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ADACAS Submission Reps L&C Affairs Ctee

BY: LACA

ADACAS

ACT DISABILITY, AGED & CARER ADVOCACY SERVICE Inc

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Submission No. 115

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**Submission by ADACAS to House of Representatives' Standing  
Committee on Legal and Constitutional Affairs  
Inquiry into Older People and the Law**

**Executive summary**

***Preliminary points***

ADACAS is an independent, community based advocacy agency funded predominantly to provide individual advocacy for people who may have a disability or who may be aged. The views expressed in this submission are based on the case experience of its advocates.

Individual advocacy for older people should continue to be recognised and funded by governments at all levels and should grow as the numbers of older people grow. Individual advocacy should be supplemented by provision of resources for the study of systemic issues.

All levels of government should develop a meaningful charter concerning the rights and the nature and level of services older Australians may reasonably expect, together with action/implementation plans developed in consultation with community organisations.

There is a need to address underlying adverse cultural attitudes towards older people. The lack of material resources available to older people forms a backdrop to many other problems in their lives.

Governmental policy proposals resulting from this inquiry should be subject to wide community consultation.

***Issues concerning lack of legal capacity***

ADACAS is concerned that there is insufficient expertise on the part of GPs and others who certify that a person lacks decision-making capacity.

There is a need for a more particularised report from such health personnel that distinguishes between different areas of decision-making and different levels of impairment.

There is a need to widen the scope of those who may have access to a person whose decision-making capacity has been certified as impaired, and who may take other action on behalf of the person, including contesting the appropriateness of the certification of impaired capacity. In particular, professional advocates and close friends need to be included.

***Enduring powers of attorney***

There is a danger of abuse when an enduring power of attorney made by an older person is expressed to commence immediately in relation to property matters.

We suggest that limitations be placed on the exercise of a power of attorney in

relation to the sale of a principal's house or significant other property when:

- the principal has capacity and does not support the sale; or
- there is doubt about the extent or duration of the principals incapacity.

Where there are disputes about capacity or the exercise of an enduring power of attorney, there is a need for a low-cost and easily accessible dispute resolution body to adjudicate on the matter.

#### ***Access to legal and financial services***

Justice for older low income Australians is difficult to access. We suggest there should normally be a waiver for older people in relation to taking account of the value of the family home, with a discretion to include it in specified circumstances.

There is increasing complexity in the legal arrangements that older people are entering into to secure accommodation in a retirement village or residential aged care facility or to access support services in their own home. The oppressive operation of many of these arrangements is difficult to challenge.

There is a strong case for a dedicated low cost Aged Care Legal Service, perhaps available through Legal Aid or the Community Legal Centres, for assistance in these and other areas.

There are many "poverty traps" where older people may be disproportionately disadvantaged by having income in excess of a fixed amount. Pensioners and many other older people need to monitor their income levels closely, but need financial planning advice to assist them. We suggest that government should make low-cost specialised financial advice readily available to older people with limited financial resources.

#### ***Commonwealth Aged Care Complaints Resolution Scheme***

The existing scheme has been very disappointing. Details of the replacement scheme have not been disclosed. We consider that interested community members and representatives of those who have used the scheme should be involved and consulted in establishing and fine tuning the new scheme. We further consider that in establishing the new scheme attention should be paid to the learning's drawn from the operation of other well-regarded governmental complaints schemes, for example, the Commonwealth Ombudsman's Office.

#### ***Transport assistance for residents of aged care facilities***

We are concerned that residents of aged care facilities do not have access to community transport assistance. Residents should have the same access to community transport facilities as older people who live elsewhere in the community.

#### ***Public Advocate visits to facilities***

There is a need for regular visits by the Public Advocate to aged care facilities to provide support, information and a measure of security to the people for whom they are the guardian.

#### ***Increase in financial support for kinship placements***

Grandparents with whom there is a "kinship placement" receive less government financial and other support than foster parents. Government supports should be tied to the needs of the child not to the type of carers.

## Submission

### *Preliminary points*

ADACAS is an independent, community based advocacy agency with a mission “to vigorously advocate for and with vulnerable people, who may have a disability or who may be aged, so that they may exercise their rights as citizens, live valued and dignified lives in the community and pursue their dreams”.

ADACAS is predominantly funded to provide individual advocacy under three different programs, the National Disability Program, the National Aged Care Advocacy Program, and the Home and Community Care Program.

In particular ADACAS provides advocacy to frail and aged people living in the community and to residents of aged persons facilities or people who are in receipt of Community Aged Persons Packages. The role of an ADACAS advocate is to act on behalf of a person, as far as possible according to their instructions in relation to the issues affecting their lives. Thus, ADACAS advocates engage on behalf of older people with the wide variety of services and the broad range of regulatory and legislative frameworks that affect their lives.

This submission to the committee’s inquiry into older people and the law arises out of the individual advocacy work of our advocates with older people, and reflects concerns that advocates have developed in the course of that work. ADACAS is not in a position to make a comprehensive submission on all the areas raised in the committee’s letter, nor to propose detailed policy solutions to the problems it has identified.

ADACAS has previously made submissions to a Parliamentary Committee concerning abuse of elderly residents in aged care facilities.<sup>1</sup> That arose out of the terrible experiences of some of our clients (both residents and their relatives), which revealed deep-seated defects that could not be resolved only on an individual basis. Our concern in such cases remains focused on future satisfactory outcomes for individuals.

Many of the legal issues adversely affecting older Australians involve both Commonwealth and State/Territory arrangements and we welcome the committee’s intention to examine issues that cross jurisdictional boundaries. Clearly, formulation of policies to address these issues will need State/Territory input and cooperation.

We also note that most if not all of the areas in the committee’s terms of reference may lead to the involvement of aged care advocacy organisations like ours. In particular we assist people who, because of their age or frailty, have become vulnerable and less able, on their own, to insist that their issues are addressed by service providers and decision-makers. Advocacy for older people, whether they live in the community or in an aged care facility, should continue to be recognised and funded by governments at all levels. Such funding should increase as the number of older people increases. There is also a need for individual advocacy to be supplemented by the provision of resources for the study of systemic issues to enable

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<sup>1</sup> ADACAS Submission titled “Retribution Intimidation and Payback In Aged Care Homes” to the 2004 Senate Community Affairs Committee Inquiry into Aged Care

independent advice to governments and community organisations on the needs of older Australians.

We believe that all levels of government need to develop a meaningful charter concerning the rights and nature and level of services that older Australians may reasonably expect to be accorded by governments, community organisations, aged care facilities and their fellow Australians. The charters should be supplemented by action/implementation plans in each identified key sector, developed in consultation with relevant community organisations, including advocacy agencies like ours.

There is a pressing need to address underlying Australian cultural attitudes towards older people, many of which lead to adverse outcomes for them, and to raise the need for compensating policies to influence change in such attitudes.

In addition, we note that lack of adequate superannuation is a major issue among those over 65. The aged pension is very low, while rental allowances are inadequate in capital cities. This forms a backdrop to many other problems in the lives of older Australians.

Finally, we suggest that the committee recommend that all policy proposals by all levels of government resulting from this inquiry be widely disseminated throughout the community and particularly to community groups representing older Australians and that consultations be held with them, to ensure that policies and implementation appropriately address the needs identified by the committee.

#### ***Issues concerning lack of legal capacity***

Questions of legal capacity and lack of capacity arise in relation to a number of the areas identified by the Committee. Certification by a medical practitioner that a person lacks capacity to make decisions concerning his or her affairs clearly may have very significant legal consequences, for example, but not only in relation to enduring powers of attorney.

In our experience, major problems can arise for older people who are inappropriately certified as no longer having capacity to manage their own affairs or for people where there is dispute about their level of capacity. A General Practitioner is commonly responsible for a certification of incapacity. Frequently this person will not have enough knowledge either about the individual or about how to adequately assess the different aspects of capacity to make an informed decision on such a complex question.

At the same time, there are insufficient numbers of geriatricians or neurologists to deal with the majority of such cases.

Conflicts of interest may arise where the certifying medical practitioner is requested to make a certification of incapacity by an aged care facility or family member with whom they have close links. In such cases, a decision about capacity can be made based largely on the information provided by the facility or family member rather than on a proper assessment of capacity.

There may also be a problem with the either/or nature of a certification of the incapacity of a person to manage his or her own affairs. Such certifications may not distinguish between, for example, the incapacity to deal with major/complex financial matters, on the one hand, and the ability to continue to deal with matters of everyday financial arrangements on the other.

This situation may be alleviated if GPs and others are required to answer more

specific questions about the degree of capacity of a person to make certain kinds of decisions and to indicate how they arrived at their conclusion.

Another issue arising out of inappropriate certifications of incapacity is the question of who is entitled to contest such a certificate. The recently enacted ACT *Powers of Attorney Act 2006*, for example, confers certain rights on an “interested person” in relation to a principal who has been certified as lacking legal capacity. However, the definitions of “interested person”, while wide – including a relative of the principal, the public advocate, the public trustee, a guardian of the principal, a manager of the principal (see s 74), and in another provision relating to access to a principal, a carer of a principal, a lawyer or doctor acting on behalf of the principal’s family (s 84(3)) – does not extend to an advocate employed by a recognised advocacy service such as ADACAS, or a close friend of the principal who is concerned with some aspect of the way an attorney is acting.

The inability to obtain access to the principal or to act on their behalf severely restricts the help that advocates or close friends can offer. An advocate or close friend may be the only person able to raise capacity issues on the principal’s behalf in some cases, and some mechanism is needed for them to be able to contest a certification of incapacity or the actions of an attorney. We note that there is provision in the ACT legislation for the Guardianship Tribunal to allow someone other than an “interested person” to make an application to it (ACT *Powers of Attorney Act 2006*, s75(2)), but something more accessible than this is needed.

Guardianship Tribunals in various jurisdictions have a role in relation to findings of incapacity, but in practice most matters are not taken to that level. As discussed below in relation to enduring powers of attorney, there seems to be a need for a more systematic monitoring mechanism.

#### ***Enduring powers of attorney***

There are problems connected with the commencement of an enduring power of attorney.

Problems arise when an attorney acts under the authority of the power of attorney:

- Against the wishes of the principal while the principal still has capacity; or
- On the basis of the incapacity of the Principal when incapacity is disputed

We raise the question whether the existing statutory and common law provisions in relation to the actions of an attorney in such circumstances are in fact adequate.

In ADACAS experience, particular problems arise when an attorney acts in any of the circumstances mentioned above to sell a principal’s house or significant other property.

In our view such significant transactions require further safeguards for the rights of principals, for example:

- Limitation placed on the circumstances in which these kinds of actions may be undertaken
- Registration of medical practitioner certification of incapacity required before any such action
- Oversight by a public authority of such actions.

We note also that incapacity is not necessarily once and for all. There may be one or

more periods of temporary incapacity of short duration, or a person may recover after a substantial period of time. This may pose real difficulties for the principal, for the attorney, and for others connected with the principal.

We have also experienced attorneys refusing to take into account the reasonable wishes of the principal and acting in a way that excludes the principal from taking a proper role in decisions about their life.

Where there are disputes about capacity or the exercise of an enduring power of attorney, there is a need for an effective, low-cost mechanism to complain and seek redress. This mechanism should be accessible both by a principal and others who might act on the principal's behalf, for example, an advocate, friend or other family member.

The role of public authorities with legislative power to intervene in these and other legislated circumstances becomes important. It is vital that they act quickly to investigate concerns that are raised about the actions of an attorney. A slow response will only exacerbate the issue, either by inflaming the relationship between the attorney and the principal or by allowing the inappropriate actions of an attorney to continue unfettered. Our experience is that authorities often find it easier to believe the attorney than to follow up on the concerns of a vulnerable principal.

#### *Access to legal and financial services*

Access to justice is difficult to achieve for the majority of older low income Australians. Legal Aid assets tests may be difficult to meet. There are insufficient Community Legal Centres in most parts of Australia, while demand has trebled or quadrupled. Retired older Australians are especially disadvantaged.

In the ACT the assets test for Legal Aid excludes from the gross assets of an applicant for Legal Aid, "the equity in the principal home to a maximum amount equal to the monthly median price of an established house in the A.C.T." (ACT Legal Aid Guidelines, para 2.1.2(f)(i)).<sup>2</sup>

In the case of an older person who has paid off their mortgage, the home may be in an inner city area of Canberra or other area with high property valuations. In the present Canberra market, then, if the standard assets test is applied, an older person may easily find that they exceed the relevant Means Test (set out in ACT Guidelines, para 2.2). That may also be a problem in other major cities in Australia where there are high property values.

The Legal Aid CEO currently has discretion in certain circumstances to disregard the equity in the home of an applicant over 60 years of age. It would be preferable for the Legal Aid eligibility criteria to be recast for older people to take account of these circumstances, as of course, so that access to justice does not rely on the uncertain exercise of the CEO discretion.

There is increasing complexity in the legal arrangements that older people are entering into to secure accommodation in a retirement village or residential aged care facility or to access support services in their own home. Increasingly, these arrangements are with for-profit providers operating in a favourable sellers market to

the disadvantage of older people.

Many retirement village contracts, for example, require that a person move on when their care needs exceed a certain level. Others allow for virtually unrestricted fee increases. It is vital that older people have access to independent specialized advice when entering into these arrangements so that they understand their rights and are able to make informed judgments about the options available to them. They also need access to this advice to be able to plan for their future financial and care needs.

Where older people have a dispute with the management of a retirement village in the ACT they are able to have recourse to the dispute resolution mechanisms contained in the Retirement Villages Industry Code of Practice created under the ACT Fair Trading Act 1992. Unfortunately the mechanisms created, while appearing fair, in our experience, tend to operate to the advantage of the management. Management largely has control of the process by which the Disputes Committee is established and is usually able to exert considerable influence over the processes adopted by it. A more independently managed mechanism is required.

