

ALRC Inquiry into Elder Abuse

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the ALRC

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners.

Legal Aid NSW regularly provides services to older people, including those who have experienced or are experiencing elder abuse. For example:

- the Legal Aid NSW Civil Law Older Person's Legal Service (OPS) provides legal information, advice, assistance, community legal education and representation to older people about their legal rights. The OPS also supports the whole of Legal Aid NSW to provide effective legal services to older people.
- other parts of the Legal Aid NSW Civil Law Division also advise and represent older people who have been victims of elder financial abuse.
- the Legal Aid NSW Veteran's Advocacy Service is a statewide specialist that provides free legal advice, assistance and representation to veterans and their dependents about rights and entitlements under the *Veterans' Entitlements Act 1986*.
- the Legal Aid NSW Domestic Violence Unit provides legal information, advice, assistance and representation and social work support to women who have experienced or are experiencing domestic and family violence, including older women.
- Legal Aid NSW produces, in partnership with other organisations, the Legal Topics for Older People Diary. This diary is a free publication which provides detailed information about the legal rights of older people.

In the 2015-2016 financial year, approximately 2.2 per cent of Legal Aid NSW's clients were aged 60 or over.

Legal Aid NSW also funds services provided by non-government organisations, including community legal centres and 28 Women's Domestic Violence Court Advocacy Services (WDVCASs). These partners also provide services to older people who are experiencing or have experienced elder abuse. For example, Legal Aid NSW funds:

- The Seniors Rights Service, a community legal centre that protects the rights of older people. This includes an advice and advocacy service in relation to aged care services.
- WDVCASs, which provide information, advocacy and referral services to women seeking legal protection from domestic and family violence through an Apprehended Domestic Violence Order. Approximately 7 per cent of WDVCAS clients are women aged 60 or over.

Legal Aid NSW welcomes the opportunity to respond to the Australian Law Reform Commission inquiry into Elder Abuse. Should you require any further information in relation to this submission, please contact Louise Pounder, Senior Legal Project Manager, on louise.pounder@legalaid.nsw.gov.au or Annmarie Lumsden, Director, Strategic Planning and Policy on annmarie.lumsden@legalaid.nsw.gov.au.

What is Elder Abuse?

Definition of elder abuse

Legal Aid NSW supports the World Health Organisation definition of Elder Abuse:

Elder abuse can be defined as a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person. Elder abuse can take various forms such as physical, psychological or emotional, sexual and financial abuse. It can also be the result of intentional or unintentional neglect.¹

Legal assistance for people experiencing elder abuse

As noted in the previous section, “About Legal Aid NSW”, Legal Aid NSW provides a significant range and volume of services to people experiencing or at risk of elder abuse. However, Legal Aid NSW is aware that there is a large level of unmet legal need amongst older people,² and that this is likely to increase in the future given the ageing population.³ If provided with more resources, Legal Aid NSW would be able to expand its services and better meet the legal needs of older people, including older people experiencing or at risk of elder abuse. For instance, Legal Aid NSW would like to explore and expand multi-disciplinary socio-legal models of legal practice for older people, and dispute resolution services for older people.

Legal Aid NSW is also aware that many older people cannot access grants of legal aid because they do not meet the Legal Aid NSW means test. In particular, older people who own or have equity in their home may not be eligible because of the assets component of the means test. There is a discretion to relax this aspect of the means test for elderly applicants, but certain criteria must be met, including that there be ‘exceptional circumstances’. Increased funding would mean that this discretion could be broadened and exercised in more cases, so as to increase access to legal assistance for victims of elder abuse.

Best practice legal responses to elder abuse

In terms of best practice legal service delivery to older people at risk of, or experiencing, elder abuse, Legal Aid NSW would suggest the following:

- establish a screening process for elder abuse
- interview older clients alone, or separate to family members and carers
- ensure that an independent interpreter is provided where necessary. Avoid using family members or carers as interpreters if possible

¹ World Health Organisation, *Toronto Declaration on the Global Prevention of Elder Abuse* (2002).

² See NSW Law and Justice Foundation, *The Legal Needs of Older People* (2004).

³ See for instance Treasury, *2015 Intergenerational Report Australia in 2055* (2015).

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- assess client capacity using established guidelines, such as the NSW Law Society guidelines on client capacity. Do not presume incapacity based on claims by family members or carers, and
 - appoint a litigation guardian where an older person does not have capacity based on expert evidence.

In developing an effective response to elder abuse more generally, we would also highlight the Law and Justice Foundation's conclusions on this issue:

... there are identified problems in categorising [elder abuse] 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.⁴

Case studies of elder abuse

The ALRC has requested examples of elder abuse to provide illustrative case studies, including those concerning older people from particular communities. Legal Aid NSW provides the following case studies in response, drawn from clients of Legal Aid NSW or the WDVCSs. Other case studies are provided throughout the submission.

Case study: Older people from culturally and linguistically diverse communities

Mary is a 62 year old widow who lived in her family home with her son, Ben, aged 20. Mary's cultural background was Hindu.

Police attended Mary's home as a result of a domestic dispute with her daughter Sarah, aged 39. Sarah did not reside in the family home, but visited her mother to discuss some financial matters. During this visit an argument developed and Sarah became aggressive. Sarah threatened to punch Mary in the face if she did not give her \$75,000 for a house deposit. Sarah kicked Mary in the upper thigh causing Mary to fall.

Police arrived a short time later and entered the home. Police took pictures of Mary's injuries and took statements from Mary and Ben. Sarah was arrested, taken to the police station and charged with assault. She was provided with a court attendance notice and served with a provisional Apprehended Domestic Violence Order (ADVO).

Police referred Mary to the local WDVCS. A WDVCS caseworker made phone contact with Mary two days after the incident. Mary stated she was very embarrassed, hurt and ashamed of the behaviour of her daughter. Mary believed Sarah's conduct was a direct reflection, to the Police and other people, of the way Sarah had been raised.

Mary stated that her daughter was regularly abusive and demanding money. Mary also stated that usually she gave Sarah the money to avoid this sort of thing and that on a previous occasion she had given Sarah \$20,000.

⁴ NSW Law and Justice Foundation, *The Legal Needs of Older People* (2004), p303.

Mary felt very ashamed that she had to go to court to give evidence against her daughter and felt very concerned about the impact this would have on Ben.

The caseworker spoke to Mary about the court process, the role of the Police and the ADVO process. The caseworker informed Mary that the WDVCS could offer her support on the day of court and at a hearing if required.

Sarah did not consent to the ADVO and the matter proceeded to hearing. The WDVCS provided support to Mary and her son Ben throughout the court process, including by arranging a meeting with the police prosecutor and officer in charge.

On the day of the hearing Sarah changed her plea to guilty to the charge on amended facts. Mary found this process upsetting and confusing. Mary felt that it was important that her daughter be truthful to all about her poor behaviour.

Mary and Ben expressed sincere gratitude to the WDVCS caseworker for her support. Mary stated that as a result of the support and information she had received she felt stronger to deal with this issue if it arose again in the future

The above case study highlights the embarrassment and shame that older women from CALD communities can experience when reporting elder abuse, particularly abuse by an adult child.

Case study: Older people with disability

Suzie is an older woman with an intellectual disability and severe mental health issues. She is often incoherent due to her anti-psychotic medication. Suzie has a standing appointment with a local psychiatrist. Suzie lives alone with her two dogs in a Housing NSW unit.

Suzie has disclosed lifelong abuse by many of those that she has trusted to care for her. Many of her intimate relationships have resulted in ADVOs, as there has been physical, financial and social abuse and more recently sexual assault. Most of the time she resorts to applying for apprehended violence orders as Police are reluctant to act. They are often listed as personal violence orders as staff fail to recognise the relationship between the parties.

As a result of her recent sexual assault, Suzie now walks with a cane and has had numerous injections in her back to help with the pain. She is now unable to walk her dogs (she refers to them as her kids). She felt she had no other option but to apply to vary a previous ADVO to allow another abusive ex partner to come into her home to help care for them. This same man has threatened to kill her dogs in the past if she did not give him money for alcohol.

Police did not believe that Suzie had been sexually assaulted, even with the support of disability services when she gave her statement. Police spoke to the alleged perpetrator and he said that she initiated sex with him and his friend, and that she had consented to the activity that resulted in two fractured vertebrae. Suzie had to employ a barrister to represent her in a private application for an ADVO. She was successful in gaining the ADVO and is currently protected for a period of two years.

The above case study highlights the particular vulnerability of older people with disability to abuse. Older people with intellectual disability are particularly vulnerable to abuse in both domestic and residential care settings. The case study also highlights the additional barriers older people with disability can face when reporting abuse to authorities.

Social security

Nominees

In Legal Aid NSW's view, the process for an aged pensioner to appoint a nominee to receive their pension payments creates potential for abuse. The form can be lodged online and does not require Centrelink to contact the person making the appointment to verify that they know and approve of the nomination. It is easy for someone to forge the signature on the form or get an older person with a cognitive impairment to sign the form without understanding the implications. Although Centrelink sends a letter to the person and the nominee confirming the nominee arrangements, Legal Aid NSW does not believe this is sufficient protection for vulnerable older people. As a safeguard, Legal Aid NSW suggests that Centrelink be required to contact the older person to verify the nomination is genuine, to explain what the effect of the nominee arrangement is, and also let the person know how to revoke the nomination, if and when they want to.

Case study: Mr Freeman

Mr Freeman's wife was admitted to residential aged care. Mrs Freeman was frail and suffering from dementia. Mr Freeman assumed that Mrs Freeman's fees were being paid from her age pension. After some months, the manager of the facility notified him that she was in arrears. Mr Freeman contacted Centrelink and found out that his son had forged a nominee form which directed her payments into his own bank account. The son had used her pension for his own benefit until Mrs Freeman revoked his nomination and nominated her husband.

Elder abuse and Centrelink gifting rules

Centrelink and the Department of Veteran Affairs (DVA) have strict gifting rules which are intended to limit the potential for individuals to avoid the assets and income tests for income support, including the age pension. Gifting is when a person gives away assets or transfers them for less than their market value. Any gift that exceeds certain allowable amounts will be assessed as a deprived asset for five years from the date of gift and will be subject to income deeming provisions. Both the asset and the income will be taken into account when calculating the person's pension entitlements. Depending on the size of the gift, the older person may lose their entitlement to a pension, or receive a reduced amount.

Older people who experience elder financial abuse can be caught up in these provisions, in particular those who mortgage or guarantee their home for the benefit of third parties. The typical situation arises when an adult child persuades an older parent to enter the secured loan/mortgage contract as the borrower and assures them that they will make all the repayments. If the adult child defaults on the loan repayments, the bank will then commence proceedings for possession of the older person's home in order to discharge the debt. In the unfortunate event that this occurs, not only is the older person at risk of losing their home but they are also at risk of losing their age pension, or having it reduced because of the Centrelink gifting rules. This is illustrated by the following case study.

Case study: Mr and Mrs Day

Mr and Mrs Day were an elderly couple on the age pension from a non-English speaking background. Their youngest son asked them to help him borrow money to purchase some properties he wanted to develop. At the time, Mr Day was in the early stages of dementia. Mrs Day queried how they could assist their son as low-income pensioners. Their son assured her with words to the effect, "Don't worry, you just sign the papers, I will make the payments to the bank." The papers were a loan contract for \$600,000 and a mortgage was subsequently registered against Mr and Mrs Day's home. Mr and Mrs Day signed these documents at the office of their son's solicitor.

Two years later the son advised Mr and Mrs Day that he was unable to keep up the repayments on the loan and that they would have to sell the house to discharge the debt. Mr and Mrs Day reluctantly put the house up for sale and the proceeds of the sale settled the balance of the loan and discharged the mortgage. Their eldest daughter took them in to her home as they had nowhere else to go.

Centrelink found out about the sale of Mr and Mrs Days' home and suspended their pensions pending an investigation about their future entitlement. Centrelink subsequently informed Mr and Mrs Day that they had been overpaid since the date the loan was taken out. Mr and Mrs Day were required to repay the overpayments and their future pension entitlements were reduced by about 50 per cent.

Mr and Mrs Day were wholly unaware of the requirement to inform Centrelink about the loan borrowed against the equity in their home. Unfortunately, Centrelink regarded the loan funds as their asset. As the total loan funds were above the Centrelink asset threshold, Centrelink determined that Mr and Mrs Day had not been entitled to the full pension from that date.

Centrelink also treated the proceeds of the sale of the house as a 'gift' to their son. The fact that the loan had been for their son's benefit and that they used the money from the sale of their home to pay out the loan made no difference. The proceeds of sale exceeded the allowable amount for gifts, so Centrelink treated the proceeds as if they were Mr and Mrs Day's asset, and deemed that they had received income. This exceeded the income allowable for a full pension and their pension was reduced accordingly.

Legal Aid NSW assisted Mr and Mrs Day by persuading Centrelink that the sale of the house was not a gift to their son but a loan. Even when this was accepted, Mr and Mrs Day were still getting a reduced pension. Legal Aid NSW then had to make an application under a hardship provision on the basis that the loan was 'unrealisable'. In the first instance, the application was refused because Legal Aid NSW had not provided evidence that legal action had been taken against the son to recover the loan. However, as Legal Aid NSW was in fact suing the son, Centrelink agreed to restore Mr and Mrs Day's pensions pending the outcome of the legal proceedings.

Additional safeguards and protections around the Centrelink/DVA gifting rules are needed to ensure that victims of elder financial abuse are not placed into further hardship. Legal Aid NSW puts forward the following options for consideration:

- All lenders could be subject to a mandatory disclosure requirement that acting as a guarantor and/or mortgaging a property can affect the guarantor/borrower's social security entitlements. This could be implemented through amendments to the *National Credit Code* (Schedule 1 to the *National Consumer Credit Protection Act 2009* (Cth)).
- It could be mandatory for borrowers and guarantors to provide evidence that they have received legal advice or seen a financial advisor in relation to the potential impact of the loan on their social security entitlements.
- If Centrelink becomes aware that an aged pensioner has transferred an interest in their home for little or no value, this could be a red flag for possible elder financial abuse. In these circumstances, Centrelink should not immediately suspend or cancel payments on the assumption it is a deprived asset. Instead, a Centrelink social worker could follow up with the aged pensioner to clarify what has happened and make a preliminary assessment of the person's capacity and whether the transfer was made knowingly.
- If Centrelink makes a decision to cease or reduce an older person's pension on the basis of the gifting rules, Centrelink should let the person know that she or he can get advice from Legal Aid NSW or a community legal centre.
- Where a gift is determined to be a loan, Centrelink should not require litigation to be commenced to recover the loan if litigation is not affordable or would be futile because the creditor does not have assets that would be able to satisfy any order.

