirement.

ADA Australia would also like to highlight the importance of ensuring elder mediation services are flexible in responding to the unique needs of vulnerable clients. E.g. offer services in residential care and hospitals.

ADA Australia was recently involved in a case where a client went into hospital and was thought to have impaired capacity. The client's sons wanted him to go into a residential care facility but the client wanted to go home. The mediation service would not come to the hospital and the hospital would not let the client out of hospital to attend mediation. The client waited in hospital for two months before attending a hearing with the Queensland Civil and Administrative Tribunal (QCAT), where he was deemed to have capacity and sent home. ADA Australia considers these types of scenarios, where flexible outreach models are not supported, to be an unnecessary drain on both health and justice resources and unsupportive of the rights of vulnerable people to exercise choice and seek justice.

## Other priority areas

### ***Support for people with Impaired capacity***

Legal services have an ethical and professional obligation which prevents them from accepting instructions from someone who has impaired capacity for that matter. In these instances, legal services must act at the discretion of an Enduring Power of Attorney, who in the experience of ADA Australia may also be the person's abuser. It is essential that vulnerable people in these circumstances have access to alternative supports.

As a non-legal service, ADA Australia is not subject to these conditions and is able to support people with impaired capacity to have their views and wishes heard.

ADA Australia recommends that advocacy services work alongside legal services to ensure people's voices are not over-taken by the formal decision maker, who may also be the perpetrator of abuse.

### ***Advocacy support for discrimination complaints***

The Older Persons Discussion Paper refers to the difficulties older people face in engaging with the discrimination complaints process.

ADA Australia recommends that consideration be given to the model adopted by the Aged Care Complaints Commissioner (ACCC).

The ACCC has a close working relationship with the National Aged Care Advocacy Program (NACAP). The ACCC and NACAP have reciprocal referral pathways and NACAP organisations play an important role in assisting aged care recipients through the ACCC conciliation process. NACAP organisations support aged care recipients to follow up with service providers following conciliation to ensure agreed outcomes have been actioned and will also support clients to reconnect with the ACCC when issues remain unresolved.

This working relationship ensures that vulnerable older people, who are often fearful about making a formal complaint and, are supported to voice their concerns at every step of the complaint process.

ADA Australia suggests that the disability discrimination complaints process may also benefit from an enhanced relationship with consumer advocacy groups.

### ***Means testing***

ADA Australia notes that the ACT Legal Aid has argued for relaxation of the means test to allow older people to receive legal aid grants, particularly in cases where abusive circumstances prevent them from accessing their funds.

ADA Australia supports this argument and recommends that in cases of suspected financial elder abuse the means testing for legal aid grants be relaxed.

For example, we are aware of clients who are quite wealthy, but receive little to no allowance of funds to enable them to purchase anything more than \$20 - \$30 per fortnight.

### **Summary of Recommendations**

In summary, ADA Australia encourages the Law Council of Australia to consider the following strategies for improving access to justice for older persons:

- community legal education for older people be delivered in collaboration with the health and community sectors.
- Legal services to develop stronger links and referral pathways with problem noticers in the health and community sectors
- Legal services to establish formal alliances with specialist advocacy organisations that can accept instructions from vulnerable people with impaired capacity, who are subject to abuse.

## Contact ADA Australia

Should you have any queries regarding the content of this submission, please do not hesitate in contacting the following ADA Australia representatives:

Geoff Rowe  
Chief Executive Officer  
Phone (07) 3637 6000  
Email [Geoff.Rowe@adaaustralia.com.au](mailto:Geoff.Rowe@adaaustralia.com.au)

Karen Williams  
Manager, Guardianship Team  
Phone (07) 3637 6000  
Email [Karen.Williams@adaaustralia.com.au](mailto:Karen.Williams@adaaustralia.com.au)