

## Barriers to older Australians accessing legal services

### Introduction

- 5.1 Older Australians require access to legal services for a variety of reasons, including wills and powers of attorney, property and accommodation issues, family law matters involving grandchildren, health services, consumer and financial issues, and as victims of elder abuse.<sup>1</sup> However, for many older people, their access to legal services is constrained by factors that are largely beyond their control.
- 5.2 The Committee found that the existing legal system is not well equipped to meet the legal needs of older people, who often have complex needs but require low cost solutions that are targeted and delivered in a specific way. Initiatives to address these needs are often constrained by funding and the difficulty of obtaining suitably qualified people.
- 5.3 This chapter discusses the barriers encountered by older Australians in accessing legal services. It also looks at the options that are available to older people to obtain legal assistance and examines how these might be expanded or improved.

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<sup>1</sup> Loddon Campaspe Community Legal Centre, *Submission No. 57*, p. 13; Victoria Legal Aid, *Submission No. 101*, p. 5.

- 5.4 The Committee recognises that while a number of the barriers identified in this chapter are specific to older people, others are also relevant to a broader cross section of Australian society.

## Legal needs of older people

- 5.5 Older people are not a homogeneous community.<sup>2</sup> However, previous studies and experiences have identified that, in broad terms, older people have specific needs in relation to the delivery of legal services and that they generally access information and services in a particular way.<sup>3</sup> Loddon Campaspe Community Legal Centre characterised older people as requiring legal services that are:

- Face to face;
- Based in the local community;
- Multi-disciplinary;
- In the best interests of the older person; and
- The least restrictive in approach.<sup>4</sup>

- 5.6 In addition, the Law and Justice Foundation of New South Wales highlighted that older people require:

...legal practitioners who provide explanations in simple terms, are friendly, courteous, inexpensive, expert in dealing with older people and do not require the older person to exercise a lot of 'self-help'.<sup>5</sup>

- 5.7 The Committee also heard that older people generally rely upon informal sources of information and established contacts.<sup>6</sup> This includes service providers and families, or other intermediaries:<sup>7</sup>

...'Will older people come?' No, they do not readily make use of legal services. They like to reveal an issue to their family

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2 Federation of Community Legal Centres (Vic) Inc, *Submission No. 41*, p. 13.

3 Federation of Community Legal Centres (Vic) Inc, *Submission No. 41*, p. 10.

4 Loddon Campaspe Community Legal Centre, *Submission No. 57*, pp. 13-14.

5 Law and Justice Foundation of New South Wales, *Submission No. 102*, p. 4.

6 Federation of Community Legal Centres (Vic) Inc, *Submission No. 41*, p. 10; Victorian Government, *Submission No. 121*, p. 33.

7 Assets and Ageing Research Team, University of Queensland, *Submission No. 26*, p. 7; Victorian Government, *Submission No. 121*, p. 33.

first, perhaps, and then perhaps to their physio, their local doctor or their podiatrist, and then they come through to the legal service.<sup>8</sup>

- 5.8 Other participants commented that outreach models of delivery are well suited to the legal needs of older people, particularly where these services are provided in places where older people already congregate and have a level of comfort and trust.<sup>9</sup>

## Barriers to access

- 5.9 The Committee heard of numerous barriers to older people accessing legal services.<sup>10</sup> These barriers reflect a complex array of issues that affect older people, including not only the nature of the legal system itself but also a range of personal factors, such as health, mobility, capacity and social networks.

- 5.10 Many older people have a number of issues that require resolution. For example, Caxton Legal Centre told the Committee that:

...many of our older clients' legal problems tend to be multi-layered in nature and often involve a mixture of questions relating to estate planning, social security entitlement, capacity concerns and substituted decision making, undue influence, other forms of abuse and exploitation, family law, property issues and systems abuses.<sup>11</sup>

- 5.11 Accordingly, this mix of issues also means that a range of laws apply. The Aged Care Crisis Team commented that:

Federal and State laws abound and cover almost every facet of life, from: accommodation, living arrangements, estate

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8 Ms Jeni Lee, Federation of Community Legal Centres (Vic) Inc, *Transcript of Evidence*, 4 June 2007, p. 63.

9 Federation of Community Legal Centres (Vic) Inc, *Submission No. 41*, p. 10; Loddon Campaspe Community Legal Centre, *Submission No. 57*, p. 4.

10 See, for example, Assets and Ageing Research Team, University of Queensland, *Submission No. 26*, p. 7; Federation of Community Legal Centres (Vic) Inc, *Submission No. 41*, p. 8; Ms Margaret Jones, *Submission No. 47*, pp. 1-2; Alzheimer's Australia, *Submission No. 55*, pp. 24-29; Loddon Campaspe Community Legal Centre, *Submission No. 57*, pp. 4, 11; Law Institute of Victoria, *Submission No. 78*, p. 6.

11 Caxton Legal Centre Inc, *Submission No. 112*, p. 6.

planning and management, financial affairs, medical treatment, and these are only a few such areas.<sup>12</sup>

- 5.12 The complexity of issues results in many people needing to establish a relationship of trust with their legal practitioner before they are willing to proceed with a matter.<sup>13</sup> However, the Queensland Government observed that 'general legal services often lack the capacity to spend the time required in order to build rapport and appropriately respond...'<sup>14</sup>
- 5.13 Further, legal practitioners do not always have an interest or sufficient expertise in the many legal issues affecting older people.<sup>15</sup> Participants in the inquiry pointed to elder law as an emerging area of law within Australia.<sup>16</sup> Accordingly, 'lawyers generally are not fully conversant with substitute decision making legislation/instruments and Centrelink requirements and other areas affecting older people'.<sup>17</sup>
- 5.14 The Committee is concerned that insufficient expertise in the issues affecting older people is a significant impediment to their access to appropriate legal services. The Committee notes that there is growing interest amongst legal practitioners in elder law,<sup>18</sup> and that many state and territory law societies already have elder law committees.<sup>19</sup> The Committee considers, however, that there is a role for law societies to further encourage expertise in elder law among legal practitioners.

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12 Aged Care Crisis Team, *Submission No. 86*, p. 8.

13 Queensland Government, *Submission No. 96*, p. 1.

14 Queensland Government, *Submission No. 96*, p. 1.

15 Law Institute of Victoria, *Submission No. 78*, p. 6.

16 Elder Abuse Prevention Unit (EAPU), *Submission No. 97*, p. 3; Ms Susan Field, University of Western Sydney, *Proof Transcript of Evidence*, 17 August 2007, p. 17; Ministerial Advisory Council on Ageing, *Submission No. 103*, p. 5.

17 EAPU, *Submission No. 97*, p. 3.

18 Mr Bill O'Shea, Law Institute of Victoria, *Transcript of Evidence*, 4 June 2007, p. 1; Public Trustee NSW, *Submission No. 78*, p. 5; Ms Susan Field, University of Western Sydney, *Proof Transcript of Evidence*, 17 August 2007, p. 18.

