



PUBLIC TRUSTEE NSW
ABN 58 389 343 989

Submission No. 72
Date Received

RECEIVED
01 DEC 2006
BY: LACA

29 November 2006

Our reference: Mr A Lentini: General Counsel

N/A

Dr Nicholas Horne
The Secretary
House of Representatives Standing Committee
On Legal and Constitutional Affairs
P O Box 6021
Parliament House
CANBERRA ACT 2600

Dear Dr Horne

Re: Inquiry into Older People and the Law

Reference is made to your letter dated 20 September 2006. Thank you for inviting the Public Trustee to make a submission to the inquiry which we have prepared in conjunction with the Public Trustee NSW Fellow in Elder Law, Sue Field, of the University of Western Sydney. The specific areas referred to in the inquiry are addressed separately as set out below.

Financial Abuse

Financial abuse involves the illegal or improper use of a person's finances or property by another with whom they have a relationship implying trust (ANPEA).¹

Generally people are living longer and have a greater accumulated wealth at the time of their retirement from the workforce than previous generations. The government encourages people to be self funding as retirees. A large percentage of retirees own their own home and have very few debts when they leave the workforce.² However with this accumulated wealth these retirees are often targets of financial abuse. Dr Cheryl Tilse, a senior lecturer at Queensland University and specializing in asset management for the elderly, has commented

¹ Elder Abuse Prevention Unit - www.eapu.com.au.

² ABC Radio National Background briefing 22 Jan 2006 – Financial abuse of the elderly

that financial abuse of the elderly is becoming worse because of the importance of money in today's world. She says that the elderly are increasingly caught in a tangle of competing interests – the market trying to sell financial products such as reverse equity mortgages or financial planning or accommodation products and, the family who may require financial assistance or are attempting to preserve their inheritance.³

Statistics indicate that the average amount of money lost to victims of financial abuse is \$150,000 and that one in three adult Australians actively assist an older person with their finances.⁴

Examples of financial abuse:

- Misappropriation of money, property or valuables
- Victim being coerced into changing legal documents such as their will or power of attorney
- Victims entering into family agreements which may result in the victim losing their house
- Victim losing control of their personal funds
- Forging signatures
- Power of attorney being used inappropriately

Indicators that a person is being abused financially:

- Reluctance to make a will
- Jewellery or other personal property missing
- Unexplained movements in banks accounts or investments – large amounts of money withdrawn or transferred to another person's account
- Power of attorney being used inappropriately
- Financial/legal documents missing
- Finances not properly conducted by a third party appointed for that purpose
- Personal cheques being cashed
- Cash being withdrawn from bank account but not given to victim.⁵

What is available to assist older people?

- Crisis care – e.g. urgent respite care in a hostel if the victim needs to be physically removed from the person abusing them.

³ Ibid

⁴ Ibid

⁵ Elder Abuse Prevention Unit - www.eapu.com.au.

- Community support services – home nursing, housekeeping help, Meals on Wheels – this is useful in situations where the older person relies on another person to do their shopping but the person assisting them misappropriates the victim's funds.
- Respite care – e.g. in-home respite, day-centre respite or residential respite. This is very useful if the victim feels threatened by the person who has been abusing them.
- Counselling – individual and family sessions can be organised.
- Legal proceedings – an issue if the victim feels intimidated by lawyers or cannot afford to seek legal assistance.

Issues:

- One of the main problems with cases of elder financial abuse is that most cases do not involve “shady businessmen or confidence tricksters”. Most in fact involve the victim's child or children or other people who are in a position of trust such as healthcare workers or family solicitors or accountants.⁶
- There is no system in place for recording incidents of financial abuse on an Australia-wide basis and hence no national figures are available. There are state figures and the Elder Abuse Prevention Unit in Queensland has reported that one half of its cases deal with financial abuse.⁷
- Often the victim is physically wrecked – they have stress related health problems, they are aged over 75 years and they are not in a position to earn more income. They often require medical treatment for aged related illnesses and as victims will often require treatment for depression. In some acute cases where people have lost all their savings and assets they need to rely on charitable organizations such as St Vincent de Paul for assistance.⁸
- When the victim's child is the abuser the victim is often placed in a difficult position of having to take action against their child. In some instances they prefer to take no action for fear of reprisal from the abuser. The victim often feels guilty and ashamed about what has happened and cannot deal with the matter for this reason.
- While there are agencies such as the guardianship tribunals and public advocates to assist older people with diminished capacity there is little available to assist those who are old and able.⁹ These services need to be available to all older members of the community.

⁶ ABC Radio National Background briefing 22 Jan 2006 – Financial abuse of the elderly

⁷ Ibid

⁸ Ibid

⁹ Ibid

- A major problem for many older Australians is remoteness. In rural areas of Australia there are usually few or if any services to assist elder people with financial abuse issues. It is often difficult to provide trained people to these areas. Further in these communities people tend to know one another very well and while this may be useful to detect abuse it also means that older people may not be afforded privacy to deal with these issues.
- A lot of elderly people are immobile or experience mobility problems which limits their ability to access certain information and services. An outreach service offering staff who are specialized in dealing with elder law issues is important.
- A suggestion has been made that when dealing with issues involving older people it would be preferable to pair a social worker with a lawyer, the social worker being there to provide much needed support for the older person.¹⁰
- It has been suggested that in Australia there is a prejudice in the legal profession against older people. Attempts are being made to change this. In America, by contrast, elder law is a major area of law practice and most American states have their own legislation. There are specific laws devoted to the interests of older people.¹¹ For example, in California there is new legislation making it compulsory for banking and financial staff to report any suspected cases of financial abuse. Such legislation is lacking in Australia and has actively been resisted by banks and other financial institutions. Having lawyers specializing in elder law and devoting their practice to this area of the law is a must for our aging community.
- It must also be taken into consideration that older people have the right to spend their money as they see fit. Reports of unwise spending must be balanced against investigating concerns of financial abuse.¹²

Fraud

Examples of fraud aimed at older people:

- **'Worthless' share offers**¹³ – FIDO has issued a warning to older Australian regarding 'worthless' share offers. The shares are often in companies that are in liquidation or suspended from trading. While an unsolicited offer to purchase shares is legal it is illegal to mislead or deceive shareholders into accepting an offer. Older people are particularly vulnerable to these worthless offers because:

¹⁰ Ibid

¹¹ Ibid

¹² Ibid

¹³ Australian Securities & Investments Commission, fido website– www.fido.asic.gov.au

- they are often in a position to invest funds accumulated for their retirement
 - they may not be aware of or have access to services such as FIDO (financial tips and safety checks)
 - they may not have the necessary business acumen to fully investigate these offers
 - they may feel uncomfortable questioning the person making the share offer
 - they may not have resources available to enable them to investigate the share offer
- **Telemarketing campaigns**¹⁴ - information is available from the Elder Abuse Prevention Association to assist people who may be vulnerable to telemarketing. However the information is only of assistance if people are aware of the information and are able to access it. In the United States there are specific laws against telemarketing in place.¹⁵
 - **Door to door sales persons**
 - **Financial advisors** who target older people seeking investment and financial advice having accumulated savings during their working years. ASIC provides information about financial advisors who have been banned by ASIC but the information is only useful for people who are aware of its existence and can access the information.
 - **Elderly release super scheme** – a financial advisor pleaded guilty in a Queensland Court to dishonestly inducing persons to deal in financial products following an investigation by ASIC. The advisor dishonestly induced the trustees of various superannuation funds to rollover their member's superannuation benefits to the Health Group Superannuation Fund. The inducements were dishonest as they failed to disclose all of the facts relevant to those rollovers.¹⁶

ASIC has recently warned that scams and dodgy investment schemes targeting the elderly are on the rise.¹⁷

Family Agreements

Family agreements usually involve a transfer of property by an elderly person to a family member or friend in exchange for a promise that they will be looked after. It is usually the family home that is transferred and it arises from a desire to stay in the home and to provide security for the family member. For example,

¹⁴ Elder Abuse Prevention Association – Telemarketing Checklist

¹⁵ ABC Radio National Background briefing 22 Jan 2006 – Financial abuse of the elderly

¹⁶ ASIC – www.asic.gov.au

¹⁷ ASIC – www.asic.gov.au.

the property may be placed in joint names or transferred to the carer outright, or a 'granny flat' may be built on the property of a family member from the sale proceeds of the elderly person's home.

Many of these agreements are made orally or without legal advice. The parties may be uncomfortable about formalising the relationship and problems arise when circumstances change. For example, when the living relationship falters or where the carer cannot cope with a deterioration in the elderly person's health the situation may not have a ready solution. In the 'granny flat' situation mentioned above the elderly person may have to move into a nursing home with no compensation given for the value of the 'granny flat'.

Problems may also arise on death if the asset is no longer part of the elderly person's estate and litigation may ensue from other next of kin.

Community education and raising awareness about family care agreements among the elderly, lawyers etc will help in decreasing this problem. Understanding the issues may lead to more formal written agreements being entered into thus providing some protection under contract law.

Informal agreements may still be preferred by those who do not wish to see a lawyer or who are uncomfortable with discussing a formal agreement in such a family situation.

Legislation may be required to assist in the interpretation of and providing a solution for both formal and informal arrangements. For example, the court may be given the power to set aside or revoke the conveyance of the property or set aside or vary any agreement.

Powers of Attorney

The NSW Powers of Attorney Act 2003 commenced on 16 February 2004. It made changes to the power of attorney laws in NSW and in particular for enduring powers of attorney. An enduring power of attorney continues to be effective even after the principal suffers loss of mental capacity. It provides an inexpensive alternative to the Guardianship Tribunal or Supreme Court appointing a financial manager to deal with the property and financial property of a person lacking capacity.

It is important for a principal to choose an attorney carefully as they are managing the principal's assets and financial affairs and taking responsibility and making financial decisions on their behalf. A power of attorney is a powerful document and the consequences are great if the power is abused by the attorney.

Although an attorney must always act to protect the principal's best interests there is no formal reporting or review process for attorneys and problems arise if the attorney abuses the power.

A compulsory review process for private attorneys or review at the request of the donor may help to reduce any possible abuse of power by a rogue attorney.

Also at present in NSW, registration of a power of attorney is only required when dealing with real estate. Introducing compulsory registration for powers of attorney and revocations of powers of attorney would assist in ensuring that the attorney is authorised to deal with the financial affairs of the principal. It would allow for a check to be made of the register with the power of attorney or its revocation on record as a public document. It also means that the power of attorney would be safe from destruction or loss.

Ensuring uniformity of powers of attorney across Australia is also important as elderly people are becoming more mobile. As they travel to each State and Territory it would be helpful if the legislative requirements and use of powers of attorney was uniform so that there is a better understanding about what is required.

Barriers to older people accessing legal services

General Observations:

- Older people (particularly those who were born before 1940) are often not aware that they have information needs and they tend to have low awareness of what services exist, their entitlements, and knowing about where to access available sources of information. This problem is exacerbated among people of migrant backgrounds and Aboriginal & Torres Strait Islander people groups.
- There are socio-psychological tendencies of reluctance, reticence and resistance in evidence among some older people feeling comfortable dealing with "strangers" (i.e. call centre operators, negative perceptions of government bureaucrats). The problem of suspicion and mistrust can hinder older people from being sufficiently assertive to avail themselves of services and information, and instead tend to rely on immediate relatives, local GP, local newspapers, radio personalities, and in some cases one's local member of parliament.
- Specific needs of the elderly (as opposed to general community needs) can constitute a small niche of work flow for legal practitioners.

Hindrances to Accessing Legal Information:

- Affordability for those totally reliant on welfare and social security services – "solicitors are expensive". Those who are affluent are accustomed to

dealing with solicitors but those who are not have little or no experience of the legal profession.

- Negative perceptions of time used, expenses, and the intimidating atmosphere of law courts, tribunals and formal dispute resolution systems can be an additional disincentive to act if a problem or need is likely to involve these processes.
- Perceptions of some who feel reticent to act because they do not want to be perceived by others as "being a burden" or "nuisance".
- Physical frailty and those with disabilities feeling isolated or unable to be sufficiently mobile to attend government departments, courts and solicitor's offices.
- The language barrier and the associated social isolation of first-generation migrants dealing with government departments and legal firms in English.
- The marginalization of indigenes (Aboriginal and Torres Strait islanders) from mainstream society, government departments, and "negative" experiences and perceptions of the legal system – the system is open to suspicion as it is a symbol of power.
- The existence of multiple departments and agencies appears as a mysterious labyrinth in which one can be confused and easily "lost". Also the frustration of having one's inquiries referred on to another office, agency or department can act as a mental hindrance to inquiries being pursued.
- The inadequacies of printed pamphlets containing vague or non-specific information, or conversely being overloaded with too much information, and whose contents suffer from too much jargon and an obfuscation of plain language.
- Technology can act as a hindrance especially in dealing with computer-generated telephone menus, and waiting in queues with telephone call centres.
- Computer technology does hold some promise for the future as a source of information. However, while some older people are joining community-based computer clubs, and have access at municipal libraries, many others are "afraid" or confused about using this technology, or lack the financial resources to afford computers and internet-access in both metropolitan and regional contexts. Allied to this is that those older consumers who do use the technology, the next level of hindrance concerns government websites -- the clarity of the content and the extent of easy navigation in finding information on these websites.

Consumers Experiencing Bureaucratic Impediments:

- Older people who manage to overcome some of their hindrances in accessing information may feel intimidated by the "symbolic power" of the

legal profession, courts, government departments or other forms of bureaucracy. Symbols of power may be manifested in the technical jargon that appears in pamphlets or websites, the intimidation felt in completing application forms (such as privacy being threatened), or power that seems to be held in the hands of an officer or government employee with whom they have interviews. This might include experiences of feeling a lack of respect, one's dignity being denuded or humiliated, fear of retribution ("I might lose my pension"), feeling marginalized and a sense of vulnerability.

- Suspicion of being financially exploited by legal costs and "user-pays" economics.
- Ignorance of what formal processes may exist to appeal to higher authorities in bureaucracy when they are dissatisfied with the way their case is handled.

Barriers Created in the Legal Profession:

- Elder law is a relatively new field that has very few specialists. There is a paucity of elder law courses, although Continuing Legal Education providers are addressing this knowledge deficit. There is a demand amongst practitioners for elder law subjects which currently is not being met.
- Perceptions among legal practitioners that working with older people is not financially rewarding and is also time-consuming.

Suggested Remedies:

In view of the above points, government and service providers need to redress these problems along these lines: -

- Anti-discrimination principles need to be rigorously applied in staff training and in the communication of information to eliminate condescending vocabulary, cultural stereotypes, and stigmatizing words like "old", "older" (because they connote negative images of those who are a burden or are beyond any meaningful form of living).
- Overcoming the "knowledge gaps" among older people requires a profound reassessment of the way in which information is presented. It requires the revision in the actual content of information about services and entitlements. Brochures and information packets should be written in clear, concise, lucid and readable sentences that obviate any confusion for the consumer. This would involve eliminating obfuscated paragraphs, poor grammar, redundant sentences, technical jargon, Americanisms and esoteric neologisms (i.e. elitist newly coined words known only to the in-group) from brochures.
- There is a burgeoning need to have older employees with whom older customers and consumers can feel some affinity.

- The modes of communication and distribution of information should combine printed media with radio, TV and other forms of electronic media.
- Websites need to be overhauled and/or developed with older consumers envisaged as the users of these sources – is the site clear and easy to navigate, is the information clear and lucid?
- Encouragement of more legal firms offering pro bono services to older people who are without the financial resources to afford legal help.
- Availability of specialist services generally e.g. something similar to the community legal centres but for older people. Such centres currently exist i.e. Marrickville Aboriginal Women's Legal Centre, Redfern Legal Centre, Kingsford Legal Centre.
- A one stop shop is needed. At the moment the various forms of assistance are specialized, e.g. TARS Aged Rights Service offers legal assistance in respect to agreements pursuant to the Aged Care Act and contracts pursuant to Retirement Villages Act but not other areas of law relating to older people. TARS is already established and its base could be broadened to offer a wide variety of help to all "aged" people. Some Australian states do have such centres but they are not yet available in NSW. If each state and territory had such legal centres they could support one another.

Source materials for this topic are:

1. Law and Justice Foundation Legal Information Needs of Older People by Susan Edwards & Antonia Fontana
2. Access to Justice and Legal Needs, The Legal Needs of Older People in NSW, Law and Justice Foundation of New South Wales, December 2004.

Discrimination

Some areas of concern are:

- **Employment**

There are sufficient papers and studies that have been written and compiled which highlight the following concerns¹⁸:

¹⁸ See Sarah Ellison, Louis Schetzer, Joanna Mullins, Julia Perry, Katrina Wong *Access to Justice and Legal Needs Vol 1 The Legal Needs of Older People in NSW*, Law and Justice Foundation of New South Wales, December 2004. Rachael Patterson, "The Eradication of Compulsory Retirement and Age Discrimination in the Australian Workplace: A Cause for Celebration and Concern," *Elder Law Review* Vol. 3 2004. Sol Encel, "Age Discrimination in Law and Practice," *Elder Law Review* Vol 3 2004. Lynne Bennington, "Prime Age Recruitment: The Challenges for Age Discrimination Legislation", *Elder Law Review* Vol 3 2004. Australian Law Reform Commission, *Addressing age discrimination* - www.austlii.edu.au/au/other/alrc/publications/reform/reform81/03.html

- Many employers hold stereotypical views about older people in relation to hiring, training, promotion, retirement and redundancy that are not based on fact. Older people are stereotyped as not open to new ideas, not trainable and unable to cope with new technology. Research indicates this stereotyping is not based on fact or evidence.
- Executives and human resources personnel are not prepared to hire executive staff of middle age and upwards. Also older people are identified by these people as being first to be thought of when retrenchment is considered.
- The Age Discrimination Board expresses the view that many discrimination complaints are not capable of being dealt with under the Age Discrimination Act 2004 because it is difficult to prove that employers are being unlawfully discriminatory. Older people often do not even get an interview for a job, they get no response to their application and so it cannot be proved that discrimination has taken place. If an older person is interviewed but fails to obtain the job they are advised they were "overqualified" and wouldn't be happy. The employer expresses concern that because of this overqualification the older applicant might leave soon after taking up the position – all legitimate responses but still a cover up for discrimination – but insufficient to allow the Age Discrimination Board to investigate.
- The Age Discrimination Board is also concerned about the use by employers of personnel agencies to screen out older applicants. Employers can "wipe their hands clean" if there is found to be any discrimination.
- Long-term unemployment is disproportionately concentrated among older workers.
- Legislation banning age discrimination alone has little effect on improving work opportunities for older people.
- We have a culture geared towards early retirement and this together with the retrenchment and restructure trends aimed at older workers only perpetuates discrimination.

Provision of Goods and Services:

- Because providers assume that older people present as a high-risk group for contracts/sales due to limited financial support they are often refused access to goods and services, e.g. mobile phone contracts and loans.
- The Age Discrimination Board reports that travel insurance is an area of complaint by older people i.e. premiums are extremely high. However these types of complaints are not capable of being dealt with by the Age Discrimination Act 2004 as insurance policies are exempted from the

operation of age discrimination provisions in the Act. The other area of concern to people is income insurance.

Barriers to Accessing Assistance:

- As with many other areas of life where older people confront obstacles they have a tendency to be reluctant to complain.
- Older people feel disempowered.
- Older people are ignorant of how to make a complaint.
- The Age Discrimination Board and the Human Rights and Equal Opportunity Commission are conciliation-oriented processes. This means that complainants mainly have to be self represented, the processes are not open to public scrutiny, sanctions cannot be imposed and parties are assumed to be on an equal footing. Employment is a contractual relationship and power resides with the employer who determines the contract of employment.¹⁹
- The prospect for discrimination arising against the aged under the new Industrial Reform legislation is an untested area but one that could have ensuing problems.
- The Federal Age Discrimination Act 2004 is more limited than the state legislation and may not have any real impact, e.g. age needs to be the dominant reason for discrimination rather than simply one of the reasons and has a wide range of exemptions.
- The definition of employment in the Age Discrimination Act 2004 is too limited and does not allow for all developing forms of employment.

Remedies:

- As studies indicate that legislation alone is not adequate to change attitudes and put an end to discrimination there must be education of employers, recruitment agencies and the public in general. There could also be more proactive monitoring of discrimination. Research carried out after a public awareness campaign in Finland showed that age discrimination had decreased and public attitudes changed.²⁰
- Make use of the role given under Section 53 of the Age Discrimination Act 2004 to the Human Rights and Equal Opportunity Commission to hold public awareness and education campaigns, develop monitoring strategies and develop effective policies against age discrimination.
- Grievance processes should be simplified.

¹⁹ Encel, "Age Discrimination in Law and Practice," *Elder Law Review* Vol 3 2004, 12.

²⁰ Ibid.

- Financial incentives could be offered to employers to employ older people.

Yours sincerely

Anthony Lentini
**General Counsel
and Deputy Public Trustee**