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

Dear Ms Scarlett

**Inquiry into older people and the law**

Thank you for your letter of 20 September 2006 inviting the Australian Institute of Criminology (AIC) to make a submission to the *Inquiry into older people and the law*.

The AIC has commented on the following specific areas of the inquiry:

- Fraud;
- Financial abuse; and
- General and enduring 'power of attorney' provisions.

Please find the relevant information enclosed.

Should you require any further information, please contact

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Yours sincerely,

Toni Makkai PhD  
Director

27 November 2006



**Submission No 2006/002**

**Standing Committee on Legal and Constitutional Affairs  
Inquiry into older people and the law**

The following submission provides an overview of relevant Australian Institute of Criminology (AIC) research and publications. The references to relevant material are listed under three specific areas identified by the Standing Committee on Legal and Constitutional Affairs:

- fraud
- financial abuse
- general and enduring 'power of attorney' provisions.

To address the impact of fraud and financial crimes (including enduring power of attorney) among the Australian population aged 65 years and over, it is useful to situate these within the context of criminal victimisation of older people generally. The broad pattern of victimisation for personal offences (such as robbery, assault, sexual assault and homicide) is consistent with findings throughout Western countries: older people face far lower risks than other age groups. Risks for older people are also lower for household crimes such as burglary and motor vehicle theft (ABS Recorded Crime 2005; ABS Crime and Safety Survey 2005). However, while older people are less likely than young people to be subject to consumer fraud, within their age group consumer fraud occurs more frequently than other types of crime (Carcach et al 2001).

It is not old age itself which reduces the risk of crime, but some of the other factors associated with it, for example, the tendency to spend more time at home, to live in more secure forms of accommodation, and to not own a motor vehicle. However, some groups of older people will be more at risk than others, as is the case for all Australians. Regardless of risk, crime can impact greatly on some older people's lives. Some groups of older people are more afraid of crime than others. Those most likely to be afraid are those who:

- are more socially and physically vulnerable to the consequences of crime
- live in areas with high levels of crime and disorder
- are on a lower income
- have been previously victimised or in contact with other victims.

While older people are less at risk of being the victims of fraud and financial crime than younger age groups, the impact of this crime can have a devastating effect on them. Not only can a comfortable lifestyle collapse, but they may not have the time or the opportunity for financial recovery. A blow to financial security is often a permanent and life-threatening setback, characterised by fear, lack of trust, and is often the onset of acute and chronic anxiety. Loss of assets may ruin a person's otherwise well-planned retirement (Smith 1999). It has also been found that the personal, emotional and psychological consequences of fraud for older persons are much more profound than for younger persons. As the proportion of older people in the community increases, it can be expected that the number of people victimised through fraud will also increase.

Relevant **AIC publications** include:

Carcach C, Muscat G, Graycar A 2001. *The victimisation of older Australians*. Trends and issues in crime and criminal justice no 212, Australian Institute of Criminology, Canberra (<http://www.aic.gov.au/publications/tandi/tandi212.html>).

Smith R 1997. *Measuring the extent of fraud in Australia*. Trends and issues in crime and criminal justice no 74, Australian Institute of Criminology, Canberra (<http://www.aic.gov.au/publications/tandi/tandi74.html>).

Smith R 1999. *Fraud and financial abuse of older persons*. Trends and issues in crime and criminal justice no 132, Australian Institute of Criminology, Canberra (<http://www.aic.gov.au/publications/tandi/tandi132.html>).

### **Older people and the law**

In 2004, people aged 65 years and over made up 13 percent of Australia's population. This proportion is projected to increase to between 26 percent and 38 percent by 2051. The internal structure of the older population is also changing significantly with projections showing that one-quarter of the aged population will be more than 80 years old in 2016 (ABS 2003). A notable feature of Australia's ageing population is that women increasingly outnumber men in the later age groups – at the present time more than 70 percent of people over the age of 85 are women (ABS 2003). Policies and attitudes therefore need to be very sensitive to the situation of very old women living alone. It has also been projected that the number of persons aged 55 years and over will increase by over 200 percent by 2050, with an additional two and a half million people in this age group (ABS 2003). In comparison, the number of persons aged 18 to 54 is projected to grow by just over 7 percent by 2050 (ABS 2003).

