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BY: *LACA*

The Hon Peter Slipper MP
Chair
Standing Committee on Legal and Constitutional Affairs
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Mr Slipper

On behalf of the ACT Government, I am writing to provide you with a submission to the Inquiry into Older People and the Law.

Thank you for the opportunity to make this submission, and for granting an extension of time to provide it.

Yours sincerely

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ACT Government Submission

to the

**House of Representatives Standing Committee
on Legal and Constitutional Affairs**

inquiry into

Older People and the Law

January 2007

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The ACT Context

1. The ACT Government is committed to ensuring that Canberra's older citizens live in a society in which people of all ages and abilities from different cultural and linguistic backgrounds are valued for their contribution, respected, included and encouraged to reach their full potential and to shared in the benefits of our community.
2. The ACT Government is developing and implementing policies and programs that will build a strong, safe and cohesive community, consistent with the goals identified for Canberra seniors in the "Canberra Social Plan". These goals include identifying and meeting the diverse needs of our ageing community, recognising the contribution that community organisations and volunteers make, and promoting and supporting carers.
3. The ACT has a relatively young population (the median age in the ACT at June 2005 was 34.5 years compared to the national average of 36.6 years), but it is ageing more quickly than that of Australia as a whole (an increase of 6.4 years in the median age since 1985 while the national median age has increased by only 5.9 years since 1985).
4. With advances in medical technology and improvements in public health, the life expectancy of people (males and females) in the ACT has increased from 72.5 in 1971 to 81.8 in 2004. In fact, ACT residents have had the highest life expectancy of all Australian state and territory residents since 1991.
5. Although the ACT is ageing, and fertility rates are lower than replacement levels, there are other significant factors also at work. The ACT is not ageing evenly; in fact, there are significant differences between the various age cohorts. The highest growth is being experienced in the older age groups with negative growth being experienced in most of the younger categories.

ACT Legislation

- **ACT Discrimination Act 1991**

6. The ACT *Discrimination Act 1991* makes it unlawful to treat a person unfavourably because of their age, just as it is unlawful to discriminate on the basis of a person's sex, race or disability. The Discrimination Act provides for exceptions, for example where there are genuine health and safety reasons. It allows for age limits to apply in relation to benefits and concessions. It also allows for positive discrimination or 'special measures' to meet particular needs.

- **ACT Human Rights Act 2004**

7. The ACT *Human Rights Act 2004* gives legal effect to fundamental civil and political rights enshrined in the International Covenant on Civil and Political Rights. The ACT is the first jurisdiction in Australia to directly incorporate international human rights standards into local law. All individuals in the ACT, whether Australian citizens or not, have human rights under the Act.

8. The Act commenced on 1 July 2004 and protects rights to, inter alia:

- equality before the law and non-discrimination;
- life;
- protection from torture and cruel, inhuman or degrading treatment;
- consent to medical treatment;
- privacy and reputation;
- freedom of expression;
- take part in public life;
- liberty and security of person; and
- a fair trial.

9. The primary aim of the Act is to establish a 'dialogue model' for the protection of human rights in the ACT. The 'dialogue' model, essentially seeks to ensure that human rights are taken into account when developing and interpreting ACT law, without displacing the current constitutional arrangements, that is, the Legislative Assembly has the final say on whether laws are passed or changed to be compliant with human rights.

10. The Act requires that all Territory laws must be interpreted, as far as possible, in a way that is consistent with the human rights protected in the Act. Courts, tribunals, decision makers and others authorised to act under ACT legislation to take into account human rights when interpreting the law.

11. The Act does not provide for a direct right of action or specific remedies for breaches of human rights. Instead, it allows human rights issues to be raised in the context of existing court proceedings and existing remedies that are already available will apply in cases where a human rights argument is raised. The ACT Attorney General has the right to intervene in court and tribunal proceedings concerning human rights.

12. The Act gives the ACT Human Rights Commissioner the role of reviewing the impact of laws on human rights, monitoring the operation of the Act and providing human rights education to the community.

13. The long-term aim of the Act is to build a human rights culture firstly, by promoting cultural change within the executive by ensuring that decision makers work within the agreed framework of human rights standards; and secondly, by promoting awareness within the wider community of these standards and the ways in which they may be applied effectively.

- **ACT Powers of Attorney Act 2006**

14. The new Act had its origin in the recommendations aimed at addressing the abuse of older people's powers of attorney contained in the ACT Legislative Assembly Standing Committee on Health and Community Care's 2001 Inquiry into Elder Abuse in the ACT. The ACT Government decided that the standing committee's concerns should be addressed through a comprehensive reform of the whole scheme of powers of attorney.

15. The new law clearly sets out the criteria for deciding whether a person making a power of attorney has understood the nature and effect of making it, and requires attorneys for people who

lose capacity to comply with general principles relating to rights of the maker of the enduring power of attorney.

16. Under the Act, the Guardianship and Management of Property Tribunal will have supervisory powers in relation to enduring powers of attorney when the maker has lost capacity. The Act also recognises interstate documents similar to ACT powers of attorney.

- **ACT Director of Public Prosecutions Direction 2006 No 2**

17. Under the *ACT Director of Public Prosecutions Act 1992*, the ACT Attorney General has the ability to issue directions to the ACT Director of Public Prosecutions about the management of particular categories of prosecutions. Given the importance of maintaining the decision-making integrity of the Director of Public Prosecutions, such directions can only be of a general nature, rather than referring to a specific case, and can only be made following proper consultation with the Director.

18. The medical treatment direction has been issued to ensure that the *ACT Medical Treatment Act 1994* remains effective despite the enactment of the Commonwealth *Euthanasia Laws Act 1997*. The new direction is cast in the same terms as a direction made in 1998, and is intended to replace the 1998 direction.

19. The direction protects the right of patients to provide instructions in advance regarding the withdrawal or withholding of medical treatment. The direction also protects the right of patients to appoint a decision-maker to make decisions about medical treatment on their behalf, through the use of a power of attorney.

20. The direction requires the ACT Director of Public Prosecutions not to pursue a prosecution against a health professional for the death of a patient in circumstances where the health professional follows, in good faith, the instructions set out in an advance directive, or instructions given by a person exercising a power of attorney, regarding the withdrawal or withholding of medical treatment. The Director of Public Prosecutions is also directed not to pursue prosecutions against health professionals who provide pain relief in good faith to a person diagnosed as being in the terminal phase of a terminal illness where an incidental effect of the pain relief appears to have been the hastening of death. Both of these conditions have been met in relation to the medical treatment direction.

Commonwealth Age Discrimination Legislation

21. The Commonwealth Age Discrimination Act, enacted in June 2004, prohibits discrimination on the basis of age in areas of public life including employment, education, accommodation, the provision of goods, services and facilities, the administration of Commonwealth laws and programs, access to premises, selling or other dealings with land and requests for information on which unlawful discrimination might be based.

22. There are a number of ways in which this legislation differs from other federal anti-discrimination legislation. These differences provide exemptions which enable the offering of discounts to Seniors Card holders, and the provision of free influenza vaccines to older people. However, it must be noted that the Act also includes a 'dominant reason' test – something not

seen in other federal anti-discrimination law. The dominant reason provision means that an action will only be deemed to be discriminatory under the Act if the person's age was the dominant reason for the action.

23. The ACT Government recommends that further thought should be given to this provision. In the case of an older worker seeking employment or advancement, for instance, establishing that age was the dominant reason for a refusal could be problematic in the case where an employer had decided against employing or promoting an older person because of their age, but was able to cite a different cause as the dominant reason.

Aged Accommodation

24. The diversification of forms of retirement accommodation and associated services that are becoming available raise a number of questions as to the adequacy of current consumer protections.

25. In the ACT the *Retirement Villages Code of Practice* provides consumer protection and was introduced in 1999 under the regulations of the *ACT Fair Trading Act 1992*.

26. Only a limited number of complaints have come to the attention of ACT authorities under the Code, but rather than seeing this as an indicator of its adequacy, it appears that a number of complaints have been raised about matters that fall outside the scope of the current Code.

27. Most jurisdictions have specific Retirement Villages Acts that provide consumer protection, and in some states, there are also particular provisions in planning legislation to cover retirement accommodation, most notably the NSW SEPP Senior Living.

28. The ACT *Retirement Villages Code of Practice* is presently being reviewed with a view to strengthening the protection for consumers.

Rights of Grandparents

29. In 2005 the *Family Law Act 1975* was amended following wide community debate regarding the effectiveness of the legislation, including the issue of whether it appropriately recognised the role, responsibilities and rights of grandparents in family breakdown.

30. While these recent amendments state the important role that grandparents can play in the lives of children, even going as far as to explicitly include them in various sections of the Act, it remains that grandparents are hesitant to be involved in legal and non-legal proceedings for a number of reasons, including:

- Being unwilling to antagonise parties;
- A belief that they should not interfere with their own child's life;
- A fear that their involvement will exacerbate an already tense situation;
- Problems with in-law relationships;

- High legal costs may prohibit those on fixed incomes (pensions);
- No legal aid available for many who are asset rich (and therefore do not meet the eligibility criteria for accessing aid); and
- The aged may simply be physically less able to take part.

31. While these concerns may be addressed in part through the activities of the newly established Family Relationship Centres, anecdotal evidence suggests that many grandparents remain unaware of their new legal status under the amended *Family Law Act*, indicating that education programs associated with recent amendments may have failed.

32. Equally, legislative amendment alone will not fully address the rights of grandparents without commensurate action to address those barriers listed above.

33. The ACT Government recommends that the Standing Committee should consider the effectiveness of efforts associated with the recent Family Law reforms to promote the rights of grandparents and to gauge whether additional efforts need to be made to provide appropriate information and facilitate access.

Same-Sex Relationships

34. The ACT Government is proud of its legislative action to address discrimination in the treatment of same-sex relationships. However, many jurisdictions including the Federal Government retain legislative provisions that exclude same-sex couples from the benefits offered to heterosexual couples. For example, same-sex partners of Defence personnel historically have not been included in moving entitlements while the employees' pets were.

35. Similarly, in late 2003 the United Nations' Human Rights Committee ruled that the Australian Department of Veterans' Affairs was wrong not to recognise same-sex couples when it comes to the availability of widows' pensions. Currently, the Human Rights and Equal Opportunity Commission (HREOC) is conducting an inquiry called "Same-Sex: Same Entitlements" looking at the practical implications of such exclusions. Older persons are relevant in this inquiry in relation to a variety of legislation. One specific example is where the Defence Force Retirement and Death Benefits Act 1973 provides for a spouse; 'spouse' in this Act refers to a marital relationship limited to one between a husband and wife.

36. Further areas of legislation subject to discriminatory intent (by explicitly referring to heterosexual (and not same-sex) spouses, partners or dependents) and that may relate to older persons include:

- Tax rebates (eg. Income Tax Assessment Act 1936);
- Medicare levy;
- Health concessions (eg Pharmaceutical Benefits Scheme and Medicare Safety Net);
- Superannuation entitlements (of Commonwealth employees, Defence Force members or Parliamentarians);
- Workers compensation (eg. Safety, Rehabilitation and Compensation Act 1988);

- Veterans' pensions and benefits (eg Veterans' Entitlement Act 1986);
- Compensation for Veterans (eg. Military Rehabilitation and Compensation Act 2004); and
- Judicial pensions (Judges Pension Act 1968).

(A comprehensive list of legislation that may need amending to avoid discrimination against same sex couples can be found at <http://www.humanrights.gov.au/samesex/index.html>. At this stage, there are supposedly around 68 federal laws which exclude same-sex couples from accessing financial and work related entitlements and therefore need amending.)

37. In undertaking the inquiry HREOC has indicated that it hopes to achieve equality before the law for all Australians, or at least steps toward it.

38. The ACT Government recommends that the Standing Committee:

- Note that, while past amendments to legislation do bring us closer to a non-discriminatory society, particularly with regard to older people, it would be prudent for the current House of Representatives' inquiry to both seek input from the Commission; and
- pay heed to the outcomes of HREOC's inquiry on this matter.

Elder Abuse

39. As a response to the ACT Legislative Assembly's Standing Committee on Health and Community Care 2001 Inquiry on Elder Abuse, in the 2003/04 Budget, the ACT Government allocated \$411,000 over four years to support a multifaceted approach to addressing Elder Abuse in the community, including the introduction of an information and referral telephone line; a community awareness campaign; the development of comprehensive training materials for professionals; and the development and conduct of an initial benchmarking survey to establish the level of awareness of what constitutes elder abuse in the ACT.

40. An Elder Abuse Prevention Taskforce was also set up in 2003 to oversight the implementation of the 14 recommendations from the Standing Committee inquiry. In December 2005 following the completion of the majority of the recommendations this role was transferred to the Ministerial Advisory Council on Ageing (MACA).

41. In response to some of the Standing Committee's recommendations a suite of documents was developed consisting of a Policy Framework, Training Kit and Information and Resource Pack, and a community awareness campaign consisting of television and radio advertisements was conducted in May 2006.

42. It is understood that since the April 2006 Federal/State and Territory summit on elder abuse in aged care facilities, the Federal Government has moved to:

- introduce compulsory police checks on staff and certain volunteers,
- increase spot checks of aged care homes,
- develop legislation to protect these safeguards,
- increase funding to the Aged Care Standards and Accreditation Agency; and

- introduce a new complaints mechanism along with compulsory reporting and whistle blower protection requirements to take effect from 1 April 2007.

43. Definitions of abuse in various States and Territories are also being examined with a view to developing possible uniformity. Any such moves should take into account the need for jurisdictional flexibility given differing demographic and social characteristics and should not be used to shift costs to States and Territories without commensurate financial compensation.

44. It is also important in the context of the summit's finding to recognise that elder abuse is not limited to aged care facilities, and there is a significant role for Territory legislation relating to power of attorney laws, guardianship boards and powers and laws governing apprehended violence orders.

45. Again, while greater uniformity in legislative provisions may be helpful (for example it is understood that not all powers of attorney signed in another state are recognised when an older person is living in a different state or territory, despite the recent changes to this effect in the ACT), the approach needs to be balanced.

46. The ACT Government recommends that moves towards achieving uniformity in definitions of abuse in various States and Territories:

- must take into account the need for flexibility to reflect jurisdictions' differing demographic and social characteristics; and
- must not be used to shift costs without adequate compensation.

47. Elder Abuse is notoriously difficult to prosecute, partly for the same reason that prosecuting the sexual abuse of children is difficult, though Elder Abuse has received much less attention. The reasons include the similarities of the victims, namely that they are vulnerable and often regarded by the legal system as unreliable, and potential disabilities of cognition make them problematic witnesses. Older people may be reluctant to report or pursue elder abuse due to perceptions that they will be discredited during the process. There may also be concerns about the time required to resolve court proceedings.

48. The ACT Government recommends that an appropriate body, such as the Australian Institute of Criminology or the Australian Law Reform Commission, be asked to conduct a proper and professional inquiry into how changes in procedures, practices and legislation might be made to improve the investigation and prosecution of elder abuse.

Summary

49. The ACT Government appreciates this opportunity to provide a submission to the Inquiry into Older People and the Law. The ACT Government has a number of programs in place that address issues relevant to this topic, and would be interested in taking the findings of the Inquiry into account when further developing these programs.