There is a strong case for a dedicated Aged Care Legal Service, perhaps available through Legal Aid or the Community Legal Centres, for assistance in these and other areas.

### ***Financial advice***

There is an absence of affordable financial advice available for older Australians at a time when they need to be able to arrange their affairs to carefully manage a reduced income. Lack of adequate superannuation is a major issue among those over 65. The aged pension is very low, while rental allowances are inadequate in capital cities.

There are many "poverty traps" where older people may be disproportionately disadvantaged by having income in excess of a fixed amount.

Example: Where a single pensioner with other income (such as interest and a superannuation pension) exceeds a fixed total amount (currently \$20,500), even if only by a small amount, she immediately becomes liable for the full Medicare levy of 1.5%. Others with deductions or a little less earnings pay nothing for Medicare. A more tapered approach for low income aged pensioners is required here and in other similar situations.

Moreover, pensioners in that kind of situation need to vigorously monitor income levels, but normally cannot afford the financial planning advice that would assist them to do so. Centrelink provides some financial advice, but the scope of this should be widened to assist pensioners to maximise their financial position.

Such financial planning advice could be co-located with offices of an Aged Care Legal Service, a community based financial counseling service or could be achieved by funding Centrelink to expand the financial information and advice it provides for older Australians.

### ***Commonwealth Aged Care Complaints Resolution Scheme***

The experience of ADACAS with the existing Aged Care Complaints Resolution Scheme has been very disappointing. There have been considerable defects in the past, resulting in many warranted complaints not being dealt with adequately, complainants being administratively discouraged from continuing with their complaints or finding the process too long, drawn out and stressful to continue, and inadequate agreements being reached at mediation (where there is frequently a power

imbalance). The results of a mediated settlement are rarely likely to achieve major systemic change even where that is clearly indicated. There has been insufficient connection in the past between the complaints system and the accreditation system, so that well-founded serious complaints do not result in systemic change, unless the complainant pursues the matter all the way to the Complaints Resolution Tribunal, which has determinative powers.

ADACAS is aware that the Commonwealth has been working on a replacement Scheme for which recruitment has already taken place. However, organisations such as ADACAS have not been involved in the planning and design process. We wish to be involved and consulted along with other older people and their representatives who may have an interest in the establishment of an effective scheme. We believe that advocacy services have a wealth of experience of the former scheme that could be of considerable assistance in establishing and fine tuning the new scheme. We would also like to see the new complaints scheme draw from the experience and learnings of other well-established Commonwealth Government complaints processes, for example, the Ombudsman

#### ***Transport assistance for residents of aged care facilities***

Residents in aged care facilities are denied government provided transport assistance through the HACC Program that they were able to access when living in the community. While some aged care facilities have their own bus transport it is usually fairly limited. In order to retain mobility and the community access to which they are entitled under the Charter of Residents Rights and Responsibilities residents of aged care facilities should have the same access to community transport as other older Australians. Extension of the HACC transport services to residents of aged care facilities would require additional resources, but it would be compensated for by their better physical and mental health, and is owed to those who have contributed so much to the Australia the rest of us enjoy. Entering an aged care facility should not automatically result in a reduction in community participation through reduced access to transport and other services.

#### ***Public Advocate visits to facilities***

The Public Advocate is the guardian for many residents in Aged Care facilities and as such makes decisions about important aspects of their lives. Despite this vital role and their legislated responsibilities to give paramount consideration to the wishes of person for whom they act, they rarely visit and largely make their decisions based on advice from the facility. An aged care facility, like any large institution, finds it had to provide individualised service so it is vital that a person's guardian visits often enough to ensure that the individual needs of the person are being met and that as far as possible they understand and are accorded their rights under the Charter of Resident's Rights and Responsibilities

The Community Visitor's Scheme, which has the potential to provide useful community connection and protection for residents of Aged Care facilities, has not been operating effectively in the ACT. At a minimum, it needs an injection of energy and visitors to fulfil its potential. In all likelihood it also requires a revised charter so that residents and others are clear about what can be expected from the Scheme.

#### ***Increase in financial support for kinship placements***

Where grandchildren are placed with grandparents ("kinship placement"), which is happening increasingly frequently, the grandparents do not receive adequate support from government. They receive less financial support and have access to fewer

services than other foster parents on the ground that foster parents are receiving a wage for caring for children, while grandparents on pensions do not qualify for the same payment.

Financial and other support should be tied to the needs of the child not to the type of carers. The criteria should be based on "what's in the best interests of the child? what is required to support the placement?" Absence of adequate support is a barrier to grandparents caring for grandchildren when parents are unable to do so.