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Law
Institute
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Mr Peter Slipper MP
Chair
House of Representatives Standing Committee on
Legal and Constitutional Affairs
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Mr Slipper

Inquiry into Older Persons and the Law – Supplementary LIV submission

Thank you for the opportunity to meet with you on 19 February 2007 to discuss the Law Institute of Victoria's (LIV) submission dated 13 December 2006 to the *Inquiry into Older Persons and the Law* (the Inquiry).

Based on our discussions at that meeting, the LIV has prepared a supplementary submission to the Inquiry. This supplementary submission highlights areas that the LIV believes are of particular relevance to the legal needs of older persons.

Powers of attorney

The LIV considers that the current laws regarding powers of attorney are problematic. In Victoria, different kinds of powers of attorney are authorised by varying pieces of legislation. There are also fundamental differences between power of attorney laws throughout Australia. For instance, a power of attorney authorised in one state is not necessarily legally effective or valid in another. This can cause problems in situations where the donor requires the services of the attorney but is interstate and, therefore, the power may not apply. The LIV submits that a national, uniform system of powers of attorney would be appropriate with one statute applying to all powers of attorney. You expressed doubt about the Commonwealth's constitutional power to enact such legislation. The LIV believes that any such legislation would be constitutional given Commonwealth's power to legislate in the areas of health and finance.

This lack of uniformity also creates the potential for attorneys to misunderstand or even abuse their power. Such behaviour on the part of attorneys could have a serious, detrimental effect on older persons. As noted in our 13 December submission, a blow to an older person's financial or

emotional security can often be a permanent and life threatening set-back, characterised by fear and a lack of trust, which can, in turn, give rise to acute and chronic anxiety and physical illness.

Powers of attorney can be revoked in certain circumstances, for instance, by the donor or a court. Yet, the LIV notes that there are no serious legal consequences against or punishment for an attorney whose powers are removed from them, for example, because of fraudulent or unconscionable behaviour. In the LIV's view, this is a matter requiring legislative attention.

Capacity

Fundamental to the solicitor / client relationship is the presumption that an adult client has legal capacity. Without capacity, a person is unable to enter into any contract, including a contract for the provision of legal services when instructing a solicitor. Likewise, the solicitor needs some reassurance that he or she is free to accept these instructions without any ethical issues arising due to the possibility of having an incompetent client.

As noted in its 13 December submission, the LIV considers that there is a lack of clear law or available guidelines to assist legal practitioners in determining a person's legal capacity. Making such determinations involves assessing complex health and medical issues, which are outside the scope of legal practitioners' expertise. There are also evidentiary difficulties around questions of legal capacity, which could have implications for civil litigation as there may be an inability to meet a required standard of proof. These factors all serve as a barrier to older people accessing justice.

The LIV also believes that greater certainty about capacity issues would assist people who witness the making of another person's will. The *Wills Act 1997* (Vic) does not require such witnesses to make a statement about a testator's capacity. Nevertheless, it is possible that witnesses to a will may be subsequently asked to give evidence about the circumstances surrounding that will, including whether – in their view – the testator had capacity at the time they witnessed the will.

Reverse Mortgages

Another issue of concern to LIV members is "equity release" products such as reverse mortgages where property owners trade or release some of the equity in their property for a financial benefit from a third party such as a lender.

The Senior Australians Equity Release Association of Lenders (SEQUAL) is a group of banks and financial companies who offer reverse mortgages to consumers. Members of SEQUAL agree to abide by a code of conduct under which the lenders must ensure that a borrower obtains independent legal advice from the solicitor of their choice.

However, membership of SEQUAL is voluntary and, therefore, not all financial institutions offering equity release products must comply with the requirement for independent legal advice. The LIV submits that this requirement should be mandatory for all providers of equity release products.

The Victorian Legal Practitioners' Liability Committee recently issued guidelines *Advising on Reverse Mortgages and Other Equity Release Products*. These guidelines advise solicitors of the risks involved in advising on such products and warn them about their potential liability. A copy of these guidelines is attached for your information.

The LIV would welcome the opportunity to make an oral submission to the Inquiry on the issues raised above at the Inquiry's Melbourne hearing on 4 June 2007.

Please contact Elissa Campbell on (03) 9607 9386 if you have any questions regarding this submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'G. Provis', with a long horizontal flourish extending to the right.

Geoffrey Provis
President
Law Institute of Victoria