ACCESS TO JUSTICE AND LEGAL NEEDS

THE LEGAL NEEDS OF OLDER PEOPLE IN NSW

December 2004

LAW AND JUSTICE FOUNDATION OF NEW SOUTH WALES

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Volume 1

THE LEGAL NEEDS OF OLDER PEOPLE IN NSW

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December 2004

LAW AND JUSTICE FOUNDATION OF NEW SOUTH WALES

ISSN 1832-2670

This report is part of the *Access to Justice and Legal Needs* monograph series published by the Law and Justice Foundation of New South Wales. The Foundation seeks to advance the fairness and equity of the justice system, and to improve access to justice, especially for socially and economically disadvantaged people.

The series is aimed at researchers, policy-makers, government, the legal community and others interested in legal need and access to law and justice. It is a scholarly, refereed series. Monographs are refereed by at least two appropriate external referees who are independent of the Foundation and any other organisations/authors involved in the publication.

Editors:
Managing Editor: Geoff Mulherin
Principal Editor — this edition: Christine Coumarelos

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National Library of Australia Cataloguing-in-Publication data:

The legal needs of older people in NSW.
Bibliography.
ISBN 0 909136 87 4.

1. Older people - Legal status, laws, etc. - New South Wales. 2. Older people - Services for - New South Wales. 3. Legal Aid - New South Wales. I. Ellison, Sarah. II. Law and Justice Foundation of New South Wales. (Series : Access to justice and legal needs ; v. 1).

347.944

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Cover photo: courtesy of Tony Miller, Over the Horizon Publications.

Foreword

The objects of the Law and Justice Foundation are to contribute to the development of a fair and equitable justice system which addresses the legal needs of the community, and to improve access to justice by the community (in particular, by economically and socially disadvantaged people).[1]

In 2002 the Foundation commenced the Access to Justice and Legal Needs research program, which aims to examine the ability of disadvantaged people to:

- obtain legal assistance,
- participate effectively in the legal system,
- obtain assistance from non-legal advocacy and support, and
- participate effectively in law reform processes.

The main purpose of the program is to provide a rigorous and sustained assessment of the legal and access to justice needs of the community, especially disadvantaged people, which would provide evidence to assist government, community and other organisations develop policy and plan service delivery. The research is a challenging program involving an interconnected set of projects employing a range of qualitative and quantitative methodologies.

An important feature of the program is the examination of the particular access to justice and legal needs of selected disadvantaged demographic groups. This report is a qualitative study examining the legal needs of older people. Other groups to be examined as part of the program include homeless people and people experiencing a mental illness. These groups have been chosen principally because less is available in the literature concerning their legal needs.

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[1] Law and Justice Foundation Act 2000 (NSW), s. 5(1).

Given the ageing of the population over the last twenty years and the likely continuation of this trend in the coming decades, there is a pressing need to consider the particular legal issues confronting older people, their ability to access legal services, and the issues within the legal system which present barriers for them. This report attempts to address this need, within the scope of the research methodology.

This report into the legal needs of older people is based on a review of existing literature, consultations with legal and non-legal service providers, academics, and older people themselves, and seeks to canvass many of the particular issues relevant to older people in NSW. While the report 'stands on its own', it is also important to consider this report in the context of the relevant data on legal barriers and legal need for older people contained in other quantitative and qualitative components of the access to justice and legal needs program. The following reports, in particular should be considered:

- *Public Consultations Report* (August 2003)
- *Quantitative Legal Needs Survey — Bega Valley (Pilot)* (November 2003)
- *Data Digest* (February 2004)
- *The Legal Needs of Homeless People* (to be published 2005)
- *Quantitative Legal Needs Survey – Six Regions* (to be published 2005)
- *Legal Needs of People with a Mental Illness* (to be published 2005)

Geoff Mulherin
Director
Law and Justice Foundation of NSW
December 2004

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Acknowledgments

The authors acknowledge the assistance of Myra Cheng and Sam Lebovic in finalising this report.

The Law and Justice Foundation of NSW would like to thank the many individuals, organisations and agencies with whom we have consulted during this project.

The Foundation would especially like to thank the many older people who responded to our invitation to contact the Foundation to express their views, and who participated in focus groups. Their preparedness to share often extremely personal experiences of the legal system has been a significant contribution to this project.

The Foundation is also grateful to the following people for commenting on an earlier draft of the report:

- Sue Field, University of Western Sydney
- Professor Jeff Giddings, Director of Clinical Legal Education, Faculty of Law, Griffith University, Queensland
- Professor Terry Carney, Director of Research, Faculty of Law, University of Sydney.

Access to Justice and Legal Needs Program: Terms of Reference

Program Aim

To identify the particular legal and access to justice needs of economically and socially disadvantaged people in NSW.

Objectives

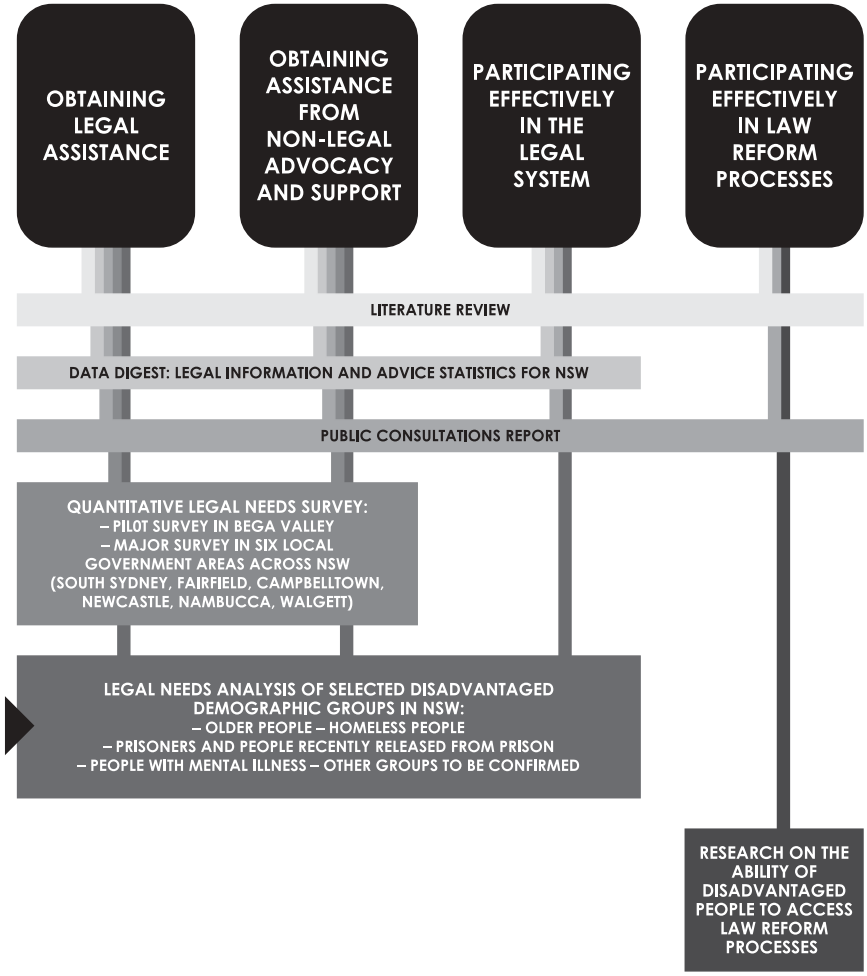
The program will examine the ability of disadvantaged people to:

- **obtain legal assistance** (including legal information, basic legal advice, initial legal assistance and legal representation)
- **participate effectively in the legal system** (including access to courts, tribunals, and formal alternative dispute resolution mechanisms)
- **obtain assistance from non-legal advocacy and support** (including non-legal early intervention and preventative mechanisms, non-legal forms of redress, and community based justice)
- **participate effectively in law reform processes**.

This will involve both qualitative and quantitative investigations into:

- legal problems encountered by disadvantaged people
- services and processes to deal with these problems
- barriers that obstruct access
- useful services and processes not provided by the legal system.

Program Components



Executive Summary

Background

Faced with an ageing population, State and Federal Governments have acknowledged the need to implement strategies to address the diverse needs of older people in the community. However, there has been little research or specific attention to their access to justice and legal needs. The importance of addressing the legal needs of older people is underscored by the fact that older people are identified as a group who are socially and economically disadvantaged.

Aim and methodology

The aim of the present study was to identify the particular legal issues which often confront older people in New South Wales (NSW). It looked at the particular barriers confronted by older people in accessing services to resolve legal issues, including any attitudinal barriers.

The report is based on:

- an extensive literature review
- interviews with a range of individuals and organisations with an interest in elder law, including community organisations, government bodies, government service providers, community legal centres, private legal practitioners and academics
- nine focus-group discussions involving 78 participants, including both older men and women, older people from urban, regional and rural locations, older people in different accommodation arrangements, and carers

- 135 individual written or telephone submissions from older people
- participation in relevant conferences and forums relating to ageing and older people.

Legal Services

Many of the obstacles for older people in accessing legal services reflect characteristics of the current cohort of older people, including a lack of awareness of their legal rights, a lack of confidence in enforcing those rights, a reluctance to take legal action, and a perception that the law is disempowering and cannot solve their problems.

General barriers relating to the ability to access legal information and advice services which were identified during this research include:

- technological barriers, particularly for telephone and web based services
- a lack of awareness of where to obtain legal information and assistance
- a lack of appropriately communicated legal information
- the high cost of legal services
- a lack of interest by some legal practitioners in older clients
- potential conflict of interests when legal practitioners for older people are arranged by family members.

Barriers for older people in accessing existing legal services which were identified during the research include:

- difficulties in accessing legal aid, including restrictive eligibility tests
- a lack of availability of legal aid for civil disputes
- lack of specialised legal services for older people, particularly in rural, regional and remote areas

- lack of resources in community legal centres to tailor their services to the needs of older people.

Older people's needs in terms of legal service delivery include:

- legal information that is clear and readily accessible—preferably through face-to-face contact
- legal practitioners who provide explanations in simple terms, are friendly, courteous, inexpensive, expert in dealing with older people and do not require the older person to exercise a lot of 'self-help'.

Many service providers and older people alike expressed the view that there was a gap in service provision to older people, particularly to older people who cannot afford private solicitors.

Accommodation related legal issues for older people

Legal issues for older people relating to accommodation and housing reflect the distinct nature of accommodation and housing options for older people.

Nursing homes and residential aged care facilities

The main areas of concern which were identified include:

- inadequate security of tenure
- complex and confusing contractual and financial arrangements, particularly concerning the transfer of the person's property to the nursing home/facility, the return of bond money, and complex fee structures
- abuse and neglect within the nursing home/residential aged care facility
- inadequate access by residents to medical and care records.

There are three agencies that receive complaints about residential care facilities in NSW: the Commonwealth Aged Care Complaints Resolution Service; the NSW Department of Health, Private Health Care Branch Complaints Team; and the NSW Health Care Complaints Commission (HCCC).

Identified barriers for older people in using the complaints resolution mechanisms include fear of retribution from service providers, and a sense that it is ungrateful to complain.

Consumer advocacy groups play an important role in assisting people in nursing homes and residential aged care facilities to protect their rights. In addition, the NSW Aged Care Rights Service (TARS) was specifically established to provide advocacy and assistance for residents of Commonwealth funded nursing homes and residential aged care facilities in NSW. There are also various agencies that provide a range of information services to residents and prospective residents.

Retirement villages

The main areas of concern which were identified include:

- confusion over the nature of the tenure
- disputes over recurrent charges for residents, departure fees, refund of entry fees on departure, contract provisions, responsibility for damage to premises, and village rules
- village mismanagement, investment risk and financial viability of operators
- disputes over variation or reduction in village services.

The Consumer Trader and Tenancy Tribunal (CTTT) has jurisdiction to resolve disputes between residents and village operators. Self-representation before the CTTT is difficult for many older people. TARS provides a legal advocacy service, a telephone information service and

workshops for residents of retirement villages. Other sources of information for residents of retirement villages include the NSW Office of Fair Trading, the *It's Your Life* Retirement Village Information website,[1] the Retirement Villages Residents' Association, and the Council on the Ageing.

Home units under strata title

The main areas of concern which were identified include:

- unscrupulous or ineffective body corporate managing agents
- increases in charges controlled by investor owners
- lack of information/advice services regarding body corporate issues.

The Office of Fair Trading provides a mediation service for disputes related to strata living. If mediation fails, then parties can apply for a decision from an adjudicator and can also appeal that decision to the CTTT.

Public housing tenancy

The main areas of concern include:

- long waiting lists for public housing and rigid eligibility criteria
- delays in carrying out repairs
- problems with neighbours
- unfair lease terminations and increased vulnerability to lease terminations.

Tenants can appeal decisions by the NSW Department of Housing to the NSW Housing Appeals Committee. For complaints regarding a failure by the Department to carry out repairs, a tenant can appeal to the CTTT.

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[1] <http://www.itsyourlife.com.au/> (Last accessed 15 December 2003).

The Combined Pensioners and Superannuants Association of NSW Older Persons Tenants' Service (OPTS) provides advice, advocacy and assistance specifically for older people, on both public and private housing tenancy issues. There are 11 other tenancy advice services in NSW for the general population.

Private tenancy

The main areas of concern which were identified include:

- discrimination by real estate agents
- lack of security of tenure in short term leases and lease terminations
- unreasonable rent increases
- landlords/agents excessively seeking access to premises
- difficulties in getting repairs to premises.

Tenants can apply to the CTTT regarding issues such as rent increases, lease terminations, delays in getting repairs to premises, and complaints about landlords requesting excessive access to premises. Older people who are not granted leave for representation may be considerably disadvantaged. In relation to disputes over rent increases for protected tenancies, the matter can be referred to the NSW Fair Rents Board for determination.

Home ownership

Areas of concern which were identified include neighbour problems, older people who act as guarantor for their adult children, real estate agent scams, abuse of power of attorney resulting in sale of home, and informal family accommodation agreements (i.e. where the older person has transferred the title of their home to a relative in consideration for a promise to provide accommodation and/or care assistance).

Boarders and lodgers

Areas of concern which were identified for older people in boarding house accommodation include:

- lack of legislative protection for occupancy rights resulting in terminations
- prohibitive tariff increases, and inadequate notice for tariff increases
- difficulties in recovering security deposits
- failure by operators to undertake necessary repairs and maintenance
- disputes about boarding house rules
- excessive and intrusive access to residents' rooms by managers
- disputes with other occupants
- disputes over uncollected personal goods following termination of occupancy
- disputes with owners/managers over rent payments.

Where a dispute arises between a boarder/lodger and the owner/manager, there is no access to an independent and informal dispute resolution process that can resolve disputes quickly. Aggrieved residents can only pursue redress through either the Local or Supreme Court.

The Older Persons Tenants' Service and general tenancy advice services are available to assist older residents of boarding houses.

Residential parks

Areas of concern which were identified include:

- denial of rights for residents when a residential park is to be closed
- disputes over fees/charges and park rules
- difficulties for older residents resulting from park managers preventing public service vehicles (e.g. taxis, delivery vehicles, ambulances) from entering residential parks.

Where residents have disputes over park rules, they can apply to their park disputes committee. A resident can apply to the CTTT for an order for compensation for having to relocate due to park closure. However, the delays in the process of obtaining such an order may result in diminished availability of alternative sites in the area.

The Park and Village Service (PAVS) of NSW and the Parks and Village Tenants Association provide information and advice to residents of caravan parks and mobile home estates. Tenancy advice services also provide legal information and advice services to residents.

Health related legal issues

Issues relating to access to health services are more common amongst older people than other age groups. Certain cohort characteristics of older people, such as their reluctance to question, complain and challenge authority, act as barriers to accessing quality health care and in enforcing basic patient rights. These barriers have significant implications for the effectiveness of current complaint and legal mechanisms, where the onus on enforcing rights is placed on the individual.

Advance health care directives

Advance health care directives are written statements regarding a person's instructions as to the type and extent of health care that they wish to receive in the event of losing the capacity to make decisions. In NSW, while these are not supported by legislation, they are strongly persuasive to health care providers and the Guardianship Board. However, barriers for older people in accessing such directives include:

- lack of knowledge of their availability
- the lengthy time involved in planning them
- a reluctance to think about end of life health issues

- difficulties in predicting future circumstances accurately in relation to health issues.

Access to health services

The following consumer issues in relation to health services for older people were identified:

- poor communication and delivery of health services to older people
- the impact of age-based rationing of health care services
- the cost of health services, due to the shift away from bulk billing and the high cost of private health insurance.

Hospital discharge

The following general barriers to effective discharge were identified:

- poor communication and coordination between medical staff, GPs and hospital staff in discharge planning
- lack of community health and welfare services
- lack of accommodation for older patients
- attitudes and expectations of patients and their carers.

Medication misuse

The legal issues of medication misuse which were identified include:

- lack of knowledge and education regarding the use of medication for older people
- lack of knowledge/education and communication with health care providers
- difficulties in obtaining access to medical records.

Available complaint mechanisms for health related issues

The NSW Health Care Complaints Commission (HCCC) provides people with a means of making a complaint about health care practitioners and services. For hospital complaints, there are also delegated employees in many hospitals whose role is to investigate and mediate complaints.

Identified barriers in accessing these complaint mechanisms include:

- responsibility being placed on the consumer to initiate complaints
- the complaints processes are usually individually based, and often fail to uncover organisational or systemic problems.

Available advocacy services for health related issues

The Patient Support Office set up by the HCCC can provide officers who can act as advocates, helping to identify issues of concern, providing information about health rights and providing direct assistance to resolve concerns.

The Combined Pensioners and Supperannuants Association provides advocacy, education and support to older people on medicines and health rights.

Older people and disability

Particular issues identified for older people with disabilities include:

- physical access to facilities
- access to information for people with visual or cognitive impairments
- attitudinal problems amongst service providers, resulting in neither aged services or disability services providing the necessary services
- cost related issues, due to the likelihood that older people who have suffered an earlier onset of disabilities have lower savings.

Financial and consumer related legal issues

Older people face a broad range of financial and consumer issues.

Social Security and Veterans' Pensions

The main areas of concern which were identified include:

- confusion regarding eligibility for the Aged Pension and Veterans' Affairs pensions
- difficulties with the application of income and assets tests
- overpayments and errors in assessment of correct rates for pensions.

Although the Welfare Rights Centre provides advice and assistance about social security entitlements, older people make up a low percentage of their clients. The Veterans Advocacy Service (VAS) of Legal Aid NSW provides free legal advice about rights and entitlements under the *Veterans' Entitlements Act 1986* (Cth). Some ex-service organisations and individuals also provide assistance for applicants at the Veterans' Review Board (VRB).

It was noted that few legal and financial advisers are sufficiently familiar with the social security legislation, practice, and appeals process to provide effective assistance to pensioners.

Both social security and veterans' benefit entitlement legislation provide for an appeal process against administrative decisions. The first step in this process is to complain to the original decision-maker for re-consideration, after which a complainant may seek internal review by Centrelink or the Department of Veterans' Affairs (DVA). Decisions by Centrelink can be appealed to the Social Security Appeals Tribunal (SSAT). DVA appeals go to either the Administrative Appeals Tribunal (AAT) or the VRB.

An alternative avenue for complaints on pension matters is the Commonwealth Ombudsman. The Ombudsman cannot override the decisions of agencies or issue directions to agency staff, but can resolve complaints by negotiation.

Superannuation

The Superannuation Complaints Tribunal (SCT) investigates complaints relating to superannuation, annuities and deferred annuities, and retirement savings accounts.

Banking, credit and debt

The main areas of concern identified include:

- difficulties faced by older people in using the new technologies
- credit and debt issues arising from personal loans and credit card purchases.

The Consumer Credit Legal Centre (CCLC) specialises in issues related to consumer credit, banking and debt recovery, and focuses on issues that affect low-income and disadvantaged consumers. Financial counsellors can also assist people who are experiencing financial difficulties relating to credit and debt.

The Banking and Financial Services Ombudsman (BFSO) is a free independent dispute resolution service which considers disputes involving amounts of up to $150 000 between individuals and banks.

The Credit Union Dispute Resolution Centre (CUDRC) is a free service that deals with complaints about credit union services involving claims of up to $100 000.

Investment advice and financial planning

The main areas of concern which were identified include:

- poor access to necessary information to make investment decisions
- lack of experience of some older people in handling financial affairs
- problems arising from acting as guarantor for someone else's loans.

The Centrelink Financial Information Service (FIS) provides free information on financial planning, income and assets tests, and taxation. The Commonwealth Department of Veteran's Affairs Financial Information Service (VAFIS) offers a similar free financial information service. The National Information Centre on Retirement Investments provides a range of leaflets on retirement investment and financial information by telephone.

The Financial Industry Complaints Service Ltd (FICS) provides free assistance to resolve complaints against financial services industry members about life insurance, superannuation, and financial and investment advice.

Insurance Brokers Disputes Ltd (IBD) is a free consumer service that handles complaints on claims of up to $50,000 by consumers against insurance brokers and other financial service-providers (other than insurance companies).

Consumer issues

The main issues identified include:

- complaints about goods and services, including public transport services, health insurance, gas/water/electricity and professional services
- vulnerability of older people to consumer fraud and pushy door-to-door sales people
- concerns regarding the prudential standards of pre-paid funeral schemes.

The NSW Office of Fair Trading (OFT) runs call-centres and provides comprehensive consumer information on its website, including information specifically designed for older people.

The CTTT handles small consumer claims (up to $25,000). In addition, a number of industry based complaints schemes provide an alternative form of resolving consumer complaints for specific industries (e.g.

Telecommunications Industry Ombudsman, the Energy and Water Ombudsman of NSW).

Resolving financial and consumer issues

Common features of industry dispute-resolution schemes are that they are free for consumers and generally binding on the service provider. The complexity of the process for lodging complaints varies from body to body. Allowing complaints to be lodged orally and providing staff to facilitate the lodging of complaints helps to improve accessibility.

A common feature of dispute resolution schemes is that potential complainants are required to attempt to resolve the matter directly with the service supplier before approaching the independent body. This may present a psychological barrier for many older people.

Many tribunal procedures require complainants to negotiate on their own behalf. Allowing an older person to be represented in hearings and conciliation may assist in overcoming imbalances in power and in negotiation skills.

Discrimination

In NSW, age-based discrimination is covered in the *Anti-Discrimination Act 1977* (NSW). Age discrimination can be direct (i.e. where a person is treated less favourably than others because of their age) or indirect (i.e. where an unreasonable condition is imposed that presents difficulties for older people but not for younger people).

While there is little information available on the prevalence of age discrimination, a number of studies have focussed on age discrimination in employment.

Discrimination in employment

Age discrimination in employment arises in the areas of recruitment, terms and conditions of employment, opportunities for advancement, and dismissal/redundancy. The Anti-Discrimination Board (ADB) reports that many complaints arise from interactions with employment agencies, including:

- employment agencies requiring people to divulge their age
- being told by employment agencies that they were too qualified
- being told that the job would suit a younger person.

Discrimination in the provision of goods and services

Issues of concern which were identified include:

- denial of contracts or loans because of income level or the limited time older people have for repayment
- denial of travel insurance.

Barriers to accessing assistance for discrimination matters

The main barriers to accessing assistance include reluctance to make a complaint, individual disempowerment, ignorance of who to approach for assistance or how to make a complaint, and lack of evidence that the treatment is discriminatory.

Barriers to effective participation in anti-discrimination complaints processes

The main barriers to effective participation in discrimination complaints processes include:

- the system requires an older person to advocate for him/herself

- the reliance on conciliation conferencing means that there is little attention to the objective fairness or legal soundness of agreements between parties
- the power differentials between individual complainants and respondents
- the confidentiality of the substance and outcomes of conciliation limits the development of case law.

Elder abuse

Types of abuse

Elder abuse can include the following:

- financial abuse (e.g. abuse of power of attorney, theft, pressure to change their will or to become guarantors)
- psychological abuse (e.g. social isolation, verbal abuse, treating them like children)
- physical abuse, including violence, physical restraint and neglect
- sexual abuse
- neglect (e.g. inadequate food, shelter, clothing, medical care/ assistance, hygiene, medication)
- multiple abuses—different kinds of abuse occurring at the same time or on a continuum within a single relationship of trust.

There is also variation in the nature of the relationships within which abuse of older people may occur, including those with adult children, spouses, other family members, friends, carers or institutions.

Prevalence of elder abuse

There is evidence that elder abuse is under-reported because of a lack of community and professional awareness and understanding of the problem. Other barriers to reporting abuse include:

- ignorance of services which may assist
- isolation of victims, resulting in lack of access to assistance, and continuance of the abuse due to lack of scrutiny
- fear of retribution or of being institutionalised
- shame of being abused by people they should be able to trust, and fear of jeopardising important relationships with family or friends
- health professionals may lack procedures for addressing abuse.

Responding to elder abuse

The most effective responses to elder abuse have been those which focus on empowering the victim and emphasise an interdisciplinary partnership approach between the domestic violence and aged care sectors.

Issues for lawyers

Strategies to assist lawyers in their dealings with older clients who may be victims of abuse include:

- taking older people seriously when they raise the issue of abuse
- ascertaining the true wishes of their older clients, by seeing the older client by themselves and by using interpreters where appropriate
- supporting older people to be medically assessed for legal capacity, as this may forestall future conflicts about their wishes
- understanding the risk factors indicating elder abuse and the legal options for preventing and addressing elder abuse.

Substitute decision-making and end of life issues

The prospect of diminishing capacity associated with ageing may cause many older people to consider options for substitute decision-making for financial and personal/lifestyle matters. Older people may also give greater consideration to will making and issues of estate administration.

Powers of Attorney

An Enduring Power of Attorney (EPOA) enables an older person to pre-arrange substitute decision-making should s/he lose personal capacity. The main barrier identified for accessing EPOAs was a lack of awareness of their existence and function. Some older people also expressed concern regarding the potential for EPOAs to be abused by attorneys. This included fears that:

- an EPOA may be activated on a false representation of incapacity
- an attorney will wrongly take a benefit for him or herself
- an attorney will issue benefits to a third party without authorisation.

The *Powers of Attorney Act 2003* (NSW) attempts to address some of these issues and provides for greater review of EPOAs by the Guardianship Tribunal.

Guardianship and Financial Management

Enduring guardianship enables older people to make arrangements for others to make certain decisions regarding personal, health and lifestyle matters on their behalf should they lose the capacity to do so.

The main barriers to accessing enduring guardianship include a lack of knowledge of its availability, and the complex procedure for appointing an enduring guardian.

Where an older person has failed to prearrange substitute decision-making, the Guardianship Tribunal has the power to appoint a guardian or financial manager to make decisions for that person. The following concerns have been expressed regarding this process:

- concerns about mismanagement, delays and fees, and the processes used to assess incapacity
- lack of automatic right of representation before the Guardianship Tribunal, and lack of advocacy services to assist people with the Tribunal
- lack of accessible review mechanisms of Guardianship orders made by the Tribunal.

There is no internal appeal of the Tribunal's decision. Appeals must be lodged either with the Supreme Court of NSW or the Administrative Decisions Tribunal (ADT) of NSW.

Nominee arrangements

There is provision for limited substitute decision-making to assist older people who receive pensions with the management of their financial affairs. Centrelink is able to send social security payments to a nominee, to release information to a nominee, and to accept changes in information from a nominee. As social security is administered by the Commonwealth, Centrelink does not automatically recognise powers of attorney drafted under State legislation.

Wills and Probate

Wills are the most common formal legal mechanism for advance decision-making, permitting people to prepare instructions about the distribution of their assets after their death. Generally, will making is an accessible process, with most older people either having a will or being aware of their basic function.

The complexity of applying for a grant of probate for a deceased's estate presents more difficulties for older people in terms of formality and expense. It was reported that there is insufficient free assistance for probate matters.

Concerns were expressed about the use of lawyers in will making and in applying for the grant of probate, including concerns about potential conflicts of interests for lawyers who advise the testator as well as the family, and about the potential difficulties in locating wills or determining which of a number of wills is valid.

Grandparenting

Identified problems relating to grandparenting include denial of contact and grandparents caring for grandchildren.

Denial of contact

Separation or divorce may result in a grandparent's contact with grandchildren being reduced or denied, particularly if the grandparent is the relative of the parent who is no longer living with the children following the separation. If the grandparents' relationship with their own child becomes strained they may also experience difficulty in having contact with their grandchildren, even if there has been no separation or divorce.

Identified barriers for grandparents taking action in these circumstances include:

- if the dispute is with their own child, they may be reluctant to take any court action, with the fear that the relationship may be permanently damaged
- feeling intimidated by court action or that their role as grandparents will not be respected by the court
- the legal costs associated with seeking orders.

A non-legal process which may assist in resolving these disputes in a cheap and expeditious manner is mediation through Community Justice Centres.

Grandparents caring for grandchildren

Some grandparents have full-time care of their grandchildren, either on the basis of a residence order through the Family Court or a care and protection order through the Children's Court. Grandparents, attempting to obtain a residence or protection order, often find themselves negotiating a very complex area of the law, under both State and Commonwealth jurisdictions.

Identified issues for grandparents seeking assistance from the State Department of Community Services (DoCS) include:

- concerns by grandparents regarding delays by DoCS in investigating cases involving their grandchildren who they consider to be at risk
- DoCS policy of not case-managing children in kinship care with their grandparents is viewed by some to be deficient
- inconsistent responses between DoCS offices to a given situation
- inequitable treatment when compared to foster care arrangements.

Identified problems for grandparents seeking residence or contact orders through the Family Court include:

- high financial cost and/or emotional strain associated with contested family court proceedings
- lack of other support for grandparents who obtain a residence order, when compared to kinship caring arrangements with DoCS.

Conclusion

The most commonly recurring theme throughout this project was that older people are often reluctant to complain about issues affecting them. Given older people's distrust of the legal system, and limitations of the law in addressing their legal problems sufficiently, there is a danger that the legal needs of older people may be largely hidden from legal and non-legal service providers, courts, tribunals, and complaint handling bodies. A specialist legal service for older people could provide a valuable resourcing role for generalist legal services across NSW regarding issues for older people and methods of effective service delivery to older people.

1. Introduction

What sorts of legal issues arise for people as they grow older? How well does the system of law and justice meet the legal needs of people aged 65 years and over? Do older people have access to the legal information they need? What non-legal forms of assistance do older people use in dealing with legal issues?

This report considers the particular legal needs of older people in NSW and the barriers they face in accessing services that can help them resolve their legal issues.

The 2001 Census conducted by the Australian Bureau of Statistics (ABS) found that there were 828,475 people aged 65 and over in NSW, comprising 13 per cent of the population. Women were a majority of the older group overall (56 per cent) and a high proportion of those aged 85 and over (69 per cent).[1] Consideration of the services required to address the needs of older people is becoming more important with population trends indicating steady increases in the population aged 65 and over. It is projected that people over the age of 65 will comprise 17 per cent of the population in NSW by 2016.[2] There are two main reasons for this increase:

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[1] Australian Bureau of Statistics, '2001 Census Basic Community Profile and Snapshot — New South Wales', *2001 Census of Population and Housing*, Australian Bureau of Statistics, Canberra, 2001. Available at <http://www.abs.gov.au/ausstats/abs%40census.nsf/4079a1bbd2a04b80ca256b9d00208f92/c2ce6c310b89361fca256bbe008371f3!OpenDocument#Table3> (Last accessed 15 December 2003).

[2] Australian Bureau of Statistics, *Older People, New South Wales*, Catalogue n.4108.1, Australian Bureau of Statistics, Sydney, 2000, p. 2.

- The large cohort born between the end of World War 2 and the early 1960s, the Baby Boomers, is ageing. The high birth rate in this period was followed by lower birth rates subsequently.[3]
- The life expectancy of older people has increased over recent decades and is expected to increase further. Life expectancy at age 65 is 16.85 years for a man and 20.44 years for a woman. This has increased by four years in the last three decades and is projected to increase further.[4]

Why do older people have particular legal needs?

There is a wide variation in the circumstances of older people. Many of the legal needs of older people are the same as those of younger people, while some predominate at older ages but are shared with other groups. An example of the latter is legal issues related to disability. Such issues predominate at older ages because the incidence of disability increases with age.

In considering the ways in which the circumstances of older people might give rise to legal needs different from those of younger people, it is important to consider both life-cycle factors and cohort factors. Life-cycle factors are those that affect people as they age, either through the physical and mental process of ageing or through the socially constructed expectations of the role of older people. These life-cycle factors include:

- retirement and loss of access to paid work
- the transition from earned income to reliance on superannuation, other savings and investments, or age or service pensions

[3] Commonwealth Treasury, *Intergenerational Report 2002–03*, Commonwealth of Australia, Canberra, 2002.

[4] Australian Bureau of Statistics, 'Australian Life Tables — 1988–2000', *Deaths, Australia*, Catalogue n.3302.0, Australian Bureau of Statistics, Canberra, 2000, see Tables 7.33 and 7.34.

- family and caring circumstances such as widowhood, grandparenting, the higher probability of caring or needing care, and supporting adult children
- the higher likelihood of incidence of disability- and other health-related problems
- the need to move to supported or aged specific accommodation such as retirement villages, hostels, nursing homes, or boarding with family
- the need to consider end of life issues such as wills, estate planning and substitute decision making
- age and disability-related discrimination.

Cohort effects are those that distinguish the present group of older people from the cohorts born before and after them. These effects are often difficult to measure because of a lack of longitudinal data. However, there is some research to suggest that on average, compared with the situations likely to face younger cohorts as they grow older, the present cohort of older people

- left education earlier, and might have lower literacy rates[5]
- if they are men, have had a longer, more consistent history of permanent full-time employment than the future cohorts will have, and if they are women, have had a shorter, more intermittent employment history, broken by periods of child rearing[6]

[5] Wooden, M., VandenHeuvel, A. and Cully, M. (Richard Curtain; Curtain Consulting), *Barriers to Training for Older Persons and Possible Policy Solutions: Data Analysis*, National Institute of Labour Studies, Inc (NILS) report prepared for Commonwealth Department of Education, Training and Youth Affiairs, 1999. Available at <http://www.dest.gov.au/archive/iae/documents/olderworkers/olderworkers.htm> (Last accessed 15 December 2003).

[6] See Patrickson, M. and Hartmann, L. (eds), *Managing an ageing workforce*, Business and Professional Publishing, Warriewood, NSW, 1998.

- retired later, but had less superannuation entitlement at retirement and a higher level of age pension take-up[7]
- are more likely to own their own homes than generation X in particular[8]
- had a lower rate of divorce, and were more likely to have had children[9]
- had children who left home and became independent earlier[10]
- had a lower standard of health, nutrition and active lifestyles[11]
- are much less likely than younger groups to be skilled in using new technologies, particularly computers, and thus less able to take advantage of the range of information available over the Internet.[12]

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7 Commonwealth Department of Family and Community Services, *Income support customers: A statistical overview 2001*, Occasional Paper n.7, March 2003, see Table 1: 'Age Pension customers: Sex, June 1981 to June 2001'. Available at <http://www.facs.gov.au/internet/facsinternet.nsf/content/occasional_paper7.htm> (Last accessed 15 December 2003); Ann Harding, Anthony King and Simon Kelly, *Trends in Incomes and Assets of Older Australians*, Natsem Discussion Paper 58, Natsem, University of Canberra, 2002; Simon Kelly, Ann Harding and Richard Percival, *Live Long and Prosper? Projecting the Likely Superannuation of the Baby Boomers in 2020*, Paper presented at the 2002 Australian Conference of Economists Business Symposium, 4 October 2002.

8 Yates, J., 'Decomposing Australia's home ownership trends, 1975–1994', in Judith Yates and Maryann Wulff, (eds), *Australia's Housing Choices*, University of Queensland Press for the Australian Housing and Urban Research Institute, Brisbane, 1999.

9 Hugo, G., 'A century of population change in Australia', Population Centenary Article in Australian Bureau of Statistics, *Year Book Australia 2002*, Australian Bureau of Statistics, Canberra, 2002.

10 Badcock, B.A. and Beer, A.P., *Home Truths: Property Ownership and Housing Wealth in Australia*, Melbourne University Press, Carlton, 2000, p. 135 & pp. 139–140.

11 Hugo, G., 'A century of population change in Australia', Population Centenary Article in Australian Bureau of Statistics, *Year Book Australia 2002*, Australian Bureau of Statistics, Canberra, 2002.

12 Australian Bureau of Statistics, 'Census of Population and Housing: Ageing in Australia', Catologue n.2048.0, 2001, see Tables 7.1 and 7.3. Available at <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/AAB1BA81D6BDE4DFCA256DBD007F4703.> (Last accessed 15 December 2003).

Are older people disadvantaged?

Compare with younger people, older people tend to have less access to earned income, higher rates of home ownership, higher assets and greater access to means-tested income support. Older people are less likely to be involved in the criminal justice system either as offenders or as victims (although those who are victims of crime can suffer serious physical and emotional consequences).

However, older people are not a homogenous group. They may face a diversity of issues and challenges which may be related to a number of factors, including ethnicity, family status, where they live, level of income and wealth, the type of accommodation in which they live and whether they have any disabilities or health-related problems. When combined with their age, such factors may accentuate their level of disadvantage.

Ethnicity

Older people from culturally diverse backgrounds may suffer difficulties as a result of differing cultural expectations about the position of older people in society and families, and from a lack of cultural diversity in services (e.g. aged care services which can provide for cultural and dietary needs). According to the Australian Bureau of Statistics, of the 828 475 people in NSW aged 65 and over, 30 per cent were born overseas. The most common overseas countries of birth were United Kingdom (9 per cent), Italy (3 per cent), New Zealand (2 per cent), China (2 per cent) and Greece (2 per cent).[13]

[13] Australian Bureau of Statistics, 'Older overseas-born Australians', *Australian Social Trends 2002*, Catalogue n.4102.0, Australian Bureau of Statistics, Canberra, 2002. Available at <http://www.abs.gov.au/Ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/4cf582717c12d9d0ca256bcd008272ee!OpenDocument> (Last accessed 15 December 2003).

Family status

The majority of older men in NSW lived with their partner (71 per cent), compared with only 40 per cent of older women. Conversely, older women were more likely than older men to live alone, with 35 per cent of older women and 17 per cent of older men living alone.[14] This finding appears to reflect that, on average, life expectancy for women is longer than for men.[15]

Thus for many people, ageing is associated with losing their spouses. As well as the grief and loneliness that this entails, they often need to make major adjustments. An older person who is living alone may become more reliant upon family support if it is available. Further, some men with traditional gender roles may find themselves having to learn domestic skills that they have not needed in the past.

> For men over 65 years… the loss of a partner signals tremendous increases in unpaid work ... The scale of these increases is truly breathtaking, with laundry time quadrupling and cleaning and cooking trebling. Retired men living alone are the only category of men who spend more time in food and drink preparation than their female counterparts.[16]

Some widowed women may be confronted with learning to manage financial affairs with very limited experience or knowledge. Many in the current older generation may have been financially dependent on their husbands for most of their lives.

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[14] ABS, *Older People*, *New South Wales*, p. 18.

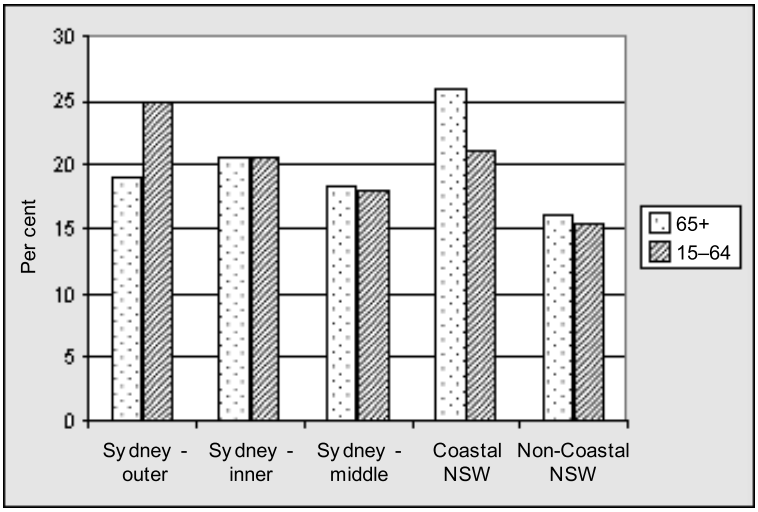
[15] ABS, *Older People, New South Wales,* p. 30.

[16] Bittman, M. and Pixley, J., *The Double Life of the Family*, Allen & Unwin, Sydney, 1997, p. 111.

Geography

Figure 1.1 is based on census data and shows the place of residence across NSW of people aged 65 years or over. It also shows the place of residence across NSW of people aged 15 to 64 years. It can be seen that, of all people in NSW aged 65 or over, 19 per cent live in outer Sydney, 20 per cent live in inner Sydney, 18 per cent live in other Sydney regions, 26 per cent live in Coastal regions of NSW outside Sydney and 16 per cent live in other regions of NSW. Compared with 15 to 64 year olds, older people in NSW are somewhat less likely to live in outer Sydney (19% versus 25%), and somewhat more likely to live in Coastal regions outside Sydney (26% versus 21%).

Figure 1.1 Population Distribution (percentages) across regions: Aged 15–64 years and 65 years and over, NSW 1996



Source: 1996 Census, Place of Usual Residence Data

Notes: Coastal NSW excludes Sydney.

The figure presents data for 15–64 year olds rather than 18–64 year olds because the ABS collect data in relation to specified age groups, commencing with the 15–24 age group. The ABS do not present data separately for 15–17 and 18–24 year olds.

For many older people, retirement to the coast or country is a financial or lifestyle choice. As a result, some areas have relatively larger proportions of older people. This has implications for the provision of, and distribution of funding for, public services such as specialised health services, home help, public transport and specialised legal services.[17]

Income

The 2001 census data show that older people had lower incomes than those aged under 65. Fifty-eight per cent of older men and 67 per cent of older women had incomes under $300 a week, compared with only 19 per cent of men and 38 per cent of women aged 25–64. In 1997–98, 77 per cent of people in NSW aged 65 or over received a government pension or allowance as their main source of income, compared with 20 per cent of those aged 15–64 years. In contrast, only three per cent of older people relied on wages or salary as their main source of income, compared with 66 per cent of those aged 15–64 years. Eight per cent of older people relied on superannuation as their main source of income, compared with one per cent of 15–64 year olds.[18]

Older women are less likely than men to be receiving superannuation income either on their own account or from their husband's employment. This reflects the fact that women are more likely than men to have spent much of their adult lives out of the labour force. The pattern of women's working lives is often characterised by employment designed to fit around the demands of child bearing and child rearing, with lengthy periods out of the labour force and often a preference for occasional, part-time work. The failure of superannuation schemes to reflect the nature of the working

[17] Australian Bureau of Statistics, 'Regional population ageing', *Australian Social Trends 2002*, Catalogue n.4102.0, Australian Bureau of Statistics, Canberra, 2002. Available at <http://www.abs.gov.au/Ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/fc77531037cb0d06ca256bcd008272ec!OpenDocument> (Last accessed 15 December 2003).

[18] ABS, *Older People*, *New South Wales*, p. 76.

lives of women means that relatively few older women have been eligible to draw benefits in their own right upon reaching retirement age.[19]

Low interest rates over the last seven years have also had a negative impact on the investment incomes of older people who are self-funded retirees.

Older people are eligible for a range of concessions related to health, pharmaceuticals, transport, rates, telephones and various leisure and entertainment activities provided by different levels of Government and the private sector. These are accessed by concession cards, such as the Department of Veterans' Affairs (DVA) Gold Card, DVA White Card, Pensioner Health Benefits Card, Commonwealth Seniors Card and NSW Seniors Card. Different eligibility criteria and different concessions apply to each of these.

Nevertheless, a high proportion of older people suffer serious financial hardship. Consultation by the Older Women's Network with older women in 1995–96 found that over two-thirds of those receiving a pension felt it was not enough to live on. Their main concerns were their inability to replace household equipment or afford maintenance to their homes, and a fear of health costs.

> Now I'm 69 I'm realising that women on a pension live in permanent poverty. There's a fear of spending your capital. I've got a house that needs so much doing to it. I'm unable to fill a prescription for glasses—I've had it for one year. I'm scraping the bottom of the barrel. My standard of living has gone right down. I have dropped health cover [but I] should have it because of my standard of health.[20]

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[19] Rosenman, L. and Warburton, J., *Retirement Policy, Retirement Incomes and Women*, Chapter 8 in Borrowski, A., Encel, S., Ozanne, E., Ageing and Social Policy in Australia, Cambridge University Press, 1997.

[20] Older Women's Network (New South Wales), *Difficult Decisions: Older Women talk about money, life and retirement*, Older Women's Network, Sydney, 1996.

Others commented on their inability to replace their clothes and shoes, the cost of keeping companion animals and the cost of holidays or outings to visit their children or grandchildren. Single women living alone in particular reported financial hardship as they could not share their accommodation costs, and some had formerly relied on their husbands to carry out home maintenance.[21]

Housing and other accommodation

Unlike the low incomes of younger people who live long term on pensions and benefits, the low incomes of older people tend to be supplemented, to some degree, by their assets. Older people are more likely than younger people to own their own home or board with their children's families. In 1996, 79 per cent of older people in NSW lived in a home that was fully owned by a member of the household, and five per cent lived in homes where a mortgage was being paid off. That is, 84 per cent of older people lived in homes which were owned or mortgaged as compared with 69 per cent of people under the age of 65. Relatively few older people (12 per cent) lived in rented accommodation, of which about half was rented from the State housing authority. This compares to 27 per cent of people under the age of 65 in rented accommodation.[22]

Ninety-three per cent of older people live in private dwellings, compared to 99 per cent of those aged under 65. The likelihood of a person living in an institutionalised setting increases with age: of those aged 85 years and over, 34 per cent lived in nursing homes or in retirement or aged care accommodation.[23]

[21] Older Women's Network, *Difficult Decisions*.

[22] ABS, *Older People, New South Wales*, see ch.5, 'Housing', pp. 54–67.

[23] ABS, *Older People, New South Wales*, p. 55.

Disability and health

Older people are more likely than younger people to have a disability and to have developed degenerative conditions as a consequence of ageing. Older people are also more likely than younger people to be caring for people with disabilities. In 1998, 54 per cent of older people in Australia had a disability, with almost one-third of these having a profound or severe restriction. In comparison, of those aged 15–64 years, only 17 per cent had a disability, and only four per cent had a profound or severe restriction.[24]

Strategies to address the needs of older people

Faced with an ageing population, in the last five years, State and Federal Governments have acknowledged the need to implement strategies to address the diverse needs of older people in the community. In 1998, the NSW Government announced its *Healthy Ageing Framework 1998–2003*.[25] The Healthy Ageing Framework, with a primary focus on those aged 65 years and over, had the objective of ensuring "a society in which all older people lead satisfying and productive lives with maximum independence and well-being". It recognised the importance of ensuring that programs, policies and services for older people take into account the differences in gender, culture, language, geographical location and socio-economic circumstances of older people.[26]

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[24] Australian Bureau of Statistics, 'Disability among adults', *Australian Social Trends 2001*, Catalogue n.4102.0, Australian Bureau of Statistics, Canberra, 2001. Available at <http://www.abs.gov.au/Ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/99d78f1319336c9eca256bcd00825573!OpenDocument> (Last accessed 15 December 2003).

[25] Ageing and Disability Department, NSW Health, *NSW Health Ageing Framework*, 1998–2003, Sydney, 1998. Available at <http://www.dadhc.nsw.gov.au/NR/rdonlyres/6DA00E13-B68E-4E7C-BFC0-4FF0AA8A59D4/255/hafwork.pdf> (Last accessed 26 September 2003).

[26] *NSW Health Ageing Framework*, p. 8.

The Commonwealth's *National Strategy for an Ageing Australia* was released in 2001.[27] It provides a framework for action and planning by Governments, businesses and individuals. In particular, it reinforced that all Australians, regardless of age, should have access to appropriate employment, training, learning, housing, transport, cultural and recreational opportunities and care services that are appropriate to their diverse needs, to enable them to optimise their quality of life over their entire lifespan.[28]

Neither of these frameworks specifically addresses access to justice and the legal needs of older people. In addition, in Australia, there has been little research into the legal needs of older people, despite the fact that older people are a considerably disadvantaged demographic group.

Aim of the present study

The aim of the present study was to identify the access to justice and legal needs of older people living in NSW and to examine their ability to obtain legal services including legal information, basic legal advice, initial legal assistance and legal representation to meet these needs. The report also looks at whether they are able to participate effectively in the legal system and the availability of assistance from non-legal advocacy and support (including non-legal early intervention and preventative mechanisms, non-legal forms of redress, and community based justice). The project is based on a literature review, a series of consultations with older people and a series of consultations with service providers and organisations representing older people.

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[27] Hon. K. Andrews MP, Minister for Ageing, *National Strategy for an Ageing Australia*, Commonwealth of Australia, Canberra, 2001. Available at <http://www.ageing.health.gov.au/ofoa/documents/pdf/nsaabook.pdf> (Last accessed 26 September 2003).

[28] Andrews, *National Strategy for an Ageing Australia*, pp. 2–3.

Structure of Report

Chapter Two details the research methodology for the present study. The chapter commences by providing the operational definition of 'older people' which formed the basis of the research. The chapter then details how the the literature review and interviews with stakeholders, service providers and academics were conducted. It also details how the perspectives of older people were obtained via focus group discussions and via individual submissions and communications to the Foundation.

Chapter Three looks at difficulties encountered by older people in accessing legal assistance, including legal information, legal advice and legal representation. The chapter considers the effect of attitudinal and cohort factors in presenting barriers to engaging with the legal system, as well as aspects of legal service delivery which present access difficulties for older people.

Chapters Four to Ten look at specific areas of law which significantly impact on older people, and the services and processes available to older people to resolve these issues.

Chapter Four looks at the diverse accommodation-related legal issues confronted by older people. Issues related to nursing home accommodation, residential aged-care facilities, retirement villages, strata title issues, tenancy issues (both private and public housing), issues associated with home ownership, boarding house accommodation and accommodation in residential parks are considered.

Chapter Five looks at the health-related legal issues for older people. Issues considered include the development of advance health care directives to provide instructions as to the older person's desired level and type of health care, access to health services, and misuse and mis-prescription of medication.

Chapter Six looks at the significant consumer and financial issues which confront older people, and their related legal problems. Issues considered include social security and veterans' pension entitlement, superannuation,

banking, credit and debt issues, consumer related issues, and financial abuse of older people.

Chapter Seven looks at the incidence of age-related discrimination for older people and the impediments in accessing anti-discrimination resolution processes.

Chapter Eight looks at issues pertaining to the abuse of older people, whether by their spouse, by another family member, by their carer or by an institution. Consideration is given to the different types of abuse, including physical abuse, financial abuse, psychological abuse, sexual assault and abuse, and neglect.

Chapter Nine looks at the legal issues which arise when an older person has to consider arrangements for substitute decision-making and certain end of life related issues. These include arrangements for powers of attorney, incapacity and guardianship issues, nominee arrangements and wills.

Chapter Ten considers the grandparenting-related legal issues, including being denied contact with grandchildren, and being in the role of full-time carer of grandchildren by direction of either the Family Court or the Children's Court.

As a conclusion, Chapter Eleven provides an overview of the barriers and difficulties confronted by older people in accessing legal assistance, participating effectively in the legal system, and accessing various alternative forms of dispute resolution and non-legal advocacy.

In terms of the legal issues which confront older people, it was decided not to include a separate chapter covering general issues of crime and crime victimisation. It was noted that the existing literature indicates that older people have a high fear of crime.[29] This was supported by the comments made in several consultations undertaken and submissions received as part

[29] Baldassare, M., *The elderly and fear of crime*, Sociology and Social Research, 1986, vol 70, pp. 218–221; Clarke, A.H. and Lewis, M., *Fear of Crime among the elderly*, British Journal of Criminology, 1982, vol. 22, pp. 49–62.

of this study, which also indicated a perception by older people of high vulnerability to violent crime. However, the actual incidence of crime against older people is significantly lower than for younger people. According to the Australian Institute of Criminology:

> The broad pattern of victimisation for predatory crime (homicide, assault, robbery, burglary) in Australia is consistent with findings throughout Western countries, that is older people are far less likely to be victims of crime than other age groups in all types of recorded criminal incidents. The results from crime surveys indicate a similar pattern.[30]

Graycar and James observe that while research indicates that older people are not particularly at risk of what may be described as 'conventional crimes' (such as burglary, robbery and assault), the literature on the abuse of older people in residential care institutions, in private homes, and through their contacts with government, administrative or financial structures (in particular guardianship and administration systems) suggests that crime victimisation of older people occurs in other ways.[31] As detailed above, the present report covers these issues associated with abuse of older people.

This report aims to record as fully as possible the substance of the responses received through the various consultations and submissions, and of the relevant literature which has been examined. In this respect, the report reflects the results of methodology which is largely qualitative in nature.

At the time of writing this report, the Law and Justice Foundation of NSW was undertaking a major quantitative legal needs study in six local government areas across NSW (South Sydney, Fairfield, Campbelltown, Newcastle, Nambucca and Walgett). A total of 2,431 participants were interviewed by telephone as part of this survey. At the time of writing this

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[30] Graycar, A. and James, M., *Crime and Older Australians, Understanding and Responding to Crime and Older People*, Paper presented at Family Futures: Issues in Research and Policy, 7th Australian Institute of Family Studies Conference, Sydney, 24–26 July 2000. Available at <http://www.aic.gov.au/conferences/other/graycar_adam/2000-07-AIFS.html> (Last accessed 15 December 2003).

[31] Graycar and James, *Crime and Older Australians*.

report the data analysis of the survey had not been conducted. However, across the six regions, a total of 332 people over the age of 65 participated in the survey. It is anticipated that analysis of the results for these older people will provide significant quantitative information regarding the access to justice and legal needs of older people in NSW. It is anticipated that a report detailing these results will be available in 2005.

2. Methodology

Definition

For the purposes of this study, older people were defined as those aged 65 and over. This age limit was selected because much of the available statistical material for older people is based on a definition of those over the age of 65. However, most of the issues identified as associated with ageing can arise earlier than that, and some relate more often to the very old than to people aged 65 to 75.

During the research, some exceptions to this definition were allowed. In particular, the process of exclusion from paid employment through age discrimination is more apparent among people below age 65, because by that age few people are still in employment or seeking it.

An exception was also made for Indigenous people, where consideration was given to those aged 45 and over. The reason for this was because the Aboriginal and Torres Strait Islander population is significantly younger than for the population as a whole. In 1996, only 2.5 per cent of the Indigenous population was aged 65 or over (compared to 13 per cent for the population as a whole), and only 13 per cent were aged 45 or over (compared to 36 per cent for the population as a whole). 'Age-specific death rates were higher for Indigenous people than for the total Australian population in every age group, but the largest differences were observed among males and females aged 35–54 years old, when the rates were 6–7 times higher'.[1]

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[1] Australian Bureau of Statistics, 'Occasional Paper: Mortality of Indigenous Australians', Catalogue n.3315.0, Australian Bureau of Statistics, Canberra, 1997, p. ix.

Background paper

The research team developed a project background paper in August 2002. The purpose of the background paper was to provide details concerning the research project, including the issues to be explored in the research, some basic demographic details about older people in NSW, and a brief overview of certain life-cycle and cohort factors which may impact on the particular legal issues which older people may face, or their ability to access legal services.

The background paper was distributed to individuals and organisations identified as potential stakeholders in the project, to assist them in providing relevant information to the research team, either through the consultations or the submission process. These included community and peak organisations representing the interests of older people in NSW or providing services to older people in NSW, relevant government bodies, community legal centres, ageing and disability officers in local government, academics and others with an interest in general or particular issues concerning the legal needs of older people.

Literature review

The research team undertook a literature review of recent, predominantly Australian sources, including plain language sources, on various topics of law for older people and non-legal issues affecting older people.

The literature review was governed by a number of strategies. First, because the study focused on the legal needs of older people in NSW, priority was accorded to literature dealing with NSW. In the absence of relevant literature in NSW, or as a means to engage in comparative analyses, materials dealing with other Australian States and Territories, and to a lesser extent, with foreign jurisdictions, were collected.

Second, the literature review was generally limited to literature that was published from 1980 onwards. There were occasions when there was a need to review literature published prior to 1980, primarily where nothing more recent had been written on the topic and the publication contained information that remained relevant to the present issues.

Third, while there did exist some literature which generally dealt with the legal needs of older people, it was recognised that most of the literature would be more directly related to specific areas of law, policy and practice. Therefore, we proceeded with using the broad areas of law that had been determined as forming the basic structure of the study to locate materials which were pertinent to those areas. This allowed us to uncover literature which, on its face, had no obvious connection with legal needs and access to justice, but whose content provided valuable information on particular issues related to this field.

Interviews with service providers, interested stakeholders and academics

The research team held a series of interviews with a range of individuals and organisations with an interest in elder law. These included:

- community organisations representing the interests of older people in NSW or providing services to older people in NSW
- government bodies providing policy advice on the ageing population
- government service providers and regulators
- community legal centres
- private legal practitioners with a particular interest in legal issues of older people
- ageing and disability officers in local government
- academics

- others with an interest in general or particular issues of the legal needs of older people.

For reasons of limited resources, the list of service providers, interested stakeholders and academics who were consulted was confined to those who exhibited a special interest, expertise or background concerning issues confronting older people, particularly legal or human rights issues. For this reason, general service providers or legal professionals, such as Local/ District/Supreme Court staff, were not consulted, unless they were involved with specific programs to assist older people, or their jurisdiction specifically encompassed issues relating to older people (e.g. Anti-Discrimination Board, Guardianship Tribunal).

A list of these individuals and organisations appears in Appendix 1.

The interviews were semi-structured and sought to canvass the following issues:

Legal problems

- What do you see as the most serious legal issues for older people?
- What are the most common legal issues affecting older people?
- Do older people from culturally and linguistically diverse backgrounds suffer any special legal problems or require different kinds of consideration?
- Do older people from rural or remote regions suffer any special legal problems or require different kinds of consideration?
- Do older people with disabilities suffer any special legal problems or require different kinds of consideration?

Information, Advice and Services

- Do older people have difficulty obtaining legal information, advice or other legal services?

- In your opinion or experience, are older people less likely to try to solve a problem through legal channels?
- In what circumstances would older people be inclined to seek legal assistance?
- Do older people access Legal Aid? Why/why not?
- What legal services do older people use to assist them in dealing with disputes?
- What other non-legal means do older people use to address their legal problems?

Formal Processes

- Do older people have any problems accessing courts, tribunals and formal Alternative Dispute Resolution (ADR) mechanisms?
- Do they experience any particular problems in courts, tribunals and ADR?
- Is there any legislation in NSW that has a discriminatory effect on older people or which neglects to consider the needs of older people?

Reform

- What do you see as ways in which older people's legal needs could be better met?
- Are you aware of any recent initiatives aimed at addressing older people's legal needs?
- What areas of improvement could be made to the provision of legal information, advice and assistance for older people?
- Do you think that older people or their advocates participate effectively in law reform processes?

Seeking the views of older people

The views and experiences of older people themselves were sought in two ways: focus group discussions, and individual submissions and contributions.

Focus group discussions

The research team conducted nine focus group discussions, involving a total of 78 participants (three-quarters of whom were women). In selecting the organisations with which to organise the focus groups, the research team sought to get a representation of both older men and women, older people from urban, regional and rural locations, and older people in different accommodation arrangements. The research team also sought to obtain the views of Indigenous older people, and also of those who work with older people in need of a high level of care and support.

The following focus group discussions were conducted:

- Older Men: New Ideas (OMNI) Lakemba Branch focus group, Sydney, 10 September 2002
- Combined Pensioners and Superannuants Association focus group, Dubbo, 4 October 2002
- Older Women's Network focus group, Sydney, 8 October 2002
- Murwillumbah Autumn Club focus group, Murwillumbah, 11 October 2002
- Older Women's Network focus group, Penrith, 14 October 2002
- Indigenous Elders focus group, Penrith, 14 October 2002
- Mirabooka Retirement Village focus group, Sydney, 21 October 2002
- Eric Calloway House Nursing Home focus group, Sydney, 21 October 2002
- Combined Pensioners and Superannuants Association focus group, Sydney, 10 September 2003

While the participants were diverse, they cannot be taken as statistically representative of the population of older people as a whole. Information from participants on demographic, financial or social factors was not collected.

Participants in these focus groups were first asked a general question about what legal problems or issues they had experienced since they had reached the age of 65. This was asked with the intention of identifying what areas would be of most significance. However, given that this general question was interpreted very narrowly by participants—as referring only to criminal law or court cases—it was necessary to give participants a brief outline of the other legal areas that might be pertinent. Participants were then prompted with a series of general questions, each of whom were asked about whether they had experienced a particular type of legal problem. The legal problems asked about first were less sensitive problems such as wills, conveyancing or retirement village contracts, or financial issues. Participants were then asked about more sensitive issues and those in which legal avenues were less likely to be used, such as family issues. Finally they were asked indirectly about issues relating to financial or other elder abuse. That is, they were asked whether they knew of cases where older people had experienced these kinds of problems, rather than being asked whether they themselves had experienced these problems. This was asked indirectly because it was thought that people who had suffered abuse might be reluctant to discuss it in an open forum.

Participants were also asked the following questions:

- What kinds of legal services did they use to address these issues?
- Were there other ways they would rather deal with these issues, rather than through a lawyer?
- Had they experienced any problems in getting access to those services, or with the services which were provided?
- Had they experienced any problems in getting access to courts and other decision-making bodies?

- How had they tried to deal with any of the problems they had experienced, either in accessing services or in accessing courts/ decision making bodies?

Focus discussion groups of this nature have some clear advantages as a means of data collection:

- they allow for different points of view to be canvassed from the participants in the group
- the participants may raise issues that the researchers might not have considered beforehand
- the group's response to particular issues provides some indication of whether such an issue is commonly experienced or agreed, or whether there is disagreement within the group
- the flow of discussion often stimulates participants to think of topics that might not come up in a one-on-one open-ended interview. Thus they are a useful way to raise a range of perceptions and experiences.

Thus, such focus discussion groups are a useful way to raise a range of perceptions and experiences. There are also, however, some disadvantages:

- Because the intention is to encourage discussion, researchers conducting them need to use fine judgement about when to intervene in order to keep the discussion on track and ensure that sufficient topics are canvassed, and when to allow discussion to flow freely in order to keep participants engaged. This limits the amount of structure that can be imposed without reducing the richness of the data, and therefore limits the valid comparability of the groups.
- Group participants may influence each other to a great degree and each group forms a culture so that certain views take on a greater significance than individuals interviewed separately might attribute to them.

- Group participants are likely to be reluctant to talk about more sensitive issues publicly and to take what they perceive to be an acceptable attitude.[2]

While the results need to be viewed in the light of the above considerations, participants were generally keen to air their experiences and views on legal issues and service provision. The researchers were surprised at the apparent frankness on most issues.

Individual submissions and contributions

The other source of data from older people was by individual submission. The research team placed an advertisement in *Age Pension News for Seniors Magazine* asking readers to contact the Foundation by telephone, e-mail or post. In particular, the advertisements invited older people to provide information about:

- the types of legal problems they have experienced
- whether they had experienced any problems in getting legal information, advice or legal representation
- their views as to how legal services could be improved for them.

The Foundation also made available a guide for making submissions for individuals, which provided some more specific direction and guidance as to the information being sought. A copy of this submission guide is included in Appendix 2.

[2] Stewart, D.W. and Shamdasani, P.M., Focus Group Research: Exploration and Discovery, in Bickman, L. and Rog, D.J., *Handbook of Applied Social Research Methods*, Sage 1998, pp. 505–526.

We received 135 contacts, 85 of which were from NSW callers and 31 of which were from other States. In 19 cases the State was not identified. Most submissions were received by telephone and most concerned individual experiences.[3]

These submissions provided us with a valuable indication of some of the prevailing legal problems and issues of interest to older people. It appeared to the research team that as the telephone conversations were confidential, people were even more likely to discuss matters of a personal nature than had been the case in the focus groups. The telephone calls enabled us to interview callers in more depth and at greater length than would have been possible through a structured survey or via written submissions. It should, of course, be noted that the callers were self-selecting and thus cannot be considered representative of all older people in NSW. More importantly, the callers had defined what they saw as legal problems and the issues they chose to raise with us, rather than the researchers selecting the issues on which to collect data. The stories these callers recounted reflected their perceptions and attitudes. The research team was not able to make judgements about the accuracy or validity of complaints on the basis of one side of the story.

Attendance at relevant forums and conferences

Members of the research team participated in five forums and conferences relating to ageing, older people and issues of disadvantage which they experience. These forums were:

- Aged and Community Services Australia (ACSA) Retirement Villages Seminar, 16 August 2002

[3] Many of these callers were initially seeking legal advice, which the Foundation is not able to provide.

- 2002 Premier's Forum on Ageing — Consumer Protection, 1 October 2002
- Planning for Later Life Forum, NSW Benevolent Society, 14 October 2002
- Older Women Violence and Abuse, Forum for service providers presented by NSW Attorney-General's Department, Crime Prevention Division, Violence Against Women Specialist Unit, 22 October 2002
- Grandparents Raising Grandchildren Forum, Council of the Ageing (COTA), 25 October 2002.

These forums were selected on the basis that they provided further opportunities to consult with relevant legal and community organisations, as well as providing opportunities for receiving further direct input from older people who attended these forums.

The outcomes of these forums, together with the papers from the forums, have been considered as part of the consultation process for this study. It should be noted that the list of forums and conferences attended does not represent an exhaustive list of relevant conferences and forums which occurred during the conduct of the present study.

Developing a framework for analysis

Upon analysis of the material collected for this study, it became apparent that issues of access to legal services, access to non-legal advocacy support services, and access to dispute resolution processes were integrally related to the types of legal issues confronting older people. While some of the identified barriers to meeting legal needs were of general application to older people regardless of the type of legal issues involved, in many cases, the barriers were specific to the types of legal issues confronting older people. Accordingly, in developing a framework for analysis of the research

material, the research team decided to cover the general issues of legal need and barriers to accessing legal services for older people separately from the issues of legal need which were directly related to particular types of legal problems experienced by older people. The structure of the report, as outlined in the Introduction, reflects this approach.

3. Legal services

Introduction

Obtaining legal assistance to address a legal issue or problem is defined by the terms of reference[1] as access to legal information, basic legal advice, initial legal assistance and legal representation. While participating in the legal system does not necessarily equate with accessing justice, barriers to that participation can adversely impact upon older people's access to justice. This chapter reports on the comments that individuals, organisations and service providers made in relation to obtaining and providing legal assistance, as well as relevant literature on the subject. The consultations particularly concentrated on the types of problems experienced by older people in seeking to access legal services.

Attitudes of older people

Older people are not a homogenous group. As a group, they comprise diverse cultural and linguistic backgrounds, levels of education, family arrangements, socio-economic status and so on. Nevertheless, some common themes were evident from our consultations and submissions received. Older people's attitudes to themselves, the legal system, access to legal information and the provision of legal assistance will, of course, impact upon the way that services need to be tailored for older people.

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[1] See the Access to Justice and Legal Needs Program Terms of Reference, p. xiii.

The way older people see themselves

Consultations with older people, and those providing legal services to them, attracted comments that were commonly themed around a lack of capacity or willingness to engage with their legal problems or the legal system.

> *I'm pretty cluey, I haven't got dementia or anything, but we're not tough enough. I don't want to be rude to people, whereas our daughter is much more direct and she'll stand up to people and keep them from getting off the track.*[2]

> One of [my older clients] came under the *Contract Review Act* and had the contract reopened because they did not have any independent advice. They were old, it was their only asset and so on but they really did not want to go down [the legal] road. They didn't get legal advice before becoming guarantor.[3]

The National Alternative Dispute Resolution Advisory Council has assessed the current cohort of older people in the following way:

> A great majority of conflicts in which elderly adults are involved are tolerated, avoided, or suppressed. Even when they do become actively involved, elderly people have difficulties recognising their inability to cope with conflict. As a consequence, they are frequently reluctant to openly discuss their dispute, downplay it or deny its existence. They tolerate discomfort, and regard it as a personal achievement to manage their problems silently, which further adds to their powerlessness.[4]

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[2] Individual telephone submission.

[3] Consultation with Natalie Ross and Andrew Taylor, Inner City Legal Centre, 9 October 2002.

[4] National Alternative Dispute Resolution Advisory Council, *Issues of Fairness and Justice in Alternative Dispute Resolution*, Discussion Paper, The Council, Canberra, November 1997, paragraph 5.82. Available at <http://www.nadrac.gov.au/www/disputeresolutionHome.nsf/0/043D3288E4FE074CCA256B4C000BD025?OpenDocument> (Last accessed 18 December 2003).

The attitudes reflected in the above comments are to some extent contradictory, but nevertheless both result in legal inaction. Not feeling sufficiently assertive to take on a problem and leaving it to family members is counterposed with a pride in managing problems silently, in not burdening family members or friends with one's problems. Both result in older people not directly using the legal system to address an issue.

> *Because I am still receiving ongoing treatment for the sciatica and rely on painkillers, I really do not think that this was worth the effort of fighting for my rights. It is still costing money and I am the one that has lost all round.*[5]

Increased physical and emotional vulnerability, as people age and experience higher levels of dependency, can also have an impact on how they deal with perceived threats. Fear of what might happen to them can exacerbate the problem by isolating the older person from support networks and assistance.

> When you're older, your nerves are not as good as they were and these things can do you more harm. A lot of older people get frightened, they won't go out, particularly after dark because they're afraid that when they get home they'll find the house robbed or they'll be attacked.[6]

This vulnerability does not only result in a heightened sense of anxiety. It can also mean that when something does go wrong, its effects are experienced more severely than would be the case if the person were younger. It can also have consequences beyond the physical. It can affect older people's identity and their expectation of spending time in the way they had planned.

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[5] Individual email submission.

[6] Consultation with Keith James, Treasurer, Combined Pensioners and Superannuants Association, Dubbo, 4 October 2002.

Four years ago, an older woman was thrown off her seat in a bus and was injured all down her right side. She went to the Transport Accident Commission (Victoria)… In the first instance she was offered $1600 and she appealed that decision and was then offered $2500…In order to get more money, she would have to appeal again and she gave up… "I'm a good 91, I was playing bowls… it's buggered me up and I've had a struggle. I can't play me bowls anymore…. They've spoilt me life."[7]

I now have a loss of balance which has affected my ballroom dancing and my walking. I relish my reputation as a ballroom dancer.[8]

These comments suggest that, at least for these two women, the law will not be able to redress the real problems: coping with a physical disability, pain and suffering, and the loss of anticipated lifestyle. For them, as with many others, the law cannot return them to the position they were in prior to their accidents. This perspective of seeing the legal system as unable to adequately address a problem, seems to explain why some older people do not engage with the legal system, which can only offer them financial relief.

When older people do seek assistance to address a legal problem, they frequently demonstrate high expectations of legal service providers.

> Older people just want to hand over the problem to the lawyer and go passive. They have a tendency to want to hand over the issue to someone they can trust, rather than taking an active role in solving it, while younger people want to stay in control. One problem here is in a misunderstanding of the relationship between lawyers and clients. Lawyers require instruction from the client, while the client might expect the

[7] Individual telephone submission.

[8] Individual telephone submission.

> lawyer to handle the whole matter for them and tell them what to do. With some complex or sensitive issues, even stating the problem is too hard.[9]

These comments indicate that expectations that a lawyer *will* be able to solve an overwhelming problem can fuel older people's perceptions of themselves as individually powerless and encourage a mentality of needing to be rescued. These problems compound when other impairments, such as dementia, afflict the older person.

> The capacity of elderly adults to argue for their own interests or to agree to a particular outcome depends on the extent to which they have the requisite competencies. If they have lost those competencies, they will be unable to articulate their difficulties or negotiate a resolution. Even when they have an advocate who represents their interests and does not fall into the trap of believing they know what is best, without those competencies, elderly adults feel overwhelmed and powerless, and frequently are unable to continue.[10]

Some older people can be paralysed, both by the notion of having to resort to legal assistance and anxiety emanating from engaging with the legal system, which they may have managed to avoid up to this point in their lives.

> An older client I had recently just froze up in my office every time I tried to interview her. Eventually, I discovered that if I took her to the kitchen and made her a cup of tea, she was able to relax completely. But back in my office she froze again. I ended up conducting the interview in the kitchen and held it as an informal chat about her situation.[11]

One submission, made by the neighbour of an older woman who had witnessed a crime, further illustrated this problem of being faced with a legal problem for the first time. The woman had had little or no contact

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[9] Consultation with Karen Cox and Emma Keene, Consumer Credit Legal Centre, 25 October 2002.

[10] National Alternative Dispute Resolution Advisory Council, *Issues of Fairness and Justice in Alternative Dispute Resolution*, paragraph 5.83.

[11] Consultation with Karen Cox and Emma Keene, Consumer Credit Legal Centre, 25 October 2002.

with the police or the legal system and was frightened of the unknown as well as the formality. She was served with a subpoena by the police late at night, as she and her husband were going to bed for the night.

> *When I spoke to her, she was very distressed and hadn't eaten for days. I am a lawyer, so I've been trying to prepare her for what it will be like in court, but she is worried about her husband, who she cares for, and who will look after him while she attends court.*[12]

And,

> The other common one is that often, older women that we encounter have never had anything to do with the legal system before so it's very overwhelming. Something that they try to avoid. Something that they comment on: 'This is the first time I've come into a court.' A few women we've seen recently haven't had the support of their family in what they're doing.[13]

Beyond the clear discomfort experienced at being faced with the unfamiliar, indicated by the submissions above, these comments have implications for legal service delivery to some older people.

> Personal and psychological barriers often prevent vulnerable people from seeking legal services. For example, there is a tendency for older people to defer to other family members and, in some situations, such deference can see the older person's interests compromised and can also give rise to elder abuse. Another problem is that faced by widowed women who have traditionally left legal and financial considerations to their husbands. Many older people do not understand their rights, what legal avenues of redress are available to them, or the kinds of alternative assistance that are offered.[14]

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[12] Individual telephone submission.

[13] Consultation with Northern Rivers Community Legal Centre, 11 October 2002.

[14] Giddings, J. and Thomas, J., 'Teaching the law as it relates to older people', *Alternative Law Journal*, vol. 27, n.2, 2002, pp. 78–82.

Another service provider to women drew attention to how adherence to traditional notions of gender roles play out and disadvantage older women in particular.

> For a lot of women, particularly older women, their husbands have controlled the larger financial decisions, even when they have had earnings of their own. It is a symbol of power and control in marriages for the husband to handle the mortgage, insurance, superannuation, investment, debt, etc., while the woman is given housekeeping money or uses her income for that purpose. Older women thus often lack confidence or experience in handling money decisions. This is particularly an area where they display learned helplessness, as it has not been part of their accepted gender role.[15]

And Consumer Credit Legal Centre's comments were similar.

> Often older clients are women whose husbands have managed their finances in the past and their husbands have died or become incapacitated.[16]

However, another service provider to men suggested that there may be comparable problems for older men.

> Women have traditionally had their affairs looked after by men, and this is often the case for most women over the age of 65, but would it be harder for older men to ask for help?… you have to remember too, that if it's financial affairs, older men usually have had the control, but with health issues, in that generation, it has been the women who have played a much more nurturing and caring role. So, maybe the roles have been reversed between the two, I don't know…[17]

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[15] Consultation with Margaret Small, Women's Legal Resource Centre, 25 October 2002.

[16] Consultation with Karen Cox and Emma Keene, Consumer Credit Legal Centre, 25 October 2002.

[17] Consultation with Anthony Brown, Project Officer, Men's Health Information and Resource Centre, 6 August 2003.

A male participant in a focus group discussion also had a number of observations about men. He said that for himself and other men of his age, they simply did not have the confidence to use the courts and the police. He said that men who had not gone anywhere for assistance in solving their problems were not going to start now. Quite apart from lack of confidence, it was suggested that there was a tendency to solve problems themselves, partly because of the uncertainty of what assistance could be provided by others, and partly because of a culture of not complaining, to accept what is given.[18]

The way older people see the legal system

While current trends in service delivery to disadvantaged groups have focused on empowerment through legal assistance and the creation of choices,[19] there is at least some indication here that some older people may not be capable of seeing the legal system system as empowering.

> Yesterday a woman came to my divorce class and was determined to leave a long-term marriage. When it came to the issue of property, she said she thought she might just leave that. She said, "It's just something I don't want to have to deal with. I need help filling out the forms. Can you take it and do it for me."[20]

[18] Older Men: New Ideas (OMNI) Lakemba Branch focus group participant, Sydney, 10 September 2002.

[19] See Chapter 9, *Elder Abuse*; Livermore, P., Bunt, R. and Biscan, K., 'Elder Abuse Among Clients and Carers Referred to the Central Coast Aged Care Assessment Team (ACAT): a Descriptive Analysis', *Australasian Journal on Ageing*, vol. 20, n.1, March 2001, pp. 41–47; Consultation with Robyn Sedger, Aged Abuse Monitoring Project, Western Sydney, 5 November 2002.

[20] Consultation with Margaret Small, Women's Legal Resources Centre, 25 October 2002.

And,

> *My mother was traumatised and didn't want to have anything to do with taking on the council after her accident: it has been up to me to do that. Many other elderly people may not have somebody to help them, and may therefore take no action.*[21]

Another submission described an assault on an older couple in a regional area in NSW. The husband tried to find out what happened to the two girls who assaulted them. He was told that they were charged but acquitted. 'So much for the law being fair and taking in both sides of the story.'[22]

However, as previously mentioned, it is not possible to reliably generalise about older people. Different people have different needs and various levels of engagement with the legal system. The following comments from legal service providers to Indigenous service users exemplify a differential approach to the legal system.

> I guess we don't get so many older people who are clients but I guess we come into contact with older people, for example, as parents of people who are in trouble. Older people usually come in support. It's not unusual for parents or even grandparents to ring up and say 'Little Johnny's in trouble what can you do? Do you want me to come and see you?'[23]

And,

> I find older people far more up front—wanting to know, wanting advice, whether they are making inquiries on behalf of their grandson or son or niece or nephew—some of them are incapable of taking an interest in their own matters.[24]

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[21] Individual telephone submission.

[22] Consultation with Keith James, Treasurer, Combined Pensioners and Superannuants Association, Dubbo, 4 October 2002.

[23] Consultation with Richard Wilson, Sydney Regional Aboriginal Corporation Legal Service, Redfern, 8 October 2002.

[24] Consultation with Western Aboriginal Legal Service, Dubbo, 3 October 2002.

Professor Carolyn Sappideen, Director of the Centre for Elder Law at the University of Western Sydney, has another perspective on the current cohort of older people.

> As a group, they are better organised, better educated and better funded, and they are working longer than earlier older populations…You now have a very articulate, educated group who are not going to sit by and let their retirement disappear…[25]

While a number of older people consulted for this project did not have faith in the legal system, some had strategically identified alternative methods of addressing problems. One caller made a submission that she did not want to seek advice from lawyers because she did not trust them. Instead, she approached a local MP, using political rather than legal pressure.[26]

Another participant in this project based his rejection of the legal system on assumptions about the current law. He said that he was inhibited from using the law because of his perception that the laws have fundamentally changed such that there are no longer the same remedies, and going to court has been substantially restricted.[27]

One service provider noted gender specific misconceptions about the legal system from the perspective of older women.

> I think it's a matter of how that cohort sees the role of law. They see the legal system is about trees and the neighbourhood fence or about writing your will and getting properties organised but not about personal protection against violence in the domestic sense in families. If someone punches her in the nose or tries to steal her handbag she'd probably report it to the police. So if your husband beats you up every night, you don't necessarily see that criminal justice systems have a role.[28]

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[25] Consultation with Carolyn Sappideen, Elder Law Centre, University of Western Sydney, 10 September 2003.

[26] Individual telephone submission.

[27] Older Men: New Ideas (OMNI) Lakemba Branch focus group participant, Sydney, 10 September 2002.

[28] Consultation with Margaret Small, Women's Legal Resource Centre, 25 October 2002.

For some,[29] engagement with the legal system is not a choice. They are forced to participate, when clearly they would prefer not to be involved.

> *I was sued by my neighbour for nearly $10,000 for damage to his fence and swimming pool equipment. The dispute has been going on for about 3 years. My wife and I are both ill—she has cancer and I have just had my sixth bypass operation. We had no choice but to fight the case in court. However, the neighbour had never turned up at court and his solicitors continually asked for adjournments. I attended every court date.*
>
> *Finally, in the neighbour's absence, the magistrate found in our favour, but this was after hiring many expert witnesses and a solicitor. The maximum costs were awarded against the neighbour, but this didn't cover our legal expenses. The neighbour didn't pay the costs, so we applied to the court to have the sheriff enforce the judgment. The neighbour appealed the costs order. He then didn't show up at the hearing date but sent two solicitors to argue his case.*
>
> *Our solicitor tried to expedite matters by settling on a smaller amount and the neighbour rejected the settlement. Eventually, the court ordered a much-reduced amount of $180.00, down from $650.00. The neighbour still has not paid the amount and we don't know if we should pay for the sheriff to collect the money, again, as a matter of principle.*
>
> *Now we want to simply sell our house and move somewhere else to avoid harassment by the neighbour, but our health has deteriorated so much that we have had to abandon that plan.*[30]

[29] See above, p. 34, note 12.

[30] Individual telephone submission.

This caller's story illustrates that, while some older people fail to see the law as empowering, for others it can be actively disempowering. This kind of experience, where the law is used as a weapon, may in turn affect the way that the legal system in its entirety is viewed.

Access to legal information

Like other disadvantaged groups, older people can come up against many barriers to accessing legal information because of comprehension problems. This may be due to a lack of access to materials translated into community languages, poor literacy skills or cognitive impairments. However, there are some barriers to which older people, distinct from other groups, are particularly susceptible.

Technological barriers

Telephones

Even though older people exhibit high use of telephones for communication, submissions to this project indicate that they prefer to speak to someone rather than be faced with messages and directives to press a number to clarify their needs.

> Old people often comment about button menus on phones. They don't even like 'press hash or just hang up.'[31]

And,

> Centrelink commissions a range of customer satisfaction surveys both general and specific. The results are circulated internally. The complaints we get from older people are varied. One issue is that people dealing with

[31] Tilse, C., Setterlund, D., Wilson, J. and Herd, B., 'Legal practitioners and older clients: challenges and opportunities for effective practice', *Elder Law Review*, vol. 1, 2002, p. 34. Available at <http://www.uws.edu.au/about/acadorg/clb/sl/research/elderlaw/elderlawreview/reviewvol1/reviewvol1articles> (Last accessed 11 December 2003).

> Centrelink for the first time can find the call centre a bit daunting.[32]

Several of the participants in focus groups complained of frustration at being met with recorded information: "I don't know if it's computers that we can attribute to the change—I think it's press buttons that have allowed it to happen."[33] Another participant spoke positively of a telephone information service that used to be available, "It was wonderful because they didn't have to press three, somebody actually answered the phone."[34]

> *I tried to contact LawAccess but was left on hold for too long, and in frustration hung up. I also wanted to speak to someone in person and not be referred to an Internet site or speak to someone on the phone. I tried to make an appointment at our local legal centre but could not get through on the phone as it was always engaged.*[35]

One focus group participant commented about telephones and difficulties that older people have with them: "People on the phone speak far too quickly for the elderly and they can't understand what they are saying."[36]

Clearly, the telephone does present some barriers to access for older people, although it also can make legal services more accessible, particularly when there are mobility issues for people with disabilities or for people living in rural, regional and remote areas.

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[32] Consultation with Michael Jordan, National Co-ordinator of the Customer Relations Team at Centrelink, 5 December 2002.

[33] Older Women's Network focus group participant, Sydney, 8 October 2002.

[34] Older Women's Network focus group participant, Sydney, 8 October 2002.

[35] Individual telephone submission.

[36] Eric Calloway House Nursing Home focus group participant, Sydney, 21 October 2002.

> I think for us, because we're a regional service, the vast bulk of our contact is generally telephone advice or people who want face-to-face end up not making an appointment unless they can get to an outreach centre—we have six.[37]

And,

> We provide phone information and advice where we usually wouldn't but do so because of mobility issues associated with older, frail people.[38]

Computers

The internet has been increasingly relied upon by legal service providers, government departments, complaint handling bodies and interest groups to convey legal information to consumers. There is some evidence that older people are using the internet more.

> In Australia, there is a declining fear of technology among older people as they recognise its ability to improve their social well being and help them gain greater autonomy. Research by Australia's Council On The Ageing (COTA) suggests that older adults are particularly attracted to technology products that enhance their capacity for independent living. Older adults have acknowledged their need to adapt to ICTs [Internet Communication Technologies] and there is a strong demand among them for training in how to use computers and the Internet at basic and advanced levels.[39]

Some participants affirmed this increase in computer usage, though were limited in their ability to make full use of the technology, "I use computers but I haven't used it to get legal information yet."[40] Others expressed their feelings of exclusion, "…for those of us who really need information,

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[37] Consultation with Northern Rivers Community Legal Centre, 11 October 2002.

[38] Consultation with Inner City Legal Centre, 9 October 2002.

[39] Cited from <http://www.govonline.gov.au/projects/access/Connecting_Communities/older_aust.htm> (Last accessed 11 December 2003).

[40] Older Women's Network focus group participant, Sydney, 8 October 2002.

[computers are] just a real put off,"[41] and, "…now, I will not participate in anything that's being advertised or information that is being given out that doesn't list the company by telephone number."[42] Another submission by an individual caller expressed concern that when quasi-judicial bodies publish their decisions online for ease and efficiency, with no other option being given to consumers, this can impact upon people who are not technologically savvy:

> *I was sent a letter saying if I wanted to know the results I could look it up. I was told 'ww something something.' I went to the library and the woman there couldn't find it either.*[43]

There is evidence, however, that the 'young-olds' are more computer/internet literate, as in 2001, 18 per cent of 55–64 year olds used the Internet to access Government services compared with a population average of 26 per cent.[44]

Where to go for information

Older people commented on their frustration at not knowing where or who to turn to for legal information, "My information for the focus group is the lack of information."[45] Many spoke of the need for a single point of reference and referral.

> What is really sort of absent in our society is where you can actually get information. Now this Government used to have an information resource centre where you could phone up, and I used it twice, and I was absolutely staggered at how on the ball they were and that was before

[41] Older Women's Network focus group participant, Sydney, 8 October 2002.

[42] Older Women's Network focus group participant, Sydney, 8 October 2002.

[43] Individual telephone submission.

[44] Department of Ageing, Disability and Home Care, *2002 Premier's Forum on Ageing: Consumer Protection*, Department of Ageing, Disability and Home Care, Sydney, 2002, p. 26.

[45] Older Women's Network focus group participant, Sydney, 8 October 2002.

> databases, and I was trying to find out something about specific classes that I wanted to know about, and I don't know whether there is a gap…[46]

A consultation with Inner City Legal Centre yielded this comment: "There is an information problem that older clients aren't aware of the services available".[47] This was echoed by the Welfare Rights Centre.

> The Welfare Rights Centre will provide advice to anyone who rings up about a social security matter. However, for older people, there might be an issue of awareness, or they might be put off by the name 'welfare.' Maybe its outreach and publicity activities are not targeted to the elderly.[48]

Similarly, a Women's Legal Resource Centre officer, speaking about older women in particular, commented that:

> Older women are less aware than younger women of what assistance is out there. They did not have community legal centres, etc. when they were young. The information about such services does not seem to reach older women. How do you get to them?[49]

The Premier's Forum on Ageing, held in Sydney in 2002, reported on research commissioned by the Department of Ageing, Disability and Home Care (DADHC) into consumer rights protection and older people. Key issues identified in relation to communications and government agencies include the following:

> There is a lack of understanding about the role of specific Government agencies with some older people asking themselves: Who does what? Who should you go to? Who would be interested in my concern? and What will they want to know? A single point of contact would be ideal for older people; a 'one-stop-shop', which could either deal with the enquiry

[46] Older Women's Network focus group participant, Sydney, 8 October 2002.

[47] Consultation with Natalie Ross and Andrew Taylor, Inner City Legal Centre, 9 October 2002.

[48] Consultation with Gerard Thomas, Policy Officer, Welfare Rights Centre (NSW), 10 December 2002.

[49] Consultation with Margaret Small, Women's Legal Resource Centre, 25 October 2002.

> then and there, or refer older people to the most appropriate organisation that could help.
>
> If organisations fail to help when contacted, it is unlikely that older people will approach them subsequently. For older people, there is a small window of opportunity to inform (and impress) them.[50]

These comments have broader application than for government departments, although numerous legal problems arise through interaction with government agencies. Research commissioned by Centrelink into the information needs of older people indicated the need for a point of reference toward service providers and sources of information.

> When prompted, respondents indicated that a much broader range of sources could be useful. This reflects qualitative findings, which indicate that it is a lack of knowledge of sources, rather than a lack of sources which is a major barrier to effective dissemination…[51]

A consultation with the Veterans' Advocacy Service, Legal Aid NSW, suggested that existing services for legal information and referral may not be appropriately formatted for older people, given their dislike of press-button telephone services and desire to speak to a person.

> A perfect example of that is the LawAccess line that's just been set up. I've called them twice because people have called me and there are things like, one person rang who is in some quite remote place in the back of NSW somewhere and he'd called them and said that he hadn't been able to speak to anyone, he'd just had recorded messages. So I said 'OK, give me your number and I'll call them and call you back'. And there are an unbelievable number of recorded messages. Because they have these little recorded information seminar things, they avoid speaking to people by going 'if you want a divorce, press 4' right so then you get all the information on what to do that's just an example. So first of all you have

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[50] *2002 Premier's Forum on Ageing: Consumer Protection*, p. 25.

[51] Woolcott Research, *An Evaluation of the Information Needs and Communications Preferences of Older People: Volume II of II*, Centrelink, Sydney, 1997, p. 91.

> to choose a number, then from there you have to choose another number, depending on what type of inquiry you have, it just went on and on.
>
> On the very first time you get to choose a number, the very last thing it tells you is 'If you've made a mistake, just hold to speak to a customer service officer' and that's the only way, there's not even a number to press to get onto someone, without waiting through recorded messages.
>
> And you mightn't know what to call your problem. Because most people ring up and they just want to tell their story to someone who can then say, 'No, your problem isn't that, it's actually this really, isn't it'.[52]

A consultation with the National Information Centre on Retirement Investments (NICRI) affirmed that for specific issues that have great relevance for older people, there is little knowledge of where to find adequate information and advice.

> As for general knowledge about where to go for financial advice, it's very low. The Centrelink Financial Information Service is highly respected but can only give out general information. Its resources were cut in the 1997 Budget. NICRI is a small organisation, set up and funded by FaCS [Department of Family and Community Services]. It is the best organisation for free, confidential, independent information. Many people don't know about it—it gets 20–30 calls a day.[53]

Of course, some older people are more adept at navigating sources of legal information. One caller's submission related to liquor licensing law; she and her husband were opposed to extensions of licenses late at night in their area. Although the cursory information she obtained was inadequate, she was able to access an intermediary source of information (i.e. the Legal Information Access Centre — LIAC) that eventually satisfied her requirements. However, she provided no information as to how she became aware of LIAC:

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[52] Consultation with the Veterans' Advocacy Service, Legal Aid NSW, 15 October 2002.

[53] Consultation with Basil La Brooy, National Information Centre on Retirement Investments (NICRI), 20 September 2002.

> *The Law Handbook, which is very useful, does not contain adequate information on this subject. We contacted LIAC [Legal Information Access Centre] which has provided us with useful information and provided us with a copy of relevant parts of the Liquor Licensing Act.*[54]

Lack of information, when such information is required, can have severely deleterious effects on some older people.

> Amongst all of the barriers that relate to aged care abuse, especially in terms of disclosure and reporting cases, it is important to consider that victims of abuse are not always making informed decisions and to a large extent lack of information is to blame for the poor way in which the matter is often handled.[55]

Older people tend not to go directly to a legal service provider or other intermediary when they have a problem that is legal in nature. According to the National Office for the Information Economy there is a heavy reliance on informal sources of information.

> Older adults rely on informal sources (i.e. family and friends) and established contacts (i.e. doctors) for information. They prefer face-to-face personal interactions when accessing information or being provided with information about products and services, especially in provision of detailed or personal information.[56]

Members of the NSW Committee on Ageing also stated:

> More often, the pathway to a lawyer is a person who will advise them that they need a lawyer. Doctors, district nurses and local friends are more

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[54] Individual telephone submission.

[55] Consultation with Robyn Sedger, Aged Abuse Monitoring Project, Western Sydney, 5 November 2002.

[56] National Office for the Information Economy, *Older Australians Online,* 2002. Available at <http://www.noie.gov.au/projects/access/Connecting_Communities/older_aust.htm> (Last accessed 25 September 2003).

> likely to be the people whose advice will be listened to i.e. people in positions of trust in relation to the older person.[57]

According to Woolcott Research:

> …54 per cent nominated family and friends as useful information sources, thereby emphasising the need to ensure that information is disseminated to the community beyond the primary target to try to eliminate misinformation from well meaning, but not always well equipped friends and family.[58]

One participant in a focus group with Aboriginal Elders in Penrith reiterated this dependence on informal networks, and on incidental rather than authoritative sources of information.

> Warwick, a mate of mine—he's in the funeral business ….I rang him up and I asked him if he knew anything at all about this mob who I'd joined up with and he said 'who's the underwriter of it?' and I told him and he said 'you've got no worries'. I just can't remember who it was now.[59]

This was affirmed in other focus groups.

> "…you do get [information] by your relationships—talking to other people about their experiences…"[60]

This reliance on family and friends was expressed as being based upon trust. The research commissioned by Centrelink reflected the lack of trust in relation to more formal sources of information and referral.

> When it came to intermediaries there was total confusion, uncertainty and suspicion. Interestingly again the issue was, "Where should I go first?" Some felt they could not unravel who to approach for what. Many felt that advisers were only really for the wealthy and, that the DSS was

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[57] Consultation with Sarah Fogg, Heather Graham, Dawn Linklater and Gerard Thomas, NSW Committee on Ageing, Department of Ageing, Disability and Home Care, 9 September 2002.

[58] Woolcott Research, *An Evaluation of the Information Needs*, p. 91.

[59] Indigenous Elders focus group participant, Penrith, 14 October 2002.

[60] Older Women's Network focus group participant, Sydney, 8 October, 2002.

> only for the very poor and was really only in the business of paying pensions.[61]

And,

> It was not obvious to people where they should start and many, particularly those from Non-English Speaking Backgrounds, rural areas, with limited education and/or financial experience were genuinely embarrassed about making the first approach. Some clearly feared being taken advantage of by "advisers" whose credibility varied widely.[62]

One consultation which canvassed issues relating to elder abuse yielded these comments about information and assumptions about intermediaries.

> Older people need more education in terms of their knowledge of the legal system and the structure of AVOs et cetera. They also require more knowledge of nursing homes and the degree of difficulty in having someone admitted. A lot of older people feel that if they involve the police or even a community nurse any control that they have in their lives may be taken away from them. They need to be reassured that if anything is reported there are certain controls that they can have.[63]

The above comments suggest that high levels of anxiety are experienced by older people about where to begin in their search for legal information and/or information to avoid legal problems developing. That distress might, at least partially, explain the reliance upon less formal, though not necessarily reliable, sources of information and advice.

> Referral from GPs is the best way of accessing older women in particular—also community nurses. One woman presenting has gone out and trained 1000 GPs around NSW trying to get them to pick up violence issues, identifying and being more receptive to it and to know what to do.[64]

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[61] Woolcott Research, *An Evaluation of the Information Needs*, p. 24.

[62] Woolcott Research, *An Evaluation of the Information Needs*, p. 26.

[63] Consultation with Robyn Sedger, Aged Abuse Monitoring Project, Western Sydney, 5 November 2002.

[64] Consultation with Meredith Osborne, Blue Mountains Community Legal Centre, 23 September 2002.

The Blue Mountains Community Legal Centre also noted the importance of having multiple strategies to convey information to older people: "…you can't just have one information strategy and expect to reach all older people."[65]

Relevance

It is a matter of common sense that people do not tend to process and remember information that does not have some relevance to their daily lives. One way for legal information to become significant to people is if they have a legal problem and want to find out how to address it. This need for appropriately timed information has been noted elsewhere, "information which is not communicated at the time it is needed is usually not absorbed or is forgotten quickly"[66] and, "…it is not what people want to know that is most important, but what they need to know."[67]

People generally do not actively seek out legal information until they, or someone close to them, has a legal problem. Implicit in this, is that they realise that the problem they are experiencing is legal in nature or has legal consequences or remedies.

A pilot legal needs survey conducted by the Law and Justice Foundation in the Bega Valley Local Government Area[68] showed that:

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[65] Consultation with Meredith Osborne, Blue Mountains Community Legal Centre, 23 September 2002.

[66] Deasey, M., *Reaching ethnic communities: a resource guide to information strategies for reaching ethnic groups in the North West Region*, North East Region Information Network (Vic.), Preston, 1985.

[67] Woolcott Research, *An Evaluation of the Information Needs*, p. 9.

[68] Law and Justice Foundation of NSW, *Access to justice and legal needs: a project to identify legal needs, pathways and barriers for disadvantaged people in NSW. Stage 2, Quantitative legal needs survey, Bega Valley pilot*, Law and Justice Foundation of NSW, Sydney, 2003.

> [p]articipants aged 65 and over were significantly less likely to experience one or more legal events[69] than all other age groups… participants who were over 65 were less likely to be engaged in many of the activities that may have legal consequences.[70]

If these findings are borne out in the larger legal needs survey currently being undertaken by the Law and Justice Foundation in six local government areas across NSW,[71] then there will be implications for the perceived relevance of legal information from older people's perspectives, and strategies for its delivery from legal service providers' perspectives.

There are some areas of the law that bear special relevance to older people. One report has indicated that substitute decision-making, care arrangements and accommodation decisions are of particular significance to older people.[72] According to data collected by the Foundation from legal service providers in NSW, older people are more likely than other age groups to inquire about civil law matters. Data collected from Legal Aid NSW shows that housing, wills and estates, personal injury, consumer issues and other civil issues are the subject of most inquiries by people over 65.[73]

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[69] The approach of identifying 'legal events' rather than 'legal problems' recognises that individuals may not always realise that an event that they experience has legal consequences, and therefore assists to minimise the under-reporting of events. The form of questions focussed on activities, identified as having legal significance, not necessarily classified as 'legal' by the respondents.

[70] Law and Justice Foundation of NSW, *Access to justice and legal needs: a project to identify legal needs, pathways and barriers for disadvantaged people in NSW. Stage 2, Quantitative legal needs survey, Bega Valley pilot*.

[71] The Bega survey was a pilot study of the the Access to Justice and Legal Needs Program. A modified survey is, at the time of writing, being delivered to six other Local Government Areas in NSW, which will provide a more complete picture of older people's access to legal information and services.

[72] Tilse et al., 'Legal practitioners and older clients', *Elder Law Review*, vol. 1, 2002, p. 34.

[73] Law and Justice Foundation of NSW, *Access to justice and legal needs: a project to identify legal needs, pathways and barriers for disadvantaged people in NSW. Stage 1 Access to Justice Data Digest, A Compendium of Service Usage Data from NSW Legal Assistance and Complaint Handling Services*, Law and Justice Foundation of NSW, Sydney, February 2004.

Table 3.1 Legal Aid NSW 2000–2002 Age by Broad area of law — Advice and Duty Solicitor
Percentage for law type within age group, *Access to Justice Data Digest,* A Compendium of Service Usage Data from NSW Legal Assistance and Complaint Handling Services, Law and Justice Foundation of NSW, January 2004

	0–14	*15–17*	*18–24*	*25–34*	*35–44*	*45–54*	*55–64*	*65–74*	*75+*
Family	3.0	0.8	8.1	32.3	34.4	14.6	4.6	1.8	0.5
Crime	2.0	6.7	31.4	33.4	18.1	6.1	1.6	0.5	0.2
Domestic violence	0.9	4.8	15.4	31.9	28.3	11.5	4.5	1.8	0.7
Traffic Offences	0.2	1.2	26.1	38.0	22.6	8.3	2.6	0.7	0.2
Business and Media	1.0	0.2	5.1	16.1	30.3	24.3	11.9	7.6	3.5
Consumers	1.1	0.3	7.5	17.9	25.0	21.9	13.8	9.0	3.6
Credit and Debt	1.1	0.1	7.1	22.4	24.8	20.0	13.6	7.4	3.5
Employment	0.9	0.3	11.2	24.0	27.8	23.1	9.9	2.4	0.5
Government	0.6	0.9	13.0	28.2	22.5	13.6	9.1	4.7	7.3
Health/Human Rights	1.0	0.7	11.8	29.3	24.1	15.7	10.7	4.3	2.4
Housing	1.9	0.1	3.7	13.2	20.4	19.4	16.6	15.5	9.1
Motor vehicles	1.0	0.3	17.4	21.4	24.7	16.0	9.8	6.0	3.5
Personal Injury	1.2	0.2	6.6	19.6	24.3	16.6	13.4	9.2	9.0
Wills and Estates	18.5	2.3	4.3	13.8	15.9	15.6	12.1	9.7	7.8
Civil — other	1.9	0.5	7.4	16.9	24.1	20.3	14.6	9.1	5.2
Total (100%)	**6,869**	**15,126**	**84,054**	**117,130**	**81,968**	**35,389**	**14,526**	**6,610**	**4,926**

Notes: No. of inquiries=366,598; Missing values=16,965 (4.4%)

In at least some of these identified areas, forward planning is a pivotal preventative mechanism to avoid many problems arising. This was acknowledged in the research conducted on behalf of Centrelink in 1997.

> This evaluation of the information needs of people approaching or in retirement indicates that in order to ensure success of a retirement information strategy, there is a need to convince people of the benefits of early planning. Without this, much of the value in dissemination of information, and making it more accessible to all, will be diminished.[74]

[74] Woolcott Research, *An Evaluation of the Information Need*s, p. 6.

When planning strategies for legal information dissemination to older people, it may be important to first raise awareness of potential problems to create the context for the provision of legal information. This may require targeted and appropriate education campaigns.

Legal service provision

Lack of specialised services

Based on consultations undertaken for this project, older people and service providers agreed that there was a gap in service provision to older people. Older people, while experiencing many of the same legal problems as other age groups, do have some special needs that differentiate them from others. This is the case in terms of specialised areas of the law, such as retirement village contracts, and in terms of catering to their particular communication needs.

> There is no community legal centre for older people. This is a gap in New South Wales Service Provision. When you're dealing with elder abuse, there is no dedicated service, like there is in South Australia and Queensland. Older people who go to domestic violence services can encounter a lack of empathy and awareness.[75]

The lack of a singular, specialised service for older people, or 'one-stop-shop,' sends them on a referral path.

> We've had quite a bit of CLE [community legal education] talking about [end of life issues]. Our policy is not to write wills—we talk to people about it. We give them advice about wills after the event of death in disputes about estates but we don't write wills. That probably keeps the older people away from our service. We give referrals.[76]

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[75] Consultation with Basil La Brooy, National Information Centre on Retirement Investments (NICRI), 20 September 2002.

[76] Consultation with Northern Rivers Community Legal Centre, 11 October 2002.

Referrals can be discouraging and frustrating for consumers of legal services as well as time consuming for service providers.

> …Clients seeking assistance from public legal service agencies often experience a legal advice 'roundabout,' as they are referred from one CLC [community legal centre] or legal aid office to another… There is often a lack of knowledge about the services provided by other agencies in the system. The service provider may not have the expertise to give advice…[77]

Even if a specialised service were to be introduced to cater to older people's legal needs, better referral practices require development to prevent older individuals being shunted from service to service.

Service provision to older people

There are, however, a very small number of services that either cater to a specific area of the law or make some special provision for older consumers.

The Aged-Care Rights Service provides legal assistance for residents of Commonwealth-funded nursing homes and hostels in NSW. It also advocates for residents of retirement villages and serviced apartments. It offers a telephone information service, and also conducts workshops for service providers and staff as well as residents.

In a consultation with the Aged-Care Rights Service, they reported overwhelming numbers of inappropriate referrals from service providers and cold calls from older individuals, which they then had to refer on to other services.

> People know that we provide specialised services to older people, they are not necessarily aware that our charter limits us to retirement villages and nursing homes—that is, very specific accommodation issues.[78]

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[77] Australian Law Reform Commission, *Managing Justice — A review of the federal civil justice system*, Australian Law Reform Commission Report n.89, Australian Government Publishing Service, Canberra, 2000, pp. 379–380.

[78] Consultation with The Aged-Care Rights Service, 18 September 2002.

There are also many service providers that are aware of the specificity of their service and provide appropriate referrals to older people, for example:

> The Aged-Care Rights Service in Sydney is a specialist. It deals with more of those [retirement village] issues. I'm inclined to refer people there in the first instance.[79]

And,

> …we don't have any expertise around retirement village contracts or nursing homes, etc. so we would refer those to Aged Care Rights Service.[80]

Other services accommodate their older clientele, or more discrete groups, by providing additional or special services. The submission from Centrelink to the Law and Justice Foundation of NSW Access to Justice and Legal Needs Program highlights some of their initiatives aimed at older people.

> Centrelink provides various services to Australia's older citizens and is constantly building community and business sector partnerships to expand these services. Centrelink provides a referral service to community organisations and other support services for older people needing legal assistance as a result of a bereavement (e.g. what to do with the home, is there a will? pre-paid or unpaid funeral arrangements, financial counseling, etc.) and changed personal circumstances (e.g. retirement, caring for a grandchild, caring for someone who is ill or suffering a disability, or needing care for themselves).
>
> Centrelink Social Workers can provide appropriate counseling and referrals, e.g. grief counseling, referrals to other support services such as Community Information Services, Legal Aid, Welfare Rights, Public Trustee, etc. Financial Information Services (FIS) conducts seminars on Estate Planning and Wills emphasising the importance of: Making a Will; Enduring Power of Attorney; Administration; and Making Your Wishes

[79] Consultation with Northern Rivers Community Legal Centre, 11 October 2002.

[80] Consultation with Natalie Ross and Andrew Taylor, Inner City Legal Centre, 9 October 2002.

> Known. These seminars may also include guest speakers from law firms, public trustees and funeral directors. FIS also assists people who have lost a partner and need help to understand and/or reorganise their financial affairs.
>
> Centrelink also provides nominee arrangements for customers approaching or reaching retirement age. These nominee arrangements assist older people address income support and related matters. There are currently around 220,000 people who act as nominees for Centrelink customers and four main types of nominee arrangements are available.[81]

Legal Aid NSW also has a Veterans' Advocacy Service, which provides legal assistance in veterans' affairs cases and veterans' pension applications.

> What we do is we represent the veterans, or the widows, or the dependants of veterans who have had claims refused at the Department of Veterans' Affairs, and pursue appeals against the refusal.[82]

The service has established relationships with the Vietnam Veteran Associations, Returned Services League (RSL) Associations and with Indigenous communities through the Aboriginal and Torres Strait Islander Veterans' Association (ATSIVA) in Moree, Kempsey and Coffs Harbour. Current advice and information services exist in Newcastle, Wollongong, Nowra, Bateman's Bay and Coffs Harbour.

In addition to Legal Aid, Federal funding is provided directly to RSL, Legacy and Vietnam Veterans' Associations to assist people making applications for veterans' pensions. Many veterans also seek assistance from private advocates who work on a contingency basis.[83]

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[81] Centrelink, *Submission to Stage 1, Law and Justice Foundation of NSW Access to Justice and Legal Needs Research Program*, 15 January 2003.

[82] Consultation with Veterans' Advocacy Service, Legal Aid NSW, 15 October 2002.

[83] Legal Aid NSW, *Submission to Stage 1, Law and Justice Foundation of NSW Access to Justice and Legal Needs Research Program*, 16 January 2003.

NSW Local Courts provide *ad hoc* outreach services on request for frail aged people in aged care facilities.[84]

Numbers of older people

One explanation for the lack of a specialised service for older people and the relatively small numbers of agency initiatives aimed at older clients is the small numbers of clients over the age of 65.[85]

> While Consumer Credit Legal Centre client records show that older people (55 plus) constitute only three per cent of the client base, staff believe that it is higher. Many callers' ages are not recorded as well as some people who are taken onto the caseload.[86]
>
> 3.4 per cent of Legal Aid clients were aged 60 and over. Possible reasons for this were the Legal Aid means test and the fact that the majority of cases dealt with by Legal Aid were Family Law and Crime.[87]
>
> We don't have a lot of older clients but we're not sure why that is. I can speculate that it might be the demographics of the area. I think there is an information problem—that older clients aren't aware of the services available.[88]
>
> 3000 clients in total—we have no detail about matters—about 100/3000 [are over 45]—most clients would be aged 15–40.[89]

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[84] NSW Attorney General's Department, *Submission to Stage 1, Law and Justice Foundation of NSW Access to Justice and Legal Needs Research Program*, 22 November 2002.

[85] It is difficult to judge actual numbers of older clients as many legal service providers have varied definitions of 'older people.' However, lower age definitions only result in over-estimations of clients and the numbers are still very low.

[86] Consultation with Karen Cox and Emma Keene, Consumer Credit Legal Centre, 25 October 2002.

[87] Consultation with Sally McAtee, Policy Officer, Legal Aid NSW, 4 November 2002.

[88] Consultation with Natalie Ross and Andrew Taylor, Inner City Legal Centre, 9 October 2002.

[89] Consultation with Richard Wilson, Sydney Regional Aboriginal Corporation Legal Service, Redfern, 8 October 2002.

> I have a printout of the cases which came in and it's a tiny proportion (a few thousand visits and 60 of them from older people).[90]
>
> Older women make up six per cent of the total stats for the DV [domestic violence] court assistance scheme. Six per cent are older people, if not lower, with the general legal service.[91]

As previously mentioned, there may be a number of explanations why older people are not using legal services, including cohort issues, costs and a general distrust that the legal system will assist them. Definitional differences in categorising older people and inconsistent data collection methods might also provide a skewed picture.

Some organisations do not collect age data.

> The statistics for the [Women's Legal Resource] Centre's Annual Report do not include ages, although they do include other demographic data. I believe that it would be useful for CLCs [community legal centres] to report on ages to assess whether older people are missing out on community legal services assistance.[92]

Clearly the Veterans' Advocacy Service would have a very high proportion of older people. The Welfare Rights Centre also reported a high number of older people using their services, although their threshold age is considerably lower than 65.

> …twenty per cent of Welfare Rights clients are aged 50 or over. Many cases concern widows, compensation payments, Centrelink overpayments, and debts.[93]

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[90] Consultation with Northern Rivers Community Legal Centre, 11 October 2002.

[91] Consultation with Meredith Osborne, Blue Mountains Community Legal Centre, 23 September 2002.

[92] Consultation with Margaret Small, Women's Legal Resource Centre, 25 October 2002.

[93] Consultation with Gerard Thomas, Policy Officer, Welfare Rights Centre (NSW), 10 December 2002.

Rural, regional and remote

Older people living in rural, regional and remote areas were identified in the consultations as being particularly difficult to service. Distance, disability, numbers and resources were all identified as key issues.

> Elderly, frail, marginalised, poor people on the western ranges—off the coastal strip—who are doing it hard need a lot of services and they are not accessing the services and we do nothing for them because we don't have the resources. That's a hard area to crack, west of the range, for our services. We run outreaches in places like Kyogle and no one comes through the door. That's a big specialist effort.[94]

> The first issue for older clients is mobility and geographical access particularly as older people tend to live more regionally and are less likely to drive. Also many of them have mobility restrictions because of disability.[95]

Time management

A number of service providers to older clients mentioned the fact that older people require a particular sensitivity to time management issues from their service providers. The Legal Aid policy officer consulted for this project saw this as a benefit.

> I have had no problems in dealing with older clients. If there are any differences, they have usually less time-stress so they have time to become more closely involved in their matters, are reliable in keeping appointments, and possibly tend to get more obsessive about some issues. I do not see them as less focussed or less independent than other clients.[96]

However, other service providers perceived the issue of the time needed to provide adequate service as a problem that needed to be addressed.

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[94] Consultation with Northern Rivers Community Legal Centre, 11 October 2002.

[95] Consultation with Caxton Legal Centre, Queensland, 29 October 2002.

[96] Consultation with Sally McAtee, Policy Officer, Legal Aid NSW, 4 November 2002.

> Older people are definitely more time consuming. They want to tell stories rather than come to the point. They avoid direct questions. Even stating the problem is too hard. They jump around from question to question and issue to issue… By the time they come to Consumer Credit Legal Centre the situation has got out of control. If they had come earlier we would have been able to help them structure their debts to avoid it getting so bad. [97]

What older people think about legal practitioners

Research conducted in Queensland in relation to legal service provision to older people concluded that key issues for older clientele are that the legal practitioner effectively communicates with them and demonstrates legal skill.

> Participants valued legal practitioners who were good communicators generally and who could communicate about legal terms specifically. For several participants the fact that their legal practitioner came to their home to provide advice on legal matters was important. Overall, the attributes of a good legal practitioner were thought to be: personal qualities of friendliness and warmth, good communication skills, respectful attitudes, expertise that demonstrated value for money and reasonable costs that were known beforehand.[98]

It has been noted, however, that there may be some barriers preventing best practice service provision to older people.

> Effective communication and sensitivity to complex client situations may be hampered by ageist attitudes and organisational pressures arising from appropriate allocations of time to clients, cost effectiveness and management of workloads.[99]

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[97] Consultation with Karen Cox and Emma Keene, Consumer Credit Legal Centre, 25 October 2002.

[98] Tilse et al., 'Legal practitioners and older clients', *Elder Law Review*, vol. 1, 2002, p. 38.

[99] Tilse et al., 'Legal practitioners and older clients', *Elder Law Review*, vol. 1, 2002 pp. 34–35.

Legal practitioners clearly articulated during the course of the Queensland study that the time required to explain legal advice to older people was a problem. However, there was also a systemic barrier raised by many about the need for legal education, in and out of law schools, that focused on legislation that is relevant to service provision to older people: "Current training needs in relation to the legislation were identified by approximately half of the [legal practitioner] respondents."[100]

The Queensland research revealed that when the older people they sampled did access legal services, the majority had positive experiences, reporting kindness and a willingness to assist as features of good practice. There were no unequivocally positive submissions to this study made by older people about legal practitioners. The following two submissions, however, had some favourable comments regarding legal service providers.

> *After my mother had had a stroke she wanted to find out whether she could give us Power of Attorney and the lawyer actually made the journey up to Springwood because he couldn't trust us and he handled my father's affairs—and he was handling my mother's. He was wonderful—he was representing her, not us, and he said 'I'll make my own opinion.' He went and had a cup of coffee and came back to see her and she was non compos mentis… he explained the situation, he gave us Power of Attorney over somebody who mightn't have understood.*[101]

> *I've found that if you've lived in the area a fair while and you've had dealings with lawyers and you know them over the years, most of them would give you a pretty reasonable deal ...*[102]

[100] Tilse et al., 'Legal practitioners and older clients', *Elder Law Review*, vol. 1, 2002, p. 36.

[101] Older Women's Network focus group participant, Sydney, 8 October 2002.

[102] Older Women's Network focus group participant, Penrith, 14 October 2002.

Legal service providers consulted during this study provided some insight into the preferred modes of service delivery for older people.

> A lot of my stuff, I do on the phone. And I think that's a difference between the areas, because where I cover they're more inclined to do that. Some of them still want face-to-face… the older ones prefer face-to-face.[103]

> …over the years, my older clients really stand out in my memory because of extra attention they've required such as home visits but they haven't formed the majority of my clients. We also provide phone information and advice where we usually wouldn't but do so because of mobility issues associated with older/frail people. Older people generally do take a little more time, patience and careful communication.[104]

The Queensland research team reported that negative experiences of older people in relation to legal practitioners included: "…communication problems, a lack of interest in older people's specific situations, negative public perceptions of the legal profession and excessive costs…"[105] These negative reports were echoed by a number of older people making submissions to the Law and Justice Foundation. However, it should be noted that many older people contacting the Foundation did so after a public call for submissions from people experiencing legal problems. This influx of poor reports then, were from a pool of self-selecting participants with, on occasion, a series of legal problems, including problems with lawyers.

Communication problems

Many of the older individuals making submissions for this project commented on communication difficulties when it came to dealing with lawyers.

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[103] Consultation with Western Aboriginal Legal Service, Dubbo, 3 October 2002.

[104] Consultation with Natalie Ross and Andrew Taylor, Inner City Legal Centre, 9 October 2002.

[105] Tilse et al., 'Legal practitioners and older clients', *Elder Law Review*, vol. 1, 2002, p. 38.

I was involved in a car accident and I think that my solicitor misrepresented my case and did not keep me adequately informed. The hearing went ahead without my knowledge.[106]

One participant in the Older Men: New Ideas focus group said that one of the reasons why he does not consult lawyers is the legal language used, which is full of jargon. He did not understand why they had to use this language, which made things appear more complex.[107]

Some callers indicated that solicitors did not take the time to explain matters fully to them.

I was injured at work. My solicitor in Bankstown got compensation for me for pain and suffering, and gave me a cheque after deducting his fees. Recently, he told me that I might have to pay it back. I've now left that solicitor, but I want to know why I may have to pay it back.[108]

Neglecting to take the time to fully detail the various options for substitute decision-making can have a severe effect on those older people on fixed small incomes.

I live in a hostel, receive an invalid pension. I wanted to know the difference between 'living wills', wills and powers of attorney. I had a will and a power of attorney set up some time ago. I am really upset as I think I have been given the wrong information by my lawyer. I spend nearly all of my pension on board at the hostel. I am scared that I will have to see a lawyer again and fork out more money for a living will.[109]

[106] Individual telephone submission.

[107] Older Men: New Ideas (OMNI) Lakemba Branch focus group participant, Sydney, 10 September 2002.

[108] Individual telephone submission.

[109] Individual telephone submission.

The pensioner had saved money to invest in legal assistance and the prospect of having to repeat the experience because she was possibly given incomplete advice was difficult for her to contemplate.

Some callers reported that accessibility to their legal practitioner for the purpose of communication was a problem.

> *It's also about availability. Like you ring up and you might have been waiting with your case for say six months or whatever, every time you ring up they are either in Court or not there. So you can't ring up and ask them questions, you can't talk to them about anything.*[110]

In her guide to Communication Skills for Working with Elders, Barbara Dreher discusses the inappropriateness of conducting business-like interviews with older people, stating that such interviews yield limited responses, and will often result in important information being missed. The importance of adopting an empathetic approach is emphasised, so that a relationship of trust is established. This will result in a higher quality of information exchanged, and ultimately more effective advocacy on behalf of the older client.[111]

Dreher also stresses the importance of not attempting to rush an older person into making a decision or providing instructions.[112] Older people need more time to process information and make decisions than younger people, and this needs to be factored into the provision of legal advice and assistance for older people.

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[110] Indigenous Elders focus group participant, Penrith, 14 October 2002.

[111] Dreher, B.B., *Communication Skills for Working with Elders*, Springer Publishing Company, New York, 1987, p. 43.

[112] Dreher, B.B., *Communication Skills for Working with Elders*, pp. 87–88.

Cost issues

Whether it is assumed or experienced, many older people operate under the belief that access to quality legal services are beyond their incomes.

> The attitude of older people is that legal avenues of redress will be too costly, even if it is affordable, and will not change anything in any case. Access to lawyers is not always the first thing they think of.[113]

> *I spoke to [someone] at the South Australian Law Society about some sort of compensation and she referred me to lawyers who wrote to me and quoted me prices that I could not afford. I am on an age pension—I am a divorced-ex wife of a Vietnam veteran.*[114]

> *I am reluctant to visit the solicitor in town because they all charge too much. I have been over-charged in the past.*[115]

> *Three years ago I went through a property settlement and had high legal fees that I am still paying. The bill was not properly itemised and difficult to understand.*[116]

[113] Consultation with Sarah Fogg, Heather Graham, Dawn Linklater and Gerard Thomas, NSW Committee on Ageing, Department of Ageing, Disability and Home Care, 9 September 2002.

[114] Individual written submission.

[115] Individual telephone submission.

[116] Individual telephone submission.

And,

> *I am confident about appearing in court and have been around solicitors enough to know what to do. However, of all the people I know who have been involved in this fraud, I am the only one pursuing it through the courts. The others are inhibited by the cost of solicitors and the complexity of the law.*[117]

Many submissions noted the apparent lack of value for money.

> *And the thing I find with solicitors is that you pay out an awful lot of money to go and see them but you are still doing all the ground work... you will get these letters saying, well we need this so can you go and get it sort of thing. I mean what are you paying them for? Once you are half way through a court case or whatever it may be, that means you are going to have to go somewhere else and start the same thing all over again and go through that power struggle with another group. So they have got you over a barrel no matter what you do, you've got to fork out the money if you can afford it.*[118]

This dissatisfaction with the lawyer's reliance upon the client to 'do the groundwork' may be an indication of a misunderstanding of the lawyer's role, which may contribute to negative public perceptions of lawyers. Alternatively, it may also present a basis for suggesting that lawyers who provide services to older people need to provide a greater level of servicing and assistance, and need to bring a particular specialist service for such clients.

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[117] Individual telephone submission.

[118] Indigenous Elders focus group participant, Penrith, 14 October 2002.

Other participants reported that solicitor's fees were misrepresented to them and that the amount was severely underestimated in the initial advice they received.

> *My solicitor told me that his fees would be approximately $2000, but he charged me $4000 in the end. Combined with my doctors' fees, this leaves me with practically nothing, I came out of the episode with almost nothing because of all the bills I have to pay.*[119]

And,

> *My lawyer was the family solicitor and told me that he would take the case on a pro bono basis. The lawyer said they would sort it out after the case was over but still charged me $14 000 last year and I recently received a bill for $7,000 in court fees. The sheriff came to our home and threatened to take my property to the value of $7,000. My wife and I were really shaken up by the experience and so we paid the bill.*[120]

Some submissions revealed an opinion of lawyers as disreputable, based on a perceived compulsion to accumulate money. A participant in the Older Men: New Ideas focus group said that he would not consult lawyers because of the cost. There was general consensus within the group that they believed that legal costs associated with lawyers and courts were not affordable for them. One participant recounted seeing in the news a lawyer who received $5,000 per day in court, and was put off by such exorbitant fees. Another focus group participant said that he did not want to see lawyers because they were just after as much money as they could get out of him (the participant), and they would devise reasons for him to go back to them so as to pay more fees.[121]

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[119] Individual telephone submission.

[120] Individual telephone submission.

[121] Older Men: New Ideas (OM:NI) focus group, Lakemba, 10 September 2002.

> *Well I only used [a lawyer] once, a divorce lawyer…I got an el'cheapo one and he was hopeless. I would end up losing everything and somebody put me onto a Barrister in Sydney and he was glorious. I got half of everything. Otherwise, I would've lost the lot with this fella. He said, 'there's nothing we can do you've gotta pay, you've gotta give over.' He was only just out of law school.*[122]

Many submissions by older individuals addressed the issue of no-win no-fee arrangements, proffered by lawyers to those without the immediate funds to pay for legal assistance. Usually, because of the risk to the lawyer taking on the case, they will not do so unless there is a good chance of success and charge more to cover their risk.

One caller also felt that large, powerful defendants are apt to discourage lawyers from entering into no-win no-fee arrangements.

> *The way I see it, is this. If you have the money you really don't have a problem. But, if you are in my position where I have no money and have a very good case against the Northern Territory government, then forget it—no one is prepared to take government on in a no-win, no-pay situation.*[123]

And,

> *My solicitor lacked sincerity in his no-win no-fee offer. I approached a number of solicitors. The first said it would be an easy case, and he would do it on a no-win no-fee basis. The solicitor asked for $2,500 to file the claim. He spoke with the*

[122] Older Women's Network focus group participant, Penrith, 14 October 2002.

[123] Individual telephone submission.

other side's solicitors who said they needed more information. Then he asked me for another $3,000 to negotiate with the other side. I sacked him.[124]

The consultation with Caxton Legal Centre in Queensland revealed that no-win no-fee arrangements pose real access to justice issues for clients with any alternative options.

> In no-win, no-pay arrangements, it might not be clear to a person entering into this that the costs if they win will be higher than ordinary legal costs because lawyers need to cover their risks of losing. However, poor people might have no choice but to enter into such an arrangement to get legal help. If costs are awarded, the contract might still allow the lawyers to take more of the principal awarded. But most matters settle and anything can be arranged.[125]

I had a public liability, personal injury case. The no-win no-fee contract I entered into with my solicitor soured when I only received 20 per cent of what was awarded by the judge.[126]

Perceived lack of interest

The Queensland research[127] into legal service provision to older people also indicated that older people felt lawyers were not interested in their problems. Submissions made by older people to this project resonated with that research.

[124] Individual telephone submission.

[125] Consultation with Caxton Legal Centre, Queensland, 29 October 2002.

[126] Individual telephone submission.

[127] See Tilse et al., 'Legal Practitioners and Older Clients', *Elder Law Review*, vol. 1, 2002.

We went to see a firm of solicitors who 'didn't show much interest'. The solicitor we saw told us that we could apply to the Victims Compensation Tribunal, but only if our damages were greater than $7,000. She suggested we should go to Orange for psychological tests. We didn't hear any more about it and went to see our local member. He suggested we see another solicitor. We returned to the original firm and were told the solicitor we had first seen had gone overseas and their papers could not be found. Eventually when the solicitors found the papers, they said there was nothing worth doing. We let the matter lapse and did not go to Orange for psychological tests, because we heard no more.[128]

Much of the criticism from callers related to lawyers being more interested in money than the clients.

> A big problem is the tendency of lawyers to evince interest only in matters that are likely to produce big money.[129]

My father had a legal problem. But the lawyers showed no interest in it because they lacked expertise and there was little money in it for them. I believe that the solicitors were not interested in the case, only in their own profit from it, and do not have expert knowledge in dementia, abuse issues or power of attorney. However, we are reluctant to change solicitors now because we have already run up debts of $10,000.[130]

[128] Individual written submission.

[129] Individual written submission.

[130] Individual telephone submission.

Problems in legal service provision

Family members of older people

An issue raised by a number of different service providers with older people as clients was that providing assistance to the older person via their family members can cause a variety of concerns for both the older person and the practitioner.

> Getting legal advice independently of family members—the practical difficulties when you are frail or have some disability, or when family members are controlling.[131]

> Where an older person dealing with a solicitor is being assisted by relatives, the interest of the relative may be different from that of the old person. The old person might want to leave it to the son or daughter or spouse with mistaken trust in their loyalty. The relative might take over and decide what's best for the older person without really understanding their viewpoint. The solicitor might talk directly to the relative because (a) an assumption that the older person is incapable of understanding, (b) an older person might not know enough about the issues, or (c) it's less time consuming.[132]

> Some people come in always accompanied by family members. I've just finished seeing a client with his mother and she'll always come with him. It does cause some problems with confidentiality in taking instructions and things like that but at the same time, that's the way they operate. I could not exclude her.[133]

Complaints against lawyers

Many submissions from individual older people noted that they had, or would like to complain about the solicitors they had retained.

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[131] Consultation with Sarah Fogg, Heather Graham, Dawn Linklater and Gerard Thomas, NSW Committee on Ageing, Department of Ageing, Disability and Home Care, 9 September 2002.

[132] Consultation with Caxton Legal Centre, Queensland, 29 October 2002.

[133] Consultation with Western Aboriginal Legal Service, Dubbo, 3 October 2002.

I suffered a work injury in 1974 at the age of 40. The compensation case was heard in 1986 and some relevant evidence was not taken into account. I think that the lawyer was negligent. However, I did not discover this until I applied for Disability Support Pension. I could not take action because the 6-year time limit had finished. I lost everything because I could not work and could not get properly compensated.[134]

A number of callers highlighted the problem of securing a solicitor to represent them or assist them in making a complaint against other solicitors.

I had a dispute with a corrupt and negligent solicitor. I complained to the Law Society but they are not independent…. other solicitors won't take cases against solicitors.[135]

Others claimed the Law Society was less than helpful in facilitating complaints by individuals.

This case took 7 years and was funded by litigation loans that the Barrister said had to be taken out to cover his expenses. I tried to change solicitors in the next 18 months but he would not release the files until an enormous amount was paid, of course this was impossible because of all of the litigation loans. I rang the Law Society and complained about his actions and that I had been advised by other Barristers that this case should have been over quickly as it was straightforward and the person who hit us admitted liability. I never received any itemized or expenditure accounts or any information on what the money was being spent on. The pay

[134] Individual telephone submission.

[135] Individual telephone submission.

out came in April 1990, still with no paper work to show me any figures or to what extent almost $200,000 was spent on to allow me only $40 odd thousand dollars. I contacted the Barrister's office on several occasions for this information and was told it would be sent or it was not relevant for me to know. The only reason I knew how much the actual payout was, and that it was in the bank for some time, was because a partner in the firm who happened to have a conscience confided in me and told me that he was leaving anyhow as he did not like seeing people like myself being ripped off.

I again contacted the Law Society and they said that I would have to contact the barrister again and demand these accounts. This I did and was told they would be sent. Of course I have never seen them and I just gave up in disgust.[136]

The hardship produced for the individual frustrated in engaging in a complaint system against lawyers, that gives them little or no satisfaction, clearly can affect their willingness to consider accessing the legal system as a form of redress in the future.

I've got a client who is having a lot of trouble ... she has a compensation claim for her leg—apparently she had an operation and [the doctor] botched it up so her solicitor showed her some figures and said 'this is the bottom price, this is how much it will be.' And then after she has won the case they said 'now this is how much it is going to be plus 30 per cent,' and it was a 90 per cent taking on what she had got…Yeah, well she has put in a formal complaint but now she has got to get advice on how to handle, you know she has to go to another solicitor now and try and sort out what to do

[136] Individual email submission.

with this… she has to find a specialised solicitor that can do the work. She has complained to the Law Society but they can't actually do anything. It's a complaint so they have to deal with it as a complaint but they can't advise her as to how to handle it because that's not what they do.[137]

When solicitors are understood as the mechanism by which people have access to justice, being confronted by unfair or incompetent practitioners can be very disheartening for older people, particularly when it may be difficult to overcome feelings that they should not complain.

We received $5000 from the estate in the end and were charged $2,000 by the solicitor. We have waved goodbye to the inheritance, but do not want to pay the legal costs. We have complained to the Law Society and that complaint is still on foot. We're very upset…[138]

One caller, who reported being deceived by a lawyer in relation to his compensation payout, suggested a practical measure for reform, in the hope that it would create greater transparency for the individual.

Solicitors should provide their clients with a statement in writing advising them of full details of their compensation and that insurance companies should send the client a letter to make sure they receive the total amount. If they do not, they should call the Law Society to complain.[139]

[137] Indigenous Elders focus group participant, Penrith, 14 October 2002.

[138] Individual telephone submission.

[139] Individual telephone submission.

Nowhere to turn for assistance

A few submissions to this project emanated from older people who were at an impasse. Having tried several different legal and non-legal mechanisms for redress, they were left feeling as though no method could help alleviate or solve their problems.

> *I was appointed sole executor of his mother's will. While my mother was in hospital suffering severe dementia, my elder sister arranged for our mother to transfer the mother's property to her, using the mother's own money from her bank account. I have wanted to take action for fraud in Supreme Court. I have been to many solicitors, some of whom would act on a no-win no-fee basis, but when referred to barristers, they ask for $50,000 up front for fees, which I cannot afford. I approached Legal Aid in Wollongong, who said they could not help for this type of action. I approached the public trustee who could not help because the mother's property was disposed of prior to her death. I approached police, who said that due to limited resources and the fact that it took place a long time ago, things will not happen quickly.*[140]

> *My husband and I had $19,000 worth of shares in AMP and a life insurance policy. My husband was very ill and probably did not have capacity. While I was away, our daughter came to the house and had my husband sign over the shares and life insurance policy to her… I went to the police and they said it was not a police matter because my husband had signed the papers—there was no forgery. I have also been to see a solicitor twice, but he said there was nothing he could do for me.*[141]

[140] Individual telephone submission.

[141] Individual telephone submission.

I am a 67 year-old aged pensioner. I own my own caravan but at the moment I am living in an abandoned house. I had a house in joint tenancy with my late mother and my 2 sisters-in-law (my brothers are deceased) swooped in and saw a lawyer after my mother died and concocted some story about my house being a part of my late father's estate and sold the house. I still have the deeds. I have seen a lawyer and made a complaint to the Law Society about the involvement of the sisters-in-laws' solicitor. I would like to be able to take Council and the sisters to court but I cannot afford it.[142]

Free legal services

Many people over the age of 65 are not aware of the existence of free legal assistance, beyond Legal Aid grants.

Problems accessing legal aid

Tests of eligibility

In a consultation with Legal Aid NSW, the opinion was advanced that many older people would necessarily be excluded from accessing grants of Legal Aid. One reason for this is the high number of older people who own their own homes and live on a pension.

> I believe that the income and assets tests are likely to exclude the great majority of older people. The income test, which is based on the income of the client and their partner, limits grants to people with an income of less than $190 a week or $250 a week for a couple, after tax and housing costs.[143] A single person aged 60 or over receiving social security payments is entitled to $202.75 (Newstart) or $217.60 (Pension) after tax

[142] Individual telephone submission.

[143] Disregarding $60 a week for each dependent, including a dependent spouse.

> income. A couple is entitled to $338.10 or $364.20 a week. Thus eligibility would depend on the level of housing costs (after rent assistance).
>
> There is a discretion to waive the rule in a case of a person whose income is less than $210.
>
> The assets test applies to all assets over $100 except personal effects, including a car, and the first $195,200 of home equity… Funeral savings are taken into account as cash assets.[144]

Clearly, the assets test would not be as onerous for people living outside of the Sydney metropolitan area, but for those living in the city, it is more likely than not that a home owner would not pass the assets test. This has a harsher impact on older people, who may not be able to secure a mortgage over their home due to small, fixed incomes. Similarly, the fact that older people are more likely to have money set aside for funeral arrangements than younger people, the inequity of taking account of funeral savings in the assets test militates against older people being eligible for grants of legal aid.

The Legal Aid Commission has some discretion in granting legal aid:

> In the case of pensioner home owners aged 60 and over who have lived in the house for at least five years, legal aid can be granted at the discretion of the Commission in return for a charge over the house.[145]

However discretionary decisions can leave older people in a position of uncertainty. Furthermore, a charge over an older person's home may not be as readily paid off as it may be by a younger person with the prospect of a reasonable income. Charges over houses can put older people in the precarious position of possibly losing their homes.

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[144] Consultation with Sally McAtee, Policy Officer, Legal Aid NSW, 4 November 2002.

[145] Consultation with Sally McAtee, Policy Officer, Legal Aid NSW, 4 November 2002.

The policy's harsh effect was highlighted in a consultation with the Women's Legal Resource Centre.

> If they do know [that grandparents can pursue contact through the *Family Law Act*] they often do not have the money to get legal representation and lack the confidence to appear in person. Legal Aid is usually not available because the grandparents own their own homes and that is taken into account as an asset.[146]

People retiring on their accumulated savings and superannuation making submissions to this project also reported ineligibility for Legal Aid.

> *...as self-funded retirees we are unable to obtain Legal Aid..."*[147]

> *We were selling our house when the purchase fell through. I wanted to sue the solicitor, but could not get a grant of Legal Aid. As a consequence, I represented myself and lost the case. Currently, I am an age pensioner living in insecure private rental.*[148]

Furthermore, the issues for which older people seek assistance are often those which are excluded from legal aid assistance, due to the legal aid subject matter guidelines. As indicated in Table 3.1 above, the most common matters for which older people seek assistance from Legal Aid NSW are civil matters, namely housing, wills and estates, personal injury and consumer issues. For many of these matters, legal aid will not be available, or only available on a limited basis. By contrast, the proportion of inquiries from older people regarding the matters for which legal aid is often made available, criminal law and family law, is very low.

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[146] Consultation with Margaret Small, Women's Legal Resource Centre, 25 October 2002.

[147] Individual telephone submission.

[148] Individual telephone submission.

Ineligibility for Legal Aid can and does force people who have no other choice to represent themselves—sometimes to their detriment.

Limits of Legal Aid

Reductions in funding to Legal Aid over the years has created more stringent policies limiting its application, both on financial grounds and to various areas of the law. This can impact harshly on older people particularly, as they can be more vulnerable than other groups.

For example, Legal Aid policy changed recently to exclude grants of Legal Aid to people applying for Apprehended Personal Violence Orders (APVOs).[149] These are orders that restrict the access and or behaviour of people who are not in a 'domestic relationship' with the person in need of protection. As older people are less likely to be in the workforce, they are more likely to spend time at home which increases the chances of them being embroiled in a neighbourhood dispute. This policy means that if they need to apply for an APVO to protect themselves from a violent, threatening or harassing neighbour, they will not have the benefit of Legal Aid assistance.

In turn, the policy may create greater resource pressures for Community Legal Centres, as older people, among others, will likely require assistance to apply for APVOs.

> We haven't come across anyone being denied Legal Aid, so far, but the policy has only just come in.[150]

Limits on eligibility due to means and assets tests can mean that older people who are marginally more financially secure fall through the cracks—those that cannot afford private legal services, do not feel confident to represent themselves and are ineligible for Legal Aid funding.

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[149] See <http://www.lawlink.nsw.gov.au/lac/lac.nsf/pages/scrmavo> (Last accessed 11 December 2003).

[150] Consultation with Meredith Osborne, Blue Mountains Community Legal Centre, 23 September 2002.

> Legal aid is not always available for Family law cases. You hear stories like 'it cost me $10,000 through the courts to get the kids.'[151]

One caller had been involved in a neighbourhood dispute. She was forced to represent herself as,

> *I can't get Legal Aid and I can't afford a lawyer.*[152]

Despite the fact that Legal Aid gives free initial legal advice, their limited financial resources also means that their ability to address all problems is commensurably limited.

> *I am 64. My husband has found a new partner on the Internet and gone to the United States. He has filed for divorce from Colorado and I am unable to find out from Legal Aid how the Colorado divorce laws affect me as an Australian resident.*[153]

Uncertainty

The uncertainty of whether or not Legal Aid will be granted can produce great stress for older people, particularly in circumstances where family members are involved:

> *After a three-year battle, I obtained custody of my grandchild. The parents are drug abusers. I was twice refused Legal Aid (on two separate occasions). On each occasion I successfully appealed.*[154]

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[151] Consultation with Prue Fairlie, Grandparenting NSW, Council on the Ageing, 22 October 2002.

[152] Individual telephone submission.

[153] Individual telephone submission.

[154] Individual telephone submission.

Originally I used a private lawyer but I ran out of money. Then I applied for Legal Aid and had a private lawyer that was Legal Aid-funded. I had to reapply for Legal Aid when my grandaughter's mother tried to get contact with her daughter. I will have to reapply again if she attempts to get a residence order in the future.[155]

Problems accessing Community Legal Centres

One theme that emerged from consultations for this project in relation to community legal centres (CLCs) was the importance of having workers that are from, or sensitised to the issues affecting, the target audience for the service. The effects of this are two-fold. Firstly, it enriches the management of the legal centre, guiding the direction of program initiatives. For example, a Caxton Legal Centre worker explained the inception of their focus on older people and the law:

> The project on elder law has been running for four years and is about to cease. It is funded by Queensland Legal Aid, after a pilot in one outreach area. It came about when they had a social worker there who had a background in aged care. She noticed that older people were not well represented among their clients and believed they had a number of special legal needs.[156]

Secondly, it makes the centre more attractive to the target audience, because the perception is that there is someone familiar that will assist them.

> A lot of Aboriginal people have a mistrust of authorities and white organisations. Other people in this organisation have a lot to do with the Redfern Legal Centre, and I understand that they see a lot of Aboriginal people… it certainly does help that they have some Aboriginal staff, it does certainly make it more welcoming for people.[157]

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[155] Individual telephone submission.

[156] Consultation with Caxton Legal Centre, Queensland, 29 October 2002.

[157] Consultation with Richard Wilson, Sydney Regional Aboriginal Corporation Legal Service, Redfern, 8 October 2002.

The other main issue raised was one of resources. This necessarily limits the delivery of services that can be tailored to meet the needs of older people.

> Some older people have to use phone advice because of mobility difficulties. There are almost no facilities meeting their needs in CLC-land at all.[158]

It also means that there are simply not sufficient staff and time to deal with client demand.

> *I tried to make an appointment at her local legal centre but could not get through on the phone as it was always engaged.*[159]

Another problem that flows from having very limited resources for community legal centres is the limits it places on the capacity to advocate more fully on a client's behalf as well as represent them in court. If Legal Aid is not available for an older person, and the community legal centre they see has a full caseload, then either older clients have to come up with the money to pay for a private solicitor, represent themselves, or decide not to engage with the legal system—if it is possible to do so. Some submissions to this project by older individuals addressed this issue:

> *For court hearings, people are encouraged to get legal representation. For appearances before the Guardianship Tribunal, which might have very serious consequences, a legal practitioner can accompany them, but they cannot represent them. Self-representation is very onerous for older people.*[160]

[158] Consultation with Karen Cox and Emma Keene, Consumer Credit Legal Centre, 25 October 2002.

[159] Individual telephone submission.

[160] Individual telephone submission.

As a matter of principle I do not believe that we should be required to spend a large amount of money on legal advice, because as citizens we should have a right to go to the Licensing Court and object in person to the loss of amenity in our local area. The average person would not stand a chance because they cannot afford legal assistance, do not know where to go for accessible information and are easily brow beaten.[161]

Conclusion

This chapter has detailed the submissions received from older people in relation to accessing legal assistance and their relationship to the legal system. It also reports on the experiences of legal service providers and some peak organisations on their experiences of older people engaging with the solicitors—whether private, Legal Aid or community legal centres.

Many of the obstacles in accessing legal services emanate from features of the current cohort of older people. Although these are necessarily generalisations, and some are contradictory, these can be briefly summarised as follows:

- a lack of confidence in their abilities to advocate on their own behalf or recognise and enforce their legal rights
- a reluctance to take legal action on the basis that they do not want to cause trouble/complain
- a feeling that the law/solicitors will not be able to adequately address their problems
- a desire to be rescued: to have their legal problems solved by someone else

[161] Individual telephone submission.

- concerns about the cost of legal services
- difficulties in physically accessing legal services
- a perception that the law can be disempowering.

These attitudes can be viewed as barriers to accessing legal assistance for older people. For legal service providers wanting to target their services toward older people, these cohort features will require due consideration.

It is clear both from previous research and submissions made by older people that their needs in terms of legal service delivery are not so great that they cannot be negotiated. They are as follows:

- legal information that is clear and readily accessible—preferably through face-to-face contact, but if that is not possible, in one-on-one phone advice
- legal advice provided by practitioners who
  - — take enough time to properly explain all the relevant information in simple terms
  - — are friendly and courteous
  - — are not too expensive and provide value for money
  - — are interested and expert in dealing with their legal problems.

For those older people who cannot afford the services of private solicitors, they need to be able to access free legal services that can address the legal problems that are of particular significance to them. Many service providers and older people alike expressed that there was a gap in service provision to older people and that a 'one-stop-shop' was required.

4. Accommodation

Introduction

The importance of housing and accommodation is amplified with ageing. According to the Australian Housing and Urban Research Institute (AHURI), the housing situation of the aged is the culmination of a lifetime of opportunities and obstacles.[1] Legal issues for older people relating to accommodation and housing reflect the distinct nature of accommodation and housing options that are prevalent amongst older people. Unlike younger people, older people are often more restricted in their accommodation options, either due to physical incapacity, cost, need for caring arrangements, or widowhood. In addition, while an older person's housing may meet their accommodation needs at a particular point in time, these needs can change dramatically with the ageing process.

According to the Australian Bureau of Statistics, older people place a high value on their home environment, as they are less likely to be in full-time employment, and consequently more likely to spend more time in their home, and in their immediate neighbourhood, than at any other period in their lives.[2] In 1996 in NSW:

- Ninety-three per cent of older people (i.e. over the age of 65) lived in private dwellings. Of these, 70 per cent lived in separate houses, 14 per cent in flats and eight per cent in semi-detached dwellings. Five per cent of older people lived in private dwellings located within retirement villages.

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[1] Faulkner, D., *Linkages among housing assistance, residential relocation and use of community health and social care among old adults: shelter and non-shelter implications for housing policy development — positioning paper*, Australian Housing and Urban Research Institute, Melbourne, 2001.

[2] Australian Bureau of Statistics, *Older People, New South Wales*, Catalogue n.4108.1, Australian Bureau of Statistics, Sydney, 2000, p. 54.

- Seven per cent of older people lived in non-private dwellings, the vast majority of whom (95 per cent) were in care accommodation, accommodation for the aged or nursing homes. However, for people aged 85 and over, 34 per cent lived in non-private dwellings, due to higher numbers of people in that age group living in nursing homes and aged care accommodation.
- While less than two per cent of the total population lived in non-private dwellings, older people accounted for around half of these.
- From the age of 50, the proportion of people living in a separate house decreases with age, with the decreases becoming more marked from the age of 65. Seventy-seven per cent of those aged 65–74 years lived in a separate house. For people aged 85 years and over, this decreased to 45 per cent.
- Seventy-nine per cent of older people lived in homes that were fully owned by a member of the household, with a further five per cent living in homes where mortgage payments were still being made. That is 84 per cent of older people lived in homes which were owned or mortgaged as compared with 69 per cent of younger age groups.
- Twelve per cent of older people rented their accommodation. Almost half of these were public housing tenants. This compares with 29 per cent of 15–64 year olds (and less than a quarter were public housing tenants).
- Twenty-one per cent of older people had moved in the previous five years. Approximately two-thirds of older people living in non-private dwellings had moved in the previous five years.[3]

Given the distinct housing issues confronting older people, such people face a range of legal issues relating to accommodation which are both common to other age groups, and also unique to their particular situations. Legal issues relating to the following accommodation types, in particular, will be considered:

[3] ABS, *Older People, New South Wales,* pp. 64–65.

- nursing homes and residential aged care facilities
- retirement villages
- home units under Strata Title
- public housing tenancy
- private tenancy
- home ownership
- boarding house accommodation
- residential parks accommodation.

Nursing homes and residential aged care facilities

Nursing homes are those premises where residents are provided with nursing care for a fee, and who are recuperating from illness or childbirth and who require nursing care, or who require nursing care on account of age, infirmity, chronic ill-health or other condition.[4] They include private for-profit nursing homes, private not-for-profit nursing homes and public sector nursing homes. All private sector nursing homes in NSW are licensed under the *Nursing Homes Act 1988* (NSW). Private not-for-profit nursing homes, public sector nursing homes and most private for-profit nursing homes also operate under the *Aged Care Act 1997* (Cth), so that they can receive Commonwealth accommodation and care subsidies. These homes which receive Commonwealth funding are also known as residential aged care facilities ("RAC facilities").

In NSW, as at 30 June 2002, there were 48,962 permanent residents in 934 residential aged care services. Of these:

- 72 per cent were female

[4] Section 3, *Nursing Homes Act 1988* (NSW).

- 85 per cent were over the age of 75
- 76 per cent were born in Australia, nine per cent were born in the UK or Ireland, eight per cent were born in other European countries, two per cent were born in Asia, one per cent were born in the former USSR or Baltic States
- 0.3 per cent indicated that they were Indigenous
- 88 per cent received either an Aged Pension or a Veteran's Allowance.[5]

Areas of concern for consumers of nursing home services and residential aged care facilities

Security of tenure and fair trading

According to the New South Wales Council of Social Services (NCOSS), under the current legislative framework, nursing home and RAC facility residents are afforded inadequate security of tenure, making them vulnerable to eviction. NSW Health states that under the *Aged Care Act 1997* (Cth), a resident faced with an eviction decision bears the onus to initiate action to appeal and defend the decision.[6] Under the *Nursing Homes Act 1988* (NSW), while there is no explicitly stated protection of security of tenure of residents, there is still a requirement that, in situations of eviction, the provider assist in finding alternative accommodation for a resident if so requested.[7]

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[5] Australian Institute of Health and Welfare, *Residential Aged Care in Australia 2001–02: A statistical overview*, Aged Care Statistics Series n.13, Australian Institute of Health and Welfare, Canberra, 2003. Available at <http://www.aihw.gov.au/publications/index.cfm?type=detail&id=8922> (Last accessed 15 December 2003).

[6] The Council of Social Service of NSW (NCOSS), *Older people in Nursing Homes: NCOSS response to the Review of the NSW Nursing Homes Act 1988,* September 2000, at 7. Available at <http://216.239.57.104/search?q=cache:cKtUuXWBSJ8J:www.ncoss.org.au/bookshelf/agedcare/submissions/0009_nhomeop.rtf+NCOSS+%27Older+People+in+Nursing+Homes%27&hl=en&ie=UTF-8> (Last accessed 15 December 2003).

[7] NSW Department of Health, *Review of the Nursing Homes Act- Issues Paper*, Sydney, June 2000, p. 34. Available at <http://www.health.nsw.gov.au/csd/llsb/nhome/> (Last accessed 15 December 2003).

Contractual issues

The Aged Care Alliance expressed concern that the contractual and financial arrangements regarding nursing homes are often confusing to older people, who may not be aware that they are entering into arrangements that are not in their best interests.[8] Particular areas identified included:

- contracts that provide for the person's property to be transferred to the nursing home rather than being returned to the person's family[9]
- conditions regarding return of bond money after a person has left a nursing home, which seek to extend the period within which the bond money must be returned beyond the statutory maximum period[10]
- complexity of nursing home fee structures, and lack of information to explain it to potential consumers.[11]

The Aged Care Rights Service reported that in 2001/02, of the 1150 advices it provided in relation to nursing homes, hostels and residential aged care, 69 per cent were for issues relating to fees, charges, and entry payments.[12]

Abuse and neglect within nursing homes

The Combined Pensioners and Superannuants Association of NSW (CPSA) has expressed concerns regarding continuing reports of the poor state of some nursing homes and RAC facilities, and the lack of legislative protection for nursing home residents from ill treatment. The Association asserts that low bed numbers, shortage of staff, especially qualified nurses, and a

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[8] Consultation with Christine Regan (NCOSS, The Council of Social Service NSW), Brenda Bailey (Council on the Ageing) and Sol Encel (Social Policy Research Centre), Aged Care Alliance, 9 September 2002.

[9] Consultation with Christine Regan (The Council of Social Service NSW), Brenda Bailey (Council on the Ageing) and Sol Encel (Social Policy Research Centre), Aged Care Alliance, 9 September 2002.

[10] Consultation with Park and Village Service Unit of the Combined Pensioner and Superannuants Association of NSW, 29 November 2002.

[11] Eric Calloway House Nursing Home focus group, Sydney, 21 October 2002.

[12] The Aged Care Rights Service, *Annual Report 2000/01*, TARS, Sydney, 2001.

legislative framework which was not designed to address issues of abuse and neglect, are major factors contributing to incidences of abuse and neglect in nursing homes and RAC facilities.[13]

Others concerns raised were:

> It seems that old people lose certain human rights when they go into nursing homes, which leaves them vulnerable to abuse. For example, there are incidents in which old people are physically or sexually abused and notwithstanding that they have bruises or wounds, the police are persuaded by the residential care staff not to pursue the matters on the grounds that the victims' complaints are not reliable because, for example, they are suffering dementia. It is difficult to get lawyers to take actions against nursing homes where elder abuse is alleged to have occurred, because such cases are perceived to be too hard to take instructions on.[14]
>
> Another form of abuse is in the food that is served in residential aged care. This is often inedible and the managers cut costs on the food they provide. Residents are afraid to complain for fear of getting kicked out.[15]

Financial abuse

Incidents of financial abuse in residential aged care services were reported by some contributors. Reports of residents losing most of their pensions to nursing homes' fees and charges, as well as residents receiving excessive pharmacy bills were received. It was noted that many aged residents find it difficult to check the validity of the bills, charges and fines they receive, making them vulnerable to financial abuse.[16]

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[13] Combined Pensioners and Superannuants Association of NSW Inc., *Elder Abuse: A Paper on the Problem in Nursing Homes*, Policy Discussion Paper n.8, May 2002.

[14] Aged and Community Services Australia Retirement Villages Seminar, 16 August 2002.

[15] Consultation with Margaret Small, Women's Legal Resource Centre, 25 October 2002.

[16] Consultation with Margaret Small, Women's Legal Resource Centre, 25 October 2002.

My mother has a heart problem. We have just been billed by her nursing home on behalf of the local pharmacist for pain killers and tranquilisers. When we checked up with the pharmacist, he said that the amount prescribed would have been enough to kill her because it was about 100 times the amount that any one person would take. When they traced the bill and found it we found out that we had been paying for pain killers for the whole nursing home.[17]

Medication and restraint

The Private Health Care Branch of the Health Department and the Health Care Complaints Commission have expressed concerns about what appears to be a systemic problem with the prescribing, administration and reviewing of psychotropic medication in aged care facilities. A 1995 study of 46 nursing homes in the Central Sydney Area Health Service concluded that the percentage of residents in Central Sydney nursing homes who were taking psychotropic drugs was among the highest reported from geriatric institutions worldwide.[18] In 1996, a NSW Ministerial Taskforce confirmed the widespread use of psychotropic medications in nursing homes, and that physical and chemical restraint were commonly used for behaviour management. The Taskforce confirmed that despite the fact that such practices breach the rights of residents and have potentially harmful consequences, restraint was often regarded by providers as an 'easier' and less expensive way of managing difficult behaviour than appropriate behaviour management strategies.[19]

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[17] Older Women's Network focus group participant, Sydney, 8 October 2002.

[18] Snowdon, J., 'Psychotropic Drug Use in Sydney Nursing Homes', *Medical Journal of Australia*, July 1995.

[19] NSW Department of Health, *Psychotropic Medication Use in Nursing Homes*, Report of the NSW Ministerial Taskforce, Sydney, 1997. Available at <http://www.health.nsw.gov.au/public-health/psymed/psymed1.html> (Last accessed 15 December 2003).

The NSW Department of Health reported that claims have been made that the use of restraints continues to be a major problem in nursing homes in NSW, due to:

- difficulties in managing residents with dementia, particularly where facilities have a diverse mix of residents and are not physically set up to provide care to people with dementia. Nearly half of the people with moderate to severe dementia live in a residential care facility.
- staff shortages, particularly in qualified nursing staff
- an inappropriate mix of staff and the use of unqualified staff who are not trained to manage difficult behaviour or qualified to administer medication
- inadequate regulatory and monitoring arrangements
- a focus on improving the efficiency of the sector, 'profits' and cost cutting, rather than meeting the needs of consumers.[20]

Access to clinical records

According to NCOSS, residents' access to medical and care records is a necessary pre-requisite to the protection of their rights within nursing homes. It expressed concerns that the *Aged Care Act 1997* (Cth) fails to provide for satisfactory access to clinical records by residents of residential care services.[21] Resident advocacy groups in NSW have expressed concern to the NSW Department of Health Review of the *Nursing Homes Act 1988* (NSW) that the right that nursing home residents currently have to access their clinical records will not be replaced if the Act is repealed.[22]

[20] NSW Department of Health, *Review of the Nursing Homes Act — Issues Paper*, p. 36.

[21] NCOSS, *Older people in Nursing Homes*, at 34.

[22] NSW Department of Health, *Review of the Nursing Homes Act — Issues Paper*, p. 34.

Right to equipment, appliances and materials

NCOSS has expressed concern regarding reports that unscrupulous providers charge residents for equipment and materials that are paid for under the Commonwealth subsidy, even though provision of these items is a mandatory part of the care that is supposed to be provided.[23] Such practices appear to be in breach of the *Nursing Homes Regulations 1996* and Schedule 1 of the *Commonwealth's Quality of Care Principles 1997*, which specify that facilities and equipment must be provided to residents of nursing homes. Some advocacy groups have expressed concern that this demonstrates deficiencies in the systems of montitoring compliance under both the State and the Commonwealth regulatory regimes.[24]

Dispute resolution

Residents of residential care facilities in NSW have three mechanisms they can use to make a complaint about a facility or the care they receive:

- Commonwealth Aged Care Complaints Resolution Service
- NSW Department of Health, Private Health Care Branch Complaints Team
- NSW Health Care Complaints Commission (HCCC).

General descriptions of the roles and processes of the Department of Health Private Health Care Branch Complaints Team and the HCCC are detailed in Chapter 5 on Health. However, the roles of these bodies in resolving disputes regarding nursing homes are considered below.

[23] NCOSS, *Older people in Nursing Homes*, at 8.

[24] NSW Department of Health, *Review of the Nursing Homes Act — Issues Paper*, p. 34.

Commonwealth Aged Care Complaints Resolution Scheme

The Commonwealth Aged Care Complaints Resolution Scheme (ACRS) involves two levels of complaints resolution—an internal and an external complaints resolution system:

Internal complaints resolution system

Under the Commonwealth Act, all providers of residential services are required to establish a process to deal with complaints at the service level.

According to Sandra McCullough of the Victorian Residential Care Rights Advocacy Service, the quality and effectiveness of these internal complaints resolution mechanisms vary greatly, and only a minority appear to provide fair, accessible and effective systems.[25]

> Aged care providers… do not have, in developing effective complaints processes, the incentive of 'retaining satisfied customers and building loyalty' because most consumers have nowhere else to go—that is, demand greatly exceeds supply; market power is predominantly biased in favour of the providers.[26]

External complaints resolution system

Where an internal complaints mechanism is ineffective in resolving a consumer concern, a complaint may be lodged, either orally or in writing, with the Complaints Resolution Scheme (CRS) of the Department of Health and Ageing. The complaints may be about anything relating to residential care that affects a person who is receiving or is eligible to receive residential care services. The CRS has a discretion as to whether to accept a complaint, or reject it where it considers it to be frivolous, vexatious or not made in good faith, or where the complainant has initiated legal action.

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[25] McCullough, S., 'Aged Care — A Victorian perspective on complaints handling and the enforcement of consumer rights', *Alternative Law Journal*, vol. 27, n.2, April 2002, p. 59.

[26] McCullough, S., 'Aged Care — A Victorian perspective on complaints handling and the enforcement of consumer rights', *Alternative Law Journal*, vol. 27, n.2, April 2002 p. 63.

The scheme involves three stages—negotiation, mediation and determination. Where negotiation and mediation fail, the matter is heard by the Complaints Resolution Committee, where a decision will be made as to a process for resolving the complaint. Where a provider does not act upon the Committee's decision, the matter is referred to the Commonwealth Department for action. The matter is concluded when resolution is achieved and all parties are informed of the outcome.[27]

The focus of the system is on resolving the complaint through negotiation and mediation. It is not the role of complaints units to substantiate a complaint or take an investigatory role. Units can accept anonymous complaints, however resolution becomes more difficult where only one of the parties is identified.

There is reasonable satisfaction with the complaints process when mediation is able to restore breakdowns in communications and relationships with the provider. However, identified problems with the CRS process include:

- excessive time taken by the CRS to decide whether to accept or reject a complaint
- delays in the negotiation phase where some providers seem to be allowed a considerable time to respond in writing to the complaint
- frustration with having to go through an individualised complaints process when the alleged breaches are systemic
- regular turnover of CRS staff during the course of one complaint, resulting in perceptions that the process starts again with each new staff member
- difficulties in proving allegations about the provider because:
  - — the provider controls all of the relevant records
  - — the complainant's records may be viewed as 'anecdotal' and therefore of little account

[27] NSW Department of Health, *Review of the Nursing Homes Act — Issues Paper*, p. 47.

— there may be staff solidarity in corroborating provider's statements and denying allegations
— other consumers may fear speaking out in corroboration
— there may be a lack of witnesses
— complainants may be branded as 'difficult' or 'unreasonable' by providers, and therefore lacking credibility.[28]

NSW Department of Health, Private Health Care Branch

The NSW Private Health Care Branch (PHCB) complaint process focuses on complaints about standards of service and care in licensed facilities. These include issues about staffing, quality of premises, equipment, furniture and facilities in the service, and quality of care. The PHCB focuses on local resolution of issues between facilities, residents and their relatives and will refer complainants back to the facility in question for resolution if they have not already attempted resolution with them first.

The NSW PHCB has the power to investigate complaints, including the ability to act on anonymous complaints, enter facilities, and examine and remove relevant records and documents. However, they cannot compel staff to talk to them as part of their investigations.

NCOSS reported that the PHCB enjoys reasonable standing as a complaints body from both service providers and consumer bodies.[29]

NSW Health Care Complaints Commission

The NSW Health Care Complaints Commission (HCCC) has the power to investigate any complaint about a health service provider, which includes residential care facilities providing health services. The HCCC deals primarily with complaints relating to the professional misconduct of health care practitioners and the clinical management or care of individuals by

[28] McCullough, S., 'Aged Care — A Victorian perspective on complaints handling and the enforcement of consumer rights', *Alternative Law Journal*, vol. 27, n.2, April 2002, p. 61.

[29] NCOSS, *Older people in Nursing Homes*

health service providers. The HCCC has the power to investigate complaints, to refer complaints to the Health Conciliation Registry for conciliation, and to refer complaints to registration boards, practitioners and employers for investigation.

The HCCC will not act on an anonymous complaint unless there is clear evidence of a systemic problem that needs to be investigated.

In 2001/2002, the HCCC received 46 complaints relating to nursing homes, which represented five per cent of the total complaints received by the Commission for that period.[30]

Issues for consumers

NCOSS reported that while it is important to have as many avenues for complaints handling as possible available for vulnerable consumers, the maze of mechanisms can present problems. It emphasised that there is a need for a co-ordinated and cohesive mix of complaints handling mechanisms which can appropriately respond to a range of issues and complaints.[31]

Other identified barriers to using the complaints resolution mechanisms include fear of retribution from the service provider or the provider's staff, and also a sense by consumers that it is ungrateful to complain, when they feel that most staff may be overworked and stressed.[32] Residents and their families are often anxious about the lack of accommodation options which are suitable, convenient and appropriate, and accordingly may be fearful to complain about their present arrangements.

> It has been suggested to the Review that many old people are so grateful for any care they receive and so afraid of not having it, that they will tolerate intolerable situations and treatment. This argument is used to

[30] Health Care Complaints Commission, *Annual Report 2001/02*, Health Care Complaints Commission, Sydney, 2002, p. 32.

[31] NCOSS, *Older people in Nursing Homes*.

[32] McCullough, S., 'Aged Care — A Victorian perspective on complaints handling and the enforcement of consumer rights', *Alternative Law Journal*, vol. 27, n.2, April 2002, p. 61.

> stress the vulnerability of residents and the need to ensure mechanisms are in place to protect their interests, even if they are reluctant to raise issues themselves.[33]

The NSW Department of Health further reported that there have been concerns that reliance on the co-operation of, and conciliation with, service providers is placing too much emphasis on the "soft" end of complaints resolution, and that there needs to be a greater willingness to wield more coercive powers of investigation and sanction.[34]

Available advocacy and assistance services

The NSW Department of Health Review *Issues Paper* stated that consumer advocacy groups play an important role in assisting people in nursing homes to protect their rights. Proprietors of services are required to allow advocacy groups to access residential services during normal working hours or at any time if a resident or their representative has asked the advocacy service to do so.[35]

NCOSS also emphasised the importance of advocacy, expressing concern about the capacity of existing advocacy organisations to respond in the face of increased demand for assistance from residents in nursing homes.[36]

The NSW Aged Care Rights Service (TARS) was specifically established to provide advocacy and assistance for residents of Commonwealth funded nursing homes in NSW. TARS also provides information telephone services and workshops for residents. TARS has reported that 88 per cent of its 1558 advices and new cases in 2001/02 related to issues involving nursing homes, hostels and residential aged care.[37]

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[33] NSW Department of Health, *Review of the Nursing Homes Act — Issues Paper*, p. 49.

[34] NSW Department of Health, *Review of the Nursing Homes Act — Issues Paper*, p. 49.

[35] NSW Department of Health, *Review of the Nursing Homes Act — Issues Paper*, p. 49.

[36] NCOSS, *Older people in Nursing Homes*, p. 16.

[37] The Aged Care Rights Service, *Annual Report 2001/02*, pp. 13–14.

The following agencies provide a range of printed, online and telephone information services to residents and prospective residents of nursing homes:

- The Aged and Community Care Information line — 1800 500 583
- The Commonwealth Department of Health and Ageing.

  The Department publishes printed and online material and publications providing information to residents of nursing homes. The publications are available in 15 community languages. They include:

  — a general information booklet (*Five Steps to Entry into Residential Aged Care*)

  — information sheets on various topics including aged care options, complaints handling, and residents rights and responsibilities, fees and charges, GST, and issues for special needs residents (i.e. people with dementia, people in rural and regional areas)

  — a newsletter (*Aged Care News*) which provides information on aged care issues.[38]

  The Department's website also includes basic information to consumers regarding their rights in nursing homes, and the process for making complaints.[39]

- The Aged Care Standards and Accreditation Agency

  The Agency is the independent body responsible for managing the accreditation and ongoing supervision of Commonwealth-funded aged care homes. Its website provides information about the Agency, for both the general public and the aged care sector, including information to consumers about the accreditation system. It also provides reports on each aged-care home, based on the findings of the assessment team which assessed the home against the Agency's standards. The Agency also publishes a newsletter (*The Standard*).[40]

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[38] Publications by the Department of Health and Ageing are available at <http://www.health.gov.au/acc/index.htm> (Last accessed 15 December 2003).

[39] See <http://www.health.gov.au/acc/index.htm>.

[40] See <http://www.accreditation.aust.com/index.html> (Last accessed 15 December 2003).

Retirement villages

Retirement villages are complexes containing residential premises that are predominantly or exclusively occupied by retired persons (i.e. people over the age of 55 years who have retired from full-time employment) who have entered into village contracts with an operator of the complex.[41] Unlike aged care facilities, retirement villages operate on the basis of residents caring for themselves and being self-funded.

The exact number of residents in retirement villages is difficult to estimate due to the fact that many villages are not registered, and new villages are regularly being established. The NSW Office of Fair Trading estimates that in NSW there are in excess of 35,000 residents living in some 700 retirement villages.[42] TARS estimates that the number of retirement village residents in NSW exceeds 50,000.[43]

There are four main types of tenure for residents of retirement villages:

- Strata Title — with a deed executed by the village operator for the provision of personal services
- Company title — with services provided by the company
- Lease — generally for 49 years, with provisions as to personal services
- Loan/Licence — an agreement that on consideration of the resident advancing a loan to the operator, a licence to occupy for a term is provided, with stipulated provisions as to personal services.

The two most common forms of tenure for retirement villages are lease and loan/licence.

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41 Section 5, *Retirement Villages Act 1999* (NSW).

42 See <http://www.dft.nsw.gov.au/realestaterenting/parksvillages/retirementvillages.html> (Last accessed 17 December 2003).

43 Consultation with Wendy Fisher and John Newton, The Aged Care Rights Service, 8 April 2003.

Areas of concern for retirement village residents

The form of occupation

According to TARS, many residents who have tenure under lease or loan/licence arrangements are under the mistaken belief that they 'own' their premises. This confusion largely arises as a result of residents having sold their former home and then paying a considerable portion of the funds of the sale as an 'entry contribution' into the retirement village, for the right to reside in a property in which they only have a leasehold interest. The most common complaint arising from this situation is that a solicitor has failed to adequately explain the terms of the occupation under the contract.[44] Other issues raised through the consultations undertaken in this project include:

- lack of access to legal advice on retirement village contracts[45]
- lack of information about terms of occupation made available to potential residents

  The special legislation governing the rights and relationship between residents and village owners may not be well undestood by lawyers and residents and potential residents may not have sufficient information to make an informed choice.[46]

- lack of specialist skills, experience and knowledge of this area amongst legal professionals.

  There is confusion about residential accommodation and retirement village issues. Even lawyers often don't have any idea. Many people don't get advice on these contracts.[47]

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[44] Newton, J., *Retirement Village Law Update*, NSW Young Lawyers Continuing Legal Education Seminar Papers, NSW Young Lawyers, The Law Society of NSW, Sydney, 25 March 2003.

[45] Consultation with Wendy Fisher and John Newton, The Aged Care Rights Service, 8 April 2003.

[46] Consultation with Ros Monro, Legal Outreach for Older People Project, Caxton Legal Centre, 12 July 2002.

[47] Consultation with Sarah Fogg, Heather Graham, Dawn Linklater and Gerard Thomas, Department of Ageing, Disability and Home Care, Committee on Ageing, 9 September 2002.

TARS reports that 27 per cent of its inquiries relating to retirement villages are in relation to exploring alternative retirement village options.[48]

Disputes over recurrent charges

As village residents are participating in a form of communal living, they are liable for the operating costs of the village by way of a monthly levy payment. If the village has extensive facilities or plans to provide additional facilities, this payment can be substantial, with the possibility of it being increased annually. For residents on pensions, fixed incomes, or self-funded retirees, the fees and the prospect of them increasing may cause significant difficulties.[49] While details of recurrent charges will be included in the contract, and also in the disclosure statement, details about these charges may be unclear and confusing for older people with limited experience in reading financial statements or budgets.

Particular concerns were expressed regarding:

- inadequate information or advice regarding recurrent charges at the time of entering into the contract
- failure by legal practitioners to advise of the probability of progressive increases in levy payments.

> It is pot luck what you get in a retirement village and what you have to pay for. There are hidden costs that people aren't aware of when they move in, e.g. washing, cars, levies, rates.[50]

The majority of villages will present a Statement of Proposed Income and Expenditure annually to residents, which will specify the costs associated with operating the village facility to be expended out of the recurrent charges. It is necessary for the operator to present the statement to the Village

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[48] The Aged Care Rights Service, *Annual Report 2001/02*.

[49] Newton, *Retirement Village Law Update*.

[50] Individual participant at 2002 Premier's Forum on Ageing: Consumer Protection, 1 October 2002.

Residents Committee, which can either accept or reject the statement. If the statement is rejected, an application can be made to the Consumer, Trader and Tenancy Tribunal (CTTT) to resolve the dispute. The most common items of expenditure which are disputed are:

- management fees
- depreciation of assets
- maintenance/capital expenditure
- salaries and wages of people employed in the operation of the village
- insurance premiums.[51]

TARS reported that 10 per cent of its inquiries and new cases in 2001/02 which relate to retirement villages were specifically on the question of fees and charges.[52]

Disputes over departure fees

Most retirement village contracts contain provisions relating to 'Departure Fees'. This is usually a percentage of the entry contribution retained by the operator when the resident departs from the village. The percentage is usually 2.5–5 per cent per annum for a period of either five or 10 years, calculated on a daily basis. Several participants during the consultation process indicated that residents have previously expressed confusion over the method of calculation of such fees, and concerns regarding the size of the departure fees where the resident has had to leave a village soon after moving in.[53]

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[51] Newton, *Retirement Village Law Update*.

[52] The Aged Care Rights Service, *Annual Report 2001/02*.

[53] Consultation with Janet Scott, Community Services Manager, Ageing and Disability Service Uniting Care, 1 October 2002; Older Women's Network focus group, Sydney, 8 October 2002.

Disputes over refund of entry contributions

Under the *Retirement Villages Act 1999* (NSW), a former occupant of residential premises in a retirement village, who did not own their premises, is required to receive a refund of their entry contribution, less any monies owed, within six months of vacating the premises.[54] TARS reported examples of contracts which provide that refunds of entry contributions to a departing resident are dependent on the receipt of an entry contribution from an incoming resident. These situations can cause significant hardship, where residents have to move to other accommodation, and still remain liable for recurrent charges until their former premises are sold. At the same time they may have to pay the fees in their new residential facility.[55]

The difficulties associated with such contracts have been accentuated by a recent Residential Tribunal decision. The Tribunal held that in spite of the fact that most residents do not have a proprietary interest in their premises, the former occupant in this case was bound by their contract which contained a provision that the refund of the entry contribution is 'wholly dependent on the amount paid by an incoming resident'.[56]

Disputes over other contract provisions

The following issues which are usually covered in village contracts have been identified:

- Entitlement to capital appreciation following sale of the premises

  The contract will usually indicate whether a resident shall share the capital appreciation with the operator following the sale of the premises. While most contracts provide for the capital appreciation to be shared on an equal basis between resident and operator, there are examples of contracts which state that any capital gain from sale will go totally to the operator.[57]

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[54] Section 181 (1) and (2), *Retirement Villages Act 1999* (NSW).

[55] Newton, *Retirement Village Law Update*.

[56] *Bain v. The Peridon Group Pty Ltd & Ors* 01/15167, as referred to in Newton, *Retirement Village Law Update*, p. 12.

[57] Newton, *Retirement Village Law Update*.

- Refurbishment of premises prior to sale

  A departing resident who entered into a village contract prior to 1 July 2000 is required to refurbish the premises prior to sale if the contract so requires. However, contracts entered into after 1 July 2000 cannot contain such provisions.[58]

Damage to premises and maintenance

Disputes between residents and operators relating to responsibility for maintenance and repairing damage to premises, and delays in getting repairs carried out are not uncommon. Often residents believe that as lessees or licensees, they do not have an obligation to pay for the reasonable maintenance of the village out of the recurrent charges.[59]

The Department of Fair Trading has advised residents that the operator is responsible to pay out of its own funds for the replacement of fixed items of capital within the village, including fixed items of capital in the premises of residents (unless the damage was caused by the resident or their guests, beyond normal wear and tear). This includes replacing carpets, hot water systems, and stoves. In relation to non-fixed capital items such as a village bus, lawnmowers, tables, chairs, whitegoods, portable air conditioners, filing cabinets, computers, fans and curtains, the operator can use the recurrent charges paid by residents, or its own funds, to replace the items. If the operator wishes to spend recurrent charges in this way they must specify the item and the amount in the Statement of Proposed Expenditure given to residents before the start of each financial year. The consent of residents is then required. In relation to maintenance of either fixed or non-fixed capital items, the operator can allocate funds when preparing a Statement of Proposed Expenditure, either from recurrent charges or from the village's long term maintenance fund.[60]

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[58] Section 164, *Retirement Villages Act 1999* (NSW).

[59] Newton, *Retirement Village Law Update*.

[60] NSW Office of Fair Trading, *Retirement Village Repairs*, Fact Sheet FTR29, April 2003. Available at <http://www.fairtrading.nsw.gov.au/corporate/publications/publications_propertyandtenancy.html> (Last accessed 15 December 2003).

TARS reports that it has received inquiries from residents who have executed contracts with an operator, requiring them to pay for the cost of structural rectification of their premises, necessitated by damage caused by termite infestation. In spite of this, TARS reports that many solicitors do not recommend to applying residents that they obtain pest inspection reports prior to signing their contracts.[61]

TARS also reports that a failure on the part of an operator to maintain the village is a major area of dispute between residents and operators, and constitutes a withdrawal of services on the part of the operator.[62]

Disputes regarding village rules

As retirement villages are a form of communal living, there is a requirement that residents comply with a set of village rules. Under the *Retirement Villages Act 1999* (NSW), village rules may address the following issues:

- persons other than residents or employees living in the village
- visitors and short-stay guests
- noise
- parking of motor vehicles
- disposal of rubbish
- pets
- gardening and landscaping
- the use and operation of services and facilities.[63]

The main areas of dispute which arise concerning village rules are:

- concerns that a rule is invalid, harsh or oppressive

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[61] Newton, *Retirement Village Law Update*.

[62] Newton, *Retirement Village Law Update*.

[63] Section 46, *Retirement Villages Act 1999* (NSW).

- claims by operators that to amend rules will involve an additional cost burden and therefore require an increase in recurrent charges
- particular concerns about the operation of rules regarding pets, gardening and noise.[64]

Investment risk and financial viability of operators

TARS cited examples of village mismanagement which has resulted in significant losses of entry contributions by residents. A lack of prudential protection in the *Retirement Villages Act 1999* (NSW) places a heavy onus on applying residents to obtain information and advice regarding the financial viability of the operator.[65]

> There is no regulation to prevent unsuitable people managing and operating retirement villages. There is no check on the viability of the organisation that owns the village even if the village management itself is required to report its financial state. There is no monitoring in smaller establishments. There is no requirement to be met for licensing.[66]

Variation of services

Situations where either residents or an operator propose a variation in services are a commonly reported area for disputes between operators and residents. Reduction in services can include reductions in the use of the village bus, closure of a dining room, reduction in care staff, and so on.[67]

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[64] Newton, *Retirement Village Law Update*.

[65] Newton, *Retirement Village Law Update.*

[66] Individual participant at 2002 Premier's Forum on Ageing: Consumer Protection, 1 October 2002.

[67] Individual participant at 2002 Premier's Forum on Ageing: Consumer Protection, 1 October 2002.

Village rental accommodation projects

The Older Persons Tenants' Service (OPTS) and TARS reported that a new type of aged rental accommodation in villages has become available. The projects have similar features to retirement villages, but are not strictly retirement villages and operate outside of the provisions of the *Retirement Villages Act 1999* (NSW).

According to OPTS and TARS, the projects involve a corporate entity developing village style accommodation under a strata title. Individual units are then sold to investors who lease the units back to the entity. The entity then sub-leases the units to aged residents on a standard terms residential agreement prepared by the entity. According to TARS, all units are rented, with tenants paying 85 per cent of the standard aged pension plus 100 per cent of their rent assistance allowance. TARS and OPTS report that the residential agreement with the entity will also include some additional clauses covering such things as the provision of three meals a day, provision of clean linen, special termination provisions and cleaning fees.

At the time of writing, eight of these aged accommodation projects were in operation across regional NSW, with a total of 412 units. According to OPTS and TARS, the following issues of concern have been raised with these accommodation projects:

- the high cost of accommodation—tenants on aged pensions, have very little money left over to cover utilities, clothing, medical costs and food expenses
- there is no provision in the contracts regarding the standard and quality of the three meals provided each day
- there is no provision in the contracts regarding the standard and quality of the cleanliness of the linen to be provided
- lack of gazetted standards on such things as provision of food and linen

- the rental agreements only show a formula of how the rental is calculated, and do not show the actual rent payable
- termination on medical grounds is easier for the accommodation supplier to satisfy than what is required under the *Retirement Villages Act 1999* (NSW)
- tenants being charged a cleaning fee instead of paying a bond, which would have to be lodged with the Rental Bond Board, and which would be refunded upon the premises being left in a satisfactory state.

The OPTS advises that disputes involving these projects need to be resolved by applying to the CTTT.[68]

Dispute resolution

When the *Retirement Villages Act 1999* (NSW) was introduced, the Residential Tribunal had jurisdiction to resolve disputes arising under the Act, between residents and the village operator. The Act also conferred an unlimited monetary jurisdiction.[69] The jurisdiction of the Residential Tribunal was merged with the Consumer Trader and Tenancy Tribunal (CTTT) in early 2003.[70] Applications for orders to the CTTT can be made in respect of the following issues:

- inconsistency between a village contract and a pre-contract disclosure statement
- disputes regarding terms of new service contracts
- disputes where terms of contracts are void due to contradictions with the *Retirement Villages Act 1999* (NSW)
- disputes concerning legal validity of retirement village rules
- concerns that village rules are harsh, unconscionable or oppressive

[68] Consultation with Denise Steele, Older Persons Tenants' Service, Combined Pensioner and Superannuants Association of NSW, 17 July 2003.

[69] Sections 126–127, *Retirement Villages Act 1999* (NSW).

[70] *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW).

- authorisation for operators or other people gaining entry to residential premises
- orders in respect of abatement or non-abatement of recurrent charges
- orders in respect of proposed expenditure
- disputes between residents and operators
- disputes over uncollected goods
- disputes regarding repairs to premises required by operator
- orders for making premises secure and safe
- disputes over contracts or disclosure statements
- orders for termination or delivery of vacant possession
- orders for compensation or refunds of 'waiting list fees' or 'holding deposits.'[71]

Issues for residents

The CTTT adopts a less formal, expedient approach to dispute resolution, thus making it a more accessible means of dispute resolution than the formal court litigation process. It is not bound by the rules of evidence, but is required to adhere to the principles of procedural fairness.[72] The CTTT will usually not award costs against an unsuccessful party.[73]

However, there are some issues with the Retirement Villages Division of the CTTT which present difficulties for older people:

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[71] Section 128, *Retirement Villages Act 1999* (NSW).

[72] Section 28, *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW).

[73] Section 53, *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW).

- the complex nature of retirement village disputes means that self-representation before the CTTT is difficult for many residents, particularly if they are frail and elderly[74]
- the merger of the Residential Tribunal with the CTTT means that some CTTT members are inexperienced or unfamiliar with the particular complexities involved with retirement village disputes[75]
- parties to an application before the CTTT do not have a right to be represented unless an application is made, and generally leave for representation will only be granted when the claim exceeds $10,000.[76] Older people who are not granted leave for representation may be considerably disadvantaged because of their frailty and unfamiliarity with the CTTT processes, particularly when confronted with opposing litigants or their advocates who have experience in the CTTT and have become skilled advocates.[77]

Available advocacy and assistance services

TARS provides a legal advocacy service for residents of retirement villages, as well as providing information telephone services and workshops for residents. Of the 1,300 advices provided by TARS in 2001/02, 11 per cent related to retirement villages.

The NSW Office of Fair Trading provides a range of printed and web based information concerning the rights of residents in retirement villages, including:

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[74] Consultation with John Newton and Wendy Fisher, The Aged Care Rights Service, 8 April 2003.

[75] Consultation with John Newton and Wendy Fisher, The Aged Care Rights Service, 8 April 2003.

[76] Sections 36(2) and (3), *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW).

[77] 'Alternatives to traditional approaches in Civil Law' in Law and Justice Foundation of NSW, *Access to Justice Roundtable: Proceedings of a Workshop July 2002*, Law and Justice Foundation of NSW, Sydney, April 2003, pp. 117–130.

- an information booklet (*Retirement Village Living*) which explains the different types of retirement villages and outlines some basic rights for residents
- fact sheets on the following issues:
  - — what is a retirement village?
  - — residents' rights in the event of closure of a retirement village
  - — retirement village repairs and maintenance
  - — retirement village contracts
  - — dealing with prospective residents
  - — financial accounts
  - — statements of expenditure
  - — recurrent charge variations
  - — strata retirement villages.
- a regular newsletter (*Retirement Village Green*) containing relevant information to residents and operators.[78]

Printed and online information is also available from the *It's Your Life* Retirement Village Information website.[79] Apart from basic online information about retirement villages and related issues, *It's Your Life* also produces a Retirement Village Handbook, a consumer guide to resident funded retirement villages in Australia. Topics covered include the different legal structures, departure fees, service charges, stamp duty, GST, refurbishment and capital replacement costs, security of tenure, operator default, termination, vacating the premises, capital losses, credit risk, parking, documentation and summaries of the retirement village legislation in NSW, Queensland and Victoria.

[78] See <http://www.dft.nsw.gov.au/realestaterenting/parksvillages/retirementvillages.html> (Last accessed 17 December 2003).

[79] See <http://www.itsyourlife.com.au/> (Last accessed 15 December 2003).

Some online information regarding retirement villages is available for residents from the website for the Retirement Villages Association of Australia (RVAA).[80] However, the principal purpose of the RVAA is to represent retirement village owners and managers within the private sector. It provides accreditation to villages which meet the building and service standards set by the Association.

The Retirement Villages Residents' Association (RVRA) is a non-profit, volunteer-run organisation which provides basic information, advice and referral for assistance to retirement village residents. The Association publishes a quarterly newsletter, and also provides basic telephone advice from other village residents. The RVRA aims to:

- assist residents to be aware of and understand their rights and obligations
- defend and extend the rights of residents in Retirement Villages
- encourage residents to exercise their rights, to have input into and participate in the decision-making processes affecting their accommodation
- encourage and assist residents to form and participate in the function of their Residents' Committees
- provide information and advice to prospective residents
- encourage the development of positive relationships between residents and management.

The Council on the Ageing (COTA) provides printed information about retirement villages, including details about contracts, services and costs of individual villages.

[80] See <http://www.rvaa.com.au/> (Last accessed 15 December 2003).

Home units under strata title

As mentioned above, according to the Australian Bureau of Statistics 1996 population census, 14 per cent of people over the age of 65 years in NSW live in private dwellings which are flats, units or apartments (compared to 11.4 per cent of people aged under 65 years). Of the 96,400 people aged over 65 living in private flats, units or apartments, 52 per cent were aged 65–74 years, and 39 per cent were aged 75–84 years.[81] The overwhelming majority of these residents live in units which are governed by strata title schemes.

Areas of concern for residents in strata title units

Problems relating to strata title units, body corporate bodies and managing agents were some of the most commonly reported issues by older people who directly contacted the Foundation as part of the consultation process for this project. Three of the most common issues reported are discussed in turn below.

Unscrupulous or ineffective body corporate managing agents

Many individual contributors reported examples of managing agents charging excessive fees, in return for delivering very few services. Examples of managing agents' dereliction of duties included failure to forward insurance claims, providing 'kick-backs' to tradesmen and suppliers, and failure to repair common areas.

> *Many older people live in home units under the NSW Strata Scheme, which is very poorly regulated ...Managing agents hired by owners cause problems, and it often proves difficult to get resolutions ... Elderly people are at the mercy of these*

[81] ABS, *Older People, New South Wales*, p. 55.

managing agents, who are intent on doing as little as possible for the money. The elderly are seen to be easy marks.[82]

Influence of investor owners on body corporate bodies

Contributors also reported examples of older people who are strata title resident-owners who find that other units in their complex have been purchased by investor-owners. In such situations, the investor-owners may constitute the majority on the body corporate and propose resolutions for external renovations or improvements to enhance the investment value of their properties. The resident-owners will then have to incur a substantial charge as part of their share, even though they may not have voted in support of the capital improvements. For older people who are on pensions or are self-funded retirees, who have no interest in increasing the capital value of their home, such charges may be prohibitive.

A person in my body corporate is buying up all the apartments and because he has the majority vote, he is getting the body corporate to make repairs to the properties for which he should be responsible.[83]

Have you considered the problems of elderly owners who find that their block has become an investment block, controlled by investors, and run in their interests?[84]

Lack of information and advice regarding body corporate issues

Individual participants reported that there was little information and advice available to residents regarding their rights and duties in relation to strata title schemes and body corporate bodies.[85]

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[82] Individual telephone submission.

[83] Older Women's Network focus group participant, Sydney, 8 October 2002.

[84] Individual telephone submission.

[85] Consultation with Ros Monro, Legal Outreach for Older People Project, Caxton Legal Centre, 10 July 2002.

Dispute resolution

The Office of Fair Trading provides a mediation service for disputes related to Strata living through the Strata Schemes and Mediation Services Branch. If mediation has been attempted and has failed, then parties can apply for a decision from an adjudicator in respect of the following types of disputes:

- repairs to ceilings, walls and bathrooms
- water penetration through windows and shower floors
- parking on common property without approval
- keeping pets without approval
- alterations to common properties
- use of air conditioners
- insufficient floor coverings
- noisy residents
- appointment of a managing agent
- invalidation of meetings
- variation of insurance.[86]

If a party is unhappy with an adjudicator's decision he or she can appeal to the CTTT within 21 days of the order coming into effect.[87]

Available advocacy and assistance services

The Office of Fair Trading website provides information regarding issues which arise in strata living situations, including obtaining access to the records of the owners' corporation, dispute resolution, mediation, adjudication, and

[86] <http://www.dft.nsw.gov.au/realestaterenting/strata/strataliving.html> (Last accessed 17 December 2003).

[87] <http://www.dft.nsw.gov.au/realestaterenting/strata/strataliving.html> (Last accessed 17 December 2003).

applying to the CTTT.[88]

The Home Unit Owners Association of NSW represents and advises proprietors and office bearers in both commercial and residential strata schemes.

Public housing tenancy

According to the Australian Bureau of Statistics 1996 population census, 5.6 per cent of people aged over 65 in NSW lived in dwellings rented from the Department of Housing. This amounted to some 36,800 older people and represented almost half of the total number of older people who lived in rented dwellings. While older people are more likely to own their own homes, those that do rent are more likely than other age groups to rent from the Department of Housing.[89]

Areas of concern for older public housing tenants

The Combined Pensioners and Superannuants Association of NSW Older Persons Tenants' Service (OPTS) advised of six commonly reported issues for older public housing tenants which are discussed in turn below.

Long waiting lists for public housing

Long waiting lists for public housing makes it difficult for older people to transfer to public housing, or to move to another area.

[88] <http://www.dft.nsw.gov.au/realestaterenting/strata/strataliving.html> (Last accessed 17 December 2003).

[89] ABS, *Older People, New South Wales*, p. 60.

Overly rigid eligibility criteria

The eligibility criteria for public housing applied by the Department creates difficulties for older people in their 70s. The OPTS reported that people in their 70s applying for public housing may be told by the Department to apply for private tenancy accommodation if it considers that the older person is sufficiently physically mobile to be able to search for such accommodation options. The OPTS reported that the demands that such Department eligibility guidelines place on older people to look for alternative tenancy accommodation fails to take account of their frailty and vulnerability, and may amount to indirect age discrimination. Of the specifically designated public housing inquiries received by OPTS, 41 per cent related to issues about applications for public housing or applications for priority listing.[90]

> *A 70 year-old man who has privately rented his home for 38 years, never applied for a pension, has been paying rent out of his savings. When he ran out of savings he fell into arrears, and his landlord terminated his tenancy. The Department of Housing would not place him in public housing, and insisted that he re-enter the private market with some little assistance. He is unable to afford to remain in the area where he has lived for 38 years, and the only affordable housing available for him is on the outer fringes of Sydney.*[91]

Delays in the Department carrying out repairs to units

The OPTS reported that it is seeing an increased number of inquiries relating to the lack of repairs carried out by the Department of Housing, often due to inefficient bureaucratic processes. It reports that many of these inquiries are from long-term residents, where the premises are run down. These cases are often complicated where the aged tenant does not live on his/her

[90] Consultation with Denise Steele, Older Persons Tenants' Service, Combined Pensioner and Superannuants Association of NSW, 17 July 2003.

[91] Case study from the Combined Pensioner and Superannuants Association of NSW, *2001–2002 Annual Report*, 2002, p. 38.

own, but instead lives as part of an extended family. The OPTS reported that in such cases the Department will not do the structural repairs and will not transfer the family. Instead they offer to transfer the tenant only, and refuse to acknowledge the full household composition. The OPTS reported that it is difficult to run these matters in the CTTT as the repairs required are often worth more than $10,000, and the older tenant cannot afford to obtain independent building evidence.[92]

OPTS reported that 16 per cent of its overall inquiries in 2002–2003 related to complaints about repairs, although OPTS do not differentiate between public and private housing tenants in its data collection in relation to repairs.

> *An elderly public housing tenant had been renting a 1940s fibro cottage for over 16 years. The premises needed repairs, all the ceilings were peeling, the carpet was torn and the kitchen flooring was ripped and lifting. The tenant's son and his family had moved in with her, and they were all living together as an extended family unit. The son had major health problems and required an organ transplant. The Department refused to transfer the family, and did not do a first level review. This prevented access to the Housing Appeals Committee. An application was made to the Consumer Trader and Tenancy Tribunal and the Department agreed only to some minor cosmetic repairs.*[93]

Neighbour issues

The OPTS reported that these issues often arise from the fear and intimidation experienced by older people living in high density public housing, where they are in constant close proximity to residents who have high

[92] Submission from the Older Person's Tenants' Service, Combined Pensioner and Superannuants Association of NSW, August 2003.

[93] Case Study from the Submission from the Older Persons Tenants' Service, Combined Pensioner and Superannuants Association of NSW, August 2003.

needs, such as people with psychiatric illness, young people or people who suffer from substance abuse.[94]

OPTS reported that 4 per cent of its inquiries in 2002–2003 related to neighbour issues, although it makes no differentiation between public and private housing tenants in relation to its data collection on this issue.

Terminations

The OPTS reports that it receives complaints regarding terminations of lease arising from the actions of a co-occupant who may be a younger relative in need of temporary accommodation.[95]

OPTS reported that 28 per cent of its overall inquiries in 2002–2003 related to termination issues, although, as mentioned, it makes no differentiation between public and private housing tenants in relation to its data collection on this issue.

Public Housing rental bonds

The introduction of rental bonds for public housing tenancies has meant that tenants on fixed or low incomes, including pensioners, face increased vulnerability to termination of lease based on rent arrears.[96]

> A pensioner on a widow allowance moving into a one bedroom public housing flat with a market rent of $150 per week will have to pay $10 per week for 15 months to pay back her bond of $600. If she does not pay her 30 per cent [of her income] a week (25 per cent rent, 5 per cent bond), any money which is paid will be counted first towards rental bonds and then to rent. This will mean that she will fall into rent arrears, which if repeated another four times, will result in possible termination. Due to her debt to

[94] Consultation with Denise Steele, Older Persons Tenants' Service, Combined Pensioner and Superannuants Association of NSW, 17 July 2003.

[95] Consultation with Denise Steele, Older Persons Tenants' Service, Combined Pensioner and Superannuants Association of NSW, 17 July 2003.

[96] Consultation with Denise Steele, Older Persons Tenants' Service, Combined Pensioner and Superannuants Association of NSW, 17 July 2003.

the Department of Housing, she would not be eligible to apply for public housing until the debt is paid off.[97]

Dispute resolution

Tenants or public housing applicants who are unhappy with decisions by the NSW Department of Housing can appeal to the NSW Housing Appeals Committee. Once an appeal is lodged a hearing date is set. The appellant can attend the hearing to explain their position, and can also be assisted at the hearing by an advocate or support person. Following the hearing, the Committee will make a recommendation regarding the Department's original decision, which it will communicate to the Department and to the appellant within two weeks of the hearing. The matters which can be appealed to the Housing Appeals Committee include decisions regarding:

- eligibility to be on the public housing waiting list
- type and location of dwelling assigned
- eligibility for priority listing on the public housing waiting list
- type of assistance or dwelling provided to an older client
- eligibility for priority transfer
- locational need for accommodation
- eligibility to be approved for an absence from the dwelling
- eligibility for a joint tenancy.

The Committee cannot consider appeals regarding the Department's policies or about the way the Department delivers its services.[98]

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[97] The Combined Pensioners and Superannuants Association of NSW, *Submission to the NSW Department of Housing Consultation on the Introduction of Rental Bonds in Public Housing and on Renewable Tenancies*, 2002. Note that, contrary to the comment in the quote, the Department of Housing policy states that to be eligible for public housing, including priority housing, a tenant has to "repay, or undertake a formal agreement to repay, any outstanding debts owed to the Department [of Housing]" (see Policy ALL0030A and ALL0040A at http://www.housing.nsw.gov.au/).

[98] See <http://www.hac.nsw.gov.au/appeal/appealable.html> (Last accessed 15 December 2003).

For complaints regarding a failure by the Department to carry out repairs, a tenant can appeal to the CTTT.

Available advocacy and assistance services

There are 11 tenancy advice services in NSW, providing advice, advocacy and legal information services to private and public housing tenants on various tenancy related issues. Four of these centres are located in metropolitan Sydney (Bondi Junction, Chatswood, Campsie and Harris Park). The seven remaining services are located in rural, regional and remote areas of NSW. Three of these are designated as Aboriginal tenancy advice services.

In addition, the Combined Pensioners and Superannuants Association of NSW Older Persons Tenants' Service (OPTS) provides tenancy advice, advocacy and assistance specifically for older people, on both public and private housing tenancy issues. According to statistics provided by OPTS, 23 per cent of the 258 inquiries they received in 2002/03 related to specific public housing issues. This does not include issues relating to rent, repairs, neighbour issues or terminations, for which OPTS does not differentiate between public and private housing tenants in their data collection.

Private Tenancy

According to the Australian Bureau of Statistics, 6.4 per cent of people in NSW aged over 65 (or 42,800 people) live in dwellings which are rented privately.[99]

[99] ABS, *Older People, New South Wales*, p. 60.

Areas of concern for older private tenants

Identified areas of concern for older people are discussed in turn below.

State Environment Planning Policy 10 Applications

State Environment Planning Policy (SEPP)10 requires developers or owners wishing to strata existing company title blocks of units, or redevelop/ refurbish existing blocks of units and boarding houses to apply for consent. Their application must address what impact their development will have on low cost rental accommodation in the local market. Applications are lodged with the local council and final approval is granted by the Department of Planning. In most cases consent will be granted with conditions. Conditions can include the following:

- the developer compensating tenants $500 plus providing 90 days notice (instead of the requisite 60 days as required under the *Residential Tenancies Act 1987* (NSW))
- a specified number of units being relet as affordable housing at existing rents for a specified number of years, e.g. three years
- the developer providing a specified number of units or cash to a local community housing provider.

When councils receive development applications tenants are notified of that application. However as SEPP 10 applications are determined before any notices to terminate are issued, most tenants are not aware of the importance of contacting a tenants advice service or making a SEPP 10 submission to council. The OPTS reports that it receives regular complaints from older tenants who are facing termination after redevelopment approval has been granted, without any SEPP 10 submissions being made from tenants.[100]

[100] Submission from the Older Person's Tenants' Service, Combined Pensioner and Superannuants Association of NSW, August 2003.

An elderly tenant in a block of units being redeveloped by a landlord was being threatened to be locked out of his flat by the landlord. The landlord had not applied to the council for approval to redevelop the block. The tenant was reluctant to complain to the local council, as he believed that the landlord would lock him out.[101]

Discrimination by real estate agents

Some aged housing organisations have reported situations of evicted older tenants being unable to secure other tenancies, due to discrimination by real estate agents, in situations where they are able to afford the tenancy.[102]

Lack of security of tenure in short term leases

The OPTS reported that it receives complaints from older people that even though they would prefer the security of a long-term 12 month lease, many are forced to enter into 3 month leases, particularly where there is an interest by the owner to develop the site.[103]

Rent increases

The OPTS reported that in 2002–2003, 17 per cent of the inquiries it received related to rent issues, almost half of which related to inquiries about rent increases being sought by landlords from their older tenants.[104]

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[101] Case Study from the Submission from the Older Persons Tenants' Service, Combined Pensioner and Superannuants Association of NSW, August 2003.

[102] Crispin, L. and Porteous, P., 'Older People Made Homeless in Sydney's Housing Gold Rush', *Parity*, vol. 13, i.2: Meeting the Needs of the Elderly Homeless, February 2000, p. 18.

[103] Consultation with Denise Steele, Older Persons Tenants' Service, Combined Pensioner and Superannuants Association of NSW, 17 July 2003.

[104] Consultation with Denise Steele, Older Persons Tenants' Service, Combined Pensioner and Superannuants Association of NSW, 17 July 2003.

Lease terminations

The OPTS reported that in 2002–2003, 28 percent of the inquiries it received related to termination issues, with the majority from long term tenants issued with 60 day termination notices. As stated earlier, OPTS makes no differentiations between public and private housing tenants in relation to its data collection on this issue. However, it reports that in many private tenancy situations, the tenants have lived in the premises for over 20 years, and that many are aged in their 70s and cannot afford to relocate in the immediate area. OPTS reported that often these are situations where the owner is wanting to develop the property. The OPTS states that in these circumstances, the landlord applies the same processes to terminate the lease for an older tenant, as it would for other tenants, with the expectation that the older tenant is equally able to find alternative accommodation, pack up their belongings, vacate the premises and move into new premises with the same ease as other tenants. The OPTS asserts that this is a form of indirect age discrimination, and that there is a need to build in a responsibility for landlords and agents, on giving notice to older tenants, to ensure that alternative accommodation is available for the older tenant.[105]

> There is a situation where older people in their 70s in privately rented homes have to leave, either through eviction or because the lease has expired, they have lived there for a long time, they are not in a protected tenancy, so they are not going to get compensation, so they are going to have to find the money to be able to move and pay for a new bond.[106]

Landlords/agents accessing premises

The OPTS reported that in 2002–2003, six per cent of the inquiries it received were complaints about real estate agents and landlords, most of which related to complaints from older tenants of excessive visits to premises from landlords and agents. The OPTS observed that older tenants often

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[105] Consultation with Denise Steele, Older Persons Tenants' Service, Combined Pensioner and Superannuants Association of NSW, 17 July 2003.

[106] Consultation with Park and Village Service Unit of the Combined Pensioner and Superannuants Association of NSW, 29 November 2002.

experience a greater level of fear and intimidation from landlords who seek to access premises, and may therefore be compliant to such requests, and not assert their rights to quiet possession.[107]

Getting repairs to premises

The OPTS reported that it receives complaints regarding older tenants needing repairs to be carried out on their premises. As stated earlier, 16 per cent of inquiries it received in 2002–2003 related to complaints about repairs, although OPTS do not differentiate between public and private housing tenants in its data collection in relation to repairs.[108]

Protected tenancies

Protected tenants are those who live in controlled premises which come under the *Landlord and Tenant (Amendment) Act 1948* (NSW). The Act gives tenants living in these premises greater protection against increased rents and eviction than other tenants in NSW. However, landlords of protected tenants are under no obligation to undertake repairs to premises. As no new protected tenancies have been created in NSW since 1 January 1986, most of the remaining protected tenants are older people who have been living in the same premises for many years.[109]

Issues facing protected tenants include facing pressure to vacate premises and difficulties in getting landlords to undertake repairs. The OPTS reported that 17 per cent of its inquiries in 2002–2003 related specifically to protected tenancies. It reported that it receives complaints from older protected tenants who perceive that they are being pressured by their landlords to

[107] Consultation with Denise Steele, Older Persons Tenants' Service, Combined Pensioner and Superannuants Association of NSW, 17 July 2003.

[108] Consultation with Denise Steele, Older Persons Tenants' Service, Combined Pensioner and Superannuants Association of NSW, 17 July 2003.

[109] See Chapter 18, 'Housing', in Rosemary Barry (ed.), *The Law Handbook — Your practical guide to the law in New South Wales*, 8th edition, Redfern Legal Centre Publishing, Redfern, 2002, pp. 661–732.

vacate the premises, so that the protected tenancy will be terminated. This pressure may take the form of threats, intimidation, or not undertaking essential repairs and then seeking eviction on the basis of the property having fallen to waste, or needing to be demolished because it is unsafe.[110]

The OPTS stated that they are expecting to see an increasing number of protected tenants being ejected because of their age, and their inability to care for their property. In these circumstances, the tenant may not be aware that they are able to negotiate with the landlord for a compensation payment in return for the termination.[111]

> For protected tenants, often what would happen is that landlords would not do up the places, and so tenants would put their own money in to make it a habitable dwelling, while still paying rent. For some people, their homes have turned into appalling slum dwellings, so run down, and the people are living in the most appalling situations. Unless there are people who are looking out for them, they are being evicted without having their rights met, without receiving compensation …. or else they are living in a place and they don't know how to get the plumbing fixed. They probably live with that for years and years, until someone tells them there is somewhere to go.[112]

Dispute resolution

Older residents who are in dispute with their landlord can usually apply to the CTTT regarding issues such as rent increases, lease terminations, delays in getting repairs to premises, and complaints about landlords requesting excessive access to premises. As stated above, the CTTT adopts a less formal, expedient approach to dispute resolution, thus making it a more

[110] Consultation with Denise Steele, Older Persons Tenants' Service, Combined Pensioner and Superannuants Association of NSW, 17 July 2003.

[111] Submission from the Older Person's Tenants' Service, Combined Pensioner and Superannuants Association of NSW, August 2003.

[112] Consultation with Park and Village Service Unit of the Combined Pensioner and Superannuants Association of NSW, 29 November 2002.

accessible means of dispute resolution than the formal court litigation process.[113] However, older people who are not granted leave for representation may be considerably disadvantaged, particularly when confronted with opposing litigants or their advocates who have experience in the CTTT, as mentioned earlier.[114]

In relation to disputes over rent increases for protected tenancies, the matter can be referred to the NSW Fair Rents Board for determination.

Available advocacy and assistance services

The tenancy advice services previously mentioned provide advice, advocacy and legal information to private housing tenants on various tenancy related issues. The CPSA Older Persons Tenants' Service provides tenancy advice, advocacy and assistance specifically for older people on private housing tenancy issues. According to statistics provided by OPTS, more than 50 per cent of the 258 inquiries they received in 2002–2003 related to private tenancy issues.

Home ownership

Older people, more than any other age group, are likely to own their own home, or live in premises which are either owned or being purchased by a member of the household. In 1996, 79 per cent of people in NSW over the age of 65 lived in homes that were fully owned by a member of the household, and five per cent lived in homes where mortgage payments were still being made, as stated above.[115]

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[113] Section 28, *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW).

[114] 'Alternatives to traditional approaches in Civil Law' in Law and Justice Foundation of NSW, *Access to Justice Roundtable: Proceedings of a Workshop July 2002*, pp. 123–124.

[115] ABS, *Older People, New South Wales*, p. 60.

Areas of concern for older home owners

Areas of concern which were identified for older people who reside in homes which either they or others in their household own or are being purchased include:

Neighbour issues

Neighbour problems, particularly those relating to damage or nuisance caused by a neighbour's trees, were reported throughout the consultation process.

> *A neighbour's tree roots which are infested with white ants, is lifting my driveway. The council will not give permission for the tree to be removed, and the problem is complicated by changes in ownership of the next door property.*[116]

> *I had to get my plumbing and storm water drains to be renewed due to tree roots from next door.*[117]

Guarantor issues

Problems arising for some older people who have agreed to act as guarantor for their adult children's loans were identified in consultations with Legal Aid NSW.[118] According to Juliet Lucy Cummins of the Centre for Elder Law at the University of Western Sydney, older people are particularly susceptible to being persuaded to act as guarantors for their adult children who are in need of financial assistance.[119] Older guarantors are vulnerable under Australian Guarantee Law, as often they are taken advantage of by younger, adult relatives without the creditor's knowledge. Even if a creditor

[116] Individual telephone submission.

[117] Individual telephone submission.

[118] Consultation with Sally McAtee, Policy Officer, Legal Aid NSW, 4 November 2002.

[119] Cummins, J.L., 'Relationship debt and the aged: Welfare vs. Commerce in the law of guarantees', *Alternative Law Journal*, vol. 27, n.2, April 2002, p. 63.

has grounds to believe that the guarantor has been pressured into the arrangement, the courts may still find that the guarantor has entered into the contract freely.[120]

An elderly couple in their 60s with limited English and little education were pressured by their adult son to mortgage their home to secure a loan to finance his business. The son disappeared overseas leaving the loan unpaid.[121]

A man asked his elderly parents to execute a mortgage over their home to inject funds into his business. Both parents suffered from serious chronic conditions. When the son's business failed, the lender wanted to sell the parents' home. The father claimed that the bank was aware of the son's undue influence over the parents and his unconscionable conduct. The father's claim failed because of the bank's lack of knowledge of the circumstances surrounding the transaction.[122]

Real estate agent scams

The NSW Department of Ageing Disability and Home Care Committee on Ageing advised of situations where older people are vulnerable to undervalued property purchases by real estate agents. As older people are less likely to be aware of the value of their properties, they are vulnerable to real estate agents seeking to purchase their property at a price below its market value, and then re-sell it at a much higher price.[123]

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[120] Cummins, 'Relationship debt and the aged', *Alternative Law Journal*, vol. 27, n.2, April 2002, p. 64.

[121] *Janesland Holdings Pty. Ltd v. Francis Simon & Ors* [2000]ANZ ConvR 112 as quoted in Cummins, 'Relationship debt and the aged', *Alternative Law Journal*, vol. 27, n.2, April 2002, pp. 64–65.

[122] *Tessman v. Costello* [1987] 1 QdR 283, as cited in Cummins, 'Relationship debt and the aged', *Alternative Law Journal*, vol. 27, n.2, April 2002, p. 65.

[123] Consultation with the NSW Department of Ageing Disability and Home Care Committee on Ageing, 9 September 2002.

Abuse of power of attorney

The Committee also reported examples of older people who have executed powers of attorney prior to entering hospital or temporary aged care, only to find that on returning home, their appointed attorney has abused their authority and sold the older person's house.[124] This issue is dealt with more fully in Chapter 9, Substitute decision-making and end of life issues.

Informal family accommodation agreements

According to the Australian Bureau of Statistics, 20 per cent of those older people living in private dwellings in NSW also live in family households with their children, relatives or friends.[125] In these situations, the older person may have entered into some informal family accommodation agreement, where s/he has transferred the title of their home, or other significant financial assets to their relative in consideration for a promise to provide accommodation, and possibly other care assistance. Often these agreements are private and informal, making it difficult to assess their prevalence in the community. Examples of these arrangements include:

- an older person selling their home, and using the proceeds to pay for the relative's mortgage, or to alter the relative's property by, for example, building a 'granny flat' or an extension
- relatives may move in with the older person, and the older person may transfer their property into the names of the relatives, or purchase new property in the name of the relative.

Examples of disputes arising in such arrangements have been provided by the Legal Outreach for Older People (LOFOP) program at Caxton Legal Centre, and also Shelter NSW.[126] The LOFOP program has indicated that

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[124] Consultation with Sarah Fogg, Heather Graham, Dawn Linklater, Gerard Thomas, NSW Committee on Ageing, Department of Ageing, Disability and Home Care, 9 September 2002.

[125] ABS, *Older People, New South Wales*, p. 59.

[126] Consultation with Harvey Volke, Shelter NSW, 24 September 2002; Consultation with Ros Monro, Legal Outreach for Older People Project, Caxton Legal Centre, 10 July 2002.

such agreements can involve significant long term consequences which, if not considered at the time, can lead to serious disputes which can endanger the financial interest, security and independence of the older person. Issues which can affect the accommodation in the long term include:

- changes in the health of the older person which require the relative to provide a greater level of care
- the desire of the relative to move homes
- the breakdown of the relative's marriage, with the sale of the family home as part of matrimonial property proceedings
- the isolation of the older person from their preferred community.[127]

In matrimonial property proceedings relating to the breakdown of the relative's marriage, an older person may be able to apply as an intervenor under section 92 of the *Family Law Act 1975*, to seek to protect his/her interest. In other jurisdictions, courts may also look at the common intention between the parties at the time of forming the agreement, and find a constructive trust may exist, so as to provide a remedy to the older person. However, according to Ros Monro of the Caxton Legal Centre:

> [t]he cases illustrate that the legal system is not responsive to the whole social context in which these agreements are formed, but to the particular issue of financial inequality… The factors that influenced the forming of the agreement in the first place are not part of the judicial considerations. Without the courts going behind the agreement to the social context, the law views these agreements as 'just family arrangements', not as a social phenomenon that is intrinsic to the accommodation needs of older people.[128]

[127] Monro, R., 'Family Agreements: all with the best of intentions', *Alternative Law Journal*, vol. 27, n.2, April 2002, p. 68.

[128] Monro, 'Family Agreements', *Alternative Law Journal*, vol. 27, n.2, April 2002, p. 71.

The litigation process which an older person would need to initiate in order to protect their financial interest where the arrangement has broken down, is in itself a significant barrier. The cost of pursuing legal action, a sense of powerlessness against a younger person due to a relationship of dependency, a commitment to preserving family relationships at any cost, and the physical and emotional toll involved in any legal action, particularly those against relatives, make it extremely difficult for an older person to protect their interests in these situations.[129]

On the death of his wife, a 69 year-old man sold his home unit and, at the invitation of his son, moved in with the son and his family. The sale proceeds were applied to the construction of a second story to the son's house. Six months later, the son's marriage broke down, and the father had to move out of the house.[130]

One woman I know sold her house, gave all the money to her daughter and her husband, with the idea that as they were building a new house, they would build a place at the back for her. She never got it. They didn't want her. You would not believe what children can do to their parents for money.[131]

Boarders and lodgers

A boarder is a person living in a house, unit or hostel without the legal protection of a lease or other kind of contract. Features that often characterise boarding house accommodation include:

[129] Monro, 'Family Agreements', *Alternative Law Journal*, vol. 27, n.2, April 2002, p. 71.

[130] *Morris v. Morris* [1982]1 NSWLR 61, as quoted in Monro, 'Family Agreements', *Alternative Law Journal*, vol. 27, n.2, April 2002, p. 70.

[131] Mirabooka Retirement Village focus group participant, Sydney, 21 October 2002.

- an agreement between the owner of premises and the occupant for the provision of a room for occupation as their principal place of residence
- it is often mistakenly perceived as relating to solely short-term accommodation
- boarding house premises can include commercial boarding houses, private accommodation, hotels and motels
- boarders and lodgers do not have statutory occupancy rights, nor do they have statutory remedies available to resolve disputes
- while some boarding and lodging agreements are in writing, most are oral arrangements between the resident and the owner/manager.

Older people make up a significant proportion of residents in boarding houses. A 1998 survey of 384 residents from 161 inner Sydney boarding houses in four local government areas found that 18 per cent of residents were aged over 60 years. In addition, 30 per cent of residents were pensioners, and contrary to the common perception of boarding houses being short-term accommodation, 71 per cent identified as being long-term residents.[132] According to a 1998 survey of residents of licensed boarding houses for people with disabilities undertaken by the Department of Ageing, Disability and Home Care, 29 per cent of residents were aged 65 years and over.[133]

[132] Davidson, A., Phibbs, P., Cox, G., *Inner Sydney Boarding House Report*, University of Sydney, Sydney, 1999 as cited in NSW Department of Fair Trading, *Boarders and Lodgers Review Issues Paper*, August 1999, p. 8.

[133] NSW Department of Fair Trading, *Boarders and Lodgers Review Issues Paper*.

Areas of concern for boarders and lodgers

Lack of legislative protection

As stated above, boarders and lodgers do not have any statutory occupancy rights. Any occupancy rights they have arise from their individual oral or written agreements with the owner or manager of the premises. This can make boarders and lodgers vulnerable to such issues as evictions, tariff increases, security deposits and house rules.[134]

> There is a very real imbalance in the relationship between boarders and lodgers and owners and managers …For boarders and lodgers, the room is their home and, in the absence of legislative protection, they are subject to the whims of the owner or manager. They are particularly vulnerable to evictions. Should they complain and seek to enforce what few rights they currently enjoy, then they can be asked to leave at very short notice or be locked out.[135]

Termination

Termination of occupancy arrangements was a commonly reported issue amongst advocates and service providers for boarders and lodgers. According to the Boarders and Lodgers Action Group, boarders are rarely able to challenge termination notices due to the lack of statutory legal protections. This makes them vulnerable to short periods of notice to vacate premises. Issues of termination and short notice periods have also been raised by NCOSS, the Western Sydney Tenants' Service, and the Inner Sydney Tenants Advice Service.[136]

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[134] Western Sydney Tenants' Service, *Submission to the Boarders and Lodgers Review*, September 1999.

[135] Western Sydney Tenants' Service, *Submission to the Boarders and Lodgers Review*, September 1999.

[136] Boarders and Lodgers Action Group, S*ubmission to the Boarders and Lodgers Review*, 1999; The Council of Social Service of NSW (NCOSS), *Submission to the Boarders and Lodgers Review*, October 1999; Inner Sydney Tenants Advice Service, Redfern Legal Centre, S*ubmission to the Boarders and Lodgers Review*, October 1999; Western Sydney Tenants' Service, *Submission to the Boarders and Lodgers Review*, September 1999.

An elderly Tongan couple, together with their grandson, had been living in a boarding house in Redfern for six months. The manager of the boarding house gave them an eviction notice asking them to leave in two days. The reason for the notice was "persistent slamming of the security door." The only accommodation they were able to find was in the south-west suburbs. The family was seriously traumatised by the experience, involving organising removal of their possessions, uprooting their grandson from his primary school and now living a long way from their places of work.[137]

Tariff increases

Inadequate notice for tariff increases, and increases which are prohibitive for people on fixed incomes was commonly reported by service providers. The Office of Fair Trading has stated that there are currently no standards for assessing the fairness of a tariff charged in advance.[138] The Boarders and Lodgers Action Group commented that a resident has a contract for their room only for as long as the period for which they have paid rent, most commonly seven or 14 days. An owner or manager can therefore increase rents on very little notice.

A 70 year old man on a disability support pension who had lived in a room above a hotel in Kings Cross for 8 years was given two weeks notice of a 63 per cent increase in his rent (from $80 per week to $130 per week).[139]

[137] Case study in the Inner Sydney Tenants Advice Service, Redfern Legal Centre, *Submission to the Boarders and Lodgers Review*, October 1999.

[138] NSW Department of Fair Trading, *Boarders and Lodgers Review Issues Paper*.

[139] Case study in the Inner Sydney Tenants Advice Service, Redfern Legal Centre, *Submission to the Boarders and Lodgers Review*, October 1999.

Security deposits

While there is no legal requirement to pay a security deposit, many boarding house owners require such a deposit, where they consider it necessary to cover the contents of rooms (e.g. blankets, table, chair, fridge, etc.). Usually, such a deposit is equivalent to the tariff for two weeks.[140]

The Boarders and Lodgers Action Group and the Inner Sydney Tenants' Advice Service reports that many boarders have difficulties in getting their security deposits returned. They cite examples of owners or caretakers not issuing receipts for security deposits, or where they do, a boarder/lodger losing his/her receipt and the owner/manager denying ever receiving a security deposit (particularly if there has been a change in the owner/manager).[141]

The Boarders and Lodgers Action Group also state that the ability of boarders and lodgers to get their security deposits returned often relies on the state of personal relations between them and their owner/manager. If there is hostility or an ongoing dispute, they may lose their deposit. While they may be able to apply to the Local Court for recovery of their security deposit, this rarely occurs.[142]

Maintenance and repairs

The Boarders and Lodgers Action Group stated that many boarders are concerned about the quality of their accommodation, commenting that many boarding houses are extremely run-down and unsafe. However, there is a fear among residents that if they complain about repairs and maintenance to the owner/manager, the local Council, or to tenancy services, they will be retaliated against and evicted. The Group state that some long-term

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[140] NSW Department of Fair Trading, *Boarders and Lodgers Review Issues Paper*.

[141] Boarders and Lodgers Action Group, *Submission to the Boarders and Lodgers Review*, 1999; Inner Sydney Tenants Advice Service, Redfern Legal Centre, *Submission to the Boarders and Lodgers Review*, October 1999.

[142] Boarders and Lodgers Action Group, *Submission to the Boarders and Lodgers Review*, 1999.

residents will undertake repairs and maintenance to their own rooms, bearing the cost themselves.[143]

Disputes about house rules

The fact that boarders and lodgers share facilities and live close to each other requires house rules and mechanisms to ensure that the rights of all residents are known and respected. However, often residents are unaware of the house rules before moving in, even though they may have agreed to abide by the house rules.

The Boarders and Lodgers Action Group stated that disputes often arise where residents are unaware of the house rules until they have broken them, or where they perceive that enforcement or alteration of the house rules by the owner/manager is arbitrary and inconsistent.[144]

Access to rooms by owners/managers

The Boarders and Lodgers Action Group reports that one of the most common types of disputes in boarding houses is where an owner/manager has accessed a resident's room without warning, notification or reason.[145] This also reflects the lack of legislative protection for boarders and lodgers.

Disputes with other occupants

The Boarders and Lodgers Action Group reports that the nature of boarding house accommodation, with shared living spaces, often leads to disputes between occupants, which can sometimes escalate into violent confrontations.[146]

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[143] Boarders and Lodgers Action Group, *Submission to the Boarders and Lodgers Review*, 1999.

[144] Boarders and Lodgers Action Group, *Submission to the Boarders and Lodgers Review*, 1999.

[145] Boarders and Lodgers Action Group, *Submission to the Boarders and Lodgers Review*, 1999.

[146] Boarders and Lodgers Action Group, *Submission to the Boarders and Lodgers Review*, 1999.

Disputes over uncollected goods

The Boarders and Lodgers Action Group reported that where a boarder/lodger has been locked out of the premises, disputes can arise in relation to them retrieving their goods and personal possessions, particularly if the owner/manager claims to have incurred some cost for their storage. While a resident may take action in the Local Court for recovery, many residents, particularly those who are older, do not have the ability or resources to take such action.[147]

Disputes over owner/manager records of rent payments

The Combined Pensioners and Superannuants Association of NSW Older Persons Tenants' Service advised that it receives complaints from boarding house residents regarding disputes with owners/managers regarding rent payments. These concern situations where the owner/manager has failed to keep adequate records of rent payments received, and alleges that the resident has outstanding rent arrears. In these situations, the resident has very few options but to comply with the owner/manager's demands, or find alternative accommodation.[148]

Dispute resolution

Where a dispute arises between a boarder/lodger and the owner/manager, there is no access to an independent and informal dispute resolution process, which can resolve disputes quickly, such as the Consumer, Trader and Tenancy Tribunal (CTTT). Aggrieved residents can only pursue redress through either the Local Court or Supreme Court. The cost and complexity of such actions makes them inaccessible to many boarding house residents.[149] According to the Inner Sydney Tenants Advice Service, the

[147] Boarders and Lodgers Action Group, *Submission to the Boarders and Lodgers Review*, 1999.

[148] Consultation with Denise Steele, Older Persons Tenants' Service, Combined Pensioner and Superannuants Association of NSW, 17 July 2003.

[149] Boarders and Lodgers Action Group, *Submission to the Boarders and Lodgers Review*, 1999; The Council of Social Service of NSW, *Submission to the Boarders and Lodgers Review*, October 1999.

lack of an independent dispute resolution process can result in disputes becoming personal, with parties resorting to violence or other inappropriate 'self-help' remedies.[150]

Community Justice Centres are available to mediate non-violent disputes between residents, while applications for Apprehended Violence Orders may be made in disputes which have escalated into violence. For older people, specific assistance to access these processes is often needed.[151]

Available advocacy and assistance services

While general tenancy advice services are available to assist boarders and lodgers who may be in dispute with an owner/manager, there are few services available to specifically assist older people who utilise boarding house accommodation. The Older Persons Tenants' Service, which is part of the Combined Pensioner and Superannuants Association of NSW, is available to assist older residents of boarding houses. However, it reports that demand for its services from older boarding house residents make up a very low proportion (less than one per cent) of their overall inquiries. The service attributes this to an overall disempowerment of boarding house residents, where there is an overwhelming sense of powerlessness to be able to address grievances they may have with an owner/manager. This may be due to an accepted history of itinerancy and its vulnerable status in terms of accommodation rights, an awareness of the lack of legislative protections for boarders/lodgers, or a lack of awareness of tenancy advocacy services which may provide some assistance.[152]

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[150] Inner Sydney Tenants Advice Service, Redfern Legal Centre, *Submission to the Boarders and Lodgers Review*, October 1999.

[151] Boarders and Lodgers Action Group, *Submission to the Boarders and Lodgers Review*, 1999; The Council of Social Service of NSW, *Submission to the Boarders and Lodgers Review*, October 1999.

[152] Consultation with Denise Steele, Older Persons Tenants' Service, Combined Pensioner and Superannuants Association of NSW, 17 July 2003.

Groups such as Shelter NSW or the Boarders and Lodgers Action Group are able to promote the interests of boarders and lodgers and lobby for legislative change to protect their rights, but do not provide direct advocacy and assistance services for boarding house residents.

Residential parks

Residential parks include caravan parks, manufactured home estates and establishments often referred to as 'mobile home villages' or 'relocatable home parks'. For people whose principal place of residence is in a residential park, their rights and responsibilities as residents are governed by the *Residential Parks Act 1998* (NSW) and the *Residential Parks Regulations 1999* (NSW).[153] In NSW in April 2002, there were 962 residential parks providing 26 169 permanent sites.[154]

According to the Combined Pensioners and Superannuants Association of NSW Parks and Village Service (PAVS) NSW a high proportion of park residents are older people on fixed incomes. For many older people, the option to live in a residential park represents an affordable lifestyle choice for retirement. PAVS reports that many retired people will invest their superannuation or the proceeds from the sale of their house in a small home or van and annexe on a rented site, in a location where they have previously spent holidays and thought affordable.[155] While researchers and statisticians use different definitions of residential parks, the Australian Bureau of Statistics estimates that across Australia, one per cent of people aged over 65, or 16,200 people, were usual residents of caravans, cabins or

[153] <http://www.dft.nsw.gov.au/realestaterenting/parksvillages/residentialparks.html> (Last accessed 17 December 2003).

[154] 'Planning NSW database: Caravan Parks in NSW', April 2002.

[155] Connor, J. and Ferns, S., Park and Village Services NSW, Combined Pensioners and Superannuants Association NSW, Shelter NSW, I.B. Fell Housing Research Centre — University of Sydney, NSW Department of Fair Trading, *No Place for Home — the loss of permanent accommodation on NSW residential parks*, CPSA, Sydney, 2002.

houseboats (note this does not include manufactured homes).[156] Some have estimated that in NSW, the proportion of park residents over the age of 60 is 40 per cent.[157] It is clear that significant numbers of older people in NSW choose to live in residential parks.

Areas of concern for older residential park residents

Park closures and redevelopment

The most commonly reported issue for aged park residents related to concerns about their rights where a park is to be closed, with PAVS reporting that approximately 70–80 per cent of inquiries they receive relate to park closure issues.[158] PAVS reports that in the last two years, six residential parks have closed in NSW resulting in the loss of 350 long term sites. A further 12 residential parks are in the process of closing, which will result in the loss of an additional 1035 long term sites. A further 10 residential parks will be reducing the number of long term sites available, resulting in the loss of a further 258 long term sites. In addition, a further seven parks are earmarked for future development, which may result in the loss of a further 504 long term sites. The result is a possible loss of accommodation for nearly 3000 people.[159]

PAVS reports that many residents are unaware of their rights in relation to park closures, and this causes unnecessary hardship. In addition, PAVS reports that while the *Residential Parks Act 1998* (NSW) contains

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[156] Australian Bureau of Statistics, *Older people, Australia: A Social Report*, Catalogue n.4109.0, Australian Bureau of Statistics, Canberra, 1999. Available at <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/78A8D5B9944FBAA6CA256889000D50C1> (Last accessed 15 December 2003).

[157] Mr. Paul Crittendon, MLA, Member for Wyong, 'Residential Parks Bill', *NSW Legislative Assembly Hansard*, n.3 of 28 October 1998. Available at <http://www.parliament.nsw.gov.au/prod/web/phweb.nsf/frames/hansard> (Last accessed 15 December 2003).

[158] Consultation with Joy Connor and Dianne Evans, Park and Village Services NSW, Combined Pensioners and Superannuants Association NSW, 31 July 2003.

[159] Consultation with Joy Connor and Dianne Evans, Park and Village Services NSW, Combined Pensioners and Superannuants Association NSW, 31 July 2003.

provisions for compensation for residents for relocation, there are several shortcomings in the provisions. These shortcomings are detailed below under the heading Dispute Resolution.[160]

> *Three elderly women are permanent residents of a residential park on the North Coast. The park will soon be closed to be redeveloped, forcing the women to find alternative sites for their homes. As pensioners, the three women look at sharing utilities and equipment to save money. They have older style homes which are difficult to relocate. There are no other parks in the area which have such similar close access to shops and medical services. They are also unlikely to find three adjoining sites in a park, which will allow them to continue their communal living.*[161]

Disputes over fees and charges

Concerns over excessive increases in site fees have also been reported to the PAVS, which reported that 13 per cent of the inquiries it received in 2002–2003 related to rent increases and fees and charges.[162] PAVS reported that some retirees are paying up to 48 per cent of their pension to live in their home in residential parks on the central coast, and that many are applying to the CTTT to fight the fee increases.[163]

In addition, PAVS receives complaints that residents who previously were paying rental which included water charges, and since 1 January 2000, have been charged separately for water, did not receive a corresponding reduction in rent.[164]

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[160] Connor and Ferns, *No Place for Home.*

[161] Case study from Connor and Ferns, *No Place for Home*, pp. 12–13.

[162] Consultation with Joy Connor and Dianne Evans, Park and Village Services NSW, Combined Pensioners and Superannuants Association NSW, 31 July 2003.

[163] Connor, J., 'Affordability Crisis Looms for Retirees on NSW Parks', *Parity*, vol. 14, i.3, April 2001, p. 13.

[164] Connor, 'Affordability Crisis Looms', *Parity*, vol. 14, i.3, April 2001.

Gladys and Bruce are a retired couple who sold their house and purchased a manufactured home on a residential park on the Central Coast. The site rental of $60 per week included water. Six months after moving in, the management installed water meters for each site, as the area was now under a user pays system. However, the $60 per week rental fee was not reduced, even though residents now paid for their own water. Six months later the manager put the rent up $5 per week to pay for the water meters.[165]

Disputes over park rules

The communal nature of residential park living makes it necessary for park owners to make park rules about the use, enjoyment, control and management of the park. The *Residential Parks Act 1998* (NSW) requires that park rules are in writing and provided to residents at or before the time they sign an agreement for residence. Disputes over park rules, particularly where the owner wishes to change or add to the park rules, are not uncommon. PAVS reported that in 2002/03, five per cent of the inquiries it received related to disputes regarding park rules.[166] Issues that may be covered by park rules include:

- noise limits
- vehicle speed limits
- parking
- garbage disposal
- pets
- playing sporting activities
- the use and operation of park facilities

[165] Connor, 'Affordability Crisis Looms', *Parity*, vol. 14, i.3, April 2001, p. 13.

[166] Consultation with Joy Connor and Dianne Evans, Park and Village Services NSW, Combined Pensioners and Superannuants Association NSW, 31 July 2003.

- maintenance standards for homes
- landscaping rules
- safety of persons and property within the park
- means of transportation within the park.[167]

Denial of services

The Residential Parks Network reported that some park managers prevent taxis, delivery vans, ambulances and health services' vehicles from entering residential parks. For older people in need of medical assistance, this could prove to be serious and life threatening. In situations where the park is not close to services, shops or public transport, older residents may be forced to walk substantial distances to catch a taxi or to collect delivered items.[168]

Dispute resolution

Consumer, Trader and Tenancy Tribunal

Section 128 of the *Residential Parks Act 1998* (NSW) allows a resident who owns a movable dwelling with a rigid annexe, a relocatable home, or a manufactured home to apply to the Consumer, Trader and Tenancy Tribunal (CTTT) for an order for compensation for relocation from the park owner. If the resident has vacated the park and relocated to another park, s/he can seek an order for compensation for relocation costs within six months of vacating the site in compliance with the termination notice. The identified shortcomings of this process include:

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[167] <http://www.dft.nsw.gov.au/realestaterenting/parksvillages/residentialparks.html> (Last accessed 17 December 2003).

[168] Watson, J., 'Promoting and Sustaining Change in Residential Parks Communities', *The Bulletin of Good Practice in Popular Education*, n.6: Community Education and Community Building for Justice and the Law, Centre for Popular Education, UTS, Sydney, 2002, pp. 108–109.

- a resident must have sufficient financial resources to relocate, and then apply to the CTTT for compensation, which has a discretion as to whether compensation will be granted
- a resident who is unable to afford to relocate can wait until the park owner seeks an order from the CTTT for vacant possession, and then seek compensation. This may involve substantial delay, and diminished availability of alternative sites in other parks nearby
- a failure to be able to find an alternative site on which to relocate their dwelling may result in the resident only being able to seek compensation for the costs associated with disposing of their dwelling, which is usually a cheaper alternative for the person paying the compensation
- older style vans with annexes and manufactured homes cannot easily be moved without sustaining damage. The legislation provides that compensation for damages arising from relocation cannot exceed the value of the dwelling.[169]

Park Liaison Committee and Park Disputes Committee

Residential park owners are required to establish a Park Liaison Committee, the objective of which is to improve the lifestyle and well being of the park's residents. Its functions include assisting the park owner to develop park rules, develop proposals for private mail facilities, develop standards of behaviour, and tree maintenance policies. In addition, a park owner must establish a Park Disputes Committee when a dispute arises over changes to park rules or when a matter is referred to the CTTT, or when parties agree that the Disputes Committee should resolve a particular dispute.[170]

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[169] Connor and Ferns, *No Place for Home*, p. 17.

[170] <http://www.dft.nsw.gov.au/realestaterenting/parksvillages/disputeresolution.html> (Last accessed 17 December 2003).

If at least five residents disagree with proposed changes to park rules, they can apply to the park's Disputes Committee to resolve the issue. If a resident is not happy with the decision of the Disputes Committee, s/he can appeal to the CTTT. The CTTT can also hear disputes about the legal validity of existing park rules.[171]

Available advocacy and assistance services

Tenants of caravan parks and mobile home estates are often unable to assert their rights because of both geographical and social isolation.

> Having chosen a rural or semi-rural lifestyle without appreciating all the consequences, those residents find that they are often the victims of a double loss—the loss and decline of facilities and services within their park, and the loss and decline of facilities and services in local communities. Even where alternative facilities and services exist within reasonable geographical proximity, the limitations of age, infirmity, income and poor social supports make accessing those alternatives difficult.[172]

The Park and Village Service (PAVS) of NSW is a statewide service which seeks to ensure that tenants of caravan parks and mobile home estates are aware of and able to access their rights. PAVS is funded by the Department of Fair Trading under its Tenants' Advice and Advocacy Program, and operates out of the Combined Pensioners and Superannuants Association of NSW. The role of PAVS is to provide:

- casework support for park residents
- resourcing and training to tenants' advice and advocacy services throughout NSW

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[171] <http://www.dft.nsw.gov.au/realestaterenting/parksvillages/residentialparks.html> (Last accessed 17 December 2003).

[172] Lawler, M., *There are different kinds of isolation*, Alternative Law Journal Volume 26, No. 2, April 2001, p. 81.

- advice on legislation and input into policy affecting residential parks in NSW.[173]

In 2002/03, PAVS received a total of 571 inquiries relating to issues arising in caravan parks and mobile home estates. Of those who indicated their age, 94 per cent were over the age of 55.[174]

The 11 generalist tenancy advice services in NSW mentioned earlier also provide advice, advocacy and legal information services to residents of residential parks. As stated, four of these centres are located in metropolitan Sydney, and seven services are located in rural, regional and remote areas of NSW. Three of these are designated as Aboriginal tenancy advice services.

The Department of Fair Trading website provides some information regarding residential park residents' rights, particularly when parks are to be closed. The website also provides information regarding types of agreements for residents, moving in, rent increases, gas/electricity charges, water charges, park rules, selling one's home, moving out and compensation.[175]

The Parks and Village Tenants Association is a voluntary organisation which provides basic information and advice to residents of caravan parks and mobile home estates who are members of the Association regarding their rights and responsibilities as residents. The Association provides information and advice to residents on such issues as disputes with park managers, how to complain to the department of Fair Trading, and how to apply to the CTTT.

Many individual residential parks have residents groups which also provide basic information and advice to residents regarding their rights and

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[173] Combined Pensioners and Superannuants Association of NSW, *Annual Report 2001/2002*.

[174] Consultation with Joy Connor and Dianne Evans, Park and Village Services NSW, Combined Pensioners and Superannuants Association NSW, 31 July 2003.

[175] <http://www.dft.nsw.gov.au/realestaterenting/parksvillages/residentialparks.html> (Last accessed 17 December 2003).

responsibilities, and how to make a complaint to the Department of Fair Trading.

Conclusion

The importance of stable and secure accommodation for older people can make them exceptionally vulnerable to accommodation-related legal problems. Legal issues which may threaten the stability of accommodation arrangements may present a greater level of stress and anxiety to older people than other age groups.

The accommodation related legal needs of older people are not homogenous. Rather they reflect the diverse range of accommodation types available to older people and preferred by older people. The needs can be categorised in the following ways:

- Legal needs relating to accommodation that is specifically designated for older people (i.e. nursing homes, residential aged care facilities and retirement villages) that tend to be experienced only by older people. They are usually governed by legislative or administrative frameworks requiring specialist knowledge.
- Legal issues relating to accommodation which, while experienced by other age groups in the population, will be common amongst older people because of the high proportion of older people residing in these accommodation options, i.e. strata title units, home ownership, and public housing tenancies.
- Legal issues relating to accommodation in which older people make up a significant proportion, i.e. boarding and lodging houses, and residential parks. While the proportion of older people residing in such accommodation options may not be high, the fact that older people make up a significant proportion of the total numbers using them makes the related legal issues particularly relevant to older people.

- Legal issues relating to accommodation where older people are particularly vulnerable, or may find it difficult to seek assistance, i.e. strata title units, home ownership, private housing tenancy, boarding and lodging houses, residential parks. These legal issues will be experienced by other age groups and demographics as well, but older people may be particularly vulnerable to their occurrence, and may face particular barriers in accessing assistance.

Accommodation-related legal issues for older people often require specialist knowledge on the part of advocates and service providers. However, the vulnerability of older people to more general accommodation related legal issues indicates a need for generalist services to be sensitive to the particular needs and issues confronted by older people in seeking assistance for housing related matters.

5. Health

With Australia's population of older people increasing and expected to further rise over the next 50 years, there is a pressing need to look at health and the related legal implications that will arise from an older population. The 2001 Census found that people aged 65 and over in NSW comprised 13 per cent of the population.[1] This is expected to increase to 17 per cent of the population in NSW by 2016.[2] As well as increasing in absolute numbers, the expected life span for older people will also increase, with the 85 years and older population increasing more rapidly than other groups.[3] As people age they become more vulnerable to ill health and disability. In 1995, 90 per cent of older people had experienced a recent illness, and virtually all (99 per cent) reported at least one long-term health condition.[4] There is evidence that older people are the largest group of users of the health system:

- older people have a higher rate of hospital admissions, accounting for 33 per cent of all hospital separations, while only comprising 12 per cent of the population
- older people use general practitioner (GP) services at a rate double that for people under the age of 65

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1 Australian Bureau of Statistics, '2001 Census Basic Community Profile and Snapshot — New South Wales', *2001 Census of Population and Housing*, Australian Bureau of Statistics, Canberra, 2001. Available at <http://www.abs.gov.au/ausstats/abs%40census.nsf/4079a1bbd2a04b80ca256b9d00208f92/c2ce6c310b89361fca256bbe008371f3!OpenDocument#Table3> (Last accessed 15 December 2003).

2 Australian Bureau of Statistics, *Older People, New South Wales*, Catalogue n.4108.1, Australian Bureau of Statistics, Sydney, 2000, p. 2.

3 Australian Institute of Health and Welfare, *Older Australia at a Glance*, 3rd edition, AIHW Catalogue n.AGE 25, Australian Institute of Health and Welfare, Canberra, 2002, p. 4.

4 Australian Bureau of Statistics, *Older People, Australia: A Social Report*, Catalogue n.4109.0, Australian Bureau of Statistics, Canberra, 1999. Available at <http://www.abs.gov.au/Ausstats/abs@.nsf/0/3be24b1cb70dcae1ca2568a90013941e?OpenDocument> (Last accessed 15 December 2003).

- older people are more likely to use prescribed medication, with approximately 86 per cent using medication compared with 59 per cent for the general population.[5]

In research conducted by the Commonwealth Department of Health and Ageing,[6] 46 per cent of older people believed that health was a major area of concern as they age. Given the distinct health concerns confronting older people, access to hospitals and health care services remain an important issue for older people, particularly in regards to patient rights.

This chapter will focus on various legal issues facing older people relating to health and the legal avenues available to older people to address these issues. The legal status of written instruments giving instruction as to desired medical treatment, known as Advance Health Care Directives, are discussed, together with barriers confronted by older people in using such advance and substitute decision-making mechanisms. The chapter also details some of the health related consumer issues which are likely to confront older people, including access to health services, quality of health services, hospital discharge practices and medication misuse.

It should be noted that many health related legal issues for older people take place in the context of health care provided by nursing homes. These have been partially dealt with already in Chapter 4, Accommodation.

Advance health care directives

Advance health care directives (also known as "living wills") are written statements that contain information regarding a person's instructions as to the type and extent of health care that they wish to receive in the event of

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5 Australian Institute of Health and Welfare, *Older Australia at a Glance*, pp. 64–70.

6 Department of Health and Ageing, *Community Attitudes: Ageing and Older Australians*, 2000. Available at <http://www.olderaustralians.gov.au/research/commatt.htm> (Last accessed 29 September 2003).

losing the capacity to make decisions. They are similar to other forms of substitute decision-making such as powers of attorney. Whether or not an older person has made formal arrangements for substitute decision-making, it may be useful for the older person to make an advance health care directive. In addition to providing a mechanism whereby an individual can indicate a desire to refuse treatment in advance of losing capacity—advance health care directives can encompass decisions about the management of one's affairs in the event of losing capacity.

There is no standard format in NSW for advance health care directives: they can consist of specific instructions as to what should be done in particular circumstances, or provide a general description of how the person would like to be treated.[7] These can include:

- who should/should not be contacted
- what hospital/facility to be treated in
- types of medical treatment to be refused/consented to (for example, cardiopulmonary resuscitation (CPR) or artificial ventilation)
- what staff you want/do not want to treat you
- if treated at home, the method of treatment.

The legal status of advance health care directives

In NSW advance health care directives are informal mechanisms that are not supported by legislation. Despite this fact, there are ways in which they may have legal force or limited legal effect.

Advance health care directives can be seen as strongly persuasive to health care providers and the Guardianship Tribunal, particularly if they are

[7] NSW Department of Ageing, Disability and Home Care, *Planning Ahead Kit: Resources for managing financial, health and lifestyle decisions into the future*, Department of Ageing, Disability and Home Care, Sydney, 2001, p. 9.

consistent and up to date.[8] Advance health care directives are a useful addition to the Enduring Guardian provisions. Where the directives form part of the appointment of an enduring guardian, they can act as instructions to the guardian on how to exercise his or her functions, and serve as limitations on the guardian's authority, especially where they are quite specific. However, where advance health care directives conflict with enduring guardianship, the guardian is able to make decisions contrary to the directives.[9]

Advance health care directives can be binding at common law, if they fulfil the criteria of specificity and competence at the time of writing. Medical practice also appears to support the advance directives of patients who can no longer make decisions about their health, as outlined in the NSW Department of Health's guidelines in relation to management of dying patients:

> the contents of an advance directive, where made, should also be taken into account.[10]

The need to have advance health care directives recognised by legislation has been an issue that has attracted much discussion. The Director of the Benevolent Society's Centre on Ageing expressed the view that the informal nature of advance directives, supported by the common law and medical practice, was preferable to legislative recognition. The concern was that under legislation there would be the risk that an advance directive not completed on a specific form in the prescribed manner would remain ineffective and inflexible.[11] In addition, one consultation suggested that:

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[8] Consultation with John Le Breton, Director, and Amanda Curtin, Office of the Public Guardian, Sydney, 24 September 2002.

[9] Consultation with John Le Breton, Director, and Amanda Curtin, Office of the Public Guardian, Sydney, 24 September 2002.

[10] NSW Department of Health, *Dying With Dignity: Interim Guidelines in Management*, NSW Health, North Sydney, 1993.

[11] Consultation with Barbara Squires, Director of the Centre on Ageing, Benevolent Society, and President, Australian Association of Gerontology, Sydney, 10 October 2002.

> The effectiveness of doing advance health care planning and using advance health care directives are really not about whether it is nailed down in legislation—the authority of advance health care directives is that they really match what the older person would want, and that hinges on having the right discussion.[12]

At the same time, there are concerns about the lack of legal safeguards in NSW for medical practitioners when there is an advance health care directive that is in conflict with the practitioner's duty of care under the law of negligence.[13] If the current informal arrangement with advance directives is to continue, it would assist if there are clearer rules and thorough guidelines in relation to the legal and ethical duties of medical practitioners and health professionals when confronted with advance directives.

The common arguments supporting the introduction of legislation dealing with advance health care directives are that:

- legislation would clarify the legal ramifications and liabilities for stakeholders such as government departments, hospitals and doctors
- legislation makes people more confident that doctors will carry out their advance health care directives
- an increasing number of older people are living alone[14] and have no appropriate family member or friend who they would like to ask to take on the role of carrying out their wishes when they are no longer able to do so
- it would make it easier for people to update their advance health care directive regularly.[15]

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[12] Consultation with Julie Letts, NSW Department of Health, 19 August 2003.

[13] Consultation with Sue Field, Elder Law Centre, University of Western Sydney, 27 August 2002.

[14] Australian Institute of Health and Welfare, *Older Australians at a Glance*, p. 6.

[15] Hampshire, A., Squires, B., Wall, S. and Thompson, R., *Taking Charge: Making Decisions for Later Life*, NSW Committee on Ageing, Sydney, 1999, p. 36.

Arguments against such legislation include that:

- the current situation is working well and legislation will create inflexibility
- circumstances may change over time, and it is difficult for a person making the directive to accurately predict the exact circumstances that might occur
- doctors would have to act in accordance with advance health care directives and could be sued for failing to do so.[16]

Relevance of advance health care directives for older people

As older people face diminishing physical and cognitive capacity, the use of directives to make future decisions about health care becomes a significant instrument by which they can maintain control over their medical treatment. Advance health care directives also aim to uphold principles of autonomy and self-determination for people with diminishing capacity.

There is increasing evidence that people would like to be able to make enforceable advance health care directives. A survey conducted in Sydney by the Centre for Education and Research on Ageing found that approximately two-thirds of nearly 500 respondents believed that they would complete advance health care directives having been made aware of them.[17]

The desire for greater involvement in decision-making on health issues is even more pronounced in relation to the area of terminal care.

> Australian opinion polls show that community attitudes are moving strongly towards wanting more control over the terminal stage of life, and

[16] Hampshire, A., Squires, B., Wall, S. and Thompson, R., *Taking Charge: Making Decisions for Later Life*, NSW Committee on Ageing, Sydney, 1999, p. 36.

[17] Wall, S. and Shanley, C., *Ascertaining older people's knowledge and acceptance of advance care directives: Final report for the NSW Ageing and Disability Department,* Centre for Education and Research on Ageing, Sydney, 1999, p. 11.

> the Public Health Association of Australia supports legislation to allow people to prepare enforceable living wills rejecting excessive medical treatment in the event of terminal illness.[18]

The University of Queensland's Department of Social and Preventative Medicine has conducted a comprehensive study on end of life decision-making and advance health care. The survey of 389 patients in Queensland found that 71 per cent reported that a written document expressing their wishes for medical treatment for a future time of incapacity was important, while 61 per cent said that they would like to write down their wishes. Seventy-one per cent of patients also agreed that advance directives would make a useful contribution to medical care.[19]

The surveys of GPs and health professionals produced similar results in support of advance health care directives. Sixty-four per cent of the 172 GPs and 76 per cent of the 860 health professionals agreed that advance directives would make a useful contribution to medical care.

The above research suggests overwhelming support within the community, from both the public and health professionals, for advance health care directives as the means with which individuals may have their wishes for medical treatment and care considered in the event of future incapacity.

Barriers for older people in accessing advance health care directives

Knowledge

The study conducted by the University of Queensland's Department of Social and Preventative Medicine suggested that the most significant barrier

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[18] Cartwright, C., 'End of Life Decision Making: Practical and Ethical Decisions for Health Professionals', *Australasian Journal on Ageing*, vol. 20, n.4, 2001, p. 7.

[19] Steinberg, M.A., Parker, M.H., Cartwright, C.M., McDonald, F.J., Del Mar, C.B., Williams, G.M., Hoffenberg, R., *End of life Decision-Making: Perspectives of General Practitioners and Patients*, Department of Social and Preventive Medicine, The University of Queensland, Brisbane, 1996, p. xix.

to people using advance health care directives is their lack of knowledge. Similarly, 93 per cent of GPs and 91 per cent of health professionals reported that the greatest impediment to the use of advance directives was people not knowing enough about them.[20]

Time

Another barrier to older people using advance health care directives is the time involved in the discussion and planning of the directives.

> People can see that these discussions take a lot of time. Traditionally, the people who would have been vested with the responsibility of doing this, such as doctors, often don't have that time and are not well positioned in other ways to start these discussions.[21]

NSW Health is in the process of drafting a best practice advice for health professionals regarding the use of advance health care directives to address this issue. The advice looks at instigating cultural change in hospitals, nursing homes and other health service providers to train both physicians and allied health professionals (such as social workers and nurses) in starting discussions about advance health care directives with patients.

Reluctance by older people to consider end of life issues

There is evidence suggesting that the present cohort of older people are less likely to think about end of life issues than previous cohorts and to leave the decision to the doctor[22] and that this tends to increase with age.[23] One NSW Health officer expressed reservations about leaving the onus of advance health care directives on older people:

> These older patients come from a generation where the doctor knows best. This is one of the problems if you want to make the driver for

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[20] Steinberg et al., *End of life Decision-Making*.

[21] Consultation with Julie Letts, NSW Department of Health, 19 August 2003.

[22] See, for example, Brown, M., 'The Law and Practice associated with Advance Directives in Canada and Australia: Similarities, Differences and Debates', *Journal of Law and Medicine*, vol. 11, n.1, 2003, pp. 59–76.

> change lie with older people, because they feel they don't necessarily have the power to change, even within their own personal circumstance. The change needs to occur with health professionals.[24]

The Department states that the instigation of such discussions needs to be normalised and mainstreamed into medical management—often health professionals are reluctant to start such discussions for fear that patients will assume the worst and be overwhelmed by anxiety. Implicit in this is the important role that participation and appropriate discussion have in older people implementing advance health care directives. Advance health care directives can facilitate greater participation and consultation in care, as they focus on discussion of the individual's wishes and in involving other people in the process.

Difficulty in predicting future scenarios

Another limitation on the use of advance health care directives is the fact that circumstances may change over time, and it is difficult when making the directive to predict future circumstances accurately. Even where a predicted circumstance occurs, while an individual may be sure of what treatment or what health care they want in advance, it can be very difficult to apply when that situation actually occurs.[25] Where there is such a treatment dilemma, doctors may be loath to follow advance health care directives in the face of strong objections from family members and friends.[26] The inability to anticipate every eventuality further demonstrates the importance of communication and discussion amongst family members and older people.

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[23] Brown, M., 'The Law and Practice associated with Advance Directives in Canada and Australia: Similarities, Differences and Debates', *Journal of Law and Medicine*, vol. 11, n.1, 2003, p. 61.

[24] Consultation with Julie Letts, NSW Department of Health, 19 August 2003.

[25] Consultation with Sue Field and Carolyn Sappideen, Elder Law Centre, University of Western Sydney, 10 September 2003.

[26] Consultation with Julie Letts, NSW Department of Health, 19 August 2003.

Access to health services and consumer rights

The Australian health care system is based on a combination of public and private sector involvement, with private medical practioners providing primary and specialist care in the community, and a mixed public and private system providing comprehensive acute services. With the population of people aged over 65 expected to triple to 6.6 million in the next 50 years,[27] there has been concern about the increasing costs of health care.[28]

The burgeoning costs of health care have resulted in a shift of responsibility to provide services from the State to the individual. This shift is reflected in the increased prevalence of, and reliance on, private health insurance,[29] and in government incentives for people to use private health insurance. The waiting lists for public hospitals are also increasing,[30] and the number of consultations bulk-billed by GPs throughout Australia fell from 80 per cent in 1995–1996 to 71 per cent in September 2002.[31]

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[27] Commonwealth Department of Health and Ageing, *Aged Care in Australia*, Commonwealth Department of Health and Ageing, Canberra, August 2002.

[28] Health expenditure on older people (on average $4,919 per person aged 65 or more in 1993–94) is nearly four times that of people aged under 65 years ($1,301). Australian Bureau of Statistics, 'Health of Older People', *Australian Social Trends 1999*, Catalogue n.4102.0, Australian Bureau of Statistics, Canberra, 1999. Available at <http://www.abs.gov.au/Ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/9f963da8ecf49309ca25699f0005d61f!OpenDocument> (Last accessed 17 December 2003).

[29] Australian Bureau of Statistics, 'Private health insurance', *Australian Social Trends 2001,* Catalogue n.4102.0, Australian Bureau of Statistics, Canberra, 2001. Available at <http://www.abs.gov.au/ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/996b3621f22dfa17ca256bcd00825574!OpenDocument> (Last accessed 30 September 2003).

[30] NSW Audit Office*, NSW Department of Health: Waiting times for Elective Surgery in Public Hospitals*, Performance Audit Report n.116, 18 September 2003. Available at <http://www.audit.nsw.gov.au/perfaud-rep/Year-2003-2004/WaitingLists-Sept2003/execsum.htm.> (Last accessed 17 December 2003).

[31] Commonwealth Department of Health and Ageing, 'Table B7: Percentage of Services Bulk Billed by Quarter and Financial Year of Processing By Broad Type of Service', *Medicare Statistics*, September 2003. Available at <www.health.gov.au/haf/medstats/tableb7a.pdf> (Last accessed 5 October 2003).

In 1999–2000, approximately 24 per cent of non-hospital GP services were provided to the 12 per cent of the population who are over 65. The rate of use of GP services by older people is also more than double that of people under the age of 65.[32] With older people accessing medical and health care services more than other age groups, the impact of allocation of resources to health care will have a significant influence on older people's ability to access proper health care.

Areas of concern

The Health Care Complaints Commission (HCCC) has identified the following consumer rights in relation to health services:

- the right to receive prompt and free emergency treatment at public hospital emergency departments
- the right to receive treatment on the basis of health need and not on the basis of having private health insurance
- the right to access qualified health personnel and competent care
- the right to be treated with dignity, respect and courtesy
- the right to access personal medical records
- the right to information about grievance and complaints procedures.[33]

Attitudes of service providers

Communication and delivery of health services to older people can be hindered by attitudes of service providers and organisational pressures arising from cost-effectiveness, appropriate allocation of time to clients and management of workloads. Delivery of health services to older people can also be affected by negative stereotypes and perceptions of older people.

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[32] Australian Institute of Health and Welfare, *Older Australia at a Glance*, p. 68

[33] Health Care Complaints Commission, *Your rights and responsibilities as a health consumer*, 2000. Available at <http://www.hccc.nsw.gov.au/hccc/pdf/Your%20Rights%20&%20Responsibilities.pdf> (Last accessed 28 September 2003).

Seeing older people as inflexible, too old to change and a drain on scarce resources, are some of the common stereotypes that exist in health service provision.[34]

It has been reported that health work with older people is perceived to have low status.[35] These attitudes are sometimes translated in health professionals' treatment of older people. Complaints of being talked down to, patronised and decisions made without any discussion or consultation, are common amongst older people.[36]

> Doctors definitely treat older people with indifference and impatience. Not only that, if you are from a non-English speaking background—and you can't make yourself clear and straight and strong—they become very impatient and just won't listen to you properly.[37]

The recognition of such attitudes was highlighted by the Australian Society for Geriatric Medicine, who in their position statement on education and training in geriatric medicine to students, proposed:

> A positive approach to old age and to illness in elderly people. This should include an awareness of ageist attitudes and negative stereotypes about ageing in the community and among heath professionals.[38]

There needs to be effective communication between health service providers and older people in order to provide quality health care.

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[34] Sargeant, D., *Confronting Ageism — Towards a society for all ages*, Sir John Quick Bendigo Lecture n.6, Latrobe University, Bendigo, 1999. Available at <www.latrobe.edu.au/bendigo/quick/quick99.pdf> (Last accessed 17 December 2003).

[35] Sargeant, *Confronting Ageism*, p. 4.

[36] Combined Pensioners and Superannuants Association focus group, Sydney,10 September 2003.

[37] Combined Pensioners and Superannuants Association focus group, Sydney, 10 September 2003.

[38] Finucane, P*., Education and Training in Geriatric Medicine for Undergraduate Medical Students*, Australian Society for Geriatric Medicine Position Statement n.4, March 1 1996. Available at <http://www.asgm.org.au/pdfdocs/position_statements/PositionStatementNo04.pdf> (Last accessed 17 December 2003).

Professionals need to be sensitive to older people's concerns and treat them with dignity and respect. Having a good bedside manner and having good communication skills are precursors for deflecting complaints[39] and in achieving patient satisfaction. The Council on The Ageing (NSW) have summarised "golden rules" that define quality health services for older people, and reflect the rights of older people as health service consumers.[40] Some of these include:

- involving older people in all aspects of their consultation and care
- speaking to older people with respect
- giving the time that older people need
- providing older people with information they need
- acknowledging and respecting older people's differences.

Rationing of Health Care Services

The impact of age-based rationing is of great concern amongst older people in accessing health services.

> *A healthy and competent older woman who was 91 years of age needed to see a specialist—when referred to that specialist, upon realising the age of the patient, he refused to treat her. It was only with intervention, that he agreed to see her.*[41]

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[39] Clark, R.B., *Australian Patient Safety Survey, Final report to the Commonwealth Department of Health and Aged Care*, August 2001. Available at <http://www.participateinhealth.org.au/ClearingHouse/Docs/cfcaustpatientsurvey.pdf> (Last accessed 17 December 2003).

[40] Le Bris, C., 'How older people define quality care — qualifying quality and canvassing care', *Health Investigator: Journal of the Health Care Complaints Commission*, vol. 1, n.8, June 1999.

[41] Consultation with the Brenda Bailey, Policy Officer, Council of the Ageing (NSW), 21 August 2003.

According to the Centre for Elder Law, prioritising patients for treatment based on need is a common, but hidden practice amongst health service providers. Such practices reflect the utilitarian nature of allocation of scarce resources, and attitudes of service providers towards older people.[42]

While the presumption that age hinders favourable medical outcomes may have some statistical accuracy,[43] older people have the same right to access to health services when needed, as others in the population.

Cost and access to private health insurance

On the basis of consultations conducted as part of this study, it appears that the gradual shift in GPs away from bulk billing has had an effect on the ability of older people to access health services. Although most GPs continue to bulk bill for pensioners, a significant proportion of GPs do not. Lack of bulk billing can be a financial burden for older people whose basic income may rely on the pension or a small fixed income. There are some cases where older people will forgo medical treatment in lieu of incurring the expense.

> *Some GPs are charging $50 for us to see them, and well frankly, you might think twice before you go—because you might not have the $50 they want, it's not like we're working and earning a wage. Not that you go for nothing, but when you're really sick and you have no money, you might just wait a few days and then you get worse.*[44]

[42] Consultation with Sue Field and Carolyn Sappideen, Elder Law Centre, University of Western Sydney, 10 September 2003; George P. Smith, 'Allocating Health Care Resources to the Elderly', *Elder Law Review*, vol. 1, 2002, pp. 21–27. Available at <http://www.uws.edu.au/about/acadorg/clb/sl/research/elderlaw/elderlawreview/reviewvol1/reviewvol1articles> (Last accessed 17 December 2003).

[43] Smith, 'Allocating Health Care Resources to the Elderly', *Elder Law Review*, vol. 1, 2002.

[44] Combined Pensioners and Superannuants Association focus group, Sydney, 10 September 2003.

Integrally related to this issue is the affordability of private health insurance. The Australian Bureau of Statistics data in 2001 showed that the proportion of the population covered by private health insurance progressively decreased with age, with only 35 per cent of those aged 75 years and older in receipt of private health insurance.[45] The Centre for Elder Law also highlighted concern about older people being unable to access private health insurance due to the increased onus on the older person to show assets or demonstrate financial capability.[46] In such circumstances older people are left to access health care through the public health system.

The focus group with the Combined Pensioners and Supperannuants Association highlighted the dissatisfaction of some older people with the public health system.

> *Private health insurance is a must, if you can afford it—otherwise you have to wait years to go to the public hospital. I find that I'll do without a holiday or something else, but I will pay for health insurance.*[47]

Hospital Discharge

Hospitals are a key component of the health care system. Older people have a higher rate of admission to hospital than the general population, accounting for 33 per cent of admissions, while comprising only 12 per cent of the population.[48] The length of the stay at hospital also increases with age. Older patients stay on average for 5.3 days, compared to 3.7 days across all age groups.[49]

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[45] Australian Bureau of Statistics, 'Private health insurance'.

[46] Consultation with Sue Field and Carolyn Sappideen, Elder Law Centre, University of Western Sydney, 10 September 2003.

[47] Combined Pensioners and Superannuants Association focus group, Sydney, 10 September 2003.

[48] Australian Institute of Health and Welfare, *Older Australia at a Glance*, p. 64.

[49] Australian Institute of Health and Welfare, *Older Australia at a Glance*, p. 65.

In recent years there has been a system-wide shift to earlier discharge from hospital, creating a high level of consumer concern, with extensive anecdotal evidence of gaps in the continuity of care.[50] For example, there has been an increase of same day hospital stays between 1996 and 2001, and an overall decrease in the length of hospital stay for all ages, including older people.[51] Discharge policies directly impact on health outcomes, quality of life and the ability of patients to return to the community.

The NSW Council of Social Service (NCOSS), in their submission to the NSW Department of Health on effective discharge planning, highlighted some consequences from early discharge practice:

- creation of new care needs
- increased demand for families and friends who act as carers
- poor communication and coordination between medical staff and hospital staff
- addition to existing pressure on community care providers, with a lack of clarity over which government agency is responsible for providing care to those who have been discharged
- creation of consumer pressures to improve level of care service provided to the community.

The need for effective discharge planning

The NSW Department of Health defines effective discharge as:

> [p]lacing the patient at the centre of the discharge process. It promotes continuity of care through adequate information and communication flow between patients, carers and service providers to ensure optimum health outcomes for patients.[52]

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[50] The Council of Social Service of NSW (NCOSS), *Effective Discharge Planning*, Submission to NSW Health, May 2001. Available at <http://www.ncoss.org.au/bookshelf/health/submissions/0105_early_discharge.pdf> (Last accessed 26 September 2003).

[51] Australian Institute of Health and Welfare, *Older Australia at a Glance*, p. 65.

Gaps in discharge management practices and identified common barriers to effective discharge present particular difficulties for aged patients. An audit of discharge practices in Victorian hospitals in 2000, identified the following general barriers to effective discharge:

- poor communication and coordination between medical staff, GPs and hospital staff in discharge planning
- lack of community health and welfare services
- lack of accommodation for aged patients
- attitudes and expectations of patients and their carers.[53]

The lack of communication and coordination of services after discharge was the major area of concern, particularly for older people and their quality of life outcomes. There has been no comparable study in NSW examining common barriers to effective discharge. A 1998 study of adverse events within Australian general practice found that one of the major contributing factors to adverse events was poor communication between health professionals including clinical information about the outcomes of hospital referrals or admissions and the expected role of GPs in post discharge care.[54]

Lack of resources presents as a major factor in influencing early discharge policies, with the shortage of beds in NSW hospitals creating a perceived pressure for hospitals to discharge older patients. This was highlighted in one of the focus groups as a major concern for older people, particularly in relation to outcomes of quality care.

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[52] NSW Department of Health, *Shared Responsibility for Patient Care between hospitals and the Community — an effective discharge policy*, July 2001, p. 3. Available at <http://www.health.nsw.gov.au/policy/gap/publications/pdf/discharge_policy.pdf> (Last accessed 17 December 2003).

[53] KPMG Consulting, *Department of Human Services Second Effective Discharge Patient Recore Audit — Final Revised Report*, August 2001. Available at <http://www.health.vic.gov.au/discharge/ > (Last accessed 17 December 2003).

[54] Bhasale, A.L., Miller, G.C., Reid, S.E. and Britt, H.C., 'Analysing Potential Harm in Australian General Practice: An incident-monitoring study', *Medical Journal of Australia*, vol. 169, n.2, 1998, pp. 74–76. Available at <http://www.mja.com.au/public/issues/jul20/bhasale/bhasale.html> (Last accessed 17 December 2003).

> *I've heard of people who have had a major operation and after 2 days, are sent home. You don't have the facilities a hospital has at home—something might happen—so I think people should be able to stay in hospital longer. They're supposed to give you home care, but they say that you should arrange when you're going home before you go into hospital—but you don't know what day you're going to leave when you go into hospital.*[55]

Inadequate resources to various community support programs has also meant that many patients face lengthy delays in accessing much needed community care programs (such as accommodation).

In their review of re-admission of elderly patients to hospital, Tierney and Worth identify a number of factors that could aid in implementing effective discharge policy:

- effective discharge preparation and timely discharge
- timely and adequate information to the GP
- sufficient nursing and social services support
- attention to the needs of the carer and person.[56]

While NSW Health has written policies and new initiatives relating to effective discharge planning in NSW hospitals there still needs to be effective monitoring of such practices to ensure that older people have access to adequate quality care.

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[55] Combined Pensioners and Superannuants Association focus group participant, Sydney, 10 September 2003.

[56] Tierney, A. and Worthy, A., 'Review: re-admission of elderly patients to hospital', *Age and Ageing*, vol. 24, n.2, March 1995, pp. 163–166.

Medication misuse

According to Australian Bureau of Statistics, 12.5 million people (69 per cent of the Australian population) had used some form of medication in the previous two weeks prior to being surveyed, 36 per cent of which were prescribed medicines.[57] The level of medication use increases with age, with approximately 86 per cent of people aged over 65 using medication, compared with 59 per cent for the general public.[58] The relatively higher use of medicines by older people can be attributed to their higher rates of chronic illness. Older people are also more likely to take multiple medications, with over 20 per cent of older people using more than four types of medicines,[59] thus increasing the risk of adverse drug reactions. Age-related changes of the body, such as loss of vision and hearing can affect the ability to follow correct dosages.

Legal issues relating to medication misuse

The legal issues of medication misuse identified in this project are discussed in turn below.

Lack of access to relevant information

The lack of knowledge and education regarding the use of medication for older people was identified as an issue in health service delivery, and in response to this, the Combined Pensioners and Supperannuants Association initiated a project called "The Medicine Information Persons Project." This project encompasses the training of volunteers to be Medicine Information People (MIPs). The MIPs provide support, education and information to other older people about the proper use of medicines. They act as peer

[57] Australian Bureau of Statistics, 'The Use of medication', *Australian Social Trends 1998*, Catalogue n.4102.0, Australian Bureau of Statistics, Canberra, 1998. Available at <http://www.abs.gov.au/ausstats/abs@.nsf/0/1F17401B0D5B9572CA2569AD000402AF?Open> (Last accessed 26 September 2003).

[58] Australian Institute of Health and Welfare, *Older Australia at a Glance*, p. 70.

[59] Australian Institute of Health and Welfare, *Older Australia at a Glance*, p. 70.

educators and advocates who go out into the community to educate other older people. According to one MIPs volunteer:

> I'm trying to educate older people about how to use medicines wisely because most of the elderly people can't express themselves to the doctors or the pharmacists—I'm trying to emphasise that it is their body and they have to ask questions so that they know what their rights are when they go into hospital or to see the doctor.[60]

Poor communication between doctors and older people

One consultation[61] suggested that there is a general lack of communication between older people and health care providers regarding information about older people, with older people often being described as passive health consumers who "blindly" accept information provided and are reluctant to question doctors. It was further suggested that this problem results partly from a mindset among older people that "doctors know best", and also partly from health care providers failing to properly communicate and educate their patients.

> *When I go to the doctor, the moment I enter the room the doctor asks me what sort of prescriptions I want, which is wrong because you don't go to the doctor simply for repeat prescriptions—you want to talk to the doctor.*[62]

One of the focus groups identified that time constraints with GPs prevent a proper discussion of the purpose and use of medication, due to the amount of time and patience needed to explain instructions to older people.[63]

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[60] Combined Pensioners and Superannuants Association focus group participant, Sydney, 10 September 2003.

[61] Consultation with Julie Letts, NSW Department of Health, 19 August 2003.

[62] Combined Pensioners and Superannuants Association focus group, Sydney, 10 September 2003.

[63] Combined Pensioners and Superannuants Association focus group, Sydney, 10 September 2003.

However, recent studies have shown that where older people were given education about their treatment and encouraged to participate in managing their medication, their understanding of their medication was improved.[64] Similarly, GP involvement with older patients also improved medication quality and safety. The Council on The Ageing (COTA) further emphasises the importance of this communication:

> Older people should be fully involved in all aspects of their health consultation and care, including information and discussion around their diagnosis and treatment options.[65]

Lack of access to medical records

According to the Council on the Ageing, an older person's access to their medical records is necessary, not only in protecting their rights, but also in informing and involving the older person in their continuing care. It expressed that such access would greatly assist GPs at admission to hospital, as well as acting as an aid in the appropriate use of their medicines.[66]

Available advocacy and assistance services

Several of the health related issues which have been identified have a strong consumer rights focus. The mechanisms available to address these consumer oriented issues are identified below.

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[64] Chan, D., *Helping Older People to Manage their Medicines*, May 31 2002. Available at <http://www.archi.net.au/document/index.phtml/id/2126/topic_id/206> (Last accessed 17 December 2003).

[65] Le Bris, 'How older people define quality care', *Health Investigator: Journal of the Health Care Complaints Commission*, vol. 1, n.8, June 1999.

[66] Council on the Ageing (Australia), *Submission to the Department of Health and Aged Care: Better Medication Management System Bill*, 2001, p. 5. Available at <http://www.cota.org.au/bmmsbill.htm> (Last accessed 26 September 2003).

Complaint Mechanisms

The Health Care Complaints Commission[67]

The NSW Health Care Complaints Commission (HCCC) provides people with a means of making a complaint about health care practitioners and health care services, and to have their complaints handled by an independent organisation. Complaints must be in writing.

The HCCC has the power to investigate any complaint when:

- it concerns an important public health and safety issue
- it raises significant questions about the care and treatment provided by a health care practitioner
- disciplinary action against a health care practitioner may be required
- a health registration authority, such as the Chiropractors Board, believes that a complaint should be investigated.[68]

In accessing the complaints, it has the power to:

- refer the complaint for conciliation with the consent of all parties
- refer the complainant to the Commission's Patient Support service for assisted resolution
- refer the complaint to another organisation or person for investigation
- refer the complaint to registration boards, practitioners and employers for investigation
- investigate the complaint
- decline to deal with the complaint.

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[67] See <www.hccc.nsw.gov.au> (Last accessed 17 December 2003).

[68] Health Care Complaints Commission, *The Complaint Guide*, p. 7. Available at <http://www.hccc.nsw.gov.au/hccc/pdf/complaints.pdf.> (Last accessed 5 August 2003).

According to the HCCC's Annual Report for 2001–2002, approximately 108 complainants were aged over 60, which represented 25 per cent of the complainant profile for that period.[69]

The HCCC can deal with a wide range of complaints including incorrect prescribing, inadequate diagnosis, lack of communication and unprofessional conduct. The HCCC will then investigate the matter and may refer the complaint for conciliation, to the Patient Support Service for assisted resolution or to another organisation.

Internal hospital complaints

For hospital complaints, there are delegated employees in many hospitals whose role is to investigate and mediate complaints by consumers. They are known under various titles such as Patient Advocate or Patient's Friend.

Barriers for older people in accessing complaint mechanisms

Reluctance of older people to initiate complaints

One of the identified barriers to using complaint mechanisms is their emphasis on placing the responsibility of enforcement of rights onto the consumer. This barrier is of particular concern for older people, with significant anecdotal evidence and research highlighting the reluctance of older people to complain.[70] Many older people fear that by complaining they will be subjected to some form of retribution.[71] This is particularly the case for older people in nursing homes, as often they are dependent on the carers to provide day-to-day care, and they fear that complaining would put their health in further jeopardy (see Chapter 4, *Accommodation*).

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[69] Health Care Complaints Commission, *Annual Report, 2001–2002*, Health Care Complaints Commission, Sydney, 2002.

[70] McCullough, S., 'Aged Care — A Victorian perspective on complaints handling and the enforcement of consumer rights', *Alternative Law Journal*, vol. 27, n.2, 2002, p. 60.

[71] McCullough, S., 'Aged Care — A Victorian perspective', *Alternative Law Journal*, vol. 27, n.2, 2002.

> I fear that especially in nursing homes, they just can't complain—they are afraid of talking, because they may get in trouble with the nursing home, and it will be a lot worse for them when they find out—that's why they are scared to talk even with their relatives about it.[72]

Adding to that, is the recognition that

> … aged care providers, distinct from many other goods and services providers, do not have the incentive of "retaining satisfied customers and building loyalty," because most consumers have nowhere else to go—that is, demand greatly exceeds supply.[73]

The unequal power relations between aged care providers and consumers is caused by the lack of accommodation facilities in the aged care sector, with many older people forced on to waiting lists to gain access into some form of accommodation. With such demand, older people (and especially their families) are more intent on retaining and securing their position in accommodation, than in enforcing their rights.[74]

It has also been expressed that such a complaints system is an inappropriate mechanism for older people.

> [For older people] life experiences were forged during the depression. Life treated people extremely badly and harshly; there was 30 per cent unemployment and great insecurity. As a generation, they knew two world wars—so they're a generation that has learnt not to complain. It's the wrong mechanism. Consumer rights and grievance mechanisms seeking redress is an alien concept.[75]

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[72] Combined Pensioners and Superannuants Association focus group participant, Sydney,10 September 2003.

[73] McCullough, 'Aged Care — A Victorian perspective', *Alternative Law Journal*, vol. 27, n.2, 2002, p. 60.

[74] Consultation with Sue Field and Carolyn Sappideen, Elder Law Centre, University of Western Sydney, 10 September 2003.

[75] Consultation with Professor Terry Carney, Head of Research, School of Law, Sydney University, 8 August 2003.

Issues such as lack of confidence to speak up, reluctance to challenge authority, isolation and failure to understand the system, are other factors that act as barriers to using such complaint mechanisms.

Lack of systemic change

Given the issues such as fear of retribution and reluctance to complain, there is a need to put responsibility of enforcing older people's rights onto service providers. A criticism of complaints mechanisms such as those mentioned above is their emphasis on the individual, rather than on organisational or cultural change. Even when a complaint is registered, the emphasis on resolving the complaint is on mediation and resolution, thus failing to uncover any organisational and systemic problems. The need for systemic change was raised in one consultation.

> Is the answer to educate older people to use an inappropriate mechanism for their generation? No, it's not—that's victim blaming. Rather the answer lies in changing the culture of the professional, of the administrator, of the organisation.[76]

Similarly, it was argued that law reform initiatives should take in those considerations.

> If you're going to use law in recommendations, then you need to recognise that their role is to somehow create the incentives for organisations to embrace some of those measures of cultural change.[77]

[76] Consultation with Professor Terry Carney, Head of Research, School of Law, Sydney University, 8 August 2003.

[77] Consultation with Professor Terry Carney, Head of Research, School of Law, Sydney University, 8 August 2003.

Advocacy services

Patient Support Office advocacy

The Patient Support Office is a service set up by the HCCC as an alternative to formal complaints-handling mechanisms and complements the complaint-handling options available to the Commission. Patient Support Officers (PSOs) act as advocates for people by helping identify issues of concern (including legal and consumer issues), providing information about health rights and providing direct assistance to resolve concerns. This can range from accompanying an older person to see their doctor and facilitating discussion, drafting letters, and arranging and attending meetings between consumers and service providers.[78]

The use of an advocate is highly beneficial, particularly for older people, given that they are less likely to rely on formal complaint mechanisms to address their concerns.[79] PSOs operate on the basis of advocacy and empowerment, so that older people are supported while being able to participate and be involved in the negotiation process. An example of how a PSO can aid in resolving an issue is demonstrated in the following case study.

The daughter of an 83 year old dementia sufferer of non-English speaking background contacted the PSO to report concerns that her mother had sustained facial bruising while attending a dementia day care centre. She was fearful that her mother may have been assaulted at the centre. Meetings were held with the client, director of community health, team leader of the facility and the PSO to discuss concerns. Community health management investigated the matter at the

[78] See <http://www.hccc.nsw.gov.au/hccc/psoffice.html> (Last accessed 17 December 2003).

[79] McCullough, 'Aged Care — A Victorian perspective', *Alternative Law Journal*, vol. 27, n.2, 2002, p. 60.

client's request. The investigation resulted in implementation of a number of changes, including increased staff supervision of the outdoor area of the day care centre and development of policy on documenting and reporting injuries.[80]

Medical Information Persons (MIPs)

The Combined Pensioners and Supperannuants Association trains volunteers in various issues and programs relating to aged care, including working as community advocates by acting as peer educators. One of these programs is the "Medicine Information Persons Project", which seeks to provide education and support to older people about the use of medicines and their health rights.[81] One of the major issues highlighted by the MIPs was the overwhelming lack of knowledge and information available for older people. They found that the best way of educating older people was to physically go out into the community and talk to them in an informal manner.[82]

People with Disabilities (NSW) Inc also raised the need for more advocates.

> There is a real need for advocacy that is proactive—it can't wait for older people to make complaints—it has to go in there and dig out the issues and bring them out.[83]

[80] 'Patient Support Office helping people with dementia', *Health Investigator: Journal of the Health Care Complaints Commission*, vol. 1, n.5, September 1998. Available at <http://www.hccc.nsw.gov.au/hccc/Health%20Investigator%20Vol%201%20No%205.htm#pso> (Last accessed 17 December 2003).

[81] Combined Pensioners and Superannuants Association focus group, Sydney, 10 September 2003.

[82] See above, Medication misuse, *Lack of access to relevant information*, p. 169.

[83] Consultation with Matthew Keely and Digby Hughes, People With Disabilities (NSW) Inc., 12 August 2003.

Legal Advocacy Services

The NSW Aged Care Rights Service (TARS) provides the only specialist legal advocacy service for older people in NSW. It is specifically aimed at residents of Commonwealth funded residential aged care facilities in NSW, and provides legal advice as well as information telephone services and workshops for residents (for a more detailed description of TARS, see Chapter 4, Accommodation). There are no other specialist legal advocacy services to assist older people in NSW in relation to health related legal issues. This has caused a high demand for TARS' services, which limits its capacity to provide information to residents and other older people on their rights. This issue was further emphasised by People With Disabilities (NSW) Inc.

> In terms of legal services—there isn't much expertise in the area. Your community legal centres operate geographically or are specialist. Those that are geographically located are generalist, and when faced with an elder law issue, will say "I can't help you with that matter" and will refer them to TARS, who simply do not have the resources to deal with the workload—the specialist ones will do the same.[84]

The lack of a specialist legal advocacy service was also seen as a concern by the CPSA.

> We need a separate advocate. There should be a lawyer going around the community and giving information like we do for the Medicine Information Persons project. Older people don't really know about their rights or what they are—TARS people talk about housing only.[85]

In terms of aged care facilities providing adequate service to older people, the importance of adopting a holistic and cross-collaborative approach amongst service providers was stressed.

> … there is clearly, a huge area of unmet need and there is still a lot of work from the point of view of a whole lot of disciplines such as law,

[84] Consultation with Matthew Keely and Digby Hughes, People With Disabilities (NSW) Inc., 12 August 2003.

[85] Combined Pensioners and Superannuants Association focus group, Sydney, 10 September 2003.

management and quality assurance in terms of meeting older people's needs. So what there is, is a lack of cross-fertilisation across the organisations…[86]

Older people and disability

The probability of a person developing a disability increases with age, from 21 per cent for those aged 35–64 years, to 84 per cent for those aged 85 and over.[87] As a result of the ageing of the general population, the population with a disability is also ageing, with the proportion of those aged 75 and over with a disability increasing from 66 per cent in 1981, to 73 per cent in 1998.[88] Nearly all older people in care accommodation have a disability (97 per cent), and most have a profound core activity restriction (82 per cent).[89] Accordingly, support services and program policies in the area of disability are important issues for older people.

Needs for older people with a disability

Current trends in community attitudes and government policies have seen a move away from institutionalisation to an increased focus on community and home care for people with disabilities. Older people with disabilities have particular health care needs and are likely to need assistance in everyday living activities, due to increased mobility restrictions and self-

[86] Consultation with Matthew Keely and Digby Hughes, People With Disabilities (NSW) Inc, 12 August 2003.

[87] Australian Bureau of Statistics, *Disability, Ageing and Carers*, Catalogue n.4430, 1999. Available at <http://www.abs.gov.au/Ausstats/abs@.nsf/b06660592430724fca2568b5007b8619/c258c88a7aa5a87eca2568a9001393e8!OpenDocument> (Last accessed 24 September 2003).

[88] Australian Institute of Health and Welfare, *Disability and ageing: Australian population patterns and implications*, AIHW cat. no. DIS 19, Australian Institute of Health and Welfare, Canberra, 2000, p. xviii. Available at <http://www.aihw.gov.au/publications/index.cfm?type=list&id=0&criteria=disability+and+ageing&requestTimeout=1000> (Last accessed 18 December 2003).

[89] Australian Institute of Health and Welfare, *Disability and ageing*.

care restrictions.[90] In particular, older people are more likely to develop degenerative-related impairments, such as physical restricting impairments and age related cognitive disorders (i.e. dementia).[91] There is consequently an increased demand for carers and support services, which is likely to affect the future availability of informal care.[92]

While there are some needs that are common to older people with a late onset of disability and those with an early onset of disability,[93] the latter group are a more vulnerable group within the aged population. Whereas most people will not experience disability until late in life, people with an early onset disability experience an earlier and pronounced decline in function than others of a similar age and thus have higher support needs at an earlier age than older people generally.[94] "Secondary disability" or health complications can also arise as a result of the long-term effects of disability itself, thus requiring access to intensive services at an earlier age.[95]

There are important differences and needs between older people with a late onset of disability, and those with an early onset of disability. Some of the distinct needs of older people with a longstanding disability are:

- they are more likely to have low levels of functional ability, which is often the main reason they require care
- they are less likely to use community services and facilities or participate in community activities without assistance

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[90] Australian Bureau of Statistics, 'Health of Older People'.

[91] Australian Bureau of Statistics, 'Disability among adults', *Australian Social Trends 2001*, Catalogue n.4102.0, Australian Bureau of Statistics, Canberra, 2001. Available at <http://www.abs.gov.au/ausstats/abs@.nsf/0/99D78F1319336C9ECA256BCD00825573?Open&Highlight=0,disabilities> (Last accessed 12 October 2003).

[92] Australian Institute of Health and Welfare, *Disability and ageing*, p. xxii.

[93] Australian Institute of Health and Welfare, *Disability and ageing* p. 44.

[94] Australian Institute of Health and Welfare, *Disability and ageing*, p. 45.

[95] NSW Industry Group on People Ageing With Disability, *Issues paper: People with a long-standing disability who are ageing*, October 2001, p. 2. Available at <http://66.102.7.104/search?q=cache:rYiTJweBwusJ:www.ncoss.org.au/bookshelf/disability/submissions0110_pwld_ageing.pdf+NSW+Industry+Group+on+People+Who+are+Ageing+with+a+Disability&hl=en&ie=UTF-8> (Last accessed 17 December 2003).

- they are more likely to have low levels of education
- they are more likely to live in residential care and less likely to live alone or live with their families
- they are less likely to have good social networks outside the family or their place of residence
- many have difficulty expressing their needs or may require assistance to identify their needs
- they are less likely to use community services and facilities or participate in community activities without assistance.[96]

Access to services for older people with disabilities

Compared to older people in general, for older people with a disability, access to health and legal services presents an even greater challenge. People With Disabilities (NSW) Inc. commented on the particular vulnerability of older people with disabilities.

> Those who are older and have a disability are those that are the most vulnerable and real barriers do exist, especially for those who live in boarding homes or nursing homes, as the majority of them will have a disability. If you are old and don't have a disability, there will still be barriers to your legal access, but not as great as those for people with a disability.[97]

Other issues such as physical accessibility to facilities (for example, workplaces), and access to information were also identified as barriers to older people with a disability in accessing services.[98] The move towards online information, whilst beneficial for a significant proportion of the

[96] NSW Industry Group on People Ageing with Disability, *Issues paper: People with a long-standing disability who are ageing*, p. 46.

[97] Consultation with Matthew Keely and Digby Hughes, People With Disabilities (NSW) Inc, 12 August 2003.

[98] NSW Industry Group on People Ageing With Disability, *Issues paper: People with a long-standing disability who are ageing*, p. 6.

population, remains largely inaccessible for older people in general as well as for those ageing with a disability.

> The move to computerisation has been fantastic for those who have actually kept up to it—but a lot of older people in general, and a lot of older people with a disability, aren't able to access computer information.[99]

Some factors that impact on the accessibility of information online are:

- older people with visual impairments—this can include eyesight problems related to ageing and colour blindness
- mobility issues: such as upper limb mobility and co-ordination problems
- cognitive impairment: mental impairment, poor literacy and learning problems such as dyslexia.

Attitudinal barriers

The NSW Industry Group on People Ageing with a Disability in their draft position paper, identified attitudinal problems as a barrier for older people with a disability to access services within the aged care and disability sector.[100] While this has been identified as a significant barrier for older people in general, for people with a longstanding disability who are ageing, access to aged care services can be made even more difficult by the attitudes of staff to people with a disability.[101] This may indicate a need for specific legal services for older people with disabilities.

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[99] Consultation with Matthew Keely and Digby Hughes, People With Disabilities (NSW) Inc., 12 August 2003.

[100] NSW Industry Group on People Ageing With Disability, *Cross-sector Position Paper: People with Disability who are Ageing (Draft)*, March 2003, p. 8. Available at <http://66.102.7.104/search?q=cache:Ge5J0QDbLs8J:www.ncoss.org.au/bookshelf/disability/submissions/0305_ageingwithdisability.pdf+Cross-Sector+Position+Paper:+People+With+Disability+Who+Are+Ageing&hl=en&ie=UTF-8> (last accessed 17 February 2003).

[101] NSW Industry Group on People Ageing With Disability, *Cross-sector Position Paper*, p. 8.

> The disability sector will often say, "Well they're an aged person" and refer them to the aged sector, while the aged sector will say they belong to the disability sector. And so the person falls through the gaps. It's not a deliberate policy, but it has happened.[102]

Costs

The cost involved in accessing health care and other legal services is a major concern for older people, that is intensified with the presence of disability. More specifically, older people with an early onset of disability are disadvantaged as a result of their reduced participation in the workforce, (with 65.3 per cent of the disabled population not in the labour force),[103] which consequently reduces the possibility for savings and superannuation.[104] The diminished financial capacity for older people with a longstanding disability is further emphasised with the extra cost of disability incurred throughout their lives and an increased dependence on government pensions (such as the Disability Support Pension)[105] as a major source of income. Women ageing with a disability are seen as particularly vulnerable, as they are less likely to participate in the labour force, are less likely to work full time and earn a lesser amount than men (84% of male employees).[106]

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[102] Consultation with Matthew Keely and Digby Hughes, People with Disabilities (NSW) Inc., 12 August 2003.

[103] Bradbury, B., Norris, K. and Abello, D., *Socio-Economic Disadvantage and the Prevalence of Disability*, Social Policy Research Centre, UNSW, Sydney, 2001, p. 21.

[104] NSW Industry Group on People Ageing With Disability, *Issues paper: People with a long-standing disability who are ageing*, p. 7.

[105] Australian Bureau of Statistics,'Trends in Disability Support', *Australian Social Trends 2002*, Catalogue n.4102.0, Australian Bureau of Statistics, Canberra, 2002. Available at <http://www.abs.gov.au/ausstats/abs@.nsf/0/AA8061B752495C35CA256BCD0082730A?Open> (Last accessed 17 December 2003).

[106] Bradbury et al., *Socio-Economic Disadvantage and the Prevalence of Disability*, p. 1.

Conclusion

Given that older people are more susceptible to illness and disability than any other age group, health-related legal issues become a predominant concern. The issues of access and quality of health services, inappropriate hospital discharge practices, and medication misuse, reflect broader concerns about patient's rights as consumers of health services. Certain cohort characteristics of older people, such as their reluctance to question, complain and challenge the authority of doctors and health service providers, act as barriers to protecting and enforcing these basic patient rights. These barriers have significant implications for the effectiveness of current complaint and legal mechanisms, where the onus of enforcing rights falls on the individual.

An identified source of health related consumer issues for older people is the poor quality of communication between health service providers and older people. Attitudinal stereotypes, cohort factors and lack of access to information all contribute to such difficulties. Advance health care directives are one mechanism which focus on discussion and involving the older person.

Older people with a longstanding disability are a particularly vulnerable group within the aged population. Health complications are intensified as a result of the long-term effects of disability, and access to services are made more difficult due to the lack of cross-collaboration of disability and aged care sectors.

Like many other consumer related issues, the mechanisms available to address health-related legal issues rely on the aggrieved party to be sufficiently motivated, confident and aware of the relevant complaint processes, to initiate a complaint. It is therefore important that the available mechanisms and services to address health-related legal issues are accessible and appropriate to older people, and are able to specifically cater to their needs.

6. Financial and Consumer Issues

Introduction

The move from work to retirement constitutes a significant change in lifestyle. Financial planning issues can loom large for people at this time. Not all of those with superannuation funds will have the knowledge to make financial decisions that will optimise their living standard for the rest of their lives. Those without superannuation face a significant drop in income and change in lifestyle, and may, for the first time in their lives, need to access government pensions and allowances.

This chapter examines a range of financial and consumer issues that affect older people, including pensions, superannuation, banking, credit and debt, and issues related to financial planning and advice. The chapter includes discussion of sources of assistance and advice, and mechanisms for appeal and complaint in cases where problems arise.

Social Security and Veterans' Pensions

At mid-2001, an estimated 80 per cent of older people in NSW were receiving government pensions or benefits.[1] These pensions or benefits are the responsibility of the Commonwealth Government, and are paid either by Centrelink under the *Social Security Act 1991* (Cth), or by the Department of Veterans Affairs (DVA) under the *Veterans Entitlement Act 1986* (Cth).

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[1] Australian Bureau of Statistics, 2001 Census Basic Community Profile, NSW, Table B03; Department of Family and Community Services, March 2001 data, unpublished; Department of Veterans' Affairs, Annual report 2000–2001, June 2001 data, Tables 15 and 73.

In addition to the basic rate of Age Pension, an older single person or couple is entitled to a Pharmaceutical Allowance, and may be eligible for Telephone Allowance, Rent Assistance and Remote Area Allowance. Age pensioners are also eligible for the pensioner concession card, which gives them access to various concessions from Commonwealth, State and Local Government and private businesses.

The Service Pension rates are the same as for Age Pension. The *Veterans Entitlement Act* also provides for Disability and War Widows'/Widowers' Pensions (for those whose spouse died as a result of war service), which are not means tested. There are various rates of Disability Pension, depending on the severity of war injuries. It is paid in addition to Age or Service Pensions. Recipients of the Service Pension are eligible for a means tested Income Support Supplement and may be eligible for a number of additional allowances, such as home help, free convalescent and respite accommodation, as well as generous health cover.

Problems encountered by older people

In a study of older people and the law undertaken in Victoria by the Consumer Law Centre of Victoria (CLCV) in 1994, 20 per cent of respondents reported having experienced problems with Social Security (the third most common problem experienced by survey participants), and four per cent had experienced problems with veterans' pensions.[2] While the differences in the number of problems experienced can be attributed in part to the smaller number of people receiving a veterans' pension, the study found that older people had different experiences in dealing with the two departments.

> One woman stated that "Veterans' Affairs looks after us very nicely"…there is a clear discrepancy in the way both entitlements are perceived by older people…Problems were sometimes raised about the

[2] McCullough, S., Older People and the Law, Consumer Law Centre of Victoria Ltd, Melbourne, 1995, Table 4.4.1.

> [then] Department of Social Security (DSS) missing payments of pensions, wrongly deducting money, and giving false or misleading information or advice.[3]

Specific issues raised are discussed below.

Eligibility Rules

The Age Pension is currently available to men aged 65 and over and, depending on their year of birth, to women aged 62 and over.[4]

The rules governing eligibility for the age pension are considerably simpler than those for other social security payments, which require judgements to be made on family relationships, disability, caring responsibilities or compliance with activity test requirements. Contributors to this study expressed positive views of Centrelink and the age pension.

> Most seem pretty happy with the service…. age pensioners generally seem to get better treatment than other income support recipients. Nevertheless, some people are frightened of Centrelink letters, particularly if they are from foreign cultures or cannot read English. People who have never dealt with Centrelink before find it very intrusive.[5]

The rules governing eligibility for Veterans' Affairs pensions are more complex. Service Pensions are payable to veterans with qualifying service, their partners, and widows and widowers, at ages five years earlier than the age pension, or if they are permanently blind or unable to work.[6]

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[3] McCullough, S., Older People and the Law, 1995, p. 54.

[4] The exception is people with less than 10 years qualifying residence in Australia, except in certain circumstances. The threshhold age for women to receive the age pension is being gradually increased to 65.

[5] Consultation with Gerard Thomas, Policy Officer, Welfare Rights Centre (NSW), 10 December 2002.

[6] Qualifying service generally means that a person has 'served in operations against the enemy whilst in danger from hostile forces of the enemy'; Department of Veterans' Affairs Fact Sheets No XX, IS1, Service Pension and Income Support Supplement, and DP60: War Widow(er)s/Orphans, <www.dva.gov.au/factsheets/default.htm> (Last accessed on 2 December 2002).

Eligibility for War Widows'/Widowers' and Disability Pensions involves complex questions about the level of disability and/or the extent to which it was war-caused. Seventy five per cent of decisions reviewed by the Veterans' Review Board involved questions of whether the veteran's death or injury was war or defence caused, with 24 percent of decisions on entitlement being set aside.[7]

Income and assets tests

Age and Service Pensions, like other income support payments, are subject to income and assets tests. The income and assets tests can be challenging for those with retirement savings, superannuation or assets, as different investment arrangements yield different pension assessments. Pensioners must report any changes in the value of an asset, which may require obtaining a professional valuation. Some age pensioners are reluctant to maximise their income because they could lose part of their pension, or lose access to the Pensioner Concession Card.

People approaching pension age who have held an interest in a farm may not be aware that there are particular rules relating to giving away their farm or relevant farm assets, which may affect their pension entitlement.[8]

> A couple of years ago the government brought in special rules for people to gift a farm and maintain eligibility for the aged pension, but they have now revoked the law. This raises many issues about gifting and how it can impact on the rights to the aged pension. Many older people do not know about it.[9]

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[7] Veterans Review Board, Annual Report 2002–03, Commonwealth of Australia, Canberra, 2003, Table 6, p. 29.

[8] Section 1185B, Social Security Act 1991 (Cth).

[9] Consultation with the NSW Committee on Ageing, Department of Ageing, Disability and Home Care, 9 September, 2002.

In the case of couples, income and assets are pooled. A person might not qualify for a pension, or a full rate of pension, if his or her partner has higher income or assets. This condition can be a source of problems for women trying to get out of domestic violence situations, particularly where there is financial abuse, they are remaining 'under the same roof' and cannot establish that they are living 'separately'.[10]

The assessment of income and assets can also entail complex interactions with the tax system. In the 1994 CLCV Victorian study of problems experienced by older people in Victoria, 15 per cent of respondents had experienced taxation problems.[11]

Errors and overpayments

The complicated nature of the rules for assessing income and assets, and the ensuing complexity of financial arrangements, give rise to significant levels of error on the part of both Centrelink and claimants. An Auditor-General's review of assessment of age pension claims in 2000–2001 found a 52 per cent error rate for new claims for age pension. Quantifiable errors impacting directly on payment were assessed at 28 per cent. These included payment rate errors, payment from the wrong date, and claims for the Age Pension or Telephone Allowance rejected or accepted inappropriately.[12]

A second Audit report of Centrelink's own performance monitoring system reported that:

> According to the 2000–01 Age Pension Random Sample Survey undertaken by FaCS and Centrelink, 28 per cent of age pensioners were receiving an incorrect entitlement. The error was attributed to the

[10] Consultation with Meredith Osborne, Blue Mountains Community Legal Centre, 23 September 2002.

[11] McCullough, S., Older People and the Law, 1995, Table 4.4.1.

[12] Australian National Audit Office, Audit Report No. 34 2000–01, Performance Audit: Assessment of New Claims for the Age Pension by Centrelink, Commonwealth of Australia, Canberra, 2001, pp. 20–21.

> following sources: 13 per cent customer error, one per cent Centrelink error, two per cent Centrelink and Customer error, and 12 per cent other causes.[13]

The incorrect payments reported illustrate the need for pensioners to have a sound understanding of the assessment procedures and the system of appeal in the case of incorrect decisions. This is illustrated in the following anecdotal evidence:

> Many women on part pensions could not understand how their pension level had been arrived at by the Department of Social Security. A number of respondents expressed their frustration and dissatisfaction with the formula used to treat certain investments.[14]

and

> Occasionally we get calls about problems with Centrelink assessment of income and assets. I met a chap and his mother in Brisbane…. and found that Centrelink had been counting one asset twice. They had not been able to identify where the error was.[15]

A further area in which people reported problems was overpayment of pensions following the death of a pensioner.

> I had no idea when pension day was but we always got it on a Wednesday and mum died at 8.30 on a Wednesday night. Centrelink said they wanted the pension back. If mum had had the good grace to wait another four hours she could have had the pension. I had no idea that Thursday was pension day.[16]

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[13] Australian National Audit Office, Audit Report No.17 2002–03, Age Pension Entitlements, Commonwealth of Australia, Canberra, 2002, pp. 16–17.

[14] Older Women's Nework, Difficult Decisions — Older Women talk about money, life and retirement, 2001, p. 21.

[15] Older Women's Nework, Difficult Decisions — Older Women talk about money, life and retirement, 2001, p21.

[16] Eric Calloway House Nursing Home focus group, Sydney, 21 October 2002.

Getting advice and assistance

In the CLCV Victorian study 49 per cent of respondents with social security problems and 70 per cent of respondents with problems related to veterans' pensions sought assistance.[17]

Further respondents who approached the (then) Department of Social Security (DSS) directly for help did not always find DSS helpful.

> Concerns were also voiced about the difficulty of negotiating with the DSS or complaining to it. Some of these difficulties were because of the attitudes of DSS staff (e.g. rudeness or brusqueness); some were because people just did not feel confident to complain; others were because people could not speak English fluently enough or at all and were unable access an interpreter.[18]

Welfare Rights Centre NSW[19]

The Welfare Rights Centre provides advice and assistance to help individuals exercise their rights, fulfil their obligations, and maximise their entitlements under the Australian social security system. The Centre can help people by advising them of their rights and entitlements, and assisting them to appeal against Centrelink decisions. The Centre also undertakes law reform and lobbying, as well as community development, community education and training.

Twenty per cent of Welfare Rights clients are aged 50 or over.[20] Suggested reasons as to why older people may not approach the centre for assistance include:

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[17] McCullough, S., Older People and the Law, 1995, Table4.5.1.

[18] McCullough, S., Older People and the Law, 1995, p. 54.

[19] Information taken from Welfare Rights Centre website: <http://www.welfarerights.org.au/> (Last accessed December 2003).

[20] Consultation with Gerard Thomas, Policy Officer, Welfare Rights Centre (NSW), 10 December 2002.

- the simpler rules for obtaining the age pension, meaning that fewer errors arise
- lack of knowledge of the service
- older people's attitudes to complaining.

This is illustrated in the following:

> For older people, there might be an issue of awareness, and they might be put off by the name 'welfare'. Maybe its outreach and publicity activities are not targeted to the elderly. Older people have a general reluctance to complain about Government. This is because of fear of trouble, a general stoicism, a sense of the futility of complaining.[21]

Veterans Advocacy Service, Legal Aid NSW[22]

The Veterans Advocacy Service (VAS) is a unit of Legal Aid NSW that provides free legal advice about individuals' rights and entitlements under the *Veterans' Entitlements Act 1986*. Services provided include:

- lodging claims with DVA on behalf of individuals
- completing application forms and questionnaires in disability claims, pension assessments, service pensions and war widows' pension claims
- lodging appeals to the Veterans' Review Board (VRB) and the Administrative Appeals Tribunal (AAT)
- preparing the case once an appeal has been lodged and obtaining any necessary evidence including medical reports
- representation at the AAT hearing, and if necessary in higher courts (representation is not permitted at VRB hearings).

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[21] Consultation with Gerard Thomas, Policy Officer, Welfare Rights Centre (NSW), 10 December 2002.

[22] Information taken from Legal Aid NSW website, <http://www.lawlink.nsw.gov.au/lac/lac.nsf/pages/vas> (Last accessed December 2003).

The work of the VAS largely concerns issues of disability, rather than the more general issues of income and assets tests. Assistance for disability claims is subject to a merits test, but not subject to a means test. In cases involving income and assets tests, or the rate of pension payable, the Legal Aid means test guidelines apply, and can present barriers for some older people seeking assistance.[23]

Other sources of assistance

Concerns were expressed during this study that few legal and financial advisers are sufficiently familiar with the social security legislation, practice and appeals process to provide effective assistance to pensioners.

> Most advisers don't have a good knowledge of social security legislation. Most callers say they didn't get advice on how their investment choices would affect their pension.[24]

The *Social Security Act* also allows nominees to be appointed to act on a recipient's behalf where the recipient is not capable of managing his or her own affairs. As with other issues of substitute decision-making this requires the nominee to have an accurate knowledge of the person's financial arrangements. On occasions, the nominees may not understand Centrelink's requirements, leading to poor decision-making on behalf of the recipient.[25] There are also reports of inappropriate nominees being appointed, or nominees who do not act in the best interests of the recipient.[26] The issues associated with Centrelink nominees is discussed in more detail in Chapter 9, *Substitute decision-making and end of life issues*.

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[23] Information taken from Legal Aid NSW website, <http://www.lawlink.nsw.gov.au/lac/lac.nsf/pages/cvtappea> (Last accessed December 2003); Consultation with Veterans' Advocacy Service, Legal Aid NSW, 15 October 2002.

[24] Consultation with the National Information Centre on Retirement Investments, 1 December 2002.

[25] Centrelink, Submission to Stage 1, Law and Justice Foundation of NSW Access to Justice and Legal Needs Research Program, 15 January 2003.

[26] Creyke, R., Whose Pension is it? Substitute Payees for Mentally Incompetent Pensioners, (1991) 10 Universoty of Tasmania Law Review, 102 at pp. 106–112.

Some ex-service organisations and individuals also provide assistance and representation for applicants at VRB hearings. Most provide their services free, however some charge a fee.

Mechanisms for complaints, appeals and disputes

Both social security and veterans' benefit entitlement legislation provide for an appeal process against administrative decisions. The first formal step in this process is to complain to the original decision-maker for re-consideration, after which a complainant may seek internal review by Centrelink or the DVA.

Decisions by Centrelink officials can be appealed to the Social Security Appeals Tribunal (SSAT) once an internal review has been conducted. Depending on the nature of the decision in question, DVA appeals go to either the AAT or the VRB. AAT decisions can be appealed only on matters of law to the Federal Court.

Social Security Appeals Tribunal [27]

The SSAT is the first external level of review of Centrelink decisions, and is independent of Centrelink. It is able to affirm, vary or set aside Centrelink decisions.

The SSAT is able to review a range of decisions, including:

- the failure to grant a pension, benefit or allowance
- the rate of entitlement payable
- the suspension or cancellation of an entitlement
- the raising and recovery of overpayments.

[27] Social Security Appeals Tribunal, The Social Security Appeals Tribunal: A Guide, <http://www.ssat.gov.au/Internet/ssat.nsf/pubh/ssatguide.4.1> (Last accessed December 2003).

There is no cost in appealing to the SSAT. Cases are reviewed by a panel of at least two members. The SSAT will also pay for reasonable travel expenses and provide an interpreter if required. Hearings are private, informal, and designed to give the applicant an opportunity to explain their reasons for appealing. Legal representation is permitted, but not required, at SSAT hearings. Centrelink is not represented, and the Department's case is presented in a written submission.

Although age pensioners make up around 40 per cent of social security income support recipients, in 2002–2003 they represented only 10 per cent of cases to the SSAT.[28] In 2002–2003, the SSAT reviewed 996 age pension decisions, setting aside or varying the decision in 35 per cent of cases and affirming the decision in 51 per cent of cases.[29]

Veterans Review Board[30]

The VRB is an independent tribunal that reviews Repatriation Commission decisions on:

- claims for acceptance of injury or disease as war-caused or defence-caused
- claims for war widows', war widowers' and orphans' pensions
- assessment of pension rate for incapacity from war-caused or defence-caused injury or disease
- claims for the grant, or assessment of, attendant allowance.

The VRB does not impose any fees. DVA will pay an applicant's reasonable travel costs, and individuals can apply for reimbursement for the cost of

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[28] Social Security Appeals Tribunal, Annual Report 2002–2003, Commonwealth of Australia, Canberra, 2003, p. 61.

[29] Social Security Appeals Tribunal, Annual Report 2002–2003, Commonwealth of Australia, Canberra, 2003, p. 61. The other 14 per cent of cases were either withdrawn, dismissed or outside the SSAT's jurisdiction.

[30] Information taken from Veterans' Review Board website, <http://www.vrb.gov.au/>, (Last accessed December 2003).

obtaining medical evidence to support the appeal. Most cases are reviewed by a panel of three members. An applicant can be represented at a hearing, but cannot be represented by a lawyer.

The VRB is not bound by the rules of evidence. Hearings are informal and normally conducted in private. The presiding member determines who may be present and, if requested by the applicant, may permit a hearing to take place in public. Although not usual, witnesses may be summoned and evidence may be taken on oath or affirmation.[31]

The VRB finalised 6,394 matters in the 2002–2003 financial year, with 3,595 matters going to hearing. The two main areas of concern were entitlement to the Veterans' Pension and the assessment of the rate of pension. The VRB set aside the decision in 24 per cent of cases involving entitlement, and increased the rate of pension payable in 42 per cent of cases involving assessment.[32]

In some instances, the absence of legal representation may be disadvantageous, particularly where the appeal involves complex questions of causation, or where the VRB examines witnesses on oath. The fact that the cost of medical reports can only be reimbursed after first being paid for by the applicant may also represent a significant barrier for older people with little income or savings to draw upon.

Administrative Appeals Tribunal [33]

The Commonwealth Administrative Appeals Tribunal (AAT) provides merits review of decisions by a range of government and non-government bodies. Social security matters must be reviewed by the SSAT before an appeal to

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[31] Veterans Review Board, Annual Report 2002–03, Commonwealth of Australia, Canberra, 2003, p13.

[32] Veterans Review Board, Annual Report 2002–03, Commonwealth of Australia, Canberra, 2003, pp. 29–31.

[33] Information taken from Administrative Appeals Tribunal Website, <http://www.aat.gov.au> (Last accessed December 2003).

the AAT can be made. Similarly, decisions that are reviewable by the VRB must follow that process before an application can be made to the AAT for further review. There is no application fee for review of income support decisions. Applications for review can be made either by writing to the AAT or by filling in an application form.

The AAT has the power to vary, affirm or set aside the original decision. In 2002–2003, appeals against social security decisions made up 23 per cent of the AAT's caseload, while appeals concerning veterans' entitlements comprised another 15 per cent. There were 146 appeals lodged concerning age pension (two per cent of all cases lodged and eight per cent of social security cases). The vast majority of veterans' entitlement cases involved either assessment or entitlement to disability pension (74 per cent) and a further 14 per cent concerned Widows'/Widowers' Pensions.[34]

The AAT provides merits review. AAT procedures are more formal than those of the SSAT and VRB, and it is more common for applicants to be legally represented. This formality, and the cost of obtaining legal representation, can present significant barriers for older people seeking to appeal a decision.[35]

The AAT has an outreach program (usually conducted by telephone) for unrepresented applicants to obtain information about appeal processes and procedures. The AAT also provides further information on its internet site and through pamphlets and a video.

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[34] Administrative Appeals Tribunal, Annual Report 2002–2003, Canberra, 2003, Table 4.2, pp. 106–111.

[35] National Alternative Dispute Resolution Advisory Council, Issues of Fairness and Justice in Alternative Dispute Resolution — Discussion Paper, Commonwealth of Australia, Canberra, November 1997, paragraph 5.56.

The Commonwealth Ombudsman [36]

An alternative avenue for complaints on pension matters is the Commonwealth Ombudsman. The Ombudsman cannot override the decisions of agencies or issue directions to agency staff, but resolves complaints by negotiation and, if necessary, by making formal recommendations to Government.

In late 2001, the Ombudsman established a specialist unit to deal with complaints involving Centrelink, the Department of Family and Community Services and the Child Support Agency. Centrelink complaints account for just over half (52 per cent) of all complaints received under the *Ombudsman Act 1976 (Cth)*. During 2002–2003, the Commonwealth Ombudsman received 9,642 complaints about Centrelink. In approximately three-quarters (76 per cent) of these complaints, the Ombudsman decided not to investigate, in most cases because the agency had not first been given the opportunity to address the complainant's concerns.[37]

Complaints about the DVA represented 28 per cent of all complaints to the Defence Force Ombudsman in 2002–2003.[38] As noted earlier, veterans have access to well-established avenues of appeal within the portfolio, and further rights of appeal through the AAT. These mechanisms can deliver enforceable decisions, and complainants are therefore encouraged to use these approaches rather than pursuing an investigation by the Ombudsman.[39]

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[36] Information taken from Commonwealth Ombudsman's website, <http://www.comb.gov.au> (Last accessed December 2003).

[37] Commonwealth Ombudsman, Annual Report 2002–2003, Commonwealth of Australia, Canberra, 2003, p20. The Annual Report does not provide any further breakdown on how many of the complaints concerning Centrelink were related to the age pension.

[38] Commonwealth Ombudsman, Annual Report 2002–2003, Commonwealth of Australia, Canberra, 2003, p. 77.

[39] Commonwealth Ombudsman, Annual Report 2002–2003, Commonwealth of Australia, Canberra, 2003, p. 81.

Superannuation

In 1992, the Commonwealth Government introduced the Superannuation Guarantee Levy. This currently requires employers to provide contributions of nine per cent for compulsory minimum coverage of employees.[40] Under the *Superannuation Industry (Supervision) Act 1993 (Cth),* superannuation is 'vested' in the employee (i.e. it is not forfeited on resignation) and 'preserved' (i.e. cannot be withdrawn before age 55). The preservation rules have certain exemptions, such as in cases of extreme hardship. From the age of 55 (the 'preservation age'), a person can draw benefits if he or she leaves employment and retires from the workforce (the preservation age will increase to 60 years by 2024). From the age of 60, a person can draw benefits after leaving the employer through which it was being paid.[41] In early 2004, the Government announced changes for the work test rules for people aged over 65, which currently require people to work at least 10 hours in each week to be eligible to make superannuation contributions.[42]

Problems encountered by older people

In the 1994 CLCV Victorian study, 5.5 percent of respondents indicated having experienced a problem with superannuation.[43]

While superannuation was an important issue for the lawyers and financial advisers consulted as part of this study, it was rarely raised by the older people themselves. This discrepancy may be due to the fact that the older people consulted either received relatively little superannuation, or had already taken their superannuation benefits. Problems with superannuation

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[40] *Superannuation Guarantee (Administration) Act 1992* (Cth)

[41] *Superannuation Industry (Supervision) Act 1993* (Cth). The preservation age increases gradually to 60 for those born after 1960.

[42] Australian Government, A more flexible and adaptable retirement income system, Commonwealth of Australia, February 2004, available at <http://demographics.treasury.gov.au/content/discussion.asp?NavID=6> (Last accessed 28 April 2004).

[43] McCullough, S., Older People and the Law, 1995, Table 4.4.1.

are more likely to be encountered at the point of retirement, as decisions taken at this point will affect a person's financial security and living standards for the rest of his or her life.

One issue that did arise was in relation to the effect of the work test rules on superannuation for people who are still in employment when they are over the age of 65.

> Employers are required to pay [superannuation] up to the age of 70, but then they no longer have to unless it is in the award. The problem is that if you are over 65 and you do not work more than 10 hours per week, you are obliged to remove your super from the fund. This means she has to close her account every time she does some work that pays her super.[44]

Problems such as these may become less common with announced changes to the work test rules for those aged over 65.[45]

> *I have no superannuation, but I'm still working full time. I cannot make contributions to superannuation and get the tax benefits of someone aged under 70. I can make contributions, but they are after-tax.*[46]

Mechanisms for complaints, appeals and disputes

Superannuation Complaints Tribunal[47]

The Superannuation Complaints Tribunal (SCT) is funded by the Commonwealth through an annual levy on superannuation funds.[48] It

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[44] Consultation with the NSW Committee on Ageing, Department of Ageing, Disability and Home Care, 9 September, 2002.

[45] Australian Government, A more flexible and adaptable retirement income system, Commonwealth of Australia, February 2004.

[46] Individual telephone submission.

[47] Information taken from Superannuation Complaints Tribunal website, <http://www.sct.gov.au> (Last accessed December 2003).

[48] *Superannuation* (Resolution of Complaints) Act 1993.

investigates complaints relating to superannuation, annuities and deferred annuities, and retirement savings accounts.

The SCT is required to try to resolve complaints by conciliation, and exercises its discretion in arranging conciliation conferences. Parties can object to entering conciliation, and the process is not bound by any formal rules of evidence, nor are there any particular requirements as to the structure of a conference.

Where conciliation is not possible, the SCT formally reviews the contested decision or conduct. These reviews are normally conducted on the basis of documentation, including submissions by the parties, rather than oral hearings. Parties are given the opportunity to read and comment on the documents and submissions presented. Representation is viewed as unnecessary; however, if the applicant is incapacitated or believes that the issues are too complex they may apply to the SCT to be represented, providing reasons. Applicants are encouraged to bring a 'support person' with them to the conciliation conference, but this person cannot participate in the conference itself.

SCT determinations can be appealed on a point of law to the Federal Court.

The SCT does not charge a fee for lodging a complaint. Potential complainants must first complain directly to the relevant superannuation fund. If they are unsatisfied with the response, or a response is not received within 90 days, a complaint can be lodged with the SCT. The complaint must be lodged in writing on specific forms, and must also include the complainant's letter to the fund and the fund's response. It is possible to complain on behalf of another person.

The SCT's Annual Report for 2001–2002 stated that 33 per cent of complaints received were from people aged 55 and over. Information as to the nature of those complaints is not available.[49]

[49] Superannuation Complaints Tribunal, Annual Report 2001–02, Commonwealth of Australia, Canberra, 2002, p. 25.

Banking, credit and debt

The main problems confronted by older people in relation to credit and debt reflects the increasing use of new technologies in banking, and also the high proportion of older people on fixed incomes and pensions.

Problems encountered by older people

Technology

The introduction of new technologies over the last two decades has transformed banking from a primarily personal service industry into a 'self service' one. Telephone banking, Internet banking, B-Pay and automatic teller machines (ATMs) have largely replaced bank books and branch offices as the preferred methods for conducting financial transactions.

> Older people tend to prefer face to face service in banks; they either don't trust or don't understand ATMs or are afraid of being mugged. Banks charge extra fees for personal service. Older people ... are more comfortable with bank books where you can easily see the balance of the account.[50]

Further, many older people have difficulty using new technologies for banking.

> Electronic banking clearly emerged as an issue of concern for older consumers … banks continue to encourage people away from face-to-face or personal service and towards electronic banking…Many older people represented in this research mistrust ATMs. They spoke of their fear of physical attack and many lacked knowledge about available consumer protection measures.[51]

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[50] Consultation with Karen Cox, Consumer Credit Legal Centre, 25 October 2002.

[51] Department of Ageing, Disability and Home Care, Premier's Forum on Ageing Report: Consumer Protection, 1 October 2002, p. 22.

A Human Rights and Equal Opportunity Commission (HREOC) Inquiry into the accessibility of technologies for older Australians and people with a disability found that a relatively lower proportion of older people use electronic commerce technologies.[52] While access by older people is increasing, it still remains considerably lower for people aged 55 and over than for other age groups. The following table shows the percentage of persons who used electronic technologies in the 12 months to November 1999, by age.

Table 6.1: Use of selected electronic commerce facilities by age[53]

Age (years)	*EFTPOS (%)*	*ATMs (%)*	*Internet (%)*
18 to 24	80	90	73
25 to 39	80	89	56
40 to 54	64	72	44
55 and over	31	44	16

HREOC identified a range of barriers to accessing technology for older people and people with a disability, including:

- the cost of access to computers or internet connections and the limited availability of public facilities for people who cannot afford their own equipment
- the need for awareness and training in use of EFTPOS and ATMs
- the inaccessibility of many ATMs, EFTPOS facilities and other similar devices to people with limited vision, manual dexterity or memory, and to people using a wheelchair

[52] Human Rights and Equal Opportunity Commission, Accessibility of electronic connerce and new service and information technologies for older Australians and people with a disability, Commonwealth of Australia, Canberra, 31 March 2000.

[53] Human Rights and Equal Opportunity Commission, Accessibility of electronic connerce and new service and information technologies for older Australians and people with a disability, 31 March 2000, paragraphs 2.1 and 2.2.

- older people's concerns about privacy and security of internet transactions
- concerns for personal safety when using ATMs, and concerns for security when using EFTPOS facilities.[54]

Some participants in our consultations even indicated that they were not accustomed to using banks at all.

> It's foreign to a lot of people. They're used to 'you're paid and you get the pay packet every week and you keep it under the mattress'. A lot of old people tend to keep money—my uncle died and my aunt had to dig the money up from under the chookhouse. They like to think they've got money in the house for emergencies. My mum, when she was alive, used to get the pension out every pension day.[55]

Credit and debt

Partly because of their low income, some older people encounter problems with credit and debt.

In the CLCV study of older people in Victoria:

- seven per cent of respondents had experienced debt problems
- two per cent had experienced problems with credit
- one per cent had experienced problems with bank loans
- one respondent had been declared bankrupt.[56]

Credit and debt problems were also identified during the present study.

> Debts … tend to accumulate, because people can't manage on their pensions. They run up a credit card debt to pay phone bills without realising that the interest on the credit card is higher than the interest on

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[54] Human Rights and Equal Opportunity Commission, Accessibility of electronic connerce and new service and information technologies for older Australians and people with a disability, 31 March 2000, Chapter 3.

[55] Eric Calloway House Nursing Home focus group, Sydney, 21 October 2002.

[56] McCullough, S., Older People and the Law, 1995, Table 4.4.1.

> the phone bill and that you can negotiate with Telstra for time to pay. When they overdraw their accounts they get charged substantial fees, fines and charges. Then they get sued.[57]

In these situations, people may need legal assistance to determine the extent of the debt, and to negotiate terms for paying the debt. They may also need financial advice on how to budget so as to avoid debts or keep them at manageable levels.

Credit cards were identified as a significant problem for older people.

> Often they do not fully understand how credit card accounts work ... banks follow poor lending practices, particularly in inviting pensioners to increase their credit card limits beyond the level where they could afford the interest ... [even though they] are aware that the person is on a pension. The bank fails in the duty of care in this case.[58]

Because of low income, older people may also become victims of 'credit screwing'.

> Another problem is that older people on pensions can't get credit through normal mainstream financial institutions so they end up in the hands of fringe lenders who charge exorbitant interest on small loans. Or else they deal with loans through credit cards which also charge high interest. Often each loan is small. By the time they come to [the Consumer Credit Legal Centre] the situation has got out of control.[59]

The following example indicates that older people sometimes fail to deal assertively with creditors or lenders.

> One had taken on a mobile phone and the debt had got out of hand. It was passed to the debt collectors who were harassing her and her referee. They had added their charges to the original bill. I asked her to get a statement from the referee about how often they had contacted her, but

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[57] Consultation with Karen Cox, Consumer Credit Legal Centre, 25 October 2002.

[58] Consultation with Karen Cox, Consumer Credit Legal Centre, 25 October 2002.

[59] Consultation with Karen Cox, Consumer Credit Legal Centre, 25 October 2002.

> the woman kept saying she felt unwell and hadn't done so. Basically not dealing with the situation in a proactive way. The debt collector was based in Queensland although the person lived in NSW. The collection order was made in a Queensland Court and the defendant could not get there to put her case.[60]

Getting advice and assistance

Most of the older respondents to the CLCV Victorian study who had experienced a problem with credit/debt sought help (58 per cent of those with a credit problem, 60 percent of those with a debt problem and 67 percent of those with a bank loan problem).[61]

Consumer Credit Legal Centre (NSW) [62]

The Consumer Credit Legal Centre (CCLC) is a community legal centre specialising in issues related to consumer credit, banking and debt recovery. It is the only centre of its kind in NSW. As well as providing casework services, the CCLC conducts community legal education, lobbies for pro-consumer reforms in financial services regulation, and provides information, legal advice and referral on financial issues to consumers and community and welfare agencies. Although CCLC services are provided to the community generally and are not specifically aimed at older people, the CCLC has a particular focus on issues that affect low-income and disadvantaged consumers.

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[60] Consultation with Margaret Small, Women's Legal Resources Centre, 25 October 2002.

[61] McCullough, S., Older People and the Law, 1995, Table 4.5.1.

[62] Information taken from Consumer Credit Legal Centre website, <http://www.cclcnsw.org.au> (Last accessed December 2003).

Financial Counsellors [63]

Financial counselling assists people who are experiencing financial difficulties or who need information relating to credit and debt. It aims to raise the financial literacy of clients, empower them to regain control of their financial situation, and enable them to learn financial management skills that will assist them in making informed decisions in the future. Financial counsellors assist with such activities as budget planning, negotiating with creditors, dealing with bankruptcy, and potential bankruptcy and referrals to other agencies where necessary.

The Financial Counsellors' Association of NSW (FCAN) is the body that accredits financial counsellors within NSW. Members of FCAN provide a free, private and confidential service to the community in the areas of financial counselling and credit reform, without a conflict of interest. The FCAN website includes a list of accredited financial counsellors and a series of fact sheets.[64]

Mechanisms for complaints, appeals and disputes

Banking and Financial Services Ombudsman [65]

The Banking and Financial Services Ombudsman (BFSO) is a free independent dispute resolution service which considers disputes involving amounts of up to $150 000 between individuals, or small businesses on the one hand, and banks and their affiliates on the other.

Once a complaint is received, the financial service provider is sent a copy of the complaint and has 30 days to respond. If the dispute is not resolved during the investigation process, the allocated case manager may make a

[63] Information taken from Financial Counsellor's Association of NSW website, <http://www.acwa.asn.au/fcan/> (Last accessed January 2004).

[64] <http://www.acwa.asn.au/fcan/find.htm> (Last accessed January 2004).

[65] Information taken from Banking and Financial Services Industry website, <http://www.abio.org.au> (Last accessed December 2003).

"finding" on the matter. If either party rejects the finding, the matter is referred to the Ombudsman, who will make a formal recommendation. If the service provider rejects the recommendation, the Ombudsman may then make a formal determination, which is binding on the financial service provider. The BFSO may also convene a conciliation conference where required.

Applications to the BFSO must be lodged either on-line or in writing. While a written application can be fairly informal, the lack of facilities to lodge applications via telephone may create a barrier for those older people who are unused to using the internet.

Credit Union Dispute Resolution Centre [66]

The Credit Union Dispute Resolution Centre (CUDRC) is a free service that deals with complaints about credit union services involving claims of up to $100,000. Initially, complainants are expected to raise the issue directly with the relevant credit union. A formal complaint can be made to CUDRC if the complainant is either dissatisfied with the credit union's response, or if 45 days have passed and no response has been received. This complaint can be made via telephone, email, fax or mail.

The CUDRC will investigate the complaint and attempt to facilitate a negotiated settlement. If this is not possible, the centre has the power to make a determination which, if accepted by the complainant, becomes binding on both parties. If the complainant rejects the determination, he or she retains the right to pursue the dispute in a different jurisdiction.

[66] Informastion taken from Credit Union Dispute Resolution Centre website, <http://www.cudrac.com.au> (Last accessed December 2003).

Investment advice and financial planning

For many older people, acquiring large sums of money either through superannuation, inheritance from spouse or family, or termination payments can present new financial challenges, particularly if they do not have prior experience investing money.

> …. sometimes the sheer amount of someone's superannuation scares them to death. They've never had that much money. It is a sad thing.[67]

Problems encountered by older people

Access to financial information

Simply getting access to information to make financial decisions can pose significant difficulties for older people. In the CLCV Victorian study, 20 per cent of respondents indicated that they had experienced a problem with financial decision-making, making this the fourth most common problem area experienced by survey participants.[68] This was consistent with responses from consultations undertaken for this study.

> Many clients did not know of any way to get advice on investment. They found that most financial advisers worked on the basis of commissions from investment product sellers ... ASIC has produced a booklet with the questions a person should ask in selecting an investment adviser. It is not clear how widely this is circulated.[69]

Further,

> Older consumers certainly expressed anxiety about not knowing where to go for help and sound, impartial [investment] advice.[70]

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[67] Eric Calloway House Nursing Home focus group, Sydney, 21 October 2002.

[68] McCullough, S., Older People and the Law, 1995, Table 4.4.1.

[69] Consultation with Karen Cox, Consumer Credit Legal Centre, 25 October 2002.

[70] Department of Ageing, Disability and Home Care, Premier's Forum on Ageing Report: Consumer Protection, 1 October 2002, p. 21.

A qualitative study undertaken by Chant Link and Associates in 2001 for the Investment and Financial Services Association[71] sought the views of a group of middle to high-income pre-retirees and retirees (on the assumption that lower-income earners would have little superannuation, and less access to information). The study found that participants placed a high value on saving for retirement, but had very poor financial planning.

> There was a very low level of understanding among pre-retirees of the decisions they may need to make to convert their superannuation benefit to an income stream on retirement. Most assumed they would simply take a lump sum and invest it somehow (e.g. in property, managed funds, shares, bank term deposits). Even amongst retirees, knowledge of [income stream] products was quite low. Many could not readily name products nor describe product features, nor how they differed. Virtually all retirees had sought advice close to retirement regarding what to do with their superannuation benefit…. Most pre-retirees predicted they would need advice closer to, and at the point of retirement, but were largely uncertain about which types of advisers they would choose, and how they would find a good adviser.[72]

Lack of knowledge about their options leaves older people open to exploitation if they trust the wrong adviser.

> People with a lump sum to invest who have not had investments before are naïve in the financial market. They are vulnerable to exploitation by financial advisers who do not make it clear that they are receiving commissions for introducing clients to various investment products. Often old people do not even know they are getting bad advice or have been defrauded. They do not know what they should ask.[73]

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[71] Chant Link and Associates, A Qualitative Report on Retirement Savings — Desires & Drivers Sydney, July 2001.

[72] Chant Link and Associates, A Qualitative Report on Retirement Savings — Desires & Drivers, July 2001, p. 8.

[73] Consultation Ros Munro, Legal Outreach for Older People Project, Caxton Legal Centre, Queensland, 12 July 2002.

I am a self-funded retiree. I invested a lump sum with a chartered accountant who has always done my tax. He invested it with one fund and I lost $42,000. He made me take it away from an investment broker I had it with, but he didn't tell me he was getting a kickback from the fund to bring in new customers.[74]

Older women

Older women, in particular, have been identified as having little experience of handling financial affairs, with many being unaware of financial arrangements their husbands have made.

> For a lot of older women, their husbands have controlled the larger financial decisions, even when they have had earnings of their own ... Older women thus often lack confidence or experience in handling money decisions.[75]

Further,

> Often older clients are women whose husbands have managed their finances in the past and their husbands have died or become incapacitated.[76]

Similarly,

> Some of the wives have never had to handle any decisions. When something is thrust upon them they don't know how to go about it. We've had a lady just recently who's never had a cheque account because her husband always handled it. She didn't know how to write a cheque.[77]

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[74] Individual telephone submission.

[75] Consultation with Northern Rivers Community Legal Centre, 11 October 2002.

[76] Consultation with Karen Cox, Consumer Credit Legal Centre, 25 October 2002.

[77] Eric Calloway House Nursing Home focus group, Sydney, 21 October 2002.

Other research supports this perspective. In the 1994 CLCV Victorian study of the legal needs of older people, 72 per cent of respondents who indicated that they had problems with financial decisions were female.[78]

Families, carers and financial matters

Financial abuse of older people was reported by several participants of this study. In addition, "financial exploitation" was experienced by six per cent of respondents to the CLCV study on the legal needs of older people.[79] The issue of financial abuse is dealt with in detail in Chapter 8, *Elder Abuse*.

Capacity and powers of attorney

The second most common category of problem experienced by respondents to the 1994 CLCV survey was that associated with powers of attorney. Thirty one per cent of respondents had experienced problems related to powers of attorney, and five per cent had experienced difficulties relating to guardianship.[80] Abuse of enduring powers of attorney (which survive beyond loss of capacity), the question of determining capacity and the role of the Protective Commissioner are discussed further in Chapter 9, *Substitute decision-making and end of life issues*.

Becoming a Guarantor

Another problem raised was that concerning parents being asked to guarantee loans for their children's business ventures. Because of the involvement of financial institutions, these cases have perhaps received more legal attention than others.

The University of Sydney and NSW Law Reform Commission undertook empirical research into the experiences of guarantors. A survey of guarantors found that:

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[78] McCullough, S., Older People and the Law, 1995, Table 4.4.1.

[79] McCullough, S., Older People and the Law, 1995, Table 4.4.1.

[80] McCullough, S., Older People and the Law, 1995, Table 4.4.1.

- 65 per cent were female[81]
- 65 per cent were over 50, with the highest proportion aged 60 years or older (37 per cent) and 28 per cent aged between 50 and 59[82]
- 40 per cent were born overseas (compared to 27 per cent of the total population of older people in NSW), and 85 per cent of these were from non-English speaking backgrounds (compared to 67 per cent of the total population of older people in NSW born overseas)[83]
- 26 per cent were guaranteeing loans for adult children.[84]

Older people are disproportionately represented in problematic third-party guarantee transactions. A review of litigated cases concerning guarantees found a high proportion (35 per cent) of such cases involved parents guaranteeing loans for their children.[85]

Cultural factors can often lead to older people from culturally diverse backgrounds feeling obliged to provide financial assistance to family members without proper regard for the commercial viability of the transaction. There can also be considerable confusion about the nature of a third-party guarantee, as the concept of such a transaction is foreign to many cultures.[86]

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[81] Lovric, J. and Millbank, J., Research Report 11: Darling please sign this form: a report on the practice of third party guarantees in New South Wales, NSW Law Reform Commission, and University of Sydney, Sydney, 2003, paragraph 3.6.

[82] Lovric, J. and Millbank, J., Research Report 11: Darling please sign this form: a report on the practice of third party guarantees in New South Wales, 2003, paragraph 3.9.

[83] Lovric, J. and Millbank, J., Research Report 11: Darling please sign this form: a report on the practice of third party guarantees in New South Wales, 2003, paragraph 3.14.

[84] Lovric, J. and Millbank, J., Research Report 11: Darling please sign this form: a report on the practice of third party guarantees in New South Wales, 2003, paragraph 3.28.

[85] Lovric, J. and Millbank, J., Research Report 11: Darling please sign this form: a report on the practice of third party guarantees in New South Wales, 2003, paragraphs 3.10–3.11.

[86] Lovric, J. and Millbank, J., Research Report 11: Darling please sign this form: a report on the practice of third party guarantees in New South Wales, 2003, paragraphs 3.63–3.67.

Getting advice and assistance

The majority of respondents to the CLCV survey in Victoria had sought some form of outside assistance with financial planning issues when they arose:

- 68 per cent of respondents who had experienced a problem relating to financial decision-making sought help
- 75 per cent of respondents who had experienced financial exploitation sought help
- 69 per cent of respondents who had experienced a guardianship issue had sought help
- 61 per cent of people who had issues related to a power of attorney had sought help.[87]

The report provides a breakdown showing where assistance was sought with financial decision-making. The most common sources of assistance were private consultants (59 per cent), a bank or credit union (27 per cent), a government department (12 per cent), and private accountants (nine per cent).[88]

Centrelink Financial Information Service[89]

The Centrelink Financial Information Service (FIS) provides information on financial issues including financial planning, understanding financial or investment products, income and assets tests, and taxation. As well as attending public seminars, people can make an appointment to receive individualised information from a FIS Officer; however, FIS does not provide investment recommendations. The FIS service is free and open to anyone, whether or not they are in receipt of social security benefits.

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[87] McCullough, S., Older People and the Law, 1995, Table 4.5.1.

[88] McCullough, S., Older People and the Law, 1995, Table.4.5.3(c).

[89] Information taken from Centrelink website, <http://www.centrelink.gov.au/internet/internet.nsf/services/fis.htm> (Last accessed December 2003).

Veterans' Affairs Financial Information Service

The Commonwealth Department of Veteran's Affairs offers a similar free financial information service through the Veterans' Affairs Financial Information Service (VAFIS).[90] The VAFIS is generally regarded as a very useful information source, particularly because they do not receive commissions from particular financial interests, they explain the income and assets tests to individuals, and they are used to meeting the needs of small investors.[91]

National Information Centre on Retirement Investments[92]

The Commonwealth Government also funds the National Information Centre on Retirement Investments, which provides a range of leaflets on aspects of retirement investment as well as providing financial information by telephone. It is open to anyone needing information on investment products or about how to obtain further assistance.

Financial planners and advisers

As noted above, almost 70 per cent of respondents to the CLCV study who had experienced problems with financial decision-making sought assistance from either a private consultant or an accountant.[93] Concerns were expressed about the lack of expertise of investment advisers—both legal and non-legal—in regards to pension means test and eligibility rules, and the most appropriate retirement investment products available.

> Anybody who presents themselves as being in a position to advise older people needs to know about their financial circumstances and the effects of decisions and actions on their social security entitlement. …There is a

[90] Centrelink, Submission to Stage 1, Law and Justice Foundation of NSW Access to Justice and Legal Needs Research Program, 15 January 2003; Consultation with Sharyn Caroll, Co-ordinator, Centrelink Financial Information Service, 5 December, 2002.

[91] Consultation with Gerard Thomas, Policy Officer, Welfare Rights Centre (NSW), 10 December 2002.

[92] Information taken from National Information Centre on Retirement Investments website, <http://www.nicri.org.au/> (Last accessed December 2003).

[93] McCullough, S., Older People and the Law, 1995, Table 4.5.3(c).

> move by chartered accountants to become more responsive to the particular circumstances of older people. Lawyers ought to be doing the same in the light of changing demographics.[94]

Similarly,

> Investment advisers do not usually understand social security rules and the effect of different types of investments, annuities, etc. on eligibility for the age pension. It is very difficult to take action against financial advisers for negligence.[95]

On the other hand, financial advisers presented as more positive about their ability to assist older clients:

> Financial planners ... saw themselves as trusted guides for bewildered clients, helping them negotiate the information maze to a financially viable retirement future. The interpretation of government legislation was seen to be a key element in their role. They see themselves as the 'only real experts' in the area ... reducing the options open to a client to a number of simple concepts tailored to their individual needs ... saw themselves as educators of the financially illiterate ... frequently critical of the advice of solicitors and accountants, whose advice in the retirement context they regarded as being narrowly focussed and overly oriented towards tax and property issues.[96]

Mechanisms for complaints, appeals and disputes

Financial Industry Complaints Service Ltd[97]

The Financial Industry Complaints Service Ltd (FICS) provides free advice and assistance to consumers to help resolve complaints against members

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[94] Consultation with Rodney Lewis, Elder Law Centre, University of Western Sydney, 26 September 2002.

[95] Consultation with Karen Cox, Consumer Credit Legal Centre, 25 October 2002.

[96] Woolcott Research, An Evaluation of the Information Needs and Communications Preferences of Older People: Volume II of II, Centrelink, Sydney, 1997, at p. 66.

[97] Information taken from Financial Industry Complaints Service Ltd website, <http://www.fics.asn.au/> (Last accessed December 2003).

of the financial services industry relating to issues such as life insurance, superannuation, funds management, financial advice, stock broking, investment advice and sales of financial or investment products. All potential complainants are first required to complain directly to their financial adviser. The FICS then takes on the matter if it was not resolved to the complainant's satisfaction, or 45 days have passed.

The FICS initially attempts to resolve the complaint through conciliation. If the complaint is not resolved to the consumer's satisfaction, it is referred to the Chief Executive Officer (CEO), who can:

- order a conciliation conference
- refer the case to an adjudicator if the amount in dispute is less than $10,000
- refer the case to an independent panel who will make a determination.

Any determination by the adjudicator or the panel is binding on the member, but not on the consumer.

Applications must be made in writing, and require considerable formal documentation, including an 'authority to proceed'. These documents can be downloaded from the FICS website: however, as mentioned earlier, the fact that older people have very low rates of access to the internet constitutes a considerable barrier for using this mechanism. A review of the scheme found that, while paper-based systems remain necessary, supplementary telephone and face-to-face processes should be introduced.[98] The review also recommended the FICS should appoint a part-time consumer adviser—a person skilled in dispute resolution, with an understanding and awareness of consumer issues—to assist consumers in preparing complaints and exploring dispute resolution options.[99]

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[98] Community Solutions, La Trobe University, University of Western Sydney, Review of the Financial Industry Complaints Service 2002 — Final Report, December 2002, p. 49.

[99] Community Solutions, La Trobe University, University of Western Sydney, Review of the Financial Industry Complaints Service 2002 — Final Report, December 2002, p. 54.

Insurance Brokers Disputes Ltd[100]

Insurance Brokers Disputes Ltd (IBD) is a free consumer service that handles complaints by consumers against insurance brokers and other financial service-providers (other than insurance companies). It covers claims of up to $50,000 on a range of policies, including life insurance.

Under the scheme, complainants are required to attempt to resolve the matter directly with the broker in the first instance. Participating brokers are required to have internal systems to monitor and resolve complaints, and must make a decision about a complaint within 20 working days. If the matter is not resolved through this process, it will be passed on to IBD's Referee. Insurance brokers and financial service providers are bound by the Referee's decisions, but consumers are not.

Consumers can contact IBD by facsimile, email, mail, telephone or face-to-face. IBD's General Manager is available to discuss the dispute and to help the complainant formulate the complaint in writing.

Consumer Issues

The main problems confronted by older people in relation to consumer issues reflect general accessibility to goods and services, vulnerability to consumer frauds and scams, regular exposure to door-to-door salespeople, and vulnerability to pre-paid funeral arrangements.

[100] Information taken from Insurance Brokers Disputes Ltd website, <http://www.ibdltd.com.au/> (Last accessed December 2003).

Problems encountered by older people

Goods and services issues

The CLCV study identified a range of consumer issues that had been experienced by survey respondents. These included public transport (19 per cent), health insurance (13 per cent), gas/water/electricity (13 per cent), professional services (11 per cent), telephone/post (nine per cent), contracts (eight per cent), lawyer's services (eight per cent), other insurance (seven per cent), and goods and services (five per cent).[101]

Consumer fraud and scams

The general community perception is that older people are at a higher risk of falling victim to frauds and scams.

> They are vulnerable members of society, are slower to catch on, have been brought up to trust people and to take things at face value, are hungry for some social contact and are pleased if someone takes an interest in them.[102]

In reality, older people are often highly aware of the existence of frauds and scams and may be more wary than younger members of society.

> Older people represented in this research said they are careful because they have time to study or "check things out". Older people are less likely to move outside their 'routines' and again are less likely to take risks with schemes promising overnight wealth—they prefer to stick to tried and tested approaches.[103]

Nevertheless, it appears that older people can sometimes be vulnerable to scams.

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[101] McCullough, S., Older People and the Law, 1995, Table 4.4.1.

[102] NSW Department of Ageing, Disability and Home Care 2002 Premier's Forum on Ageing, Consumer Protection, Sydney, 2002, p. 23.

[103] NSW Department of Ageing, Disability and Home Care 2002 Premier's Forum on Ageing, Consumer Protection, Sydney, 2002, p. 23.

An elderly householder was approached by two men who offered to repair tiles on the roof of her home. They had just completed work on a neighbour's house so she assumed they were competent. Because she suffered from arthritis she asked one of them to fill in a cheque for her. You can imagine her dismay when her bank later informed her that the cheque, originally made out for $100, had subsequently been altered to read $2100. They had duped her of most of her savings.[104]

Research conducted by Taylor Nelson Sofres in 2002 on consumer protection issues affecting older people in NSW included a short survey of older people who called the Office of Fair Trading (OFT) call centres with concerns about frauds and scams.

> … there were many calls regarding lottery scams. The large majority were inquiries, not a complaint. This suggests that older people are making use of Fair Trading information portals to enquire about something prior to the fraud or scam being perpetrated.[105]

High pressure door-to-door sales

Pushy door-to-door salespeople can also present problems for older people, many of whom are retired and therefore more likely to be home during the day.

Recently a well-spoken young man selling vacuum cleaners knocked on the door of a 72-year-old woman who lived alone. His sales pitch was persuasive and the elderly householder eventually agreed to buy a new cleaner—for

[104] Case study taken from NSW Department of Fair Trading Website <http://www.fairtrading.nsw.gov.au/shopping/scams/itineranthucksters.html> (Last accessed January 2004).

[105] NSW Department of Ageing, Disability and Home Care 2002 Premier's Forum on Ageing, Consumer Protection, Sydney, 2002, p. 24.

$890! Because she did not have money readily available, the salesman 'kindly' offered to drive her to the bank to withdraw the funds.[106]

People buying on credit have special protection under the NSW *Door to Door Sales Act 1967*. When goods or services are purchased through door-to-door sales on credit, the law provides for a 10-day 'cooling-off' period.[107] This means the householder can cancel the contract during this period and get their deposit back. Under this legislation, the trader must also give the customer a list of their legal rights, a copy of the contract, and a cancellation document in case they change their mind.[108] There is however, no cooling-off period for cash purchases.

Pre-paid funerals

Pre-paid funerals allow consumers to pay for their funerals in advance, either as a lump sum or by making small payments over a long period into a funeral fund. This industry is different to many consumer practices, being designed to be used only many years after purchase, where the original purchaser obviously has no ability to monitor the delivery of the service.

Following several problems in the pre-paid funeral industry, the NSW *Funeral Funds Act 1979* was enacted to regulate it. The legislation requires that funeral funds be registered, and that they meet certain prudential and fair trading standards.[109] It also ensures that money placed in funeral funds is secure, and that the funeral is delivered as promised.[110]

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[106] Case study taken from NSW Department of Fair Trading Website <http://www.fairtrading.nsw.gov.au/shopping/scams/doortodoorsalesscams.html> (Last accessed January 2004).

[107] Section 4, Door to Door Sales Act 1967 (NSW).

[108] Section 3, Door to Door Sales Act 1967 (NSW).

[109] NSW Department of Fair Trading, National Competition Policy Review of the Funeral Funds Act 1979 — Final Report, Department of Fair Trading, Sydney 2001, p. 5.

[110] NSW Department of Fair Trading, National Competition Policy Review of the Funeral Funds Act 1979 — Final Report, Sydney, 2001, p. 14.

A national competition policy review of the legislation found that the industry continued to require close scrutiny, and that there were significant grounds for the retention of specific consumer-protection provisions.[111]

The issue of pre-paid funerals arose in one focus group consultation.

> Basically they would sell you this funeral package and you had to pay a certain amount of money out of your account every fortnight and it would just be drawn out automatically and if you stopped paying for any reason then you just lost everything. But if you gave them a month's notice then you would get 75% of it back…Then if you reached 75, or 73 I think was the cut off, and you hadn't died, then the contract expires.[112]

Getting advice and assistance

Older people seek information on consumer protection issues from a range of sources with which they are familiar and comfortable. These can include the local Returned Services League (RSL), police, church, Centrelink, local retailers, magazines and talkback radio.[113]

Research conducted in 2001 for the NSW Department of Ageing, Disability and Home Care by Taylor Nelson Sofres found that while 55 to 64 year olds were considerably more likely (compared to people aged over 65) to use on-line sources, use of Government portals and on-line information sources is relatively low amongst people aged 65 and over.[114]

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[111] NSW Department of Fair Trading, National Competition Policy Review of the Funeral Funds Act 1979 — Final Report, Sydney, 2001, pp. 6–8.

[112] Indigenous Elders focus group, Penrith, 14 October 2002. If a pre-paid funeral is arranged in accordance with the *Funeral Funds Act 1979*, the contract cannot 'expire' before the contributor dies.

[113] NSW Department of Ageing, Disability and Home Care 2002 Premier's Forum on Ageing, Consumer Protection, Sydney, 2002, p. 25.

[114] NSW Department of Ageing, Disability and Home Care 2002 Premier's Forum on Ageing, Consumer Protection, Sydney, 2002, p. 26.

NSW Office of Fair Trading [115]

The role of the NSW Office of Fair Trading (OFT) within the Department of Commerce is to safeguard consumer rights and to advise business and traders on fair ethical practice. The OFT runs call-centres and, as noted above, older people appear to use this mechanism as a means of 'checking out' matters and organisations about which they are uncertain.

The OFT also provides comprehensive consumer information on its website, including information specifically designed for older people. However the usefulness and accessibility of web-based information for older people is questionable, given the low rate of internet use by people over 55 years of age.

Mechanisms for complaints, appeals and disputes

Consumer Trader & Tenancy Tribunal [116]

The General Division of the NSW Consumer Trader and Tenancy Tribunal (CTTT) handles small consumer claims (up to $25,000). For a pensioner, the cost of an application is $5. The application process is quite formal and applications must be lodged at a CTTT Registry.[117]

The CTTT will first try to resolve the matter through voluntary conciliation before moving to a formal hearing. The hearing process itself is also relatively formal, and can involve examination and cross-examination of witnesses on oath, as well as submission of documentary evidence. It is not uncommon for either or both parties to be legally represented. As noted earlier in this chapter in relation to the AAT, the formality and complexity of these processes may act as a barrier to access for aged people.[118]

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[115] Information taken from Office of Fair Trading website, <http://www.fairtrading.nsw.gov.au> (Last accessed January 2004).

[116] Information taken from Office of Fair Trading website, <http://www.fairtrading.nsw.gov.au/secondarymenus/cttt.html) (Last accessed January 2004).

[117] Tenancy applications can be lodged on line.

[118] National Alternative Dispute Resolution Advisory Council, Issues of Fairness and Justice in Alternative Dispute Resolution — Discussion Paper, Commonwealth of Australia, Canberra, November 1997, paragraph 5.56.

Telecommunications Industry Ombudsman [119]

The Telecommunications Industry Ombudsman (TIO) has jurisdiction to investigate complaints about telephones, mobile phones, internet services, pay phones, connections, fault repair, privacy, land access, White Pages and breaches of Codes of Practice. Potential complainants are required to make reasonable attempts to resolve the matter directly with the service provider before approaching the TIO. Complaints to the TIO may be made online, by phone, fax, email, in writing, in person or via TTY. An authorised representative may also complain on behalf of the individual experiencing the problem.

Energy & Water Ombudsman NSW [120]

The Energy and Water Ombudsman of NSW (EWON) is a free service that can investigate matters specifically relating to decisions or actions by an electricity or gas provider, and its member water providers, with particular reference to: disputed accounts; disconnection or restriction of supply; actions of a service provider which affect a property; and the supply of electricity, gas or water services such as delays in connection or quality of supply. Complaints can be lodged on-line, or via email, telephone, fax or mail. Deaf, hearing impaired, and speech impaired people can contact EWON via the National Relay Service.

EWON has an internal review process. If a customer disagrees with a decision made by EWON, a review of the decision can be requested. EWON will review the matter if the customer can provide additional information, or indicate where EWON has relied on incorrect information.

[119] Information taken from Telecommunications Industry Ombudsman website, <http://www.tio.com.au> (Last accessed December 2003).

[120] Information taken from Electricity and Water Ombudsman website, <http://www.ewon.com.au> (Last accessed December 2003).

Conclusion

Older people face a broad range of financial and consumer issues. Some issues are specific to their stage in life, such as pension entitlements, superannuation related issues and investment planning and advice. Others are not dissimilar to the problems faced in the market by all consumers of goods and services, but reflect an increased vulnerability of older people (e.g. credit and debt, consumer fraud and scams, door-to-door sales, pre-paid funerals).

There are many different avenues for older people to obtain help in dealing with financial and consumer problems, and in lodging formal complaints and appeals. Common features of industry dispute-resolution schemes include that they are free for consumers, and that they are generally binding on the service provider, but not on the consumer. The complexity of the procedures for lodging complaints varies from body to body. The ability to lodge complaints orally, or alternatively, the availability of complaint body staff who can facilitate the lodging of formal complaints, or the completion of complaint forms, is an important access to justice issue for older people.

Another common feature of dispute resolution schemes is that potential complainants are required to attempt to resolve the matter directly with the service supplier before approaching the independent body. While it is not unreasonable to expect consumers to try and resolve a complaint directly before elevating the matter to a formal complaint body, this requirement may in itself create a psychological barrier for many older people.[121]

The informality of procedures in many tribunals does not remove the need for individual complainants to be able to argue and negotiate on their own behalf. This ability may be even more critical where procedures involve formal hearings or conciliation conferences. While legal representation is

[121] National Alternative Dispute Resolution Advisory Council, Issues of Fairness and Justice in Alternative Dispute Resolution — Discussion Paper, Commonwealth of Australia, Canberra, November 1997, paragraph 5.83.

generally regarded as not essential for the Social Security Appeals Tribunal, the Veterans Review Board and the Superannuation Complaints Tribunal, an older person may be significantly disadvantaged by not having representation. Allowing an older person the right to be represented in hearings and conciliation may assist in overcoming imbalances in power and in negotiation skills.

Even where they would be willing to complain or take action, older people also tend to be less aware of the existence of avenues of appeal.[122] The fact that many complaint and appeal mechanisms rely on web-based information compounds the problems faced by older people in becoming aware of their rights of appeal. Hard-copy information such as pamphlets and posters, appropriately distributed and displayed in organisations and agencies frequented by older people, would provide a more useful method of disseminating such information.

[122] National Alternative Dispute Resolution Advisory Council, Issues of Fairness and Justice in Alternative Dispute Resolution — Discussion Paper, Commonwealth of Australia, Canberra, November 1997, paragraph 5.31.

7. Discrimination

Introduction

Older people, like other age groups, experience discrimination on the basis of their age in a variety of contexts in their everyday lives. Just as people under 16 cannot apply for a driver's licence, people aged 85 and over must successfully complete yearly driving tests to retain their licences. Although this is a discriminatory practice, it is not unlawful. It is reasoned that these decisions further public safety and are therefore justifiable policies.

These lawful regulations determining eligibility for participation in certain areas of public life are distinguishable from other forms of discrimination. In Australian society older people can be made to feel like they are a burden on their families, on the labour market, on health and social services, and on the economy generally.[1] From this broader social context, aged individuals can find themselves being forced out of the workforce or shunted into menial jobs, which are not indicative of their skills or capacity for re-skilling. They can be marginalised from the consumer culture due to fixed, low incomes, and they may be denied full citizenship in society as their political power is calibrated to diminish with age. The law attempts to address these issues by outlawing age discrimination in certain public arenas.

Anti-discrimination legislation renders age-discriminatory treatment unlawful in the areas of employment, education, the provision of goods and services, accommodation and registered clubs.[2] Like younger people, older people can also experience discrimination based on other grounds, such as sex,

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[1] It should be noted that some cultural groups, represented within Australian society, are known for having a more respectful attitude toward the elderly.

[2] There are various legislative exceptions to the ground of age discrimination set out in the *Anti-Discrimination Act 1977* (NSW). See, for example, ss. 49ZYI and 49ZYJ.

race, disability and so on. These other grounds of discrimination can intersect with age and can result in compounding disadvantage. However, this chapter will focus on age discrimination.

In the work context, many people experience the effects of age discrimination at a much earlier age than 65. As the bulk of this chapter deals with age discrimination in the area of employment and many people over the age of 65 are retired, the definition of older people (65+) was extended to include those in the latter stages of their working life.

Anti-discrimination law in Australia

The anti-discrimination legislative framework

Anti-discrimination law in Australia is split between State and Federal systems. In NSW, the Anti-Discrimination Board (ADB) administers the *Anti-Discrimination Act* 1977 (NSW) (hereafter referred to as "the ADA") and the Human Rights and Equal Opportunity Commission (HREOC) manages a raft of Federal legislative instruments.[3] Discrimination on the basis of a person's age was effectively proscribed by legislation in NSW in 1994.[4] Corresponding age discrimination provisions have not yet been enacted at the Federal level, although they are in the process of development.[5] There are, however, some existing Federal instruments that broach the issue of age discrimination, but in a very limited way. For example, the *Human Rights and Equal Opportunity Act 1986* (Cth) (HREOCA) permits complaints on the basis of age discrimination in the

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[3] *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth), *Human Rights And Equal Opportunity Commission Act 1986* (Cth), and *Disability Discrimination Act* 1992 (Cth).

[4] The *Anti-Discrimination Act 1977* (NSW), Parts 4E and 4G.

[5] The *Age Discrimination Bill* (Cth) was introduced into Parliament on the 26th of July, 2003. See <http://www.hreoc.gov.au/human_rights/older_australians/index.html> for more information. (Last accessed 17 December 2003).

area of employment. HREOC is empowered to attempt to conciliate complaints made under the HREOCA, but is not authorised to make binding determinations or enforce its decisions. The *Workplace Relations Act 1996* (Cth) also contains a number of provisions aimed at eliminating discrimination in the area of employment, and includes age as a potential ground for such discrimination.[6]

Like other grounds of discrimination prohibited by the ADA, age discrimination can be direct[7] or indirect.[8] Direct age discrimination occurs when a person is treated less favourably than others because of their age or on the basis of some attribute that generally relates to their age group. For example, an older man is told by his employer that he does not fit in with the younger work culture they are trying to foster. He is pressured to retire with taunts like 'out with the old, in with the new'. This scenario is an example of direct age discrimination as it is *because* of his advanced age that he loses his job, while a younger person with the same skills and experience would have retained their employment.

Indirect age discrimination against older people occurs when an unreasonable requirement or condition is imposed that an older person does not or cannot comply with, while a substantially higher proportion of younger people would have little or no difficulty in meeting. For example, an older woman receiving the pension makes an application for private rental accommodation[9] but is rejected because she has no income, other than social security. Although the real estate agent's policy of leasing property only to employed people has the appearance of applying to all people equally, it is indirectly discriminatory because it has the practical effect of favouring younger tenants over older ones.

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6 See, for example, Section 3(j) *Workplace Relations Act 1996* (Cth).

7 Section 49ZYA(1)(a), *Anti-Discrimination Act 1977* (NSW).

8 Section 49ZYA(1)(b), *Anti-Discrimination Act 1977* (NSW).

9 The literature on age discrimination generally makes no reference to age discrimination in the private rental market. For one exception, however**,** see Crispin, L. and Porteous, P., 'Older People Made Homeless in Sydney's Housing Gold Rush', *Parity*, vol. 13, i.2: Meeting the Needs of the Elderly Homeless, 2000, pp. 18–19.

How it works in practice

When a person lodges a complaint with the President of the Anti-Discrimination Board, the first step is for the Board to investigate the complaint. If the complaint is made within the statutory time limits,[10] falls within the ambit of the Act and has substance, the matter will be referred to an investigation or conciliation officer. That officer will discuss the matter with both parties and then attempt to conciliate the case with a view to settling the complaint. If conciliation cannot be achieved, the case will be referred to the Equal Opportunity Division of the Administrative Decisions Tribunal (ADT). If the ADT is unable to mediate the complaint, it will proceed to a hearing. The Tribunal is able to make a variety of orders, including compensation of up to $40,000.

HREOC operates similarly up to the point of conciliation of the complaint. Although HEROC once had the power to hear complaints and make determinations, it was unable to enforce those decisions: this could only be achieved in the Federal Court. However, in 1999[11] amendments were made to the HREOCA removing these powers. Now, if a matter cannot be conciliated, HEROC must terminate the case and the Federal Court or Federal Magistrates Service, on application by either the applicant or respondent, will hear it and make binding determinations.

Prevalence of discrimination

There is a paucity of data in relation to the prevalence of age discrimination.

> The hardest issue is to ascertain the level of discrimination that's occurring that is not reported… Age discrimination seems to be very prevalent but under-reported.[12]

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[10] Complaints are time-limited to 6 months after the discriminatory behaviour. The President of the ADB has the discretion to investigate complaints made 'out of time' if there are good reasons for the delay, Section 88 (3) and (4) *Anti-Discrimination Act 1977* (NSW).

[11] The *Human Rights Legislation Amendment Act No. 1 1999* (Cth) received Royal Assent on 13 October 1999 and came into effect on 13 April 2000.

[12] Consultation with Sarah Fogg, Heather Graham, Dawn Linklater and Gerard Thomas, NSW Committee on Ageing, Department of Ageing, Disability and Home Care, 9 September 2002.

The reporting of age discrimination, however, is dependent upon a number of factors.[13]

There is, nevertheless, some data available on enquiries regarding age discrimination. While the simple fact that a person has made an enquiry does not confirm that, at law, age discrimination has occurred, it is indicative of the subjective experience of discrimination by those who feel motivated enough to investigate their options. The ADB reported that, in the 2001–2002 financial year, 876 enquiries were made regarding age discrimination,[14] representing six per cent of the total enquiries received. This number, however, reflects all enquiries about age discrimination, not only enquiries related to advanced age.

In the same year, the ADB recorded 68 complaints[15] of age discrimination where the person was discriminated against because they were 'too old'.[16] This represents four per cent of the complaints across all the various grounds of discrimination. Fifty (74 per cent) of those 68 complaints were in the area of employment, 15 (22 per cent) were complaints in relation to goods and services, one was in the area of education and 2 were 'other/unknown'.[17]

The same is true of HREOC enquiries and complaints made under the HREOCA. HREOC received 180 enquiries in the 'age — too old' category, but these are recorded without reference to actual age, or the area of

[13] See below *Barriers to accessing assistance for discrimination matters*, p 251, and *Barriers to effective participation in anti-discrimination complaints processes*, p. 256.

[14] Every time the Board is contacted for information about discrimination from an individual, it is recorded in a broad category of enquiry, such as sex, race or age discrimination.

[15] When the President of the Board receives a formal complaint of discrimination, statistics record greater detail, including sex of the complainant as well as rough categories within the ground of discrimination. For example, when a complaint of age discrimination is lodged, it will be noted whether the person is discriminated against by virtue of 'association' with a person of a particular age group, or because they are 'too young' or 'too old'.

[16] Note, this does not necessarily relate to discrimination against older people. It can also, for example, apply to the fast food industry where people are not allocated shifts because they are over 21 and not eligible for a junior wage. It can also apply in other industries (e.g. the IT industry) where the median age tends to be younger.

[17] Material provided by the Anti-Discrimination Board of NSW, 28 March 2003.

complaint. Thirty complaints of age discrimination in employment under the *International Labour Organisations Convention* were registered by HREOC in 2001–2002.[18]

Thus while the available data is incapable of revealing accurate intelligence about enquiries or complaints of unlawful age discrimination experienced by people over the age of 65, it is possible to conclude that the numbers are relatively small by comparison to sex discrimination (1720 enquiries), disability discrimination (1649 enquiries) and race discrimination (1066 enquiries),[19] and that age discrimination in the area of employment, if not necessarily the most prevalent form of age discrimination, is the one most frequently complained about. Neither HREOC nor the ADB conduct victimisation surveys, which are a means of establishing the prevalence of a phenomenon when it is suspected that it is under-reported. Therefore, the prevalence of age discrimination is difficult to estimate.

Studies on age discrimination

A number of studies have been undertaken on age discrimination: however, these tend to focus squarely on age discrimination in the area of employment. For example, the Australian Bureau of Statistics (ABS) has reported on a longitudinal survey, the Survey of Employment and Unemployment Patterns (SEUP), which tracked the jobseeking efforts and outcomes of a sample of jobseekers over a three-year period.[20] While 'older jobseekers' (those

[18] Human Rights and Equal Opportunity Commission, *Annual Report 2001–2002,* 2002. Available at <http://www.humanrights.gov.au/annrep01_02/chapter2.html> (Last accessed 24 June 2003).

[19] Anti-Discrimination Board, *Annual Report 2001–2002: Total Enquiries By Ground,* 2002. Available at <http://www.lawlink.nsw.gov.au/adb.nsf/pages/ar01-02%20enquiriesground> (Last accessed 24 June 2003); Human Rights and Equal Opportunity Commission, *Annual Report 2001–2002*.

[20] The SEUP general population group consisted of a random sample of 15–59 year olds. See Australian Bureau of Statistics, 'Older jobseekers'*, Australian Social Trends 1999,* catologue n.4102.0, Australian Bureau of Statistics, Canberra, 1999. Available at <http://www.abs.gov.au/Ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/d2da058a2cef2ba1ca25699f0005d62c!OpenDocument> (Last accessed 23 May 2003).

aged between 45 and 59),[21] showed a relatively low unemployment rate of five per cent, they experienced less success than younger jobseekers in gaining employment.

During the course of the ABS study, older jobseekers looking for work fell from 74 per cent to 32 per cent. However, only about half of those ceasing to look for work did so because they chose to move out of the labour market, rather than because they became unemployed.

It is useful to examine employment population ratios in order to establish some sense of how many older people are actually employed, and how employment participation decreases with age. The ABS reports levels of participation in the workforce of older people:

Table 7.1 Employment Participation Rates in NSW for 55–64 year olds: Males and Females[22]

	Males %	*Females %*
55–59 years	70.8	46.8
60–64 years	43.7	18.6
Total Labour Force (15–64 years)	71.3	53.7

While these data demonstrate a high employment participation rate for men in the 55–59 year age bracket, those in the 60–64 bracket in NSW show a lower participation rate. In both age groups women have a much lower participation rate than men.

[21] Older jobseekers numbered 168,000, representing 19% of the panel. See Australian Bureau of Statistics, 'Older Jobseekers'.

[22] Australian Bureau of Statistics,'Work — State summary tables', *Australian Social Trends 2002*, Catalogue n.4102.0, Australian Bureau of Statistics, Canberra, 2002. Available at <http://www.abs.gov.au/Ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/695d4157b8409331ca256bcd00827300!OpenDocument> (Last accessed 21 March 2003).

Research into age discrimination has been commissioned and undertaken by a variety of institutions. One 1999 study of employer attitudes conducted by Drake Management Consulting indicated that the problem is widespread and severe: "while we have long known that ageism is a problem in organisations, we were unaware of just how deep-rooted the problem is".[23] The study involved a survey of 500 senior executives and human resources managers from their employer clients. The survey asked questions in relation to age preferences in the recruitment, retrenchment and training of executive staff. No participants in the study indicated that they would hire executive staff over the age of 50. Twenty-three per cent reported that they would select employees from the 41–50 age group, while 62% said they would hire employees in the 31–40 age bracket.[24]

The study also shows a heavy bias against older people when decisions about retrenchment of staff had to be made. Sixty-five per cent of participants stated that the 50 plus age group would be the first to be offered redundancy, with 70 per cent of them saying "the reason why they'd retrench executives over the age of 50 ahead of others, is because they're perceived to be inflexible and unwilling to change."[25] The study reported that on the contrary, older employees were amenable to change:

> Our findings show that as many as many as 86 per cent of senior workers are more than happy to take up training opportunities offered to them—crushing any suggestion that they are either too arrogant or too set in their ways to embark on learning.[26]

According to Drake's findings, many executives make hiring, training and retrenchment decisions based on stereotypical assumptions about older people.

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[23] Drake Personnel Limited, 'Age Discrimination is Alive and Well', Media Release, Drake Management Consulting, Melbourne, 5 November 1999.

[24] Drake Personnel Limited, 'Age Discrimination is Alive and Well'.

[25] Drake Personnel Limited, 'Age Discrimination is Alive and Well'.

[26] Drake Personnel Limited, 'Age Discrimination is Alive and Well'.

Similarly HREOC's report, published in preparation for the introduction of age as a ground of discrimination at the Federal level states.

> Age discrimination in employment takes place in a context of negative attitudes and stereotypes of older people in general. Whether in recruitment, promotion, training, retirement or redundancy, older people are left feeling judged on their age rather than their abilities. They are made to feel expendable.[27]

HREOC recorded a number of stories from older people who made submissions to the enquiry outlining how they had experienced the brunt of negative stereotypes held by employers.

When reviewing the ADA, the NSW Law Reform Commission made the following comments on the age discrimination provisions in respect of assumptions about older employees:

> It aims at undermining entrenched attitudes where they are built on misconceptions. For instance, older workers are often presumed not to be skilled in modern technology, to be inflexible in their work practices, unable to acquire new skills and incapable of physically demanding work… That those judgements may be correct in particular cases does not mean that they are universally correct. Decisions should not be based on stereotyping assumptions.[28]

Employer practices that are motivated by these kinds of attitudes in relation to older workers may fall within the definition of unlawful age discrimination, but are often difficult to prove in a discrimination complaint because they are rarely overtly stated.

> We don't receive many complaints of age discrimination because on the whole, it's one of the more difficult grounds to prove.[29]

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[27] Human Rights and Equal Opportunity Commission, *Age matters: a report on age discrimination*, Human Rights and Equal Opportunity Commission, Sydney, 2000, p. 12.

[28] New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, vol. 1, Report n.92, New South Wales Law Reform Commission, Redfern, NSW, 1999, p. 269. Available at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r92toc> (Last accessed 23 December 2003).

[29] Consultation with Jill Moir, Anti-Discrimination Board of NSW, 30 September 2002.

In response to this problem of proving age discrimination, some studies have set their sights on exposing age discrimination by exploring employer attitudes towards, and treatment of, older workers in comparison with younger workers.

The Social Policy Research Centre (SPRC) conducted a survey in 2001 of 1000 employers in the Business Services industry who had recruited in the last 12 months. This industry was "selected because of the diverse businesses and employment arrangements it includes and because it has a profile suggesting that it is representative of the employment opportunities available to older workers".[30] In their findings, 47 per cent of businesses did not employ any staff over the age of 55 in the past 12 months and 70 per cent had less than 10 per cent of their staff aged over 55 years. However, when they considered all employees in Business Services, not just of those employers surveyed, 10 per cent were over the age of 55.[31]

The SPRC study reported on numerous other studies[32] showing that negative stereotypes of older employees, that act as barriers in recruitment, often contradict or conflict with an employer's perceptions of their own older workers.

In the UK, an interim evaluation[33] of the 'Age Diversity in Employment; A Code of Practice',[34] a best-practice code introduced in 1999 by the Blair

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[30] Bittman, M., Flick, M. and Rice, J., *The Recruitment of Older Australian Workers: A Survey of Employers in a High Growth Industry*, SPRC Report 6/01, Social Policy Research Centre, University of New South Wales, Sydney, December 2001, p. 18.

[31] Bittman, et al., *The Recruitment of Older Australian Workers*, p. 30.

[32] Steinberg, M., Donald, K., Najman, J., Skerman, H., 'Attitudes of Employees and Employers Towards Older Workers in a Climate of Anti-discrimination', *Australian Journal on Ageing*, vol. 15, n.4, 1996; Encel, S., 'Age Discrimination', in Patrickson, M. and Hartmann, L., (eds), *Managing an Ageing Workforce*, Business and Professional Publishing, Warriewood, NSW, 1998; Reark Research, *Attitudes of Employers Towards Older Workers: Report to NSW Office on Ageing*, Reark Research, Sydney, 1994; and Senate Employment, Education and Training References Committee, *Report on the Inquiry into Long Term Unemployment*, The Committee, Canberra, 1995.

[33] Department for Education and Employment, *Evaluation of the Code of Practice on Age Diversity in Employment: Interim Summary of Results for Wave 2*, Research Brief RBX 6/00, United Kingdom, 2000.

[34] Department for Education and Employment, *Age Diversity in Employment: A Code of Practice*, United Kingdom, 1999, pp. 15–16.

government, concluded that age discrimination in employment is difficult to prevent. Legislation prohibiting age discrimination is being considered in the UK, but has not yet been enacted. One conclusion from the report, according to the SPRC, is as follows:

> …The process of eliminating age discrimination in the labour market is difficult. Employer attitudes, business practices and the economic situation combine to limit the opportunities of older workers in the labour market. The British Code of Practice illustrates that while best practice models may be developed, unless age discrimination legislation can be effectively enforced, there may be little alteration in actual employer practices.[35]

The evaluation indicated that there had been little demonstrable change in employer policies as a result of the Code. This kind of study shows the persistence of negative attitudes towards older workers.

The SPRC tried to interrogate this issue further by posing a series of dichotomous characteristics commonly associated with older and younger workers to their sample of employers in the Business Services industry. The respondents were asked to indicate a preference between the various employee characteristics, without being informed that they were age-related stereotypes.

The results did not establish a pattern of preference, rather a mixture of qualities for ideal prospective employees. The SPRC reports that this is a different result to the earlier studies, which showed chiefly negative attitudes toward the characteristics associated with older employees.[36] This finding is consistent with the argument that when the reference point of the older worker is removed, employers tend to have a more balanced view of the kinds of qualities that contribute to a beneficial working environment.

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[35] Bittman, et al., *The Recruitment of Older Australian Workers*, p. 16.

[36] Bittman, et al., *The Recruitment of Older Australian Workers*, p. 40.

Another study conducted in Washington DC[37] took a more experimental approach to test age discrimination in the hiring practices of employers in relation to entry-level management and sales positions. The study involved preparing four pairs of applicants for the experiment: three of the pairs were male, and one was female. One of each pair claimed to be aged 57 and one 32 years old. Hypothetical resumes were prepared for all 8 'testers', with the researchers controlling for the differential work experience between the younger and older applicants by filling the 25-year age gap with work or life experience that was unrelated to the employment criteria. Nevertheless, each was assigned several years of relevant work experience appropriate to the target jobs. They then applied for positions in their respective pairs.

In 70 per cent of occasions, the members of each pair were treated comparably in the application process. In the remaining 31 per cent of occasions, the older of each pair experienced discrimination:

> …While older testers fared less well than their younger counterparts in all phases of the application process, the majority of their disadvantage arose immediately upon contacting employers, before they could present their qualifications fully.[38]

One of the older testers applied for a job and made contact four times without managing to speak with anyone directly. When the younger tester contacted the same employer, an interview was immediately organised.[39]

The pairs were also sent to interviews for various positions. They reported that older testers experienced discrimination in 34 per cent of the sales positions and 100 per cent of the managerial positions for which they applied. It was suggested that the relatively lower level of discrimination in sales might be

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[37] Bendick, M., Brown, L. and Wall, K., 'No Foot in the Door: An Experimental Study of Employment Discrimination Against Older Workers', *Journal of Aging & Social Policy*, vol. 10**,** n.4, 1999, p. 10.

[38] Bendick et al., 'No Foot in the Door', *Journal of Ageing and Social Policy*, vol. 10, n.4, 1999.

[39] Bendick et al., 'No Foot in the Door', *Journal of Ageing and Social Policy*, vol. 10, n.4, 1999, pp. 11–12.

explained by the nature of remuneration in that field, which is often wholly or partly commission-based. They reasoned that employers may perceive that it is less risky to hire older employees for commission-based sales positions, due to the lesser financial burden placed on those employers.[40]

In one sales position for which both members of a pair were interviewed, there were marked differences in the way each was treated. The older of the two was interviewed for 48 minutes and was warned against making a career change from teaching to sales. The younger applicant's interview extended to 85 minutes, during which he was treated in a friendly and informal manner and, after a second interview, was offered a job.

Another finding of note was the increased level of discrimination when employment agencies were used as intermediaries. The study reported that older testers were treated less favourably than younger ones 84 per cent of the time when an employment agency was involved, as opposed to 29 per cent when no employment agency was engaged.

> All this evidence is consistent with the hypothesis that, with or without explicit instructions from their clients, many employment agencies assume that older applicants and other traditionally discriminated against groups should automatically be screened out.[41]

When older applicants did receive job offers, these were often qualitatively different from offers to younger applicants. Commission levels were often lower, and some older employees were offered part-time employment, in jobs where younger testers were offered full-time positions. The study also reported that factors such as whether the firm advertised themselves as an "equal opportunity employer" or whether they were a nationally recognised company, had no impact on the likelihood that they would discriminate against older job applicants.

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[40] Bendick et al., 'No Foot in the Door', *Journal of Ageing and Social Policy*, vol. 10, n.4, 1999, p. 14.

[41] Bendick et al., 'No Foot in the Door', *Journal of Ageing and Social Policy*, vol. 10, n.4, 1999, p. 15.

Issues raised in consultations

Employment

The ADB has identified employment as the area that attracts the most complaints on the ground of age discrimination. In NSW, there are four different employment contexts which are susceptible to age discrimination:

- in recruitment
- in the terms and conditions of employment
- in the opportunities for advancement, training and transfer
- in dismissal/redundancy.

Older workers do not have a uniform experience of discrimination in the workplace.

> People over 65 make fewer complaints about not being able to get a job but more complaints about being in a job, being compulsorily retired or encouraged to leave. People between 45 and up make complaints about not being able to get a job if there is an assumption made about their age or if there's knowledge about how old they are.[42]

After consulting with the Board, it became clear that many discrimination complaints are not capable of being dealt with under the ADA, because it is very difficult to prove that employers are being unlawfully discriminatory.

> So many of the inquiries or complaints we get are from people who say, 'I missed out on this job and I'm sure it's because I'm older', or whatever but they don't really have any way of proving it. The bulk of age-discrimination complaints are from people who have sent off applications and have never heard back from the employer—they've done it 40 times and they didn't hear back and they've assumed that is because of age. It's circumstantial often, but it might be that someone gets an interview because there's nothing in their CV that's going to suggest that they

[42] Consultation with Jill Moir, Anti-Discrimination Board of NSW, 30 September 2002.

> have a disability. Whereas if someone puts in a CV that, for instance, has a lot of jobs on it, or where they maybe put their age or date of birth on it—they just don't ever hear back from the employer.[43]

Further,

> I've heard stories about people removing the oldest six jobs from their CV and their birth certificate, and then getting an interview—just to be able to get their foot in the door—but then they are seen.[44]

Other complaints in which there is demonstrable evidence of discriminatory behaviour are more conducive to conciliation.

> People approaching retirement age are being pressured to leave to make way for younger employees. On occasion, people are made to feel like they're being very selfish wanting to keep continuing work, particularly after 65… there've been a few complaints where people have felt really harassed by the sorts of comments made to them like, 'you don't need this job as much as some young person with a family—you're entitled to your super now, back out gracefully' kind of thing.[45]

Also,

> The word 'betrayal' comes up a lot. We just settled a complaint for a chap who had worked for 35 or 40 years for the one large organisation and he got asked what his retirement plans were when he turned 64. He said, 'uh, no. I'm still quite good at my job thanks … and I'd like to stay'. They said, 'the company is going through a big transition'. They gave him a year's notice of his redundancy but the sole basis of his redundancy was age. They abolished his title but an equivalent position was created. It probably involved some IT skills that he didn't have or they assumed he wouldn't be able to acquire because he was older.[46]

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[43] Consultation with Jill Moir, Anti-Discrimination Board of NSW, 30 September 2002.

[44] Consultation with Jill Moir, Anti-Discrimination Board of NSW, 30 September 2002.

[45] Consultation with Jill Moir, Anti-Discrimination Board of NSW, 30 September 2002.

[46] Consultation with Jill Moir, Anti-Discrimination Board of NSW, 30 September 2002.

The ADB reports that one assumption commonly held by employers is that someone who is made redundant, and then later seeks out entry level employment, will not be able to be managed by someone younger and less experienced. Their sense of this issue is that it might apply to men more than women, but only because women were less likely to be in such high level positions to begin with.

The ADB also identified age-based discrimination concerning employers' assumptions about employees' plans for retirement. Examples of such assumptions included a man whose contract was not renewed due to a downturn in business, and who was told that at age 62, he was 'likely to leave the company soon anyway', and a woman who was overlooked for promotion because it was assumed she would probably not want to take on the challenge of the new position at her age. They also reported instances of front line staff being dismissed or not hired, because they didn't fit the 'image' of the workplace. They noted that systemic discrimination is higher in some industries. This might manifest as not employing people who have made worker's compensation claims, the likeliness of which increase with age in certain industries.[47]

Over time, some employers have become more familiar with their obligations under anti-discrimination legislation,[48] although there are examples of employers taking steps to avoid discrimination disputes.[49] One strategy noted by the ADB is using employment agencies as a buffer.

> Employers have this misguided notion[50] that if agencies do their recruiting for them, then they won't get into trouble if they don't consider

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[47] Consultation with Jill Moir, Anti-Discrimination Board of NSW, 30 September 2002.

[48] This is partly due to articles written with the protection of employers in mind. See for example, Edgerton, F., 'Age discrimination', *In Depth***,** April 1999, pp. 13–16.

[49] However, in a consultation with Christine Regan (The Council of Social Service of NSW), Brenda Bailey (Council on the Ageing) and Sol Encel (Social Policy Research Centre) from The Aged Care Alliance, on 9 September 2002, it was suggested that employers are generally ignorant of anti-discrimination laws. They found there was little knowledge of the Commonwealth proposal in this area.

[50] It is a 'misguided notion' because the *Anti-Discrimination Act 1977* (NSW) is able to find the employer liable in any case. See Section 53, *Anti-Discrimination Act 1977* (NSW).

> people in a fair way. They can say to an agency, 'we don't want someone who can't speak English as a first language… so you go and do that for us and we'll keep our hands clean'.[51]

Indeed, many complaints from older jobseekers arise from their interactions with employment agencies.[52] ADB conciliators anecdotally report that complaints made to them include: employment agencies requiring people to divulge their age; and being told by employment agencies that they were too qualified or that the job would suit a younger person. Some older people using the services of employment agencies have reported to the ADB that in their experience, agencies have been more overtly discriminatory in their approach to aged clients than employers dealing directly with them.

> A common theme of complaints is people who are older and have been made redundant from previous jobs—they go to an employment agency and the agency tells them quite bluntly, 'we're going to have a hard time placing you because of your age' or won't put their name forward for jobs ... that they know they would be suitable for ... It's hard to tell if there are more complaints about agencies than employers but it might be a bit more obvious in relation to an agency.[53]

The ADB has suggested that this phenomenon might be explained by recruitment agencies' perceptions that their allegiance is with employers' and their needs, rather than people seeking employment.

> The agencies see themselves as working for the employers, as opposed to working for the individual job seekers. So they're not going to put people forward if they think the employer isn't going to want them. Agencies want to get continued business from the employers. They really try and pick someone who they think is going to fit very well, and they have a very narrow conception of what is going to be a good employee—and that doesn't exclude just older people, they exclude a whole bunch of people.[54]

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[51] Consultation with Jill Moir, Anti-Discrimination Board of NSW, 30 September 2002.

[52] This accords with the Bendick et al.'s findings (see Bendick et al., 'No Foot in the Door', *Journal of Ageing and Social Policy*, vol. 10, n.4, 1999). Age discrimination by employment agencies is rendered unlawful under Section 49ZYH of *Anti-Discrimination Act 1977* (NSW).

[53] Consultation with Jill Moir, Anti-Discrimination Board of NSW, 30 September 2002.

[54] Consultation with Jill Moir, Anti-Discrimination Board of NSW, 30 September 2002.

The result can be that older jobseekers are hit with a double jeopardy. An employer firm wants to protect itself by using an intermediary to cull potential employees on the basis of their advanced age, but the agency's perception of their requirements might be even more extreme than they had contemplated. Furthermore, employment agencies may act on assumptions that might not reflect any real prejudices held by the employer firm.

Provision of goods and services

According to the ADB, the next area after employment in which most formal complaints are lodged on the ground of age discrimination is in the provision of goods and services.[55] This ranking should be treated with caution however, as complaints made to the ADB in 2001–2002 in this area numbered only 15 (22 per cent of all complaints regarding age discrimination). As mentioned previously, the number of complaints cannot act as a reliable measure of prevalence, but only as an indication of those whose sense of entitlement motivates them to make complaints.

Many of the enquiries and complaints received by the Board relate to income, or lack thereof, combined with a perception of a limited life expectancy. For example, "Older people were refused a mobile phone contract because they were on a pension".[56] Similarly, "people were refused loans because they were on pensions—you know aged pensioners—because they're not seen to have enough time to pay them back".[57] This kind of discriminatory behaviour has its basis in a commercial determination that older people present as a high-risk group for contracts involving periodical payments over an extended period of time due to their limited financial flexibility.

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[55] Consultation with Jill Moir, Anti-Discrimination Board of NSW, 30 September 2002.

[56] Consultation with Jill Moir, Anti-Discrimination Board of NSW, 30 September 2002. While this example does not constitute direct age discrimination, it might meet the legislative requirements for indirect age discrimination.

[57] Consultation with Jill Moir, Anti-Discrimination Board of NSW, 30 September 2002.

A variation on this theme occurs where a company calculates a level of risk without reference to individual circumstances, and either excludes the older person entirely, or does so effectively by pricing them out of the market.

> The other one we do get quite a few complaints about is travel insurance. After they're over a certain age, it varies between companies, but they can't take out travel insurance—the 65–70 age group—there's a distinct sliding scale of premiums.[58]

These kinds of complaints, however, are not capable of being dealt with under the ADA because insurance policies, provided they are based on reliable actuarial data, are exempted from the operation of the age discrimination provisions in the Act.[59] Thus, while insurance companies are clearly discriminating against older clients by charging higher premiums, it is not deemed unlawful discrimination.

Anti-discrimination legislation only renders very specific kinds of discrimination unlawful in Australia. The result is that some complaints, as is exemplified by the insurance scenario above, are outside the jurisdiction of complaint-handling bodies like the ADB.

> There have been lots of complaints from older folk who don't meet doctors' criteria for bulk billing. It's not really a complaint that we can do terribly much about—the gist of it is that aged pensioners might qualify for bulk-billing, but for other older people who aren't pensioners, that just have a seniors card, the doctor won't give them a bulk-billing concession. It's really about someone's income level rather than their age.[60]

In this instance, the discriminatory behaviour manifests as a policy more appropriately characterised as differential treatment on the basis of economic status, rather than age. One submission made to this project reiterated this complaint:

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[58] Consultation with Jill Moir, Anti-Discrimination Board of NSW, 30 September 2002.

[59] See Section 49ZYT, *Anti-Discrimination Act 1977* (NSW).

[60] Consultation with Jill Moir, Anti-Discrimination Board of NSW, 30 September 2002.

An 89-year-old woman, who uses a walking frame, was knocked down by another woman who was walking without her frame. "I hit my head on concrete and need ongoing medical treatment, for which I pay in full. The other person gets free medical help because she has an Army gold pass. This is not fair."[61]

While this may be experienced as unequal treatment by older people excluded from the medical concession, anti-discrimination law is drafted to protect disadvantaged groups from invidious policy-making, rather than ensuring equal treatment for all.

Other grounds for discrimination

As mentioned previously, age data is not available on other grounds of discrimination from HREOC or the ADB. This means that it is not possible to assess how frequently complaints by older people are made on other grounds, such as racial or sex discrimination. A couple of community legal centres, consulted for this project, commented that they had not experienced extensive discrimination complaints from older clients. The Inner City Legal Centre (ICLC) workers, whose client demographic includes a large number of people who identify as homosexual, recalled one case of discrimination on the grounds of homosexuality:

> One client from a few years back, who was homosexual and a veteran, his partner wasn't eligible for the war service entitlements that he would have been entitled to if he was the female partner of the Veteran.[62]

The Blue Mountains Community Legal Centre reported that the bulk of discrimination in the area is on the basis of disability, which can be, but is not necessarily, connected with age.

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[61] Individual telephone submission.

[62] Consultation with Natalie Ross and Andrew Taylor, Inner City Legal Centre, 9 October 2002.

Another issue raised in consultation with Aboriginal Legal Services in Sydney is the discrimination that can result from multiple disadvantage.

> …One thing that's always stuck in my mind ... is how [sentencing] relates to life expectancy. If the average Aboriginal male is expected not to live beyond about 57 … then sending a 50 year old to gaol for five years may be a life sentence effectively… If you're talking about say a 60 year old Aboriginal man being sentenced, well that would be the equivalent of an 80 year old white person in terms of life expectancy. And an 80 year old white person would get quite different treatment. [His advanced age is] certainly going to be taken into account.[63]

This example demonstrates palpably how, at times, equal treatment can result in extreme inequity.

Issues raised by older people

The biggest issue raised in the focus group conducted with Older Men: New Ideas (OM:NI) was in relation to the importance of employment. Although none of the participants referred to discrimination, the older male's perspective on the impact of losing employment was ventilated during the discussion.

Many of the OM:NI members had left work before the age of 65. One left at 59 when his factory closed down. Unable to secure a job elsewhere, he applied for Newstart and had to daily fill in a form to show he was looking for work.[64] Another participant retired at 58. He worked in telecommunications and was offered a redundancy package (receiving 75 per cent of his salary on an ongoing basis). He said that this was a good decision because he has a disability.

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[63] Consultation with Richard Wilson, Sydney Regional Aboriginal Legal Service, Redfern, 8 October 2002.

[64] Older Men: New Ideas (OMNI) Lakemba Branch focus group participant, Sydney, 10 September 2002.

Although none of the participants had sought out advice in relation to retirement issues, one participant said that his union organised for a financial adviser to attend the factory for that purpose. Also, some companies gave seminars in which retirement was discussed with employees and their wives. Such treatment could be construed either as a considerate service for employees, or as gentle pressure to encourage them to think about retirement.

Some participants felt that there was no value placed on the importance of work for older men, for whom work is a substantial part of their identity. The majority said that they did not want to retire when they did. Other comments included: 'Your wife doesn't want you under her feet'; 'Your work is what you do'; and, 'Your workplace is a second family in a way'. It was felt that although some look forward to retiring at 65, when it finally happens they find the lifestyle change to be a shock, particularly since work is often a rich source of male friendships.

One participant had a sick wife. His employer noticed that his mind was not on the job and fired him at 63, whereas he had planned to retire at 65. He expressed dismay about his situation:

> When plans are stuffed up like this, particularly in relation to finances, it is difficult to deal with it. One needs to have a good accountant.[65]

He might have had some recourse under the ADA provisions prohibiting discrimination on the ground of carers' responsibilities, but he did not seek out legal information or advice.

One OM:NI member discussed how things were different for older men in this situation:

> Young blokes around 40 are better equipped to deal with leaving employment because they can see what older people have been through,

[65] Older Men: New Ideas (OMNI) Lakemba Branch focus group participant, Sydney, 10 September 2002.

> and because they have more experience with changing jobs, whereas many men of the older generation worked for the same company for 30 or 40 years.[66]

Lengthy periods of employment with single employers has been advanced by many as a reason why dismissal due to age can come as such a shock to older people, as employee loyalty creates an expectation of equal dedication on the part of the employer.

Other focus groups on these issues were conducted with the Older Women's Network (OWN). The gender difference was noted by one OWN member:

> … a lot of men, when they retire, don't go out and do things and join things like a lot of women. It's part of their own making too sometimes ... Some women don't either, but a lot of women will get out and join groups and do things.[67]

For the female participants, work seemed to be less associated with identity and friendships, and more connected with necessity or enjoyment, such as:

> They couldn't understand somebody who worked because they liked their job… One of the classics was 'get a life'. What they didn't appreciate is that I wouldn't go into a life where I couldn't contribute to the broader community nearly as much.[68]

Another participant stated:

> I was worried that I wasn't going to find an outlet for my political beliefs to be satisfied… I was despairing that I wasn't going to live long enough to be able to replace what I'd found to be very satisfying work.[69]

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[66] Older Men: New Ideas (OMNI) Lakemba Branch focus group participant, Sydney, 10 September 2002.

[67] Older Women's Network focus group participant, Penrith, 14 October 2002.

[68] Older Women's Network focus group participant, Sydney, 8 October 2002.

[69] Older Women's Network focus group participant, Sydney, 8 October 2002.

The women in OWN seemed to have a high sense of entitlement in relation to their work. The following remarks indicate that participants had seriously thought about some form of redress, but were put off by the imbalance of power between individual employees and their employers:

> I just think it would be a hard battle because the person you're bringing the age discrimination complaint against has all the big guns and you're going to have to be very tough to stand up to their big guns.[70]

> I have a friend who's in her sixties and she had to put up with a lot of ageist treatment… in the end the remarks got so terrible that she became very sensitive and nervous… she did complain to management, but by the time she did that, she'd decided she was going to go anyway.[71]

Further,

> They're often the ones that are making your work environment so difficult—so you're actually going to exacerbate the problem in your personal relationships. There's actually nowhere to go. It's a 'catch 22'.[72]

Another participant indicated a lack of interest in trying to solve the problem in her workplace by making a complaint and chose instead to resign.

> Well, I actually resigned because I was being pushed around there a bit and I'm not a person who can be pushed around ... The poor old husband nearly fainted when I resigned. I did say that I'd been considering leaving for quite some months prior to that. I was given an option of staying—they didn't accept my resignation straight away. No, they said, "think about it" ... I wanted to resign at the time for me, because I could see that it would never ever get any better. Probably, in the light of the decision I would have had to do something else about it, but I was probably a bit more fortunate than some people that I knew. I still had a living, once I left work, but some people they have to work because they're supporting themselves and some of them actually still got mortgages that they have to pay.[73]

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[70] Older Women's Network focus group participant, Sydney, 8 October 2002.

[71] Older Women's Network focus group participant, Sydney, 8 October 2002.

[72] Older Women's Network focus group participant, Sydney, 8 October 2002.

[73] Older Women's Network focus group participant, Penrith, 14 October 2002.

Apparently the employer in this case was keen for her to continue working, and possibly would have been open to trying to resolve the issue. This woman's story reveals that she felt entitled to be treated with respect in her place of employment, but also demonstrates a pessimism about things changing in the future: she chose to withdraw from the problem, rather than actively taking steps to address it.

Barriers to accessing assistance for discrimination matters

Reluctance to complain

Although this is not a phenomenon exclusive to the area of discrimination, one of the main impediments to accessing justice for older people suffering discrimination is a reluctance on the part of victims to make a complaint. Many older people are reluctant to complain, or resort to legal remedies to solve a dispute.[74]

> Older Australians tend not to come forward with complaints. It's a generational sort of thing…[75]
>
> Some elderly adults do not see themselves as the kind of people who could have a legitimate claim to anything better.[76]

In order to receive redress, the older person must first feel that the treatment they are receiving is unacceptable, and that they are entitled to better treatment. This is a threshold issue, in the absence of which, the older person will probably take no further action.

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[74] See Chapter 1, *Introduction*, Why do older people have particular legal needs?, p. 2.

[75] Consultation with Michael Jordan, National Co-ordinator of the Customer Relations Team at Centrelink, 5 December 2002.

[76] National Alternative Dispute Resolution Advisory Council, *Issues of Fairness and Justice in Alternative Dispute Resolution*, Discussion Paper, National Alternative Dispute Resolution Advisory Council, Canberra, November 1997. Available at <http://www.nadrac.gov.au/www/disputeresolutionHome.nsf/0/043D3288E4FE074CCA256B4C000BD025?OpenDocument> (Last accessed 18 December 2003).

> The older people who do complain have a great sense of entitlement that they have their own reasons for wanting to continue to work… Those who do make complaints have been a bit defensive—felt that they had to justify why they wanted to keep working. For example, women who don't have that much super that need to support themselves, instead of just saying 'I enjoy it'.[77]

Even those who do complain have to struggle against personal and external expectations that they should simply "bow out gracefully".

In regards to complaints of age-related discrimination, the ADB made some observations that may explain the disparity between evidence of discrimination against older workers from external sources and the relatively small number of formal complaints received by the ADB.

> They'll often feel the need, more than other people, to say, 'I'm not the sort of person that ordinarily complains. I wouldn't ever have thought that I would have to do this—I've always been a really loyal and hard-working sort of person', because they're quite embarrassed about having to come and make a complaint… as a generalisation, younger people have a greater sense of entitlement and can make a complaint without feeling like they need to apologise for it.[78]

Individual disempowerment

Some older people spoke with a sense of inevitability about discrimination, highlighting what they perceive as the pointlessness of complaining.

> We grew up in an era where I can imagine everyone of us worked in a very discriminating workforce… One of the reasons I left work was because I was getting to the stage, you know, like you had no rights anymore… It is still going on out there and it's been by people who are possibly no better than us in some circumstances, but they just happen to be in the position of power and they're using that power to do this to people.[79]

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[77] Older Women's Network focus group participant, Penrith, 14 October 2002.

[78] Consultation with Jill Moir, Anti-Discrimination Board of NSW, 30 September 2002.

[79] Older Women's Network focus group participant, Penrith, 14 October 2002.

Individuals also have to be aware, or be motivated to find out, that there are laws prohibiting discrimination. Once aware of the anti-discrimination legal framework, the legislative definition must strike a chord with the older person's experience of discrimination. For some, the discriminatory treatment can be subtle and cumulative or ambiguous, which may leave the person feeling uncertain about whether they have actually experienced discrimination as defined at law.

'Microagressions' is a term that comes from critical race theory and is used to describe daily encounters with minor suspected acts of racism.[80] These are "sudden, stunning, or dispiriting transactions"[81] that can combine to create feelings of exclusion and denigration in the individual, whether or not they are intentional. Older people may experience age-based 'microaggressions' in seeking employment, or in other aspects of their lives, although they may not translate that experience as discrimination as it is legally defined. These may affect an older person's self-esteem, making them less likely to feel they have a right to be treated otherwise.

> People who don't have a sense of entitlement, who perhaps do internalise the comments about selfishness, are not those making complaints.[82]

Ignorance of how to make a complaint

Making a complaint necessitates that those affected must know where they should report the discrimination. While many organisations are in a position to refer people to the appropriate body, many older people complain that they do not know who to approach in the first instance, and that getting this information is a real battle.

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[80] Delgado, R. and Stefancic, J., *Critical Race Theory: An Introduction,* New York University Press, New York, 2001. Available at <http://www.nyupress.org/19309chapt1.php> (Last accessed 14 July 2003).

[81] Delgado and Stefancic, *Critical Race Theory.*

[82] Consultation with Jill Moir, Anti-Discrimination Board of NSW, 30 September 2002.

> Older women are less aware than younger women of what assistance is out there. They did not have community legal centres etc. when they were young. The information about such services does not seem to reach older women. How do you get to them?[83]

More general observations include:

> A single point of contact would be ideal for older people; a 'one-stop-shop', which could either deal with the enquiry then and there, or refer older people to the most appropriate organisation that could help.[84]

> There should be an Office for Government Information. It is difficult for people to find the right body to contact in Government for information, complaints etc. This is particularly hard when you are not sure which level of Government is the appropriate one. Government agencies change names so often you don't know who does what.[85]

This last comment has particular resonance for anti-discrimination law, which includes both State and Federal legislative instruments and corresponding complaint-handling bodies.

Lack of evidence and procedural delays

For a complaint-handling body to proceed with a formal complaint it must come within their jurisdiction, and so there must be demonstrable evidence that the treatment accords with legal requirements. One of the obvious reasons the ADB might not be able to proceed with a complaint is that there is suspicion, but no proof, of discrimination.

> So many of the inquiries or complaints we get are from people who say, 'I missed out on this job and I'm sure it's because I'm older', or whatever, but they don't really have any way of proving it.[86]

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[83] Consultation with Margaret Small, Womens Legal Resources Centre, 25 October 2002.

[84] 2002 Premier's Forum on Ageing — Consumer Protection, 1 October 2002.

[85] Accomodation Workshop, 2002 Premier's Forum on Ageing — Consumer Protection, 1 October 2002.

[86] Consultation with Jill Moir, Anti-Discrimination Board of NSW, 30 September 2002.

The ADA permits that unlawful discrimination does not have to be the only, or even a substantial, reason for an act for it to be regulated by the legislation.[87] However, a reasonable explanation for the act may overshadow the suspicion that it is discriminatory. For example, an older person may be rejected when applying for a job by being told that they are over-qualified for a position. This could really mean that the employer thinks the person is too old, or it could be an expression of anxiety that the person will not be satisfied by the position and want to leave after a short time. Because of this ambiguity, the substance of the complaint may not be sufficient for the Board to proceed.

Critically, the older person will require personal strength and stamina to initiate a complaint and proceed through the complaint process. Depending on the number of complaints on foot at any one time, there may be substantial time delays before a claim can be investigated, let alone before the organisation of the parties to the point of conciliation can take place. The Education Services branch of the ADB conducts community education that generally covers age as a ground upon which people may experience discrimination, but does not actively encourage people to complain, partly for this reason:

> We always recommend self-help and other strategies over recourse to the Board. The reality is that many people are denied employment on the ground of their age. But we make it clear what they might be contemplating making a complaint through the Board and tell them "the pain might not be worth the gain". You know, they may spend 2 years in an action against a prospective employer and they may end up being compensated in the end, but what they really wanted was to be employed for those 2 years.[88]

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[87] See Section 4A, *Anti-Discrimination Act 1977* (NSW).

[88] Consultation with John Hill, Manager of Education Services, Anti-Discrimination Board of NSW, 12 March 2003.

If conciliation is not successful, the case may be referred to the ADT[89] or the Federal Court/Federal Magistrates Service.[90] Those jurisdictions have their own further time delays for mediation and securing hearing dates, meaning that a case may not be resolved for more than two years.

Every one of these steps towards making a complaint, including the Board's encouragement towards self-help, is a barrier to be overcome by older people in addressing discrimination aimed at them.

Many of the older participants in this project expressed a belief that the legal system is either not worth the trouble and expense of engaging with, or is incapable of producing a satisfactory outcome for them.

> *I have applied to both employment agencies and employers directly through the newspaper. The agencies have said point blank: 'Your age is against you'. When I said they were discriminating on the basis of age, they said: 'We are entitled to match the qualities of the employers with prospective employees.' As soon as employers realise your age, they start being nice to you, but they don't give you a job. You know, to get a job by force (i.e. making a complaint to the Anti-Discrimination Board) it doesn't work. It gets you satisfaction, but not a good job.*[91]

Barriers to effective participation in anti-discrimination complaints processes

One way of addressing the negative perceptions of the legal system among older people would be to convince them that it is capable of protecting them and resolving their disputes. However, there are a number of reasons why the law may not be adequate for achieving this.

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[89] If the complaint is lodged with the Anti-Discrimination Board.

[90] If the complaint is made to Human Rights and Equal Opportunity Commission.

[91] Individual telephone submission.

The need for self-advocacy

Generally speaking, anti-discrimination law in Australia is a complaints-based system.[92] This kind of system requires the most disadvantaged people to become advocates for themselves—which often means assuming a level of power and entitlement that may be beyond their reach.

> A great majority of conflicts in which elderly adults are involved are tolerated, avoided, or suppressed. Even when they do become actively involved, elderly people have difficulties recognising their inability to cope with conflict. As a consequence, they are frequently reluctant openly to discuss their dispute, downplay it or deny its existence. They tolerate discomfort, and regard it as a personal achievement to manage their problems silently, which further adds to their powerlessness.[93]

The problem is often compounded by the often vast power disparity between the complainant and respondent in conciliation. The ADA does not include a right to representation for either party in a conciliation conference: this is a discretionary matter for the President to decide upon application by one or both parties.[94] Having to ask for and be granted permission for someone to represent them in conciliation—and possibly pay for the privilege—can present an extra hurdle for older people.

> Older clients have a tendency to want to hand over the issue to someone they can trust, rather than taking an active role in solving it, while younger people want to stay in control.[95]

The ADA permits a representative body to make a complaint on behalf of one or more people, provided the President is satisfied that it is with the consent of those represented, and that the organisation has a 'sufficient

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[92] The ADB and HREOC are empowered to act other than on the basis of complaints—for example, in their law reform capacities, education services and, to a limited extent, can create standards such as accessibility to public buildings for people with disabilities.

[93] National Alternative Dispute Resolution Advisory Council, *Issues of Fairness and Justice in Alternative Dispute Resolution.*

[94] See Section 93, *Anti-Discrimination Act 1977* (NSW).

[95] Consultation with Karen Cox and Emma Keene, Consumer Credit Legal Centre, 25 October 2002.

interest' in the complaint.[96] It is also possible to undertake a class action in the ADT, but the conditions that need to be satisfied for the Tribunal to proceed are onerous.[97]

Such impediments to an older person receiving assistance, whether through representation by an individual advocate or representative body, or banding together as a class of victims, act as further barriers to accessing justice.

Problems with conciliation-oriented processes

In its conciliation of complaints, neither the ADB nor HREOC, has the power to impose sanctions on respondents.[98] In terms of resolving matters, the conciliation process does not take an interest in the objective fairness of the resolution: rather it accepts the agreement arrived at between the parties. If the applicant does not seek legal advice prior to conciliation, it is possible that they will not be aware of the strength or weakness of their position and the likely outcome if the matter were to proceed to a tribunal or court hearing. This may adversely affect the complainant's leverage in conciliation. Furthermore, the outcomes of conciliation will not be open to public scrutiny.

Conciliation conferencing also assumes parties to be equal. Thus, if a respondent such as a large corporation is to undertake the implementation of a policy that will effect systemic change in the organisation in relation to their older workforce, it would require that the parties arrive at that conclusion between themselves—or, more practically, for the older person to demand it as a term of settlement. It would also depend upon the good will of the corporation to follow through with that agreed course of action, as the complaint-handling bodies are not in a position to police or enforce the terms of the agreement.[99]

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[96] See Section 88(1A) *Anti-Discrimination Act 1977* (NSW). Also see Section 88(1B) for definition of 'sufficient interest'.

[97] See Section 103 *Anti-Discrimination Act 1977* (NSW).

[98] Only the ADT or Federal Court/Federal Magistrates Service have this power.

[99] If the conciliated agreement is not adhered to, the complainant may have to take the matter to the ADT or Federal Court/Federal Magistrates Service, depending on the jurisdiction of the complaint.

Limited impact of individual complaints processes

Systemic change as a result of a single complaint of age discrimination is unlikely. Although sweeping reforms are not impossible, complaint-based systems that encourage self-representation discourage it. The ADB has acknowledged this problem in a recent report.

> While it is important that individuals can take action and obtain redress for unlawful discrimination, a system which is primarily focused on individual complaints is limited in its ability to address issues which are systemic in nature.[100]

They suggest that alongside the capacity to receive and handle individual complaints, setting standards that employers, service providers and educational institutions would be required to meet is a sound method for effecting systemic change.

> There is a need to examine the potential to reposition anti-discrimination legislation generally to impose positive duties subject to appropriate defences.[101]

In respect of age discrimination, this would mean that the responsibility for addressing age discrimination would not fall solely on older individuals, but would be shared, to create a balance of rights and responsibilities. In time, this might also have a positive impact on work culture as a whole, making some inroads into behaviours that do not, strictly speaking, meet the legal definition of discrimination, but which do nevertheless have a cumulative, enervating effect on older people.

In the past, the ADB has participated in law reform activities including making submissions to reviews of Acts of Parliament to law reform commissions and parliamentary reviews, and has initiated its own

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[100] Smyth, M. and Falk, A., *Addressing systemic discrimination in the public sector: Report of the study tour undertaken April/May 2002,* March 2003. Available at <http://www.lawlink.nsw.gov.au/adb.nsf/pages/systemic02> (Last accessed 18 December 2003).

[101] Smyth and Falk, *Addressing systemic discrimination in the public sector.*

enquiries.[102] Its expertise on human rights issues has been brought to bear on a number of projects. For example, the ADB was recently asked by the Commonwealth Attorney General's Department for information on the operation of the age provisions under the ADA, for the purpose of developing Federal legislation to prohibit age discrimination.

To some extent, the NSW ADB is hamstrung in its law reform capacity by the general exception of 'acts done under statutory authority, etc.' in the ADA.[103] The operation of this section was explored in the NSW Law Reform Commission (NSWLRC) *Review of the Anti-Discrimination Act 1977*:[104]

> …the general exception for acts done under statutory authority importantly excepts anything that is 'necessary' to be done in order to comply with other legislation and with orders of the… Equal Opportunity Division of the Administrative Decisions Tribunal and the courts.[105]

The NSWLRC explains that this exception was originally intended as a temporary measure. It was to provide a buffer for legislation and court/tribunal orders while the ADB prepared its report to the Minister on discrimination.[106] So much was made clear in the, then Premier, Hon. Neville Wran QC's Second Reading Speech:

> Many of the statutes in their present form are discriminatory. It is, therefore, proposed in clause 130 [see s.121, ADA] that the Anti-Discrimination Board be established to undertake a review of the legislation of the State, and of governmental policies and practices, to identify discriminatory provisions, and to report these matters to the

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[102] For example, ADB's statewide enquiry into Hepatitis C-related discrimination, 2001. The report from this enquiry is available at <http://www.lawlink.nsw.gov.au/adb.nsf/pages/hepcreport1> (Last accessed 18 December 2003).

[103] See Section 54, *Anti-Discrimination Act 1977* (NSW). There is no equivalent general exception in the Federal anti-discrimination jurisdiction. The *Sex Discrimination Act 1984* (Cth) and the *Disability Discrimination Act 1992* (Cth) provide exceptions for specified legislation, that is justified on public policy grounds.

[104] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*.

[105] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, p. 324.

[106] As it was required to do under Section 121, *Anti-Discrimination Act 1977* (NSW).

> Government. Clause 65 [see s.54 of the ADA] provides that in the meantime this Act shall not apply to provisions of other Acts, or to instruments made or approved under any other Act.[107]

The Board did report to the Minister by 1978,[108] and some 25 years later, the section is still in operation,[109] effectively making legislation and orders 'off limits' to the operation of the ADA. The ADB has strenuously argued for the repeal of s.54 and eight organisations were critical of the section in their submissions to the Review of the Act.[110] Further the NSWLRC recommended the repeal of s.58 and the scrutinising of all new legislation to ensure compliance with the ADA.[111]

The ADB reported receiving complaints from older people about being paid less worker's compensation because they were older,[112] however, these complaints are outside their jurisdiction because of s. 54 of the ADA. While there are government and non-government organisations engaged in law reform process on behalf of older people, the ADB is well-placed to investigate areas in the legal system that unlawfully discriminate against aged people. This provision significantly weakens the ADB's capacity to have an impact on systemic discrimination.

Another impediment to systemic change is that conciliated complaints cannot be publicised. The outcomes of conciliation conferences are reported in the ADB's Annual Report, although the detail of matters and the parties cannot be revealed (see table 7.2).

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[107] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r92chp6> (Last accessed 18 December 2003).

[108] See NSW Anti-Discrimination Board, *Report of the Anti-Discrimination Board in Accordance with section 121 of the Anti-Discrimination Act 1977*, The Board, Sydney, 1978.

[109] Although subject to some minor, narrowing amendments.

[110] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* see footnote 23 at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r92chp6>.

[111] See NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, recommendations 43–44 at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r92chp6>.

[112] Consultation with Jill Moir, Anti-Discrimination Board of NSW, 30 September 2002.

Table 7.2 Outcomes of age discrimination 'too-old' complaints to the ADB 2001/2002

Sydney, Wollongong & Newcastle offices		
	No.	*%*
Threshold exclusion		
Outside jurisdiction of ADA	6	7.2
Formally declined by the ADB	2	2.4
Complaint is out of statutory time limit	1	1.2
Subtotal	9	
Not proceeded with by the ADB		
Complaint withdrawn	21	25.6
Other more appropriate remedy	3	3.7
Contact lost	5	6.1
Other	4	4.9
Subtotal	33	
Referred to ADT		
Referred to ADT	1	1.2
Referred to ADT after unsuccessful conciliation	5	6.1
Referred to ADT conciliation not suitable	3	3.7
Subtotal	9	
Settled in some form		
Settled after advice to parties — no conciliation	3	3.7
Settled after minimal negotiation — no conciliation	3	3.7
Settled after intensive negotiation — no conciliation	9	11.0
Settled at or after conciliation	9	11.0
Settled outside the Board	7	8.5
Subtotal	31	
TOTAL	82	100%

In the year 2001–2002, just over a third (38 per cent) of age discrimination ('too old') complaints to the ADB were settled, but there is no further data available revealing how they were settled.

> I don't know that age discrimination matters that have been conciliated over the years have been conciliated particularly favourably for the

> complainant… I can't tell you about particular cases because they're confidential.[113]

Eleven per cent of matters were referred to the ADT. The largest proportion of complaints, however, were those not proceeded with by the ADB. The limited detail provided in the table above raises questions about why so many complaints were withdrawn or contact lost with the complainants.

The negative flow-on effects of this confidentiality are at least two-fold. On one hand, the privacy of conciliation protects the reputation of respondents, permitting discriminatory policies and practices to persist.

> There's the process of mediation, which often allows employers to pay 'hush money' rather than to be publicly found to have discriminated against a person. The system provides little scope for reducing the incidence of discrimination that occurs.[114]

On the other hand, it stymies the development of case law: only a small number of cases have progressed to the ADT dealing with the issue of age discrimination.[115] While some important developments have occurred through those decisions, it could not be described as a rich body of cases from which to draw principles of age discrimination. Thus, even if complainants to the ADB do manage to obtain legal advice prior to conciliation, the case law is not going to be very useful in predicting likely outcomes in individual cases. This, in turn, may impact upon the demands that complainants feel they can make in settlement negotiations.

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[113] Consultation with Jill Moir, Anti-Discrimination Board of NSW, 30 September 2002.

[114] Consultation with Office for Ageing, Department of Ageing, Disability and Home Care, 12 September 2002.

[115] Between 1994 and 2001, 10 cases of age discrimination were heard by the Equal Opportunity Division of the ADT. Four were decided in favour of the complainant. See for example, *Blatchford v. Qantas Airways Limited* (1997) EOC 92-888; *Cassidy v. Cronulla Golf Club* [1998] NSWEOD, 14 November 1998.

Conclusion

The literature review, consultations with service providers and submissions from older people reveal that age discrimination is much more readily experienced than it is enquired or complained about. As a result, this chapter has focused on the barriers facing older people in addressing age discrimination through existing complaint-handling bodies.

Many of the impediments in accessing justice in anti-discrimination law stem from problems with the legal framework itself. These can be summarised as follows:

- conciliation conferencing is inattentive to the objective fairness or legal soundness of agreements between parties
- the confidentiality of the substance and outcomes of conciliation creates strongholds for serial respondents
- the vast majority of complaints being privately resolved in conciliation limits the development of case law
- complaint-based systems do not effectively bring about systemic or cultural change
- current and new legislation, court/tribunal orders, and governmental policies and practices are exceptional to the operation of the ADA,[116] which prevents the ADB from fully engaging in law reform processes, thereby restraining it from causing systemic change.

There are also significant barriers for individual older people accessing justice when they have been victims of discrimination:

- access to sound legal information, advice and representation is a general barrier restricting older people's access to justice and specifically restricts their navigation of the anti-discrimination legal framework

[116] See Section 54, *Anti-Discrimination Act 1977* (NSW).

- requiring older individuals to be their own advocates is less than ideal for a group who are characterised as being both unwilling to complain and tend toward handing over their problems to someone else
- complaint-based systems offer only passive protection to older people. In the absence of imposing positive obligations and setting standards for employers, service providers, educational institutions and other bodies, the most vulnerable people must assert their rights
- power differentials between individual complainants and respondents (often corporations or large institutions) are not sufficiently addressed in conciliation conferences
- as agreement (rather than objective fairness) is the goal of conciliation, the onus is on the complainant to inform themselves of the law in order to operate effectively in its shadow
- complaint-handling bodies' incapacity to enforce conciliated agreements requires individuals to take their matter to a court or tribunal, involving added expense, time and stress.

Clearly existing mechanisms available to older people for the purpose of seeking redress, after suffering discrimination, place onerous burdens on individuals who are vulnerable from the outset. Instead of compensating for that vulnerability, the legal framework and complaint-handling schemes compound the problem. Under the current system, it is little wonder that the most disadvantaged and disempowered people do not readily see the law as a solution to their problems.

8. Elder abuse

Introduction

Internationally, policy makers and researchers do not have a common definition for elder abuse. This creates problems in the fields of research and policymaking, as research results are not readily open to comparison.[1] Lack of a consistent definition also leads to difficulties in assessing the prevalence of elder abuse and the adequacy of the law in addressing elder abuse. Nevertheless, elder abuse in Australia has been appreciated as a serious social problem warranting attention since the early 1990s.[2]

The term 'elder abuse' has been used to describe a range of abuses that include: "physical abuse, psychological abuse, medical abuse, economic abuse, violation of rights, sexual abuse, neglect and self-neglect",[3] or a combination of these. The abuse can be intentional or unintentional, and can be the result of acts or omissions. Broad-brush definitions are fleshed out with varying inclusions and exclusions of the above-mentioned forms of abuse. One of the simplest definitions is: "the wilful or unintentional harm caused to an older person by someone with whom they have a relationship of trust",[4] Other definitions focus more on the harm sustained than the relationship with the abuser.[5]

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1 Biviano, N., 'Abuse of the non-institutionalised aged: dilemmas of policy and practice', *Australian Social Work*, vol. 49, n.4, 1996, pp. 41–46.

2 For example, the NSW Advisory Committee on Abuse of Older People in their Homes was formed in 1993 after a series of reports examining the issue.

3 Kinnear, P. and Graycar, A., 'Abuse of Older People: Crime or Family Dynamics?' *Trends and issues in crime and criminal justice*, i.112, May 1999, p. 2.

4 Consultation with Robyn Sedger, Aged Abuse Monitoring Project, Western Sydney, 5 November 2002.

5 NSW Advisory Committee on Abuse of Older People in their Homes, *Abuse of Older People: The Way Forward: final report of the NSW Advisory Committee on the Abuse of Older People in their Homes*, Ageing and Disability Department, Sydney, 1997, p. 10.

Australian definitions commonly exclude self-neglect and crimes committed by strangers.[6] Australian research and practice also tends to separate elder abuse in institutional settings from that experienced in private homes, as the issues in relation to prevention, detection, intervention and remedies are quite different from those of older people in community care. One reason for this distinction is that aged people in nursing homes, retirement villages and hostels are open to greater scrutiny by government, workers, family and friends.[7]

From a worker's perspective, the operation of varying definitions means that no single definition can be employed for the purposes of detection and intervention. However, it has been noted that a single definition may also cause problems.

> Armed with an encompassing definition there is the danger that professionals will see what they expect to see when confronted with a possible abuse situation.[8]

Thus, instances of abuse that do not match the textbook definition may be overlooked.

The Victorian Office of the Public Advocate reported in 1990 that one of the factors preventing people from reporting elder abuse was the absence of a clear and commonly accepted definition.[9]

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[6] See for example, NSW Advisory Committee on Abuse of Older People in their Homes, *Abuse of Older People: The Way Forward*, p. 10; Kinnear and Graycar, 'Abuse of Older People: Crime or Family Dynamics?' *Trends and issues in crime and criminal justice*, i.112, 1999, p. 2.

[7] Consultation with Wendy Fisher and John Newton, The Aged Care Rights Service, 8 April 2003.

[8] Biviano, 'Abuse of the non-institutionalised aged', *Australian Social Work*, vol. 49, n.4, 1996, p. 42.

[9] Barron, B., Cran, A., Flitcroft, J. et al., *No Innocent Bystanders: A Study of Abuse of Older People in Our Community*, Office of the Public Advocate, Melbourne, 1990.

Abusive Relationships

> Family care can be among the very best or worst experiences human beings can devise for each other.[10]

The vast majority of perpetrators of elder abuse have been identified as close family members, often living with the victim. A recent Aged Care Assessment Team (ACAT) study examined elder abuse on the Central Coast of NSW. The study involved 1,777 people aged over 65 years of age who were referred to the Central Coast ACAT during a one-year period from November 1996 to November 1997. The research focused on clients and carers living in private homes. Clients in hospitals, aged care facilities and boarding house type accommodation were excluded. Of the 1,777 referrals to ACAT, there were 96 cases (five per cent) of elder abuse confirmed. The study found that in these cases, 40 per cent of perpetrators were the adult children of the victim, 35 per cent were spouses and 25 per cent were other and non-relatives.[11]

Other research conducted by the Aged Rights Advocacy Service (ARAS) in Adelaide examined 100 case records for older people who had reported some form of elder abuse, and for whom the outcome was known (i.e. whether the abuse had stopped, or whether it had not). This represented approximately 20 per cent of total clients over an eighteen-month period from November 1997 to June 1999. The study found that out of the 267 situations of abuse reported, 56 per cent of abusers lived with the victim and that the adult child was the most common perpetrator, with sons making up 29 per cent and daughters 24 per cent overall of abusers. These were followed by:

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[10] Consultation with Robyn Sedger, Aged Abuse Monitoring Project, Western Sydney, 5 November 2002.

[11] Livermore, P., Bunt, R. and Biscan, K., 'Elder Abuse Among Clients and Carers Referred to the Central Coast ACAT: a Descriptive Analysis', *Australasian Journal on Ageing*, vol. 20, n.1, March 2001, p. 43.

> …multiple family (11 per cent), spouse (eight per cent), and grandchild (seven per cent). Friends comprised six per cent of total abuser relationships, with the remainder being made up of other family relationships (e.g. niece).[12]

The ACAT and ARAS studies are the only available studies on who the perpetrators are. However, given that these studies related to very specific geographic areas (i.e. Central Coast, NSW, and Adelaide, South Australia) the extent to which their results are generalisable to the NSW population is unclear.

Carers and others in relationships characterised by a duty of care are sometimes abusers of older people in their care, but are also sometimes the subject of abuse.

> The stressful nature of the caring role, complex family dynamics and a loose and largely unregulated system of support provide an environment in which abusive situations arise. These factors also mean that abuse is not always an uncomplicated or unidirectional interaction of 'carers' who abuse dependent people. In some situations, especially where there is a history of family violence or child abuse or where dementia and other psychological disorders are present, the dependent elderly can also be 'abusive' towards their carer.[13]

In the ACAT study, 25 per cent of the victims identified were carers.[14]

In NSW, approximately 150,000 (19 per cent) carers are aged over 65, and of all older people 20 per cent are carers.[15] Ninety per cent of all primary

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[12] Livermore et al., 'Elder Abuse Among Clients and Carers', *Australasian Journal on Ageing*, vol. 20, n.1, March 2001, p. 19.

[13] Kinnear and Graycar, 'Abuse of Older People: Crime or Family Dynamics?' *Trends and issues in crime and criminal justice*, i.112, 1999, p. 2.

[14] Livermore et al., 'Elder Abuse Among Clients and Carers', *Australasian Journal on Ageing*, vol. 20, n.1, March 2001, pp. 41–47.

[15] NSW Ageing and Disability Department, *Older People in NSW*, Ageing and Disability Department, Sydney 1999. Available at <http://www.dadhc.nsw.gov.au/NR/rdonlyres/AD83F531-ED4F-4ECF-8E3A-36FCE980DA04/442/carers.pdf>. (Last accessed 21 October 2003).

carers aged over 65 live with the person they care for and 75 per cent care for a spouse.[16] It is reasonable to conclude that at least some of the abused carers will be older people.

One phenomenon that has been noted is that well-established power relationships can shift through ageing and onset of disabilities. This shift can affect abuse patterns. For example, a long-term relationship characterised by domestic violence which continues into old age may result in the victim becoming the perpetrator when the original perpetrator becomes ill.[17] Another example is where a person who was sexually abused in childhood by a parent becomes the parent's abuser when the parent ages and is dependent upon the grown-up child.

Some categories of abuse

Financial abuse

Financial abuse can come in many forms. Perpetrators may have legal control of the older person's finances and assets via a power of attorney or enduring power of attorney[18] and may be siphoning money for themselves. Others may steal money or assets from the aged, for example, "taking Nan's pension, not giving her enough for bus money, getting her to sign over life savings and live in a room above the garage",[19] or pressure her into changing a will in their favour or giving them money through manipulation or standover tactics.

[16] NSW Ageing and Disability Department, *Older People in NSW*.

[17] Kinnear and Graycar, 'Abuse of Older People: Crime or Family Dynamics?' *Trends and issues in crime and criminal justice*, i.112, 1999, p. 4.

[18] See Chapter 9, *Substitute decision-making and end of life issues.*

[19] Consultation with Meredith Osborne, Blue Mountains Community Legal Centre, 23 September 2002.

A 2002 study exploring asset management and financial abuse of older people, recognised that formal and informal practices of asset arrangement for older people create much potential for financial abuse. The study was based on a national survey of people over 18 years (n=3,434) of the prevalence of asset management in the Australian population. One-third of respondents had assisted a family member or friend with an asset management task in the previous 12 months, and 85 per cent had assisted a person aged over 55 years. The most common person assisted was a parent (53 per cent). The means utilised by family members to assist an older person with asset management included Enduring Power of Attorney, arrangements with banks, signing blank cheques and using automatic teller machine PIN numbers.[20]

Financial abuse is a commonly reported form of elder abuse. It was the main form of elder abuse that participants in this project reported.[21] A consultation with the Inner City Legal Centre yielded some discussion about clients in similar positions:

> One of them came under the *Contract Review Act* [*1980 (NSW)*] and had the contract reopened because they didn't have any independent advice, they were old, it was their only asset and so on but they really didn't want to go down that road. They didn't get legal advice before becoming a guarantor.[22]

Rodney Lewis, principal solicitor of the Elder Law Centre at the University of Western Sydney, suggested that this kind of problem should be less of an issue following developments in the common law.

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[20] Tilse, C., Wilson, J., Setterland, D., Robinson, G., Rosenman, L., *Families, Asset management and Care giving: Developing issues in policy, research and practice*, Symposium: Assets, ageing and abuse — emerging issues for families, 8th Institute of Family Studies Conference, Melbourne, 12–14 February, 2003.

[21] Note, however, the methodologies employed for collecting data, mostly through focus groups, were not conducive to participants disclosing other forms of abuse that might have been experienced. The reason for this is that the public nature of focus groups would mean that participants would be reluctant to disclose other, more personal forms of abuse such as physical or sexual abuse.

[22] Consultation with Natalie Ross and Andrew Taylor, Inner City Legal Centre, 9 October 2002.

> The case of *Amadio*[23] was a watershed. Financial institutions now require guarantors to seek independent legal advice where they do not have a financial interest in the business or property.[24]

It was clearly established in *Commercial Bank of Australia Ltd v. Armadio* that unconscionable conduct requires the obtaining of an advancement or benefit from a person with a special disability as a result of that disability. In *Urane v. Whipper*[25], the NSW Supreme Court decided that the age, health, hospitalisation, mental state of the plaintiff and his requirement for constant assistance, made him a person under a special disability, from whom a benefit was obtained. The lack of separate independent legal advice was also a relevant factor. In this case, the plaintiff provided the whole of the sale proceeds of his house to his daughter (the defendant), without any interest or charge over the property being provided in return. The plaintiff had suffered two strokes, was in poor health, was quite confused, and had received a significant amount of caring support from the defendant. The defendant had threatened that if he did not comply with her request, she would no longer provide any assistance or support. The court held that the arrangement was an unconscionable dealing between the parties, accepted by the plaintiff in a state of weakness with little choice.

However, according to Juliet Cummins, co-director of the Elder Law Centre, the developments in the common law still fail to provide adequate protection to older people who go guarantor for their children's debts.

> Australian law has recently gone some way to recognising the problems associated with guarantees given in familial contexts, but has stopped short of protecting older Australians guaranteeing their children's debts. In *Garcia v. National Australia Bank Ltd* (1998) 194 CLR 395, the High Court was asked to uphold the 'special rule for wives' … holding that it would be unconscionable for a lender to enforce a guarantee against a

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[23] *Commercial Bank of Australia v. Amadio* (1983) 151 CLR 447.

[24] Consultation with Rodney Lewis, Elder Law Centre, University of Western Sydney, 26 September 2002.

[25] *Urane v. Whipper* [2001] NSWSC 796.

> borrower's wife if she had not understood the nature and effect of the transaction and the lender or an independent party had not taken steps to explain them to her. The basis for this rule … was not a presumption that the husband had exercised undue influence over his wife, but rather that the marital relationship should alert the creditor to a relationship of 'trust and confidence' between the borrower and guarantor meaning that the guarantor "may well receive from the debtor no sufficient explanation of the transaction's purport and effect".[26]

The basis for the claim that such response is inadequate for older people is based on the premise that the decision is essentially creditor-focused, in that it concentrates on the creditor's knowledge and behaviour, rather than directly on the relationship between the borrower and the guarantor. Accordingly, it is not adapted to the guarantor's needs. In addition, the ruling only applied to wives, and there was no suggestion from the court that it should apply to other relationships of emotional dependence.[27]

There is also concern that the present doctrine of undue influence is the product of 19th century assumptions, and does not consider the particular frailties of older people. According to Fiona Burns, Senior Lecturer, Faculty of Law, University of Sydney, the doctrine reflects the view that old age does not warrant any special protection, even in relation to undertaking huge liabilities or the transfer of substantial assets.

> The present doctrine as applied in Australia operates in a piecemeal fashion and elders have found it more difficult to obtain relief than other recognised vulnerable groups. An elder has to satisfy high thresholds before obtaining relief under the doctrine. In order to establish actual undue influence, the elder will need to show that there has been a threat to prosecute him or her or deliberate concealment of important information. Generally, an elder will only successfully claim relational undue influence where he or she can prove total or excessive

[26] Cummins, J.L., 'Relationship debt and the aged: Welfare vs. Commerce in the law of guarantees', *Alternative Law Journal*, vol. 27, n.2, April 2002, p. 64.

[27] Cummins, 'Relationship debt and the aged', *Alternative Law Journal*, vol. 27, n.2, April 2002, p. 64.

> dependence on the defendant. It appears that proof of manifest disadvantage to the elder or substantial benefit to the defendant is also required in cases of relational undue influence ... In short, the doctrine of undue influence inter vivos fails to protect a significant portion of elders who willingly transfer large assets, such as their home, or guarantee substantial liabilities of relatives and caregivers, to the detriment of their financial security.[28]

Burns suggests that well-structured and broad-based legislative protections, including the requirement of independent professional advice in relation to a wide range of transactions, could begin to address the uneven treatment of older people in comparison to other vulnerable groups.[29]

However, independent legal advice does not prevent older people from entering into these arrangements with their children. It may only protect the financial institutions from liability. Situations of this kind will not always constitute elder abuse. Some people make poor decisions that result in a loss of assets or money. For example, one caller stated that he put up his house as collateral for his son's business that subsequently failed.[30] Financial abuse requires more than simply making a poor financial decision. The abusive element is generally that the older person is directly or indirectly pressured by the beneficiary to enter into an arrangement of this kind.

Some callers reported difficulties accessing inheritances after the death of their aged parent or in-law.

> *My brother-in-law is a developer and used his physical proximity to his mother and influence over her to get her to sign property over to him prior to her death. The will*

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[28] Burns, F., *Undue Influence Inter Vivos and the Elderly*, (2002) 26 Melborune University Law Review, 449–536, available at <http://www.austlii.edu.au/au/journals/MULR/2002/27.html> (accessed on 30 April 2004).

[29] Burns, F., *Undue Influence Inter Vivos and the Elderly*, (2002) 26 Melbourne University Law Review, 449–536.

[30] The caller provided no information about abusive circumstances.

> *bequeathed him half of the estate and the other half was to go to my husband, but there was virtually nothing left when she died. The brother-in-law was the executor of the will. All the transfers happened 10 years ago and the legal advice we received was that it happened too long ago to do anything about it. We received $5,000 from the estate in the end and were charged $2,000 by the solicitor. We complained to the Law Society and that complaint is still on foot.*[31]

And,

> *I am a 67 year old aged pensioner and had a house in joint tenancy with my late mother. My two sisters-in-law (both now widows) swooped in and saw a lawyer after my mother's death and concocted a story about the house being a part of my late father's estate and sold the house. I still have the deeds. I have seen a lawyer and made a complaint to the Law Society about the involvement of the sisters-in-law's solicitor. I would like to be able to take the counsel and the sisters to court but I cannot afford it. I haven't got the money to fight these buggers. The estate was never done properly in the first place, which is what allowed them to do this to me.*[32]

Other callers reported money effectively being stolen from them.

> *I lent money to my 2 adult children 12 years ago—$45,000 to my daughter and $40,000 to my son under a contract where they were to pay me back after 2 years. My daughter is now divorced and she hasn't spoken to me in 10 years. The two of them lived with me for a while but they left on bad terms. I*

[31] Individual telephone submission.

[32] Individual telephone submission.

have a solicitor to write letters to them to get the money back and they have never responded. I recently found out they were divorced, so I called my son-in-law, but he keeps putting me off. My lawyer says that my only option is to take him to court to get the money back. I think that if I take him to court, most of the money will go in legal fees. I don't think you should take family members to court. The $40,000 I lent to my son is invested in property. I can't get that back but at least I know it's safe.[33]

In that case, the onus was placed on the mother to enforce the contracts with her children. It is not clear whether the children knew when the contract was drawn up that the mother would be reluctant to take court action if they broke the contract. The older person may not always be aware that he or she is being financially abused.

My mother has cerebro-vascular dementia. My sister and I had power of attorney over her monetary affairs. My sister withdrew $63,000 from the account. Mum was taken to a tribunal hearing where she announced that she had allowed my sister to have $30! After several years wait we are expecting a court judgement to be made as to the repayment of this money. My sister says she gave much of the money to her daughter. We have been very pleased with the work The Office of the Adult [sic Public] Guardian did for us. Just because Mum is a doddering old lady in a nursing home and has no idea what is going on, she has to spend what is left of her money trying to retrieve what these people took. I relinquished my rights as attorney and placed the money with the Public Trustee. My sister, her husband and her daughter are all saying they cannot repay the money.[34]

[33] Individual telephone submission.

[34] Individual telephone submission.

The research conducted by the ARAS in South Australia found that out of the 267 situations of abuse which were disclosed by the participants, 33.5 per cent came under the rubric of financial abuse. The majority of types of abuse were more likely to be reported when the older person lived with the abuser than where they did not, although they suggest that it may be more difficult to detect where incomes and assets are merged.[35] In their 2000–2001 caseload, ARAS reported that 35 per cent of situations of abuse responded to were of a financial nature.[36]

In the Aged Care Assessment Team study, financial abuse made up 44 per cent of the 72 cases of client abuse studied. They found that financial abuse was more likely to be perpetrated by children (50 per cent) or others (44 per cent) than by spouses (six per cent). They also found that "less than half of financial abusers lived with the victim while nearly all non-financial abusers lived with the victim."[37]

Psychological abuse

This category can include all manner of behaviours that have the effect of making the older person feel disempowered, perhaps through isolation from friends or family, treating them like children, or verbal abuse, such as threats, denigrating language or making them feel ashamed. Some abusers may make the person feel as though they are entirely dependent upon them and stuck in an abusive situation from which they cannot extricate themselves.

In the ARAS study referred to above, psychological abuse was the most commonly reported category of abuse experienced by both men and women

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[35] Cripps, 'Rights Focused Advocacy and Elder Abuse', *Australasian Journal on Ageing,* vol. 20, n.1, 2001.

[36] Cripps, D., Biven, J., Northey, J. and Rigger, P., 'Abuse of older people: issues for lawyers', *Elder Law Review*, vol. 1, 2002, p. 15. Available at <http://www.uws.edu.au/about/acadorg/clb/sl/research/elderlaw/elderlawreview/reviewvol1/reviewvol1comments> (Last accessed 19 December 2003).

[37] Livermore et al., 'Elder Abuse Among Clients and Carers', *Australasian Journal on Ageing*, vol. 20, n.1, March 2001, p. 45.

(35 per cent of cases).[38] In 2000–2001, they reported that 47 per cent of situations of abuse were psychologically abusive, still the most frequently reported type.[39] In the ACAT study there was a much larger incidence of this kind of abuse, with 65 cases (68 per cent) of psychological abuse reported overall.[40] This breaks down into 47 cases of client abuse and 18 cases of carer abuse.[41] Among victims of multiple forms of abuse, 90 per cent reported experiencing psychological abuse.[42]

Physical abuse

This includes all kinds of physical violence, from minor assaults such as pushing or shaking to more extreme cases of punching or physically restraining the victim. Physical abuse might include neglect, such as leaving the older person confined to bed in soiled sheets.

The ARAS study referred to above reported that in 15 per cent of instances of abuse, victims had experienced physical abuse.[43] Their later statistics show a reduction of physical abuse, representing 10 per cent of situations reported.[44] Again, the ACAT study reported a higher percentage of physical abuse cases (36 or 38 per cent). Twenty-one of these were clients, representing 29 per cent of the abuse reported by clients. Fifteen were carers, representing 63 per cent of carer abuse reported.

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[38] Cripps, 'Rights Focused Advocacy and Elder Abuse', *Australasian Journal on Ageing,* vol. 20, n.1, 2001, p. 19.

[39] Cripps et al., 'Abuse of older people: issues for lawyers', *Elder Law Review*, vol. 1, 2002, p. 15.

[40] These large discrepancies between the two studies may be explained by a number of factors including that they were undertaken in different States, city versus metropolitan settings and different socio-economic factors.

[41] All carers participating in the study were over the age of 65.

[42] Livermore et al., 'Elder Abuse Among Clients and Carers', *Australasian Journal on Ageing*, vol. 20, n.1, March 2001, p. 43.

[43] Cripps et al., 'Abuse of older people: issues for lawyers', *Elder Law Review*, vol. 1, 2002, p. 15.

[44] Cripps et al., 'Abuse of older people: issues for lawyers', *Elder Law Review*, vol. 1, 2002, p. 15.

Sexual assault and abuse

Sexual assault and abuse includes a range of offences including rape, indecent assault and sexual harassment. It also includes sexually exploitive or shaming behaviour, such as leaving an aged person undressed.

No sexual abuse was reported from ARAS during both periods of research. One case was reported in the ACAT study.

Neglect

Neglect usually occurs when a carer or service provider fails to act in some way that has a detrimental effect on the older person's health or welfare. It includes failure to provide adequate food, shelter, clothing, medical care, hygiene, preventing medical or other assistance, and failure to medicate or over-medication.[45]

In the ARAS studies, 19 instances (seven per cent)[46] of neglect were reported for 1997–1999 and four per cent in 2000–2001,[47] whereas 17 cases (18 per cent) were reported in the ACAT study.[48]

Multiple abuses

Different kinds of abuse can happen at the same time or on a continuum within a single relationship of trust.

> Experience suggests that types of abuse often occur together, and, in fact, where one type is suspected, others are indicated. Psychological abuse… often involves an assault… [and] often occurs together with

[45] NSW Advisory Committee on Abuse of Older People in their Homes, *Abuse of Older People: The Way Forward,* pp. 10–11.

[46] Cripps, 'Rights Focused Advocacy and Elder Abuse', *Australasian Journal on Ageing,* vol. 20, n.1, 2001.

[47] Cripps et al., 'Abuse of older people: issues for lawyers', *Elder Law Review*, vol. 1, 2002, p. 15.

[48] Livermore et al., 'Elder Abuse Among Clients and Carers', *Australasian Journal on Ageing*, vol. 20, n.1, March 2001, p. 43.

> financial abuse. It is as if an abuser has to first intimidate and control an older person before they can abuse their finances.[49]

The concurrence of multiple forms of abuse will have consequences in terms of legal interventions. Many different areas of law may have to be utilised to address the abusive situations, if legal avenues are pursued.

Prevalence

> In most research, only abuse that is detected or reported can be studied, and this may not be representative of the scope of the problem.[50]

As mentioned previously, definitional variations mean that the findings of studies attempting to estimate the prevalence of elder abuse may not be comparable. Overseas studies have pegged elder abuse at between three and five per cent of the total population of older people.[51] By extrapolating these findings to the population of older people in NSW, the Advisory Committee on Abuse of Older People in their Homes[52] suggested that approximately 25,000 older people in NSW are the victims of abuse. Aged Care Assessment Team (ACAT) studies[53] have suggested that between about one and five per cent of older people living at home are subject to abuse.[54]

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[49] Cripps et al., 'Abuse of older people: issues for lawyers', *Elder Law Review*, vol. 1, 2002, p. 15.

[50] Biviano, 'Abuse of the non-institutionalised aged', *Australian Social Work*, vol. 49, n.4, 1996, p. 41.

[51] NSW Advisory Committee on Abuse of Older People in their Homes, *Abuse of Older People: The Way Forward,* p. 11.

[52] Henceforth, the Advisory Committee.

[53] Kurrle, S.E. et al., 'Patterns of elder abuse', *Medical Journal of Australia,* vol. 157, 1992, pp. 673–676; Susan E. Kurrle, Paul M. Sadler, Keri Lockwood, Ian D. Cameron, 'Elder abuse: prevalence, intervention and outcomes in patients referred to four Aged Care Assessment Teams', *Medical Journal of Australia,* vol. 166, n.3, 1997, pp. 119–122.

[54] Livermore et al., 'Elder Abuse Among Clients and Carers', *Australasian Journal on Ageing*, vol. 20, n.1, pp. 41–47.

A recent study conducted by the Aged Rights Advocacy Service (ARAS),[55] which randomly surveyed 1158 South Australians, found that 3 per cent of respondents had experienced abuse. Factoring in confidence intervals, they arrived at a range of between 2 and 4 per cent of all older Australians suffering abuse. Using Census data from 1996, they estimated this could mean that as many as 85,000 older Australians could be subject to abuse at any given time. They also state that prevalence data is more likely to under-estimate than over-estimate actual prevalence.[56] However, it is important to bear in mind that definitions of elder abuse are extensive, describing a wide range of abuses. Not all abuse will be of a severe or ongoing nature.

There are also problems with the collection of data in relation to elder abuse.

> There needs to be a statewide approach to data collection and that is a real problem at the moment because there are so many barriers to disclosure. Even the Aged Care Assessment Teams don't have a category of abuse in their assessments, and for legal reasons they don't want to categorically state that a certain situation constitutes psychological or physical abuse, so we have to find the information from various other assessment forms. We also do not have mandatory reporting, so there are always concerns about nominating a situation of abuse when it may not be one. Under freedom of information, families can access those files and understandably it is a very sensitive issue to any family if they are accused of abuse, which in some circumstances can be unintentional.[57]

Relevant bodies in NSW would have a clearer understanding of the problem of elder abuse, if common and consistent reporting criteria and protocols existed. The same can be said in relation to the national level.

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[55] Cripps et al., 'Abuse of older people: issues for lawyers', *Elder Law Review*, vol. 1, 2002, pp. 14–19.

[56] Cripps et al., 'Abuse of older people: issues for lawyers', *Elder Law Review*, vol. 1, 2002, p. 16.

[57] Consultation with Robyn Sedger, Aged Abuse Monitoring Project, Western Sydney, 5 November 2002.

> Although the Australian Federal Government is responsible for aged care, it is the State and Territory governments that have had the carriage of strategies for responding to elder abuse and each State has developed a specific approach for how their ageing, community care and health services respond to elder abuse. Some States have an independent agency to respond to cases of abuse, and others utilize [sic] inter-agency protocols which set out guidelines for response.[58]

Collection and sharing of data on elder abuse is critical to understanding the extent of the problem. Unfortunately, many service providers do not adequately record information that would be useful in assessing elder abuse.

Barriers to detection and reporting of elder abuse

As mentioned above, there is no mandatory reporting of elder abuse in NSW or other jurisdictions in Australia. While mandatory reporting is legislatively instituted in most American States,[59] it is not generally recommended for introduction in Australia. It has been suggested that mandatory reporting would effectively equate elder abuse with child abuse and compel the infantalisation of older people.[60]

There are many reasons why older people may not report their experiences of elder abuse. Some of these include:

- a lack of community and professional awareness about the problem
- a lack of identification of certain situations as constituting elder abuse, for example, where no physical violence is being experienced

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[58] Kurrle, S., 'Update', *Newsletter*, International Network For The Prevention Of Elder Abuse, Issue 9, March 2002.

[59] Cripps et al., 'Abuse of older people: issues for lawyers', *Elder Law Review*, vol. 1, 2002

[60] For an example of an argument against mandatory reporting, see Biviano, 'Abuse of the non-institutionalised aged', *Australian Social Work*, vol. 49, n.4, 1996, p. 45.

- people may not know who will be able to help them—who do they report it to and what will they do?[61]
- victims of elder abuse tend to be quite isolated, which means that they may not be able to access assistance and that the abuse continues in the absence of the scrutiny of others[62]
- older people and professionals may be afraid that the consequences of reporting the abuse will place the victim in a worse position than they are currently in, such as being institutionalised[63]
- older people may be ashamed that they are being abused by people they should be able to trust, such as close family members,[64] they may not want to jeopardise important relationships with family or friends, or may fear retaliation from their abuser[65]
- health professionals may lack protocols and procedures for addressing abuse.[66]

These barriers to reporting elder abuse may mean that prevalence rates are under-estimated.

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[61] Cripps et al., 'Abuse of older people: issues for lawyers', *Elder Law Review*, vol. 1, 2002, pp. 17–18; L Anike, *Older Women's Network Questionnaire: A Report on violence and abuse against older women*, Older Women's Network, Sydney, 1999.

[62] This is a big factor in the abuse of older people from culturally and linguistically diverse backgrounds. See E. D'Urso & Associates, *Research on Abuse of Older People from a Non-English Speaking Background*, Discussion Paper 6, NSW Advisory Committee on Abuse of Older People, Sydney, 1998; Cripps et al., 'Abuse of older people: issues for lawyers', *Elder Law Review*, vol. 1, 2002, pp. 17–18.

[63] McCullough, S., 'Aged Care — A Victorian perspective on complaints handling and the enforcement of consumer rights', *Alternative Law Journal*, vol. 27, n.2, April 2002, p. 59 at p. 61; Cripps et al., 'Abuse of older people: issues for lawyers', *Elder Law Review*, vol. 1, 2002, pp. 17–18.

[64] Cripps et al., 'Abuse of older people: issues for lawyers', *Elder Law Review*, vol. 1, 2002, pp. 17–18.

[65] Cripps et al., 'Abuse of older people: issues for lawyers', *Elder Law Review*, vol. 1, 2002, pp. 17–18; Monro, R., 'Family Agreements: all with the best of intentions', *Alternative Law Journal*, vol. 27, n.2, April 2002, p. 68 at p. 71.

[66] Cripps et al., 'Abuse of older people: issues for lawyers', *Elder Law Review*, vol. 1, 2002, pp. 17–18.

Causes of elder abuse

The causes of elder abuse are another much debated issue in research and service provision. Biviano summarises the early research findings of Kurrle, Sadler and Cameron,[67] identifying a number of factors that characterise abusive situations, including:

> … dependency of the victim (that is, physical and mental impairment), psychopathology of the abuser (including substance abuse), family violence (that is, continuation of violence in relationships), carer stress and financial dependence of the abuser…[68]

It has also been noted in some literature that older people of more advanced age, generally over the age of 75, are at greater risk.[69] Carer stress is now widely believed to be less influential than previously hypothesised, "…where carer stress is a contributing factor, it is usually associated with dependency or other mediating influences".[70] Robyn Sedger, of the Aged Abuse Monitoring Project, explained the early misconception:

> One of the problems with aged abuse is that it has been categorised as being only in relation to old people who need care, therefore, the cause is often attributed to carer stress with the attitude of "this wouldn't happen if we relieved the stress on the carer, so lets provide some respite and the situation may improve" and of course this sends the person back into the same situation.[71]

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[67] Kurrle et al., 'Patterns of elder abuse', *Medical Journal of Australia,* vol. 157, 1992, pp. 673–676.

[68] Biviano, 'Abuse of the non-institutionalised aged', *Australian Social Work*, vol. 49, n.4, 1996, pp. 41–46.

[69] Monro, R., 'Elder abuse and legal remedies: practical realities?', *Reform*, n.81, Spring, 2002, p. 43.

[70] Kinnear and Graycar, 'Abuse of Older People: Crime or Family Dynamics?' *Trends and issues in crime and criminal justice*, n.112, 1999, p. 3.

[71] Consultation with Robyn Sedger, Aged Abuse Monitoring Project, Western Sydney, 5 November 2002.

The Aged Rights Advocacy Service in Adelaide also finds the 'carer stress paradigm' a difficult one to sustain as it "suggests that older people are somehow ultimately responsible for the abuse they experience, by becoming a burden".[72]

In recent years it has been recognised that elder abuse is a complex problem with no single cause and individual 'causal elements' are not determinative of abuse. Evidence of this shift is the change in terminology from 'causes' to 'risk factors'.

> The truth is that no definitive research has been done on causality. However, there is a body of evidence about risk factors associated with abuse.[73]

The early ARAS study, for example, cited a number of risk factors identified in their sample of 100 clients who reported abuse, and stated that for that reason, percentages do not add up to 100 per cent.

> Dependence (24 per cent), family conflict (22 per cent), isolation (11 per cent), lack of service (nine per cent), dementia (nine per cent), and physical illness (nine per cent). Risk factors for abusers were: family conflict (18 per cent), unemployment (15 per cent), alcohol or drug management problems (15 per cent), inadequate income (11 per cent), emotional problems (10 per cent), carer stress (five per cent).[74]

ARAS also produced some alarming correlational findings about elder abuse victims. They found that almost one in three victims had mental health problems, compared to 1 in 11 in the general population, and almost 1 in 4 had thought about suicide.[75]

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[72] Cripps et al., 'Abuse of older people: issues for lawyers', *Elder Law Review*, vol. 1, 2002, p. 16.

[73] Cripps et al., 'Abuse of older people: issues for lawyers', *Elder Law Review*, vol. 1, 2002, p. 16.

[74] Cripps, 'Rights Focused Advocacy and Elder Abuse', *Australasian Journal on Ageing,* vol. 20, n.1, 2001, p. 20.

[75] Cripps et al., 'Abuse of older people: issues for lawyers', *Elder Law Review*, vol. 1, 2002, p. 16.

Risk factors are useful for the purposes of prevention and early detection. Service providers coming in contact with people who exhibit any or combinations of risk factors should be alert to the possibility of abuse.

Framing and responding to the problem of elder abuse

One of the explanations for the lack of a coherent definition of elder abuse in NSW is that it is not defined by legislation. Some aspects of elder abuse are made illegal through the *Crimes Act 1900* (NSW), such as assault or theft. Some would properly be dealt with by application of the *Contracts Review Act 1980* (NSW) in the case of improper contracts, or *Family Provision Act 1982* (NSW) where a will is in dispute, or an action may be taken in the Equity jurisdiction of the Supreme Court of NSW where equitable remedies will be available when unconscionability or undue influence is alleged. These disparate areas of law, however, provide little assistance in terms of a consistent paradigm or approach to the problem.

The violence and care perspectives

Behind the definitional debate, there is a conflict of how best to conceptualise the issue of elder abuse. Some believe that 'elder abuse' is the more appropriate term to describe a problem that afflicts older people because of their vulnerability. Others believe that much of the behaviour that is included under the heading of 'elder abuse' is captured by popular and legal understandings of 'domestic or family violence',[76] that is the emphasis is on the violence that characterises some familial relationships.

[76] See for example *Draw the Line! Resource Booklet for Older Women*, Inner Southern Community Health Centre, Adelaide. This booklet defines domestic violence in much the same way as elder abuse is defined, including physical, sexual, emotional, social and economic abuse.

> It is important to understand that the Older Women's Network (OWN) is critical of the term 'elder abuse'. This term has been widely accepted but there is no nationally agreed definition nor agreement as to whether or not elder abuse is different from other forms of 'family violence'. For instance, does a woman who has been physically abused during the marriage become a victim of elder abuse upon reaching the age of 65? Is it the age and not the act or the relationship between the perpetrator and victim that defines whether the violence is identified as domestic violence or elder abuse?[77]

In terms of approaches to conceptualising the problem, Michael Collingridge notes that "two perspectives—violence and care—have come to dominate policy and practice thinking".[78] Collingridge's description of the 'violence perspective' quickly distils into the narrower 'domestic violence perspective'. Robyn Sedger of the Aged Abuse Monitoring Project in Western Sydney also noted the divide between services. "Essentially we have a problem with language, a problem with varying philosophies between domestic violence services and aged care services."[79]

The difference is one of perspective, with political and legal implications. The domestic violence paradigm involves the criminalisation of the 'behaviour', attributing responsibility to the perpetrator and emphasises victim safety. The care perspective, "seeks to describe elder abuse as a problem of inadequate or inappropriate care, and parallels are frequently drawn with child abuse and the dependent relationship between the victim and carer".[80] Kinnear and Graycar frame the distinction as follows:

> It is argued that labelling harmful acts as "abuse" detracts from the criminality of the behaviour and degrades the experience of victims. The

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[77] Anike, L., *Older Women's Network Questionnaire: A Report on violence and abuse against older women*, Older Women's Network, Sydney, 1999.

[78] Collingridge, M., 'Protection of the elderly: some legal and ethical issues', *Australian Journal on Ageing*, vol. 12, n.4, Special Issue on elder abuse, p. 32.

[79] Consultation with Robyn Sedger, Aged Abuse Monitoring Project, Western Sydney, 5 November 2002.

[80] Collingridge, 'Protection of the elderly', *Australian Journal on Ageing*, vol. 12, n.4, p. 32.

> key labelling issue is whether criminal acts such as assault, rape or theft are redefined as physical, sexual and financial abuse, and thus removed from the criminal justice system. The well argued dilemma is whether a criminal act should be understood as private behaviour within a relationship.[81]

Robyn Sedger's view chimes well with Kinnear and Graycar's description:

> There… seems to be an obvious distinction between how domestic violence is treated in comparison to elder abuse—one is considered to be a criminal act while the other is not and this attitude is mirrored in terms of intervention as well.[82]

Violence and care approaches each have their limitations. Many forms of behaviour will not necessarily be susceptible to criminalisation. Collingridge notes in relation to the criminalisation of, for example, neglect in the *Crimes Act 1900 (NSW)*:

> … it is limited to instances of wilful or malicious neglect causing, or likely to cause serious injury. It will thus not catch unintentional acts or omissions by the carer, nor intentional, but 'low-level' neglect.[83]

Similarly, while it is envisaged that some forms of financial abuse will be caught by the *Crimes Act 1900 (NSW)*, others, such as the following story, will not.

> *I am 67 and my husband is 82. We own our home and are self-funded retirees. My husband is now in a nursing home. We jointly owned $19,000 worth of shares in AMP and a life insurance policy. My husband was very ill and probably did not have legal capacity. While I was away, my daughter came*

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[81] Kinnear and Graycar, 'Abuse of Older People: Crime or Family Dynamics?', *Trends and issues in crime and criminal justice*, n.112, 1999, p. 3.

[82] Consultation with Robyn Sedger, Aged Abuse Monitoring Project, Western Sydney, 5 November 2002.

[83] Collingridge, 'Protection of the elderly', *Australian Journal on Ageing*, vol. 12, n.4, p. 34.

> *to the house and had my husband sign over the shares and life insurance policy to her. I went to the police and they said it wasn't a police matter because he had signed the papers. I went to see a solicitor twice, but he said there was nothing he could do. We asked our daughter for the money back and she laughed at us.*[84]

Collingridge also notes that some forms of abuse do not sit well within the care perspective, "given the categories of harm identified, the concept of inappropriate care is severely stretched in cases of sexual abuse and intentional financial abuse".[85]

In concluding, Collingridge distils the difficulty with the violence and care perspectives:

> In our zeal to help those most in need we are running the risk of offering a range of unarticulated and vague social and legal interventions that may, on the one hand, be ineffective or, on the other, not necessarily in the best interests of those we seek to protect.[86]

The Domestic Violence Response

The Blue Mountains Community Legal Centre has reported that six per cent of their clients to the domestic violence court assistance scheme are over the age of 65. In response to that assessment, they have engaged in a process of attempting to address older women's needs. They have also encountered the divide between the violence and care perspectives.

> In the domestic violence sector, there seemed to be not enough sensitivity to the issues confronting older women, but in the aged care sector, there's not enough knowledge about the legal options that are available—there was a surprising amount of ignorance in the aged care

[84] Individual telephone submission.

[85] Collingridge, 'Protection of the elderly', *Australian Journal on Ageing*, vol. 12, n.4, p. 34.

[86] Collingridge, 'Protection of the elderly', *Australian Journal on Ageing*, vol. 12, n.4, p. 35.

> sector about what an ADVO [Apprehended Domestic Violence Order] is, how you can use it. There needs to be a connection between the health and welfare sector and the criminal justice system.[87]

The approach in the domestic violence sphere has been to utilise a number of strategies to ensure an individual's safety. Apprehended Domestic Violence Orders (ADVOs) are used to protect individuals from being assaulted, abused or harassed by specific persons. They can be used to impose restrictions upon the person, such as keeping that person away from the home or to modify any violent behaviour. They do not necessarily separate the protected individual from the perpetrator; for example, they can be issued as non-molestation orders. Another option is to find a refuge for the protected individual(s). A person in breach of an ADVO can be arrested and removed from the home. The latter two strategies are usually used in tandem with ADVOs.

Some or all of these options may present particular difficulties for victims of elder abuse. One problem of relying upon the domestic violence framework is its focus on women as victims. While the majority of victims of elder abuse are women, it is claimed that one third are men.[88] ARAS's recent study also reported this proportion.[89] Agencies that cater for victims of domestic violence, with good reason, generally aim their services at women. Nevertheless, men as victims of elder abuse are not accommodated within the infrastructure and services designed for victims of domestic violence.

While being exposed to the political movement of disclosing domestic violence and forcing it onto the public agenda, older people do not necessarily see themselves as part of that movement. When they were younger, there were no support systems—they did not have anyone with whom they could talk about their experiences.

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[87] Consultation with Meredith Osborne, Blue Mountains Community Legal Centre, 23 September 2002.

[88] Consultation with Robyn Sedger, Aged Abuse Monitoring Project, Western Sydney, 5 November 2002.

[89] Cripps et al., 'Abuse of older people', *Elder Law Review*, vol. 1, 2002, p. 16.

> Older women have commented that in the past, nobody wanted to know about domestic violence: for victims there were no refuges, no single mother's allowance, no counselling, no women's health centres, no legal aid and perhaps worst of all, little or no family and community sympathy or understanding for women in violent situations.[90]

Older people will not necessarily view their situation as domestic violence, "until they were given the opportunity to talk … some women had never thought that things like withholding money or verbal put-downs were a form of domestic violence."[91] Some still consider it a source of shame.

> Older women tend to assume responsibility for the health and well being of the family and for the emotional health of the family—how their children are, as people. That's why the shame that comes with having a child who's an abuser is so great that reporting that is extremely difficult.[92]

Crisis accommodation for domestic violence victims is usually not aimed at men, and rarely is it aimed at older women—the vast majority of refuges only accommodate women with children, although limited crisis accommodation for older women is available through Western Sydney Sole Women's Accommodation Service Inc. That service, in recognition of older women's specific needs, has very recently dedicated a worker to concentrate on providing relevant services for older women.[93] However, for some older women, specifically those who are dependent on their abuser for care, there is a fear that removal from their home will lead to institutionalisation.

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[90] Anike, L., *Older Women's Network Questionnaire: A Report on violence and abuse against older women*, Older Women's Network, Sydney, 1999.

[91] Meredith Osborne, Blue Mountains Community Legal Centre, *No Age Limit: Responding to Family Violence Against Older Women*, summary of presentations at forum hosted by the Blue Mountain Community Legal Centre, Wentworth Falls School of Arts, 19 November 2001.

[92] Consultation with Meredith Osborne, Blue Mountains Community Legal Centre, 23 September, 2002.

[93] Consultation with Joy Fuller, Older Women's Project Officer, Western Sydney Sole Women's Accommodation Service Inc., 12 December 2002.

> To use the legal system, you have to be provided with a viable alternative. There is no infrastructure in the Blue Mountains—the refuge only takes women with children… Aside from issues of shame, leaving their homes, being financially dependent, there is no infrastructure anywhere in the Mountains. Older women can't get work so they will not see an end to financial dependence. What do you do as an advocate when there is no alternative accommodation? In the elder abuse model, you work within the situation as it's occurring rather than trying to get them out of it.[94]

And,

> If their case is reported and there is intervention of some kind, there is often not the social infrastructure to cope with the situation as there might be for other types of domestic violence, such as child abuse.[95]

They may also be too invested in their relationships to think about leaving.

> The domestic violence approach is to get the person out of the relationship, into alternative accommodation and employment. For older people, if the abuse is from a child, they are less likely to want to break the relationship, feel responsible for child's behaviour and are reluctant to go to police, although less reluctant to go for an AVO. If the abuser is a spouse, the older victim might be more likely than younger people to be of the view that you should not end a marriage.

While fear of institutionalisation is not unreasonable, it may not be realistic as it is "much more difficult than people think to find a place for someone in a nursing home or hostel".[96]

A further problem with the domestic violence framework is that most older people who participated in this study demonstrated extreme reluctance to

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[94] Consultation with Meredith Osborne, Blue Mountains Community Legal Centre, 23 September 2002.

[95] Consultation with Robyn Sedger, Aged Abuse Monitoring Project, Western Sydney, 5 November 2002.

[96] Consultation with Robyn Sedger, Aged Abuse Monitoring Project, Western Sydney, 5 November 2002.

use the legal system, much less the criminal justice system, to address their problems.

> Many older women are unaware of the legal means available to them as it was never available in their younger years, they did not want to involve the police, felt dependent on their abusive person and did not have access to money.[97]

This was confirmed by service providers who stated that, "in most cases aged people for various reasons do not want the police involved and this results in most cases going unreported and unassisted".[98]

> One woman was being abused by her husband and she was dependent upon him as her carer. The community nurse would go there and she would bandage her and would see bruising on her head. It was disclosed to the nurse that she was experiencing domestic violence, and the nurse asked me what to do and I said that it was a crime and the police needed to be called, and the police went down there and she said she didn't want anything done so the police just left it—they shouldn't have. They're exercising a discretion where none exists.[99]

Moreover, one consultation suggested that some older women, who have chosen to use the justice system to address domestic violence, found the attitudes of some legal professionals to be a barrier.

> Some magistrates are pretty old school. They often perpetuate the belief that you don't separate older couples where there is domestic violence because they've been together so long. The police also hold that perception.[100]

For some women who have chosen this path, success has come in the form of short-term relief.

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[97] *Older Women Violence And Abuse*, a forum for service providers, Redfern Town Hall, 22 October 2002.

[98] Consultation with Robyn Sedger, Aged Abuse Monitoring Project, Western Sydney, 5 November 2002.

[99] Consultation with Meredith Osborne, Blue Mountains Community Legal Centre, 23 September 2002.

[100] Consultation with Meredith Osborne, Blue Mountains Community Legal Centre, 23 September 2002.

One woman owned her own property and kept accessing the legal system to try and protect herself from her husband. He received a six month gaol term. So for six months, there was no domestic violence. She was forever concerned about him coming back, but he had nowhere to live so she took him back. She hasn't contacted our service since then and there has been no further police intervention. The success was that she had a break—that there was no violence for a while. The violence was horrific—she slept out in the bush a lot because she couldn't get into her own home.[101]

On balance, there is a lot to be gained from the domestic violence framework both politically, and in terms of available strategies for responding to the harm experienced by older people in their homes. However, there are many premises upon which the domestic violence framework relies that fail when applied to victims of 'elder abuse'.

Aged Care Responses

Aged care approaches to elder abuse, as previously discussed, do not criminalise the abusive behaviour. For this reason, it may be more attractive to older people who are reluctant to blame their abusers or are unwilling to take action through the criminal justice system.

> As a basis for intervention in the lives of individuals, the care perspective, unlike domestic violence, has a potentially wider reach. It does not require intentionality or criminality on the part of the carer, merely that a socially mediated conclusion has been drawn about carer/aged person relationships based on community standards of appropriate and reasonable aged care. When the level of care falls below that acceptable level, the State has a responsibility to intervene in the best interests of the victim.[102]

[101] Consultation with Meredith Osborne, Blue Mountains Community Legal Centre, 23 September 2002.

[102] Collingridge, 'Protection of the elderly', *Australian Journal on Ageing*, vol. 12, n.4, p. 34.

Essentially, the care response relies upon standards of care set by legislation. Where these standards are not met, the Guardianship Tribunal is empowered to intervene to remove the elderly person. As Collingridge points out, in NSW these interventions are not only rarely used, they are heavily restricted to situations where the older person does not have the legal capacity to make the decision for themselves.[103] Many older people in abusive situations, then, will fall through the cracks through application of the aged care paradigm.

Innovative responses to elder abuse

The two paradigms of domestic violence and aged care essentially treat the response to abuse as the central issue, effectively asking the question, "How will we deal with this situation?" Both rely upon a rescue mentality that may disempower older people. However, there is a more integrated third approach which re-centres the victim in the problem. A small number of service providers came to the attention of the research team due to their attempts to approach the issue in a way that bridges disciplines, to reach a broader population of older people being abused and because they focussed on empowering the victims of abuse.

The Blue Mountains Community Legal Centre hosted a forum last year in the Blue Mountains made up of "coppers, aged care services, local services, community health workers, GPs—there were about 100 participants."[104]

> The theme arising out of the Forum was that there is not enough communication between the domestic violence and the aged care sectors. For older people in particular there has to be an interdisciplinary approach to partnerships.[105]

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[103] Collingridge, 'Protection of the elderly', *Australian Journal on Ageing*, vol. 12, n.4.

[104] Consultation with Meredith Osborne, Blue Mountains Community Legal Centre, 23 September 2002.

[105] Consultation with Meredith Osborne, Blue Mountains Community Legal Centre, 23 September 2002.

And,

> Low numbers of older women was the motivator for holding the 'no age limit forum' to gauge if that was the experience of other agencies to work out how to make themselves more accessible ...[106]

While the Centre is still firmly dedicated to the domestic violence framework, they are also committed to expanding their networks with other disciplines to achieve a more integrated approach. They were also interested in questionning their own assumptions about appealing to older women.

> Will older women come to something called the 'domestic violence court assistance scheme'? Is the phrase something they can relate to? It has historical and political meanings that they may not relate to. Do older women find that off-putting? [107]

These self-reflective questions were centred on improving the pathways for older women experiencing violence to access legal services and consider legal avenues of addressing the violence in their lives.

Robyn Sedger headed the Aged Abuse Monitoring Project, operating out of Penrith:

> The project is a two year funded project that has been run by the Western Sydney Area Assistance Scheme, which comes through the Department of Urban Affairs and Planning. It started in November of 2000 and it has just finished. The project was developed to increase awareness of abuse of older people, not only for those at risk of abuse but also the general community. We also wanted to find a way to empower older people to improve their situation especially if it is abusive.[108]

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[106] Consultation with Meredith Osborne, Blue Mountains Community Legal Centre 23 September 2002.

[107] Consultation with Meredith Osborne, Blue Mountains Community Legal Centre, 23 September 2002.

[108] Consultation with Robyn Sedger, Aged Abuse Monitoring Project, Western Sydney, 5 November 2002.

As well as meeting and counselling individual older people, the project contacted local members of parliament about implementing a statewide community education program. It also demonstrated an ongoing commitment to worker education.

ARAS have adopted a 'Rights Focused Advocacy Model'—a victim-centred advocacy approach to the problem of older people experiencing abuse, whether or not they have the capacity to make decisions on their own. It too relies upon an interdisciplinary philosophy, although the advocate assesses the situation,[109] educates the victim about their rights and, in partnership with the victim, develops a range of options, tailored to their situation, for the older person to choose from. They then help them implement the option(s) chosen, either by advocating on their behalf, or supporting the person to act on their choice(s).

> An advocate's task is to act as an agent of change. ARAS advocates seek to assist the older person to identify strengths in their networks of self, family, friends, service providers, etc… [and] in their potential networks, e.g. through involving lawyers, counsellors, Powers of Attorney, South Australian Guardianship Board, etc. Advocates assist the older person to identify the steps that can be taken to trigger the network around them into action, in assisting them to involve the network to overcome the abuse.[110]

ARAS have developed three tiers of intervention, which involve linking the victim to: informal networks, such as family or friends; formal networks, such as HACC services or an aged care facility; and protective measures, such as legal advice, police assistance and the Guardianship Board. The range of options developed with the client typically involves all three categories of intervention.

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[109] Often this requires a specialist psychogeriatric assessment.

[110] Cripps, 'Rights Focused Advocacy and Elder Abuse', *Australasian Journal on Ageing,* vol. 20, n.1, 2001, p. 20.

As previously noted,[111] ARAS conducted a study of the model for the purpose of evaluating its effectiveness. The research found that the majority of ARAS clients were self-referring (44 per cent), followed by referrals by their carer or representative (29 per cent), Home and Community Care (HACC) staff (13 per cent), other people, for example, neighbours (12 per cent) and two per cent were unrecorded.

The study yielded information about different interventions chosen for varying kinds of abuse. For financial abuse, protective measures were favoured. For psychological abuse, there was an even distribution of using all three tiers of intervention. In cases of social abuse,[112] informal network interventions were triggered. In neglect cases, formal interventions were generally favoured. For physical abuse, formal intervention was also a key choice, although protective measures were popular with women.[113]

Intervention effectiveness was graded by the following outcomes:

- abuse ends
- some positive change that stopped short of ending the abuse
- no change to the situation.[114]

The outcomes overall were very positive:

- in 50 per cent of situations, abuse ended[115]
- in 34 per cent of situations the abuse did not stop but the circumstances for the victim were improved

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[111] Cripps, 'Rights Focused Advocacy and Elder Abuse', *Australasian Journal on Ageing,* vol. 20, n.1, 2001.

[112] Social abuse limits the lifestyle choices of older people, for example, decisions about where they go and who comes to see them.

[113] Cripps, 'Rights Focused Advocacy and Elder Abuse', *Australasian Journal on Ageing,* vol. 20, n.1, 2001, p. 20.

[114] Cripps, 'Rights Focused Advocacy and Elder Abuse', *Australasian Journal on Ageing,* vol. 20, n.1, 2001, p. 20.

[115] As previously mentioned, 100 client files were retrospectively studied, involving 267 situations of abuse.

- in 16 per cent there was no change. In this category, the victims chose not to proceed beyond the initial contact with the Service.

Some key features of ARAS that impact upon the kind of service they provide include:

- a free, statewide service for all older people suffering elder abuse
- a single referral point for South Australia
- a non-traditional service that does not have to manage resources
- a broad funding base. They are funded by the Commonwealth Department of Health and Aged Care, the Home and Community Care Programme, and the Office for Ageing.[116]

The Caxton Legal Centre Inc., based in Brisbane, is another innovative service provider, in that they operated a specialised legal programme for people over 60 called the Legal Outreach for Older People (LOFOP). In 1999 Caxton Legal Centre received 12 months funding from the Queensland Legal Aid Office (QLAO), to set up and run the program. The program had four outreaches across Brisbane, and operated at each of the outreach locations one day per week once every four weeks, with some provision for a limited number of home visits. The program was staffed by one solicitor.

Elder abuse was a matter commonly dealt with by LOFOP and included tenancy law, enduring powers of attorney, and Peace and Good Behaviour Orders. In the cases they encountered, financial abuse was often related to Enduring Power of Attorney issues.

For older people from culturally and linguistically diverse backgrounds, the most common issues were financial abuse, particularly from extended family members. These cases were not large in number because it is thought that there may be reluctance by an older person to seek legal assistance for matters involving their family.[117]

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[116] Cripps et al., 'Abuse of older people: issues for lawyers', *Elder Law Review*, vol. 1, 2002, p. 14.

[117] Consultation with Ros Monro, Legal Outreach for Older People Project, Caxton Legal Centre, 10 July 2002.

QLAO did not provide any further funding for the 2002–2003 financial year. Caxton committed to keeping the program operating until the end of the 2002 calendar year, out of their cash reserves. The program has since concluded, although Caxton has subsequently secured additional funding from the Queensland Government to provide a legal service specifically for older people (those aged over 60) who are experiencing, or at risk of experiencing, domestic violence in the Brisbane area.

Issues for lawyers

In a recent article detailing the results of a recent study on elder abuse, ARAS workers state that "lawyers have a significant role to play in supporting older people to overcome situations of abuse."[118] ARAS argues that this is a good reason to trust that, with the proper support from professionals, older people can make decisions to redress the abusive context in which they live. They suggest some strategies to assist lawyers in their dealings with older clients, including:

- Lawyers need to listen and take older people seriously when they raise the issue of abuse. Lawyers should also be alert to the risk factors that can indicate the possibility of abuse.
- Lawyers need to ascertain the true wishes of their older clients. Attempt to see the older client by themselves, without their support people.
- Lawyers should support older people to be medically assessed by an appropriate professional, such as a gerontologist or consultant psychologist, for legal capacity. This may forestall future conflicts about their wishes.[119]

[118] Cripps et al., 'Abuse of older people: issues for lawyers', *Elder Law Review*, vol. 1, 2002, p. 17.

[119] Cripps et al., 'Abuse of older people: issues for lawyers', *Elder Law Review*, vol. 1, 2002, p. 18.

Others have suggested that lawyers advise their clients to set up enduring powers of attorney and personal guardianship.[120] While these legal instruments can be positive for many older people in that they give them control over who will look after them if they lose capacity, they are open to abuse, at least in NSW, and should be entered into cautiously.[121] Lawyers should also be cautious in allowing the relatives and friends of people who do not speak English to act as interpreters. Independent interpreters should be accessed, where possible, to ensure that the wishes and problems facing their older clients are effectively communicated.[122] Furthermore, lawyers need to familiarise themselves with relevant legislation, such as the *Guardianship Act 1987* (NSW) and the *Aged Care Act* 1997 (Cth),[123] and have clear understandings of the legal options in relation to preventing and addressing elder abuse.

Conclusion

While there is no universally accepted, encompassing definition of what constitutes elder abuse, it can be concluded that it does include the following categories of abuse:

- financial abuse
- psychological abuse
- physical abuse

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[120] Ames, O. and Harley, J., 'Elder Abuse: Being part of the solution, not part of the problem,' *Law Society Bulletin*, April 2001, pp. 34–5.

[121] See Chapter 6, *Financial and Consumer Issues*, and Chapter 9, *Substitute decision-making and end of life Issues*.

[122] E D'Urso and Associates, *Research on Abuse of Older People from a Non-English Speaking Background*.

[123] Tilse, C., Setterlund, D., Wilson, J. and Herd, B., 'Legal practitioners and older clients: challenges and opportunities for effective practice', *Elder Law Review*, vol. 1, 2002, pp. 34–42. Available at <http://www.uws.edu.au/law/elderlaw/setterlund.pdf> (Last accessed 11 December 2003).

- sexual assault and abuse
- neglect
- multiple abuses.

There is also variation in the nature of the relationships within which abuse may occur, including those with adult children, spouses, other family members, friends, carers or institutions.

The variations in the types of abuse and the relationships within which they may occur, also cause problems in estimating the prevalence of elder abuse. In addition, there is evidence to suggest that elder abuse is an under-reported phenomenon due to a range of factors including lack of awareness of the problem, ignorance of services which may assist, fear of retribution, shame, and a desire to preserve important family relationships and friendships.

In developing the most effective responses to elder abuse, there are identified problems in categorising it as either a domestic violence issue or as an aged care issue. Neither classification is able to fully address the particular characteristics and nuances that accompany the various forms of elder abuse. Moreover, the most effective responses to elder abuse have been those which recognise the particular issues which confront older people who are subjected to abuse, by focusing on empowering the victim and emphasising an interdisciplinary partnership approach between the domestic violence and aged care sectors.

9. Substitute decision-making and end of life issues

Introduction

As people grow older they are more likely to either have a disability or to be caring for a partner with disabilities. In particular, older people are more likely than other age groups to have intellectual impairments associated with cognitive disorders such as dementia and senility. In addition, older people may be more vulnerable to head or brain injuries arising from strokes or falls.[1] All of these factors may result in diminished capacity to make decisions regarding property or financial interests, as well as various personal, health and lifestyle decisions.

According to the Australian Bureau of Statistics (ABS), 2.5 per cent of those aged 65 to 74 have an intellectual disability, and seven per cent are affected by a head injury, stroke or brain damage. The corresponding percentages for those aged 75 to 84 are three per cent and nine per cent respectively, and nine per cent and 10 per cent for those aged 85 and over. Thirty-one per cent of all people over the age of 65 with a disability have a profound or severe restriction. In contrast, only two per cent of people aged 15 to 64 have an intellectual disability, with one per cent affected by a head injury, stroke or brain damage. Twenty-four per cent of all people aged 15 to 64 with a disability have a profound or severe restriction.[2]

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[1] Australian Bureau of Statistics, 'Disability among adults', *Australian Social Trends 2001*, Catalogue n.4102.0, Australian Bureau of Statistics, Canberra, 2001, at p. 78.

[2] Australian Bureau of Statistics, 'Disability among adults', *Australian Social Trends 2001*, Catalogue n.4102.0, Australian Bureau of Statistics, Canberra, 2001, at pp. 77–78.

The prospect of diminishing capacity associated with ageing may cause many older people to consider options for substitute decision-making for financial and personal/lifestyle matters. In addition, as older people have a lower future life expectancy than do younger people, they may give greater consideration to issues associated with end of life. In 2002, the median age of death was 76.2 years for men and 82.2 years for women.[3] The need for older people to consider methods of advance decision-making regarding the distribution of assets after one's death is more pressing than for other age groups. Further, as the prospect of widowhood increases with age, an older person may be more likely to be confronted with issues of estate administration for their deceased spouse.

This chapter focuses on the legal issues associated with substitute decision-making and end of life, and considers the instruments, services and organisations available to older people to assist them with these issues.

Powers of attorney

Powers of attorney (POAs) have long been used by people to enable others to manage their financial affairs when they are not in a position to do so, whether because of geographical distance or personal incapacity. A POA is a relationship of agency between a principal and an attorney, evidenced by a document signed by the principal, under which the attorney is authorised to make decisions and conduct certain transactions on behalf of the principal. As a result of amendments to the *Conveyancing Act 1919 (NSW)* in 1983, the law recognised "protected powers of attorney" which remain in effect upon the principal losing mental capacity.[4] In late 2003, the NSW Parliament passed the *Power of Attorney Act 2003* (NSW), which changed the name of "protected powers of attorney" to "enduring powers of attorney" (EPOAs).[5] The EPOA is an important mechanism with which

[3] Australian Bureau of Statistics, *Deaths, Australia*, Catalogue n.3302.0, Canberra, 2003.

[4] *Conveyancing Act 1919* (NSW), Section 163F(2).

[5] *Powers of Attorney Act 2003* (NSW), Section 19(1).

older people can pre-arrange substitute decision-making, since an ordinary power lapses at the point of incapacity.

Knowledge and use of enduring powers of attorney

The lack of awareness of the existence of EPOAs and of knowledge about how they function is one of the potential barriers to accessing this legal mechanism. Though there appears to be no formal study on the knowledge and use of EPOAs among older people in NSW, there is anecdotal evidence to suggest that they are neither well known nor well understood by many older people, particularly in comparison with ordinary POAs and wills. In the focus groups that were conducted as part of this study, particularly those outside aged care institutions, there was an overwhelming ignorance of the function of EPOAs and the legal rules supporting them. Most participants indicated that they were aware of powers of attorney, but not necessarily of enduring powers.

> *I'm not sure exactly what [the accountant] meant and I'm a bit wary of it, because I've heard of this [enduring] power of attorney and it's not always a good thing and I just don't know what to do about it. Whether to get it and not say to the kids that I've got it. I don't know, I just don't understand it enough.*[6]

There was generally little understanding of the differences between the ordinary POA and the EPOA. The participants who indicated that they had appointed attorneys were unsure whether or not the power granted extended to an enduring one.

[6] Older Women's Network focus group participant, Penrith, 14 October 2002.

> *Power of attorney's got to be ongoing, hasn't it? We got ours through the court, is that alright? Somebody said that you should go to a solicitor and make sure that it's ongoing.*[7]

These findings are supported by research conducted by Setterlund, Tilse and Wilson in Queensland between 1999 and 2000 on the understanding and experiences of older people and their families in relation to the *Powers of Attorney Act 1998* and its provisions.[8] The study was based on a sample of 377 people, including older people and family members, living in metropolitan Brisbane (n=242) and South West rural Queensland (n=29), and residents living in aged care facilities and retirement villages and their family carers in Brisbane (n=106). The data collection involved 48 focus groups and 29 individual interviews. The study found that 73 per cent of the participants who lived in aged care facilities and retirement villages had organised EPOAs, as compared with only 34 per cent of participants who lived in the community. This discrepancy may be explained by the greater likelihood of need for substitute decision-making among older people who receive care.

The study found that the participants generally had a poor understanding of EPOAs. Of the 48 focus groups that participated, there was low understanding in 23 groups, limited understanding in 19 groups and detailed understanding in only six groups. The main difference between the categories of 'limited understanding' and 'low understanding' was whether the majority of participants understood the difference between the EPOA and POA. The category of 'detailed understanding' was defined to include not merely the capacity to differentiate the two types of powers, but also the ability to articulate details such as being able to appoint an attorney for financial and health matters.

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[7] Older Women's Network focus group participant, Penrith, 14 October 2002.

[8] Part of a broader study in Setterlund, D., Tilse, C. and Wilson, J., *Legislative Changes in Aged Care: Their Implications for Older People and their Families, Informed Intermediaries and Legal Practitioners in Queensland*, University of Queensland, Brisbane, 2000.

> In the 23 groups where understanding was low, many participants were not only perplexed about the difference between [the two mechanisms], but also about the difference between appointing an executor of a will and an attorney for substitute decision-making.[9]

It is arguable that the poorer levels of knowledge about EPOAs compared with and POAs can be explained by the relatively recent law on EPOAs compared with the long-standing law on POAs. There is the additional complication that the legal instrument creating either a POA or an EPOA needs to be prepared in advance of an individual's loss of capacity, in effect, prior to any problem arising. As was pointed out in a submission by a community aged care provider:

> …often advice about Power of Attorney is sought too late when the older person is suffering severely from dementia and family are not aware of the legal issues and processes.[10]

The poor knowledge of EPOAs among older people raises questions regarding which sources currently inform older people about substitute decision-making, and whether there are more effective means of providing this information. For example, it may be more effective to place responsibility for the dispensation of advice on EPOAs (and potentially other areas of substitute decision-making) on the medical profession, rather than the legal profession. Possible reasons for this are that older people are more likely to consult with medical practitioners on a regular basis than with lawyers, and that the issue of capacity will most likely be raised by a medical practitioner before a lawyer is consulted. This will create other difficulties, however, as many medical practitioners have a limited understanding of issues surrounding capacity and of the purpose of EPOAs.

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[9] Setterlund, D., Tilse, C. and Wilson, J., 'Older People and Substitute Decision-Making Legislation: Limits to Informed Choice', *Australasian Journal on Ageing*, vol. 21, n.3, 2002, p. 130.

[10] Ethnic Aged Care Project, S*ubmission to the Law and Justice Foundation Legal Needs of Older People Project*, October 2002.

The Setterlund, Tilse and Wilson study found that a number of factors were associated with the level of knowledge and use of EPOAs by older people. One factor was the level of income: 67 per cent of participants with higher incomes compared with 17 per cent of those with lower incomes had arranged for EPOAs. Similarly, the degree of knowledge of POA legislation was higher for those with higher incomes, and lower for those with lower incomes. Life circumstances such as being exposed to advice on substitute decision-making—through, for example, one's profession or acquaintances—and feeling the need to be proactive in protecting one's assets, accounted for the differential effects of income level.[11]

Another factor was the degree of physical disability. The Setterlund, Tilse and Wilson study observed that increased physical disability was associated with a much lower level of understanding of the legal aspects of substitute decision-making and a greater willingness to give control of finances to family members without monitoring the arrangements. However, this association between disability and lower understanding was not apparent in aged care facilities, with all of the focus groups in facilities displaying low or limited understanding.[12] A prevalent attitude of participants with disabilities was the desire for their children to assume responsibility for their financial affairs.

Abuse of enduring powers of attorney

The potential for abuse of EPOAs derives primarily from three factors:

- that the principal is suffering from unsoundness of mind, and thus will have minimal capacity to effectively monitor the activities of his or her attorney

[11] Setterlund et al., 'Older People and Substitute Decision-Making Legislation: Limits to Informed Choice', *Australasian Journal on Ageing*, vol. 21, n.3, 2002, pp. 130–131.

[12] Setterlund et al., 'Older People and Substitute Decision-Making Legislation: Limits to Informed Choice', *Australasian Journal on Ageing*, vol. 21, n.3, 2002, p. 131.

- that highly trusted family members and relatives are most commonly appointed as attorneys
- that there is generally a limited understanding of the powers and duties of the attorney among both the principals and the attorneys themselves.

One of the more insidious forms of abuse involves cases where an EPOA is arranged on behalf of an older person who does not have the requisite capacity to make the power.

> … it is not uncommon to have relatives bring in an older person to a lawyer's office and state 'mum/dad wants to make an enduring power of attorney', when it is obvious mum or dad is hardly even aware of where they are.[13]

Such cases do not necessarily involve abuse. In some instances an EPOA may be made in the best interests of an older person who has failed to make arrangements for such an event, while he or she had the capacity to do so. However, in other cases, an EPOA may be used to take advantage of the older person. Further, the potential for this type of abuse may incite a fear by an older person that the EPOA may be activated on a false representation of lack of capacity. One focus group participant expressed this fear:

> *... hypothetically, now just say I couldn't do anything say tomorrow myself. Does the person I've nominated go to the solicitor and say I have the power of attorney? And how does he know that he's telling the truth and that something has happened to me?*[14]

[13] Ames, O. and Harley, J., 'Elder abuse: being part of the solution, not part of the problem', *Bulletin*, vol. 23, n.3, 2001, p. 34.

[14] Mirrabooka Retirement Village focus group participant, 21 October 2002.

More common is abuse in the form of an attorney's breach of the fiduciary relationship. Such a relationship is characterised by a high level of trust and confidence which in turn imposes a high level of responsibility or 'duty of care.' Breach of the fiduciary relationship generally occurs where the attorney takes a benefit for him or herself from the exercise of power not expressly authorised by the instrument creating it. The fiduciary relationship may also be breached where the attorney uses the principal's assets to provide maintenance for a third party, or to give gifts to third parties on behalf of the principal where such acts are not authorised by the power.

Cases of attorneys wrongly taking benefits for themselves are not restricted to attorneys acting without regard for the principal's interests, but include situations where

> the attorneys were simply misguided as to the nature and extent of their duties or believed that their actions somehow benefited the principals.'[15]

For example, an attorney justifying the use of the principal's money to purchase an expensive motor vehicle that almost exclusively was used for the attorney's benefit, on the basis of needing the vehicle to travel to visit the principal.[16]

The *Powers of Attorney Act 2003* (NSW) ("the Act") has attempted to address some of these issues. Under the new Act, an EPOA will not commence to operate until the attorney has accepted appointment by signing the power of attorney document.[17] Furthermore, the Act replaces the statutory short form of power of attorney with a more comprehensive form. The new form contains more information and more choices to enable people to make a better-informed decision about what they want their attorney to do.

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[15] Land Titles Office, *Green Paper on Powers of Attorney*, Land Titles Office, Queens Square, Sydney, 1999, p. 6. Available at <http://66.102.7.104/search?q=cache:WJSeibRMQ1IJ:www.lpi.nsw.gov.au/publications/gp_powers_attorney.pdf+Land+Titles+Office,+Green+Paper+on+Powers+of+Attorney&hl=en&ie=UTF-8> (Last accessed 22 December 2003).

[16] Land Titles Office, *Green Paper on Powers of Attorney*.

[17] *Powers of Attorney Act 2003* (NSW), Section 20(1).

It provides detailed information for principals and attorneys about their respective rights and responsibilities.

The Act also clarifies what an attorney can or cannot do in certain situations. In particular, a power of attorney drafted in the prescribed form under Schedule 2 of the Act (a "prescribed power of attorney") does not authorise an attorney to:

- give a gift of all or any of the principal's property to any other person unless the power of attorney expressly authorises the giving of the gift[18]
- signing any document or doing anything that would result in the attorney gaining a benefit at the expense of the principal or conferring a benefit on third parties, unless the power of attorney expressly so authorises[19]
- signing any document or doing anything that would result in a third party gaining a benefit unless the power of attorney expressly so authorises.[20]

In relation to the issue of gifts, Schedule 3 of the Act specifies a prescribed expression, which stipulates that the principal authorises his or her attorney to give 'reasonable gifts'. The schedule goes on to specify what gifts are included in this expression, namely:

- a gift to a relative or close friend of the principal
- a gift of a seasonal nature or because of a special event (e.g. birth or marriage)
- a donation of the nature that the principal made when he or she had capacity, or the principal might reasonably be expected to make.[21]

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[18] *Powers of Attorney Act 2003* (NSW), Section 11(1).

[19] *Powers of Attorney Act 2003* (NSW), Section 12(1).

[20] *Powers of Attorney Act 2003* (NSW), Section 13(1).

[21] *Powers of Attorney Act 2003* (NSW), Sschedule 3.

Prior to the passing of the Powers of Attorney Act 2003 (NSW), the children of a deceased man who, five days before executing his will, granted an EPOA to another child, challenged the validity of the acts of the attorney, in the NSW Supreme Court. The attorney had used the power to withdraw $55,000 from the deceased principal's account and transfer to himself the family home for the consideration of $1. In the absence of evidence to suggest that the deceased had wished to vary his will, or that he was aware of the attorney's acts, the Court concluded that the attorney had ignored the conflict of interest between the deceased and himself. It was held that his actions amounted to an abuse of his position as attorney in that he had made a profit from the transactions while going against the testamentary intention of his father.[22]

Another potential area of abuse lies with the issue of the commencement of the EPOA. In most cases for protected powers of attorney made prior to the *Powers of Attorney Act 2003* (NSW), an individual intending to create an EPOA would simply have completed the prescribed POA form under *Conveyancing Act 1919*, and include the clause allowing for the power to continue, notwithstanding the principal becoming of unsound mind, without adding any further restrictions or conditions. In such a case, the enduring power would take effect immediately upon execution, thereupon permitting the attorney to act pursuant to the authority granted immediately, rather than when the principal intends for the POA to be acted upon—only after he or she no longer has the ability to look after their own affairs.

The principal could guard against this possibility by maintaining possession of the POA document, or entrusting its security to a lawyer or other confidant. However, this entails the risk that the POA instrument is overlooked or misplaced at the intended time of use.

[22] *Watson & Ors v. Watson* [2002] NSWSC 919.

The *Powers of Attorney Act 2003* (NSW) has attempted to address some of these issues as well. In particular, in the prescribed form, there are three alternative clauses as to when the EPOA is to become effective (either immediately after the attorney has accepted, on a specified date, or when the attorney considers that the principal needs assistance managing his or her affairs).[23] The person making the EPOA must therefore give some thought as to when they want it to come into effect. If the third option is taken, and the principal disagrees with the attorney's belief that the principal needs assistance, an application can be made to the Guardianship Tribunal for a review.[24]

The *Powers of Attorney Act 2003* (NSW) also provides for greater review of both EPOAs made after the Act, and existing protected powers of attorney which were made prior to the operation of the new Act. Under the Act, the Guardianship Tribunal has powers to make a range of orders in relation to EPOAs, including:

- removing the attorney
- declaring the EPOA invalid
- appointing a substitute attorney
- varying the term of the power
- declaring that the principal did or did not have the requisite mental capacity
- directing the attorney to furnish accounts or lodge copies of records
- requiring the attorney to submit a financial management plan.[25]

Interested persons who may make an application to Tribunal for review include:

- an attorney

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[23] *Powers of Attorney Act 2003* (NSW), Schedule 2.

[24] *Powers of Attorney Act 2003* (NSW), Section 33(1), Section 36(3).

[25] *Powers of Attorney Act 2003* (NSW), Section 36.

- the principal
- any person who is a guardian or an enduring guardian of the principal
- any other person who, in the opinion of the Tribunal, has a proper interest in the proceedings or a genuine concern for the welfare of the principal.[26]

As well as giving these review powers to the Guardianship Tribunal, the Act preserves and expands the role of the NSW Supreme Court in reviewing EPOAs. Appeals against decisions of the Tribunal in relation to questions of law can be made to the Supreme Court.[27] An appeal may be made to the Administrative Decisions Tribunal against all other Guardianship Tribunal decisions.[28]

The two main issues regarding the accessibility of the Guardianship Tribunal relate to the right of representation in proceedings before the Tribunal, and the limitations of the review procedures of Tribunal decisions. These issues are dealt with more fully below, under *Guardianship and Financial Management* (see page 319).

The extension of the Guardianship Tribunal's jurisdiction allows for a more accessible forum to review situations of potential abuse or maladministration by an appointed attorney. When considering a similar provision, the Queensland Law Reform Commission stated:

> The greater accessibility of the tribunal would prove to be a stronger protection for a person who has made an enduring power of attorney who may be vulnerable to abuse by a chosen decision-maker than measures such as requiring a higher degree of capacity or more stringent witnessing procedures which would reduce the availability of an enduring power to a significant number of people.[29]

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[26] *Powers of Attorney Act 2003* (NSW), Section 35(1).

[27] *Powers of Attorney Act 2003* (NSW), Section 40(1).

[28] *Powers of Attorney Act 2003* (NSW), Section 41(1).

[29] Queensland Law Reform Commission, *Assisted and Substituted Decisions*, p. 126.

Reform of enduring powers of attorney

There are a number of mechanisms that may be adopted as a means of reducing the potential for abuse. With respect to the problem of an incapable principal being induced to make an EPOA, there is an argument for imposing a requirement for active assessment of the principal's mental capacity. Under the *Powers of Attorney Act 2003* (NSW), an EPOA must be signed in the presence of a 'prescribed witness' (i.e. a registrar of a Local Court, barrister, solicitor, a suitably qualified employee of the Public Trustee, or a licensed Conveyancer) who must certify that he or she explained the effect of the EPOA to the principal, that the principal appeared to understand the effect of the EPOA, and that the prescribed witness is not an attorney under the EPOA.[30] However, there remains the risk that the principal's actual capacity will not become known, either because it is not evident and the prescribed witness fails to make the necessary inquiries, or because the principal is accompanied by family or friends whose presence in some way disguises the principal's impairment. This risk is exacerbated in situations where the behaviour of the older person seeking to make a POA, as a result of the effects of dementia or other disorder, misleads the solicitor as to that person's actual state of mind and intentions.

> When a person starts suffering from dementia, they often turn on their carer or close relatives and become paranoid about money, or else they begin to give it away readily. Sometimes they want to cancel the power of attorney. The solicitor makes the decision about whether the person has lost capacity but is at risk if they make a mistake.[31]

Undoubtedly, a prudent legal adviser who is not convinced that the principal understands the nature and ramifications of the EPOA would refuse to issue the certificate and perhaps seek a medical assessment. In addition, the expanded jurisdiction of the Guardianship Tribunal to review EPOAs on application, and the expanded class of people who may request such

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[30] *Powers of Attorney Act 2003* (NSW), Section 19(1) and (2).

[31] Consultation with Margaret Small, Women's Legal Resource Centre, Sydney, 25 October 2002.

reviews, provides an opportunity to address situations where the principal's actual capacity has been incorrectly assessed.

However, a better safeguard might be the mandatory certification by a medical practitioner of the principal's mental capacity to create the legal instrument prior to the consultation with a legal adviser. This, of course, would come at the cost of the present informality, ease and lack of expense in making EPOAs.

Similarly, it is often argued that the imposition of other formalities—similar to those that exist with making wills—would serve to minimise the potential for abuse. The argument is that the rules associated with wills

> are designed to concentrate the mind of the person on the solemnity of the transaction and also provide independent witnessing of its execution.[32]

Another solution might be the mandatory registration of EPOAs, as exists in Tasmania and the Northern Territory.[33] Once again, such reforms raise the possibility of additional formality and cost, deterring individuals from setting up EPOAs. In addition, it is far from obvious how these types of formality would affect the occurrence of abuse. In its 1996 report, the Queensland Law Reform Commission cited cost, bureaucracy, delay, invasion of privacy, the inability to detect or deter fraud, and the negligible conferral of additional solemnity in their execution, as problems with mandatory registration.[34] Under the *Powers of Attorney Act 2003* (NSW), EPOAs may be registered, though it is not mandatory.[35] However, any conveyance or land dealing executed under a power of attorney has no effect unless the power of attorney has been registered.[36]

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[32] Carney, T., 'Abuse of enduring powers of attorney: lessons from the Australian tribunal experiment?' *New Zealand Universities Law Review*, vol. 18, n.4, 1999, p. 491.

[33] In NSW, powers of attorney need to be registered only prior to any dealing in land or shares.

[34] Queensland Law Reform Commission, *Assisted and Substituted Decisions*, Queensland Law Reform Commission, Brisbane, 1996, pp. 148–158.

[35] *Powers of Attorney Act 2003* (NSW), Section 51(1).

[36] *Powers of Attorney Act 2003* (NSW), Section 52(1).

Perhaps the most significant area for reform lies with the issue of the supervision and accountability of the activity of the attorney. In a consultation with the Consumer Credit Legal Centre, the view was expressed that a financial management order is preferable to an EPOA, as such an order requires the person responsible to enter into a management plan and to report to the Protective Commissioner. The commonly held view is that a POA does not have any real safeguards.

> … they are often abused and there is no provision for scrutiny.[37]

On the other hand, others express the view that formal supervision and accountability would be unnecessarily complex and onerous for the attorney, and costly for the State, when POAs are abused in all likelihood, only in a minority of cases.[38] As indicated above, the expanded jurisdiction of the Guardianship Tribunal to review EPOAs on application, and the expanded class of people who may request such reviews, provides a greater level of supervision and accountability of the activities of the attorney, than previously.

Guardianship and financial management

Enduring guardianship

Like EPOAs, enduring guardianship enables older people to make arrangements for others to make certain decisions on their behalf should they lose the capacity to do so. While EPOAs concern financial and property matters, enduring guardianship concerns personal, health and lifestyle decisions. This facility has been available since 1998, pursuant to amendments to the *Guardianship Act 1987 (NSW)* that recognised the need for substitute decision-making on issues such as accommodation, medical and dental care.

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[37] Consultation with Karen Cox and Emma Keene, Consumer Credit Legal Centre, 25 October 2002.

[38] Consultation with Barbara Squires, Director of the Centre on Ageing, Benevolent Society, and President, Australian Association of Gerontology, Sydney, 10 October 2002.

As with EPOAs, a significant barrier to accessing enduring guardianship is a lack of knowledge among older people and the population in general. Indeed, in the focus groups conducted for this study, there was generally a lower level of knowledge in relation to enduring guardianship than in relation to POAs. In addition, some participants seemed to believe that the POA permitted decision-making in the areas for which guardianship is needed, namely personal and lifestyle matters.[39] This confusion is at least partly due to the overlap between financial and personal/lifestyle decisions, such as in relation to purchasing care services.

The very low take-up rate of enduring guardianship is recognised by the Office of the Public Guardian, whose director explained that it actively engages in providing education to the public on enduring guardianship—including training sessions for private guardians—as part of its statutory responsibility to provide information to the community about the *Guardianship Act* and the role of guardians.[40]

The procedure for appointing an enduring guardian is more involved than that of appointing an attorney. Unlike an attorney, an appointee to an enduring guardianship is required to accept his or her appointment with the appropriate form. Further, both the appointor's and the appointee's signatures need to be witnessed by the same person, who certifies that each signed the instrument voluntarily in his or her presence, and appeared to understand the effect of the instrument.[41]

On one hand, these additional requirements provide a safeguard that is missing in the law on EPOAs, imposing formalities and allowing for the provision of information that may reduce the potential for abuse. On the

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[39] Mirrabooka Retirement Village focus group, 21 October 2002; Older Men New Ideas (OMNI) focus group, Lakemba, 10 September 2002.

[40] Consultation with the John Le Breton, Director, and Amanda Curtin, Office of the Public Guardian, Sydney, 24 September 2002. See also the information booklet, Office of the Public Guardian, *Enduring Guardianship in New South Wales: your way to plan ahead*, Office of the Public Guardian, Sydney, 2001.

[41] *Guardianship Act 1987* (NSW), Section 6C.

other hand, this level of formality may inhibit older people from using this mechanism for substitute decision-making. The Office of the Public Guardian expressed the concern that the witnessing requirements could create difficulties, especially where the appointor and appointee live distant from each other.[42] This concern was expressed by a focus group participant:

> *I made enquiries about enduring guardianship ... I wanted my daughter to be the guardian and she lives in another State, so I went to the legal people at [community legal centre], and they weren't able to answer whether my daughter could sign in another State for something that I wanted in this state ... the end suggestion was that my daughter travel to Albury and I travel down to Albury and we go into a solicitor in Albury and get both of us to sign it.*[43]

Recent amendments to the *Guardianship Act 1987* have come into force and attempt to remedy the problem of simultaneous witnessing. These provisions provide that the execution of the instrument by the appointor and the appointee may be witnessed by different persons, at different times and places.[44]

Another concern expressed by the Office of the Public Guardian is that older people who are geographically isolated, or who have neither family nor friends that they may rely upon, are effectively excluded from using the enduring guardianship mechanism. No facility equivalent to that under POAs exists for appointing the public trustee, or a trustee company in advance, in lieu of someone personally known to the principal.[45]

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[42] Consultation with John Le Breton, Director, and Amanda Curtin, Office of the Public Guardian, 24 September 2002.

[43] Mirrabooka Retirement Village focus group participant, 21 October 2002.

[44] *Guardianship Amendment (Enduring Guardians) Act 2002* (NSW), Sch.1 cl. 4 (inserting new Section 6C).

[45] Consultation with John Le Breton, Director, and Amanda Curtin, Office of the Public Guardian, 24 September 2002.

Guardianship and financial management orders

Where an older person who has failed to prearrange substitute decision-making in the form of an EPOA and/or enduring guardianship loses the capacity to make decisions, the Guardianship Tribunal has the power to appoint a guardian and/or a financial manager to make decisions and manage the affairs for that person.[46] In the case of guardianship, the Tribunal may appoint either a private guardian or the Public Guardian, while in the case of financial management, the Tribunal may appoint either the Protective Commissioner or a private financial manager under the supervision of the Protective Commissioner.

In the year 2000, there were 3,966 new applications to the Guardianship Tribunal, 50 per cent of which involved persons who suffered from dementia.[47] According to the President of the Guardianship Tribunal, there are over 60,000 people with dementia in NSW, and the 2,500 people or so under guardianship represent only between one per cent and three per cent of the total estimated number of people who cannot make decisions for themselves.[48] However in most cases, there is no need for *formal* substitute decision-making arrangements, since people often accept decisions that are made on their behalf by family members or friends.[49]

In the inquiry conducted by the Public Bodies Review Committee into the offices of the Public Guardian and the Protective Commissioner, clients and related persons raised the following issues:[50]

- inadequate information provided to families about guardianship
- delays in allocating a permanent guardian

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[46] *Guardianship Act 1987* (NSW), Section 14.

[47] Kurrle, S., *Health Care Guardians and Substitute Decision-Making: The Australian Experience*, paper presented at a conference of the Action on Elder Abuse, UK, 2002.

[48] Consultation with Nick O'Neil, President, Guardianship Tribunal, 4 November 2002.

[49] Consultation with Nick O'Neil, President, Guardianship Tribunal, 4 November 2002.

[50] Public Bodies Review Committee, *Personal Effects: A Review of the Offices of the Public Guardian and the Protective Commissioner: Report of the Public Bodies Review Committee*, Parliament of New South Wales, Sydney, 2001, p. 19.

- concern that the Public Guardian could not adequately advocate for clients
- concern that Guardianship Tribunal decisions are not being enacted
- alleged mismanagement of clients' funds by the Office of the Protective Commissioner (OPC)
- concern about time taken in processing accounts by the OPC
- unfairness of fees charged by the OPC
- difficulties in obtaining financial statements from the OPC
- concern at erosion of invested funds for protected persons in the Common Fund
- non-responsiveness or rudeness from staff of the OPC
- insufficient client contact or knowledge by staff of the OPC.

A focus group participant echoed some of these concerns, emphasising the apparently poor coordination in the making of guardianship and financial management orders in relation to the same case.

> *My wife's sister-in-law suffered dementia and could not make decisions for herself. My wife and I were appointed guardians. One day we discovered that her house had been put up for auction ...[by] authority from the Protective Commissioner. We had a hearing before the Guardianship Tribunal. The Tribunal said that they were not aware that my wife existed, which was strange given that it was the Tribunal that had appointed us as guardians. The Tribunal said the decision to sell the house and put the subject of the orders in residential care would enhance the quality of her life. The whole affair was badly dealt with by the Tribunal and the Protective Commissioner. We should have been told of the decision to sell the house and move her.*[51]

[51] Older Men: New Ideas (OMNI) Lakemba Branch focus group participant, Sydney, 10 September 2002.

In response to the above concerns identified by the Public Bodies Review Committee, the Committee made a number of recommendations in its report for improving the accountability of the OPC, and the client relations of both the Office of the Public Guardian and the OPC, including that both offices be subject to the scrutiny of the NSW Ombudsman.[52] The Committee also recommended that the legislation be amended to provide for decisions of the OPC and the Public Guardian (but not orders of the Guardianship Tribunal itself) be reviewable before the Administrative Decisions Tribunal (ADT).[53] The NSW Government has gone further by passing legislation which not only implements the Committee's proposals, but also provides for rehearings by the ADT in all key areas of guardianship.[54]

It is important to realise that a guardianship or financial management order does not ensure that the subject of the order will be free from abuse and financial mismanagement. The potential for such abuse is not helped by the fact that guardians' acts are not constantly supervised by any authority. The NSW Attorney-General has brought to light several situations of abuse.

> On a few rare occasions, it has been necessary for the Public Guardian to authorise the removal of a person under their guardianship from circumstances where the person is being abused, neglected or exploited. Sadly, this has included situations where family members or carers were physically or emotionally abusing the person; refusing access to the person by that person's doctor or other health professional thereby placing the person's health in jeopardy; or refusing to provide the person with adequate care and protection.[55]

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[52] Public Bodies Review Committee, *Personal Effects: A Review of the Offices of the Public Guardian and the Protective Commissioner,* p. 15.

[53] Public Bodies Review Committee, *Personal Effects: A Review of the Offices of the Public Guardian and the Protective Commissioner,* p. 53–56.

[54] Schedules 2 and 3, *Guardianship and Protected Estates Legislation Amendment Act 2002* (NSW); Section 80A, *Guardianship Act 1987* (NSW); Sections 21A, 23A, 28A, 30A *Protected Estates Act 1983* (NSW).

[55] Parliament of New South Wales, 'Guardianship Act Breaches', *Legislative Council Hansard*, No. 36 of 13 December 2001, p. 20138. Available at <http://www.parliament.nsw.gov.au/prod/web/phweb.nsf/frames/hansard> (Last accessed 22 December 2003).

> Whilst every effort is made to ensure that the location and storage of all significant client assets under the management of the Protective Commissioner are recorded, there have been examples of theft or disappearance of a person's property. In some instances, clients have given away property to family members, friends or others. In other cases, visitors who have been invited by clients into their home have misappropriated items belonging to the client. I am advised that family members have, on occasion, also been known to misappropriate clients' funds and property. Claims of misappropriation are investigated, and if there is evidence of criminality, are referred to the police. Civil action may also be taken to recover property.[56]

Guardianship Tribunal

The Guardianship Tribunal has jurisdiction to appoint guardians and financial managers for people 16 years and over who are incapable of making their own decisions and have no formal arrangements in place, such as enduring powers of attorney or enduring guardianship.[57] In addition, the Tribunal can consent to medical and dental treatment for persons incapable of consenting to their own treatment.[58] Where there are no suitable persons to take on the responsibility of acting as guardian or private financial manager, the Tribunal can appoint the Public Guardian and the Protective Commissioner to act as guardian and financial manager respectively.[59]

The Guardianship Tribunal generally provides an accessible forum for dealing with guardianship and financial management matters. There is no application filing fee. Parties are not required to be represented. The proceedings must be conducted with as little formality and legal technicality and form as the circumstances permit, and the Tribunal is not bound by the rules of evidence.

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[56] Parliament of New South Wales,' Office of the Public Guardian' *Legislative Council Hansard,* n.33 of 13 December 2003, p. 20137. Available at <http://www.parliament.nsw.gov.au/prod/web/phweb.nsf/frames/hansard> (Last accessed 22 December 2003).

[57] *Guardianship Act 1987* (NSW), Section 14.

[58] *Guardianship Act 1987* (NSW), Section 36.

[59] *Guardianship Act 1987* (NSW), Section 25M, *Protected Estates Act 1983* (NSW), Section 76(5).

Moreover, there is a broad principle of legal standing, permitting anyone with a genuine concern for the welfare of a person who is incapable of making their own decisions to make an application to the Tribunal.

The Tribunal also has an extensive support process as part of the investigative, pre-hearing phase. Staff from the Tribunal's Investigation and Liaison Branch first assess applications and attempt to resolve the matters informally. Where unsuccessful, the applications are prepared for hearing, which may include gathering information and preparing the parties for the hearing.[60]

Assessment of incapacity

The assessment of a person's incapacity is the starting point for the operation of enduring guardianship, guardianship orders and financial management orders. The act of determining whether an older person lacks capacity is a complex one, and it is undertaken in slightly different ways in each of the three areas.

For enduring guardianship, the appointment only takes effect when the appointor becomes 'in need of a guardian'.[61] Generally speaking, this determination is to be made by the guardian. However, where the issue arises as to whether or not the appointor is in need of a guardian, a medical certificate to the effect that the appointor is, or was, totally or partially incapable of managing his or her person because of a disability, is deemed to be sufficient evidence of that fact.[62] Moreover, where there remains a dispute or uncertainty as to capacity *despite* the production of a medical certificate, there is provision for an application to be made to the Guardianship Tribunal for an order declaring the appointment to take effect.[63]

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[60] See website for The Guardianship Tribunal, http://www.gt.nsw.gov.au/hearings/before.cfm> (Last accessed 22 January 2004).

[61] *Guardianship Act 1987* (NSW), Section 6A.

[62] *Guardianship Act 1987* (NSW), Section 6N.

[63] *Guardianship Act 1987* (NSW), Section 6M.

Similarly, before the Guardianship Tribunal makes an order appointing a guardian, it must be satisfied that the subject of the application is totally or partially incapable of managing himself or herself because of a disability.[64] A person with a disability is defined to mean a person who is intellectually, physically, psychologically or sensory disabled; or is of advanced age; or has a mental illness within the meaning of the *Mental Health Act 1990* (NSW), or has another disability. Further, his or her disability must restrict them in one or more major life activities to the extent that he or she requires supervision or social rehabilitation.[65]

In the case of financial management orders, the Tribunal must be satisfied that the person is incapable of managing his or her affairs, the person needs someone else to manage his or her affairs, and it is in the person's best interests that an order be made.[66] The Tribunal also has the power to make an interim financial management order for up to six months pending further consideration of the person's incapacity.[67]

In a consultation with a service provider, it was suggested that problems arise as a result of capacity being content-specific and constantly shifting.

> Some people are competent at certain times and not so at other times ... some have capacity to make smaller decisions but not larger ones. There are philosophical differences between gerontologists, doctors and lawyers about what capacity is … older people are in danger of being deemed to lose capacity with very little protection.[68]

As a way of overcoming the problem of subjective values in the determination of incapacity, the American Bar Association has set four essential elements to guide assessment. These are that:

- capacity be recognised as a legal rather than a medical concept

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[64] *Guardianship Act 1987* (NSW), ss. 3(1) & 14.

[65] *Guardianship Act 1987* (NSW), Section 3(2).

[66] *Guardianship Act 1987* (NSW), Section 25G.

[67] *Guardianship Act 1987* (NSW), Section 25H.

[68] Consultation with Ros Monro, Legal Outreach for Older People Project, Caxton Legal Centre, 10 July 2002.

- assessments be supported by evidence of functional impairment over time
- there be a finding that the person will suffer substantial harm as a consequence
- age, eccentricity, poverty or medical diagnosis alone does not qualify.[69]

On one level, NSW guardianship law and practice has tended to emphasise the medical qualities of incapacity, as the definition of disability in the Act refers to types of conditions that correspond with broad medical categories.

However, incapacity is treated as encompassing more than a diagnosis of disability. In requiring that the disability result in restrictions to a major life activity, and the total or partial inability to manage one's affairs, the legislation also emphasises the need for *functional* impairment and the experience of some sort of detriment. The Supreme Court of the Australian Capital Territory affirmed this in relation to the equivalent provision in its *Guardianship and Management of Property Act 1991*.

> [the Act] discourages the notion that simply because a person is affected by some mental disorder, he or she should be deprived of the practical means of enjoying his or her property.[70]

Incapacity can be determined by a multitude of medical professionals and modes of assessment. A neuro-psychologist and panel member of the Guardianship Tribunal expressed concern that assessments are provided by professionals (such as general practitioners, geriatricians, psychiatrists and psychologists), who may not be fully aware of the assessments required to determine cognitive abilities. Unlike other professionals, neuro-psychologists specialise in cognitive testing and the assessment of functional deficiency rather than merely providing a diagnosis. This type of testing is important because individuals with the same illness (e.g. dementia) can

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[69] Carney, T. and Tait, D., 'Guardianship Dilemmas and Care of the Aged', *Sydney Law Review*, vol. 13, n.1, 1991, p. 66.

[70] *A v Guardianship and Management of Property Tribunal* [1999] ACTSC 77.

have different levels and different types of functional deficiencies (e.g. short-term memory loss, speech impairment). A person who may not be able to monitor their financial affairs may still be fully competent in testifying reliably on certain matters or in making certain decisions. Unfortunately, there are few professionals qualified in this field, and medical practitioners doing assessments require better training in more specific diagnostic-assessment techniques suitable for legal purposes.[71]

An older person who made a submission to this study suggested a number of problems with the way the Guardianship Tribunal assesses incapacity. First, according to this submission, the Tribunal's practice of providing hearing impaired persons with a hearing aid for the day of the hearing may be problematic because using a hearing aid for the first time often results in severely distorted hearing. As a result, the person may be unable to properly hear the proceedings, which might prevent an accurate assessment of capacity.

Second, lengthy hearings, particularly in the absence of summaries, can be difficult to follow for the memory impaired. They may have difficulty remembering details without having written materials to assist them.

Third, the procedure for assessing capacity in the presence of the subject of the application may itself bias the findings.

> Disabilities and incapacities have to be listed before the Tribunal. The person has to sit and listen to these being read out. Then they consult the person as to their competence to look after themselves. It is understandable that someone would be angry, but that is not necessarily viewed as a reaction to being treated in this way, rather as an indication of a problem. They can be deprived of their liberty on the basis of these assessments.[72]

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[71] Consultation with Hayley Bennett, neuro-psychologist and panel member of the Guardianship Tribunal, 12 November 2002.

[72] Individual telephone submission.

Barriers to access

There are two main issues concerning access: the right of representation, and the limitations on review. With regard to the right of representation, the *Guardianship Act 1987* provides that a party to proceedings may be represented by a barrister, solicitor or agent only by leave of the Tribunal. This rule is consistent with those in many other tribunals, especially those that function primarily in an inquisitorial or investigative mode. On the one hand, the rule against an automatic right of representation generally serves to maintain the informality and lack of expense of Tribunal proceedings. According to the President of the Guardianship Tribunal:

> The policy behind the legislation is [to use] lawyers only by leave, and we believe that the purpose of the legislation is to keep the process as cheap and as accessible as possible.[73]

On the other hand, there is the fear that older persons, whether they be the subject of the application or the applicant, may be disadvantaged by not having legal representation. The concern is that the older person's need for legal representation may go undetected. According to one older person who provided a submission to this study, while people are encouraged to get legal assistance or representation for court appearances, they are not so encouraged in the Guardianship Tribunal.[74] There is also no independent advocacy body to assist people in their dealings with the Tribunal, the Public Guardian and the Protective Commissioner. Even in relatively informal proceedings, self-representation can be very onerous for older people, who are often assessed as not being their own best advocates.[75]

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[73] Consultation with Nick O'Neil, President, Guardianship Tribunal, 4 November 2002.

[74] Individual telephone submission.

[75] National Alternative Dispute Resolution Advisory Council, *Issues of Fairness and Justice in Alternative Dispute Resolution*, Discussion Paper, The Council, Canberra, November 1997, paragraph 5.83. Available at <http://www.nadrac.gov.au/www/disputeresolutionHome.nsf/0/043D3288E4FE074CCA256B4C000BD025?OpenDocument> (Last accessed 18 December 2003).

This should be compared to the arrangements in Victoria, where the Victorian Office of the Public Advocate provides a duty officer at the Guardianship Tribunal, who can provide advocacy assistance to people with disabilities, their families, and those who work with them.[76]

The Guardianship Tribunal takes the view that it is appropriate to give leave for representation where it is satisfied that it is actually the subject of the application who is to be represented, and not another family member. There may also be situations where a party is not coping with the matter, or where there is a lot of conflict amongst the parties and representation would be in everybody's interest.[77]

Nonetheless, there are a number of arguments for reviewing the legislative presumption against legal representation:

- often, quite complex medico-legal evidence is introduced
- because the subject of the application often has some disability or mental frailty, there may be strong emotional disagreements where parties to the proceedings are family members in conflict
- the orders made by the Tribunal are likely to have very serious consequences for the subject of the application and possibly the other parties.

With regard to the limitations on the Tribunal's power of review, the Tribunal conducts requested reviews of Guardianship orders and financial management orders where:

- the guardian or manager seeks a change of powers
- there is some concern about whether the appointed guardian or manager is adequately performing his or her functions

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[76] Website for the Victorian Office of the Public Advocate, <http://www.justice.vic.gov.au/CA256A76007E8265/OrigDoc/~FB104837C4FBCB83CA256ACC00071540?OpenDocument#Advocacy> (Last accessed 28 April 2004).

[77] Consultation with Nick O'Neil, President, Guardianship Tribunal, 4 November 2002.

- there is a substantial change in circumstances
- where evidence has become available that was not reasonably available at the time of the original hearing.[78]

Where a person wants to appeal a decision made by the Tribunal he or she must lodge an appeal either with the Supreme Court of NSW or with the Administrative Decisions Tribunal (ADT) of NSW, within 28 days. There is no internal appeal of the Tribunal's decision.[79] Appeals to the Supreme Court involve greater formality and expense, which may act as a barrier to an older person who cannot afford legal representation and does not have the knowledge or confidence to appear unrepresented. There are also concerns that while appeals to the ADT are less expensive and will be concluded more expeditiously, the ADT may operate with the same level of formality as the Supreme Court.[80]

Nominee arrangements

In the area of social security, it is possible to make arrangements for limited substitute decision-making to assist older people who receive pensions, with the management of their financial affairs. These arrangements may be required because of a medical condition or the complexity of a person's financial affairs, or may be desired as a matter of convenience. There are currently around 220,000 people nationally who act as nominees for social security recipients.[81] With the steady increase in people reaching pension age there is likely to be a corresponding increase in the use of nominee arrangements.

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[78] Consultation with Nick O'Neil, President, Guardianship Tribunal, 4 November 2002.

[79] *Guardianship Act 1987* (NSW), Sections 67 and 67A, see also The Guardianship Tribunal website at <http://www.gt.nsw.gov.au/hearings/appeals.cfm> (Last accessed April 2004).

[80] Consultation with Nick O'Neil, President, Guardianship Tribunal, 4 November 2002.

[81] Centrelink, *Submission to Stage 1, Law and Justice Foundation of NSW Access to Justice and Legal Needs Research Program*, 15 January 2003.

Currently, legislation allows for a nominee to receive social security payments on behalf of another,[82] and for Centrelink to release information to, and accept changes in information from, a nominee.[83] Centrelink does not recognise automatically a POA as a *de facto* nominee arrangement, because POA is determined by the States, whereas social security is a Commonwealth matter. These jurisdictional distinctions often cause the following problems for those not at ease with the legal system:

- the process of lodging forms to initiate nominee arrangements may be difficult for some, and processes for cancelling or amending nominee arrangements may not be understood
- there may be difficulties in obtaining customers' signed agreement to nominee arrangements if they are mentally capable but physically unable to sign
- the nominees themselves may not understand Centrelink's requirements or subsequent requests for information.[84]

In our consultations with professionals concerned with substitute decision-making, there was no mention of the existence of nominee arrangements. This finding raises the question of whether persons who are commonly consulted by older people to provide advice on substitute decision-making—such as lawyers and medical practitioners—are generally aware of, and able to provide, information on nominee arrangements.

As already discussed for POA appointees, there is an issue as to whether nominees fully understand the nature of their appointment, including their

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[82] *Social Security (Administration) Act 1999* (Cth), Section 44. For a detailed description of the Nominee Scheme under the old Department of Social Security see Chapter 4 'Financial Decision-Making for Pensioners', in Creyke, R., *Who can decide? Legal decision making for others*, Department of Human Services and Health, Aged and Community Care Division, Commonwealth of Australia, Canberra, 1995.

[83] *Privacy Act 1988* (Cth), Section 14; see Principle 6: 'Access to records containing personal information'; and, Principle 7: 'Alteration of records containing personal information.'

[84] Centrelink, *Submission to Stage 1, Law and Justice Foundation of NSW Access to Justice and Legal Needs Research Program*, 15 January 2003.

duties and obligations. Lack of knowledge by substitute decision makers as to their role increases the likelihood of financial abuse or breach of duty.

Centrelink has received anecdotal reports of nominees failing to manage financial affairs in the best interests of their principals, and of failing to provide information about changed circumstances, resulting in overpayments or debts on the part of social security clients. Legislative changes that took effect from 1 July 2003 include an increase in the accountability of nominees in relation to notifying Centrelink of changes in the circumstances of a benefit recipient, and the provision for recovering a debt from the nominee where appropriate.[85]

Concerns have been expressed about the accountability of Centrelink with respect to nominee arrangement. In particular, the following issues have been identified as areas where nominee arrangements may result in abuse:

- inadequate safeguards by Centrelink to ensure the appropriateness of the nominee to be appointed in the circumstances, and a failure by Centrelink to ensure that the nominee is suitable[86]
- inadequate penalties for nominees who are in breach of their obligations[87]
- inadequate provision to prevent nominee appointments made under duress, or misuse of pensioner funds by nominees

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[85] Centrelink, *Submission to Stage 1, Law and Justice Foundation of NSW Access to Justice and Legal Needs Research Program*, 15 January 2003.

[86] Creyke, R., *Financial Decision-Making for Pensioners*, in., Chapter 4 in Who can decide? Legal decision making for others, Department of Human Services and Health, Aged and Community Care Division, Canberra, 1995, at p. 68; Creyke, R., *Whose Pension is it? Substitute Payees for Mentally Incompetent Pensioners*, (1991) 10 University of Tasmania Law Review, 102 at p. 106. This should be contrasted with the system for social security nominees in the United States, where the Social Security Administration (SSA) is required to thoroughly investigate potential nominees. Payment to an uninvestigated nominee who misues the money may constitute an underpayment, for which the SSA may be responsible. See Komlos-Hronsky, P., *Representative payee issues in the Social Security and Supplementary Security Income Programs*, (1989) 23 Clearinghouse Review pp. 412–417.

[87] Creyke, R., 'Financial Decision-Making for Pensioners', in., Chapter 4 in *Who can decide? Legal decision making for others*, Department of Human Services and Health, Aged and Community Care Division, Canberra, 1995, at p. 72.

- unlikelihood of notification of any abuse to Centrelink, given that it is likely that the pensioner will be incapable of notifying Centrelink, and the only other party aware of the abuse is the perpetrator. If Cenrelink only investigate cases which are brought to their notice, then it is likely that many cases of nominee abuse will never be investigated.[88]

There is also an issue as to whether there is any conflict between a nominee appointed to deal with Centrelink, and an appointed attorney under a POA.

Wills and probate

Wills are the most common formal legal mechanism for advance decision-making, permitting people to prepare instructions about the distribution of their assets in the event of their death. Anecdotal evidence, supported by the results of the focus groups with older people, suggests that most older people have either prepared wills, or are aware of them and the basic function they perform.

Generally speaking, will making is an accessible process. Though there are a number of legal formalities that must be complied with for a will to be valid, wills are relatively inexpensive to make, and there are a number of options to avoid the expense of private legal services.

> Advertisements appear regularly in the press urging consumers to make a will 'free of charge' by using the services of a trustee company. The Law Society of NSW and other bodies carry out public information campaigns. Do-it-yourself will kits are readily available in stationers, bookshops and newsagents.[89]

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[88] Creyke, R., 'Whose Pension is it? Substitute Payees for Mentally Incompetent Pensioners', (1991) 10 *University of Tasmania Law Review*, 102 at pp. 106–112.

[89] Hampshire, A., Squires, B., Wall, S. and Thompson, R., *Taking Charge: Making Decisions for Later Life*, NSW Committee on Ageing, Sydney, 1999, p. 14.

Even purchasing the services of a solicitor for the purpose of drafting a will is relatively inexpensive compared with other legal services.

> With the competitive attitude these days, most lawyers would charge $50 to write a will. Five to ten years ago it would have been $200 to $300. We did a survey around town—I don't think anyone charged more than $100. As long as the wills are simple. If you want to create family trusts, well, maybe a bit more than that.[90]

The use of will kits as an alternative to paying for legal services has recently become more common. Only a couple of participants in the focus group of older men said that they had consulted a lawyer in order to make a will. The remainder had either drafted their own wills using will kits, or requested the assistance of the Public Trustee. Only one participant expressed the belief that it was safer to get a lawyer to draft the will, although he added that his concern was with complex financial arrangements.[91]

Nonetheless, because of the legal formalities involved, there remains some pressure upon people to seek legal assistance rather than doing it on their own, which may prevent some people from making wills. A related issue is applying for the grant of probate. An older person informed us of the difficulty he faced in attempting to obtain probate without using the services of a solicitor. It was his opinion that in NSW there is insufficient free assistance provided to the public in relation to obtaining probate.

> *A couple of years ago my father died (in the UK) and [previously] he had told my brother that we should obtain probate without using a solicitor. He'd written down all of the steps. We obtained a complete guide from the probate court and following the instructions, we managed to obtain probate on my father's will without any hitches at all. I've been trying*

[90] Consultation with Northern Rivers Community Legal Centre, 28 November 2002.

[91] Older Men New Ideas (OMNI) focus group participant, Lakemba, 10 September 2002.

> *to find similar help from the NSW Government ... Everything I've found out so far always ends up with 'see a solicitor' and from my experience I know that in many cases a solicitor is not required.*[92]

In addition, there are concerns among older people that the use of lawyers in the process of will making, as well as in applying for the grant of probate, may not always be advantageous to the clients. One person expressed the opinion that wills should be written in plain English, and that before being signed they should be taken to a third party who is not the lawyer to look over the document and ensure that it is completely understood.[93] Presumedly, the concern is that where the lawyer who advises the testator is the family legal adviser, which is often the case, he or she may not be sufficiently impartial to provide the testator with completely independent advice.

Another problem concerns the potential difficulties in locating wills or determining which of a number of wills is valid. It is often the case that an individual advises his or her family and friends of the location of his or her will, but the information is not remembered because of the distress experienced upon that person's death. An older person recounted that her uncle died leaving several wills, and suggested that there should be an official registry of wills to avoid disputes over which is the current one.[94] This suggestion, in part, has been taken up by the NSW Registry of Births Deaths and Marriages, which in 1991 set up a Wills Register to record the location of wills. The Registry does not store wills, but merely records the details of wills so that they can be found in the event of a death. However, registration of wills is only voluntary, and problems may still be encountered for those wills not registered.

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[92] Individual written submission.

[93] Individual telephone submission.

[94] Individual telephone submission.

Conclusion

In terms of substitute decision-making, it appears that the predominant barrier to utilising instruments such as EPOAs is a lack of awareness of their availability and ignorance as to their difference from an ordinary POA. Combined with this ignorance, many older people have a fear that there is potential for these instruments to be abused, either by appointed attorneys exceeding their powers, or activation of the EPOA on false representation of incapacity. Consideration needs to be given to the most appropriate and effective avenues by which older people are informed of their substitute decision-making options.

As with EPOA, the most significant barrier to accessing enduring guardianship is a lack of knowledge among older people. This combined with the onerous procedure for appointing a guardian, and the difficulties of finding someone to act as a guardian for those older people who are physically or socially isolated from family and friends, result in an under-utilisation of guardianship provisions. Other identified problems with guardianship and financial management arrangements include:

- concerns about mismanagement, delays and fees charged by the Office of Protective Commissioner
- concerns about the processes used by the Guardianship Tribunal in the assessment of incapacity
- lack of automatic right of representation before the Guardianship Tribunal
- lack of independent specialist advocacy services to assist people in their dealings with the Guardianship Tribunal
- lack of accessible review mechanisms of Guardianship orders made by the Tribunal.

In terms of advance decision-making mechanisms for dealing with estates of deceased persons, will-making is seen by older people as an accessible, and in most cases affordable process. On the other hand, the complexity of applying for a grant of probate for a deceased's estate presents more difficulties for older people in terms of formality and expense. In most cases, one needs to hire a solicitor to undertake this task.

It is likely that those older people who are considering options for substitute decision-making, or are facing difficulties with their current substitute decision-making arrangements, will be physically, emotionally and possibly intellectually frail and vulnerable. The same is also true for older people facing end of life issues such as will-making and grants of probate. The difficulties confronted by them in seeking to access legal assistance, independent from other family members, can be substantial.

10. Grandparenting

Introduction

There are a number of legal problems that older people can experience in relation to their roles as grandparents. Many people over the age of 65 years are grandparents or great-grandparents. Statistics on the proportion of grandparents in this age group, however, are not available.

Grandparents can be involved in their grandchildren's lives in a variety of ways.

> They are teachers, feeders and fixers, bakers and baby sitters ... They are also consolers and carers, historians and taxi drivers. The list is endless.[1]

The grandparent/grandchild relationship can range from occasional contact as part of a family visit through to full time care. The relationship is often characterised by grandparents as a tenuous one. It is usually the parent(s) rather than the grandparent(s) who control the level of contact between grandparent(s) and grandchild(ren). The relationship is also conditional upon an amicable relationship with the parent(s).

According to Australian Bureau of Statistics (ABS) data, in 1999 grandparents were the main providers of informal childcare with 37 per cent of children under the age of 12 receiving informal child care, more than half of which was provided by grandparents.[2] They were more likely

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[1] Gonski, H., *Grandparenting: The New Challenge,* paper presented at the Grandparenting Raising Grandchildern Seminar, Council on the Ageing, Sydney, 25 October 2002, p. 1.

[2] Australian Bureau of Statistics, 'Child care arrangements', *Australian Social Trends 2001,* Catalogue n.4102.0, Australian Bureau of Statistics, Canberra, 2001. Available at <http://www.abs.gov.au/Ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/436e561e501068f0ca256bcd00825567!OpenDocument> (Last accessed 24 September 2003).

to be the informal carers of very young children than older children.[3] Increasing reliance on grandparents for informal care arrangements correlates with women's increasing participation in the workforce. Indeed, ABS data show that for both formal and informal care, the reasons most commonly given for placing children in care were work-related.[4]

Formal childcare can be costly, particularly for economically disadvantaged families. Informal care by grandparents has become more popular over the years. Problems can arise, however, when for some reason the situation changes.

Contact denied

One way that care arrangements can be disrupted is when the parents' relationship breaks down. In some cases, the parents' separation or divorce may produce a greater reliance on the grandparent for care or support and a closer relationship with the grandchildren may result.

However, in some cases, a grandparent's contact with grandchildren may be reduced or denied, particularly if the grandparent is the relative of the parent who is no longer living with the children following the separation/ divorce.

> Grandparents can find themselves cut off from their children in circumstances of family estrangement—usually divorce—although it can be through death of a partner… It's usually that the kids go with the mother when they break up and the father's parents get denied access.[5]

The children's contact arrangements with the non-resident parent can also produce a flow-on impact on the level of contact between grandchildren

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[3] Australian Bureau of Statistics, 'Child care arrangements'.

[4] Australian Bureau of Statistics, 'Child care arrangements'.

[5] Consultation with Prue Fairlie, Grandparenting NSW, Council on the Ageing, 22 October 2002.

and their grandparents. If the parents cannot arrive at a consensual arrangement,[6] their only recourse may be to progress to a hearing in the Family Court.

In such cases, grandparents may support their own child's legal battle for a contact or residence order in the Family Court.[7] Anecdotally, many of the grandparents who become involved in Family Court actions[82] do so, not as parties applying for an order, but rather as persons providing financial, emotional, legal[9] and sometimes accommodation support. Grandparents who are not party to the proceedings are not eligible to receive legal aid.

For many older people, bankrolling a Family Court action for their child will be very onerous, especially for those on fixed incomes or pensions: "you hear stories like 'it costed me $10,000 through the courts to get the kids'."[10] Some offer, or are pressured by their children, to mortgage or sell their home to cover legal costs.[11] The following story demonstrates that the effects of supporting a child through Family Court proceedings can be greater than depleting financial resources.

> *I was going to be denied contact with my only grandchild. I knew in my heart that I had to do something about it ... for this child's identity: his right to his heritage, the right to his*

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6 These are called 'consent orders' in family law, and can be arrived at privately or through compulsory mediation and are then checked by the Family Court to ensure that they are in the best interests of the child. After they are approved and stamped by the Court, they have the effect of a court order. This means they can be enforced using the court system, even though they may have been privately negotiated.

7 The terms 'contact' and 'residence' were introduced by the amendments to the *Family Law Act 1975 (Cth)* in 1995. They replace 'access' and 'custody' and reflect the change in focus from the parents' perspective to the rights and best interests of the child.

8 Chisolm, R., 'Grandparents and children's cases and the Family Court', *Reform,* i.81, Spring 2002, pp. 53–57.

9 As witnesses providing evidence in support of their son's or daughter's application.

10 Consultation with Prue Fairlie, Grandparenting NSW, Council on the Ageing, 22 October 2002.

11 See Chapter 8, *Elder Abuse*, Financial Abuse, p. 271.

extended family. It just destroyed my son and I saw the injustice to him and to us… I funded my son's Family Court action. There was no support out there ... and people would think 'well you can't have anything to do with your grandchild, what have you done?' In the end ... it uses up your finances and finally it destroyed my marriage. At the end of the day, there's an overwhelming sense of injustice.[12]

If the grandparents' relationship with their own child is, or becomes, strained they may experience difficulty in securing an agreement for contact with their grandchildren. Thus, a denial or reduction of contact with grandchildren can occur whether or not separation or divorce is the trigger.

One woman I knew lost her battle with cancer and went to her grave never seeing her grand-daughter again. And this was because of her own daughter. That's what blew me away in the beginning ... this was her own daughter stopping her from seeing her grandchild.[13]

Barriers to taking legal action

There are several factors that discourage grandparents from pursuing orders in the Family Court for themselves. Relationship breakdown with one's own child can be one of these.

> Sometimes it's their own child that will have an amazing power struggle with their parent and for one reason or another, will just cut their parents off for no apparent reason that the parents can see.[14]

Many older people are loath to take their families to court unless there is something very valuable, such as the health and welfare of a grandchild, at

[12] Individual telephone submission.

[13] Individual telephone submission.

[14] Consultation with Prue Fairlie, Grandparenting NSW, Council on the Ageing, 22 October 2002.

stake. While contact with grandchildren is highly valued, some grandparents do not see court action as appropriate, and others are unaware that they can take legal action.

> I've come across many cases where ... the grandparents lose contact with the children, even though they might have been carers. Few know that they can pursue contact through the Family Law Act.[15]

Anecdotally, many grandparents hope that the relationship will change or improve to the point where contact will be reinstated.

One submission to this study cited three reasons for grandparents opting not to enter into legal proceedings to achieve regular contact with their grandchildren:

- grandparents feel intimidated by the very nature of court action
- legal costs limit many from seeking orders
- for some grandparents the emotional cost is all too great and for this reason many simply walk away.[16]

Another factor put forward weighing against legal redress was that grandparents are not always treated with respect.

> If you're a very strong person, you go in there fighting for the justice that you believe in, and all the rest of it, then you're branded this dominating and vindictive person.[17]

In some cases, dissatisfaction with Family Court proceedings and outcomes was expressed:

> ... perjury is not illegal in the Family Court—it doesn't seem like it is. You don't get the opportunity to test the evidence.[18]

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[15] Consultation with Margaret Small, Women's Legal Resource Centre, 25 October 2002.

[16] Written submission from Growing Relationships and Network Support, NSW (GRaNS), 7 November 2002.

[17] Individual telephone submission.

[18] Individual telephone submission.

> … It turned nasty—[my daughter-in-law's] mother told lies in court and it was hard to disprove what she was saying—that I was being 'deliberately disruptive'. I was unable to speak at all. I was up for contravention of orders but I wasn't given an opportunity to defend myself.[19]

Alternative dispute resolution

A non-legal process designed to resolve disputes cheaply and expeditiously, is mediation through Community Justice Centres (CJCs).[20] In the financial year 2001–2002, family disputes were the second highest type of dispute dealt with by CJCs, totalling 25 per cent of all disputes.[21] More specifically, 609 separate disputes were categorised as 'Family — Contact (formerly access)'. According to CJC records, 14 per cent of people making use of the centres' services in the past year were over the age of 60 years.[22] Information on the number of grandparents using CJC mediation to resolve contact disputes was not available.

While mediation provides a useful option for resolving family disputes, many older people may have reservations about the nature of mediation, due to concerns about invasion of privacy and loss of control.

> Although mediation typically offers confidentiality, the senior may be reluctant to use any forum that introduces an outsider into family matters. A senior's need for control is hindered by an inability to solve this problem alone. Thus, the very suggestion of using mediation adds to the feelings of loss of control and invasion of privacy and autonomy.[23]

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[19] Individual telephone submission.

[20] See <http://www.lawlink.nsw.gov.au/cjc.nsf/pages/index> for more information (Last accessed 19 December 2003).

[21] Community Justice Centres, *Annual Report 2001–2002,* Community Justice Centres, Sydney, 2002, p. 24.

[22] Community Justice Centres, *Annual Report 2001–2002*, p. 26.

[23] Schmitz, S.J., *Mediation and the Elderly: What Mediators Need to Know*, Mediation Quarterly, Volume 16, No. 1, Fall 1998, p. 75.

Reform

A number of people consulted about grandparenting issues were at pains to recommend that a grandparents' register be initiated. The register would keep up to date information on grandparents' contact details in the event that their estranged grandchildren might be in a position to contact them. The register would need to be centralised with national coverage. It was suggested that the Commonwealth Department of Family and Community Services should take up the initiative.

Resources available for grandparents denied contact

The Council on the Ageing (COTA) published a booklet in 1996 specifically aimed at grandparents in this situation.[24] While legal advice and action is one option suggested in the booklet, it is one of numerous methods of coping advocated. Some suggestions include: getting counselling, opening a bank account in the child's name, writing, photocopying, sending cards and letters, and keeping a diary for the grandchild(ren) including their thoughts at times such as holiday periods when they would ordinarily spend time together.

> It's to maintain a link in their minds, even if the kids never get the correspondence and presents, the grandparents know that they have done it. When they send a birthday card or whatever, they keep a copy of it and you see people with these incredible folders that they've done and I've met people that have kept a diary and really extensive stuff: 'it's Easter and I would have been buying you Easter eggs so I bought Easter eggs for someone else and gave it to them'.[25]

COTA also founded and continues to administer a grandparents' support group called Grandparenting NSW. While membership remains small, many grandparents involved find some solace in sharing their painful experiences of being denied contact with their grandchildren. The group is also a rich

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[24] Council on the Ageing, *Grandparents Help Booklet: for Grandparents denied contact with their Grandchildren*, Council on the Ageing, Sydney, 1997.

[25] Consultation with Prue Fairlie, Grandparenting NSW, Council on the Ageing, 22 October 2002.

resource of information, where, for example, grandparents share their history of trying different methods for resolving disputes, including possible legal avenues.

Grandparents caring for grandchildren

At the other end of the spectrum, some grandparents have full-time care of their grandchildren, either on the basis of a residence order through the Family Court or a care and protection order through the Children's Court. In these cases, the parent or parents of the children are assessed as unfit to be responsible for their children due to factors such as a severe drug addiction or history of abuse.

Jurisdictional conflict and confusion

Grandparents, attempting to obtain a residence or protection order, often find themselves negotiating a very complex area of the law. The Department of Community Services, which is a State government department, has jurisdiction over child protection and will initiate matters in the Children's Court (NSW). The Family Court, however, is at the Federal level and has jurisdiction to make residence orders in relation to children. The Family Court is obligated to consider the best interests of the child as paramount in any decision it makes in relation to children. In that sense, the Court is also interested in the protection of children, although it cannot initiate matters in relation to child protection.

Beyond the State/Federal distinction, there is also a fundamental difference between the two systems. The Family Court system conciliates outcomes between private parties, whereas the child protection system is effectively the State using its power to investigate allegations of child abuse and neglect, and if proven, initiate protective measures such as removing the child. Different philosophies and assumptions flow from those two perspectives.

Grandparents making an application for a residence order in the Family Court on the basis that the child is at risk in the hands of its parent(s) may find themselves in a position where the Department of Community Services (DoCS) withdraws from its investigation because of the involvement of the Family Court.

> There are some State authorities that take the view, which I don't, that if there's a viable carer, if there is at least one [person] who is acting adequately and protectively toward the child, then they have no role to play at all.[26]

Julie Stubbs, Associate Professor at the Faculty of Law, University of Sydney, indicates that DoCS's withdrawal might have even more severe consequences for applicants in the Family Court.

> The Family Court assumes that the absence of DoCS intervention indicates that there is no threat to the child, and or that the claims of abuse are not credible.[27]

Academics are among a number of individuals, community organisations, service providers, legal professionals and government departments that have grave concerns regarding these jurisdictional problems.[28]

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[26] Patrick Parkinson, Professor of Law at Sydney University interviewed on the Law Report: *Child Protection and the Courts*, ABC Radio National, 19 November 2002.

[27] Consultation with Associate Professor Julie Stubbs, Faculty of Law, University of Sydney, 21 November 2002.

[28] See, for example, *Child Protection and the Courts*, The Law Report, Radio National, 19 November 2002; Susan Nanlohy, *The Best Interests of the Child? The Interaction of public and private law*, University of Sydney, Sydney, 2002. Available at <http://216.239.57.104/search?q=cache:FTJdCu0EARwJ:www.austdvclearinghouse.unsw.edu.au/Conference%2520papers/Exp-horiz/Nanlohy.pdf+The+Best+Interests+of+the+Child%3F+The+Interaction+of+public+and+private+law&hl=en&ie=UTF-8> (Last accessed 19 December 2003).

Seeking assistance from the Department of Community Services (DoCS)

Delays

Some grandparents who consider their grandchildren are at risk and engage DoCS to investigate the matter become distressed by the amount of time it takes for DoCS to act.

> ... one woman whose grandson was placed with her by DoCS *eventually* had reported to DoCS on numerous occasions that the boy was in danger and it wasn't until he had been abused to the point that he was in a coma that DoCS intervened—they almost lost him.[29]

There is recognition and sympathy for the fact that DoCS is in an untenable position.

> I appreciate the situation that DoCS is in: being overworked and under-resourced, it's a shocking situation—it seems as though they don't respond unless it's a crisis.[30]

In response to delays in investigating matters, some grandparents take matters into their own hands and make applications in the Family Court.

Kinship Care

Kinship care is favoured by DoCS and is a first resort.[31] This policy position has been developed, according to DoCS, "in recognition of cultural identity, reduced stress of familiar guardians and retainment of essential ties. Foster care kids have to adapt to a whole new, unfamiliar family".[32] There has

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[29] Consultation with Prue Fairlie, Grandparenting NSW, Council on the Ageing, 22 October 2002.

[30] Consultation with Prue Fairlie, Grandparenting NSW, Council on the Ageing, 22 October 2002.

[31] As the term suggests, kinship care refers to care by immediate or extended family members outside the parental home.

[32] Phil Smith, Principal Policy Advisor, DoCS, speaking at *Grandparents Raising Grandchildren* seminar, Council of the Ageing, Sydney, 25 October 2002.

been a growth in kinship care in NSW over the years. Research strongly suggests that it is the most likely form of care to achieve good outcomes.

> ... such policies are favoured by children, carers and also workers ... the very antithesis of 'strangeness' inherent in placement in foster care. The fact that relatives 'know' each other and value the biological and/or emotional connections they share was emphasised. The importance of these connections for the psychological health of children is supported in the literature.[33]

Kinship care is also less resource intensive. Thus, if a grandparent has had a child placed with them through DoCS on the basis of a Children's Court order, case management is not usually provided, although financial and other assistance is given when it is deemed warranted. However, the DoCS policy of not providing case management to children in kinship care has been cause for concern in some circles.

> *I am caring for my two grandchildren, aged 7 and 4. DoCS never checked me out or checked in on the children. I called DoCS. They said that since the children were in family care, they were alright, they were safe. I said, 'How do you know?'*[34]

The DoCS assumption that kinship care is always a safer alternative to foster care has also been questioned.

> When I look at the whole issue of sexual abuse, it has been shown that it is passed down through families. So if kids are moved away from sexual abuse in their families and placed with other members of the family, the likelihood is that some may be abused within that family as well.[35]

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[33] Mason, J., Falloon, J., Gibbons, L., Spence, N. and Scott, E., *Understanding Kinship Care*, Association of Childrens Welfare Agencies Inc, Sydney, 2002, p. 8.

[34] Member of the audience at *Grandparents Raising Grandchildren* seminar, Council of the Ageing, Sydney, 25 October 2002.

[35] Consultation with Prue Fairlie, Grandparenting NSW, Council on the Ageing, 22 October 2002.

This policy of not case-managing children in kinship care also means that grandparents providing kinship care may not be provided with the assistance they require. The older the person, the less likely they are to accommodate these changes easily. Ill-health, frailty and possibly disability combined with caring for children who have been through trauma, grief and anxiety about their own futures, make this relationship of care quite distinct from that of younger people in parenting relationships.

> I was talking to a woman the other day and she's 82 and she's looking after two small children, I think the oldest is seven. Their father and mother died from drug overdose. So these poor kids—and this woman's 82 and looking after these kids.[36]

DoCS do respond to requests for assistance such as respite care, financial assistance, alternative dispute resolution (ADR) and payment of a non-parental care allowance.[37]

> *DoCS took the two children away from their parents about three years ago. It was on the basis of a number of phone calls that were made by the maternal grandmother and me. Both parents are heroin addicts. My son has previously been in gaol for break and enters; the mother worked in a brothel and they were moving from place to place. When I visited the older child just after she was born, they were living in a boarding house and she was sleeping on a couch cushion. I took the children and cared for them on and off.*
>
> *DoCS officially removed the children, for reasons of drugs, housing and criminal activity. I was looking after the eldest daughter when she called DoCS to tell them. They asked if I was happy to have them and I said I was. They then did a series of interviews, background checks and home visits to*

[36] Consultation with Prue Fairlie, Grandparenting NSW, Council on the Ageing, 22 October 2002.

[37] This allowance is means tested and reviewed every 6 months.

investigate my parenting skills and my capacity to care for the children. At the Children's Court DoCS strongly recommended that the children be placed with me on a permanent basis. I had to attend a few court hearings, but I did not have to give evidence in court. The DoCS solicitor looked after the court proceedings.

When I began looking after the children full-time, I didn't know what to do. I felt I couldn't do it all myself at my age. I got priority housing through a housing co-op. Now I'm on a sole-parent pension. I receive a non-parental carer allowance through DoCS. Before the children lived with me, I worked as a nurse but had to quit to look after the children. I couldn't afford babysitters or day-care—it was all too expensive. A lot of my friends walked away and left me when I got custody and my family are all in the country. So all the girls have is me.[38]

Inconsistencies between DoCS offices

Among grandparents interviewed, two raised the issue of moving from one DoCS office to another and experiencing different treatment.

My original[DoCS] office couldn't do enough for me. If I needed anything or wanted anything, they were there. Then I moved to [another] DoCS office and I'm still waiting for them to return a phone call from the beginning of the year. They provide no support other than financial.[39]

[38] Individual telephone submission.

[39] Individual telephone submission.

When expectations of certain kinds of support are raised, it can be disappointing and onerous for grandparents to compensate or make alternative arrangements.

> *A care and protection order in the Children's Court placed 18 month old Erica in Joy's care and allowed for supervised visits with her parents—DoCS officers were ordered to supervise the visits.*
>
> *Just recently the case was handed over from [one]DoCS office to [another] office, resulting in different treatment. [The second]DoCS office have demonstrated their unwillingness to supervise the visits. They said, "Stand up for yourself, Joy. If there's something you don't like, terminate the visit".*
>
> *Joy says either she or someone she trusts will have to supervise the visits. This puts her in an unenviable position: "I don't want to expose her or myself—I'll have to find a place where we can have the supervised visit"; "they've done gaol, crime and heroin", and "I've had AVOs on them; I've had my home ripped off by them". She is the one that is forced to terminate it if things go badly. Erica's parents don't see her as an authority figure and won't take her seriously.*[40]

Differential treatment for different carers

From the submissions received, it was reported that people experience differential treatment depending on whether the children are placed through the DoCS as foster carers or kinship carers, or through the Family Court.

> …while they get paid a guardian allowance, they don't get the support they believe they need from DoCS. If the kids are placed with foster care then the foster carers get educational expenses, they get training and support and all sorts of extra little bits and pieces, that doesn't happen for

[40] Individual telephone submission. All names have been changed to preserve anonymity.

> the grandparents, or for the aunts and uncles or other family. So, for me, it's a real inequity, but DoCS don't see that, they just think it's up to the family: 'If we are able to move the kids out of danger and in with their family, well they're right'.[41]

Grandparents can demonstrate a high level of need. Many grandparents that spoke on this subject expressed regret for the missed opportunities for the children in their care.

While grandparents in kinship care arrangements can receive a non-parental care allowance through DoCS, grandparents going through the Family Court are not eligible for this allowance.

The explanation for this differential treatment is that the two bodies are in different funding jurisdictions: State and Commonwealth. Nevertheless, it was asserted by a DoCS officer that there is no commensurate payment at the Federal level (although grandparents in kinship care arrangements would still be able to apply for the Parenting Payment and the Family Tax Benefit through Centrelink). However, he did state that if a grandparent was so impoverished that they would have to relinquish the child to foster care, DoCS would consider making special arrangements for assistance.[42]

Undertaking proceedings in the Family Court

Residence Orders

Matters that proceed through the Children's Court are funded by the State, as the potential carer is not a party to the proceedings. For grandparents who decide to pursue matters in the Family Court, as they are driving the case, consequently they face having to find the funds to pursue it. Proceeding through the Family Court system has the potential to put a lot of financial

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[41] Consultation with Prue Fairlie, Grandparenting NSW, Council on the Ageing, 22 October 2002.

[42] Phil Smith, Principal Policy Advisor, DoCS, speaking at *Grandparents Raising Grandchildren* seminar, COTA, Sydney, 25 October 2002.

and emotional strain on grandparents, particularly if the matter is contested by the parents or another party.

> If it's a contested matter, leaving it to the individual can be extremely cruel … an enormous cost, an enormous stress on them. One case … was of a woman who spent $60,000.[43]

> *Grandparents, ... can't get legal aid if they own their homes, and yet the parent of the child who could be an abuser, they're getting legal aid but you can't. So you've got to mortgage your house.*[44]

Once a grandparent receives a residence order, there is the further problem that there is not the same kind of support, financial or otherwise, provided for kinship carers through DoCS (although they could still apply for the Parenting Payment and the Family Tax Benefit through Centrelink).

Furthermore, the family law system is premised on a policy of parental responsibility through the enactment of child support legislation. Even though someone else may be responsible for the care of the child, its parents are required to financially support the child.[45] The reality for many older people who have residence of their grandchildren is that they do so because a natural parent of the grandchild may be drug addicted and not in any position to fulfil his/her parental responsibility and pay child support. They can apply for parenting payments through Centrelink, depending on their age and other qualifications, although that will be less than child support payments or the non-parental carer allowance provided by the State.

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[43] Patrick Parkinson, Professor of Law at Sydney University interviewed on the Law Report: *Child Protection and the Courts*, Radio National, 19 November 2002.

[44] Individual telephone submission.

[45] See the *Child Support (Assessment) Act 1989* (Cth) and *the Child Support (Registration and Collection) Act 1988* (Cth).

Contact Orders

Some parents recognise that they are not in a position to provide full-time care for their children and will consent to grandparents taking over that role. The *Family Law Act 1975* states that the child has a right to contact with both parents,[46] but this is mediated by the principle that the child's best interests are paramount.[47] If the child is at risk of physical, sexual, emotional or psychological abuse from one or both parents, either contact will be permitted only under supervision, or in extreme cases, contact is denied altogether.

Thus, grandparents with a residence order for their grandchild have to abide by the ruling of the Family Court with regard to the type and level of contact with the child's parents, regardless of their own view about what would be in the child's best interests.

Meredith's son has a daughter named Lucy. Her son and Lucy's mother are separated. Lucy's parents both have a fairly serious drug addiction. Her father subsequently relapsed and he is now in gaol. Meredith was granted a residence order by consent for Lucy. Since then, she has been back and forth to the Family Court. Her son fought for contact with Lucy from gaol. Meredith now has to take Lucy to gaol 4 times per year to see her father. Her mother is on supervised visits with Lucy but this has been contested on a number of occasions in the Family Court. Meredith has concerns that she will fight for residence of Lucy in the near future. She didn't realise that, even though she had a court order for residence, she would have to go back to court again and again. "I gave up work to look after Lucy. I wouldn't be able to go back now, if I lost her. It's difficult to get another job at my age." Meredith lives on a sole parent pension. She is a

[46] Section 60B(2)(b), *Family Law Act 1975* (Cth).

[47] Section 60B(2), *Family Law Act 1975* (Cth).

widow and gets financial support from her daughter. More than anything, Meredith wants to be able to keep her promise to Lucy: that she can live with her and will be safe with her.

Meredith has had to apply and reapply for legal aid for Family Court hearings. She has just had another lot of legal aid granted in preparation for further hearings against Lucy's mother over the issue of supervision. She had signed an agreement that was stamped in the Family Court, to the effect that Lucy can have contact with her mother on the condition that she provide a urine analysis to show she is drug free before the visits. When the mother could only provide an analysis that was 6 days old, Meredith did not want to go ahead with the visits. She was then found to be in contravention of the court order. Meredith did not get an opportunity to defend or explain her actions in Court. She has been branded as being an obstructionist and is concerned this may have an impact on future orders.[48]

Joy has residence of another grand-daughter, Heather. On one occasion when Heather returned from visiting her parents, she reported seeing "the inside of a drug clinic, rolls of money, DVDs, stereo, TV". Her parents have told her details about drug-taking. Heather asked her mother why she was wearing a scrunchie on her arm, at her elbow, and her mother replied because she'd stuck a needle in her arm and it had become infected. For Joy, supervision is the biggest issue and she has just received legal aid to appeal the orders in the Family Court.[49]

[48] Individual telephone submission.

[49] Individual telephone submission.

Conclusion

In all family law issues involving children, the basic and most important issue is determining what is in the best interests of the children concerned. While few would disagree with the premise that in nearly all cases, maintaining contact with their grandparent would be in the best interests of a child, a loss of contact with grandparents may be the unintended outcome of family law proceedings to which those grandparents are not parties. For instance, it may be in the best interests of the child, that he or she reside with a particular parent, with limited contact with the other parent. In these circumstances, the latter's parents may lose significant contact with their grandchild through no fault of their own. Initiating their own court action for contact in the Family Court, or providing financial and emotional support for their adult child's Family Court action may be required to maintain contact with their grandchildren.

In other situations, it may be considered to be in the best interests of the children to be in the full-time care of their grandparents, particularly if one or both parents are assessed as unfit to be responsible for their children. In these circumstances, a grandparent may have to be prepared for numerous court hearings and negotiations with the Department of Community Services, as issues of residence, contact with parents, departmental support, and supervision of contact visits become subjects of ongoing negotiation.

While historically, the family has been an area that has been regarded as a private issue in which the State should not interfere, this position has been criticised and overridden on many fronts. However, it is still a part of the cultural landscape, particularly for older people, that the family is not an area where one would want to involve the legal system. Nevertheless, for some grandparents, there is no choice in the matter, either because they are faced with the loss of contact with their grandchild, or out of necessity, they are thrust into the role of primary caregiver to their grandchildren. Regardless of how grandparents engage with the legal system in relation to their grandchildren, doing so is likely to be difficult and costly.

11. Conclusion

The aim of this Project was to identify the particular legal and access to justice needs of older people in NSW. This research aim was achieved through a broad literature review, consultations with service providers and experts, and a submission process for older individuals and those that are close to them.

The legal needs of older people have been distinguished from those of other age groups in a variety ways:

- Legal needs that, except in unusual circumstances, tend to be experienced only by older people, such as issues arising from accommodation in retirement villages, residential aged care facilities and nursing homes. Legislative and administrative frameworks which govern these areas usually require specialist knowledge.
- Legal issues that have particular resonance for older people because of life-cycle factors. By virtue of their advanced years, older people have greater need of, for example, legal instruments for substitute decision-making, wills, care agreements, and may be more likely to face certain health-related issues.
- Legal problems that, while experienced by other age groups in the population, tend to be experienced differently by older people because of cohort factors. These include a reluctance to engage with the legal system, or generally to enforce rights through legal processes.
- Legal problems that, while experienced by other age groups in the population, affect older people more frequently or more severely due to some vulnerability. This category would include financial and consumer issues, as well as issues generally categorised as 'elder abuse'. It would also include age discrimination in the workforce, where the effects are felt more keenly because it is more difficult to find alternative employment.

- Legal issues that, while experienced by other age groups in the population, will affect older people more frequently because a relatively higher proportion of older people are engaged in these issues. These would include several accommodation related issues such as strata title disputes, public housing related issues, home ownership, and accommodation in boarding houses and residential parks.

The ability of older people to access legal assistance

The particular vulnerability of older people in dealing with conflict was reported as a major factor in the difficulties they experience in accessing legal assistance. Several contributors indicated that the current cohort of older people will often seek to avoid conflict, either by tolerating or suppressing their concerns and issues. Examples of such behaviour may include downplaying any problems experienced, denying that the problems exist, or not wanting to discuss the issues or involve others.

Physical and mental incapacity, dependency on others, diminished self-confidence, anxiety about the possible consequences, and ignorance of the available information and advice services were all mentioned as factors which present barriers to older people seeking legal assistance. In addition, unfamiliarity with modern methods of legal service delivery, such as telephone helplines and the Internet, were also recognised as barriers for older people. Several contributors stated that older people were also more likely to prefer face-to-face personal interactions when seeking information and assistance.

It was reported that there is a gap in legal service provision to older people. In NSW, there are a small number of services which specifically provide legal assistance on particular areas of law to older people. These include:

- The Aged Care Rights Service, which provides legal assistance for residents of Commonwealth funded nursing homes, residential aged care facilities and hostels, and for residents of retirement villages

- Legal Aid NSW Veterans Advocacy Service, which provides legal assistance in veteran's affairs cases and veterans' pension entitlements
- The Older Persons Tenants Service, which provides assistance to older people for both public and private housing tenancy issues.

In addition, NSW Local Courts provide some outreach services on request to older people in aged care facilities. Other organisations (such as the Returned Services League, Legacy, and Vietnam Veterans' associations) receive some funding to provide assistance for older people making applications for veterans' pensions.

However, for the vast majority of legal issues confronted by older people, the only legal services available are private solicitors, generalist legal aid services or community legal centres, or legal centres which specialise in particular issues, but are available to all age groups (e.g. Welfare Rights Centre or Consumer Credit Legal Centre). The particular vulnerability and special needs of older people as outlined above will often mean that such generalist services are often not accessed by older people.

In light of the recognition of the special legal needs of older people, many voices throughout this project have either implicitly or explicitly stated the need for a specialised service to address the distinct needs of older people. The benefits of such a service would not only be experienced in terms of the specialisation in particular areas of the law. Such a centre could also develop skills and programs that attempt to address some of the life-cycle and cohort factors that make service delivery to older people challenging. Importantly, such a centre could also identify key areas in need of systemic reform to facilitate improved access to legal services and effective participation in the legal system.

However, it would be unrealistic to suggest that the establishment of a specialist legal service for older people would, of itself, address the issues and concerns raised regarding legal service delivery to older people. There

is a more general need for the legal practitioners to become more sensitive to the needs and issues confronted by older people, and the most appropriate manner with which to provide their services to older people. In particular, practitioners need to recognise that meeting the legal needs of older people requires a multi-disciplinary approach, where professionals work together in ways that empower older people. This would involve closer case-management strategies with other professionals such as health care providers, aged care workers, social workers, Centrelink officers and housing workers.

The ability of older people to participate effectively in the legal system

For the majority of legal issues confronted by older people, the methods for resolution will involve non-court based processes. The particular type of forum for resolution will differ depending on the issue. These may include:

- specific complaints resolution schemes established to deal with particular issues (e.g. Commonwealth Aged Care Complaints Resolutions Scheme, Private Health Care Branch, Credit Union Dispute Resolution Centre)
- specific internal complaints processes for particular organisations (e.g. internal hospital complaints systems, residential park liaison/ disputes committees)
- more general complaint handling schemes, such as the NSW Health Care Complaints Commission, the Commonwealth Ombudsman, the Banking and Financial Services Ombudsman, other industry based ombudsman schemes, Financial Industry Complaints Service, Insurance Brokers Disputes
- tribunals, such as the Consumer, Trader and Tenancy Tribunal, Social Security Appeals Tribunal, Veterans Review Board, Superannuation Complaints Tribunal, Anti-Discrimination Board, the Guardianship Tribunal

- government departments which receive complaints (e.g. the Department of Fair Trading).

While tribunal processes may provide a cheaper and more expeditious process for resolution of complaints, contributors reported that there were some issues which do not encourage effective participation by older people. In particular, the restriction of legal representation at several tribunals can be disadvantageous to older people who, because of their frailty or vulnerability, may be reluctant to attempt self-representation in such forums. This is an issue which warrants further analysis. On the one hand, restriction of the right to legal representation before some tribunals serves to maintain the informality and the lack of expense in accessing the tribunal processes. However, on the other hand, an older person may not be able to effectively participate in the tribunal proceedings without a proficient advocate to assist them.

Likewise, processes which utilise mediation and conciliation as strategies to resolve disputes may present particular difficulties for older people. Such processes, which may require participants to exhibit a certain level of self-confidence and ability to negotiate, may not be the most accessible or appropriate for older people. For many older people, the prospect of having to negotiate face-to-face with a party with whom they are in conflict may be too daunting. Mediation has the potential to be well suited as a form of dispute resolution for older people. However, mediators need to give careful attention to the introduction, and take more time than usual for the mediation process, to ensure privacy, to identify and involve all stakeholders, and to address the balance of power issues which may present when an older person is one of the stakeholders.

For those issues which rely on court-based processes for resolution—for example, elder abuse, and family law issues involving grandparents—the main barriers for older people which were reported include the formality and intimidating nature of court processes, the costs associated with court litigation, and the delays often associated with formal court processes.

The ability of older people to access non-legal forms of advocacy and assistance

For most legal issues confronting older people there are a wide variety of non-legal sources of information, advice, assistance and, sometimes, advocacy. These organisations and bodies will usually specialise in a particular issue, and will not provide a generalist service to older people. The various sources include:

- information helplines, printed materials and websites provided by government departments or agencies
- specific information services attached to government departments or agencies (e.g. Centrelink Financial Information Service, Veterans' Affairs Financial Information Service)
- non-government peak organisations, such as the Council of the Ageing, or the Combined Pensioners and Superannuants Association of NSW
- community based non-government organisations specialising in particular issues (e.g. Boarders and Lodgers Action Group, Park and Village Service)
- specialist non-legal advocates (e.g. Patient Support Office, Medical Information Persons, financial counsellors, Centrelink nominees)

The principal barriers to accessing these services, as identified by contributors, are similar to those for legal services: suppression of concerns; physical and mental incapacity; dependency on others; diminished self-confidence; anxiety about the possible consequences; ignorance of available services; and lack of familiarity with (and reluctance to use) technology-based services (namely telephone helplines and internet based services).

The most commonly recurring theme throughout this project was that older people were often reluctant to complain about issues affecting them. This stoic attitude of seeking to manage one's problems silently may present as the most significant and challenging barrier confronting the current cohort of older people to accessing legal assistance, initiating complaints to resolve disputes, and accessing non-legal advocacy and support services. Combined with other commonly reported factors such as older people's distrust of the legal system, of lawyers, and of the capacity of the law to address their legal problems sufficiently, there is a danger that the legal needs of older people may be largely hidden from legal and non-legal service providers, courts, tribunals, and complaint handling bodies. This danger presents a significant challenge to government in identifying the particular legal issues which confront older people, the most appropriate methods of service delivery to older people, and the most appropriate processes for resolving disputes involving older people.

As projected population trends over the next twenty years point to a significant increase in the older population, consideration of the strategies necessary to enhance access to justice for older people will become more important. This report has also identified that older people are not an homogenous group, and that the attitudes, needs and issues of future cohorts of older people may well be different from the current cohort. Therefore, it is important to acknowledge that the access to justice issues confronting older people will also change over time.

A specialist legal service for older people could provide a valuable resourcing role for generalist legal services across NSW, and the legal profession generally, regarding issues for older people and methods of effective service delivery to both current and future cohorts of older people. In addition, it could provide valuable input into strategies which assist in making the processes and procedures of tribunals and dispute handling bodies more accessible for older people.

Appendix 1

Consultations with groups and individuals

Ros Monro, Legal Outreach for Older People Project, Caxton Legal Centre, 12 July 2002.

Sue Field, Elder Law Centre, University of Western Sydney, 27 August 2002.

Sarah Fogg, Heather Graham, Dawn Linklater and Gerard Thomas, NSW Committee on Ageing, Department of Ageing, Disability and Home Care, 9 September 2002.

Christine Regan (The Council of Social Service of NSW), Brenda Bailey (Council on the Ageing), Sol Encel (Social Policy Research Centre), Aged Care Alliance, 9 September 2002.

Office for Ageing, Department of Ageing, Disability and Home Care, 12 September 2002.

The Aged-Care Rights Service, 18 September 2002.

Greta Mason, research assistant to John Mcallum, Dean, College of the Social and Health Sciences, University of Western Sydney, 19 September 2002.

Basil La Brooy, National Information Centre on Retirement Investments (NICRI), 20 September 2002.

Meredith Osborne, Blue Mountains Community Legal Centre, 23 September 2002.

Jane Boardman, Community Worker, Ageing and Disability, Hornsby Council, 24 September, 2002.

John Le Breton, Director, and Amanda Curtin, Office of the Public Guardian, Sydney, 24 September 2002.

Harvey Volke, Shelter NSW, 24 September 2002.

Rodney Lewis, Elder Law Centre, University of Western Sydney, 26 September 2002.

Jill Moir, Anti-Discrimination Board of NSW, 30 September 2002.

Colleen Cartwright, Senior Research Fellow, Australasian Centre on Ageing, University of Queensland 1 October 2002

Janet Scott, Community Services Manager, Ageing and Disability Service, Uniting Care, 1 October 2002.

Western Aboriginal Legal Service, Dubbo, 3 October 2002.

Keith James, Treasurer, Combined Pensioners and Superannuants Association, Dubbo, 4 October 2002.

Richard Wilson, Sydney Regional Aboriginal Corporation Legal Service, Redfern, 8 October 2002.

Natalie Ross and Andrew Taylor, Inner City Legal Centre, 9 October 2002.

Barbara Squires, Director of the Centre on Ageing, Benevolent Society, and President, Australian Association of Gerontology, Sydney, 10 October 2002.

Donna Graham, Manager of the Disability and Aged Information Service in Lismore for the Department of Ageing, Disability and Home Care, 11 October 2003.

Northern Rivers Community Legal Centre, 11 October 2002.

Veterans' Advocacy Service, Legal Aid NSW, 15 October 2002.

Prue Fairlie, Grandparenting NSW, Council on the Ageing, 22 October 2002.

Karen Cox and Emma Keene, Consumer Credit Legal Centre, 25 October 2002.

Margaret Small, Women's Legal Resource Centre, 25 October 2002.

Caxton Legal Centre, Queensland, 29 October 2002.

Cathie Warburton, Consumer Affairs Policy and Education at the Australian Securities and Investment Commission (ASIC), 31 October 2002.

Sally McAtee, Policy Officer, Legal Aid NSW, 4 November 2002.

Nick O'Neil, President, Guardianship Tribunal, 4 November 2002.

Robyn Sedger, Aged Abuse Monitoring Project, Western Sydney, 5 November 2002.

Hayley Bennett, neuro-psychologist and panel member of the Guardianship Tribunal, 12 November 2002.

Associate Professor Julie Stubbs, Faculty of Law, University of Sydney, 21 November 2002.

Northern Rivers Community Legal Centre, 28 November 2002.

Park and Village Service Unit of the Combined Pensioners and Superannuants Association of NSW, 29 November 2002.

National Information Centre on Retirement Investments, 1 December 2002.

Sharyn Caroll, Co-ordinator, Centrelink Financial Information Service, 5 December 2002.

Michael Jordan, National Co-ordinator of the Customer Relations Team at Centrelink, 5 December 2002.

Gerard Thomas, Policy Officer, Welfare Rights Centre (NSW), 10 December 2002.

Joy Fuller, Older Women's Project Officer, Western Sydney Sole Women's Accomodation Service Inc., 12 December 2002.

John Hill, Manager of Education Services, Anti-Discrimination Board of NSW, 12 March 2003.

Wendy Fisher and John Newton, The Aged Care Rights Service, 8 April 2003.

Denise Steele, Older Persons Tenants' Service, Combined Pensioners and Superannuants Association of NSW, 17 July 2003.

Joy Connor and Dianne Evans, Park and Village Services NSW, Combined Pensioners and Superannuants Association NSW, 31 July 2003.

Anthony Brown, Project Officer, Men's Health Information and Resource Centre, 6 August 2003.

Sally O'Loughlin, Gabrielle Leahy and Ann Cummings, Department of Ageing, Disability and Home Care, 6 August 2003.

Helen Ruhle, Health Care Complaints Commission, 6 August 2003.

Professor Terry Carney, Head of Research, School of Law, Sydney University, 8 August 2003.

Dr. Stephen Judd, Hammond Care Group, 8 August 2003.

Matthew Keely and Digby Hughes, People with Disabilities (NSW) Inc., 12 August 2003.

Julie Letts, NSW Department of Health, 19 August 2003.

Brenda Bailey, Policy Officer, Council on the Ageing (NSW), 21 August 2003.

Sue Field and Carolyn Sappideen, Elder Law Centre, University of Western Sydney, 10 September 2003.

Focus Group Consultations

Older Men: New Ideas (OMNI) Lakemba Branch focus group, Sydney, 10 September 2002

Combined Pensioners and Superannuants Association focus group, Dubbo, 4 October 2002

Older Women's Network focus group, Sydney, 8 October 2002

Murwillumbah Autumn Club focus group, Murwillumbah, 11 October 2002

Older Women's Network focus group, Penrith, 14 October 2002

Indigenous Elders focus group, Penrith, 14 October 2002

Mirabooka Retirement Village focus group, Sydney, 21 October 2002

Eric Calloway House Nursing Home focus group, Sydney, 21 October 2002

Combined Pensioners and Superannuants Association focus group, Sydney, 10 September 2003

Relevant forums and conferences attended

Aged and Community Services Australia (ACSA) Retirement Villages Seminar, 16 August 2002

2002 Premier's Forum on Ageing — Consumer Protection, 1 October 2002

Planning for Later Life Forum, NSW Benevolent Society, 14 October 2002

Older Women Violence and Abuse, Forum for service providers presented by NSW Attorney-General's Department, Crime Prevention Division, Violence Against Women Specialist Unit, 22 October 2002

Grandparents Raising Grandchildren Forum, Council on the Ageing (COTA), Friday 25 October 2002.

Appendix 2

Guide to making submission

The Legal Needs of Older People

SUBMISSION GUIDE FOR INDIVIDUALS

Please complete this guide and return to:

Julia Perry
Law and Justice Foundation of NSW
GPO Box 4264
Sydney, NSW 2001

Or e-mail: jperry@lawfoundation.net.au

You may also write us a letter if you prefer.

Note: The Law and Justice Foundation is not able to provide legal advice.

If you would like to be kept informed of the progress of the project, please provide contact details. Otherwise, you may leave this section empty.

NAME: .....

ADDRESS: .....

.....

PH: ..... **FAX**: .....

EMAIL: .....

What sorts of problems or issues have you experienced in the last 12 months? We are interested in problems you might solve by seeking legal information, advice or services.

What kinds of legal information or assistance did you look for? For example, did you check the Internet or see a lawyer? Were your needs met?

Did you have any problems getting information, advice or services, or with the service provided?

Did you seek assistance from someone who was not a lawyer? What is their relationship to you? Were they helpful?

Do you think the problem could have been dealt with in a better way? How?

Have any of your problems led you to courts, tribunals, government agencies or other decision-making bodies? Did you have any trouble dealing with them?

Have you tried to get a law or the legal system changed? How?

Could you please provide some information about yourself so we can get a picture of the range of people making submissions?

Male ☐ Female ☐

Age group? ☐ Under 55

☐ 55–64

☐ 65–74

☐ 75 to 84

☐ 85 or over

Are you Aboriginal or Torres Strait Islander?

Were you born in Australia? If not, where?

What is your postcode? ☐☐☐☐

What is the highest level of education you have attained?

☐ Primary

☐ Did not complete high school

☐ Completed high school

☐ Post-high school qualification

☐ University degree

☐ Other _____

What was your main occupation when you worked?

How did you hear about this project?

The closing date for written submissions is the 18th October 2002.

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