19 Law Institute of Victoria, *Submission No. 78*, p. 1; Mr Rodney Lewis, *Submission No. 152*, p. 1; Mr Brian Herd, Carne Reidy Herd Lawyers, *Transcript of Evidence*, 16 July 2007, p. 2; Ms Margaret Kelly, Law Society of South Australia, *Transcript of Evidence*, 31 July 2007, p. 10; ACT Law Society website, 'Committees', <http://www.lawsocact.asn.au/content/committees/committees.asp> (accessed 18 September 2007).

**Recommendation 35**

5.15 **The Committee recommends that the state and territory Law Societies continue to develop and foster expertise in elder law, including encouraging elder law as a practice speciality.**

5.16 The Committee notes that it is areas in which older people would greatly benefit from legal advice where they often encounter difficulties. For example, as is discussed in Chapter 7, retirement village contracts were raised by a number of participants as an area requiring considerable time commitments and resources due to the complexity of the contracts. Significant costs are therefore involved in obtaining legal advice. Ms Andrea Simmons of the ACT Disability, Aged and Carer Advocacy Service commented in relation to retirement village contracts:

What we find is that some of the contracts that people sign to go into residential aged care and the contracts that they get involved in in retirement villages are so extraordinarily complex that no ordinary person should be engaging in those without actually getting quite a lot of good advice.<sup>20</sup>

5.17 Another barrier to obtaining legal services is the reluctance on the part of the legal profession to take on cases with limited prospects of success. For example, the Committee heard of the difficulty in prosecuting fraud and theft offences against older people. The Queensland Public Advocate told the Committee that it had received anecdotal evidence that 'the police are unwilling to even investigate allegations of fraud under the amount of \$500,000'.<sup>21</sup> The Elder Abuse Prevention Unit (EAPU) informed the Committee that callers to its helpline often report that police cannot bring a charge against a person because of a lack of evidence and that 'there also appears to be a lack of will by some police to follow through with gathering evidence or even to take complaints where older people are the victims of crime'.<sup>22</sup>

5.18 Similarly, the ACT Government commented that prosecution difficulties often arise when older people are the victims of crime, such as elder abuse, because they 'are vulnerable and often regarded

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20 Ms Andrea Simmons, ACT Disability, Aged and Carer Advocacy Service Inc, *Proof Transcript of Evidence*, 17 August 2007, p. 29.

21 Office of the Public Advocate, Queensland, *Submission No. 76*, p. 4.

22 EAPU, *Submission No. 97*, p. 6.

by the legal system as unreliable, and potential disabilities of cognition make them problematic witnesses'.<sup>23</sup> The Law Institute of Victoria also highlighted the evidentiary difficulties surrounding questions of legal capacity and the resultant impact on older people accessing justice.<sup>24</sup> The Committee further heard that in some circumstances many police do not know if they can actually respond to a particular issue.<sup>25</sup>

- 5.19 Many people are prohibited or discouraged from taking legal action where they require an expeditious solution because existing legal systems are limited in their capacity to provide swift and effective legal remedies, quick and effective decision making or dispensation of justice in times of dispute.<sup>26</sup> The Aged Care Crisis Team told the Committee in relation to aged care that:

If the health and well being of the resident is being compromised, speedy action is needed to prevent further deterioration (or death). At present, the avenues of redress are limited and the courts and tribunals are ill-equipped to deal quickly and cheaply with such an issue.<sup>27</sup>

- 5.20 For many people, private legal advice is beyond their means, principally due to cost:

You must realise that all of us at this age are on the age pension, an income of something like \$37 each day. We certainly cannot afford a private solicitor so we are dependent upon the free services of the community legal centres and the others that are available.<sup>28</sup>

- 5.21 The Law Society of Western Australia expressed the view that cost is the greatest barrier to accessing legal services.<sup>29</sup> While many older Australians 'could not even contemplate obtaining private legal advice', the Law Society points out that because of limitations upon legal aid many have 'no source of advice available to them'.<sup>30</sup>

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23 ACT Government, *Submission No. 108*, p. 7.

24 Law Institute of Victoria, *Submission No. 78*, p. 6.

25 Mrs Amanda Hess, Caxton Legal Centre Inc, *Transcript of Evidence*, 16 July 2007, p. 20.

26 Aged Care Crisis Team, *Submission No. 86*, p. 8.

27 Aged Care Crisis Team, *Submission No. 86*, p. 8.

28 Ms Margaret Jones, *Transcript of Evidence*, 14 May 2007, p. 21.

29 Law Society of Western Australia, *Submission No. 50*, p. 4.

30 Law Society of Western Australia, *Submission No. 50*, p. 4.

- 5.22 The Committee considers that there may be merit in establishing a one off payment or annual rebate to older Australians to assist them to overcome the financial limitations on obtaining legal advice. This might encourage older people to obtain assistance in establishing an enduring power of attorney or advance care directive, or to seek advice about other issues affecting them.
- 5.23 During the hearings, Ms Rosalind Williams of Caxton Legal Centre highlighted some of the issues that people need to consider when establishing an enduring power of attorney, such as the trigger for when the document should begin to operate, upon which older people would benefit from obtaining legal advice.<sup>31</sup>

### **Recommendation 36**

- 5.24 **The Committee recommends that the Australian Government examine a rebate scheme for legal fees for older Australians to improve access to legal services.**
- 5.25 The Assets and Ageing Research Team at the University of Queensland submitted that legal practitioners also encounter difficulties because of the length of time taken to explain matters to older people and the limited ability of such people to pay.<sup>32</sup> Many older people are unable to ‘exercise a lot of self help’ and therefore have a high level of reliance upon practitioners to anticipate their needs.<sup>33</sup> This can also contribute to reluctance on the part of legal practitioners to take on matters.
- 5.26 Potential conflicts of interest can also arise where legal practitioners are arranged by family members. This situation can be exacerbated in more remote locations, where there may be only one solicitor.<sup>34</sup>
- 5.27 The Committee heard that for many people a lack of awareness as to where to obtain legal information or difficulties in accessing this information is their main barrier. For example, technology can present a significant barrier:

We are talking about people of 70 or 80: we do not have computers; we do not know how to make them go. We often

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31 Ms Rosalind Williams, Caxton Legal Centre Inc, *Transcript of Evidence*, 16 July 2007, p. 20.

32 Assets and Ageing Research Team, University of Queensland, *Submission No. 26*, p. 7.

33 Council on the Ageing South Australia, *Submission No. 77*, p. 4.

34 Assets and Ageing Research Team, University of Queensland, *Submission No. 26*, p. 7.

try to telephone, and then there is this choice, this menu: 1, up to 10 – and you’ve lost it!<sup>35</sup>

- 5.28 Alzheimer’s Australia argued that in most states and territories ‘there is no obvious place for older people to go to access the information and the support they want to attend to their affairs...’<sup>36</sup>
- 5.29 Similarly, information may not be appropriately communicated. The National Seniors Association observed that many culturally and linguistically diverse people can encounter difficulties not only in obtaining translated information but also in accessing interpreter services.<sup>37</sup>

## Social and cultural barriers

- 5.30 In addition to the barriers already identified, the Committee received evidence as to a range of social and cultural issues that are particularly relevant to the current generation of over 65s. Many participants commented that older people generally are unaware that they may have a legal problem or the right to complain or seek redress in certain situations. Ms Susan Field of the University of Western Sydney observed that:

I think one risk factor for older people is a general lack of information – I hesitate to use the word ‘ignorance’, but a lack of information – in respect of their rights.<sup>38</sup>

- 5.31 Caxton Legal Centre also commented that:

It is apparent that, due to the numerous barriers that older people are confronted with, many do not even seek to raise or identify, their legal problems, let alone attempt to obtain legal advice about their rights and options for remedying the situation... Similarly, we have learnt that older people do not usually self identify that they have legal rights or a legal problem...<sup>39</sup>

- 5.32 Mr Robert Harvie, a 72 year old resident of a retirement village, expressed the view that many older people:

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35 Ms Margaret Jones, *Transcript of Evidence*, 14 May 2007, p. 23.

36 Alzheimer’s Australia, *Submission No. 55*, p. 27.

37 National Seniors Association, *Submission No. 67*, p. 12.

38 Ms Susan Field, University of Western Sydney, *Proof Transcript of Evidence*, 17 August 2007, p. 19.

39 Caxton Legal Centre Inc, *Submission No. 112*, p. 7.



...have no idea as to what the law is about, let alone how it pertains to them and what the language used by the legal profession is about.<sup>40</sup>

- 5.33 The Committee heard that because many older people do not conceptualise an issue as a legal one, they do not see the need for legal advice.<sup>41</sup> This can result in older people placing themselves in vulnerable situations from which, when an adverse event consequently occurs, they are unable to obtain a legal remedy. For example, as discussed in Chapter 4, many older people frequently encounter difficulties in this respect with family agreements that are not documented. Older people often do not envisage that such agreements could be financially disastrous if the arrangements fail or that that they could be left vulnerable, with few assets to pay for care needs.<sup>42</sup> For many in this situation, an additional barrier is then a lack of confidence in enforcing their rights:

It is all very well to increase access to legal services ... but at the same time there needs to be some assistance for the older person to make the psychological commitment to get to that service.<sup>43</sup>

- 5.34 The Committee heard that many older people are reluctant to take legal action and to complain about issues affecting them.<sup>44</sup> The National Seniors Association told the Committee that:

...for older people to have access to legal services, they need to have a level of confidence and empowerment to do so, and this is often hampered by fear of exploitation, retribution, unwillingness to disclose personal information, complex family dynamics, and a wide range of attitudes towards the idea of substitute decision making.<sup>45</sup>

- 5.35 This is often compounded where the issue involves a family member. For example, the Alliance for the Prevention of Elder Abuse: Western Australia highlighted that:

...older people are reluctant to press charges because of family ties and the responsibility they feel for the

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40 Mr Robert Harvie, *Transcript of Evidence*, 15 May 2007, p. 43.

41 Assets and Ageing Research Team, University of Queensland, *Submission No. 26*, p. 7.

42 Assets and Ageing Research Team, University of Queensland, *Submission No. 26*, p. 7.

43 Miss Claudia Ferrante, EAPU, *Transcript of Evidence*, 16 July 2007, p. 53.

44 Law Institute of Victoria, *Submission No. 78*, p. 6.

45 National Seniors Association, *Submission No. 67*, p. 12.

perpetrator's welfare. They do not want to get their relative 'in trouble' or thrown in jail, and want to maintain a personal relationship with the perpetrator, or to be able to have contact with their grandchildren.<sup>46</sup>

- 5.36 There is also a widespread fear of reprisals or retribution,<sup>47</sup> which in many cases is unlikely to occur.<sup>48</sup>
- 5.37 The Committee also heard that in some cases an older person perceives that the law is disempowering and cannot solve their problems.<sup>49</sup> Further, a person may feel that the legal system will be unable to address their principal problem. For example, an injury to an older person can affect their quality of life in a way from which they may never recover.<sup>50</sup> Accordingly, as a legal remedy is not going to give them back their physical ability or lifestyle, they are often reluctant to take legal action.

## Personal barriers

- 5.38 Many barriers are distinctly personal: declining health and mobility, disability, ethnicity, language, gender and social isolation.<sup>51</sup>
- 5.39 An older person may lack the physical or mental capacity to pursue legal services through physical disability, dementia or other reduced cognitive ability.<sup>52</sup> They may not be able to travel to services:<sup>53</sup>

For many, the problem may be as simple as having an impairment or disability that makes it virtually impossible to seek out and travel to the offices of a legal provider.<sup>54</sup>

...my elderly mother's health made it impossible for her to address her situation via legal channels and I don't believe many elderly people could cope with the added burden of

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46 Alliance for the Prevention of Elder Abuse: Western Australia, *Submission No. 114*, p. 6.

47 Law Institute of Victoria, *Submission No. 78*, p. 7; Aged Care Crisis Team, *Submission No. 86*, p. 1; Ms Helen Campbell, Redfern Legal Centre, *Transcript of Evidence*, 14 May 2007, p. 25.

48 Ms Helen Campbell, Redfern Legal Centre, *Transcript of Evidence*, 14 May 2007, p. 26.

49 Law Institute of Victoria, *Submission No. 78*, p. 6.

50 Aged Care Crisis Team, *Submission No. 85*, p. 9.

51 National Legal Aid, *Submission No. 99*, pp. 2, 7.

52 Law Institute of Victoria, *Submission No. 78*, p. 6.

53 Aged Care Crisis Team, *Submission No. 86*, p. 7.

54 Aged Care Crisis Team, *Submission No. 86*, p. 7.

finding an appropriate lawyer to instruct, let alone cope in the court system.<sup>55</sup>

5.40 Similarly, many people in aged care facilities or without a strong support network:

...are virtually prisoners of their infirmity and may not have an emotional or cognitive awareness that would motivate them to take action to protect their legal rights or interests.<sup>56</sup>

5.41 Caxton Legal Centre commented that ill health can also present additional barriers, such as the inability to sit for lengthy periods during interviews or capacity issues where a client may be taking strong pain medications, which can lengthen and complicate the process.<sup>57</sup>

5.42 Frequently an older person does not have access to independent advice where they are reliant upon family members to set up appointments or take them to appointments. Many older people no longer have a drivers licence and are dependent upon family, carers and friends to help them both arrange and travel to and from appointments.<sup>58</sup> Where a situation may be abusive, carers may not provide assistance.<sup>59</sup> Additionally, older people often find it difficult or are deterred by the need to use public transport.<sup>60</sup>

5.43 Failing eyesight and hearing can compound the difficulty in accessing printed materials and/or making telephone calls.<sup>61</sup> Caxton Legal Centre commented that:

This, combined with mobility difficulties means that older clients become increasingly reliant on obtaining advice and gleaning information about legal issues “third hand” – that is, by asking neighbours and family to find out answers to questions for them – and often, in turn, receive misinformation.<sup>62</sup>

5.44 Ms Helen Campbell of the Redfern Legal Centre told the Committee that one of the major barriers to accessing legal services for older

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55 Ms Narelle McDonald, *Submission No. 2*, p. 8.

56 Aged Care Crisis Team, *Submission No. 86*, p. 8.

57 Caxton Legal Centre Inc, *Submission No. 112*, p. 9.

58 Caxton Legal Centre Inc, *Submission No. 112*, p. 8.

59 Caxton Legal Centre Inc, *Submission No. 112*, p. 9.

60 Ms Margaret Jones, *Submission No. 47*, p. 1.

61 Caxton Legal Centre Inc, *Submission No. 112*, p. 9.

62 Caxton Legal Centre Inc, *Submission No. 112*, pp. 9-10.

people within the Waterloo area, the largest public housing area in New South Wales, was fear of crime:

Even though they are in the middle of a bustling metropolis with many services readily available to them, they were essentially isolating themselves because of distrust of their neighbours and distrust of the services that would otherwise be available to them.<sup>63</sup>

5.45 The Alliance for the Prevention of Elder Abuse: Western Australia told the Committee that barriers are compounded for older people of Indigenous and culturally and linguistically diverse backgrounds for the following reasons:

- Aboriginal people age more rapidly than non-Aboriginal people due to inter-generational health and socio-economic issues;
- Many Aboriginal people live in rural and remote communities where there is only limited access to legal and other services;
- Many people distrust the police and legal services based upon past discriminatory experiences; and
- Mainstream services can have variable cultural and linguistic relevance to Aboriginal and culturally and linguistically diverse people.<sup>64</sup>

5.46 Mrs Maureen Sellick of Advocare commented that:

We do not get many Aboriginal clients ringing us up, because they do not like the idea of approaching mainstream services.<sup>65</sup>

5.47 The Public Advocate in Queensland highlighted that many people with limited English language skills may have little or no familiarity with services and therefore rely heavily upon family and others within their social networks for assistance.<sup>66</sup>

5.48 The Committee considers that many of the barriers that have been identified can be addressed through legal services that are conversant with the issues generally affecting older people and that are able to provide advice or other assistance in a setting and manner that older people can readily access.

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63 Ms Helen Campbell, Redfern Legal Centre, *Transcript of Evidence*, 14 May 2007, p. 25.

64 Alliance for the Prevention of Eder Abuse: Western Australia, *Submission No. 114*, p. 5.

65 Mrs Maureen Sellick, Advocare, *Transcript of Evidence*, 30 July 2007, p. 23.

66 Office of the Public Advocate, Queensland, *Submission No. 76*, p. 11.

## Legal Services

### Legal Aid

- 5.49 Legal Aid Commissions provide a number of services—including telephone and face to face legal advice, minor assistance, duty lawyer assistance, information and referral services and community legal information—that are free of charge and therefore generally available to anyone in the community, including older people.<sup>67</sup>
- 5.50 Other services, including grants of legal assistance, primary dispute resolution services and legal representation, are contingent upon meeting the requirements of funding agreements.<sup>68</sup> For example, state and territory commissions receive funding from the Australian Government to provide assistance for matters arising under Commonwealth laws. Grants are then provided by commissions in accordance with Commonwealth priorities and guidelines.<sup>69</sup> Legal Aid Commissions are therefore required:
- To ascertain that each application for a grant of assistance for legal representation falls within the guideline relevant to the Commonwealth Law matter type for which assistance is sought; and
  - To apply a means test to the application; and
  - To apply a merit test to the application; and
  - To grant legal aid in accordance with the prescribed Commonwealth “priorities”.<sup>70</sup>
- 5.51 The Committee notes that where a Commission does not have sufficient funds to satisfy demand, then aid may be refused on the basis of competing priorities.<sup>71</sup>
- 5.52 The Committee was informed by the Attorney-General’s Department that:
- Older persons can access legal aid through legal aid commissions and community legal centres in the same way

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67 National Legal Aid, *Submission No. 99*, p. 2.

68 National Legal Aid, *Submission No. 99*, p. 2.

69 Attorney-General’s Department, *Submission No. 100*, p. 3.

70 National Legal Aid, *Submission No. 99*, p. 6.

71 National Legal Aid, *Submission No. 99*, p. 6.

and under the same conditions as other members of the community.<sup>72</sup>

- 5.53 However, many participants to the inquiry expressed the view that while Legal Aid assistance is notionally available to older people, restrictive eligibility tests and minimal funding for civil disputes effectively excludes or limits the ability of older people from obtaining this assistance.<sup>73</sup>
- 5.54 The Committee notes, for example, that in Queensland people aged 65 years or older represent 0.96 per cent of clients who receive legal representation by Legal Aid Queensland.<sup>74</sup> Similarly, approved legal aid applications for people aged 65 and older comprised only 2.87 per cent of the total number of applications approved across Australia in 2005-06 relating to Commonwealth laws.<sup>75</sup>
- 5.55 National Legal Aid and individual commissions informed the Committee that most grants of legal assistance are provided for family law matters where children are involved, and family violence and criminal law matters, whereas older people are more likely to need assistance with civil law matters.<sup>76</sup> The Legal Aid Commission of NSW told the Committee that the most common issues that older people bring to the Commission are civil: housing and loss of dwelling, tenancy issues, consumer protection, discrimination, entitlements for social security, and veterans' entitlements.<sup>77</sup> Ms Paula Stirling of the Law Society of South Australia observed that civil law is a major unmet legal need for older Australians.<sup>78</sup> The Committee notes that changes to the funding arrangements for legal aid implemented in 1996, whereby the Australian Government

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72 Attorney-General's Department, *Submission No. 100*, p. 2.

73 National Legal Aid, *Submission No. 99*, pp. 1-13; Ms Patricia Reeve, Council on the Ageing Over 50s, *Proof Transcript of Evidence*, 17 August 2007, p. 7; Mr Michael Vescio, *Alternative Guardian, Transcript of Evidence*, 14 May 2007, p. 72; Assets and Ageing Research Team, University of Queensland, *Submission No. 26*, p. 7; Human Rights and Equal Opportunity Commission (HREOC), *Submission No. 92*, p. 37; Law and Justice Foundation of NSW, *Submission No. 102*, p. 4; Queensland Government, *Submission No. 107*, p. 6; ACT Government, *Submission No. 108*, p. 5.

74 Queensland Government, *Submission No. 107*, p. 6.

75 Attorney General's Department, *Submission No. 100*, p. 3.

76 National Legal Aid, *Submission No. 99*, p. 2; Victoria Legal Aid, *Submission No. 101*, p. 5; Mr Stephen O'Connor, Legal Aid Commission of NSW, *Transcript of Evidence*, 14 May 2007, p. 5.

77 Mr Stephen O'Connor, Legal Aid Commission of NSW, *Transcript of Evidence*, 14 May 2007, p. 5.

78 Ms Paula Stirling, Law Society of South Australia, *Transcript of Evidence*, 31 July 2007, p. 9.

determined it would only fund matters arising under Commonwealth laws, led to grants for civil matters dropping by 90 per cent in Victoria.<sup>79</sup>

5.56 Mr David Walsh, a private legal practitioner, observed that:

We all know that the bulk of legal aid is given in criminal matters, usually to people, often men, who are charged with property offences or domestic violence type situations... When legal aid budgets are completely dominated by those sorts of considerations, any attempt by people to get aid because they would argue that their son, daughter, cousin or whatever has defrauded them of their money or kicked them out of the granny flat or whatever, is doomed to failure.<sup>80</sup>

5.57 The means test was raised as an issue by a number of inquiry participants. Caxton Legal Centre highlighted that many older people who are home owners are ineligible for legal aid despite being reliant upon a pension or other government benefit as their main means of support.<sup>81</sup> National Legal Aid told the Committee that the means test 'has a low threshold for assets' and does not sufficiently recognise the financial position of those people with 'very modest savings'.<sup>82</sup> Accordingly:

...many people who presently do not qualify under the Means Test are not able to afford the services of private lawyers to conduct their cases or at least not able to do so without undue hardship.<sup>83</sup>

5.58 The Committee was pleased to see that this issue has been recognised by legal aid commissions and that work has been undertaken to address the matter. Mr Norman Reaburn of National Legal Aid told the Committee:

We have to operate a means test. The means test is not particularly well crafted to accommodate a range of the problems and issues that face older Australians. A high proportion of older Australians have comparatively low incomes but are reasonably well off in terms of assets. That

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79 Victoria Legal Aid, *Submission No. 101*, p. 5.

80 Mr David Walsh, *Transcript of Evidence*, 23 March 2007, p. 41.

81 Caxton Legal Centre Inc, *Submission No. 112*, p. 18.

82 National Legal Aid, *Submission No. 99*, p. 2.

83 National Legal Aid, *Submission No. 99*, p. 11.

tends to mean that they will fail our means test, even though their actual disposable income is not particularly significant.<sup>84</sup>

I do have to say that National Legal Aid, in conjunction with the Commonwealth, has had this feeling for some time in a range of areas. We have been doing some work on the means test in an attempt to try and find ways to make it fairer and to allow it, particularly in the area that this committee is looking at, to accommodate a greater range of available services to older people. That is the first thing that we need to stress to the committee.<sup>85</sup>

5.59 The Committee recognises that National Legal Aid has a number of initiatives in progress to address these issues.<sup>86</sup>

5.60 The Committee also received evidence that many older people require assistance to sort out their affairs rather than proceed with litigation:

The expansion of “Minor Assistance” or “Brief Services” programs with a relaxed means and merit test would allow Commissions to spend limited time assisting people, including older people, to negotiate and resolve a range of legal issues without recourse to litigation. In many consumer areas there are national external dispute resolution schemes... Many people require assistance to gather and present the facts of their cases so as to be able to access these schemes and resolve a range of common consumer disputes.<sup>87</sup>

5.61 Further, as noted by the Victorian Government, funding for minor assistance and particularly civil matters ‘has the potential to prevent small problems becoming large ones...’<sup>88</sup>

5.62 While the Committee acknowledges the need to prioritise available funding, it is concerned that limited funding combined with the existing eligibility criteria results in many older people being unable to access legal services. As Mr Stephen O’Connor of the Legal Aid Commission of NSW highlighted to the Committee:

Our funding is an area of anxiety. It limits the way we can provide services and limits the number of people who can receive those services.<sup>89</sup>

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84 Mr Norman Reaburn, National Legal Aid, *Transcript of Evidence*, 5 June 2007, p. 12.

85 Mr Norman Reaburn, National Legal Aid, *Transcript of Evidence*, 5 June 2007, p. 13.

86 Mr Norman Reaburn, National Legal Aid, *Transcript of Evidence*, 5 June 2007, p. 14.

87 National Legal Aid, *Submission No. 99*, p. 12.

88 Victorian Government, *Submission No. 121*, p. 36.



- 5.63 The solution, in National Legal Aid's view, is:
- An increase in funding so as to enable the easing of the means test would result in more people qualifying for legal aid.<sup>90</sup>
- 5.64 This was echoed by the Victorian Government, which suggested that relaxing the restrictions upon access to legal aid would be one way to improve the legal outcomes for older people.<sup>91</sup>
- 5.65 A number of participants also agreed that providing Commissions with flexibility in the use of some of their funds would facilitate improved outcomes for older people, particularly in areas of civil law.<sup>92</sup>
- 5.66 The Committee notes that additional funding for legal aid was announced in the 2007-08 Budget for services in regional, rural and remote areas, for separated families and for serious criminal prosecutions.<sup>93</sup> However, it is not clear to the Committee whether this will assist older people, particularly in the area of greatest demand: civil law. National Legal Aid told the Committee:
- ...we anticipate increasing demand over the coming years for an expansion of our civil law services. It will not be possible for Commissions to meet this demand without funding adequate for the purpose and funding agreements which support the delivery of the required services.<sup>94</sup>
- 5.67 The demands and needs of older people for legal services are only likely to increase in the future given the ageing Australian population and increased life expectancy. The Committee considers that, while increased flexibility for Commissions regarding funding use may assist in meeting this need in respect of legal aid, it could equally transpire that it does not. The Committee is of the view therefore that the best way to ensure that the legal aid needs of this growing sector

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89 Mr Stephen O'Connor, Legal Aid Commission of NSW, *Transcript of Evidence*, 14 May 2007, p. 7.

90 National Legal Aid, *Submission No. 99*, p. 11.

91 Victorian Government, *Submission No. 121*, p. 32.

92 Victoria Legal Aid, *Submission No. 101*, p. 5; Ms Marilyn Lennon, Law Society of South Australia, *Transcript of Evidence*, 31 July 2007, p. 11.

93 Media Release by the Attorney-General's Department, 'Boost for Legal Aid', 8 May 2007, <http://www.ag.gov.au/www/agd/agd.nsf/Page/RWP64E4CC74F037B1DCCA2572D400014763>.

94 National Legal Aid, *Submission No. 99*, p. 13.

of the population are met is for a portion of existing legal aid funding – 10 per cent – to be dedicated to matters involving older people.

### **Recommendation 37**

- 5.68 **The Committee recommends that the Australian Government require that ten per cent of Commonwealth funding to the Legal Aid Commissions be utilised for assisting older Australians with legal matters that otherwise qualify for legal aid assistance.**

### **Family Relationship Centres**

- 5.69 The Council on the Ageing Over 50s identified grandparents as one group of older people who face a number of distinct legal, financial and support issues.<sup>95</sup> The Committee received evidence that changes to the *Family Law Act 1975* have been implemented to better recognise the role of grandparents.<sup>96</sup>

- 5.70 According to the Attorney-General's Department, the Family Relationship Centres that have been established around Australia provide information, advice and referral 'for anyone who is affected by family relationship or separation issues and difficulties, including grandparents'.<sup>97</sup>

- 5.71 The Committee heard that around ten per cent of the clients accessing one particular centre are grandparents. Ms Jennifer Hannan of Family Services Australia and Anglicare Services in Western Australia told the Committee:

I think there is evidence to suggest that the advertising around the new family law changes and the family relationship centres has certainly engaged somewhat with grandparents and they are certainly more aware of their rights in relation to seeing their grandchildren.<sup>98</sup>

- 5.72 Ms Hannan went on to comment that 'the services have been highly successful, partly because they are highly visible'.<sup>99</sup>

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95 Council on the Ageing Over 50s, *Submission No. 58*, pp. 10-11.

96 Attorney-General's Department, *Submission No. 100*, p. 4.

97 Attorney-General's Department, *Submission No. 100*, p. 5.

98 Ms Jennifer Hannan, Family Services Australia and Anglicare Services in Western Australia, *Transcript of Evidence*, 23 March 2007, p. 44.

99 Ms Jennifer Hannan, Family Services Australia and Anglicare Services in Western Australia, *Transcript of Evidence*, 23 March 2007, p. 46.

- 5.73 The Committee notes that the new services include targeted information for grandparents, research and training for practitioners to promote good practice, as well as mediation.<sup>100</sup>

## Community Legal Centres

- 5.74 Community Legal Centres (CLCs) are independent and community managed non-profit services which provide a range of assistance on legal and related matters.<sup>101</sup> There are around 200 community legal centres throughout urban, regional and rural Australia,<sup>102</sup> with 128 funded by the Australian Government.<sup>103</sup>

- 5.75 The Attorney-General's Department commented that:

Assistance is directed towards people who experience some form of systemic or socio-economic barrier to accessing legal services and/or whose interests should be pursued as a matter of public interest.<sup>104</sup>

- 5.76 The Committee heard that CLCs are open to providing services for older people, providing they meet the requirements in terms of level of disadvantage.<sup>105</sup> The Committee notes that in the period of 2000-01 to 2005-06, between 5 and 6 per cent of clients seen by CLCs were 65 years or older.<sup>106</sup>

- 5.77 The Committee received evidence that CLCs are well placed in terms of their manner of operation to provide legal services to older people. For example, Ms Jeni Lee of the Federation of Community Legal Centres (Vic) Inc told the Committee:

We believe that we are in a very good position to act as gatekeepers to some of those more highly sophisticated and intimidating issues that face people as they age.<sup>107</sup>

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100 Ms Jennifer Hannan, Family Services Australia and Anglicare Services in Western Australia, *Transcript of Evidence*, 23 March 2007, p. 46.

101 Attorney-General's Department, *Submission No. 100*, p. 4.

102 National Association of Community Legal Centres website, 'What is a CLC?', <http://www.naclc-qat.socialchange.net.au/topics/2000.html> (accessed 5 September 2007).

103 Attorney-General's Department, *Submission No. 100*, p. 4.

104 Attorney-General's Department, *Submission No. 100*, p. 4.

105 Ms Katherine Jones, Attorney-General's Department, *Transcript of Evidence*, 23 March 2007, p. 57.

106 Attorney-General's Department, *Submission No. 100*, p. 4.

107 Ms Jeni Lee, Federation of Community Legal Centres (Vic) Inc, *Transcript of Evidence*, 4 June 2007, p. 62.

5.78 Professor Jill Wilson of the Assets and Ageing Research Team at the University of Queensland also commented:

It is clear from our research that older people will benefit from timely and independent legal advice. However, many are unlikely to contact a solicitor in private practice. In addition, many solicitors find it difficult to charge adequately for the time taken by people who wish to take a more conversational approach to the issues.

It is in this context that community based legal services are most appropriate. They can raise awareness of the financial management issues that are a key part of aged care, they can support service providers ... and they can provide appropriate legal advice to older people. Such services can also provide much-needed outreach services to those who are unable or loath to access legal services that are more formal. The combination of social worker and legal practitioner in such services also allows older people to access short-term counselling and referral to community services as well as legal information and advice.<sup>108</sup>

5.79 The Committee heard that the Seniors Advocacy Information and Legal Service (SAILS), operated through Caxton Legal Centre, provides the following services to people over the age of 60 who are at risk of abuse:

- Court representation;
- Crisis and short term counselling, including the development of safety plans;
- Referral to other legal and/or support organisations;
- Information, advice and support to service providers;
- Arranging pro-bono legal assistance (where possible) for more complex legal matters such as recover of money or property; and
- Community legal education.<sup>109</sup>

5.80 Similarly, the Federation of Community Legal Centres (Vic) Inc told the Committee that the 52 CLCs across Victoria assist people with free legal advice, information, assistance, advocacy and representation,

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108 Professor Jill Wilson, University of Queensland, *Transcript of Evidence*, 16 July 2007, p. 64.

109 Office of the Public Advocate, Queensland, *Submission No. 76*, p. 9.

and community legal education.<sup>110</sup> The Committee heard that these CLCs take a multidisciplinary approach:

...by looking beyond the strictly legal issues and working collaboratively with other disciplines, such as health, financial counselling, housing and others.<sup>111</sup>

5.81 The EAPU in Queensland also told the Committee that the 'Legal Outreach for Older Persons' program that operated from Caxton Legal Centre paired a lawyer with a social worker to provide a more holistic approach to the legal matters affecting older people.<sup>112</sup> The EAPU commented that:

This model recognised that older people may need the support of a social worker when accessing the law as an older person may require assistance with a number of unaddressed needs.<sup>113</sup>

5.82 The Committee notes that the mode of delivery is an essential component to many of the services provided by CLCs. For example, in its submission, the Federation of Community Legal Centres (Vic) Inc highlighted a number of initiatives, including:

- Home based service for the frail elderly during the day;
- Evening 'road shows' through aged care facilities;
- Visits to public housing estates to offer a legal service in a safe setting;
- Community legal education workshops; and
- Involvement of final year law students in clinics.<sup>114</sup>

5.83 Similarly, the Loddon Campaspe Community Legal Centre commented that in its experience:

Service models for older people should include outreach services in local communities, partnerships with local community agencies and groups, community legal education to raise awareness of issues and options, legal services that

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110 Federation of Community Legal Centres (Vic) Inc, *Submission No. 41*, p. 3.

111 Federation of Community Legal Centres (Vic) Inc, *Submission No. 41*, p. 3.

112 EAPU, *Submission No. 97*, p. 3.

113 EAPU, *Submission No. 97*, p. 3.

114 Federation of Community Legal Centres (Vic) Inc, *Submission No. 41*, pp. 5-7.

specialise in older people's legal issues, legal assistance and education in simple terms.<sup>115</sup>

- 5.84 This was echoed by both the Law Society of South Australia and the Aged Rights Advocacy Service.<sup>116</sup> Ms Paula Stirling of the Law Society of South Australia observed that:

Outreach services have proven to be highly effective in reaching client target groups who would not normally access traditional legal services. Given the restricted ability of some older people to attend additional legal appointments, outreach services to locations frequented by older people may be an effective way to deliver legal assistance to where it is needed.<sup>117</sup>

- 5.85 The Federation of Community Legal Centres (Vic) Inc commented that outreach models can work well with volunteer and pro bono support and increase the number of locations where outreaches are conducted.<sup>118</sup>

- 5.86 The Committee notes that many of the issues dealt with by CLCs relate to civil law. For example, Caxton Legal Centre commented that approximately half its work involves civil law.<sup>119</sup> In addition, CLCs provide advice in areas of law not traditionally considered commercially viable by private legal practitioners. Accordingly, they have developed expertise in certain areas of the law.<sup>120</sup>

- 5.87 The Committee considers CLCs to be well placed to provide information, advice, counselling, and advocacy to older people in one location. Ms Jeni Lee of the Federation of Community Legal Centres (Vic) Inc observed:

And that is exactly what they want. They want a one-stop shop where they get legal services but they also get legally related information. It may not identify for them their legal

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115 Loddon Campaspe Community Legal Centre, *Submission No. 57*, p. 4.

116 Ms Paula Stirling, Law Society of South Australia, *Transcript of Evidence*, 31 July 2007, p. 10; Mrs Susan Lyons, Aged Rights Advocacy Service Inc, *Transcript of Evidence*, 31 July 2007, p. 21.

117 Ms Paula Stirling, Law Society of South Australia, *Transcript of Evidence*, 31 July 2007, p. 10.

118 Federation of Community Legal Centres (Vic) Inc, *Submission No. 41*, p. 11.

119 Caxton Legal Centre Inc, *Submission No. 112*, p. 6.

120 Caxton Legal Centre Inc, *Submission No. 112*, p. 7.

problem but it will tell them about what advocacy services are available and give them other sorts of information.<sup>121</sup>

5.88 In addition, the Committee considers that initiatives that focus specifically upon the legal issues affecting older people are also important. During the hearings, Ms Susan Field of the University of Western Sydney told the Committee:

I would certainly see community legal centres having staff experienced in elder law issues such as retirement villages, aged-care facilities, reverse mortgages, substitute decision making and Centrelink issues, of course. They would have a hotline people can ring—not one where you press several numbers but a number where an actual person will speak to you—and they could have the carriage of matters and take matters to court if needs be.<sup>122</sup>

5.89 During the course of the inquiry, the Committee heard of a number of initiatives focussed specifically upon services for older people, including:

- An Elder Abuse Information, Support and Legal Service, to commence in mid 2007 with funding from the WA Government.<sup>123</sup>
- An Older Persons Legal Service that had been allocated \$1.2 million over four years to provide general legal education and advocacy services, and which will operate under the auspices of Victoria Legal Aid.<sup>124</sup>
- \$1.9 million from the Queensland Government to fund a trial legal service in Cairns, Townsville, Toowoomba, Hervey Bay and Brisbane based upon the SAILS model but with an expanded focus upon financial abuse.<sup>125</sup>
- An Older Persons' Rights Service that commenced on 1 July 2007 and which will be jointly delivered by Northern Suburbs Community Legal Service and Advocare in Western Australia.<sup>126</sup>

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121 Ms Jeni Lee, Federation of Community Legal Centres (Vic) Inc, *Transcript of Evidence*, 4 June 2007, p. 64.

122 Ms Susan Field, University of Western Sydney, *Proof Transcript of Evidence*, 17 August 2007, pp. 21-22.

123 Alliance for the Prevention of Elder Abuse: Western Australia, *Submission No. 114*, p. 5.

124 Victorian Government, *Submission No. 121*, pp. 8, 32.

125 Mr Gregory McDougall, Caxton Legal Centre Inc, *Transcript of Evidence*, 16 July 2007, p. 14.

126 Mr Stephen Boylen, WA Government, *Transcript of Evidence*, 30 July 2007, p. 6.

This service will provide legal and social support for people affected by elder abuse and community legal education.<sup>127</sup>

- An Older Persons Legal Program, established by Loddon Campaspe Community Legal Centre in May 2006 and funded by philanthropic trusts to provide casework, community legal education and policy/law reform for older people.<sup>128</sup> The Committee was interested to note that this program has established outreaches at a number of community health centres and Bendigo Base Hospital to 'acknowledge the convergence of health, social and legal issues for many older people'.<sup>129</sup>

5.90 Caxton Legal Centre pointed to the SAILS model as one that could be implemented on a national basis to provide assistance 'with a broad range of legal issues affecting older people including claims arising out of elder abuse'.<sup>130</sup>

5.91 The Committee heard that many older people are unable to access the services of CLCs simply because the CLCs lack resources.<sup>131</sup> This includes funding limitations and the difficulties in attracting suitable staff:

I cannot miss this opportunity to say that the wages of community legal centres are notoriously hopeless and it is becoming increasingly difficult to attract and retain quality staff.<sup>132</sup>

5.92 Accordingly, CLCs must prioritise their caseload as well as balance it with their role in providing education and community development.<sup>133</sup>

5.93 Mr Gregory McDougall of the Caxton Legal Centre told the Committee that in his view:

The legal problems faced by older people have been hidden, obviously, but in our view they are going to become more

127 Mrs Maureen Sellick, *Advocare, Transcript of Evidence*, 30 July 2007, p. 23.

128 Loddon Campaspe Community Legal Centre, *Submission No. 57*, p. 13.

129 Loddon Campaspe Community Legal Centre, *Submission No. 57*, p. 14.

130 Caxton Legal Centre Inc, *Submission No. 112*, p. 17.

131 Law and Justice Foundation of New South Wales, *Submission No. 102*, p. 4; Law Institute of Victoria, *Submission No. 78*, p. 6; Aged Care Crisis Team, *Submission No. 86*, p. 7; HREOC, *Submission No. 92*, p. 37.

132 Mr Gregory McDougall, Caxton Legal Centre Inc, *Transcript of Evidence*, 16 July 2007, p. 21.

133 Victorian Government, *Submission No. 121*, p. 32.



acute and much more publicly visible in the next 10 to 15 years, not just because of the ageing population but also because of the increasingly complex legal environment that older people are finding themselves in. We have found in the last 10 years that generally, across the board, matters that are coming to community legal centres are becoming increasingly multilayered and complex, and particularly so with older clients.<sup>134</sup>

5.94 He went on to argue that :

The government needs to invest heavily now to avoid these problems that are going to impact downstream. We say that a logical investment would be to inject substantial funding into the community legal sector to provide services to older people. In Queensland, it has been the Department of Communities that has taken the lead to provide legal services to older people. That is because our approaches to the Commonwealth, Attorney-General's and state legal aid to date have not been successful. We are hoping that as part of the pilot outcome there will be recurrent funding made available...<sup>135</sup>

5.95 For many older people, their key need in terms of adequate legal services is access to free or low cost, easily accessible and appropriate targeted services. Ms Andrea Simmons of the ACT Disability, Aged and Carer Advocacy Service observed:

What we are really looking for is certainly a low-cost provision of legal advice to elderly people on specific areas that affect them.<sup>136</sup>

5.96 The Committee considers that CLCs, particularly where they can provide outreach or home visits, are well placed to fill this need within the community. The Centres have developed expertise in many areas of law that affect older people and are able to deliver services in a manner that meets the needs of many older people.

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134 Mr Gregory McDougall, Caxton Legal Centre Inc, *Transcript of Evidence*, 16 July 2007, p. 14.

135 Mr Gregory McDougall, Caxton Legal Centre Inc, *Transcript of Evidence*, 16 July 2007, p. 15.

136 Ms Andrea Simmons, ACT Disability, Aged and Carer Advocacy Service Inc, *Proof Transcript of Evidence*, 17 August 2007, p. 29.

**Recommendation 38**

- 5.97 **The Committee recommends that the Australian Government increase funding to the Community Legal Services Program specifically for the expansion of services, including outreach services, to older people by Community Legal Centres.**
- 5.98 The Council on the Ageing Over 50s told the Committee that, in its view, more work needs to be undertaken to raise awareness of and familiarity with legal issues, rather than just focusing upon legal remedies.<sup>137</sup> The Committee concurs with this view. In addition, while it was clear to the Committee that there is a role for CLCs in addressing many of the barriers to legal services experienced by older people, it notes that the number of older people utilising the service is still small. The Committee believes there is a need for CLCs to be able to improve their visibility as a source of legal services for older people and raise awareness of the services they can provide.

**Recommendation 39**

- 5.99 **The Committee recommends that the Australian Government provide funding to Community Legal Centres to expand their community education role, with a specific focus upon older people.**
- 5.100 The Committee also sees merit in the establishment of a central resource or referral service that older people can utilise to obtain basic information about where to go to obtain legal assistance. This could take the form of a 1800 telephone number in a similar manner to that which has been utilised for government campaigns.

**Recommendation 40**

- 5.101 **The Committee recommends that the Australian Government establish a resource service for older people, accessible through a single contact point, such as an 1800 telephone number, that can provide assistance to older people in identifying the legal services that are available to them.**
- The Committee recommends that this be supported by a media education campaign to alert older people to their legal rights and to advertise the availability of legal assistance.**

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137 Ms Jane Fisher, Council on the Ageing Over 50s, *Proof Transcript of Evidence*, 17 August 2007, p. 4.

## Older people as offenders

5.102 Although not specifically mentioned in the Terms of Reference, the Committee did receive a submission regarding the particular situation of older people as offenders. The concerns revolve around whether a custodial sentence was appropriate for some older offenders; and secondly, if a custodial sentence was given, whether appropriate facilities were available to deal with this category of prisoner.

5.103 The Legal Aid Commission of NSW argued that with an ageing population:

Given the nature of the demographic, it is not surprising that offences involving social security fraud constitute a significant proportion of offences that older people are charged with. The case law is well established that general deterrence required that offences involving social security fraud will generally attract a custodial sentence. The issue for the criminal justice system is balancing the purposes and principles of sentencing to ensure that the sentence reflect not only the offence but the offender... It is also important where the priority given to general deterrence results in a harsh or oppressive sentence. Incarceration without effective geriatric prison care can result in deterioration of physical and mental health, reduced life expectancy and can result in premature death.<sup>138</sup>

5.104 The Legal Aid Commission indicated that 'the Commonwealth legislative regime should take into account the age of offenders in the way that it deals with them on conviction and sentence'.<sup>139</sup>

5.105 Australian Bureau of Statistics figures on prisoners in Australia as at 30 June 2006 indicate that 1.4 per cent of the prison population were aged 65 years and over. Men were significantly more represented than women (1.5 per cent of male prisoners were in this age bracket, compared to 0.5 per cent of female prisoners).<sup>140</sup> Statistics on the length of sentences and severity of crimes perpetrated by this older group are not available.

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138 Legal Aid Commission of NSW, *Submission No. 91*, p. 2.

139 Mr Stephen O'Connor, Legal Aid Commission of NSW, *Transcript of Evidence*, 14 May 2007, p. 5.

140 For more information:

<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4517.02006?OpenDocument> (accessed 30 August 2007).

5.106 The Committee notes that the Australian Law Reform Commission (ALRC) released a report on sentencing of federal offenders in April 2006.<sup>141</sup> In that report the ALRC identified a number of categories of federal offenders that might require special consideration in regard to sentencing of federal offenders. These include young offenders; those with a mental illness or intellectual disability; women; offenders with family and dependants; Aboriginal and Torres Strait Islanders; those from linguistically and culturally diverse backgrounds; offenders with a drug addiction; and those with problem gambling issues. Interestingly, the ALRC in its report noted:

These are not the only categories of federal offenders with special needs that arise in the context of sentencing. During the course of the Inquiry stakeholders expressed concern about sentencing options for elderly offenders and access to rehabilitation programs by non-citizen offenders. It has not been possible to discuss every possible category of offender with special needs in the Inquiry. Nevertheless, stakeholders have highlighted the need for other categories to be considered further.<sup>142</sup>

5.107 The Committee notes that it is difficult to balance the need for general deterrence and punishment against concerns that offenders be dealt with appropriately. The Committee was not persuaded, however, that age in and of itself should be a factor for consideration in sentencing, but rather there should be some link to physical and mental capacity when deciding what might be appropriate.

5.108 In regard to accommodation for older prisoners, in the UK there is a purpose built unit for older prisoners located at Norwich. The unit can only house 15 prisoners as the Prison Service has restricted admissions to those serving life sentences, who might ordinarily not expect to be released:

It is operated as a secure nursing home and can cope with all but acute illness. The facilities can adapt to all disabilities.<sup>143</sup>

5.109 It was suggested that state governments could examine whether such a facility would be appropriate in Australia.<sup>144</sup> The Committee notes that this issue has been recognised in some jurisdictions already. The

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141 ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No. 103, April 2006.

142 ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No. 103, April 2006, p. 710.

143 'Social Security fraud committed by older people', *Exhibit No. 33*, p. 5.

144 'Social Security fraud committed by older people', *Exhibit No. 33*, p. 5.

NSW Department of Corrective Services has indicated that a prison hospital wing is to be built for such prisoners. There may also be alternatives to full time prison sentences, such as community service options and home imprisonment. The Tasmania Prisons Infrastructure Redevelopment program has recognised that the 'planning process has taken into account that in any prison population there will be some older inmates. The smaller accommodation units included in the new prisons will provide the capacity to separate prisoners with different needs from each other'.<sup>145</sup>

- 5.110 Correctional facilities are an issue for state and territory governments. However, the Committee is concerned that the matter be addressed across all Australian jurisdictions and a national approach adopted. It would therefore propose that the Corrective Services Ministers Conference consider the matter of accommodation needs of older prisoners.

#### **Recommendation 41**

- 5.111 **The Committee recommends that the Minister for Justice and Customs raise with the Corrective Services Ministers Conference a study being undertaken on the future needs of older offenders within correctional facilities.**

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<sup>145</sup> [http://www.justice.tas.gov.au/pirp/background/special\\_needs#Older%20prisoners](http://www.justice.tas.gov.au/pirp/background/special_needs#Older%20prisoners) (accessed 30 August 2007).