

10. Social Security

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Summary

10.1 Engaging with social security through Centrelink is a part of life for most older people. In 2012, only 20% of persons over Age Pension age did not receive a pension. This makes Centrelink a primary site for the detection and prevention of elder abuse, especially financial abuse.

10.2 Stakeholders suggested that elder abuse is largely invisible in legal frameworks that determine Centrelink processes and responses. This ‘invisibility’ may result in a lost opportunity for Centrelink to detect and respond to elder abuse—particularly in areas such as Carer Payment and payment nominees, or in policies governing the entitlements of older persons.

10.3 The proposals in this chapter focus on enhancing elder abuse visibility in these legal frameworks and frontloading safeguards against abuse.

Elder abuse strategy

Proposal 10–1 The Department of Human Services (Cth) should develop an elder abuse strategy to prevent, identify and respond to the abuse of older persons in contact with Centrelink.

10.4 There are numerous laws and legal frameworks pertaining to social security. The ALRC has heard that elder abuse responses are mostly absent from these instruments.¹ To increase visibility, the ALRC proposes that the Department of Human Services develop a discrete elder abuse strategy, specifically requiring Centrelink staff to be alert to the possibility of elder abuse, and to develop appropriate responses when dealing with Age Pension clients.²

10.5 Social security legislation includes the *Social Security Act 1991* (Cth) and the *Social Security (Administration) Act 1999* (Cth). Social security laws and legal frameworks are administered by the Department of Human Services through Centrelink. The Department of Social Services produces the *Guide to Social Security Law* to provide guidance to Centrelink decision makers. The Guide is a broad publication that details the processes for a wide variety of social security outputs including study payments, unemployment benefits, Carer Payment, assurances of support and the Age Pension.

10.6 A legal framework has been developed to respond specifically to family violence when family violence intersects with social security. The Department of Human Services published the *Family and Domestic Violence Strategy 2016–19*, which is applicable to Centrelink staff and processes. The strategy focuses on providing information about family and domestic violence, identifying those at risk of family and domestic violence, providing referrals and support, training staff in relation to family and domestic violence, and embedding responses to violence across systems and processes.

10.7 The strategy document defines family and domestic violence as ‘conduct that is violent, threatening, coercive or controlling, or intended to cause the family or household member to be fearful’.³ This can include conduct relevant to elder abuse such as economic (financial) abuse; emotional or psychological abuse; and serious neglect where there is a relationship of dependence.⁴ It also includes relationships involving carers.⁵ The key aim of the strategy is, however, to identify and respond to women and children in situations of domestic violence.⁶

10.8 Welfare Rights stakeholders have advised that the strategy may not facilitate the development of appropriate policies to prevent, identify and respond to the abuse of older persons. The Welfare Rights Centre (WRC) observed, for example, that despite the reference to carers of older persons, the strategy document ‘fails to directly mention or refer to elder abuse’.⁷ This approach is reflected in the *Guide to Social Security Law*, in which the National Welfare Rights Network pointed to inadequate coverage of elder

1 See, eg, Welfare Rights Centre NSW, *Submission 184*; National Welfare Rights Network, *Submission 151*; UNSW Law Society, *Submission 117*.

2 See also UNSW Law Society, *Submission 117*.

3 Department of Human Services (Cth), *Family and Domestic Violence Strategy 2016–19* (2016) 3.

4 *Ibid.*

5 *Ibid.* 4.

6 *Ibid.* 3–4.

7 Welfare Rights Centre NSW, *Submission 184*.

abuse, and suggested that a more ‘comprehensive explanation of elder abuse is warranted’.⁸

10.9 The WRC suggested that the ALRC seek submissions on whether the *Family and Domestic Violence Strategy* should include specific reference to elder abuse and appropriate responses, or whether a discrete elder abuse strategy needs to be developed.⁹

10.10 The ALRC supports the development of an elder abuse strategy. A discrete strategy should increase the attention given to the circumstances that can lead to the abuse of older persons and facilitate improved responses in legal frameworks. A strategy that expressly addresses the abuse of older persons would provide a lens through which Government could review processes, laws and legal frameworks to ensure that social security output protects older persons and identifies and responds to older persons experiencing, or at risk of, abuse. The elder abuse strategy would complement and sit within the proposed National Plan, discussed in Chapter 2.

Sites of greatest risk

10.11 For some people who receive government benefits, Centrelink processes and practices are interwoven into their daily lives. As a corollary, social security laws and legal frameworks can intersect with older persons experiencing, or at risk of, abuse. Stakeholders have identified three sites where the risk of this intersection is high:

- the payment nominee scheme;
- Carer Payment; and
- the Aged Pension gifting rules.

Payment nominee scheme

10.12 A person in receipt of social security payments (the ‘principal’) can appoint another person to assist them to interact with Centrelink or to interact on their behalf. A principal may have a ‘payment nominee’ and may also appoint a ‘correspondence nominee’.¹⁰ The payment and correspondence nominee may be the same person. A correspondence nominee may receive any social security notice on behalf of the principal, and can make enquires and attend appointments with Centrelink on behalf of the principal. A payment nominee receives payments on behalf of the principal. Stakeholders identified the potential for elder abuse in the payment nominee scheme,¹¹ and some provided examples of misuse.¹²

8 National Welfare Rights Network, *Submission 151* noting that there is some reference to elder abuse in qualifications for Crisis Payment discussion.

9 Welfare Rights Centre NSW, *Submission 184*.

10 *Social Security (Administration) Act 1999* (Cth) pt 3A.

11 See, eg, Welfare Rights Centre NSW, *Submission 184*; Eastern Community Legal Centre, *Submission 177*; Caxton Legal Centre, *Submission 174*; Seniors Rights Victoria, *Submission 171*; National Seniors Australia, *Submission 154*; Australian Association of Social Workers, *Submission 153*; Office of the

10.13 Nominees have a duty to act in the best interests of the principal.¹³ Payment nominees have fiduciary duties. They are obliged to use payments received on behalf of the principal exclusively for the benefit of the principal, and are required to keep records to this effect.¹⁴ Failing to provide records on request can attract a financial penalty.¹⁵

10.14 The appointment of a nominee involves submitting an authorisation form to Centrelink. This is a straightforward process that can be done online, submitted in person or via the post. There are sound policy reasons to make nominee appointments easily accessible. Easy access readily facilitates an arrangement that enables people with disability, or people who are experiencing difficulties, to access and interact with Centrelink. The WRC observed that

one of the key benefits of nominee arrangements is that they can provide and prolong independence. Having a nominee to manage complex Centrelink affairs or to respond to correspondence can in some circumstances delay a move to an aged care facility and allow people to continue to live independently at home.¹⁶

10.15 However, as noted by the WRC, if payment nominee arrangements are misused, the impact can be extreme—leaving older persons with no money, or at risk of losing their home or accommodation.¹⁷ A case study provided by Seniors Rights Victoria shows the extreme impact of abuse, while also illustrating more broadly the intersection between social security payments and elder abuse:

A son was operating his father's financial affairs using an enduring power of attorney (EPOA), but also managing his pension under a nominee arrangement. To collect more money he failed to notify Centrelink that his father lived with him, and that he was renting the father's house for considerable profit (retained by the son). Centrelink discovered the situation and raised a \$12,000 overpayment against the father. As the son knew he would not be responsible for any debt under Centrelink legislation, he dropped his father off at his sister's house, emaciated and with only the clothes he was wearing. Before the administrator could get involved in the retrieval of the rent money and protecting the remaining assets the son sold his father's house and moved interstate. Both the nominee form and the EPOA were signed by the father well after he was deemed not to have capacity by the family doctor.¹⁸

10.16 There are also less visible consequences of the misuse of payment nominee appointments. Age and Disability Advocacy Australia (ADA Australia) advised that it receives many complaints regarding payment nominees taking a person's pension. It noted that, while the 'pension is obviously necessary to the older person', often the 'amount taken is often not sufficient to pursue through other legal means'.¹⁹

Public Advocate (Qld), *Submission 149*; Legal Aid NSW, *Submission 140*; State Trustees Victoria, *Submission 138*; North Australian Aboriginal Legal Service, *Submission 116*.

12 Seniors Rights Victoria, *Submission 171*; Legal Aid NSW, *Submission 140*.

13 *Social Security (Administration) Act 1999* (Cth) s 123O.

14 *Ibid* s 123L.

15 *Ibid* s 123L(6).

16 Welfare Rights Centre NSW, *Submission 184*.

17 *Ibid*.

18 Seniors Rights Victoria, *Submission 171*.

19 ADA Australia, *Submission 150*.

10.17 There are existing safeguards against financial abuse by payment nominees. These were outlined by the ALRC in the report *Family Violence and Commonwealth Laws—Improving Legal Frameworks*,²⁰ and included:

- the process of appointment—the principal must provide written consent and signatory arrangements;²¹
- oversight of nominee appointments—‘particular scrutiny’ of the appointment is to be given in certain circumstances;²²
- processes to ensure the capacity of the principal—including investigation where capacity is uncertain;²³
- revocation or suspension of nominee appointments following a written request or where the nominee has not provided records;²⁴
- processes for allegations of misuse—including referral to a social worker;²⁵
- reporting requirements—a nominee is to advise of any matter that affects their ability to act as a nominee;²⁶
- the requirement for payment nominees to keep and supply records;²⁷ and
- the statutory obligations of the nominee to act in the best interests of the principal.²⁸

10.18 Payment nominees can receive part or all of the payment.²⁹ Payment nominees need not receive the entire payment amount on behalf of the principal. It is possible for principals to appoint a payment nominee and retain direct receipt of some funds. Principals are also able to quarantine and direct payments from their pension to rent

20 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Improving Legal Frameworks*, Report No 117 (2011) [9.45].

21 *Social Security (Administration) Act 1999* (Cth) s 123D(2).

22 Department of Social Services (Cth), *Guide to Social Security Law* (2016) [8.5.3]. ‘Particular scrutiny’ must be given to nominee requests where the proposed nominee runs a boarding or room establishment; where there are multiple voluntary nominee appointments for the same nominee; or where the nominee does not live in the same residence or in close proximity to the principal. A delegate can revoke an appointment where the delegate decides that the appointment is not in the best interest of the principal, and can direct payments to another person.

23 *Ibid* [8.5.1]. Centrelink delegates are to investigate if there is any question as the principal’s capability to appoint a nominee. The delegate must also consider the effect of family violence when determining a principal’s capacity to consent to the appointment of nominee. In cases where it is determined that the principal is not capable of consenting to the appointment, the delegate may appoint a nominee, where the delegate is satisfied of the need to appoint a nominee, and is satisfied that the nominee will act in the best interest of the principal.

24 *Social Security (Administration) Act 1999* (Cth) s 123E. The Secretary can suspend or revoke appointments following a written request to the Secretary from the nominee; or where the nominee has not complied with a notice to produce records.

25 Department of Social Services (Cth), *Guide to Social Security Law* (2016) [8.5.3]. The delegate may be able to revoke under the above powers if a social worker is not immediately available.

26 *Social Security (Administration) Act 1999* (Cth) s 123K.

27 *Ibid* s 123L. Where a review is undertaken, nominees must supply records, otherwise a fine may apply.

28 *Ibid* s 123O(1).

29 *Ibid* s 123F.

and services through Centrepay,³⁰ or other direct debit arrangements. Centrelink also provides a free financial counsellor service that can help set up direct payments.

10.19 In some communities an older person may be able to opt into a program of income management. Income management is a measure that quarantines a proportion (usually 70%) of a person's social security payment for prescribed goods such as food, clothing, housing and utilities. Funds can be held for use through an Eftpos card. Income management operates only in particular declared areas, and the majority of those subject to income management reside in the Northern Territory and are Aboriginal.³¹ Stakeholders to this inquiry did not support expanding the use of income management as a strategy to address elder abuse.³²

10.20 Stakeholders have suggested that current safeguards for payment nominee appointments do not adequately address the possibility of forgery or coercion in the appointment, which may be facilitated by the simplicity of the appointment process. For example, the Office of the Public Advocate (Qld) noted that the 'appointment process of nominees involves little to no education or training. Coupled with the limited oversight of the role, it creates an environment ripe for financial exploitation and elder abuse'.³³

10.21 Legal Aid NSW commented on how simple it is to forge or to trick a person into making the appointment via the online form, and supplied an example of a son who had forged the nominee appointment form to receive the pension of his mother, who had dementia. The son had used the pension for his own benefit.³⁴

Carer payments

10.22 There are two relevant social security payments available to non-professional carers, Carer Payment and Carer Allowance. An annual Carer Supplement is also available to recipients of these payments.³⁵ Stakeholders pointed to a potential intersection between Carer Payment and elder abuse.

10.23 Carer Payment is income and asset tested, including the income and assets of the person receiving care.³⁶ The amount to be paid is calculated on par with the Age Pension.³⁷ To qualify for Carer Payment, a carer must personally provide constant and

30 Centrepay is a Centrelink service which facilitates the direct debit of payments to pay bills, such as electricity or rent. A user can set a target amount, change deduction amounts, and choose the order in which services are paid. There is no cost for using Centrepay: Department of Social Services (Cth), *Commonwealth Financial Counselling* <www.dss.gov.au>.

31 J Rob Bray et al, 'Evaluating New Income Management in the Northern Territory: Final Evaluation Report' (SPRC Report No 25/2014, Social Policy Research Centre, 2014). In December 2013, 90.2% of those subject to income management in the Northern Territory were Aboriginal: Table 4.1.

32 Welfare Rights Centre NSW, *Submission 184*; Seniors Rights Service, *Submission 169*; State Trustees Victoria, *Submission 138*; Older Women's Network NSW, *Submission 136*; North Australian Aboriginal Legal Service, *Submission 116*.

33 Office of the Public Advocate (Qld), *Submission 149*.

34 Legal Aid NSW, *Submission 140*.

35 Up to \$600.

36 Department of Human Services (Cth), *Income and Assets Tests for Carer Payment* <www.humanservices.gov.au>; *Social Security Act 1991* (Cth) ss 198A(1), 198D.

37 *Social Security Act 1991* (Cth) s 201.

significant care³⁸ to one or more adults or children with a disability in the home of the carer or the person receiving care.³⁹

10.24 To show that the adult is a person with a disability or severe medical condition in need of a significant level of care, the adult requiring care must achieve a particular score under the ‘Adult Disability Assessment Tool’ (ADAT). This comprises two questionnaires that together measure the amount of assistance required to undertake ‘basic activities of daily living’, such as mobility, communication, hygiene, eating and management in a range of cognitive and behavioural activities.⁴⁰ One questionnaire is to be completed by the potential paid carer, and the other by a treating health professional, which may be the person’s GP, registered nurse, occupational therapist, physiotherapist, a member of an Aged Care Assessment Team or an Aboriginal health worker.⁴¹

10.25 A person receiving Carer Payment must notify Centrelink of changes in circumstances that may affect their qualification for the payment, including if they are no longer providing the required level of care to the care recipient.⁴²

10.26 The National Commission of Audit reported that 220,000 people were in receipt of Carer Payments in 2013.⁴³ There is no available data on the constitution of the cohort of people receiving care, but, as older people with dementia make up the largest proportion of people under guardianship,⁴⁴ it is reasonable to assume that older persons with intermittent or diminished decision-making ability or limited mobility make up a sizable proportion of people eligible for full-time carers.

10.27 Carer Payment can intersect with elder abuse. A person may receive a payment for provision of care to an older person, and fail to provide that care, or provide inadequate care. Considering the level of care required to be given to qualify for the payment, neglect of duties may, in some circumstances, amount to elder abuse. The North Australian Aboriginal Legal Service advised that it was aware of

allegations about carers, often family members, who are receiving Centrelink carer payments and not providing proper care to older persons (including not providing proper or full meals and not assisting with the cleaning of households). In these situations, the local community or aged care service (if available or in existence) often fills this gap, despite funds being allocated to the individual carer for this purpose.⁴⁵

38 For definitions see case law cited: Law Book Company, *Laws of Australia*, vol 22 (at 31 October 2016) 22 Insurance and Income Security, ‘22.3 Social Security’ [22.3.1480].

39 *Social Security Act 1991* (Cth) ss 197–198. With some exceptions: ss 198AAA, 198AA, 198AB.

40 Department of Social Services (Cth), *Guide to Social Security Law* (2016) [3.6.9].

41 See forms for Adult Disability Assessment Determination 1999 and Carer Payment and/or Carer Allowance Medical Report for a Person 16 Years or Over: <www.humanservices.gov.au>.

42 Department of Human Services (Cth), *Change of Circumstances While Receiving Carer Payment* <www.humanservices.gov.au>.

43 National Commission of Audit, *The Report of the National Commission of Audit* (2014) Carer Payments [9.10].

44 See ch 6.

45 North Australian Aboriginal Legal Service, *Submission 116*.

10.28 A case study provided by Seniors Rights Victoria illustrated other, less direct, elder abuse issues attached to Carer Payment:

An older woman had a stroke a number of years ago, and her son moved into her rental accommodation to assist her when she was discharged from hospital. He was unemployed at the time, and then obtained a Carers Payment to assist with her ongoing care needs. The client acknowledged that her son did provide considerable assistance to her at that stage, and facilitated her recovery. However over the course of several years, the son provided less and less assistance, struggled with alcohol problems, and regularly became aggressive towards her. A wall in her home was punched in by her son during an argument between them. The mother's health improved and she became more fearful of her son's unpredictable behaviour. She attended an appointment at Centrelink, to advise of her improved health, and that her son no longer provided any care for her. The Carers Payment to her son was suspended. He confronted her about this, but she declined to discuss the matter with him. At the time of contacting SRV for assistance she reported that her son had become more aggressive, and unexpectedly produced papers for her to sign. She signed these documents under duress as she had again been threatened by him, and had no opportunity to read them. She later realised the documents were to reinstate the Carers Payment.⁴⁶

10.29 The National Aboriginal and Torres Strait Islander Legal Services spoke about how the misuse of Carer Payment can form an element of abuse:

An elderly woman sought advice from a Brisbane civil lawyer on housing issues. The elderly woman resides with her daughter, who has locked her out of her own house. The daughter continued to claim Centrelink carers' payments, despite her mother no longer residing with her. The elderly woman was effectively homeless and only has the clothes on her back, as all her property is held in the house. She has no way to retrieve the property. A Brisbane civil lawyer referred her to an appropriate legal service.⁴⁷

10.30 The Australian Association of Social Workers raised the possibility that dependency on Carer Payment (and possibly housing) by carers could affect decisions about placing an older person in residential aged care, even where residential care would provide a necessary higher level of care.⁴⁸

10.31 There is a strong policy impetus to encourage and maintain full-time unprofessional carers for older persons who need assistance. Carers provide an important and necessary service, and receive payment in recognition of the fact that their caring duties mean that they are unable to receive income through paid employment.⁴⁹ The WRC cautioned that

[i]t is important that false community perceptions about the incidence of carer abuse are not created, as this can undermine carers and deter carers from offering this invaluable support.⁵⁰

46 Seniors Rights Victoria, *Submission 171* p 22.

47 National Aboriginal and Torres Strait Islander Legal Services, *Submission 135*.

48 Australian Association of Social Workers, *Submission 153*.

49 Welfare Rights Centre NSW, *Submission 184*.

50 Ibid.

Gifting rules

10.32 The Age Pension is available to Australians who are over 65 years old⁵¹ and who meet certain resident and income/asset requirements.⁵² The current maximum payment for the Age Pension is \$798 per fortnight.⁵³

10.33 The majority of older Australian residents receive steady income through the Age Pension. The National Commission of Audit reported that, in 2012, approximately 80% of all persons over Age Pension age who met the residential requirement received income through government pensions.⁵⁴ It estimated that the proportion of eligible people receiving income through the Age Pension will remain steady over the next thirty years.⁵⁵ In 2007, the *Pension Review Background Paper* reported that the average length of time that a person received the Age Pension was 11.3 years.⁵⁶ The same report noted that the majority of people on the Age Pension had been in receipt of another form of government payment prior to transferring to the Age Pension.⁵⁷

10.34 In social security terms, ‘gifting’ means to give away assets for less than their market value. Centrelink gifting rules aim to limit the potential for individuals to divest themselves of assets or funds to gain income support, including the Age Pension.

10.35 A single person or couple can make gifts of up to \$10,000 per financial year over a period of five years (not exceeding \$30,000) without it affecting the amount of government benefits they can receive. Any amount over the allowable amount will be assessed as a ‘deprived asset’ for five years from the date of the gift, and will still be counted as the person’s asset. There are some exceptions, including where a gift creates a ‘granny flat interest’ for the older person, discussed below.

10.36 Gifting rules apply to any gifts made in the five years before receiving welfare benefits. Centrelink provides examples on their website:

- Selling a rental property to your daughter valued at \$380,000 for \$200,000 (\$180,000 gift)
- Buying your daughter a car for a present
- Donating 10% of income to a church
- Forgiving a loan

51 National Commission of Audit, above n 43, Age Pension [9.1]. From 2017 the Age Pension age will be increased by half a year every two years and will reach 67 by 2023.

