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Your reference

Our reference TP:TL



E-mail:

14 December 2006

NH
Ms Cheryl Scarlett
Acting Secretary
House of Representatives Standing Committee
on Legal and Constitutional Affairs
PO Box 6021
Parliament House
CANBERRA ACT 2600

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Dear Ms Scarlett

Inquiry into older people and the law

I refer to the terms of reference for the Committee's inquiry into older people and the law.

I attach Victoria Legal Aid's comments for your consideration.

If you would like any further information about our comments, please contact me on
or

Yours faithfully

TONY PARSONS
Managing Director

enc

1. About Victoria Legal Aid

Victoria Legal Aid (VLA) is a leading force for social justice. Our mandate is to protect legal rights, with a particular emphasis on the rights of the marginalised and economically disadvantaged.

VLA employs 189 lawyers who provide legal services from our 14 offices in metropolitan and rural Victoria. This makes us the largest and most accessible criminal law and family law practice in the state. We also practice in the area of human rights and civil law and provide specialist legal services to children and young people.

In 2005-06, VLA provided:

- 26,318 grants of assistance for legal representation by private lawyers
- 12,806 grants of assistance for legal representation by VLA lawyers
- 61,820 duty lawyer services across a range of courts
- 56,448 legal advice sessions
- 73,070 legal information services, conducted in 15 languages
- 672,916 legal education publications (printed and downloaded)
- family law alternative dispute resolution service.

2. Executive summary

VLA:

- endorses the United Nations *Principles for Older Persons*¹
- endorses the 2004 Commonwealth Senate Committee recommendations on access to justice²
- calls for initiatives targeted more specifically to meet the needs of older to people
- calls for increased funding for legal assistance in civil law
- endorses the Law Institute of Victoria's suggestions for addressing financial abuse
- suggests the committee should also consider physical abuse, psychological abuse and neglect
- suggests amendments to power of attorney laws
- supports extending human rights protection.

¹ UN General Assembly resolution 46/91 (16 December 1991) available at <http://www0.un.org/NewLinks/older/99/principles.htm>

² *Senate Committee Report: Legal Aid and Access to Justice*, Commonwealth Senate Legal and Constitutional References Committee, June 2004

3. Introduction

Legal issues relating to older people may arise under both Commonwealth and state laws.

National Legal Aid (NLA) represents the directors of each of the 8 state and territory Legal Aid Commissions. NLA has prepared a submission on behalf of all commissions about some of the national issues. This submission supplements the NLA submission by commenting on some of the state issues.

4. Principles

VLA strongly endorses the United Nations *Principles for Older Persons*.³ We believe the following principles are particularly relevant to this inquiry:

- Principle 12: Older persons should have access to social and legal services to enhance their autonomy, protection and care;
- Principle 17: Older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse.
- Principle 18: Older persons should be treated fairly regardless of age, gender, racial or ethnic background, disability or other status, and be valued independently of their economic contribution.

5. Research

VLA is aware that a number of bodies have conducted research about older people and the law. We suggest that the committee should consider the following research:

- *Access to Justice and Legal Needs: The Legal Needs of Older People in NSW*, NSW Law and Justice Foundation, December 2004.
- *Legal Need of Older People in Rural Victoria*, Loddon-Campaspe Community Legal Centre, October 2005.
- *Strengthening Victoria's Response to Elder Abuse*, Office of Senior Victorians, December 2005.
- *Elder Law Feasibility Study*, South Port Community Legal Service, 2006.

6. Barriers to accessing legal services

The research listed above has identified a number of barriers that prevent older people from accessing legal services. These include:

³ UN General Assembly resolution 46/91 (16 December 1991) available at <http://www0.un.org/NewLinks/older/99/principles.htm>

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- a lack of awareness of legal rights or where to obtain legal information
- a reluctance to complain or take legal action
- the high cost of legal services
- difficulties in accessing legal aid (see further comments at paragraph 7)
- practical difficulties such as lack of transport or internet access
- special needs arising from health issues.

VLA endorses the 2004 recommendations of the Commonwealth Senate Committee for improving access to justice.⁴ We welcome recent Victorian government initiatives for improving general access to legal information, advice and education in civil disputes.⁵ In particular, we acknowledge that the Victorian government allocated \$300,000 in the 2006-07 budget for a community based Older Persons Legal Service, with the funds to be administered by VLA through the Community Legal Centre funding program. VLA will be shortly seeking input from relevant stakeholders about the appropriate service delivery model for the service.

However, we believe there is a real need for further initiatives that are targeted to meet older people's need for legal representation.

7. Legal aid issues

7.1 Current services

As outlined at paragraph 1, VLA provides a broad range of legal services to the general community. The following VLA services are particularly relevant to older people:

- guardianship and administration
- mental health
- family law (eg. contact with or care of grandchildren)
- war veterans.

In 2005-06, VLA commenced a specialist state-wide practice in social security law. We anticipate that the practice will provide services to many older people.

7.2 Civil law funding

VLA does not currently have a specialist older persons' casework practice. This is primarily due to funding constraints in the area of civil law.

⁴ *Senate Committee Report: Legal Aid and Access to Justice*, Commonwealth Senate Legal and Constitutional References Committee, June 2004

⁵ *Gateways to Justice Project, Attorney-General's Justice Statement*, State Government Victoria, May 2004.

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Older people do not require much criminal law legal assistance. ABS data shows that there are only 65 prisoners in Victoria aged over 65 years.⁶ They generally do not require much family law legal assistance because their children are adults. We believe that they are most likely to require legal assistance in the following areas of civil law:

- health services
- property and accommodation
- consumer
- financial
- wills and estates.

We believe that VLA is ideally placed to provide casework services to older Victorians because we:

- already provide related legal services
- have established infrastructure throughout Victoria
- have extensive expertise in casework.

Unfortunately, VLA cannot afford to do so.

Background information:

Before 1996, VLA funded an average of 1,972 civil cases per year in a wide range of matter types. The average net cost of civil expenditure was \$3.2 million per year. In 1996, the Commonwealth government decided that it would only fund legal aid services for matters arising under Commonwealth law and substantially reduced the amount of legal aid funding. To ensure its financial survival, VLA had to tighten its guidelines for funding casework in a number of areas. First priority was given to cases involving personal liberty and issues relating to the care of children. Effectively, this meant Commonwealth funding was used for family law and state funding for criminal cases and child protection. As a result, very little funding was available for civil casework. Civil expenditure dropped by 95% to just \$138,000 per year. Grants for civil matters dropped by 90%, to 188 cases per year (in a narrow range of matter types).

We call on the Commonwealth government to implement the recommendations of the Commonwealth Senate Committee,⁷ including:

- the Commonwealth government should allow legal aid commissions to use 10% of Commonwealth funding at their own discretion

⁶ ABS Catalogue no 4517.0 Prisoners in Australia , 30 June 2005.

⁷ *Senate Committee Report: Legal Aid and Access to Justice*, Commonwealth Senate Legal and Constitutional References Committee, June 2004

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- the Commonwealth government should scrutinise legal aid expenditure to determine if disproportionate spending on certain priority areas is having the effect of depriving other areas of appropriate funding.
- the Commonwealth government should provide an adequate level of funding for legal assistance in matters arising under state laws about domestic violence.

7.3 Means test

VLA provides information, limited advice, minor work and duty lawyer services free of charge. However, grants of assistance for representation are means tested and clients may be required to pay a contribution towards their legal costs. The purpose of the means test is to ensure that legal assistance is limited to people who could not otherwise afford legal services.

The means test is based on both income and assets. Generally, people who receive full social security benefits and own a modest home will qualify. However, in accordance with government policy, many older people have accumulated additional assets in order to partially fund their retirement. They tend to be asset rich but income poor. Most of these people would not pass the current means test.

If governments expand legal assistance for older people, we may need to redesign the means test—to ensure that it fairly assesses whether older people can afford to pay for legal services.

8. Consumer fraud

Older people are twice as likely as the general population to be victims of consumer fraud as they are to be victims of assault.⁸

VLA suggests that the committee should consider both civil and criminal remedies to redress individual instances of consumer fraud. We also suggest that you should consider some of the preventative strategies being developed by state consumer agencies. For example, in 2006 Consumer Affairs Victoria focussed on itinerant traders who commonly target the elderly.⁹

9. Financial abuse

Financial abuse involves the improper use of an older person's income or assets by a person with whom they have a trusting relationship (usually relatives or carers). This form of abuse may be facilitated by inadequate state laws about power of attorney and other instruments. Please see further comments at paragraph 11.

