

NATIONAL PRO BONO AND ACCESS TO JUSTICE CONFERENCE

CURRENT ISSUES – OLDER PERSONS LEGAL AND EDUCATION PROGRAMS

Background to the Older Person's Legal and Education Program

Legal Aid NSW's Older Person's Legal & Education Program was launched in April of this year. It was the culmination of Legal Aid's thinking about how best to respond to a report published by the Law & Justice Foundation of NSW (LJF), under its Access to Justice and Legal Needs research program, on the legal and access to justice needs of older people in NSW.

The purpose of that research program is to assess the legal and access to justice needs of disadvantaged people in the community and to provide evidence 'to assist government, community and other organisations develop policy and plan service delivery'.¹

The LJF's 2004 report on The Legal Needs of Older People concluded that 'a specialist legal service for older people could provide a valuable resourcing role for generalist legal services across NSW, and the legal profession generally, regarding issues for older people and methods of effective service delivery to...older people'.²

Following that report the Legal Aid Board prioritised older people as one of its priority client groups and tasked a committee to develop a proposal for how Legal Aid should best address the needs of this client group.

The NSW model

The initiative that was implemented is a 2 year pilot of a partnership model between Legal Aid NSW and the community legal sector. Our partner Community Legal Centre (CLC) is the Aged-care Rights Service (TARS), which has expertise in legal issues relating to retirement villages and provides advocacy for residents of Commonwealth subsidised nursing homes and hostels and recipients of Community Aged Care Packages. Additional funding was allocated to TARS to broaden the range of civil law legal services it provides to older people, and they now have a 2-lawyer Older Persons' Legal Service (OPLS). Legal Aid now has a specialist unit of 2 lawyers and a paralegal based in Legal Aid's Civil Law division.

OPLS provides telephone and some face-to-face legal advice, minor assistance, casework and community legal education (CLE) to older people. Legal Aid's specialist Unit is developing a small casework practice through referrals from OPLS, within Legal Aid NSW and community agencies. Our

¹ Foreword, Law and Justice Foundation of NSW Report, The Legal Needs of Older People in NSW, December 2004, p.iii

² Law and Justice Foundation of NSW Report, The Legal Needs of Older People in NSW, December 2004, p. 367

casework is focussed on developing specialist expertise on complex legal issues that particularly affect older people and undertaking matters that are likely to have a systemic outcome.

However we also have a capacity-building and resourcing and clearinghouse role within the legal sector, in particular the public legal service sector, which I will talk about more later.

We work closely with OPLS by sharing information about legal issues, co-ordinating our community legal education activities and collaborating on policy and law reform initiatives.

I'll talk briefly about the aims of the program and then give you some idea of what we have been doing in the seven months we've been around to try and achieve those aims. I'll also talk about some of the issues, trends and challenges we have encountered.

Aims and elements of the program

The overarching aim of the Program is to improve access to legal information, advice, minor assistance and representation for older people, and thereby to increase access to justice. We need to have a particular focus on those older people who are most socially and economically disadvantaged - as a result of their Aboriginality, CALD backgrounds, frailty, social and geographical isolation, lack of mobility, physical and mental health issues and homelessness - despite the particular challenges involved in reaching those groups.

Our approach is a multi-faceted one, and is driven by the view that the legal issues highlighted by the casework Legal Aid, CLCs and private solicitors are doing should inform the community and professional education work we do, the resources we develop, and the policy and law reform work we undertake. It is also driven by the view that it is crucial to work in close collaboration with non-legal service providers working with older clients.

Education – raising the awareness of the community and of the providers of both legal and non-legal service to older people about the key legal issues affecting older people and the options to address them – is probably the most important element of the Program.

The education for community workers and older people that we are doing has a strong preventive focus. It, as well as the plain language resources we have developed to complement and supplement that legal education, is very much informed by the issues emerging from our casework.

By way of an example, one of the things that became immediately obvious was the high incidence of distress and difficulty being caused to older clients who have helped their family members financially and things have gone wrong, or through what could be called the 'inheritance impatience' of family members. The term 'inheritance impatience' is used to describe the situation

where family members deliberately or recklessly take advantage of the fact that their ageing relatives have assets that they believe will, or should, be theirs one day.