52 *Social Security Act 1991* (Cth) ss 43, 55, 1064.

53 Department of Human Services (Cth), *Age Pension* <www.humanservices.gov.au>. Rounded up.

54 National Commission of Audit, above n 43, Age Pension [9.1]. Fewer than 20% of people aged 65 years receive no pension. The Australian Bureau of Statistics reported that, in 2012, 2,278,215 people received income through the Age Pension, which was an increase of 57,831 people from the same point in time in 2011: Australian Bureau of Statistics, *National Regional Profile, 2008 to 2012, Cat 1379.0.555.001*.

55 National Commission of Audit, above n 43, Age Pension [9.1].

56 Jeff Harmer, *Pension Review Background Paper* (Department of Families, Housing, Community Services and Indigenous Affairs) Table 6.

57 Ibid 41. Notes that of males eligible for the maximum pension in 2006/07, 82.9% came from another income support payment. Of women, 89.6% came from another income support payment, primarily the disability support pension.

- Repaying your son's business loan where guarantor
- Putting money into a family trust which you do not control.⁵⁸

10.37 Legal Aid NSW said that the gifting rule may inadvertently 'capture older persons who have experienced financial abuse'. As an example, Legal Aid NSW supplied a case study of an adult child who had tricked a non-English speaking parent to enter a secured loan contract as the borrower, under the pretence that the child would repay the moneys. The child defaulted, leaving the bank to commence proceedings against the older person's home to discharge the debt. This left the older person at risk of losing their home *and* entitlements under the Age Pension. The older person also had to repay Centrelink the pension amount received from the date of the loan contract. The severity of this outcome was eventually lessened under an application for 'hardship'.⁵⁹

10.38 Seniors Rights Victoria expressed concern at Centrelink's application of the gifting rules in the face of elder abuse:

As the majority of older Australians are recipients of the Age Pension, it has significant impact on their lives ... If a rule or regulation appears to be breached, the penalties are applied immediately, and elder abuse is not an exception that will have any bearing on the process or outcome for the older person.⁶⁰

Granny flat interests

10.39 For the purposes of social security, a 'granny flat interest' represents an agreement for accommodation for life in a private residence. A granny flat interest is created when a person pays for a life interest or right to use certain accommodation for life that will be the person's principal home.⁶¹ The use of the term 'granny flat' does not describe the type of dwelling—it describes the living arrangement. This type of arrangement is commonly understood as an 'assets for care' arrangement or a 'family agreement'.⁶²

10.40 Where a person establishes a granny flat interest, the amount transferred or the value of the residential property given away is exempt from the gifting rules, and is not considered income.⁶³ A granny flat interest will not affect pension entitlements.⁶⁴

10.41 The gifting rules stipulate a number of requirements for Centrelink purposes. A granny flat interest cannot be established where the older person has legal ownership of the property.⁶⁵ The older person must stay in the arrangement for at least five years.⁶⁶

58 Department of Human Services (Cth), *Gifting* <www.humanservices.gov.au>.

59 *Social Security Act 1991* (Cth) s 1222A(a), div 3; Seniors Rights Victoria, *Submission 171*; Legal Aid NSW, *Submission 140*.

60 Senior Rights (Vic), *Submission 171*.

61 *Social Security Act 1991* (Cth) ss 12C(2)–(3).

62 See ch 8.

63 *Social Security Act 1991* (Cth) ss 1118(1)(c)(i)–(iii).

64 Provided that the amount paid is not more than the cost or value of the granny flat interest.

65 Department of Social Services (Cth), *Guide to Social Security Law* (2016) [4.6.4.50].

66 *Ibid* [4.6.4.70].

10.42 Centrelink will recognise a granny flat interest that is not in writing, although it recommends that a legal document be drawn up by a solicitor that confirms the security of tenure; states any obligations on the parties; and outlines the process for compensation, if required.⁶⁷

10.43 The ALRC has heard about the potential for emotional abuse and financial loss after an older person creates a granny flat interest. Issues arise when the family member does not provide the promised tenancy or care. The family member may not adequately house the older person, may not provide food or access to household appliances, and may even sell the property without recognising the older person's interest, leaving the older person without housing and care.⁶⁸ In Chapter 8, the ALRC proposes avenues for redress when family agreements break down.

10.44 Stakeholders have advised the ALRC that the Centrelink criteria for establishing a granny flat interest may have unintended consequences for older persons in abusive situations. A case study was supplied by the Older Persons Advocacy Network:

Marina is an 80-year old woman from a European background. She came to Australia with her husband in the early 1950s and they prospered. Marina worked in the business and was a driving force behind its success. When her husband died Marina was left reasonably financially secure and owned her own house in an expensive part of Canberra. Marina has a daughter living abroad and a son living in Canberra. Marina has no cognitive impairment and manages her own affairs; however in late 2011 Marina had a bad fall and broke her leg and her arm resulting in long stays in hospital. Marina's son has four daughters who are now getting too old to share bedrooms and was looking to upsize his house and move to a "better" area but needed additional finance to purchase such a property.

Marina's recovery period was going to be long but she started to progress well physically. Being in hospital with the only visitors being her son and occasionally daughter in law and grandchildren she became isolated and started to lose confidence in her ability to live alone. When her son made her an offer to live with them, sell her house and invest in their new property under a granny flat arrangement with Centrelink, it seemed tempting. Marina had been groomed by her son over a long period of time to believe she could not manage living alone any longer. A property was found by her son with a flat attached, Marina was taken from hospital to look at the flat and returned to the hospital all within the space of a few hours. She had no opportunity to discuss a major financial decision or the suitability of the property with an independent person. Based on promises of the support the family would give her and her now complete loss of confidence in her ability to care for herself Marina agreed and invested in the son's new property.

The arrangement was doomed from the start, the promised care and support never eventuated and the flat could not have been more unsuitable. By the time ADACAS [ACT Disability, Aged and Carers Advocacy Service] became involved Marina was locked in to the Centrelink granny flat arrangement for five years and a large sum of money was paid to the son to secure the granny flat interest. Centrelink applies a deprivation rule if the granny flat arrangement is terminated before five years has

67 Department of Human Services (Cth), *Granny Flat Right or Interest* <www.humanservices.gov.au>.

68 See, eg, Older Women's Network NSW, *Submission 136*; Macarthur Legal Centre, *Submission 110*; Hervey Bay Seniors Legal and Support Service, *Submission 75*.

elapsed unless the reasons for leaving could not have been foreseen at the time of entering into the agreement. The ADACAS advocate was able to support Marina and help her establish a new independent living arrangement. It could so easily have been a disaster for this client locked into isolation and despair for the last years of her life. This case highlights the hidden nature of financial abuse of older persons.⁶⁹

10.45 This case study underlines a key issue raised by stakeholders: if the person stops living in the home within five years, Centrelink reviews the granny flat interest. If the reason for leaving the arrangement before five years could have been anticipated at the time of making the arrangement, the funds used to establish the abandoned granny flat interest will be considered income retrospectively.⁷⁰ For example, gifting rules may apply where a person leaves the arrangement early due to a pre-existing illness, but not where the illness was unexpected.

10.46 The ALRC has been advised that the abuse of an older person which occurs after a granny flat arrangement commenced is likely to be viewed by Centrelink as an ‘unforeseen circumstance’, so gifting rules should not apply—that is, the exemption to the gifting rules should remain.⁷¹ Caxton Legal Centre pointed out, however, that the five-year requirement could still be inadvertently forcing victims of elder abuse to endure ‘intolerable family dynamics’.⁷²

Reducing the risk

10.47 An elder abuse strategy should have broad reach into all areas of social security that interact with older persons. The ALRC does not make proposals on the exact content of the strategy proposed at Proposal 10-1. The ALRC has, however, observed that there are knowledge gaps produced by Centrelink processes, and does make particular proposals to address these.

10.48 The ALRC proposes frontloading practical safeguards in areas that intersect with elder abuse. This includes provision for direct and personal contact with older persons about to enter certain arrangements; clear articulation of the roles and responsibilities of people entering into these arrangements; and community education and staff training. These proposals aim to support older persons in protecting their rights in situations that interact with Centrelink and the social security system.

Direct contact principle

Proposal 10–2 Centrelink policies and practices should require that Centrelink staff speak directly with persons of Age Pension age who are entering into arrangements with others that concern social security payments.

69 Older Persons Advocacy Network, *Submission 43*.

70 Department of Human Services (Cth), above n 67.

71 Department of Human Services (Cth), Advice Correspondence (11 November 2016).

72 Caxton Legal Centre, *Submission 174*.

10.49 Many arrangements involving Centrelink that are entered into by older persons arise because the older person has limited, intermittent or diminishing decision-making ability or mobility. This is apparent in payment nominee arrangements when the principal is an older person, and when a carer for an older person qualifies for Carer Payment. The capacity or mobility of an older person may even be a driving factor to enter into a granny flat arrangement. The vulnerability of older persons entering into these arrangements heightens the risk of abuse, and invites a discrete Centrelink response.

10.50 Currently, Centrelink staff are not required to have direct personal contact with an older person entering into the arrangements discussed above. Accordingly, there may be little way for Centrelink to know whether the arrangement accurately reflects the will and preferences of the older person or whether the arrangement will leave the older person at risk of abuse. Stakeholders have suggested that greater involvement by Centrelink staff early in processes involving older persons may expose and prevent at-risk situations.⁷³

10.51 Payment nominee arrangements provide a stark example. Payment nominee applications are able to be done online via the ‘myGov’ website, in person at a Centrelink service centre, or by post or fax. On approval of a payment nominee application, Centrelink sends letters in the mail to the principal and nominee confirming the nominee appointment. This may not be enough to safeguard a principal against coercion or fraud, especially where the payment nominee applicant is also the person’s correspondence nominee.⁷⁴ Seniors Rights Victoria noted that

older people can be seriously disadvantaged by the payment nominee system implemented by Centrelink, where elder abuse is at risk of occurring. In circumstances of financial abuse, or emotional or psychological abuse there is a strong likelihood that the authority to a payment nominee may not have been given freely by the older person. It is also likely that there has not been a detailed explanation of the operation or consequences of the authority to the older person. Often an older person will feel compelled to make this arrangement, particularly if they are impacted by health or mobility issues and reliant on the person nominated.⁷⁵

10.52 To protect against coercion or fraud, stakeholders suggested that Centrelink run compulsory background checks on proposed nominees.⁷⁶ It was also suggested that Centrelink staff interview proposed principals and nominees so that Centrelink officers may identify any risk factors associated with undue influence.⁷⁷ Legal Aid NSW suggested that the principal should be contacted to verify that the nomination is

73 See, eg, Welfare Rights Centre NSW, *Submission 184*; Seniors Rights Service, *Submission 169*; National Seniors Australia, *Submission 154*; Australian Association of Social Workers, *Submission 153*; Legal Aid NSW, *Submission 140*.

74 Legal Aid NSW, *Submission 140*.

75 Seniors Rights Victoria, *Submission 171*.

76 Eastern Community Legal Centre, *Submission 177*; Australian Association of Social Workers, *Submission 153*; UNSW Law Society, *Submission 117*.

77 Welfare Rights Centre NSW, *Submission 184*; Seniors Rights Service, *Submission 169*; National Seniors Australia, *Submission 154*.

genuine and to have explained what the effect of the nominee arrangement is, and to let the person know how to revoke the nomination.⁷⁸

10.53 The ALRC considers that a requirement for direct personal contact strikes an appropriate balance, retaining the accessibility of nominee applications for principals, while putting in place a simple preventative measure against abuse and misuse by nominees. Early and direct telephone or personal contact with principals could help to avoid forgeries or inappropriate nominees.

10.54 A policy in favour of direct personal contact with people over Age Pension age would have wide application. For example, it could also be applied to people who receive care from applicants for Carer Payments. Where care providers qualify for Carer Payment, it would be prudent for Centrelink staff to speak with the person under care to confirm that the person is seeking the arrangement before authorising Carer Payment.⁷⁹

10.55 A direct contact policy could also be applied in the context of the gifting rules. Legal Aid NSW suggested that when Centrelink becomes aware that an aged pensioner has, for example, transferred an interest in their home for little or no value, Centrelink should not immediately suspend payments. Legal Aid NSW suggests that Centrelink should instead deploy a social worker to clarify the circumstances and make an assessment of the person's decision-making ability and whether the transfer was made knowingly. Centrelink could also use this contact to make it known to the person that they can seek Legal Aid.⁸⁰

10.56 Similarly, granny flat arrangements, which require the older person in receipt of Age Pension to advise Centrelink of the arrangement, provide Centrelink staff with an opportunity to have contact with the older person. Direct contact could enable Centrelink to confirm that the person is entering the arrangement willingly; is aware of the criteria required to show a granny flat interest and the exceptions where elder abuse is apparent; and has been advised of the free financial counselling service offered by Centrelink.

10.57 This proposal does not stand alone. The following proposals—to articulate roles and responsibilities and provide education discussed below—would also strengthen protections for principals in nominee arrangements and other older persons interacting with Centrelink.

Enhanced understanding of roles and responsibilities

Proposal 10-3 Centrelink communications should make clear the roles and responsibilities of all participants to arrangements with persons of Age Pension age that concern social security payments.

78 Legal Aid NSW, *Submission 140*.

79 Australian Association of Social Workers, *Submission 153*.

80 Legal Aid NSW, *Submission 140*.

10.58 Older persons and third parties to arrangements involving Centrelink may not have a full understanding of their roles and responsibilities under the arrangement. For example, payment nominees may not be aware that they have fiduciary duties; carers may not understand the scope of their role and responsibilities, including their entitlement to respite; and older persons may not understand their rights.

10.59 Arrangements that involve Centrelink can transfer significant powers and responsibilities to parties to the arrangements. Payment nominees may receive all or part of a person's income, and are trusted to use those funds only for the benefit of the principal. Carers in receipt of Carer Payment are responsible for a person's health and wellbeing, and can often be involved in decisions regarding medical care.

10.60 Stakeholders have suggested a number of ways in which the understanding of roles and responsibilities may be improved. For example, it has been suggested that Centrelink should develop clear guidelines and standards for payment nominees and carers, outlining their roles and responsibilities.⁸¹

10.61 Greater use of Centrelink forms to clearly and accurately inform people of their roles and responsibilities has also been discussed. For example, the current design of the nominee authorisation application form places little emphasis on the responsibilities of the nominee.⁸² Information regarding the obligations of a nominee is put two pages before the signed declaration of the nominee. Nominee obligations are directed toward the principal, and at no point does the form state in clear terms to the nominee what their obligations to the principal are. National Seniors suggested that greater use of the nominee application form could be made to inform and deter abuse. It proposed that the form explicitly state the penalty for not producing records (60 penalty points, equating to \$10,800); the penalty at law for misuse of funds to the benefit of the nominee; and information about the review process.⁸³

10.62 With respect to Carer Payment, ADA Australia suggested the development of an agreed care plan between carers and older persons to be under care.⁸⁴ A care plan could be founded on ADAT outcomes,⁸⁵ provide a clear statement of what care needs to be provided, and outline respite options for the carer.

10.63 Centrelink could produce tools within their processes to provide greater protections. It has been proposed that Centrelink provide a mandatory pro-forma agreement for those older persons who receive the Age Pension (or other pension) who are seeking a granny flat arrangement. The pro-forma agreement could operate to ensure that older persons are aware of their rights and obligations under a granny flat agreement; provide protections for older persons should relationships break down; and,

81 Office of the Public Advocate, *Submission 149*; ADA Australia, *Submission 150*.

82 Authorising a Person or Organisation to Enquire or Act on Your Behalf (SS313): <www.humanservices.gov.au>.

83 National Seniors, *Submission 154*.

84 ADA Australia, *Submission 150*.

85 As discussed above.

by making the agreement a mandatory requirement, remove the awkwardness often associated with asking family members to enter into a contractual arrangement.⁸⁶

10.64 Another place where clarity is needed is in the relationship between payment nominees and other appointed fiduciaries. It is not clear in legal frameworks and other material whether, for example, an attorney under powers would have authority over a payment nominee where both had been appointed by the principal and there is a conflict. Stakeholders contend that the preferred approach Centrelink should take is to have nominees replaced with substitute decision makers where appointed because substitute decision makers have more robust statutory obligations.⁸⁷ This would also provide continuity of financial management and reduce complexity.⁸⁸

Enhancing awareness of risk

Proposal 10-4 Centrelink staff should be trained further to identify and respond to elder abuse.

10.65 The ALRC views staff training as a key component of the proposed Department of Human Services' elder abuse strategy (Proposal 10-1).

10.66 Stakeholders have told the ALRC that Centrelink frontline staff are not specifically trained to deal with elder abuse. For example, the Eastern Community Legal Centre noted that, in their experience, 'identification of and response to elder abuse by Centrelink is either ad hoc or non-existent'.⁸⁹ State Trustees Victoria advised that it has been contacted by social workers from Centrelink concerned about a client, and it is the experience of the Trustees that Centrelink staff do not have access to clear guidelines or procedures in how to respond to elder abuse.⁹⁰

10.67 Staff training would be required to successfully implement the policies outlined above. Stakeholders have observed that staff would need to be trained to 'develop tools and prompts to enable staff to identify signs'⁹¹ and to respond with appropriate referrals.⁹² The financial counselling service, Care Inc noted that this is especially required in circumstances where staff are contacted by older persons enquiring about gifting, granny flat arrangements or entry into aged care. Here staff should be trained to pick up any 'red flags', and refer the person to the appropriate social worker or financial counsellor.⁹³

86 Eastern Community Legal Centre, *Submission 177*; Caxton Legal Centre, *Submission 174*.

87 Eastern Community Legal Centre, *Submission 177*; Caxton Legal Centre, *Submission 174*; Senior Rights (Vic), *Submission 171*; Seniors Rights Service, *Submission 169*; Office of the Public Advocate, *Submission 149*.

88 Office of the Public Advocate, *Submission 149*.

89 Caxton Legal Centre, *Submission 174*.

90 State Trustees Victoria, *Submission 138*.

91 Eastern Community Legal Centre, *Submission 177*. See also State Trustees Victoria, *Submission 138*; Advocare Inc (WA), *Submission 86*; Law Council of Australia, *Submission 61*.

92 ARAS, *Submission 166*; National Seniors Australia, *Submission 154*; Carers Australia, *Submission 157*.

93 Care Inc. Financial Counselling Service & The Consumer Law Centre of the ACT, *Submission 60*.

10.68 The WRC said there is a need for training of specialist staff—such as the Indigenous Service Officers, Multicultural Service Officers and Community Engagement Officers—to provide support and referrals to older persons. Assessment Officers, who deal with complicated financial arrangements, could be used to identify and refer situations that may involve financial abuse. Financial Information Service Officers could inform and educate older people, families and carers about elder abuse and the steps needed to reduce it.⁹⁴

10.69 Stakeholders also emphasised the need for Centrelink staff to be trained to proactively refer carers to existing carer-support services, maintaining that many carers only find out about the service after many years. Access to supports earlier could help reduce carer stress, and accidental neglect or abuse.⁹⁵

Enhancing financial literacy

10.70 Community education to enhance the financial literacy of older persons forms an important strategy in the proposed National Plan against elder abuse, which focuses on helping older persons in protecting their rights (Proposal 2-1). Enhancing the financial literacy of older persons in agreements that involve Centrelink is critical to safeguarding against financial abuse.⁹⁶ Centrelink can play a key role in the financial literacy education of older persons regarding the interaction of personal finances with social security laws and legal frameworks.

10.71 The WRC specifically supported further education for older persons who are considering making gifts through loans or acting as guarantors to increase awareness of their social security obligations and to advise them where to seek help if needed.⁹⁷ Seniors Rights Service also suggested that Centrelink should provide an education and awareness campaign regarding the risk factors associated with granny flat arrangements. This would include informing people of the benefits of putting the agreement in writing and seeking independent financial and legal advice.⁹⁸

94 Welfare Rights Centre NSW, *Submission 184*. See also National Welfare Rights Network, *Submission 151*.

95 Carers Australia, *Submission 157*. Many stakeholders referred to the need to support carers, see, eg, ACT Disability, Aged and Carer Advocacy Service, *Submission 139*.

96 Seniors Rights Service, *Submission 169*; People with Disability Australia, *Submission 167*; National Welfare Rights Network, *Submission 151*; Care Inc. Financial Counselling Service & The Consumer Law Centre of the ACT, *Submission 60*.

97 National Welfare Rights Network, *Submission 151*; Legal Aid NSW emphasised the need for Centrelink to advise clients that they may be able to receive Legal Aid: Legal Aid NSW, *Submission 140*.

98 Seniors Rights Service, *Submission 169*.

