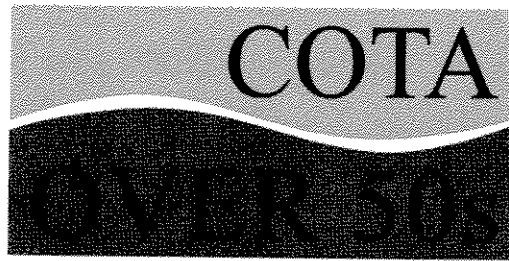


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*the voice of older Australians*

## Older People and the Law

### COTA Over 50s Submission to the House of Representatives Inquiry

December 2006

Authorised by  
National Policy Council

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# House of Representatives Inquiry Older People and the Law

## Terms of Reference

The Terms of Reference of the Inquiry are to investigate and report on the adequacy of current legislative regimes in addressing the legal needs of older Australians in the following specific areas:

- Fraud;
- Financial abuse;
- General and enduring 'power of attorney' provisions;
- Family agreements;
- Barriers to older Australians accessing legal services; and
- Discrimination.

In conducting this inquiry the Committee has stated that it will also consider the relevant experience of overseas jurisdictions. In these terms of reference the definition of 'older' is that of the Australian Institute of Health and Welfare, which defines 'older' as 65 years and over.

## COTA Over 50s

### Comments on Areas of Specific Interest

While COTA Over 50s identifies and advocates on a range of issues that impact on older Australians, it has particular interest, and has undertaken action in relation to some specific areas under consideration by the Inquiry. We will therefore limit our detailed responses to the areas of:

1. Financial Abuse
2. General and Enduring Power of Attorney provisions, and
3. Family Agreements

### General Comments

In addition COTA/Over 50's would like to draw your attention to the broad scope of issues that impact on older Australians in relation to the remaining areas being considered by the Inquiry.

## AREAS OF SPECIFIC INTEREST

### 1. Financial abuse

See attachment: *Financial Exploitation Of Older People: A Summary Of The Literature* for more detailed background information on this issue.

#### Definitions

There is no accepted definition of elder abuse in Australia, but the definition adopted by the Healthy Ageing Taskforce of the Community Services' Ministers' Conference is the most widely used definition in Australia. It is very similar to the internationally accepted definition adopted by the World Health Organisation.

'Elder abuse is any act occurring within a relationship where there is an implication of trust, which results in harm to an older person. Abuse may be physical, sexual, financial, psychological, social and/or neglect.

Financial Abuse is the illegal or improper use of mismanagement of a person's money, property or resources.

#### Forms of Financial Abuse

Examples of financial abuse include:

- taking, misusing or using, withholding knowledge about or permission in regard to money and property
- forging or forcing an older person's signature
- abusing joint signatory authority on a blank form
- misusing ATMs and credit cards
- cashing an older person's cheque without permission or authorization
- misappropriating funds from a pension
- getting an older person to sign a will, deed, contract or power of attorney through deception, coercion or undue influence
- persuading an older person to change a will or insurance policy to alter who benefits from the will or policy
- using an authorized power of attorney not in the interests of the older person
- negligently mishandling assets including misuse by a caregiver
- promising long term or lifetime care in exchange for money and property and not providing such care
- overcharging or not delivering care giving services
- denying access to money or property
- getting an older person to act as guarantor for a without sufficient knowledge to make an informed decision

## Prevalence of Financial Abuse

Available Australian statistics do not provide satisfactory indicators of the prevalence of abuse. The most reliable indicator of the prevalence of elder abuse is large population-based studies from the USA, Canada, Britain and Europe. They have demonstrated incidence rates for elder abuse of between 3% and 5% of the population 65+ in domestic settings. Precise figures on the incidence of financial abuse of people aged 65 years and above are not available. Anecdotal evidence suggests that this type of abuse accounts for approximately 50% of the projected range of 80,000 to 130,000 cases of elder abuse in Australia, based on ABS population projections for 2004. The Elder Abuse Prevention Unit (EAPU) in Queensland operates one of the most developed help lines on elder abuse. Their data indicated that financial abuse was noted in 50% of their calls. In a 7 month period, the service dealt with 59 calls in regard to suspected abuse in regard to \$8.2 million. Statistics over a number of years from the Abuse Prevention Program of the South Australian organization, Aged Rights Advocacy Service (ARAS) also indicate that financial abuse is the most prevalent form of reported elder abuse.

The issue of the financial exploitation and abuse of older people by family and other trusted people is only emerging as a mainstream issue in Australia. This form of abuse although widely recognized as the most common form of abuse, has received less attention compared with other types of elder abuse. Over the next 20 years in Australia, billions of dollars in assets will be transferred from older to younger generations. The extent of this intergenerational asset transfer opens up the opportunities for exploitation, defrauding and acting in a manner not in accordance with the wishes and timing of the older person.

The literature identifies two specific groups as being more vulnerable to financial abuse.

**(1) Women 75 + with assets who live alone:** Some women in this group may not have handled their financial affairs as their husbands/partners previously handled the finances. A range of studies have found that a lack of familiarity with financial matters enhances the likelihood of financial abuse. Changes in and unfamiliarity with electronic transactions add to this vulnerability.

**(2) People with Dementia:** Evidence suggests that the presence of cognitive impairments is also a factor in vulnerability to financial abuse. Dementia and other cognitive impairments can lead to difficulties in understanding the financial details or implications of particular actions. People with cognitive impairments without a family member or trusted other to assist them can be more vulnerable to predatory financial abusers.

## Responses to Financial Abuse of Older People

Responses to financial abuse of older people fall into two categories - preventative strategies that aim to avoid such abuse and investigative strategies that focus on determining whether abuse has occurred, and implementing remedial action to address the abuse.

### **Structuring financial transactions to reduce the possibility of abuse**

A strategy that has been recommended by some reports is the structuring of financial transactions so as to eliminate the temptation of abuse. A range of options is suggested within this strategy. These include:

- regular checks being directed to the bank regarding all payment arrangements;
- routine bills being paid automatically or by arrangement with the creditor with e.g. two nominated 'vetted' friends or family members;
- asking a 'vetted' friend to review all papers before they are signed when money is to be transferred;
- when assets are transferred or planned to be transferred, documenting the arrangements in written document signed by both parties.

### **Screening Care Workers and Live-in Staff**

Another strategy that is suggested by some commentators is that care should be taken in screening care workers and live-in staff. References should be checked and the person carefully screened so that engagement of predatory caregivers who try to isolate the older person and build a dependent relationship is avoided. In Britain, legislation was introduced in April 2004, setting up a national register of elder abusers in recognition of the impact of some individuals who persistently prey on older people in a serial manner, moving from district to district.

### **Administrative and Guardianship Laws**

All Australian jurisdictions have guardianship and administrative law provisions. These include power to appoint an administrator and/or guardian, powers to review the actions of a guardian or administrator and powers to 'freeze' assets on an interim basis while financial abuse is being investigated. However, such provisions only apply to older people who do not have capacity. No such protections are available to older people with capacity. This appears to be an obvious gap in legislative protections.

### **Banks and the Financial Sector**

In the United States and Britain, some banks and financial institutions have taken significant initiatives in addressing financial abuse. One of the most successful examples of bank involvement in monitoring and identifying financial abuse amongst older people is in the American State of Massachusetts. In this State, Government agencies worked collaboratively with the banking industry body and specific banks in tackling financial abuse. This involved the State Government and the banks working together to teach bank employees how to recognise and report financial exploitation of elder customers. The strategies used in Massachusetts included training on who commonly commits financial exploitation, training on typical scenarios of such abuse, strategies for detecting financial abuse and a model protocol for action. Other strategies include instructions on telling customers about good financial practices to prevent financial abuse. This approach has been replicated on a smaller scale in New York, Kentucky California and Washington.

One of the difficulties for the banks in addressing financial abuse has been the restrictions that privacy laws place on their role. One of the strategies for addressing this has been the introduction of advanced directives by clients that

specifically permitted banks to notify account holders and other named parties of activity that is inconsistent with the account holder's usual banking patterns.

### **Nominee Arrangements**

A number of institutions have separate arrangements for the identification of a 'nominated person', or 'person responsible' which have the potential to countermand Power of Attorney arrangements which may be in place, and for enabling financial abuse to occur. Such institutions include Centrelink, which has a Nominated Person arrangement, whereby someone nominated by the recipient can receive correspondence and payments, and residential care facilities which have a 'Person Responsible' arrangement which may also raise issues of conflict of interest and concerns for the person concerned. The fact that this person need not be the Power of Attorney, nor that any checks are made to ensure that the Power of Attorney is informed, can facilitate the occurrence of abuse of vulnerable people. These arrangements need to be reviewed and in conjunction with the Power of Attorney legislation as discussed below.

### **Specific issues in indigenous communities**

While elder abuse is known to occur in Aboriginal communities, there have been few studies directed towards identifying the extent to which different types of abuse occur. However, in 2005, the Office of the Public Advocate in Western Australia commissioned research to identify and develop local responses to elder abuse and the mistreatment and neglect of older people in Aboriginal communities. The research found that financial abuse of older Aboriginal people was the most commonly reported abuse. This could range from harassment for money on pension day and neglect by people receiving support to care for them to, in some cases, physical abuse or robbery.

The research also found that the impact of elder abuse was felt earlier among Aboriginal people where the mortality age was lower and an older person was often considered to be someone in their 40s. The Public Advocate and the Office for Seniors Interests and Volunteering are currently examining the recommendations to identify appropriate strategies for consideration by the State Government.

## 2. General and Enduring 'Power of Attorney' provisions

### Consistency Across Jurisdictions

The law and practice associated with enduring powers are complex, varied and often difficult for people to understand. There is considerable confusion about the different types of Powers of Attorney, what they cover, when they are activated and their legal status.

In addition there is no consistency across the different Australian jurisdictions which require urgent attention if these laws and policies are to become more user friendly for people as they age, especially those who will lose capacity.

There is also confusion and inconsistency in the language and terminology associated with the law both across state borders and within the states. For example:

- in South Australia there is overlap between the Enduring Power of Guardianship and the Medical Power of Attorney;
- in Western Australia and the Northern Territory people cannot appoint an enduring guardian - this means they cannot appoint a substitute decision maker for lifestyle and health care decisions;
- on the other hand, Queensland and the ACT have enduring powers that cover financial, lifestyle and health care decisions under the one power. Therefore it is only necessary to appoint one person as a substitute decision maker if the donor so chooses.

Not all states currently recognise other states' advance directive legislation. This can cause considerable anxiety, confusion and additional cost. Many people are very mobile in the twenty-first century; hence consistency and mutual recognition are essential.

COTA Over 50s endorses a recommendation in a recent Alzheimer's Australia discussion paper *Decision making in advance: Reducing barriers and improving access to advance directives for people with dementia (2006)* which identified some of the issues requiring a national approach being:

- a) clarification of when legally appointed decision makers are necessary;
- b) need to establish clear pathways to appoint substitute decision makers;
- c) mutual recognition and harmonisation of the respective laws across state boundaries;
- d) the lack of consistency in the legislation across and within the states, for example:
  - when enduring powers are activated
  - ensuring enduring powers of attorney are properly exercised once the donor becomes legally incapacitated
  - the need for an annual review of all advance directives;
- e) different terminology.

The discussion paper also recommended that:

*Attorney-Generals should convene a forum ...including (sic) the National Guardianship Administration Network to discuss the issues associated with the law and practice of advance directive legislation within each state and across state boundaries.*

## Safeguards from Abuse

Powers of Attorney are put in place to provide substitute decision making in the event of the donor losing capacity, but lack of regulatory safeguards mean that Powers of Attorney may be invoked before the person has lost capacity with the intention of securing the assets of the donor. There is no requirement to register the PoA or to provide copies to any regulatory body. The only safeguards that are in place come into effect if there are concerns expressed by a third person about the actions of the PoA. If the attorney is not acting in the donor's best interests the relevant tribunal can revoke or suspend the enduring power of attorney.

### Case Example - Mary

Mary had no relatives and lived alone with a lot of cats in a big old Victorian house in an inner suburb. She had a stroke and while in hospital gave a power of attorney to a couple who had been her next door neighbours but recently moved away to live elsewhere. They took her investments out of her bank and put them into their mortgage where they said she would get better interest. She was moved into a low care facility, straight from the hospital. After a few weeks of being cared for at the low-care facility, her health improved and she was able to return home. With assistance from a legal aid solicitor, she finally revoked the powers of attorney and recovered her funds.

Not all cases end as fortunately as Mary's. Too often there is no will on the part of the older person to seek redress through legal action, or it may not be possible to recover the lost funds, as the tribunal has limited powers in enforcing its orders.

## ACT Study into Substitute Decision Making

In 2004, in order to look at ways to address these issues, the ACT Government conducted a review of the Powers of Attorney Act as recommended by the government's Standing Committee looking into Elder Abuse. The inquiry into substitute decision making made two recommendations.

The first sought cooperation with the ACT Law Society in order to ensure 'reasonable steps to guarantee that people signing over an enduring power of attorney are, in fact, competent'.

The second identified six areas for Government action, including:

- a) a review of compulsory registration
- b) safeguards assessing the capability of a person
- c) provision of comprehensive information
- d) an education program
- e) mechanism to monitor abuse



### **COTA (ACT) Focus Groups for Consumer Study**

At the time COTA (ACT) was asked to conduct a consumer study which found that many individuals did not have an understanding of the extent of the power that they were signing away as well as a lack of knowledge concerning responsibilities taken by those accepting in the Power.

COTA (ACT) gathered information from forty-four people who attended the focus groups and a further dozen people who made contact but were unable or unwilling to participate in the groups. The issues raised were very similar and a broad range of proposals was made.

Each group produced a number of suggestions and a summary of the comments from the focus groups was also compiled against specific recommendations of the ACTD Legislative Assembly's Report into elder abuse was presented to the Elder Abuse Prevention Implementation Taskforce. For this report the information from the focus groups has been consolidated on a thematic basis.

In general, group participants found the present arrangements less than adequate. There is a poor understanding of the issues and community uptake of substitute decision making instruments is very low. Most wait until a catastrophe strikes before taking action.

The understanding of all parties involved in substitute decision making is generally very poor. This applies to those giving the power, those receiving it and third parties involved with use of the power. Large companies and Government Departments frequently do not respect substitute powers. The imposition of bank rules and procedures was frequently stated as being given precedence over the relevant law.

As well the understanding of both the processes and responsibilities involved in substitute decision making is poor. In particular, many cases of individuals not understanding the extent of the powers that they are signing away, as well as, a lack of knowledge concerning responsibilities taken by those accepting the Power were raised.

The current arrangements do not impose penalties or disincentives on those who refuse to recognise the Powers. In addition, they do not provide any protection or support to a party that acts in good faith on the basis of the Powers.

As a result the report recommended that an educational programs be developed and other mechanisms aimed at facilitating the general use of the Powers of Attorneys.

As well a mechanism should be implemented to identify companies that fail to recognise Powers. Fair Trading, or another Government agency, identify and publicise firms that are difficult to deal with under a Power.

### **ACT Government Response**

The ACT Government is in the process of amending legislation to implement the outcomes of the review. The aim is to ensure that everyone, and their families, will have confidence that the law will protect their rights when they give powers to someone else to make decisions for them, either in relation to financial matters or health directives, but particularly for those where such decisions are made if they lose their decision-making capacity.

### 3. Family agreements

#### Grandparents and Family Law

COTA Over 50s has significant experience in working with grandparents who have a wide range of responsibilities for their grandchildren. In 2003 COTA participated in a national project that involved 499 grandparents who have become primary carers and are responsible for raising their grandchildren. In 2004 in collaboration with Early Childhood Australia we investigated the best ways to identify and respond to the needs of those grandparents caring for their grandchildren on a regular basis for at least two days per week. In NSW COTA has conducted a comprehensive program of workshops for grandparents and auspiced the Grandparents Association.

The more traditional role of grandparents as the providers of occasional or short-term care for their grandchildren has become, for some grandparents, a thing of the past. In Australia, as in countries throughout the world, grandparents providing full-time child-care for pre-school grandchildren is becoming more and more common. In addition grandparents are increasingly taking on the full-time parenting role of their grandchildren as families break down and parents for one reason or another, are no longer able to fulfil their role.

According to ABS Family Characteristics Survey conducted in June 2003 it was estimated that there were 22,500 Australian families in which grandparents had the full-time care of their grandchildren. Approximately 31,100 children aged 0 – 17 years were living with their grandparents. It is generally considered by those working in the community service industry that these figures are an underestimation of the number of grandparent headed families in existence.

In NSW the Children and Young Persons (Care and Protection) Act 1998 is aimed at ensuring children and young persons are protected by using the option that is the least intrusive into their lives. Increasingly Kinship Care has become the option that is being used by authorities as indicated by statistics. In 1991-92, 14 per cent of children placed by DOCS were in kinship care; in 2001, a total of 7788 children were in 'care', and of these, 4282 were in kinship care—i.e. 55 per cent.

In 2003 COTA (NSW) ran focus groups as part of the research into *Grandparents Raising Grandchildren* commissioned by the former Minister for Children and Youth Affairs. It sought views around the country of grandparents who were raising their grandchildren full time and the conditions and constraints they were facing. The single most important issue for grandparents on low incomes is to receive parity with foster parents.

The *Grandparents Raising Grandchildren* report (CNSP 2004), emphasized the lack of support for grandparent caregivers from Commonwealth and State governments, and made 21 recommendations to address the legal, financial and support issues and concerns raised by grandparents.

However, the projects and measures so far undertaken by the Government have made little difference to the support those grandparents so desperately need. They have also not contributed to any perceptions, by either the grandparents or those assisting them, that their needs have been recognised.

Specific recommendations of the report that are relevant to the current inquiry include:

- That Commonwealth and State governments together recognise grandparents raising their grandchildren as a special group requiring assistance.
- That legal aid be available to grandchildren and grandparents involved in Family court matters
- All children involved in the legal system have an independent advocate or children's representative paid for by Legal Aid
- The income and assets test for Legal Aid have the same eligibility criteria as the aged pension.
- That grandchildren be eligible for Health Care Cards in their own right and have this card and a Medicare Card issued in their own name to be held by the carer.

COTA Over 50s recommends that a Ministerial Taskforce be set up to advance the recommendations of the *Grandparents Raising Grandchildren report*

In 2004 COTA Over 50s welcomed the proposed changes to the Family Law Act under *A New Approach To The Family Law System (2004)*, which highlighted the role of grandparents and aimed to ensure that their role is taken into account by the courts.

COTA Over 50s strongly endorsed the following proposals:

- increases to legal aid, in anticipation that more grandparents will exercise their rights
- home ownership should not preclude grandparents from receiving legal aid when they are not in the workforce and are living on low and/or fixed incomes
- grandparents be entitled to access the Family Relationship Centres, dispute resolution services and the new national advice line
- advice and support for Indigenous grandparents should be developed in collaboration with Indigenous Elders. Specific initiatives will be required to meet the specific circumstances of grandparents.

### **Indigenous 'grandparents'**

Indigenous people accepting care of children face significant problems. There are key issues around eligibility criteria as many indigenous 'grandparents' may care for many children, often from different families. They require timely access to financial support and respite. Many indigenous 'grandparents' already have health problems and these are exacerbated with caring for their grandchildren.

There are also problems with accessing appropriate indigenous officers in Centrelink and state government departments.

Rural and remote indigenous 'grandparents' suffer from lack of information and consequently lack of financial and other types of support. In the end this also leads on to intergenerational problems, in particular grandmothers trying to deal with grandsons, where key cultural issues arise.

## **Model Family Agreements**

With the ageing of Australia's population, and the increasing number of people who continue to live at home independently and with the care of their families, friends, and neighbours, there is likely to be increasing numbers of families entering into informal agreements to provide care and mutual support.

COTA Over 50s recommends that funding be allocated to the development and trialling of Model Family Agreements, which may go some way to preventing financial abuse of older people, and will assist in clarifying arrangements and terms of agreements which aim to mutually support family members through the transfer of property and funds, and the provision of care.

## GENERAL COMMENTS

COTA Over 50s would like to draw the Committee's attention to the broad scope of issues that impact on older Australians in relation to the remaining areas being considered by the Inquiry

### 4. Fraud

Due to the impact of negative age stereotyping some older people may be vulnerable to marketing/advertising claims for "age defying, miracle" potions that are not based on research evidence.

### 5. Barriers to older Australians accessing legal services

In addition to the issues identified in the previous discussion on financial abuse, older people who have been subject to abuse rarely seek redress through civil action.

A number of difficulties has been identified in relation to civil action. These include:

- the standard of proof required and the evidential difficulties where the claimant has cognitive or frailty difficulties.
- Limitations of community legal services, e.g. limited geographical cover, relatively small number of locations, types of legal topics covered, hours of opening
- Lack of expertise in elder law issues in many legal services
- Perceived language complexity and lack of understanding of the legal system
- Limited access to Legal Aid – ownership of home usually precludes people even though they have very low incomes. This has a significant impact on a number of issues, including grandparents in custody disputes

### 6. Discrimination

#### Workers Compensation and Rehabilitation Acts

There are a number of problems with these Acts in particular in relation to entitlement to weekly payments ceasing on account of age.

This is a disincentive for seniors to remain in the workforce and is an inappropriate provision in an era of healthy ageing. It is also counter-productive in the current context, when all encouragement should be extended to seniors wishing to remain in paid work. This discriminatory provision should be amended.

#### Language

Lack of proficiency in English is a significant issue for many communities as their ageing population increases. More English language teaching and interpreters in all community languages should be readily accessible to people of non-English speaking backgrounds.

## **Rationing of health services because of a persons age**

This is quite separate from judgements made because of a persons' physical condition or ability to withstand major surgery.

## **7. Other**

We would also draw the committee's attention to some other areas that need consideration.

### **Consumer Tribunal**

Establishment of a Consumer Tribunal would provide a forum for consumer issues through a complaints resolution model. This would also ease the current issue of the potential legal costs that can deter consumers from approaching state Administrative Tribunal.

### **Retirement Village Contracts**

Most contracts formalise a power imbalance in relation to residents and owner/operators. Many residents are older women, who are less likely to be assertive when faced with either disputes or conditions imposed on them. There may be a many as 20 different forms of contract in one village so it is difficult for residents to share information or to negotiate as a group with owners.

### **Reverse Mortgages Equity access finance instruments**

Protection is required in relations to security of tenure if the mortgager defaults and to access to pension entitlements.

### **Access to Medical and Legal Services**

Sick and vulnerable people are particularly disadvantaged and have little course of redress in terms of access to GPs (especially those in a residential facilities) and to legal advice and assistance.

## What is COTA Over 50s?

COTA Over 50s is a national peak seniors organization, representing 1,500 member organizations with a reach of over 500,000 older Australians. Its National Policy Council, located in Canberra, consists of eight State and Territory-based entities – Councils on the Ageing in NSW, Victoria, Tasmania, Western Australia, South Australia, ACT, Queensland and the Northern Territory – plus the national organization ARPA Over 50s.

COTA Over 50s' prime objective is to promote, improve and protect the circumstances and wellbeing of older Australians, not just its members, and particularly the vulnerable and disadvantaged. Its work draws on views of today's seniors and on concerns for future generations of Australians.

In doing so the COTA Over 50s members adhere to five main principles:

**Policy Principle 1 Maximise the economic, social and political participation of older Australians and challenge ageism.**

COTA Over 50s supports policies and programs that encourage and facilitate the inclusion of seniors in all aspects of Australian life.

**Policy Principle 2 Promote positive views of ageing, reject ageism and challenge negative stereotypes.**

COTA Over 50s supports initiatives that recognise the capacities and contributions of seniors and actively combat ageism. COTA Over 50s believes that the impact of ageism, based on negative age stereotypes, restricts the participation of older people in all aspects of Australian life. This has adverse effects on the community and on older people.

**Policy Principle 3 Promote interdependence and consciousness across generations**

COTA Over 50s promotes policies that meet the specific requirements of seniors whilst taking account of the needs of the entire community for sound economic and social development. Senior Australians share an interest in long-term policies that serve the welfare of all Australians.

**Policy Principle 4 Redress disadvantage and discrimination**

COTA Over 50s believes that all people have the right to dignity, to security, to access high quality services, and to equality in participation in the community regardless of their income, status, background, location or any other social or economic factor. COTA Over 50s recognises that seniors are a diverse group with differing backgrounds and social, economic and health status and advocates strongly for those who are most vulnerable and disadvantaged.

**Policy Principle 5 Protect and extend services and programs that are used and valued by older Australians.**

COTA Over 50s develops policies and provides advice on maintaining and improving services and programs that seniors use and value. These include primary health care, hospitals, pharmaceuticals, employment services, utilities, public transport, residential care, housing and community care. It will seek to ensure that there is an adequate "safety net" of services and income support, which all seniors can access according to fair and equitable criteria in order to maintain a reasonable quality of life.