We are seeing a number of cases where elderly clients have lent money to family members or allowed the equity in their homes to be used as security for mortgages, only to find that they are at risk of losing the homes they live in due to the failure of the family member to repay the loan. The family member might assert that the money was a gift, not a loan, or they default on the mortgage due to financial hardship and the bank takes action to repossess the home to recover the loan.

We are also seeing many 'granny flat' type cases - where elderly people have contributed to the purchase of, or extension to, a property in the expectation that they would receive a life interest – only to find that the circumstances change in ways they haven't contemplated (such as the breakdown of the relationship with their adult child) and their legal interest in the property hasn't been properly protected.

It should be said that not every case involves deliberate financial abuse or undue influence by the family member. In most cases the parties involved simply haven't thought through carefully enough the risks to the elderly person of helping their family financially, or a lack of awareness of what can be done to make sure their interests are protected.

Some examples:

1. We are acting for an 86 year old client who contributed \$555,000 towards the purchase of a property for herself, her nephew and his family. The client was not registered on the certificate of title. The relationship broke down and our client was forced to move into very basic rental accommodation obtained through the War Widows Guild. The defendants claim that the money was a gift. The case involves complex legal issues in determining the equitable interest of our client and is being litigated in the Supreme Court Equity jurisdiction.
2. Another case involves an Italian couple who took out a \$600,000 loan secured by a mortgage over their home at the behest of their son who needed the money for his (ailing) business. The son gave them blank documents to sign and filled them in later. He asserted they were company directors and had an income of over \$200,000 per annum. The son has struggled to keep up the repayments and the bank obtained judgement for possession. The son has been able to pay enough for the bank to stay eviction of his parents but is still in arrears. We are obtaining advice from counsel as to what remedies if any the clients have.
3. We investigated the prospects of a case against a bank for an 83 year old client who took out a \$60,000 reverse mortgage to help her son with a property settlement with his former partner. The agreement was that the son was to repay our client when other property he owned was sold. The son now

denies the money was a loan, and claims it was a gift. The client's equity in her home is rapidly diminishing. There is no action against the bank, and Legal Aid could not be granted for the debt recovery action against the son. However we helped the client with an application for pro bono assistance through the Law Society of NSW.

4. An elderly client contributed financially to a home she shared with her daughter and also provided domestic support to her daughter and granddaughter. The relationship broke down and the daughter sold the property and denied that our client was entitled to any of the proceeds of sale.

5. An 86 year old client with serious health issues was pressured by her two adult children into transferring title to her property to the daughter who was experiencing financial difficulties. Our client was to receive a life interest and continued to live in the home. Her daughter obtained a mortgage using the property as security and soon after obtaining the loan defaulted on the loan repayments. The daughter did not respond to letters from the lender and the lender commenced repossession proceedings.

Our CLE activities have been focused on raising the awareness of older people about the importance of thinking through the implications for themselves, and protecting their interests, if they choose to help their family financially or proceed with a granny flat arrangement. All CLE sessions provided to older people are followed by the opportunity to obtain individual face-to-face legal advice.

To support this community education we have developed a suite of five brochures on legal issues for older people. The topics include understanding the risks when providing financial assistance to family members, and protection of interests when entering granny flat arrangements, as well as preventing violence and abuse, planning ahead and substitute decision-making, and the effect of changes to accommodation arrangements on the pension.

A multidisciplinary approach - projects and partnerships

The promotion of a multidisciplinary response to issues affecting older people and developing partnerships with non-legal organisations is also proving to be an effective way of maximising our resources and meeting the challenge of accessing both a wider range older people in the community than we would be able to do alone, and accessing those clients older people who are most disadvantaged.

This is particularly important given the findings of another Law and Justice Foundation report - 'Pathways to Justice: the role of non- legal services'³ – that only a small proportion of disadvantaged people with legal problems go to a lawyer or legal service for help. Rather they are far more likely to seek

³ Law and Justice Foundation of NSW Report, Pathways to justice: the role of non-legal services, June 2007

advice from family and friends, or a broad range of non-legal services, such as doctors or social workers or others services they happen to be in contact with.

The report noted that ‘...to improve people’s access to justice and legal service provision, it is essential to recognise that non-legal services are often the first point of contact for many people with legal needs and to facilitate this as an effective pathway to legal assistance. There are a number of good reasons why disadvantaged people in particular turn to non-legal services for assistance including familiarity with the service, convenience and not knowing where else to go. In some cases, disadvantaged people prioritise their non-legal needs over their legal needs and it may be a non-legal worker who tells them the problem they face is a legal one or has a legal implication⁴...For clients with more complex needs, it may be appropriate for non-legal and legal services to be coordinated to a larger extent, for example through the establishment of service hubs⁵.

We are attempting to forge relationships with aged care services with whom older people engage on a regular basis and trust, and who are dealing with those clients on a range of other issues. In doing this we are trying to look creatively for initiatives that could facilitate the access of frail, ill, immobile, isolated older people, or older people with limited financial capacity, to legal assistance. The best way to do this is through collaborative partnerships with non-legal service providers who work with older people – those services have the access to the clients, we have the ability to deliver the legal help their clients need.

We are hoping to pilot one such initiative in conjunction with NSW Community Options Projects (COPS). There are aged care services across the State that receive funding through the Home and Community Care (HACC) Program. This is a joint Commonwealth, State and Territory initiative, which funds basic maintenance and support services to help frail older people to continue living in their community.

The pilot would also involve collaborating with the Regional Law Societies in Gosford and the St George/Sutherland Shire. Many older people are not aware of the importance of making a will or enduring guardianship or power of attorney appointments. Many are also disinclined to see a lawyer because they either believe the cost of having these documents drawn up is too prohibitive, or because they are not easily able to access a lawyer. We are hoping this pilot will assist greater numbers of disadvantaged older people plan around end of life issues and the eventuality that they may no longer be able to make decisions for themselves.

The first stage of the pilot involves our Unit providing training to caseworkers in two services on wills, substitute decision-making and advance care directives and how to identify these, and other, legal needs their clients may

⁴ Ibid, page 10

⁵ Ibid, page 11

have. We will also discuss how they might introduce the discussion of having these documents prepared with their clients and inform them of available legal referral options.

The second stage of the pilot will be to run 'clinics' by appointment at the host services where private practitioners will prepare wills, enduring powers of attorney, appointments of enduring guardian, and possibly also an advance care directive for a reduced fee. In some cases, where the elderly person is unable to get to the service, a home visit will be necessary. The lawyer will be paid out of the COPs funding. Legal Aid lawyers will also be available to provide legal advice and assistance in other areas of law if necessary.

We are also working through other collaborative forums, such as the Collaborative Legal Service Delivery Program, the NSW Legal Assistance Forum and the NSW Legal Information Referral Forum – all forums that bring together key agencies in a regional and cooperative approach to the planning and delivery of legal services to disadvantaged people in NSW – to raise awareness of our program and to deliver CLE.

We are also planning to develop an 'elder law for non-lawyers' program for community workers working with older people, in order to assist them to identify legal issues and make appropriate referrals. We would like to work in this way with the Aboriginal community in particular, as the advice we have received from speaking with Aboriginal workers is that skilling up staff in Aboriginal organisations is the most effective pathway for the dissemination of legal information to older people in Indigenous communities.

Issues, challenges and trends

Elder Law in Australia is still a relatively new area, and I think it's fair to say that the newer specialist older persons' legal services and programs implemented around the country are still learning and working out what works best as we go.

One of the issues that has been brought home to us in this area is the fact that whether you are talking about wills or substitute decision-making, intergenerational living or financial arrangements, family relationships – and all the complexity and emotion inherent in that - are at the heart of a lot of this work and that the legal issues are often played out in that context.

The process we went through in developing the brochures and the CLE approach was an interesting one. It raised the issue about how to talk to older people about what is generally called 'financial abuse' by family members. The challenge is how to raise awareness of the risks and the realities without alarming and alienating our audience. Few of us are willing to contemplate the possibility that those we love and trust could act against our best interests. Even if we can, the emotional tapestry of familial relationships is necessarily complex and it can be hard to have the difficult conversations about money and paperwork and expectations. We decided not to use the word 'abuse' in this context at all, but to frame the discussion in terms of potential effects on

pension entitlements and tips to protect your interests from unexpected developments and behaviours of family members that range from well-intentioned-but reckless to overly-optimistic-but-misguided. We have found this approach to be more palatable and better received.

Another issue we have encountered in acting for some older people is the impact of the family relationship on our ability to obtain clear and consistent instructions from clients. We are investigating the merits of a case for an 80 year old client who gave one of her two daughters her power of attorney. Without her knowledge the daughter transferred title to client's unit to her daughter (the client's granddaughter) who then took out a loan for \$150,000 secured by the client's unit. The client's vulnerability to emotional pressure from her daughters – threats of withdrawal of care or simply her fear that care and support will be withdrawn if she both proceeds or doesn't proceed with legal action – have meant that the client has been persuaded by both daughters at different times to change her mind about what she wants to do.

In terms of what we can expect to see more of in the future, the targeted promotion of reverse mortgages and other home equity release products to older people would have to be high on the list. We have already seen brokers using the recent debate about the insufficiency of the age pension as way to promote these products as a solution for people who own their own home to supplement their income. While these products can be a good option for some people, there is an increasing need for community education around how they work and what the risks are so that older people can make informed decisions.

Also, as the impact of the global financial crisis and a slowing economy is felt on families, the pressure to assist their adult children financially may increase. In an article in the Money supplement of the *Sydney Morning Herald* on 22 October the chair of the Australian Financial Counselling and Reform Association noted that with high levels of debt in our community there is likely to be '...more repayment stress ahead, more unemployment and credit is going to be much harder to get' and therefore more pressure on older relatives to bail out their family members. This is certainly the experience already in the United States.

Another trend that looks like it will only continue to worsen over time is the issue of security of housing for older people living in residential parks and the private rental market. Many older people have entered residential parks in their retirement. All along the eastern seaboard residential park owners are seeing the financial benefits of converting the use of their parks from residential to tourist parks. The effect of this on older people's homes is very significant. Last week we ran two forums in the Northern Rivers area for older people thinking of buying or selling relocatable homes in residential parks, alerting the to their rights and also the financial and other risks.

And also, in a tightening private rental market, people on fixed incomes are not as competitive when it comes to the rental 'auctions' that are now

occurring, or are hamstrung when rents are increased. And of course this in turn puts increasing pressure on public housing.

While our Unit is located within the Civil law division of Legal Aid we work with the Family and Criminal law divisions as well. Our next brochure will be about grandparents and the law. This is a particular issue within Aboriginal communities, and we hope that the development of this resource will assist us to work more effectively with Aboriginal older people.

In the criminal context we are hoping to do some work next year on issues around an ageing prison population.

Capacity building, resourcing and clearinghouse role

One other big issue that we are encountering is that of ageing parents who are carers for their adult children with disabilities. The estate and succession planning needs of these older people are very complex and require not only the relevant legal expertise but also an understanding and awareness of disability issues. While this work is outside the scope of Legal Aid's work, we are able to play a clearinghouse role in relations to requests from organisations providing support services to ageing parent carers, and facilitate contact between those organisations and pro bono legal services, specialist CLCs such as the Intellectual Disability Rights Service and other private lawyers who specialise in this area.

As I mentioned earlier our Unit also plays a resourcing role and capacity building for generalist legal services across NSW, and the legal profession generally. We organise professional development training for lawyers in the sector on elder law issues. For example we organised training for Legal Aid lawyers on changes to the *Succession Act 2006* and equitable remedies in 'financial abuse' cases and we ran an 'elder law' stream at our recent Civil Law Conference.

Policy and law reform

Our Program also participates in policy and law reform work. We are part of the National Association of CLC Older Persons Network.

We worked with other key legal services on the NLA Older Persons' Working Group to prepare a response to recommendations in the House of Representatives Standing Committee Report into Older People and the Law.

We are providing input into the Violence Against Older Women Strategy being developed by the NSW Older Women's Network. The OWN is conducting a project with funding from the NSW Domestic and Family Violence Grants Program to address violence against older women in the community. The OWN is developing a strategy to contribute to the development of both a NSW and Commonwealth plan to reduce violence against older women.

We have also been asked to contribute to the work the Human Rights Commission is doing around mature age workers and discrimination.

Evaluation

Our program will be reviewed towards the end of the pilot. In the meantime we build evaluation into our planning of CLE, focus test our publications, and consult with and request feedback from our partners and key stakeholders about what we are doing.

Conclusion

We hope that the work of the Program will culminate in a greater level of engagement with elder law issues within Legal Aid NSW and community legal services, as well as building important collaborative relationships across the whole legal services sector in relation to delivering legal services to older people.

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