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The Secretary
House of Representatives Standing Committee
on Legal and Constitutional Affairs
PO Box 6021 Parliament House
CANBERRA ACT 2600
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Dear Sir,

Older People and the Law

On behalf of Council on the Ageing (COTA) SA we are pleased to forward the attached submission to this Inquiry.

This Inquiry deals with complex matters of which Australian society is only beginning to become aware, let alone coming to grips with. Our submission only touches upon many matters on which we could expand in some detail.

This submission is based on COTA SA's direct work with senior Australians, both in our services provided to them, and through their representation on our Policy Council and other structures.

We would be pleased to further assist the Inquiry through verbal testimony, and / or supplementary written advice. Please contact our Policy Officer

Yours sincerely,

Ian Yates AM
Chief Executive

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Patron ~ Her Excellency Marjorie Jackson-Nelson, AC, CVO, MBE, Governor of South Australia

COUNCIL ON THE AGEING



**Submission to
House of Representatives
Standing Committee on
Legal and Constitutional Affairs**

**Inquiry into
Older People and the Law**

December 2006

Introduction

A crime is a crime, irrespective of the victim's age. The law should treat older people as it treats all people. Age of itself should not affect how the law applies or is formulated. However older people may be more or less associated with particular needs.

The Standing Committee on Legal and Constitutional Affairs Inquiry has adopted the definition of older people as those aged over 65 years. From the middle of this century between one quarter and one third of Australians will be aged over 65 years and will have a life expectancy well into their 90s. The legal needs of older people will be the legal needs of much of the population.

However, legislative regimes tend to be inert; that is, they take time to be altered. The Inquiry should seek to facilitate the development of legal frameworks that anticipate future needs.

Furthermore, those needs will reflect the needs of a group we can expect to be very different from our current older population. It is not that long ago that the reality of being old was, in general, to be poor and relatively frail. Advances in education, in income and social support, and improvements in fitness and health in the mainstream population mean that many older people will be socially, economically and physically active. These social changes will also see a marked increase in the number of people living into what is currently considered to be very old age, with care and support needs that are not yet understood.

Older people will be as diverse as the rest of our community, and will include people with many social and cultural experiences. Extreme poverty may re-emerge for people who through limited employment, ill health or incapacity, or family caring responsibilities, have not been able to build assets throughout their economically active years. There will also still be many people who live for many years on limited incomes after retirement. There will be older homeless people, people of many cultural backgrounds, people with varied sexual preferences and people living in a range of relationships and household types. There will be older people who are socially and economically independent and older people who are vulnerable, in need of care, support and protection. All these citizens have a right to legal frameworks that support their continued participation in and contribution to society within each of their capacities. The Inquiry could usefully consider what planning and preparation needs to happen now to prepare for older people's needs in the coming decade and beyond.

The current needs of older people include their reluctance or incapacity to use legal instruments and their limited access to legal remedy. Some of the complexity stems from the social and family interactions that surround key areas of crime and civil law relevant to older people including relationships with spouses and family members. While these complexities are often also present in victimisation and legal action among other members of the community, it is the vulnerability of some older people that warrants particular

attention to their legal, justice and safety needs. Older people should not, however, be treated as incapacitated, incapable or infantile by virtue of having lived longer than some others in our community.

Much has been written about the behaviour and needs of older people relative to the general population. For example,

Many of the obstacles for older people in accessing legal services reflect characteristics of the current cohort of older people, including a lack of awareness of their legal rights, a lack of confidence in enforcing those rights, a reluctance to take legal action, and a perception that the law is disempowering and cannot solve their problems¹.

Accordingly, preventative, mediative and restorative approaches to older people's legal needs would significantly augment the value of existing legislative frameworks.

These matters undoubtedly need to be addressed by the Inquiry. To these COTA would add a lack of consumer and financial product awareness, and a lack of duty of care by some providers and lenders. Crime prevention, community justice and safety are also matters of significant concern to older Australians and their families.

Older people who have utilised legal services throughout their lives generally do not report increased difficulties in finding advice and services appropriate to changing needs that are specific to ageing. In addition, a range of organisations to which older people belong [including COTA SA], or receive other services from, offer one-off free legal services which are well utilised. However, for people with ongoing legal matters, and among people for whom lack of income or mobility limit capacity, access to legal remedy can be difficult.

Some older people have assets that preclude them from gaining legal aid. However, liquidating such assets to undertake legal action [for example, selling a home] is likely to reduce or remove capacity to continue to live independently in the community, and would impact negatively on Centrelink income and benefit entitlements.

Older indigenous people face the same issues in relation to community and legal justice as do their younger community members. Past experience and contact with the justice system may inhibit use of legal remedy by indigenous elders. Older indigenous people may also have care responsibilities for grandchildren and other child relatives that require specific legal assistance.

Grandparents caring for grandchildren have specific legal requirements that are not currently well catered for. Specifically in relation to grandparents seeking legal assistance to gain custody of grandchildren, owning a home can inhibit access to legal aid while being necessary for the care of the grandchildren as well as themselves.

¹ Ellison S, Schetzer L, Mullins J, Perry J & Wong K, 2004. The legal needs of older people in NSW, Law and Justice Foundation of NSW, Sydney

Likewise, older people living in non-traditional relationships, including same sex couples, have limited access to some aspects of legal remedy and support that are available to others in the community.

Access to appropriate legal assistance for older people living outside metropolitan areas can be particularly difficult. The inexperience of legal officers who rarely deal with matters such as estate management, advance directives or Centrelink matters can, alongside cost, limit access to legal assistance for older Australians living outside major regional and urban areas. Access to legal assistance for Indigenous people living in rural and remote areas can be limited by the need for assistance to be provided to both plaintive and defendant.

Many legal matters pertinent to older people are for civil matters relating to planning for and going through phases of life; for example, retirement income, accessing government benefits, property sales and purchase, investments, insurance, agreements with families, and powers of attorney. The cost of legal remedy in such civil disputes is high, and aid is not provided for civil matters

Older people's needs in terms of legal service delivery include:

- More awareness of where to obtain legal information and assistance
- Succinct and comprehensible contract and other legal information
- Provision of information through face-to-face contact remains important to many older people, and should be available alongside printed and screen based materials

Some older people are not able to exercise a lot of self help and need legal assistance from a practitioner who is proactive in anticipating their needs.

For mobility or social reasons, older people consulting legal practitioners, often have such consultations arranged by family members and may be accompanied by a family member. This can present conflicts of interest for both the older person and for the practitioner.

Some specific matters relating to older people and the law are discussed below.

Financial and consumer related legal issues

Centrelink benefits and Veterans' Pensions

Access to redress where the application of rules and policies in relation to social benefits and pensions must continue to be provided to those who are reliant on this form of income and support. Specific cases include people living in non-traditional relationships and with caring responsibilities including grandparents caring for grandchildren, same sex couples, including when one partner is assessed for payment of accommodation bonds for residential aged care, and people living in extended families including Indigenous people and people from diverse cultural backgrounds.

Superannuation

Consumer awareness and protection is a key to the future effectiveness of this form of income support in old age.

Financial products, financial planning, credit, debt and investment

In addition to financial literacy and consumer protection for older people seeking to manage assets and finance their lives in older age, the Inquiry would be well placed to explore the potential for industry to create products that are actively focussed on older peoples needs, including being readily comparable and transparent in the service provided.

Home equity and reverse mortgages

The Commonwealth Government should encourage financial institutions to design products that allow older people to borrow against the equity of their home with loan and/or interest being paid at the time of sale of the property or the death of the owner. Inappropriate practices by some lenders have resulted in poor outcomes for some older people who choose to borrow against the equity in their properties. However, there is no reason why older people should not have access to financial products that allow them to utilise the wealth they have accumulated over their life times. Legal regimes that support the development and use of lending products appropriate to those who have equity in property will allow people to remain living independently in their communities for longer. This is an area in which demand can be expected to grow as the generation that has more widespread experience of investment and property ownership moves into older ages.

Internet safety, sales scams and other fraud

Older people are targeted for fraud and identity theft because they are viewed as vulnerable. The presence of internet based access to older people, as well as phone access and door-to-door sales, creates greater opportunities for victimisation. Crime and policing agencies need to place a high priority on prevention of cyber crimes against older people as well as increasing prevention of more traditional styles of fraud. Increasing people's familiarity with on-line and e-services reduces the likelihood of fraud. Programs that increase older people's use of on-line services will assist them to participate in their community and have protective effects.

Consumer protection

Access to remedy through affordable mechanisms such as consumer tribunals would assist older people where preventative measures and duty of care of providers has failed to provide protection.

Discrimination

COTA continues to be made aware of active and informal discrimination against older people in the workforce.

The experience of active discrimination against individuals could be reduced by the standardisation of age discrimination provisions nationally.

Indirect discrimination is more complex. For example, proposed amendments to workers compensation in South Australia aim to provide for the payment of weekly income support benefits to ill and injured workers over the age of 65. While the intention is laudable, the effect is simply to shift discrimination from workers who are aged more than 65 to those who are aged more than 70 years. The framework in which older workers are employed requires consideration in its entirety rather than being addressed piecemeal if discrimination is to be removed. For example, access to training and career development opportunities throughout a workers life is on key to fairness for older citizens in the workforce. Likewise, the use of redundancy as a de facto form of retirement continues to be a form of discrimination against older workers.

Substitute decision-making and end of life issues

COTA policy is that inconsistencies between States and Territories unnecessarily complicate legal issues relating to power of attorney, guardianship. Standard legislation for enduring powers of attorney and guardianship for medical and personal matters should be adopted. The need for this consistency is urgent, with older people being mobile and with family members often resident in other jurisdictions.

Advanced health directives

Older people increasingly consider what care and treatment decisions they would want made on their behalf if they are unable to make such decisions for themselves. This is a matter in which education and information pertinent to legal requirements could be usefully increased for older people and their families.

There is evidence that both oral and written directives about care and medical treatment are acceptable to older people and their families. However, people have a clear preference for written, signed and witnessed directives where such directives included instructions about the removal of life sustaining medical intervention or treatment.

Where people make such directives, even in a written form, they are frequently not honoured. Practices for observing and acting on written directives in the emergency and treatment settings are required to support legal aspects of such directives.

Similar issues pertain to directives and practices relating to organ donation.

Accountability for use of Powers of Attorney

People are encouraged to make decisions about granting Powers of Attorney well ahead of anticipated need in order to avoid the challenges of legal processes to gain such powers following incapacitation. However, once a directive is made, it is not easy to retract that power should circumstances change. Even the simple act of retrieving the documentation can limit a person's capacity to effectively remove the power of another to act on their behalf.

The donation of power to act on one's own behalf is intended to cover the event that one loses the capacity to be accountable for their decisions. However, current legislative regimes provide that power to another person in the absence of structures of accountability. It is appropriate that, where a person is granted power of attorney, some form of reporting should occur. This is clearly administratively fraught. Nevertheless, the principle of accountability should be implemented. It may be possible for people exercising such powers to report against such indicators as real property held and annual bank balances, with major variations being monitored. The requirement for such reporting in itself will have a deterrent effect.

The difficulties in changing matters relating to advance directives and the lack of accountability discourage many older people from preparing such directives while they are still able to do so.

Other means that have been proposed to increase accountability and to respond to suspected abuse of powers include legislation that enables the establishment of an investigation and/or the appointment of a third party guardian in settings beyond that currently defined as incapacity. This is a contentious matter and much thought would be required to enable its implementation.

Evidence is that lack familiarity with financial matters increases the chance of financial abuse. Efforts to increase financial literacy for both older carers and their family members, alongside increased duty of care by financial service providers may, therefore be effective in reducing fraud of older people in relation to powers of attorney.

Wills and probate

COTA policy is that, like advance directives, legal matters relating to wills and probate should be uniform across Australia. Standard documentation should be used for probate applications irrespective of jurisdiction.

Fraud and financial abuse

Evidence is that, in Australia, financial abuse is the most common form of abuse of older people. Legal approaches to prevention and redress need to address abuse by both predatory perpetrators who make contact with older people, and abuse by family members and/or carers. It is in these second circumstances, where complex social relationships are present, that it is most difficult to objectively identify and prove abuse. It is also in these settings that financial abuse is most common; fraud against older people is most commonly committed by one of their children who has responsibilities for caring for them. Financial abuse by a spouse also occurs but is less common².

Older people likely to explain the behaviour in terms of personal or financial circumstances of the offender rather than as criminal behaviour.

This in part reflects cultural norms and beliefs about inheritance, what is due to children from their parents, and what is deserved by someone who cares for a parent. It also reflects the lack of a framework of accountability for the use of resources and assets on behalf of another person.

Literature on financial abuse of older people indicates that identifying and proving fraud is fraught. Difficulties are compounded where an older person is still an active part of decision making, even if decisions about resource use are not made in what a third party considers to be their interests. Civil legal remedy is not commonly used even where an older person wishes to take legal action as the cost, standard of proof required, evidential difficulties where the claimant has cognitive difficulties or is frail all inhibit the potential for an outcome that provides redress.

At an extremely well attended forum in South Australia during Elder Abuse Prevention Week in 2006 there was discussion between carers, service providers, advocates and government agencies about the role of Justices of the Peace in proactive approaches to determining the actual wishes of older people when witnessing signatures. This proactive approach could have a preventative and deterrent effect both in the use of advance directives and in relation to transfer of assets and acting as guarantor.

Banks and financial institutions offer a setting in which financial abuse could be limited. Practices such as assisting clients to structure their financial transactions in ways that make resource use transparent and which limit the need for intervention by a person acting on a clients behalf would be effective.

Currently privacy laws inhibit institutions intervening. It may be possible to establish a system of advance directives by clients to banks that allow for specified people and account holders to be notified where there are changed or inconsistent patterns of account use. Other initiatives that have been

² Financial abusers rarely live with the victim. Other forms of abuse are nearly all committed by a person living with the victim.

considered by the industry include training for staff about types of perpetrators, typical scenarios of abuse, strategies for detecting abuse, and the establishment of protocols and practices for action where a staff person believes abuse to be occurring.

Reducing social isolation of individuals is also a key means to reducing the likelihood of financial abuse and fraud as social networks enable older people to gain information and make judgements from a wider range of sources than limited contact.

Accommodation related legal issues for older people

Nursing homes and residential aged care facilities

The residential care sector is highly regulated. However, the vulnerability of occupants warrants close attention of governments and community. COTA is a key advocate for the frail elderly and has long held that, in line with the recommendations of the Hogan Report³, the Aged Care Standards and Accreditation Agency should be resourced to provide education and information programs to increase consumer knowledge and understanding and to involve consumers and their representatives in accreditation processes.

COTA has been disappointed at the apparent lack of interest by the Agency in pursuing, enabling and requiring meaningful and effective consumer involvement in accreditation. Resources to achieve this may be better directed to consumer advocacy agencies with demonstrated networks among care recipients. The Agency should be a focus of consumer participation efforts alongside the industry it oversees.

COTA notes recently announced changes to the Aged Care Complaints Resolution Scheme which seek to provide it with more effective means to deal with complaints. However COTA has for some years sought re-establishment of the Scheme as a separate independent authority utilising as its guiding principles the Benchmarks for Industry-Based Consumer Resolution Schemes. The Government's changes will not achieve this as the Scheme will operate within the Department that regulates the industry.

Further, COTA seeks legal frameworks that support equitable treatment in relation to accessing care, co-location, and assessment of assets for accommodation bonds, where people are in non-mainstream relationships [for example, same sex couples].

Where physical and sexual assault, misuse or abuse of medication or other forms of victimisation are perpetrated against people who live in residential aged care facilities, they should be treated as such crimes against any person living elsewhere.

³ Professor Warren Hogan 2004 Review of Pricing Arrangements in Residential Aged Care

Retirement villages

Retirement villages provide an option for many older people seeking housing appropriate to their specific needs. However, issues relating to transparency and accountability in contracts and in the use of funds derived from residents, and have increasingly been brought to COTA's attention. The rights of residents to determine the use of facilities and of funds are not infrequently a matter of dispute between management and residents.

Recently gazetted amendments to South Australian legislation on retirement villages, to which COTA and its member organisation, the SA Retirement Villages Residents' Association, were active contributors, has provided for standardised and comprehensible documentation for contracts. This model is being well received in the industry and is a model that could be adopted across jurisdictions.

The model of standard documentation that is comprehensible to older consumers would also be well placed in the provision of a wide range of goods and services, including financial products.

Residential parks

Similar issues as those that disadvantage residents of retirement villages are emerging for older residents of residential parks. As the affordability of housing has declined, some older people are making a choice to live in residential parks.

COTA is beginning to hear of cases in which contracts and other documentation have not been fully informative. COTA has also been approached about disputes between older residents and management about transparency and accountability in use of resident derived funds, about residents' rights to decide how such funds are used, and about residents' rights to use communal facilities to which residents contribute. For example, management can refuse to allow residents to meet in a communal facility to discuss disputes with management. This is an area that will require attention for all low income and vulnerable residents, including older people.

Strata title dwellings

Older people choosing to live in small dwellings are often in properties held under strata titles. Many older and frail people who are living in independently in the community live in such properties. COTA receives regular inquiries from older South Australians about accessing assistance in resolving matters relating to strata titled residential properties. In South Australia at least there is not a clear and accessible complaints and dispute resolution mechanism. Court remedy is costly and can be intimidating to older residents. Such disputes, and the incapacity of older people on limited incomes to contribute to large communal cost for property improvements, can result in an older person entering a residential aged care facility. As the number of older people increases, it can be anticipated that disputes in this form of tenancy will increase.

Public housing tenancy

As the provision of publicly owned accommodation shrinks to the provision of housing for those in social need, public tenants will increasingly be vulnerable people. The need for legal support that ensures that housing provided is appropriate and affordable, to resolve disputes with neighbours and with management, and to protect fairness in gaining housing and where leases are terminated, can be expected to increase.

Private tenancy

Older people in private tenancy are particularly vulnerable through lack of assets and limited income. Issues drawn to COTA's attention include:

- Discrimination by real estate agents
- Lack of security of tenure in short term leases and lease terminations
- Large and frequent rent increases
- Difficulties in getting dwellings altered or upgraded to meet the needs of older tenants, and in getting properties repaired and maintained to a standard that is healthy, safe and comfortable for older occupants.

The capacity for vulnerable people to be represented when seeking remedy through tenancy tribunals continues to be a matter of concern to COTA's constituency.

Home ownership

Older people owning homes report requiring legal frameworks that:

- Support and protect property transactions that enable them to move to housing that is appropriate to their point of life
- Enable them to affordably and effectively realise equity in their properties to support their capacity to remain living independently
- Assists with neighbourhood disputes or where disputes arise with local or service authorities

Older home owners are frequently called on to act as guarantors by children and other family members. Where default occurs and property is liquidated the impact on an older person with no capacity to recoup assets and on a limited income can be disproportionate. Community education and the provision of accessible and comprehensible information where a person is considering acting as a guarantor is required. Duty of care among lenders is also to be encouraged where a potential guarantor is vulnerable through old age.

Home owning older people sometimes agree to transfer ownership of their property to another person, often one of their children, in return for a promise of accommodation and care. There are many cases in which the promised care and accommodation were not appropriate for the older person and/or their carer. The capacity to recover assets and to retain a quality of life independently in the community is then limited and few people opt to seek

legal remedy against their family members even where such remedy is possible and they have the capacity to do so. This is one path to housing insecurity and homelessness among older people. This is a common example of the complexity and social nature of the legal needs of older people. Prevention of such occurrences through service provision and access to care, as well as community education and information is required as much as access to legal redress following loss of property.

Boarders and lodgers

Boarding house residents tend to be very vulnerable members of the community, often experiencing mental ill health and/or physical incapacity. The tenancy provides a form of housing that, if not available, would see more older people being homeless. As a result of their vulnerability, boarding house tenants have specific advocacy and protection needs that would be well placed in a review of the legal needs of older people.

Crime prevention and community safety

While statistics show that older people are less likely than the rest of the population to be victims of crime, older people perceive themselves as a very vulnerable group. Their families and carers often also perceive them as likely to be victims. For many people the fear of victimisation is a fear that physical injury or loss of confidence will mean that they can no longer live independently in the community, and so they will go to lengths to prevent being victimised that do not reflect their actual level of risk.

The aspects of victimisation feared most varies with age group and gender. For example, retirement age males are disproportionately fearful of theft and other property crimes. Yet other older people believe that, relative to other things they have experienced in their lives, the risk and result of victimisation is a minor matter.

The actual aspects of crime and victimisation experienced by older Australians include property crimes such as house break-ins, robbery, car theft and damage, and graffiti and other vandalism. They also include physical assault by spouses, other family members and sometimes by strangers, and fraud.

However, aspects of safety in the home are of significant risk to older people. The potential for injury and death resulting from poor physical safety in their homes is a major concern for COTA, its members and constituency. Preventing falls, fire safety, food handling hygiene, quality, safe and protected use of medicines and the Occupational Health and Safety of home care workers are areas in which significant improvements in quality of life can be made.

Safety in public places and transport

The use of public space is a key indicator of older people's continuing participation and contribution to their community. However, safety in public places is an ongoing concern to older people, irrespective of the fact that their

actual risk is less than their perceived risk. Safety on public transport closely reflects the issues relating to safety in public places. The reality for older people is that an incident in a public place or on public transport, be it a safety matter such as a fall, or a matter of crime or social order, can cause an injury and/or lack of confidence that leads to the loss of independence.

There is evidence that some groups within the older population do not greatly fear victimization in public spaces, possibly because they do not feel highly vulnerable. Paradoxically, other groups that may not be expected to be fearful often have high levels of concern about victimisation. For example, younger old males more frequently report feeling threatened in public places when drunken young males are present than do their older counterparts or females in the same age group. Such research should be intrinsic to planning for an ageing population.

As patterns of ageing change, it can be expected that older people continue to actively use public places more commonly and may, therefore, put themselves at actual greater risk of victimisation and harm. Safety in public places will, therefore, continue to rate highly as a matter of public concern.

Maintaining public places as living and active areas, with lighting and surfaces that are good for walking, information and signage, and the presence of people in information, security, and general support roles are key means of supporting the active use of public spaces by older people. These are matters for governance and good management before they are matters for law.

Efforts to improve the safety and reliability of the taxi industry should include a focus on the needs of older people. In addition to physical safety, measures for protection from fraud and theft for older people using taxis could be usefully adopted in the industry.

Information on the Council on the Ageing [COTA SA]

COTA SA is recognised as a strong and effective organisation which provides significant leadership on ageing issues at state and national levels. COTA also delivers a range of programs and services.

COTA is South Australia's peak seniors' organisation with an individual membership of around 20,000 and over 250 seniors' organisations members with a combined membership of more than 60,000. In addition COTA SA has 80 associate members who are aged care providers, local government bodies, health units and other service and educational institutions. COTA's membership networks and programs are state-wide.

COTA SA was incorporated in 1957. Since then COTA has established a wide range of aged sector organisations. Currently its key roles are:

- Policy and advocacy - centrally engaged in every major aged related State Government policy over the last 20 years

- Programs and services - COTA manages a range of services and programs delivered within South Australia and in other states
- Representation - seniors' interests are represented by COTA in a wide range of State and Commonwealth government forums, non-government bodies, consumer advisory groups, research bodies.

COTA has contributed significantly to the support and development of the non-government ageing sector across South Australia and nationally.

December 2006