

Submission to Productivity Commission Title: Access to Justice

BY: THE AGED-CARE RIGHTS SERVICE INC. (TARS)

- 1 TARS is a community legal centre (CLC) which specialises in providing non-legal advocacy, legal assistance and education to disadvantaged older people (over the age of 60) in NSW (TARS target client group). TARS also provides general community and professional education on issues relevant to aged people. Many of our clients are in their 80s and 90s.
- 2 TARS is contracted to provide these services through several sources including funding by Department of Health and Ageing (Cth), Office of Fair Trading (NSW) Department of Attorney-General and Justice (Cth) through Legal Aid NSW, the NSW Special Purpose Fund (interest from the Legal Practitioners Fidelity Fund) and donations.
- 3 TARS has three divisions providing specialist services: The Advocacy Service, providing non-legal advocacy to residents of aged care facilities, The Older Persons Legal Service (OPLS), providing legal advice and limited representation to disadvantaged older residents in NSW and the Retirement Village Legal Advice Service, providing legal assistance to residents of retirement villages throughout NSW who are in dispute with retirement village operators. All three divisions also deliver education seminars, promote the service and prepare submissions on law reform issues.
- 4 TARS employs six advocates, six solicitors with a total staff of 17.
- 5 TARS is uniquely situated to make submissions on access to justice, particularly for older NSW residents as we provide phone advice to the whole state, limited face to face advice for particularly vulnerable clients and limited Tribunal and lower Court assistance to clients to self represent and we provide some representation of disadvantaged vulnerable clients. TARS also refers clients to other service providers and seeks legal aid and pro-bono assistance for clients where court representation is the most suitable avenue of dispute resolution. The writer is also a member of the Queensland Civil and Administrative Tribunal so is able to make comment from the perspective of the system of justice delivery that operates through the Tribunal architecture.
- 6 We will start this submission by making a few observations and research results of other Reports. In a report¹ released in 2012 The Law and Justice Foundation found that of the respondents who had experienced a legal issue in the past year who did nothing about it up to 50% reported a positive satisfaction rating with the outcome. Over three quarters reported that the problem was resolved within the year (presumably it resolved itself?). From an access to justice perspective this result is quite remarkable – it questions the old adage that ignoring a problem won't make it go away. For 50% of respondents ignoring the problem resulted in a positive outcome. This, of course, runs counter to a legal professionals' reason for existing and their intuition about pathways to resolve legal problems. TARS has had feedback from clients that, for example in consumer matters, they would prefer to leave the problem alone rather than pursue the matter through the Consumer Trader and Tenancy Tribunal due to the time and stress involved.
- 7 An examination of the kinds of issues that were ignored by clients would probably reveal

¹ Coumarelos C, Macourt D, People J, McDonald H, Wei Z, Iriana R, Ramsey S, *Access to Justice and Legal Needs Vol 8- Legal Australia Wide Survey, Legal Need in NSW*, Law and Justice Foundation of NSW, August 2012

that these were interpersonal disputes rather than disputes with companies or governments or other agencies and perhaps, also, the definition of the dispute as a “legal issue” might have been premature. Although we are aware that every issue might have a legal element to it is not always the case that a legal solution is the best solution. Defining a problem as a “legal issue” effectively narrows the scope for potential solutions.