Important correlates of population ageing include the fact that as the numbers of people increase in the older age groups, the level of offending against this age group will also increase simply because there will be a greater number of people to offend against. In some cases, significant levels of accumulated savings and investments may also increase the risk of fraud.

The AIC has a long history of research into many aspects of older people and the law. A major part of this research focus has been to provide information on the analysis of the causes, prevention and control of fraud and financial abuse against older people. The AIC sees this as a major emerging area in the financial services industry and one that Australia must address in view of the ageing of the population. Fraudulent and financially negligent behaviour by family members and professionals, including professional asset managers, is now acknowledged as an important issue by criminologists and regulatory authorities. The personal and social reasons which underpin this fraud and financial abuse need to be understood if positive action is to be taken to protect all consumers and particularly older people. Regulatory authorities have highlighted the crucial need for consumer and professional education if financial services regulation is to be effective. The enactment of financial services regulations reflects an awareness of the increasing complexity of financial management and the relative lack of preparation by Australians, particularly vulnerable groups including the aged, to identify, understand and challenge fraud and mismanagement of assets by financial advisors.

## **Fraud**

Criminal fraud is a generic category of crime which includes a variety of offences linked by the common element of the perpetrator seeing to obtain property belonging to another through deception. In Australia, fraud is not recognised as a separate legal category of crime (other than conspiracy to defraud and identity theft in some states). Instead, a variety of property offences may be used to prosecute conduct which involves fraud and deception such as crimes of theft and obtaining financial advantage by deception.

There is little reliable data on the nature and extent of fraud generally in Australia. Nor have data that do exist been analysed in terms of the age of victims. One exception to this was the Australian component of the 2000 International Crime Victimization Survey (ICVS). The ICVS is a standardised survey which was carried out in 17 industrialised countries in 2000. The Australian survey incorporated a supplement targeted at older persons.

Of those aged 65 or more in the ICVS, about four percent said they had experienced consumer fraud in the past year. This was less than half the level among younger people, whose broader range of activities and greater consumerism increased exposure to potentially deceitful transactions. Consistent with this was that older people were more vulnerable when they were more socially, commercially and financially active.

Although risks were low, older people were more likely to experience consumer fraud than other offences. Consumer fraud was more than twice as frequent as assault or theft and 13 times more frequent than robbery. The most common type of fraud committed against older people was some type of selling or purchase fraud that did not occur in a shop setting. Here, the incidents to which older people were particularly vulnerable were door-to-door selling, items sold over the telephone and receiving questionable mail order purchases.

For some time government policy has been to encourage those in the workforce to accrue funds throughout their working life in order to provide for their retirement, thus avoiding the need for them to draw on government funded pensions. As a result, older persons often have substantial assets to invest and this may make them attractive targets for investment fraud. In arranging to invest their funds, they often rely on professional advisers - lawyers, accountants and investment advisers - some of whom may act unprofessionally. Older people may also be defrauded by the activities of investment brokers, many of whom are unlicensed and unqualified.

### ***Health care products and services fraud***

Many older persons remain physically and mentally healthy after they have retired. However as people age, their health problems worsen. One important health condition which may increase vulnerability to fraud is dementia. The number of people with dementia is increasing in Australia as more people live longer. As dementia develops, those who suffer from the condition may be at greater risk of being manipulated and deceived through fraudulent practices, both in relation to the provision of health and medical products and treatments as well as more general consumer transactions.

Those with health problems may also be tricked into purchasing worthless remedies and cures for their conditions or may part with money and receive nothing in return. In the United States in the 1980s, an intensive examination was conducted of health product fraud and its impact on older persons. Quackery, or the promotion and sale of unproven or false remedies, was identified as the single most prevalent and damaging of frauds directed at older people in the United States (United States Report of House of Representatives Select Committee on Ageing, Washington (1984). The government inquiry found that the cost of the promotion and sale of useless remedies promising relief from chronic and critical health

conditions exceeded US\$10 billion a year. Alleged cures for cancer represented the greatest problem, followed by arthritis remedies and anti-ageing products. In human terms, the cost was even more profound as older persons often delayed seeking effective treatment for the conditions in the hope that the unproven remedies would be effective, sometimes with fatal consequences. Older persons may also be targeted by those seeking to sell health care appliances such as hearing aides or spectacles. Sometimes such appliances may be overpriced or ineffective, or they may be prescribed by unlicensed practitioners. There have also been cases of medical practitioners defrauding older patients.

### ***Residential care***

In keeping with policy directions set by the Australian Government, there has been a shift away from more intensive types of residential care to home-based care and the use of hostels. An investigation into Australia's largest nursing home fraud was concluded in January 1997 when a Sydney nursing home operator and pharmacist were convicted of defrauding the Commonwealth. The defendant had operated five nursing homes and had stolen \$1.7 million in Commonwealth government funding through lodging false claims for costs allegedly incurred in respect of the nursing and personal care of frail aged residents in the homes. Claims were made in respect of family members, non-existent employees on the nursing payroll and other staff not involved in nursing or personal care of residents such as builders, bricklayers and contractors (Comfraud Bulletin 1998).

Some years earlier, the Australian National Audit Office (1995) had examined the incidence of fraud in the Commonwealth's Aged Care Program and the role of law enforcement in dealing with such crime. Between 1987 and 1995, forty-three nursing home frauds were detected of which nine resulted in prosecutions being undertaken.

Although many nursing home frauds are directed at Commonwealth revenue, on occasions individual older persons may themselves be defrauded where they pay for services which are not provided or where the terms and conditions of contracts are misleading or deceptive. In such cases, it is their professional advisers who have the primary responsibility for identifying such problems and advising their clients on how to avoid loss. There have also been instances of the staff of residential care facilities stealing property belonging to residents or collaborating with fraudulent schemes carried out by others outside the organisations.

### ***New technologies***

New technologies and changes in commercial practices pose new risks for all Australians. This includes, for example, telephone contests in which there are no winners, opportunities to purchase goods and services of dubious value, and invitations to get-rich schemes. Many deceits are internet-based, so as more older people have access to the internet, they will become even more vulnerable.

Telemarketing fraud has been a considerable problem for older persons for many years and some studies have found that older persons are more often defrauded through telemarketing scams than younger ones. In one study of the victims of a large-scale telemarketing scheme, older women expressed feelings of 'sadness' and having been 'crushed' by the experience (Sechrest et al. 1998).

Making use of the internet for shopping has increased for all age groups over recent years. Along with this, however, comes an increased vulnerability to the many fraudulent and deceptive practices which exist online. Older people are not the only ones who are being defrauded through the use of computers, but they may be particularly vulnerable if they do not have a full understanding of the technologies they are using. Problems can occur when giving credit card or bank details online.

### **Other products and services**

Older people can be victims of fraudulent behaviour in the funeral services industry through the purchase of pre-paid funerals. Deceptions in this area are often not even discovered as relatives of the deceased may not be aware that a pre-paid arrangement had been made.

A wide variety of misleading and deceptive practices may occur in the motor vehicle industry. These include carrying out unnecessary repairs, overcharging, deceptive advertising and the use of accelerated maintenance schedules. Older people may be defrauded by such practices in the same way as others, although their lack of familiarity with some of the most recent technological advances in car design may make them particularly susceptible.

Another area of increasing vulnerability relates to gambling, prizes and lotteries. Sometimes these may be advance fee schemes in which victims are required to provide funds in order to receive a benefit which never arrives.

Relevant **AIC publications** include:

Carcach C, Muscat G, Graycar A 2001. *The victimisation of older Australians*. Trends and issues in crime and criminal justice no 212, Australian Institute of Criminology, Canberra (<http://www.aic.gov.au/publications/tandi/tandi212.html>).

Smith R 1999. *Fraud and financial abuse of older persons*. Trends and issues in crime and criminal justice no 132, Australian Institute of Criminology, Canberra (<http://www.aic.gov.au/publications/tandi/tandi132.html>).

### **Financial abuse**

Financial abuse of older people is one aspect of the more generalised behaviour referred to as "elder abuse". It includes making improper use of an older person's property without their knowledge or permission, which results in harm to an older person. Elder abuse also includes combinations of physical abuse, psychological abuse, sexual abuse, medical abuse, violations of rights and neglect.

Not all financial exploitation is regarded as criminal, and it is sometimes difficult to distinguish abusive conduct from well-intentioned but insensitive behaviour. On occasions, what starts as being in an older person's interest may end up being an abusive situation. For example, family members, friends or professionals may initially offer helpful advice on financial investments to an older person but, as that person's mental faculties decline, the adviser may take over financial management or misappropriate funds. Determining the exact point at which abuse or fraud occurs is difficult as the circumstances may be unclear and evidence hard to come by.

Within social and health frameworks, the misappropriation or misuse of older people's assets has often been conceptualised as involving uncomprehending older people and fraudulent behaviours by family members, paid carers, criminals and tradespeople. Specific organic, economic and social factors may render older people vulnerable to fraud (for example physical health, cognitive capacity, dependency, financial status, social isolation etc). The extent of fraud against older people is directly linked to the vulnerabilities arising from their living circumstances rather than old age itself. The responses to the vulnerabilities of old age may also be mediated through a range of norms, attitudes and beliefs on the part of family members and different professional groups.

Living at home alone or with relatives may increase an older person's vulnerability to fraud, particularly where carers are involved in managing the older person's finances. In addition, older persons living at home may be vulnerable to home repair fraud and other deceptive practices in relation to household maintenance.

While financial abuse is recognised as a major form of abuse, it appears to get little attention from service providers, including the police. Some older Australians will be quite well off financially compared to members of the younger generations, so the temptations to access these resources by fraud or deception is very real. It is important that the legal mechanisms designed to protect the financial interests of people when they are vulnerable to exploitation are effective. The mechanisms for detecting and responding to financial abuse seem to be qualitatively different to those used in relation to physical and emotional abuse. There is a need to explore how legal and social mechanisms can interact to prevent and respond to this issue.

Relevant **AIC publications** include:

James M, Graycar A and Mayhew P 2003. *A safe and secure environment for older Australians*. Research and public policy series no 51, Australian Institute of Criminology, Canberra (<http://www.aic.gov.au/publications/rpp/51>).

James M and Graycar A 2000. *Preventing crime against older Australian*. Research and public policy series no 32, Australian Institute of Criminology, Canberra (<http://www.aic.gov.au/publications/rpp/32>).

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Setterlund D, Tilse C and Wilson J 1999. *Substitute decision making and older people*, Trends and issues in crime and criminal justice no 139, Australian Institute of Criminology, Canberra (<http://www.aic.gov.au/publications/tandi/tandi139.html>).

Smith R 1999. *Fraud and financial abuse of older persons*. Trends and issues in crime and criminal justice no 132, Australian Institute of Criminology, Canberra (<http://www.aic.gov.au/publications/tandi/tandi132.html>).

## **General and enduring 'power of attorney' provisions**

Legislative changes to *The Aged Care Act 1997* by the Commonwealth Government have increased the complexity of the legal and financial aspects of future planning and decision making in old age. This complexity suggests an increased need for specialised advice around later life decision making.

