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Ms Joanne Towner
The Secretary
Standing Committee on
Legal and Constitutional Affairs
House of Representatives
Parliament House
Canberra, 2600

Dear Ms Towner,

Re: Inquiry into older people and the law

RE INQUIRY INTO OLDER PEOPLE AND THE LAW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is established under the *Legal Aid Commission Act 1979* (NSW) and is an independent statutory body. It provides legal services to socially and economically disadvantaged people. Legal Aid NSW has the largest criminal practice in NSW providing representation in federal and state courts. It also works in partnership with private lawyers in representing legally aided people.

Legal Aid NSW notes that the terms of reference are:

"To investigate and report on the adequacy of the current legislative regimes in addressing the legal needs of older Australians in the following specific areas:

- Fraud;
- Financial Abuse;
- General and enduring 'power of attorney' provisions;
- Family agreements;
- Barriers to older Australians accessing legal services; and
- Discrimination."

For the purpose of the terms of reference the definition of "older" is 65 years and over.

Legal needs of older Australians charges with fraud and other offences

While the media release¹ indicates that the focus of the inquiry in the area of fraud is older people as victims of fraud, the Legal Aid Commission of NSW (Legal Aid NSW) is concerned about a further issue encompassed by the terms of reference, namely older persons as offenders.

¹ Inquiry into older people and the law, House of Representatives Standing committee on Legal and Constitutional Affairs, Media Release, 20 September 2006

Legal Aid NSW submits that the current legislative regimes do not adequately address the legal needs of older Australians who are convicted of Commonwealth offences and sentenced to imprisonment.

Legal Aid NSW submits that the *Crimes Act 1914* (Cth) and all other relevant federal sentencing legislation should be amended to ensure that older people are treated as a special category of offender for the purpose of sentencing and sentence administration, particularly where they are suffering from physical frailty and/or a mental disability.

Older people are identified as a group who are socially and economically disadvantaged.² By virtue of their advanced years, older people are more likely to face certain health related issues including physical and mental disabilities, and their health is likely to continue to deteriorate with the progress of age.

Obviously, as an older person ages, their life expectancy lessens, and this process can be exacerbated by the deleterious effects of the circumstances in which they reside.

With an aging population, it is more likely that increasing numbers of people will be sentenced to imprisonment. This fact needs to be considered in the light of sentencing trends. In NSW, for example, more people are being sentenced to imprisonment, and sentences of imprisonment are for increasingly longer terms.

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 requires 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 reflects not only the offence but the offender. This is particularly important where certain purposes of sentencing are irrelevant to a particular offender. For many older people, rehabilitation and specific deterrence, for example, may have no or little relevance.

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, reduce life expectancy and can result in premature death.

This issue was highlighted by a recent case which was the subject of a study conducted by Legal Aid NSW. Annexure A is an abridged copy of the report.

In summary, Mrs R entered a plea of guilty to 12 charges of defrauding the Commonwealth. Between 1975 and 2001 she had claimed a number of pension payments to which she was not entitled and defrauded the Commonwealth of \$379,761.

² *Access to Justice and Legal Needs: The legal needs of older people in NSW*, Law and Justice Foundation of NSW, December 2004, p. xv.

At the time of her sentence on 24 September 2004 Mrs R was 73 years old (dob 22 November 1930), suffered from diabetes, dementia, rheumatoid arthritis, was incontinent and required a walker or a wheelchair to move. The Commonwealth Director of Public Prosecutions sought a custodial sentence. Mrs R was sentenced to 5 years imprisonment with a non parole period of 3 years. She died in custody on 15 February 2005, 6 months after sentence, aged 74.

Mrs R's death has been referred to the NSW Coroner and will be the subject of a coronial inquest.

Legal Aid NSW submits that older people should be treated as a special category of offender, particularly where they are suffering from physical frailty and/or a mental disability. To that end, legislative change is required to achieve the balancing of the purposes and principles of sentencing that is necessary to ensure that the sentence reflects not only the offence but the characteristics of older offenders, and their inevitable decline in health.

While s 16A(2)(m) of the *Crimes Act* requires the court to take into account "the character, antecedents, cultural background, age, means and physical or mental condition of a person", Legal Aid NSW submits that this reference is too general and that a more specific reference is required.

Legal Aid NSW submits that the *Crimes Act* 1914 (Cth) and all other relevant federal sentencing legislation should be amended to ensure that older people are treated as a special category of offender for the purpose of sentencing and sentence administration, and specifically:

- Older person should be defined as 65 years and over.
- When determining the sentence of an older offender, the court should be required to apply the following principles:
 - ⇒ The sentence imposed should be just and appropriate in all the circumstances of the particular case (the principle of individualised justice)³
 - ⇒ Detention should be used as a measure of last resort, and only for the shortest possible period
- When determining the sentence of an older offender, the court should be required to take into account the following factors:
 - - ⇒ The physical frailty and a mental condition of the older offender
 - ⇒ The life expectancy of the older offender
 - ⇒ The probable effect on the older offender of a particular sentencing option, including that the offender's circumstances may result in imprisonment having an unusually severe impact on him or her.

³ *Kable v Director of Public Prosecutions* (1995) 36 NSWLR 374

To support these legislative amendments, Legal Aid NSW submits that it would be essential for the Prosecution Policy of the Commonwealth Director of Public Prosecution to be amended to stipulate that the Director or his or her delegate is to authorise any decision to prosecute in the public interest any person defined as an older person. Consistent with the legislative intention of the proposed amendments for the sentencing of older persons, this would ensure that only appropriate matters are prosecuted in the public interest.

Please note that this submission is in addition to the submission made by National Legal Aid. Legal Aid NSW supports that submission.

Legal Aid NSW is grateful for the opportunity to present its view. Should you wish to discuss any aspect of this submission please contact

Yours faithfully

Bill Grant
CHIEF EXECUTIVE OFFICER