- 8 CLCs are established to provide legal assistance to disadvantaged and vulnerable people. They fill a gap, a very big gap, that Legal Aid in its various permutations does not cover. Access to legal aid is quite restricted and the range of civil disputes which legal aid is available for is becoming more narrow over time. Although CLCs assist disadvantaged people the restrictions on the category of issue and the type of client is not as strict as legal aid. TARS applies a broad definition to disadvantage including financial and asset limbs but also takes into account into determining the disadvantage status of the client their age, health, accommodation and social circumstances as well as the potential for a deterioration in those elements if the client’s issue is not addressed. Even so TARS is aware of a considerable unmet need. Legal aid is only available where the client satisfies a strict means and merit test and has a special disability. The client in most circumstances where it is an older person facing financial exploitation must demonstrate a loss of home or a risk of a loss of the home to be eligible for legal aid.
- 9 TARS assists over 4,500 clients each year, and makes considered referrals for many more people who do not become legal clients. TARS has noticed a direct correlation between our service education sessions and promotion activities and the number of calls we receive from people with issues. We know that there are large numbers of our target community who have not been exposed to our education sessions or promotion and thus we conclude have not contacted us about the issues that they have and about which TARS may be able to assist. We also know that many of those who do contact us already have a serious problem and often contacting us is their last desperate act to find a solution. In other words we mainly see people with problems who may already have tried a variety of actions without success. We believe other CLCs (generalist and specialist) report similar experiences.
- 10 TARS advises clients from all culturally and linguistically diverse, aboriginal and Torres Strait groups. We do engage interpreters to assist in this service. We also do community education with interpreters where appropriate and provide a selection of our fact sheets and brochures in a variety of languages. TARS limited resources mean that we cannot provide the full range of languages.
- 11 It is a well known phenomenon that older people from non-English speaking backgrounds, otherwise good English speakers, often revert to their own language as they age and particularly where dementia issues are present. Where there are dementia issues legal problems (and other social and health treatment problems) and access to justice barriers are multiplied. Not all aged-care facilities cope well with dementia residents. Indeed older people experiencing dementia are a special category of people that experience all sorts of inadequately resourced issues one of which is access to justice.
- 12 TARS seeks to assist residents and their legal representatives with enquiries associated with aged care, financial arrangements and guardianship matters. Where a resident has dementia and is unable to provide legal instructions TARS seeks to speak with their legal representative, attorney or guardian. If there is doubt as to capacity TARS refers the resident to a local private solicitor for a face to face meeting and a capacity assessment.

This will usually mean a cost to the client that may act as a barrier to the client seeking further help.

- 13 One focus of TARS education activities is to educate older people and the community at large on strategies for reducing the risk of financial exploitation and elder abuse. Under the general heading of Planning for Later Life TARS conducts programs of education with the specific purpose of reducing the incidence of legal problems arising for our target client group. We do remote, rural and regional education seminars but, again due to limited resources, the frequency with which we can deliver the message to aged-care facilities, retirement villages and those communities is restricted. Our educators may visit some areas only once every four years or even less frequently. It is TARS view that education to residents, their families and staff of aged care facilities and retirement villages and the community generally, on the stakeholders' rights and responsibilities is one of the most cost effective ways to avoid issues arising in the first place. This will also help minimise the adverse impact of dispute resolution processes when problems do arise.

RECOMMENDATION

An Aged-care Ombudsman be created to ensure that residents rights in aged-care facilities are upheld. An Aged-care Ombudsman would also ensure that when complaints to the appropriate Complaints Commission are made those complaints are adequately addressed.

RECOMMENDATION

Older Persons Community Legal Services and other CLCs funding basis be reviewed to provide adequate funding so that disadvantaged members of the community (properly identified and defined – not narrowly) are not denied access to processes that deliver justice to them in resolving their issues. Currently the bulk of CLC work is providing advice. Funding does not allow every deserving issue to be given the appropriate level of assistance beyond providing advice. There ought to be much greater scope for CLCs to engage in alternative dispute resolution pathways including formal mediation processes.

- 14 Elderly clients may still be at a disadvantage when engaging alternative dispute resolution (ADR) processes to address their issue. Where the opposing party is a corporation, or government department or commercial enterprise they may be well versed in the alternative processes by dint of experience and knowledge. The unprepared and unrepresented client is at a practical disadvantage against well informed and experienced opponents even where there is good will on the other party's behalf to come to a just resolution. Where there is no good will the older clients access to justice may well be denied because they do not get a fair go in the alternative processes. Even basic assistance in preparation for the ADR process can help balance the scales in favour of a fair outcome in such situations.
- 15 The types of problems that TARS' clients present with are as wide ranging as the general community but there are several dimensions that create barriers for older people accessing justice (and achieving justice) that are age specific. For example a significant proportion of our OPLS clients are experiencing financial exploitation perpetrated by their adult children. This can take many forms including misuse of an enduring power of attorney to undue influence when transferring property to the name of a child, to accessing bank accounts to failing to fulfil promises involving granny flats and many more. There are many barriers that

older people confront when trying to resolve these issues. Briefly these barriers include, but are not limited to:

- A diminished awareness or capacity to understand that a problem exists or how to go about resolving it (cognitive)
- A mental or physical disability
- Restricted mobility
- A lack of awareness of what constitutes abuse
- A lack of knowledge of their rights or resources available
- Social isolation or fear of alienation
- The need to preserve a relationship
- Dependency on others
- Literacy and language barriers
- Stigma or shame
- Religious, cultural or generational barriers
- Fear of reprisal
- Perceived or actual lack of options or access to services
- The cost and stress associated with undertaking a legal process

16 These issues are often brought to TARS when the family breakdown is well under way. One solution to reduce these problems is to take measures to avoid them arising in the first instance. A well constructed family agreement² that clearly sets out the rights and responsibilities for each participant can go a long way to doing this. However people often do not want to, or cannot afford to (or believe that they cannot afford to) engage with the legal system for what they see as private family matters. But by taking a few simple measures (non-contentious legal processes) the family can avoid contentious litigation later. This is one area where the Commission's brief not to deal with "transactional services" should be set aside. The specific transactional service of providing a family agreement can greatly reduce the costs, time and other burdens of disputes at a time when elderly people are generally not well placed (both financially and in terms of health impacts) to conduct vigorous legal action that might require expensive Supreme Court litigation lasting several years.

CASE STUDY

² The family agreement referred to here is not the family agreement that comes out of the Family Court, but rather an agreement between family members on the arrangements for looking after aged parents/grandparents in their later years. These agreements cover such things as what happens to the parents assets, who is to look after the parents, what services are to be provided to the parents by whom and how is that person compensated and so forth.

An elderly client had her home transferred to her daughter on the promise to provide a residence and living assistance for the rest of her life in a granny flat to be built on the lot. The granny flat was only half built when the funds ran out and the daughter and her husband's relationship broke down. This adversely impacted on the relationship between the client and her daughter. Eventually it also broke down and the client being evicted from what was once her own home.

- 17 In cases like the above a very real deterrence to older people taking action is the cost of taking Supreme Court action. In the current legal system to recover a property in Sydney will certainly require Supreme Court action if any resistance to recovery is met. This can be an expensive undertaking that may require the house to be sold to pay the legal fees if the older person is successful.
- 18 CLCs generally, and certainly TARS, are not resourced to provide this type of service (negotiating and drafting family agreements). Yet it is a service that agencies like TARS could provide relatively cheaply with beneficial effect in avoiding calls on justice systems later. Other simple legal actions that can reduce the risk of exploitation include preparing a Will, preparing an Enduring Power of Attorney and preparing an Enduring Guardianship document. Although TARS does education and does advise on these strategies for reducing the risk of elder exploitation there is a need, which is not met, to create these documents cheaply.

RECOMMENDATION

The establishment of a program to fund and train specialists to advise on, negotiate and draft Family Agreements for older disadvantaged people.

Establish and fund specialist units within the police service dedicated to investigating and prosecuting financial exploitation and abuse crimes against elder residents. In particular a police service dedicated to investigating abuse by an attorney against an elder resident within family relationships.

- 19 TARS approaches older people's legal issues in a holistic manner. That is to say that when an older person presents with a "legal issue" TARS staff are aware that the persons problems are not always just legal. This is unlike, say, a middle aged or younger person who seeks legal advice about a specific legal issue. Older people may have other health and social issues that are compounded by the "legal" issue that they present with. We are also aware that engaging in a long drawn out legal battle will adversely impact on an older person's health and often their social and family stability too. If the other party in the dispute is a family member then additional problems are guaranteed. TARS recognises the need for social workers and counsellors to be involved in assisting older people work through the legal issues that they might have.

RECOMMENDATION

Funding be provided to CLCs to employ counsellors and or social workers to enable a holistic approach to resolving client issues.

- 20 TARS is of the view that a holistic approach to resolving client issues will be repaid by avoiding the particular clients either returning for further assistance in the future or seeking further assistance elsewhere from government funded services.
- 21 As noted above TARS services the entire state of NSW. We do this mainly through phone advice. We have observed that where a client's issue requires more than phone advice and face to face meetings are needed that residents in Sydney are able to come to our office relatively easily but residents in remote, regional and rural areas of the state are not able to attend our offices.

CASE STUDY

A very elderly client who lived in far western NSW wanted to become the financial manager for his incapacitated spouse. He was able to do this – attending the Guardianship Tribunal by phone - but certain conditions were imposed on him before he could have his wife's funds released to him. These included completing detailed and complex forms and financial records. We suspected that our client was either illiterate or allergic to forms. In any event he did not have the forms completed in a reasonable time and despite our best efforts to assist him, long distance, time elapsed before he was able to assume the role of financial manager.

In our view if he had been able to attend our office (or another similar office) – he could have been readily assisted to complete the form in a timely fashion.

- 22 The difficulty of not being able to receive much needed assistance face to face is a clear example of the limits of access to justice faced by people in remote areas of the country.
- 23 TARS believes that the civil justice system should be protecting the rights of all residents and ensuring equality before the law. TARS also believes that when legal problems arise they should be resolved at the lowest level of heat. This is particularly important for older and other disadvantaged residents because the path to resolution of problems can itself cause further disadvantage and adversely impact on the already vulnerable. The more complex the path to resolution becomes the greater the negative kickbacks are for the disadvantaged and vulnerable person.

CASE STUDY

A client in his 80s resided in a dilapidated townhouse. The client had building reports dating since 2000 which stated that works done to a neighbouring property had damaged the foundations of his house. The client had engaged several solicitors who wrote to the government department who handled the works to seek a settlement but the matter was not resolved. The solicitor's billed the client \$10,000 for their work on the matter. The client came to us seeking some legal assistance. We tried to negotiate a settlement. Due to the limitations on our service we then tried to obtain pro bono assistance for the client to take the matter to Court. Unfortunately we had to advise the client that the time limits for the matter had expired and he would need special leave to bring a cause of action in negligence against the government department. We have not been successful in obtaining pro-bono assistance. He was refused

legal aid.

To complicate matters he was recently assessed by ACAT who determined that the home was unsafe for him to live in and who were encouraging him to relocate elsewhere. The client became quite distressed by this.

- 24 A dispute resolution system which is designed to resolve the issues early and cheaply with the minimum of complexity which delivers fairness and just outcomes will also deliver ongoing benefits (financial, health and social) to older people. Alternate dispute resolution and mediation systems are a step along this road but are often made inaccessible for older and vulnerable people because the rules often prohibit representation within the process. Tribunal rules also generally exclude representation except where the matter is likely to raise complex legal issues. The exceptions to the rules reference the complexity of the issues rather than the capability of the disadvantaged person to be able to adequately express their case. Mediators and Tribunal members are trained to get the best from the disadvantaged self-represented person but older people may be prone to become confused in unfamiliar surroundings and during what are to them quite formal and often alien processes. This is no reflection on their intelligence or their integrity but rather reflects the reality of growing older for many people.
- 25 TARS has had clients who have come to us for assistance early in the process and we have had clients who turn up looking for help the day before a Court Hearing. Invariably the clients who turn up later do not obtain the outcomes that they might otherwise have obtained had they sought assistance earlier. Clients also attend our offices seeking assistance for an issue that is well out of time. . A number of our clients approach us when the matter is proceeding to Court rather in the early stages where some timely advice and intervention could alleviate the legal problem. For example, a family might require a financial management order because a client did not make an enduring power of attorney whilst they had capacity and there are significant assets, a home, to be sold for aged care. A client may have moved in with their son or daughter and made significant contribution to the home only for the relationship to break down and to be forced into aged care. The existence of a family agreement would help prevent such financial exploitation.

RECOMMENDATION

Consideration be given to compulsory early intervention education, conducted perhaps in high schools, to provide a basic understanding of our law and justice system and the pitfalls of not observing the rules such as timely resolution to legal problems.

Funding also be directed to CLCs for community education on the permutations of the justice system and how best to access it.

- 26 Time limits are usually applied to commencing Court or Tribunal action. However a person who tries to resolve the issue through alternative dispute resolution gains no credit for taking that pathway in terms of the clock ticking on commencing court action. Consideration ought to be given to allowing attempts to resolve problems by non-court means to stop the clock while that process is underway. This should be automatic rather than discretionary.

CASE STUDY

An elderly client in a retirement village wanted to leave the village to move into an aged care facility. The village engaged a firm of lawyers to dispute her entitlement to the return of her entrance fee. The elderly client was not in good health and it seemed to us that a deliberate tactic of delaying the process was undertaken by the retirement village operator so that our client would give in, or worse, before the issue was resolved.

- 27 TARS produces fact sheets on legal questions common to older people. We produce these fact sheets in multiple languages but start with a plain English interpretation of the relevant law. When clients come to us with a legal issue they quickly learn that the fact sheets attempt to distil the essence of the law and to present it in a simplified way for the lay reader but the reality of actually taking Court or Tribunal action is a different matter, since rules on how to go about it are themselves quite complex, although less so for Tribunals than Courts. There are moves now to establish assistance for self-represented litigants in Federal Courts. This process could be expanded to other Courts and Tribunals. Certainly CLCs if adequately funded would be in a prime position to offer this service.

CASE STUDY

TARS Retirement Village Legal Advice Service has had numerous cases where interpretation of Residency and Service Agreements has consumed time and resources and where the same issues have been litigated time and again by different village operators.

It was timely when the NSW government decided to support the creation of a standardised contract. TARS lobbied for and was invited to join the Expert Committee to develop a standardised contract for all retirement village residents. This standard contract was released for use in 2013. TARS' participation in the expert committee ensured that residents' rights were considered and supported in the development of the contract. It is our view that TARS law reform work in this area has led to a clearer transparent contract which will mean that fewer contractual disputes arise between residents and operators. More importantly older people considering entering a retirement village will be better informed about their rights and obligations.

- 28 TARS cannot overstate the reliance we place on timely pro-bono assistance. This is often provided by major law firms who have specialist pro bono structures. However obtaining pro-bono assistance is a hit and miss affair. Quite often firms are conflicted out of providing pro-bono because of existing clients. Sometimes there is no one available in the firm at the time with the necessary expertise for the particular legal issue.

CASE STUDY

An elderly lady came to TARS for assistance. She had sold her home and provided her son with a considerable proportion of the proceeds to purchase a new home for them both. She was to reside in a flat on the property. The new property was put in the son's name alone. The son took out a large mortgage to support his business and was having difficulty meeting the repayments. We advised our client to put a caveat on the property as she had an equitable interest in the property. We advised her that if her son or the bank sought to have a lapsing notice revoke the caveat she would need to take the matter to the Supreme Court. The time period for responding

to a lapsing notice is quite short. Therefore we attempted to find pro-bono assistance on a contingency basis that there would be assistance available if the lapsing notice was filed.

- 29 The failure to find pro-bono assistance in deserving matters can have devastating consequences for older clients. Some of our clients have gone from being comfortable with their own homes to destitute and homeless in a few short months. We have found ourselves in the position of trying to find accommodation for clients where their family and the justice system have both failed them. Even where we do find pro-bono assistance for clients in situations like the one above the time taken to secure an outcome can be devastating for an elderly person. Moreover the outcomes seldom ever result in the client being re-instated to the position that they were in prior to embarking on giving their children a helping hand.
- 30 TARS has become aware, particularly in rural areas of situations where the older person and the adult child were both represented by the same solicitor, and the older person did not get their own independent legal advice. Aside from the question of a conflict of interest for the solicitor some legal education for clients making them aware of the need to avoid such situations could circumvent future legal problems.
- 31 Because TARS does not charge for its services we do not pursue questionable court actions nor engage in practices to pursue a win at all costs. While we do not criticise other legal professionals, the adversarial nature of the legal dispute process inevitably means that one side wins and the other side loses. Very often the side that wins is the one that can afford to conduct litigation more vigorously.

CASE STUDY

A client who was managing his deceased father's estate had a dispute with a retirement village operator about the share of capital gain that the estate was entitled to. TARS client won the issues in dispute at the Consumer Trader and Tenancy Tribunal. The Operator appealed the decision to the District Court and engaged a Barrister to pursue the matter. Our client could not afford a barrister and was not in a position to risk losing the Appeal and having a costs order made against the estate. Therefore our client, by agreement with the other side, did not contest the matter in the District Court and lost the case, with no costs awarded.

- 32 TARS experience is that well-funded parties to legal disputes have an advantage over people whose resources are quite limited. This advantage is exacerbated by legal representatives who adopt the must win approach to all litigation. TARS is of the view that obligations that require parties' legal representatives to co-operate with the other side should be strengthened and be made to be complied with in practice rather than paying lip service to these obligations.

CASE STUDY

TARS client was a resident of a retirement village. The operator was a religious not-for profit running retirement villages. The operator changed residents' contracts unilaterally and without following the procedure set out in sections 29-30 of the NSW Retirement Villages Act (RV Act). It

came to our attention that a large number of contracts had been changed. We filed a subpoena to produce documents in order to get copies of the original contracts. The operator's legal representative did not bother attending the first hearing, attended the second hearing without documents then refused to comply with the subpoena until at Hearing, the CTTT Member ordered that the documents be produced and noted that there was simply no reason for withholding them.

Further, the operator's legal representative did not comply with Directions in relation to filing of submissions and her submissions were usually filed out of time and faxed to our office after hours. There was no penalty for such behaviour. The operator's legal representative sent numerous faxes to our office which served no purpose and misrepresented what we had said or done.

The operator ran 'scare tactics' throughout the Hearing telling other residents that the legal fees for this case would have to come out of their fees and charges.

CASE STUDY

Our clients were retirement village residents. The Operator was a sole trader represented by a local law firm. Applicants were seeking numerous orders in relation to their village that was half built. The Operator's legal representative failed to take genuine steps (in our view) to reach consent orders and threatened costs orders against the Applicants on a regular basis, although clearly the Applicants' case had good prospects of success as the breaches of the RV Act were obvious. During the Hearing of the matter, both parties agreed to attempt to draft a settlement document. The Operator's legal representatives left the applicant's solicitor sitting in their office reception even though the Member had given a timeframe for the settlement negotiations to occur. There was a complete lack of professional courtesy. Not only that, a solicitor from the same firm made a very rude comment to one of the male applicants in the CTTT building during a break in proceedings in order to attempt to provoke him. The Operator failed to file submissions on time but did not incur any penalty.

- 33 Courts and Tribunals do attempt to manage cases but as can be seen by the two case studies above the approach and attitude of legal representatives can add costs and effectively deny access to justice despite the best efforts of the Courts and Tribunals to manage the cases in a timely and efficient manner.
- 34 In relation to the use of experts in litigation the experts should be seen as experts of the Court rather than experts for each side. Where each side has their own experts a system of experts' conclaves can be used to reduce the issues that the experts do not agree on. The results of these conclaves should be available for all parties to read.
- 35 Access to Justice is especially problematic for older people who are disadvantaged and vulnerable. Changes to the system and to incentives for all participants to approach issues with a view to achieving a fair and just outcome need to be made. The recommendations in this submission are only a few of the strategies that could be adopted to save funds over the longer term and to produce more equitable outcomes for our clients.