An area of increasing concern is financial abuse carried out by those who act in a fiduciary capacity as legally appointed agents for older persons. The law upholds the rights of older people to protection from abuse and exploitation. The main legal devices are Powers of Attorney provisions and guardianship. Anyone is able to execute an Enduring (or Protected) Power of Attorney which confers authority on someone else to act on that person's behalf in the management of his or her affairs. If the donor of the power later becomes mentally

incapable, the attorney will still be able to act for that person unless an application is made to a court or Guardianship Board to revoke the power. Such arrangements are governed by legislation in each state and territory which ensures that the person granting the power understands the nature of the agreement and how the agreement may be varied or revoked. Attorneys can be given the power to make decision about financial matters such as managing finances, selling property, and/or personal matters such as the type of health received and accommodation choices. Guardianship legislation provides an independent statutory officer to advocate for, and protect, the interests of adults with impaired capacity.

Legally appointed agents are required to act in the best interests of those whom they represent and are not permitted to profit from their agency. Where agents breach such obligations, an action for damages may lie, and in extreme cases, the agent could be prosecuted for theft or obtaining a financial advantage by deception. It is often difficult, however, to discover abuses of this nature as the older person may be incapable of knowing what is being done on his or her behalf, and the matter may only be investigated where a friend or relative believes that something has occurred.

Guardianship and administration boards have been established in each jurisdiction to protect the interests of those unable to manage their affairs because of specified forms of disability or mental deterioration. Public advocates (or guardians) can also be appointed to assist the disabled in protecting their interests. Where older people are unable to manage their financial affairs, an administration order may be made to allow the estate to be managed by a legally appointed administrator who is required to act in the party's best interests without taking profit. Where agents breach their obligations, they can be sued for damages and, in extreme case, be prosecuted for theft or obtaining financial advantage by deception.

Under any system in which management of financial affairs is delegated, impropriety can only be dealt with if it is identified and brought to official attention. Often an older person may not be in a position to know what has occurred, thereby foreclosing legal avenues of redress. This contrasts with the granting of probate and strict accountability in distributing assets specified in a will following a death. Dependence associated with dementia, severe illness, or communication impairment is a critical factor in substitute decision making for older people.

There is little information on the knowledge, use and experiences of the Powers of Attorney provisions in relation to older people. Paradoxically, while substitute decision making arrangements are designed to offer protection to older people from financial abuse, they may also provide opportunities for the financial abuse of older people. An American report suggests that the Powers of Attorney provisions were the most abused legal documents in their judicial system (Mathias 1994).

Relevant **AIC publications** are as follows:

Setterlund D, Tilse C and Wilson J 1999. *Substitute decision making and older people*, Trends and issues in crime and criminal justice no 139, Australian Institute of Criminology, Canberra (<http://www.aic.gov.au/publications/tandi/tandi139.html>).

Smith R 1999. *Fraud and financial abuse of older persons*. Trends and issues in crime and criminal justice no 132, Australian Institute of Criminology, Canberra. (<http://www.aic.gov.au/publications/tandi/tandi132.html>).



## **Preventive strategies**

### **Legislation**

In order to raise awareness of the problem of fraud and financial crimes directed at older persons, and to ensure that cases of deception may be prosecuted effectively, specific legislation may need to be enacted to proscribe some of the more blatant deceptive practices which target older persons and which are insufficiently regulated at present.

In the United States, specific legislation has been enacted to make certain telemarketing practices illegal, and in Australia the Australian Competition and Consumer Commission has adequate powers to investigate and prosecute misleading and deceptive practices, whether they affect older people or other others. Every state in the United States also has legislation proscribing various forms of elder abuse – which may or may not involve traditional forms of criminal conduct – with most jurisdictions also having mandatory reporting provisions. Although the criminalisation of elder abuse helps to publicise the problem, and may enable some cases to be dealt with which might otherwise fall outside the scope of existing criminal laws, the role of criminal law in this area is inevitably limited owing to the impediments which victims and others face in detecting and reporting cases.

### **Law enforcement**

Law enforcement agencies have a central role to play, not only in investigating crimes of deception perpetrated against older persons, but also in informing them of the risks and suggesting appropriate fraud prevention measures. Most police services throughout Australia have officers involved in crime prevention who liaise with older members of the community.

In the United States, so called “law enforcement gerontologists” have been used to work with older persons and community groups to alert potential victims to new schemes and initiate a variety of self-help programs, some of which make use of older persons as volunteers. Such specially trained officers are able to offer information and advice in a constructive way, rather than creating unnecessary alarm which could be counter productive.

### **Education and information**

Prior victimisation is a significant indicator of future victimisation. Education on fraud prevention should be specifically targeted at those who have been victimised in the past. A number of internet sites now provide information on fraud victimisation and how to avoid it, including the National Fraud Information Centre (<http://www.fraud.org/>) which, as part of its “Elder Fraud Project” provides information on various fraudulent schemes and, in particular, those which are directed at older person. The American Association of Retired Persons provides similar information, such as its medicare fraud site (<http://www.aarp.org/medraud/>), and conducts regular surveys on fraud victimisation of older persons. In Australia, the work of the Australasian Consumer Fraud Taskforce (<http://www.scamwatch.gov.au>) is raising awareness of the fraud risks facing all consumers, including older persons.

### **Private sector initiatives**

Business and professional organisations within the private sector may also be able to assist in the prevention and detection of fraud against older people. In Canada, for example, older persons have begun authorising their banks to monitor their accounts for unusually large transactions or unusual patterns of transactions. The bank is then authorised to raise its concerns with the account holder and to warn of the possibility of fraud. Account holders, however, retain full rights over their accounts and may elect to disregard any warnings given.

Other professionals may also be able to assist in identifying case of financial abuse. Those authorised to received statutory declarations and affidavits, or who prepare and witness

Powers of Attorney, for example, should undertake their obligations responsibly and ensure that older persons who sign financial and legal documents are fully competent to do so and have not been coerced by family members into disposing of their assets.

Medical practitioners who see older patients regularly may be in the best position to know if an older person's mental abilities have declined to such an extent that they are incapable of understanding the effect of documents which they sign. In appropriate cases they should refer the matter to relevant statutory agencies. It might also be necessary in appropriate cases for those who act under a Power of Attorney to prepare an annual statement setting out details of the year's financial activities.

Relevant **AIC publications** include:

James M, Graycar A and Mayhew P 2003. *A safe and secure environment for older Australians*. Research and public policy series no 51, Australian Institute of Criminology, Canberra (<http://www.aic.gov.au/publications/rpp/51>).

Smith R 1999. *Fraud and financial abuse of older persons*. Trends and issues in crime and criminal justice no 132, Australian Institute of Criminology, Canberra (<http://www.aic.gov.au/publications/tandi/tandi132.html>).

## **Conclusion**

Changing demographics and advances in technology, as well as increased investments and assets held by some older people, have increased the opportunities for fraud and financial abuse against older people.

Research has identified a number of key issues which need to be addressed. These include:

- fraudulent and financially negligent behaviour by family members
- fraudulent and financially negligent behaviour by professionals
- consumer and professional education
- risks in using new technologies for financial transactions
- individual capacity to make financial decisions.

As in other areas of fraud prevention and control, solutions to the problem will entail a range of strategies which extend from preventive activities based on the provision of information and education, through informal regulatory measures administered by those who work with older people, to the use of civil and criminal law responses. Each has an important role to play in protecting persons from economic and financial victimisation.

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Sechrest DK, Shichor D, Doocy JH and Geis G (1998). *A research note: women's response to a telemarketing scam*, *Women and Criminal Justice* vol 10, no 1, pp75-89.

United States (1984). *Quackery: a \$10 billion scandal*. Report of the House of Representatives Select Committee on Ageing, Subcommittee on Health and Long-Term Care, United States Government Printing Office, Washington.

Contact officers at AIC: