Australian Government
Attorney-General's Department

Indigenous Justice and
Legal Assistance Division

07/5034

4 May 2007

Mr Michael Crawford
Committee Secretary
House of Representatives Standing Committee on Legal and Constitutional Affairs
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Mr Crawford

House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into older people and the law – Responses to Questions taken on Notice at the hearing on 23 March 2007, and Correction to the Attorney-General's Department Submission (No.100) to the Inquiry

Officers from the Attorney-General's Department appeared before the Committee on 23 March 2007 to provide testimony to the Inquiry into older people and the law, at which time a number of Questions on Notice were taken. I am pleased to provide the Committee with responses to those questions, which are enclosed.

I further wish to advise the Committee that there was an oversight in the Department's submission of 20 December 2006 to the Inquiry. The figures relating to numbers of clients seen by Community Legal Centres (CLCs) had not been updated to include 2005–06 data.

The submission read:

Nationally, the following assistance has been provided by CLCs to people over 50 years of age:

- In the age group 50–64, CLCs saw 98,753 clients during the period 2000–01 to 2005–06, with an average of 19,750 clients per annum.
- In the age group 65 and over, CLCs saw 45,917 clients during the period 2000–01 to 2005–06, with an average of 9,183 per annum.

The submission should have read:

Nationally, the following assistance has been provided by CLCs to people over 50 years of age:

- In the age group 50–64, CLCs saw 120,788 clients during the period 2000–01 to 2005–06, with an average of 20,131 clients per annum.

- In the age group 65 and over, CLCs saw 55,941 clients during the period 2000–01 to 2005–06, with an average of 9,324 per annum.

I apologise for any inconvenience this oversight may have caused.

Yours sincerely

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HOUSE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO OLDER PERSONS AND THE LAW

Questions on Notice from appearance by the Attorney-General's Department, 23 March 2007

Question No. 1

The Chairman, the Hon Mr Peter Slipper MP, asked the following question at the hearing on 23 March 2007:

The committee asked whether the federal government provided any funding to the Caxton Legal Centre's Legal Outreach for Older People service.

The answer to the honourable Member's question is as follows:

The Australian Government does not provide any specific funding to Caxton Legal Centre for their Legal Outreach for Older People service.

The Community Legal Services Program (CLSP) provides funding to community legal services to provide legal assistance services for disadvantaged members of the Australian community, including older persons. Caxton Legal Centre received the following funding under the CLSP in 2006-07.

Commonwealth

Generalist	$106,359
Child Support Scheme	$126,759
Clinical Legal Education	$115,235
State	$177,568
Total CLSP funds	$525,921

According to the centre's audited financial statements it does not receive any other Australian Government funding.

Question No. 2

The Chairman, the Hon Mr Peter Slipper MP, asked the following question at the hearing on 23 March 2007:

The committee asked whether the Australian Government provides any funding to the Seniors Advocacy Information and Legal Service for the provision of assistance specifically to elderly clients who are the victims of financial abuse.

The answer to the honourable Member's question is as follows:

The Australian Government does not provide funding to Caxton Legal Centre specifically for its Seniors Advocacy Information and Legal Service. As noted above, according to the centre's audited financial statements it does not receive any other Australian Government funding.

Caxton Legal Centre will receive, from the Queensland Department of Communities, $107,806 in 2006-07 and $107,806 (plus indexation) in 2007-08 for the provision of services under the Seniors Advocacy Information and Legal Service program. This amount is not provided as part of the Community Legal Services Program, and is separate to Queensland's $177,568 contribution to that Program. The Queensland Department of Communities has also allocated one year funding of $576,719 for the pilot Seniors Legal & Support Service following the announcement of an additional $1.9m pilot for older person's legal services.

In addition, the Attorney-General's Department understands that the Queensland Department of Communities provided $55,000 to Caxton Legal Centre in 2005-06 for the production of fact sheets aimed at preventing elder abuse and financial exploitation.

Question No. 3

Mr. Kelvin Thomson MP asked the following question at the hearing on 23 March 2007:

Do you have any data on the types of matters most usually dealt with in legal aid applications by the older age group – 65 and over?

The answer to the honourable Member's question is as follows:

The table below responds to the request with a detailed break down for the 2005–06 financial year on the types of matters for which Older Australians seek grants of aid and which the Commonwealth provides funding for:

	Applications	Applications %
Family Law	823	61.65%
Criminal Law	48	3.60%
Civil Law - Veterans	393	29.44%
Civil Law - Migration	5	0.37%
Civil Law - Other	66	4.94%
TOTAL	1,335	100%

The majority of applications are made for family law matters, not veteran's matters as suggested at the hearing. Veteran's matters comprise the second largest category of matter for which aid is sought.

Question No. 4

Mr Kelvin Thomson MP asked the following question at the hearing on 23 March 2007:

Could the Committee be provided with a table demonstrating the application approval rates across age groups?

The answer to the honourable Member's question is as follows:

The table below shows that Older Australians make up 2.87% of successful applicants. During the 2005–2006 financial year, there were 1,335 applications by persons over the age of 65 for grants of aid and which the Commonwealth provided funding for, and 1,076 applications were approved. This gives Older Australians an approval rate of 82% nationally, which is higher than the approval rate of 73% for all applications.

Number of successful applications for Grants of Aid by age group

	NSW	VIC	QLD	WA	SA	TAS	ACT	NT	TOTAL / % of ALL
0 - 17	1,522	544	886	244	356	196	64	34	3,846 10.25%
18 - 19	239	317	263	69	120	42	13	13	1,076 2.87 %
20 - 29	2,920	2,494	2,674	657	1,032	631	201	161	10,770 28.72 %
30 - 39	3,225	3,559	3,131	917	992	631	286	175	12,916 34.44 %
40 - 49	1,455	1,685	1,290	396	413	251	144	73	5,707 15.22 %
50 - 59	466	544	359	105	119	75	35	21	1,724 4.60 %
60 - 64	109	80	88	28	24	9	8	5	351 0.94 %
65 and over	338	467	179	31	26	15	12	8	1,076 2.87 %

Question No. 5

The Chairman, the Hon Mr Peter Slipper MP, asked the following question at the hearing on 23 March 2007:

In some cases, the legal aid commissions are unable to use all of the Commonwealth funding for Commonwealth law matters, and so there is some of the budget unspent that they believe they could use to assist older Australians. Is there anything you would like to say on the matter?

The answer to the honourable Member's question is as follows:

The current policy, where the Australian Government funds legal aid commissions to provide legal assistance in matters arising under Commonwealth laws, and States are responsible for providing aid in matters arising under their own laws, is not under review. The proposal that 10% of Commonwealth funds could be 'untied' to be used at the discretion of the individual commissions is not under consideration.

However, it should be noted that Legal aid commissions are independent statutory bodies established under State and Territory legislation. In order for an application for legal aid to succeed, applicants must meet the relevant Commonwealth legal aid priorities and guidelines, and satisfy means and merits tests. Responsibility for assessing individual applications for legal assistance lies with officers of the legal aid commissions.

Question No. 6

The Chairman, the Hon Peter Slipper MP, asked the following question at the hearing on 23 March 2007:

It has been put to the committee by the Caxton Legal Centre – and you may have seen its submission – that the Family Law Act might need to be amended to provide for court-registered granny flat type investment loan agreements between older people and an adult child and his or her spouse so that they can be relied on, in any matrimonial property proceedings, to protect the interests of the aged parent. Do you have a view on how workable that would be? Are you aware whether the Family Court already takes into account such informal family agreements when deciding on appropriate arrangements between spouses?

The answer to the honourable Member's question is as follows:

The Family Court is capable of taking into account the interests of third parties – such as those of the aged parent in informal family arrangements – in matrimonial property proceedings. In particular, Part VIIIAA of the *Family Law Act 1975* permits the Court to alter third party rights when it is either making orders altering property interests with respect to the property of parties to a marriage under s.79, or making an order or injunction in circumstances arising out of the marital relationship under section 114.

Under subsection 79(1), the court is given a wide discretion to make "such order as it considers appropriate" in altering the property interests of each of the parties to the marriage. Section 79(10)) provides that third party creditors or other persons whose interests would be affected by the making of the property order are entitled to become a party to the proceedings, with s. 92 permitting them to apply to the court for leave to intervene.

The object of Part VIIIAA is to allow the court, in property proceedings, to make orders or grant injunctions under s.79 or s.114 that are directed to, or alter the rights, liabilities, or property interests of a third party (s.90AA). The orders which the court may make under s.79 to bind a third party are set out in s.90AE. The range of orders is intended to be broad and includes orders directing a third party to do a thing in relation to the property of a party to the marriage, and orders altering the rights, liabilities or property interests of a third party in relation to the marriage (s.90AE(2)). To protect third parties, the Court may only make such an order if all of the requirements set out in s.90AE(3) are met. These requirements include that the making of the order

is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage; the third party has been accorded procedural fairness in relation to the making of the order; and the court is satisfied that, in all the circumstances, it is just and equitable to make the order.

Section 90AF provides that the court has discretion to make an order or grant an injunction binding a third party when making an order or injunction under s.114. The provision mirrors s.90AE.

Question No. 7

The Chairman, the Hon Peter Slipper MP, asked the following question at the hearing on 23 March 2007:

The Committee asked what is the recognition of power of attorney instruments between Australia and New Zealand?

The answer to the honourable Member's question is as follows:

In New Zealand, powers of attorney are generally regulated by the common law. However, there are a number of Acts which set out statutory requirements in relation to powers of attorney. The *Property Law Act 1952* and the *Land Transfer Act 1952* both refer to general powers of attorney. The *Protection of Personal and Property Rights Act 1988* regulates the creation and enforceability issues for enduring powers of attorney.

In Australia, the regulation of power of attorney instruments is a matter for State and Territory Governments. The Standing Committee of Attorneys-General has previously considered the issue of mutual recognition across jurisdictions and in 2000 endorsed draft provisions for the mutual recognition of powers of attorney. The effect of the mutual recognition provisions is that registration of a power of attorney in any Australian jurisdiction will satisfy the requirements in a local jurisdiction for certain documents to be registered. New South Wales, Victoria, Queensland, Tasmania and the Australian Capital Territory have implemented the mutual recognition provisions. New Zealand has not been involved in the mutual recognition provisions project for powers of attorney between the Australian States and Territories.

Legislation in the Australian jurisdictions and in New Zealand does not specifically address the recognition and enforcement of powers of attorney instruments across the Tasman. Nor is there, as far as we are aware, any arrangement or agreement between the two countries regarding their recognition. Powers of attorney are not subject to private international law rules regarding the recognition and enforcement of judgments.

However, at common law, it appears that the proper law of the power, in the absence of express stipulation to the contrary, is the law of place where the power of attorney is intended to be used. Under Australian and New Zealand law, the proper law of the power governs the power of attorney. In general, a power of attorney should be effective outside its home jurisdiction.

Question No. 8

Mr Kelvin Thomson MP asked the following question at the hearing on 23 March 2007:

The Committee asked whether Centrelink recognises arrangements put in place directly by them over powers of attorney drafted under State legislation?

The answer to the honourable Member's question is as follows:

The Attorney-General's Department has consulted with Centrelink in relation to their recognition of power of attorney instruments.

Centrelink does recognise powers of attorney executed under State and Territory legislation. However, Centrelink also has the capacity to establish separate nominee arrangements for the purpose of either correspondence or payment. Centrelink has advised that under the nominee provisions in Part 3A of the *Social Security (Administration) Act 1999* and Part 8B of the *Family Assistance (Administration) Act 1999*, delegates have the discretion to appoint nominees consistent with the provisions dealing with the inalienability of Commonwealth social security and family assistance payments. In exercising this discretion, a Centrelink delegate will be strongly influenced by the existence of a State or Territory administration order, such as an order made by a Court or Guardianship Tribunal. Centrelink has advised that unless there are compelling reasons to the contrary, a delegate would generally appoint a nominee consistent with any orders in place. Centrelink has advised that in most cases, if a power of attorney instrument is already in place, this will suffice.