Assurance of support scheme

The assurance of support scheme is another area of social security which can have an adverse impact on older people experiencing elder abuse. As the Issues Paper notes, adult children can bring their parents to Australia if they sign a 10 year assurance of support. This means that the child must support the parent(s) for their first 10 years in Australia. Problems arise if the relationship breaks down, as the aged migrant parents may then be left destitute. Whilst the parents can claim a Special Benefit from Centrelink, many are reluctant to do so, as the child will need to repay the amount the aged parent receives under the Special Benefit in that first 10 years. In our experience, parents often choose not to claim this benefit because they do not want to antagonise their child further, or are concerned at being completely cut off from their grandchildren, or because they are victims of domestic violence. Changes need to be made to the assurance of support scheme so that if there is elder abuse and/or domestic violence, the older person can receive some form of social security support without further damaging their family relationships or placing them at further risk of abuse.

The National Disability Insurance Scheme

Legal Aid NSW is not aware of any elder abuse being experienced by participants in the NDIS. This may be because it is a new scheme, but also because a person must be under 65 years when they apply for the scheme. As the NDIS is only three years old, few older people can be on the scheme at this stage.

Legal Aid NSW's preliminary view is that the safeguards and protections provided under the NDIS are sufficient. The safeguards rely on NDIA staff observing participants, identifying their vulnerability to abuse and exploitation, observing nominees, and checking in with participants and their nominees regularly. In order for these safeguards to be effective, a reasonable amount of oversight by National Disability Insurance Agency (NDIA) staff is necessary. However with the full roll-out of the NDIS, much of the process of developing participant plans will be outsourced to external service providers, with the NDIA just signing off on plans and nominee arrangements. In our view, this means that some of the safeguards in the *National Disability Insurance Scheme Act 2013* (Cth), Rules and Operational Guidelines may not be as effective.

Financial Institutions

Elder abuse involving loans and mortgages

Legal Aid NSW sees evidence of elder abuse involving loans and mortgages with financial institutions. As noted above, the abuse typically involves an adult child persuading an aged parent or parents to enter the secured loan/mortgage contract as the borrower, and assuring the parent that they will make all the repayments. If and when the adult child defaults on these repayments, the bank will commence proceedings for possession of the older person's home to discharge the debt. Two case studies are provided below.

Case study: Mr and Mrs Jones

Mr and Mrs Jones were an elderly couple who entered into a loan as a co-borrower with their son for \$200,000. The loan was secured against their dwelling property on the understanding that the son would use the loan monies to build a house and that he would make all the repayments. Mr and Mrs Jones did not receive any independent legal or financial advice prior to entering into the loan.

In October 2006, their son requested an increase from the lender of the loan to \$240,000 without Mr and Mrs Jones' knowledge. Mr and Mrs Jones then signed loan application documents but were not aware of the content or implications.

In June 2007, their son approached a finance broker to refinance the home loan. Mr and Mrs Jones did not meet or communicate with the broker. Without instructions from Mr and Mrs Jones, the broker prepared and submitted an application for an investment loan for \$300,000 secured against their home. Mr and Mrs Jones were the co-borrowers in respect of the loan which was used by their son to discharge the previous home loan of \$240,000. The balance of funds were released to the son's nominated bank account.

Mr and Mrs Jones instructed Legal Aid NSW that they recalled signing the loan application but they had not actually read the document. At the time of signing the application, Mrs Jones was undertaking treatment for cancer and was frequently in hospital.

Legal Aid NSW assisted the clients in a negotiation process, successfully reducing the clients' liability to the bank and securing the bank's agreement not to seek vacant possession of the property. The bank also agreed to suspend repayment of the balance of the loan until either the death of Mr and Mrs Jones or sale of the property.

Case study: Mr and Mrs Barakat

Mr and Mrs Barakat are an elderly couple living in Western Sydney. They are both from Lebanon originally and speak Arabic as their first language. Mr and Mrs Barakat are able to understand and read basic English only. They are both retired and receive a Centrelink pension. Mr and Mrs Barakat's adult son wanted to start a hairdressing business and convinced them to transfer a 10 per cent interest in their home to him so that he might get a mortgage. Mr and Mrs Barakat agreed as they wanted to help their son. The son signed his parents up to a \$400,000 loan, which was then increased to approximately \$650,000 without Mr and Mrs Barakat's knowledge. The son then decided he wanted to expand his business and refinanced the loan to do so. Mr and Mrs Barakat were told by their son that they would be refinancing the loan with another lender. They were not told that the loan would be increased to approximately \$850,000. Mr and Mrs Barakat signed documents that their son asked them to sign but they did not read or understand the documents.

The son's business ran into trouble and he missed a number of payments. He went to a short term, high interest lender to borrow an additional \$60,000, and then later borrowed an additional \$25,000. Again Mr and Mrs Barakat were not told that their son was getting additional loans. They did visit a lawyer who provided advice with their son in the room. The lawyer spoke in English and they did not understand what was said.

When Mr and Mrs Barakat came to Legal Aid NSW they had over \$1 million owing in two separate mortgages over their home. They had judgment against them for possession of their home in respect of one lender. They had legal proceeding on foot against them in respect of the other lender. Mr Barakat at this time had been diagnosed with terminal skin cancer. They understood that they had only ever agreed to a \$400,000 loan over the home.

Legal Aid NSW successfully negotiated to reduce the debts owing to the lenders and kept the family in the home until such time as the husband passed away.

As the above case studies illustrate, ensuring that older people receive separate and independent legal advice, with an interpreter, is one measure that can be taken to minimise the risk of elder financial abuse. To advise two parties to a transaction is a potential breach of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*,⁵ which can and should be treated as a disciplinary matter. An emphasis on training in this area for lawyers may be desirable.

⁵ See Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, rule 11.

In recent years, Legal Aid NSW has observed that the amount of applications for a grant of legal aid by older persons who have mortgaged their home for the benefit of their children has decreased. Legal Aid NSW suspects that this decrease is, in part, due to the introduction of responsible lending requirements in the *National Consumer Credit Protection Act 2009* (Cth) in 2011. Prior to these requirements it was possible for lenders to approve home loans that were described as 'low doc' loans. In practice, this meant that the lender would accept the statements made by borrowers on the loan application, and not undertake independent verification of the borrower's stated employment, income and assets.

Low doc loans provided a means for adult children to make false statements about their parent's financial position in loan applications and for lenders to accept these statements on face value. Legal Aid NSW saw examples where the loan applications stated that the parents were in full time employment and earning high incomes. If the lender had been required to verify their true financial position, the loans would not have been made as they would not have shown the ability to make the loan payments.

Legal Aid NSW considers the responsible lending reforms to be an example of an effective safeguard to protect older people from financial abuse.

Legal Aid NSW also conducted a community legal education project to educate older people about the risks associated with using their homes as security for loans obtained for the benefit of a family member. The 'Borrowers Beware' campaign, carried out in 2015, was targeted at Arabic and South Eastern European (specifically Croatian, Serbian and Macedonian) older people. Legal Aid NSW receives a disproportionate amount of applications for legal assistance from older people from these ethnic groups when banks want to take possession of their homes in order to discharge a loan taken out for the benefit of a son or daughter. 'Borrowers Beware' took an innovative approach of delivering community legal education on this issue via community radio broadcasts. Specifically, the project involved:

- consultation with eight community organisations and eight community radio stations providing services to Arabic and South Eastern European communities
- the development of advertisements in four targeted community languages concerning the risks of entering into financial agreements with family members and the need to seek independent legal advice
- extensive broadcast of the advertisements (approximately 1,364) through SBS and other community radio providers
- five interviews with lawyers and radio journalists providing in depth discussion about the project's subject matter. The interviews were aired in different community languages 11 times, and
- provision of advice to 23 callers between September and early November 2015 as a direct result of the radio broadcasts.

Elder abuse involving access to bank accounts and credit cards

Legal Aid NSW also sees evidence of elder financial abuse involving the misuse of bank accounts and credit cards. Most of Legal Aid NSW's older clients have no access to internet banking. Many still have a passbook which requires them to attend a bank branch to undertake transactions, or they have an ATM card. They receive all correspondence from financial institutions by post.

As these older people have to leave the house to access cash and pay bills, they are vulnerable to abuse. This is particularly so when they are frail and have mobility issues. Legal Aid NSW is aware of older people in this situation that have either authorised a relative or carer to be a co-signatory on their bank account or have given a relative or carer access to their ATM card and PIN so that the person can withdraw money for them to buy items or pay bills for them. It is easy for a carer or relative to take advantage of this position of trust.

Case study: Doris

Doris was an 83 year old pensioner who had a credit card with Big Bank with a \$30,000 credit limit. She sought advice from Legal Aid NSW after she received letters from the bank threatening legal action to recover a \$30,000 debt on her credit card. Doris was easily confused and her memory was not good. She could not understand why the bank said she owed that much. Doris said she had not received any credit card statements for some time but she knew how much she was putting on her card and made sure she made the payments every month. She was terrified that the bank would take action to recover the money that would involve selling her only asset, her home.

Legal Aid NSW obtained copies of all her bank statements from the bank. These statements showed that the amount and frequency of transactions on her credit card increased dramatically over a short period. Many transactions appeared on the statements which Doris could not identify as being hers or being authorised by her. The statements also showed a marked change in the usual pattern of transactions. For example, there were large online purchases and large cash advances, when Doris had never obtained a cash advance on the card before, nor was aware it was possible.

Legal Aid NSW made representations to Big Bank on Doris' behalf and asked that the bank waive payment of these unauthorised transactions. Legal Aid NSW argued that the bank should have seen the 'red flags' and contacted Doris to confirm whether she was aware of this unusual activity on her account. Big Bank agreed to waive the debt.

Financial institutions are in a unique position to detect and prevent financial abuse of older people. Legal Aid NSW is encouraged by the work of the Australian Banking Association (ABA) in this area, including its consumer fact sheets, industry guidelines and staff training on recognising signs of cognitive impairment in customers that the ABA has conducted in collaboration with Capacity Australia. Cognitively impaired older people are particularly vulnerable to elder financial abuse as they are not able to understand what is happening or able to complain and take steps to halt the abuse.

Legal Aid NSW recommends that banks take the following actions to help safeguard older people from financial abuse. We note that many of these actions are generally consistent with the ABA industry guidelines, *Protecting Vulnerable Customers from Potential Financial Abuse*.

- Banks should be alert to any transactions on an older person's account that involve large amounts of money being withdrawn or transferred, and should contact the older person by phone to confirm that they have authorised these transactions.
- Banks should contact older people to confirm any written authorities they purport to have given to another person to transact on their accounts.
- In situations where an older person comes in with a relative or friend apparently for the purpose of transferring funds to that person, bank staff should ensure that they speak to the older person alone. If the older person does not speak English, the staff should not rely on the relative or friend to translate for them.
- Banks should train their staff to recognise possible instances of elder financial abuse and to take appropriate steps to alert the older person.

Family agreements

Legal Aid NSW has advised and represented older people in matters where family agreements have broken down. The older person may agree to a 'granny flat arrangement' with one of their adult children, where the older person makes a financial contribution to their child in exchange for being able to live under the same roof. The older person may sell their home and gift the proceeds of the sale to the adult child for the purpose of buying a property for the occupation of all generations of the family. In other cases, the older person may transfer the property title to the adult child who then resides in the older person's home. In the experience of Legal Aid NSW, these arrangements often result in the older person's name not appearing on, or being removed from, the property title.

Family agreements frequently work well and can be of great mutual benefit to all parties. However, Legal Aid NSW has seen cases where the family relationship has broken down and the older person has been evicted from the property, often without recompense. The adult child may take advantage of the fact that they are the registered legal owners of the property and that the agreement with the older relative was not documented. Even in cases where there is a written agreement, the agreement will often not protect the older person's interests. Two case studies are provided below.

Case study: Isabel

Isabel was an 86 year old widow on the age pension. She lived alone in the home she and her late husband had purchased and lived in for 40 years. Isabel suffered a stroke and was finding it harder to manage living on her own in a large house that required significant maintenance. She asked her daughter Rebecca and Rebecca's husband Charles if they would come and live with her and provide care for her.

Rebecca and Charles agreed but insisted on a formal written agreement that involved Isabel transferring the title of the property to them. Isabel felt pressured to agree to this transfer.

Even though she had a lawyer to advise her on the terms of the agreement, she was not in an equal bargaining position. Due to her poor health and a passive personality, she instructed her lawyer to agree to the terms proposed by her daughter and son-in-law that were not in her best interests.

A few months after Rebecca and Charles moved in, the relationship broke down and Isabel found it so intolerable that she left the house and moved in with a relative. The written agreement did not provide any mechanism whereby Isabel could get the house back or even obtain some compensation for the loss of her home. As the property was no longer in her name, she had no legal right to possession of the property.

Isabel was on a pension and she could not afford legal representation. She applied for and was granted legal aid to take legal action against Rebecca and Charles. The case settled before hearing. It was not realistic for Isabel to continue to live in her former home and the matter settled on the basis that the property be sold and the bulk of the proceeds of sale go to Isabel. She was able to use the money to buy a unit in a retirement village.

Case study: Roberta

Roberta was 65 years old and on the age pension. Ten years earlier she had been receiving the disability pension and living in public housing. Roberta was awarded compensation from a motor vehicle accident.

Roberta's daughter Lisa suggested that they could jointly buy a property. Roberta agreed and contributed the majority of the purchase money. Lisa borrowed the balance. Lisa later married and had children. Roberta cared for the children while Lisa went to work. Tensions arose between Roberta, Lisa and Lisa's husband, who ultimately evicted Roberta, leaving her homeless and without any compensation for the contribution she had made to the purchase of the property.

Legal Aid NSW placed a caveat on the property on behalf of Roberta and notified Lisa that she was prepared to commence proceedings in the Equity Division of the Supreme Court to obtain orders that the house be sold and Roberta be paid the proportion of her contribution to the property from the proceeds of the sale. Lisa agreed to pay out her mother's share without the need for court proceedings.

To address some of these issues and risks, Legal Aid NSW has produced a brochure titled "Moving in with the family? Make sure you protect your interests". This brochure provides information about what older people need to consider before they agree to transfer assets in exchange for living with their adult children.

Appointed decision makers

Enduring powers of attorney

An enduring power of attorney grants the appointed attorney the same legal authority to deal with the older person's property as the older person. Legal Aid NSW has been instructed in matters in which an attorney has conducted dealings in the assets of an older person, for example by selling the property without the owner's knowledge and certainly without consent.

The attorney is in a fiduciary relationship with the donor (the appointor) and is bound by a number of formal duties, including the duty to act in the best interests of the donor. Legal Aid NSW has advised in matters involving misappropriation of property by the attorney. These matters are complex and usually require a third party who has become aware of the misappropriation to intervene and make an application to the Guardianship Division of NCAT to replace the attorney.

Once an attorney has breached his or her obligations and taken the donor's assets it can be very difficult to recover this property, particularly where the attorney has already dissipated the funds. Legal action to recover the assets has to be commenced in the Equity Division of the Supreme Court on the grounds of breach of fiduciary duty. This is likely to be costly and complex litigation. Furthermore, unless the proceedings concern a dwelling, Legal Aid NSW is likely to be limited to providing legal advice, due to the limited availability of aid in civil matters.

Legal Aid NSW would be supportive of the ALRC exploring law reform proposals aimed at preventing and addressing the misuse of powers of attorney, including:

- prohibitions on conflict of interest transactions
- the introduction of offences and penalties for misuse of enduring power of attorneys, and
- provision for compensation where a person has misused a power of attorney.

In this regard, Legal Aid NSW suggests that the ALRC consider powers of attorney legislation in Victoria and Queensland, and the possibility of uniform national legislation in this area. We note that the NSW Legislative Council General Purpose Standing Committee recently recommended that NSW amend its powers of attorney legislation in line with Victoria's *Powers of Attorney Act 2014*, which in turn was modelled on Queensland legislation.⁶

⁶ NSW Legislative Council General Purpose Standing Committee, *Report No 44: Elder Abuse* (June 2016), p100-101, recommendation 7.

Guardianship matters

In NSW, grants of legal aid are available in some guardianship matters. For example, grants of aid may be available:

- to applicants who are the subject of proceedings in the Guardianship Division of the NSW Civil and Administrative Tribunal (**NCAT**) under the *Guardianship Act 1987* (NSW) where they have been granted leave to be represented at NCAT
- to applicants who are 'affected persons' in proceedings before NCAT, which often includes family members who have been involved in the care of the person who is the subject of the proceedings
- for an appeal to the Appeals Panel of NCAT and the Supreme Court against a decision of the Guardianship Division of NCAT
- for applicants seeking to revoke a guardianship order or a financial management order. This allows subjects of orders who are being financially abused by their decision-maker to seek to remove the order and, if required, have a more suitable arrangement put in place.

As the Issues Paper notes, older people constitute a significant proportion of those for whom guardianship and administration orders are made. From the 2013/14 financial year to August 2016, Legal Aid NSW has made a total of:

- 196 grants of aid in guardianship matters to applicants aged 65 and over, and
- 47 grants of aid in financial management matters to applicants aged 65 and over.

In several of these matters, Legal Aid NSW has made grants of aid to elderly clients suffering from dementia where NCAT expressed concern that the older person may be being financially exploited by their children. A grant of aid was also made in a guardianship matter where an elderly applicant alleged that she was being denied appropriate care and medical services by her son, and being denied access to her other adult children.

Legal Aid NSW is generally supportive of measures to increase safeguards against elder abuse in the context of guardianship, but is not advocating for any specific measures at this time. We note that the NSW Law Reform Commission is currently reviewing the *Guardianship Act 1987* (NSW) and this may result in reform to this area of law in NSW.

Public Advocates

In NSW, the Public Guardian promotes the rights and interests of people with disabilities, including the elderly, through the practice of guardianship, advocacy and education. The Public Guardian is a statutory official appointed by NCAT or the Supreme Court under the *Guardianship Act 1987* (NSW). It does not have any powers to investigate complaints, nor is there specific legislation in NSW empowering courts or tribunals to make orders to respond to elder abuse.

Legal Aid NSW notes that a NSW Parliamentary Committee inquiry recently considered whether a Public Advocate should be established to respond to elder abuse in NSW. After considering a range of evidence, the Committee ultimately recommended that the NSW

Government introduce legislation to establish a Public Advocate's Office along the lines of the Victorian model.⁷ This body would have powers to:

- investigate complaints and allegations about abuse, neglect and exploitation of vulnerable adults
- initiate its own investigations where it considers this warranted, and
- promote and protect the rights of vulnerable adults at risk of abuse.

Legal Aid NSW broadly supports this recommendation, but the details of such legislation, and in particular the scope of powers provided to the Public Advocate, would need to be considered closely.

Health services

Health Justice Partnerships

Legal Aid NSW considers that Health Justice Partnerships (HJPs) provide a very good opportunity to address elder abuse. A key premise of HJPs is that vulnerable and disadvantaged people may not identify that they have a legal problem, or realise that a lawyer may be able to assist with their legal problem. If a lawyer is well-integrated into a health setting, a health professional can provide a referral pathway for older people who have not identified their own legal problem.

Victims of elder abuse may also have few opportunities to obtain legal advice in a safe environment. A HJP may provide this safe environment. In this regard, the Issues Paper states that HJPs can provide vulnerable and disadvantaged clients "easier access to legal advice". We would highlight that for victims of abuse, on-site medical appointments may be the *only* way that they can ever safely access legal assistance.

Finally, research by the Law and Justice Foundation on legal needs has established that vulnerable people often seek help with their legal problems from health professionals.⁸

Legal Aid NSW notes that there is a published report on the first year of operation of the HJP between Justice Connect Seniors Law and cohealth mentioned in the Issues Paper.⁹ This report documents the impact that the HJP has had in its first year, including around capacity building for legal and health professionals, and direct service delivery to older people who are victims of abuse. LaTrobe University will also undertake an evaluation of this HJP, which will contribute to the Australian body of evidence in this area.

⁷ NSW Legislative Council General Purpose Standing Committee, *Report No 44: Elder Abuse* (June 2016), recommendation 11.

⁸ See Law and Justice Foundation of NSW, *Legal Australia-wide Survey: New South Wales* (2012), Chapter 6.

⁹ *Working Together: A health justice partnership to address elder abuse*, First Year Report, March 2016 at: https://www.justiceconnect.org.au/sites/default/files/HJP_first%20year%20report_web.pdf

Hospitals and privacy laws

In NSW, legislative changes have been made to enable information sharing to prevent or respond to child protection concerns and domestic violence. Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) establishes a regime for the exchange of information relating to the safety, welfare or well-being of children. Part 13A of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) establishes a framework for the disclosure of information where a person is the subject of a domestic violence threat. These legislative regimes could be considered when exploring changes to privacy frameworks to enable hospitals (and potentially other agencies) to better identify and respond to elder abuse. However, when considering such schemes, it is important to weigh the benefits of information sharing against the rights of older people to privacy and autonomy, and the need to preserve trust and confidentiality in the doctor-patient relationship.

Forums for redress

Given the broad range of conduct that can constitute elder abuse, it is not necessarily feasible or desirable to provide one forum for redress for all forms of elder abuse. Some conduct is appropriately treated as a criminal offence and dealt with in criminal courts, while other complex financial or property cases may need to be heard by a higher civil court. However we share the concern of the ALRC that redress for elder abuse can sometimes be costly, complicated, time-consuming and intimidating for victims.

One area where redress is often not adequate or appropriate is elder abuse by adult children living at home. Both the Legal Aid NSW Domestic Violence Unit (DVU) and the WDVCSs see older clients who are being abused by their adult children living at home. To address some of these issues and risks, Legal Aid NSW has produced a brochure titled *Adult children living at home: What do you do if you want them to leave?*

Case study: Betty

Betty is 86 years old. Betty is Italian and requires an interpreter. She is very frail, and suffers incontinence and mobility issues. Betty owns a small apartment. Betty's son, Max and his wife Amanda live with her. Betty, Max and Amanda have lived together for around 6 years. Betty is the victim of elder abuse perpetrated by Amanda. This abuse includes physical violence and emotional abuse

Amanda regularly pushes Betty and threatens her. One evening, Amanda grabbed Betty around the arm and twisted it, causing bruising. Betty called the police. The police came to the home and talked to Betty, Max and Amanda. Amanda told the Police that Betty was mentally unwell and not very reliable. The Police appeared to accept Amanda's version of events or at least they declined to apply for an ADVO.

Betty really wanted Amanda to leave her home but Amanda refused. Betty did not feel safe in her own home, but did not know what to do.

The DVU lawyer made a private application for an ADVO to protect Betty from Amanda. The ADVO included a condition to exclude Amanda from her home.

In the meantime, Amanda filed an application in NCAT to be recognised as a tenant. Amanda later withdrew this application.

On an interim basis, the Local Court Magistrate made an ADVO in mandatory terms but expressed reluctance around an exclusion order. The matter later proceeded to a hearing and settled on the basis of an an exclusion order being made.

Although in some cases an ADVO will be sought to exclude the adult child from the property, it has not always been possible to meet the threshold for such an order.¹⁰ Amendments in 2016 have lowered the threshold for the making of an ADVO in NSW, but these have not commenced at the time of writing.¹¹

If an ADVO is not made, the other options available in these situations include:

- taking proceedings in the Consumer and Commercial Division of NCAT, if the child is considered a 'tenant' at law
- asking Police to exercise their powers under the *Inclosed Lands Protection Act 1901* (NSW), or
- commencing proceedings for trespass in the Supreme Court.

There are also complexities and barriers to seeking an ADVO with an exclusion order in these situations, as discussed below under the section 'Protection orders'.

Legal Aid NSW would support the ALRC exploring proposals to give a tribunal such as NCAT jurisdiction over disputes where an older person seeks to remove an adult child from living in their home.

Addressing elder abuse in disputes over family agreements can also be costly and time-consuming. Legal Aid NSW would also support the ALRC exploring proposals to confer civil and administrative tribunals with jurisdiction over family agreement disputes. However, such proposals would need to be considered carefully given the complexity of such disputes and the significant financial and property interests that may be at stake.

Legal Aid NSW is of the view that there may be potential for greater use of ADR in situations of elder abuse. The use of ADR processes in elder abuse would need to be approached with caution, given the power imbalance that would usually exist between the parties in dispute. However, with appropriate safeguards, there may be scope for increased use of mediation and conciliation to address some forms of elder abuse.

¹⁰ Before an ADVO can be made, a NSW court must be satisfied that the person has reasonable grounds to fear and in fact fears: (a) the commission of a personal violence offence; or (b) stalking or intimidating conduct by the other person. *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s16.

¹¹ See the *Crimes (Domestic and Personal Violence) Amendment (Review) Act 2016* (NSW).

Criminal law

Offences against older people

Legal Aid NSW's preliminary view is that it is not necessary to enact specific offences for causing or permitting an older person to suffer, be injured or be placed in a situation in which their health is endangered. There would inevitably be difficulties in defining or determining who is an 'older' person for such offence provisions. Setting an age limit for offences of this kind also risks being arbitrary. For instance, an offence against a particularly vulnerable 65 year old person may cause an entirely different level of harm to the like offence against an individual of the same age who is in robust mental and physical health.

Neglect

In NSW, neglect is criminalised under section 44 of the *Crimes Act 1900* (NSW). Section 44 provides:

Failure of persons to provide necessities of life

(1) A person:

(a) who is under a legal duty to provide another person with the necessities of life, and

(b) who, without reasonable excuse, intentionally or recklessly fails to provide that person with the necessities of life,

is guilty of an offence if the failure causes a danger of death or causes serious injury, or the likelihood of serious injury, to that person.

Maximum penalty: Imprisonment for 5 years.

The offence is a 'domestic violence offence' when committed by a person with whom the offender has a 'domestic relationship' as defined in section 11 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

At face value, this offence would broadly encompass neglect of an older person by a person who holds a duty to provide the necessities of life to the older person. Necessities of life are usually considered to be adequate food, shelter, clothing, medical or dental care.

However it appears this charge is rarely prosecuted in NSW. The Judicial Information Research Statistics reveal only one offender having been convicted of this charge since 2012, and this appears to have been in relation to a young victim rather than an older person.

Legal Aid NSW is of the view that current criminal laws regarding neglect are appropriate. We are unable to comment on why prosecution rates are so low, but other issues including reporting, police training and prosecutorial decisions are likely to be contributing factors.

Older people and protection orders

As noted in the introduction, Legal Aid NSW provides and funds a range of services to people affected by domestic and family violence, including older people. Two relevant services, the WDVCSs and the DVU, are outlined below, focusing on their experience with older clients, domestic violence and protection orders (ADVOs and Apprehended Personal Violence Orders (APVOs)).

Women's Domestic Violence Court Advocacy Services

Legal Aid NSW administers state government funding for 28 WDVCSs across NSW through the Women's Domestic Violence Court Advocacy Program (WDVCSAP). WDVCSs provide information, advocacy and referral services to women seeking legal protection from domestic and family violence through ADVOs. WDVCSs operate at 114 local courts across the state.

In addition, WDVCSs play a lead role in the NSW Government *It Stops Here: Safer Pathway* domestic and family violence reforms. WDVCSs host the Local Coordination Points, which are a key component of Safer Pathway. These services provide women experiencing domestic and family violence with threat assessment and case coordination, including warm referrals to a range of service providers to meet clients' ongoing needs.

Local Coordination Points also provide secretariat support for local meetings regarding victims at serious threat of further harm, known as Safety Action Meetings. Safety Action Meetings aim to lessen or prevent serious threats to victims' life, health or safety through targeted information sharing between key government agencies and non-government services.

In 2015-16, WDVCSs assisted 39,419 women seeking protection from domestic and family violence. Of these 39,419 women, 2,731 (6.9%) were aged 60 or over. The table below provides a breakdown of these figures, as compared with figures from 2012-13. This comparison indicates that the numbers of older clients are increasing, but the proportion of older clients is remaining stable.

Table: WDVCS clients state wide

Number and % of WDVCS clients state-wide	2012-2013	2015-16
Aged 60-69 years	896 (4.2%)	1,765 (4.48%)
Aged 70-79 years	380 (1.78%)	720 (1.83%)
Aged over 80	139 (0.65%)	246 (0.62%)
Aged 60 or over (total)	1,415 (6.6%)	2,731 (6.9%)
Total WDVCS clients	21,342	39,419

The reasonable number and proportion of older WDV CAS clients can be attributed to a number of factors, including the ageing population and the increase in adult children residing with their parents. WDV CASs regularly see cases in which older women are abused by an adult child or grandchild who is drug or alcohol affected or mentally ill, or both.

The WDV CASs reports that older women experiencing domestic and family violence are often reluctant to seek formal help because of a fear of getting their child or children into trouble with the legal system, or because they are dependent on their abuser, both financially and practically. In addition, older women often feel too ashamed to report abuse due to cultural attitudes about domestic and family violence being a 'private matter'. This is particularly the case where a woman has been abused by her partner for many years and that partner is now her primary carer. The WDV CASs noted that it is often only when police are called to an older person's home that the victim is able to connect with support services.

Lastly, WDV CASs report that elder abuse is often evident in matters discussed at Safety Action Meetings. For example, at the Waverley meeting it is common for victims assessed as at serious threat of injury or death to include older women being abused by adult children. Safety Action Meetings are proving effective in addressing elder abuse through improving information sharing and collaboration between services.

While the experience of the WDV CASs is limited to elder abuse of women, it has also been observed that the abuse of older men is evident in matters discussed at Safety Action Meetings.

A case study of an older client of the WDV CAS is provided below.

Case study: Sarah

Sarah was the elderly mother of an abusive adult son, Henry. Henry was verbally and financially abusive to both of his parents. Henry had a mental health disorder and misused alcohol and drugs. He was in and out of the family home and was often absent for long periods of time. Henry would take money from the home and stand over and verbally abuse Sarah, who was elderly and frail.

The WDV CAS assisted Sarah and her husband through the court process to obtain an ADVO. The order restricted Henry's access to their home. Sarah and her husband connected with a local support group and Police through the WDV CAS.

Sarah and her husband said that in their experience, most people could not understand the nature of parent/child abuse. Family and friends believed that abuse was restricted to a husband and wife dynamic, and could not understand a son being financially or verbally abusive to his parents. They also said that they felt they had done something "wrong" in relation to raising their son and carried unfounded guilt about his abusive behaviour.

The Legal Aid NSW Domestic Violence Unit

The DVU started delivering services in January 2016. It is a specialist Legal Aid NSW unit that helps victims of domestic and family violence with both their legal and non-legal needs. The DVU provides legal advice, representation and/or referral in a range of areas including: ADVOs, family law, care and protection, housing, immigration, social security, credit/debt problems, victims support and criminal law. The DVU's services includes duty services at Bankstown, Burwood, Fairfield and Liverpool Local Courts, where they advise women seeking the protection of an ADVO.

The DVU also provides social work support to clients who are at serious threat of violence and have complex legal and non-legal needs. The social workers work closely with the DVU lawyers and support clients in court, assist with ongoing case management and help with referrals to services including Centrelink, accommodation, counselling and family support.

In the first six months of its operation, the DVU delivered 4.1% of all advice services and 6% of minor assistance services to clients aged 55 years and over. These figures include older women who are victims of violence at the hands of partners, ex-partners, neighbours and adult children.

While ADVOs and APDVOs can be, and are, used to protect older women, the DVU has observed that there are barriers and complexities in the seeking and making of such orders. These include the following:

- When elder abuse presents in the context of domestic violence, the dynamics and impact of the domestic violence are exacerbated because the dysfunctional relationship has often been so longstanding that it has become "normal", and because of other compounding vulnerabilities. For example, an older victim may not identify that they are in a violent relationship and/or may be reluctant to leave their partner because they have reduced capability to function separately.
- With older victims, there may be genuine, perceived or misplaced difficulties with capacity. For example, older clients may not have the capacity to make a private application for an ADVO, or may not be considered reliable witnesses because of reduced capacity. There are also situations where the victim has capacity and there are genuine reports of violence but the victim's account is dismissed as unreliable because of claims they are "senile" or "mentally unwell". These situation often exist on a spectrum and there can be a combination of the above mentioned circumstances operating.
- The older person may be a carer for their adult child who is violent and has mental health issues and there is no one else available to care for the perpetrator.
- The older person may have no one else to care for them except for the perpetrator.

The DVU has provided the following case studies of older clients where an ADVO was considered, which highlight some of these issues.

Case study: Nina

Nina is 65 years old and a victim of elder abuse by her ex-partner, Lloyd. This abuse includes stalking, intimidation and threatening behaviour. Nina has early onset dementia. She lives in an aged care facility. Nina does not have capacity. Lloyd has significant mental health and alcohol dependence issues. Lloyd has been scheduled several times. It is unclear whether or not Lloyd has capacity.

Nina is currently in hospital. The aged care facility is refusing to take Nina back unless there is ADVO stopping Lloyd from coming to the facility. The staff are concerned about the safety and welfare of Nina, as well as of other staff. The facility (and/or staff) refuse to make an ADVO application on its own behalf.

On a recent occasion, Lloyd stalked Nina at her aged care facility. Lloyd is delusional and paranoid. He turned up at the facility dressed up as a cleaner with equipment and attempted to gain entry. The Police attended and Lloyd was arrested for trespassing. The Police took Lloyd home after this incident and discovered that his home was fortified with traps. He is convinced that staff and police are conspiring against him and have tampered with evidence. Lloyd now harasses staff at the facility and stalks and films the entry point. Lloyd calls the ward screaming emotional abuse at staff. Lloyd stands outside the facility shouting out verbal abuse. Lloyd calls various agencies putting in complaints about the facility and claiming that they are holding his girlfriend hostage.

There are difficulties with Nina giving evidence or instructing a private application for an ADVO because of her capacity issues. If a private application is to be made, an application for guardianship will need to be made first. There is also a question about whether or not the Court is likely to make an ADVO given Lloyd's capacity to understand or follow the conditions. The DVU lawyer is currently having negotiations with Police about this matter. The matter is ongoing.

Case study: Cecilia

Cecilia is the victim of elder abuse/domestic violence perpetrated by her husband, Robert. This abuse has included a long history of physical violence and financial abuse.

Cecilia is 75 years old. She is Macedonian. Robert and Cecilia have been in a relationship for over 50 years and they have three adult children.

Robert kept financial affairs secret from Cecilia. Cecilia never had responsibility for paying bills or the mortgage. She does not understand how to manage finances. Cecilia does not identify as a victim of domestic violence. She was in a violent relationship for so long that she simply believes this is how relationships are.

One evening, Cecilia and Robert were having a verbal argument. The argument escalated. Robert threatened to kill Cecilia. Robert hit Cecilia with a piece of wood. One of their adult children, Bill, was present at the time. Bill intervened and called the Police. The Police charged Robert with assault and made an application for an ADVO to protect Cecilia from Robert and to exclude him from their home.

Robert moved into their other property. Robert cut off all the utilities and stopped paying the mortgage for the home that Cecilia remained living in. Cecilia had no concept of how to set up an account or pay the bills. Cecilia did not have any understanding around what it would be like not to be in a relationship with Robert. Even though Cecilia feared that Robert will kill her one day, she was worried about ending their relationship because she did not want the family to blame her for the breakdown of their marriage.

Initially when Cecilia saw the DVU lawyer at Court, she wanted the exclusion order on the ADVO removed so that Robert could move back into the home. This was mostly because Cecilia was extremely frightened about managing the finances on her own.

The DVU lawyer gave Cecilia advice about family law property settlement. Cecilia was genuinely surprised to learn that she had any entitlement to her and Robert's assets. She had always assumed that her contributions to their life together had meant nothing financially. The DVU lawyer referred Cecilia to a financial counsellor and assisted Cecilia to make a victims support application for counselling and financial assistance. Victims Services paid for Cecilia to change the locks on her home. After speaking to the DVU lawyer, Cecilia agreed not to seek a variation of the ADVO and to keep the exclusion order in place.

Two weeks after Court, the DVU lawyer checked in with Cecilia. She reported that she is doing well and is adjusting to living without Robert and without his violence towards her. Cecilia has engaged a private lawyer to initiate a property settlement.

The case studies above illustrate the key role played by WDVCSs and the DVU in supporting older women through the court process, including in relation to ADVOs, and in relation to their ongoing welfare and legal needs. Based on the experiences of these services, Legal Aid NSW suggests the following actions to address some of the barriers faced by older people in obtaining protection orders and accessing services for victims:

- increase training and community awareness initiatives regarding elder abuse, particularly in relation to victims' reluctance to engage with police and services when the violence is perpetrated by children or grandchildren
- improve referral pathways to specialist domestic and family violence services from aged care facilities, older persons' services, mainstreams services and forums like the Aged Care Assessment Team. This is essential given the cultural and practical barriers older women face in accessing support, and
- resource legal and associated support services to ensure that they can appropriately assist older clients to obtain protection orders, and otherwise navigate the legal system.

Court processes

Legal Aid NSW notes that in NSW, older women who are victims of domestic and family violence will be supported by the local WDVCS at court. The WDVCS will make contact with the woman after police have attended a domestic violence incident, carry out a threat assessment, and initiate referrals or provide information about other services. WDVCSs also help the victim prepare for court and provide at-court support.

In NSW, older persons who are the victim of an act of violence can also apply to Victims Services for financial support, counselling and a recognition payment (a lump sum payment given in recognition of the trauma suffered).

The case study below provides an example of how these services can be provided in the context of elder abuse.

Case study: Wendy

Wendy was the grandmother of two female convicted offenders. Wendy had been the carer of her granddaughters since they were toddlers, along with their siblings. Both granddaughters were heavy users of drugs and alcohol.

The WDVCS received a referral for Wendy from NSW Police following an incident in which her granddaughters assaulted her, made threats to kill her and slashed the tyres of her car.

Wendy disclosed to the WDVCS a long history of unreported verbal abuse and recent physical abuse from her granddaughters. Wendy stated that she had stopped going to the doctor for her injuries, as she was too embarrassed about how people were looking at her.

Wendy lived in the same home for 20 years. She didn't want to move because her mother's ashes were buried under a tree in her backyard. Wendy suffered from anxiety and depression.

Police had charged both granddaughters with assault occasioning actual bodily harm, common assault, malicious damage and breach of an ADVO. The WDVCS provided support to Wendy for Local Court and Children's Court proceedings involving her granddaughters, including support at the hearing.

The WDVCS also provided the following services to Wendy:

- referral to Victim Services for counselling
- referral to *Staying Home Leaving Violence* for a safety assessment and to have her locks changed. Wendy was too scared to leave her home until her locks had been changed
- information about other support services in Wendy's area, and
- an application to Victim Services for financial assistance for the purchase and installation of security cameras, which was approved, and for a recognition payment.

In terms of the giving of evidence, NSW has specific provisions governing the giving of evidence by:

- complainants in prescribed sexual offence proceedings¹²
- complainants in criminal proceedings for a domestic violence,¹³ and
- vulnerable persons, which are defined as children and people with a cognitive impairment.¹⁴

¹² See *Criminal Procedure Act 1986* (NSW), ss 294A – 294C.

¹³ See *Criminal Procedure Act 1986* (NSW), Chapter 6, Part 4B.

¹⁴ See *Criminal Procedure Act 1986* (NSW), Part 6, Chapter 6.

Victims of elder abuse will only receive the benefit of these provisions in the event that their abuse involved a sexual offence, domestic violence offence, or have a cognitive impairment. Legal Aid NSW's preliminary view is that this approach is appropriate but we would be open to considering proposals for reform in this area.

We also note that NSW is undertaking a pilot of witness intermediaries in child sexual assault cases in the District Court at the Downing Centre and Newcastle. Based on the registered Witness Intermediary Scheme operating in the UK for over a decade, trained and accredited communication specialists facilitate communication by and with the child, including by providing the Court and parties with a written assessment report about the child's communication needs. The evidence in full of children under 16 in the pilot is also being pre-recorded in the absence of a jury and early in the proceedings, in advance of the trial. The pilot will run for three years from 31 March 2016. This pilot provides another example of the modification of court processes and evidentiary rules for the benefit of vulnerable witnesses.

Sentencing

Section 21A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) requires a court, when sentencing an offender, to consider a list of factors including the following aggravating factors (emphasis added):

- (k) the offender abused a position of trust or authority in relation to the victim
- (l) the victim was vulnerable, for example, **because the victim was** very young or **very old or had a disability**, or because of the victim's occupation (such as a taxi driver, bus driver or other public transport worker, bank teller or service station attendant)

Legal Aid NSW is of the view that these provisions adequately and appropriately allow a court to take into a victim's old age in the context of elder abuse.

Section 16A(2) of the *Crimes Act 1914* (Cth) also sets out an inclusive list of the factors that a Court must take into account when sentencing a defendant for a federal offence. Subsection (2)(d) requires the Court to consider the: 'personal circumstances of any victim of the offence'. This provision also gives scope for the age and capacity of the victim to be taken into account on sentence.

Other types of abuse or exploitation of older people

Although Legal Aid NSW endorses the WHO definition of elder abuse, we are also instructed on matters involving the abuse or exploitation of older people occurring outside these circumstances. In particular, the Legal Aid NSW Commonwealth Crime Unit has defended an increasing number of aged clients over the past few years. Many of these clients are vulnerable to exploitation and have been caught up in email scams that lead to them acting as unsuspecting drug mules.

We draw this issue to the ALRC's attention, even though it may fall outside the scope of the current inquiry. Two case studies are provided below for illustrative purposes.

Case study: Jack

Jack was arrested at Sydney Airport in May 2014 when he was 87 years old. He was charged with importing a commercial quantity of cocaine that was found in the lining of a suitcase ticketed to him. Jack had travelled from Buenos Aires via Dubai.

Jack is a Texan. He grew up in an orphans' home. He is a Second World War and Korean War veteran. He was on a Veterans' Pension before travelling to Australia.

Jack was interviewed by the Australian Federal Police at 1am on the day of his arrest. By this time, he had been awake more than 30 hours. He was unequivocal about his innocence. Jack said he had won a holiday in an internet competition. After he flew to Argentina, he was told the prize included luggage and a further trip to Australia. Jack refused to throw away his own luggage for sentimental reasons so he put it inside the new luggage. Over one kilogram of cocaine was hidden in the lining of the new luggage.

Jack has significant physical health problems including high blood pressure, heart disease, diabetes, very poor eyesight and deafness in one ear. In parts of the record of interview it is clear that Jack was struggling to hear and understand the questions properly. Here is an example from the routine questions at the beginning of every AFP interview:

Q 32 Are you over the age of eighteen?

A Am I very agonising?

Jack's matter was not billed by the Commonwealth Director of Public Prosecutions. He was on remand for 7 months.

Case study: Guy

Guy was arrested at Sydney Airport when he was 69 for importing a commercial quantity of methamphetamine. The drugs were concealed in items packed in luggage ticketed to Guy. From the outset, Guy maintained his innocence. This was his first charge. He was acquitted at trial after 8 months on remand. Guy's wife of 47 years died of a heart attack while he was on remand in Australia.

Guy is a retired dairy farmer from a small rural town in Idaho, USA. He is a devout member of the Mormon Church and does not drink coffee, let alone alcohol.

Guy was the victim of a Nigerian 419 type scam. He was first contacted by email seven years before his arrest. He then spoke to the scammers on the phone weekly. Guy was asked to be the US contractor for a Nigerian oil pipeline. He was promised significant financial reward at the end of the project. Guy made relatively small but regular transfers to the scammers ostensibly to cover licence fees and legal fees etc.

Eventually, Guy was told that he needed to travel to Australia to execute documents for the release of his \$55 million payment. A flight was booked for him from nearby Salt Lake City to Sydney via India. A stop-over was organised in Delhi where Guy met an oil company executive. At this meeting, Guy was given gifts for company representatives in Australia, being tea and executive golf sets. The drugs were hidden in these items.