⁸ *South Australian Seniors and the Law: An Information Guide*, The Law Society of South Australia and the Government of South Australia at page 51.

⁹ *Consumer Affairs Victoria Annual Report 2005-06* at page 63.

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VLA has read the draft Law Institute of Victoria (LIV) submission to this inquiry. We endorse the LIV's suggestions for addressing financial abuse, in particular:

- clawback laws to recover property that has been improperly transferred
- establishing an independent body to investigate financial abuse
- amending social security legislation to allow benefits to be paid when assets have been improperly divested.

We also suggest that non-adversarial alternative dispute resolution (supported by appropriate legal advice and representation) may be an appropriate way to resolve family disputes about the management of older people's finances.

10. Other forms of elder abuse

VLA suggests that the committee should also consider other forms of elder abuse, such as physical abuse, psychological abuse and neglect. Like other forms of domestic violence, elder abuse is a complex problem. It requires a multifaceted response, which factors in the realities of family relationships—including emotional attachment, cultural expectations and power imbalances.

The response should include both state civil and criminal remedies (eg. intervention orders to prevent further abuse and criminal prosecutions to punish offenders). However, it must also provide a mechanism for addressing ancillary issues, which may be just as important to the well-being of the older person (eg. alternative housing and personal care arrangements, financial support and contact with extended family). Unless these issues are addressed, older people will be reluctant to report abuse or leave abusive situations.

We also suggest that the committee should consider non-legal strategies to address the underlying conditions that foster abuse. For example:

- providing resources for respite care would reduce the pressures on family caregivers and may prevent neglect.
- providing resources for community services would reduce the isolation experienced by many older people and may assist disclosure of abuse.

The law must also recognise that elder abuse may be committed by carers who are not family members (eg. volunteers, paid home caregivers or institutional care). A range of responses will be required to address these different relationships, for example:

- additional resources to ensure adequate training and staffing levels
- setting higher performance standards for care providers, better monitoring and more rigorous response to breaches.

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- consistent requirements across jurisdictions. We note that the *Aged Care Act 1997* (Cth) only applies to Commonwealth funded institutions.
- introducing an aged care ombudsman, with broad powers to deal with complaints.

VLA agrees with Southport Community Legal Service¹⁰ that we should carefully consider the potential problems with criminal background checks and mandatory reporting before implementing these strategies.

11. Power of attorney and other instruments

In Victoria, there are differing tests for determining legal capacity. For example, the *Instruments Act 1958* (Vic) now sets a high threshold for granting an Enduring Power of Attorney. This test came into operation in 1994 after a study undertaken by the Office of the Public Advocate raised concerns about financial abuse under the previous provisions. The Act also gives the Victorian Civil and Administrative Tribunal powers to inspect an Attorney's records and to revoke powers in the best interests of the donor. Unfortunately, the same test does not apply to making a will under the *Wills Act 1997* (Vic). Different tests may apply in other states. VLA suggests the following strategies:

- a consistent test for capacity across all areas of estate planning in all jurisdictions
- national registry of Powers of Attorney
- provisions for an appropriate agency to monitor Attorneys and take action to recover misappropriated funds
- regulations requiring banks to assist in identifying fraudulent behaviour (eg. by flagging unusual transactions).

We also suggest that improved access to legal assistance would enable older people (or their representatives) to seek redress when powers are misused. Currently, administrators cannot afford to bring proceedings when the older person's assets have been misappropriated and the person is on benefits.

12. Discrimination

Victoria recently passed the *Charter of Human Rights and Responsibilities Act 2006*. The charter provides that every person is entitled to the equal protection of the law without discrimination. This includes protection against discrimination on the basis of age. The Victorian Parliament must consider whether new legislation is consistent with the human rights protected by the charter before passing it. Similar provisions apply in the Australian Capital Territory. VLA supports extending similar human rights protection across all other Australian jurisdictions.

¹⁰ *Elder Abuse*, Jeni Lee (Southport Community Legal Service) in Law Institute of Victoria Administrative Law and Human Rights Section Newsletter, September 2006 at pages 3-4.

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We also suggest that improving access to legal assistance would enable older people to enforce their individual rights under state and federal anti-discrimination legislation.

13. Further information

For further information please contact: