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Civil Law Policy

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Mr Michael Crawford
Secretary
House of Representatives Standing Committee
on Legal and Constitutional Affairs
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Dear Mr Crawford

INQUIRY INTO OLDER PEOPLE AND THE LAW

Thank you for your letter of 20 September 2006 concerning an invitation to make a submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs' Inquiry into Older People and the Law.

Please find enclosed the Victorian Government submission addressing the terms of reference of the Inquiry. Thank you for the opportunity to submit and for granting an extension of time to provide the submission.

Yours sincerely

CHRIS HUMPHREYS
Director

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State Government of Victoria

**Submission to the House of
Representatives' Standing
Committee on Legal and
Constitutional Affairs**

**Inquiry into Older People and the
Law**

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1 Executive Summary

The Victorian Government welcomes the opportunity to contribute to the House of Representatives' Standing Committee on Legal and Constitutional Affairs ('the Committee') Inquiry into Older People and the Law ('the Inquiry'). This submission aims to provide an overview of the current legislative regimes in Victoria affecting older people in the terms of reference subject-areas. Some of the areas being examined by the Inquiry are currently under review or will be reformed by the Victorian Government. There are some areas that may benefit from greater legislative uniformity between jurisdictions in Australia, particularly consumer credit, and Victoria continues to take an active role in national law reform processes (see **Part 1.1 Summary of recommendations** below). For many of the areas covered by the terms of reference, however, it is the Victorian Government's view that the legislation is adequate.

There can be no doubt that all of the areas listed in the terms of references are of great concern to older people, but the major problems stem from lack of education and awareness of legal rights, reluctance to take action when rights are affected, and unwillingness to place pressure on family relationships by clearly setting out the terms of care and property agreements in advance. The Victorian Government believes that focusing on education and research will alleviate most of these issues more than specific legislative reform.

Any queries regarding this submission or appearance at public hearings should be directed to Ms Sky Mykyta, Legal Policy Officer, Civil Law Policy Unit in the Department of Justice on tel:(03) 8684 0846 or via email: Sky.Mykyta@justice.vic.gov.au.

1.1 Summary of recommendations

1.1.1 Fraud

Recommendation #1

Nationally consistent regulation of finance and mortgage broking.

Recommendation #2

A national legislative framework dealing with unfair contract terms in consumer contracts, including consumer credit contracts.

The Victorian Government believes that the specific vulnerability of older people to fraudulent practices should also be addressed by codes of conduct, cooperative schemes, and greater focus on education about rights and obligations.

1.1.2 Financial Abuse

The Victorian Government considers that the legislative regimes currently in place in Victoria are adequate to cover the issues relating to financial abuse, however it believes there a number of national initiatives that could be undertaken by the Commonwealth in this area.

Recommendation #3

Development of a national finance code of conduct for the prevention of fraud and financial abuse.

Recommendation #4

Development of a national 'clearing house' website promoting effective strategies to prevent financial and other forms of elder abuse.

Recommendation #5

Undertake national research into the nature and prevalence of elder abuse in Australia.

Recommendation #6

Funding national initiatives to promote financial literacy among older people.

Financial abuse in relation to accommodation and supported residential services

In relation to accommodation and supported residential services, any reviews or proposed reforms of relevant legislation should occur through coordination and consultation among States and Territories. The Committee should take into consideration jurisdictions' own review and reform processes.

1.1.3 Powers of attorney and related documents

The Victorian Government has no current plans to reform the legislation relating to powers of attorney and related documents, however the Government recognises that this is an area that is subject to legislative and policy differences across jurisdictions. Victoria welcomes the opportunity to consider the Committee's findings on the adequacy of legislation in this area.

Recommendation #7

Recognition by Commonwealth instrumentalities of powers of attorney, and guardianship and administrative orders.

1.1.4 Family agreements

The Victorian Government acknowledges that there is potential for amendment to legislation to introduce clawback provisions for the reinstatement of property, or reforms to laws relating to restitution in the area of family agreements due to their unique attributes, however it has no present plans to introduce such legislation. The Government welcomes the opportunity to consider the Committee's findings on the adequacy of legislation in this area.

Fundamentally, the Victorian Government believes that most family agreements will continue to be largely informal, and that the greatest scope for assisting older people will come in the form of education and advice.

1.1.5 Access to legal services

The Victorian Government considers that the legislative regimes currently in place in Victoria are adequate to cover the issue of accessing legal services. The Government continues to participate in the national legal profession reform process.

Recommendation #8

Increasing Commonwealth legal aid funding, relaxing the restrictions on access for older people, and increasing access to legal aid for civil matters.

1.1.6 Discrimination

The Victorian Government is reviewing the legislative framework as it applies to systemic discrimination of marginalised groups. Age discrimination and older people will be included in this general review.

2 Introduction

The Victorian Government welcomes the House of Representatives' Standing Committee on Legal and Constitutional Affairs' Inquiry into Older People and the Law. This submission constitutes a whole-of-government response, led by the Department of Justice with contributions from the Department of Victorian Communities' Office of Senior Victorians ('OSV') and the Department of Human Services ('DHS').

The terms of reference for the Inquiry ask the Committee to investigate and report on the adequacy of current legislative regimes in addressing the needs of older Australians in the following specific areas:

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

As with other States and Territories, Victoria has a collection of legislative provisions governing the subject-matters within the terms of reference. This submission addresses all of the Inquiry's terms of reference.

With the recent commencement of the *Charter of Human Rights and Responsibilities Act 2006*, Victoria is leading the way on the recognition and protection of human rights. The protection of older people's human rights, including their effective participation in society, is increasingly important as our population ages. Protection of rights is also essential if older people's skills and experiences are to be utilised for the benefit of the Australian economy. Preventing disputes and resolving them before they escalate is key to improving legal outcomes for older people, as well as reducing the drain on government and personal resources caused by things going wrong. Victoria is undertaking a number of initiatives to improve education about rights and responsibilities, and to remove barriers preventing older people from accessing legal services.

Analysis of the issues before the Inquiry and any recommendations pursuant to the Committee's consideration of them will assist Victoria in further addressing problems facing older people within this State. Similarly, following the Committee's deliberations, older people's legal issues may be an appropriate subject of national law reform.

3 Background

As with all other jurisdictions in Australia, Victoria faces an increasing ageing population: concomitant with this is the potential for increases in all forms of elder abuse. There are a great many challenges faced by older people in accessing justice and protecting their needs in numerous areas of life, including accommodation, health, legal services and financial security.

The Bracks Labor Government committed to a number of initiatives to assist senior citizens as part of its 2006 Victorian Election Commitments, and is in the process of implementation. For instance, the government has committed to give seniors greater security and to better equip them to deal with issues that affect them as they age; to invest in aged care and expand health services; to support people with dementia and their carers, and to help older people live independently at home. In making such commitments, the government has recognised that older people have a wealth of knowledge and experience that enriches Victoria and that the contribution of seniors to the family, the community and the workplace should be valued.

The Victorian Minister for Aged Care, Hon. Gavin Jennings, MLC, established the Elder Abuse Prevention Project in 2005 to publicly consult and report on current prevention and response arrangements and to consider the issue of financial and other forms of abuse experienced by older Victorians. In this context elder abuse is defined as:

*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.*¹

The *Report of the Elder Abuse Prevention Project* (December 2005)²:

- Identified a range of strategies to strengthen current and existing arrangements;
- Acknowledged that there are many forms of elder abuse, including physical, psychological, sexual, social, neglect and financial abuse; and
- Acknowledged that people experiencing abuse generally experience more than one form;
- Found that Australian research (although very limited) recognises that financial abuse is the most frequently reported and that evidence suggests people experience financial abuse more often than other forms of abuse; and
- Found that responding to elder abuse requires a whole-of-government response which includes strengthening the service system by improving cooperation between human services, justice, police, banking and financial sectors.

The Victorian Government's response to the Elder Abuse Prevention Project, *Supporting the Safety and Dignity of Senior Victorians: Victorian Government Response to the Report of the Elder Abuse Prevention Project* (June 2006),³ supported a range of strategies, including:

¹ National Aged Care Advocacy Program, 'Australian Network for the Prevention of Elder Abuse Working Definition' (1999) *Preventing Abuse of Older People*
<http://www.agedrights.asn.au/prevent/definition.html> accessed at 26 February 2007.

² State Government of Victoria, *Strengthening Victoria's Response to Elder Abuse* (December 2005), Department of Victorian Communities' Elder Abuse Prevention Project
[http://www.dvc.vic.gov.au/Web19/osv/rwpgslib.nsf/GraphicFiles/ElderAbuseReportFINAL/\\$file/ElderAbuseReportFINAL.pdf](http://www.dvc.vic.gov.au/Web19/osv/rwpgslib.nsf/GraphicFiles/ElderAbuseReportFINAL/$file/ElderAbuseReportFINAL.pdf) accessed at 26 February 2007.

³ State Government of Victoria, *Supporting the Safety and Dignity of Senior Victorians: Victorian Government Response to the Report of the Elder Abuse Prevention Project* (June 2006)
[http://www.dvc.vic.gov.au/Web19/osv/rwpgslib.nsf/GraphicFiles/0806-31MinisterResponse/\\$file/0806-31MinisterResponse.pdf](http://www.dvc.vic.gov.au/Web19/osv/rwpgslib.nsf/GraphicFiles/0806-31MinisterResponse/$file/0806-31MinisterResponse.pdf) accessed at 26 February 2007.

- The establishment of a community education and information service. This service will provide telephone assistance and referral, for instance in identifying potential cases of elder abuse and linking older people with existing service providers. The service will also act as a point of dissemination of research and provide individual and systems advocacy. A total of \$1.44 million has been allocated over 4 years for this initiative, through the 2006/07 budget.
- Supporting the efforts of stakeholders to build relationships and capacity to address elder abuse and provide support for professional development. Key stakeholders include lawyers, medical professionals, care workers and allied health professionals.
- The allocation of \$1.2 million over 4 years to establish an Older Persons Legal Service. This service will provide general legal education and advocacy services, to support the development of capacity for existing legal centres to support older people.
- Support for increased financial literacy for older people.

Work has commenced on the planning and development of the state-wide community education and information service. One of the key issues will be the linkages between the community education and information service and the community legal service for older people.

Victoria believes that consumer credit fraud is an important area needing ongoing review and reform, particularly as new financial products become available. To that end a review into consumer credit was conducted in 2005-06. The *Report of the Consumer Credit Review*⁴ was completed in February 2006. Many of the Report's recommendations were supported by the Victorian Government in its response to the Review, *Government Response to the Report of the Consumer Credit Review*.⁵ Many of the options require nationally coordinated reform for full effectiveness. The Committee is encouraged to examine the Report and Victoria's response.

3.1 Demographics

The next 20 years will see significant increases in the numbers of older people in Victoria, with particular increases in the proportion of people aged over 80 years.

The Australian Bureau of Statistics ('ABS') predicted that in the four years to 2006, the number of Victorians aged 80 years and above would grow by 19.1%. In contrast, within the same period, the number of Victorians less than 60 years of age would only grow by a total of 2.8%. The ABS expects the proportion of Australians aged 65 years

⁴ State Government of Victoria, *Report of the Consumer Credit Review* (February 2006) Consumer Affairs Victoria
[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Credit_Review_Documents/\\$file/credit_review_complete.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Credit_Review_Documents/$file/credit_review_complete.pdf) accessed 5 March 2007.

⁵ State Government of Victoria, *Government response to the Report of the Consumer Credit Review* (September 2006)
[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Consultations_Reviews/\\$file/Credit%20Review%20-%20Government%20response%20\(web\).pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Consultations_Reviews/$file/Credit%20Review%20-%20Government%20response%20(web).pdf) accessed 5 March 2007.

and over to increase from 13.1% of the total population in 2005 to 20.3% of the total population in 2025 and 25.7% of the total population in 2050.⁶

An Access Economics report prepared for Alzheimer's Australia identified that the incidence of dementia for the population aged over 60 years, ranges from 2% at age 65 years to 32% at age 85 years.⁷ The available research suggests that the 'oldest old', defined as those over 80 years of age, and those with dementia, are at greater risk of abuse. Anecdotal evidence suggests that financial abuse of people aged over 65 years of age accounts for approximately 50% of elder abuse cases.⁸

There are a number of specific traits that can be associated with victims of elder abuse, including culture, degree of social isolation, and level of access to relevant information and support. The level of dependency of an older person, whether that person may experience a mental illness, physical incapacity, or other signs of diminished capacity due to the effects of ageing, increases the risk of abuse to the individual.

4 The Current Legislative Regimes in Victoria

The terms of reference ask the Committee to inquire into the adequacy of current legislative regimes in addressing the legal needs of older Australians in specific areas. Victoria has a range of legislative provisions dealing with the issues covered by the terms of reference. This section of the submission summarises and explains the current legislative provisions in relation to each of the subject-areas in the terms of reference. It also comments on the perceived adequacy of the legislative regimes and offers recommendations in some of the areas.

4.1 Fraud

There is significant overlap between the issues of fraud and financial abuse. **Parts 4.1 and 4.2** of this submission should be considered together.

4.1.1 Introduction and background

Fraud is not generally thought of as a specific crime but instead refers to a range of criminal practices that dishonestly deprive a person of property, or induce them to accept goods and services they have no need for or would not otherwise have accepted. Fraud is similar to financial abuse, though the latter encompasses a wider range of reckless or negligent practices, and may not involve the element of deliberate dishonesty. Further, financial abuse may be considered more likely to be perpetrated by family members or close associates, while fraud is more likely to be perpetrated by strangers.⁹

⁶ Australian Bureau of Statistics, *Pace of Aging: Australia and Japan* (2006) <http://www.abs.gov.au/ausstats/abs@.nsf/7d12b0f6763c78caca257061001cc588/fcdefb9501c34275ca2571b0000f1a9e!OpenDocument> accessed at 28 February 2007.

⁷ Access Economics, *Dementia Estimates and Projections: Victoria and its Regions* (February 2005) <http://www.accesseconomics.com.au/publicationsreports/getreport.php?report=18&id=21> accessed 2 March 2007.

⁸ Lee, J, 'Preventing the Abuse of Older People: What an Older Persons' Community Legal Service could do' (Paper presented at the Federation of Community Legal Centres (Vic) Conference, Melbourne, 31st May 2006).

⁹ It is acknowledged that this distinction is difficult to maintain, hence Part 4.1 and Part 4.2 should be considered together.

Consumer credit fraud is an important area needing ongoing review and reform, particularly as new financial products become available. In May 2005, the Victorian Minister for Consumer Affairs launched the Consumer Credit Review. The Review was tasked to:

- Examine the efficiency and fairness of credit markets in Victoria,
- Examine the effectiveness, efficiency and fairness of regulation of credit in Victoria;
- Commission research into the credit market in Victoria, with particular reference to fringe lending and any special features in rural and regional markets, and the effect of introducing 'positive' credit reporting; and
- Make recommendations to enhance consumer and public benefit.

The *Report of the Consumer Credit Review*¹⁰ was completed in February 2006. The Report is over 300 pages long and provides a large number of options for reform of credit in Victoria. Many of the Report's recommendations were supported by the Victorian Government in its response to the Review, *Government response to the Report of the Consumer Credit Review*.¹¹ Many of the options require nationally coordinated reform for full effectiveness. The Committee is encouraged to examine the Report and Victoria's response.

A great number of credit providers in Victoria are national operations, or local subsidiaries of overseas or international credit providers. The Victorian Government supports nationally uniform regulation of consumer credit and has contributed to making policy and maintaining consistent administration and enforcement across all states and territories. It has chaired the Uniform Consumer Credit Code Management Committee (UCCCMC) since May 2003; it is also involved in the national project on the uniform regulation of finance brokers and co-chairs the national working group on uniform unfair contract terms.¹²

Legislation in Victoria (complemented by federal legislation) provides a regime for the protection of consumers and property owners from unfair practices. The provisions are not directed specifically at older people but apply generally. However it is recognised that older people may be more vulnerable to these practices than other members of the community.¹³ In particular, older people may be less comfortable with

¹⁰ State Government of Victoria, *Report of the Consumer Credit Review* (February 2006) Consumer Affairs Victoria
[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Credit_Review_Documents/\\$file/credit_review_complete.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Credit_Review_Documents/$file/credit_review_complete.pdf) accessed 5 March 2007.

¹¹ State Government of Victoria, *Government response to the Report of the Consumer Credit Review* (September 2006)
[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Consultations_Reviews/\\$file/Credit%20Review%20-%20Government%20response%20\(web\).pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Consultations_Reviews/$file/Credit%20Review%20-%20Government%20response%20(web).pdf) accessed 5 March 2007.

¹² State Government of Victoria, *Report of the Consumer Credit Review* (February 2006) Consumer Affairs Victoria
[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Credit_Review_Documents/\\$file/credit_review_complete.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Credit_Review_Documents/$file/credit_review_complete.pdf) accessed 5 March 2007, 23.

¹³ State Government of Victoria, *Report of the Consumer Credit Review* (February 2006) Consumer Affairs Victoria
[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Credit_Review_Documents/\\$file](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Credit_Review_Documents/$file)

new technologies,¹⁴ more dependent on the advice and assistance of other people, less mobile¹⁵ (and therefore less able to check the quality of services performed), and may suffer from other disabilities such as sight or hearing loss or diminishing mental capacity.

Older people are generally careful to check out potential 'get-rich-quick' type scams, however there is evidence they may be susceptible to scams involving goods and services provided door-to-door.¹⁶ Victoria like other jurisdictions has legislation regulating such transactions, including the provision of cooling-off periods. The Victorian Government notes that this is an area requiring national cooperation and coordination, as recognised in the National Scams Awareness campaign. As with other types of fraud, a major issue is older people's lack of knowledge of their legal rights and their reluctance to take action.

Credit and debt are an area of significant concern for older people, especially older women who may not have managed their finances before.¹⁷ Older people may not fully understand their obligations with regard to credit cards, loans and mobile phone contracts.¹⁸ As noted below in **Part 4.2**, older people have generally lower levels of financial literacy, and may not understand the terms of documents asking them to give a guarantee, or increasing their credit limit, for example. Banks may refuse to lend to older people on low incomes leaving them particularly vulnerable to the practices of 'fringe lenders who charge exorbitant interest on small loans.'¹⁹ While it certainly may be good practice by banks to refuse credit to those who are at risk of not being able to make repayments, banks and credit unions stand in a unique position to assist older people with their financial affairs (see particularly the discussion of **structured financial transactions** in **Part 4.2** below).

Older people are particularly vulnerable to fraudulent practices in relation to guarantees. Although the majority of such transactions appear to be procured at the behest of family members (and therefore this issue overlaps with the general heading of financial abuse), banks and credit providers may be complicit in fraudulent dealings or negligent by allowing them to continue. Significant case law has developed setting out the responsibilities of banks to ensure that people giving guarantees of substantial money with no apparent benefit to themselves have received independent advice.²⁰ Situations where banks have not taken sufficient care in procuring guarantees have been considered by the courts to be unconscionable

[/credit_review_complete.pdf](#) accessed 5 March 2007, 86-88; Sarah Ellison, Louis Schetzer, Joanna Mullins et al, *Access to Justice and Legal Needs: The Legal Needs of Older People in NSW* (December 2004) vol 1, Law and Justice Foundation of NSW, 219-222.

¹⁴ For more information on this point see Sarah Ellison, Louis Schetzer, Joanna Mullins et al, *Access to Justice and Legal Needs: The Legal Needs of Older People in NSW* (December 2004) vol 1, Law and Justice Foundation of NSW, 202-204.

¹⁵ ATMs in particular are not accessible to people with physical disabilities: Human Rights and Equal Opportunity Commission, *Accessibility of electronic commerce and new service and information technologies for older Australians and people with a disability* (31 March 2000) http://www.hreoc.gov.au/disability_rights/inquiries/ecom/ecomrep.htm accessed at 27 February 2007.

¹⁶ Sarah Ellison, Louis Schetzer, Joanna Mullins et al, *Access to Justice and Legal Needs: The Legal Needs of Older People in NSW* (December 2004) vol 1, Law and Justice Foundation of NSW, 219-220.

¹⁷ See *ibid* 211-212.

¹⁸ See *ibid* 204-206.

¹⁹ *Ibid* 205.

²⁰ See, for instance, *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

conduct amounting to equitable fraud, and the guarantees have been set aside. Clearly, this is an area where prevention is better than cure, both for banks and their elderly customers.

Reverse Mortgages

Reverse mortgages are increasingly popular financial services products that allow people to use home equity to pay for essential bills and payments, renovations, holidays, and loans to family members.²¹ The customer borrows money and their homes are offered as guarantee that the loan will be repaid. Although these mortgages have been around for some time, it is only in the last few years that they have begun to be used widely. There has been very little research regarding the impacts of reverse mortgages on older people. Older people have often paid off their mortgages and may experience pressure from their family members to take out reverse mortgages.

The Victorian Government response to the *Report of the Consumer Credit Review* (September 2006)²² identified that reverse mortgages and other equity release products have different characteristics and potential risks compared to other credit products, and that strategies should target specific population groups.

The Victorian Government has agreed to:

- Amend credit legislation to prevent consumers from entering into negative equity with a reverse mortgage;
- Ask the Ministerial Council on Consumer Affairs to ensure that information is provided to consumers who are intending to take out a reverse mortgage which details the full cost of credit, risk to the consumer's equity in the property and implications of the loan for tax;
- Improve the effectiveness of information and education strategies by increasing the extent to which they are based on sound research and are part of an integrated set of policies targeted at achieving relevant behavioural change, targeting senior Victorians using housing finance products;
- Have ongoing discussions with the Australian Securities and Investments Commission in relation to reverse mortgages; and
- Work with the Australian Securities and Investments Commission to develop a comprehensive information statement for consumers entering into reverse mortgages.

Ongoing discussions and negotiations will continue between the Victorian Government and the peak body representing reverse mortgage products.

²¹ Choice, *Reverse Mortgages Investigation* (October 2006)
<http://www.choice.com.au/viewArticle.aspx?id=104321&catId=100570&tid=100008&p=1&title=Reverse+mortgages+investigation> accessed at 5 March 2007.

²² State Government of Victoria, *Government response to the Report of the Consumer Credit Review* (September 2006)
[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Consultations_Reviews/\\$file/Credit%20Review%20-%20Government%20response%20\(web\).pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Consultations_Reviews/$file/Credit%20Review%20-%20Government%20response%20(web).pdf) accessed 5 March 2007.

4.1.2 Victorian legislative regime

4.1.2.1 Interests in land

The *Instruments Act 1958* (Vic) s 126(1) is a restatement of the Statute of Frauds and requires that transactions involving interests in land must be evidenced in writing with signature.²³

The *Transfer of Land Act 1958* (Vic) (TLA) provides for the protection ('indefeasibility') of registered title to land in Victoria. Sections 40-42 set out that property interests in the Torrens system must be registered in accordance with the TLA and provide for the paramountcy of the registered proprietor over other interests. Section 42(1) expressly provides for an exception to indefeasibility where the registered proprietor has committed fraud. It is also accepted that personal equitable actions may be taken against registered proprietors for conduct falling short of the strict definition of fraud. Uniquely, the Victorian TLA contains a further restatement of the fraud exception in s44, however it is unclear whether this provision adds anything to the requirements under s42(1). It should be noted that mere notice of another person's interest in the land is insufficient to constitute fraud: s43 TLA.

The *Limitation of Actions Act 1958* (Vic) Part I place limitation periods on actions for recovery of land however s 27 provides for the postponement of limitation periods in the case of fraud. This section may provide particular protection for older people whose interests are being taken care of by an agent, and that agent defrauds the older person of their property or conceals a fraud.

The *Credit Act 1984* (Vic) prohibits fraudulent transactions in relation to interests in land: s101.

The *Crimes Act 1958* (Vic) s81 sets out the specific crime of obtaining property by deception. Property is defined in s71 and includes real and personal property.

4.1.2.2 Consumer protection

The *Fair Trading Act 1999* (Vic) supplements and, in some cases, mirrors the protections of the *Trade Practices Act 1974* (Cth). Part 2 prohibits unconscionable conduct, misleading or deceptive conduct, false representations, and a range of other unfair practices. Part 2B prohibits unfair terms in consumer contracts, not including consumer credit contracts. A contract term is 'unfair' if it causes a significant imbalance in the rights and obligations arising under the contract to the detriment of the consumer, contrary to the requirements of good faith and in all the circumstances. An unfair term is void. Part 4 of the *Fair Trading Act 1999* specifically covers 'Off-Business-Premises Sales' such as door-to-door and telephone sales.

The *Equal Opportunity Act 1995* (Vic) Division 4 prohibits discrimination in the provision of goods and services and the disposal of land, although s44 provides an exemption for credit providers who may reasonably discriminate on the basis of age.

²³ Please note that s126(2) of the *Instruments Act 1958* (Vic) sets out that the requirements of s126(1) may be met in accordance with the *Electronic Transactions (Victoria) Act 2000* (Vic).

4.1.2.3 Credit and Debt

The Committee is specifically referred to Chapter 3 of the *Report of the Consumer Credit Review* for a comprehensive examination of the regulatory framework governing credit in Victoria.²⁴

Victorian legislation, which is not uniform with that of other jurisdictions, deals with:

- the registration of credit providers;
- interest rate caps;
- the jurisdiction of courts and tribunals;
- the regulation of finance brokers;
- the regulation of pawnbrokers;
- the administrative powers of Consumer Affairs Victoria;
- the establishment and operation of the Consumer Credit Fund;
- credit reporting.

In addition, general legislation such as the *Fair Trading Act 1999* (Vic.) provides a general regulatory framework applicable to consumer credit.

As noted above, Victoria has agreed to amend its legislation to prohibit credit providers from allowing consumers to get into negative equity if they taken out reverse mortgages.²⁵

Victoria has enacted the uniform national Consumer Credit Code in the *Consumer Credit (Victoria) Act 1995* (Vic). Part 4A regulates finance and mortgages brokers.

The *Credit Act 1984* (Vic) provides comprehensive regulation of credit contracts including mortgages and guarantees. Part IX provides that the Victorian Civil and Administrative Tribunal ('VCAT') can re-open credit contracts in certain circumstances.

Division 2 of the *Crimes Act 1958* (Vic) deals with dishonesty crimes in general and provides serious criminal penalties for theft and associated offences. Section 82 sets out the specific offence of obtaining financial advantage by deception. Section 83 criminalises false accounting, while s83A makes it an offence to falsify documents. The Act also prohibits secret commissions (see ss175-180).

²⁴ State Government of Victoria, *Report of the Consumer Credit Review* (February 2006) Consumer Affairs Victoria
[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Credit_Review_Documents/\\$file/credit_review_complete.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Credit_Review_Documents/$file/credit_review_complete.pdf) accessed 5 March 2007, 50-61.

²⁵ State Government of Victoria, *Government response to the Report of the Consumer Credit Review* (September 2006) Consumer Affairs Victoria
[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Consultations_Reviews/\\$file/Credit%20Review%20-%20Government%20response%20\(web\).pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Consultations_Reviews/$file/Credit%20Review%20-%20Government%20response%20(web).pdf) accessed 5 March 2007, 34.

4.1.3 Recommendations

The Victorian Government has committed to a raft of reforms arising from the *Report of the Consumer Credit Review*. The Committee is encouraged to peruse the recommendations and the Government Response. A number of the recommendations require national coordination for full effectiveness.²⁶

Recommendation #1

Nationally consistent regulation of finance and mortgage broking.

A national process to achieve uniform regulation of finance and mortgage brokers was agreed to in 2003. There is consistent evidence of continued problems in the market, heavy reliance on commission-based remuneration, and ever-increasing diversification and complexity. The Victorian Government committed to the process in 2003 and will continue to work with the other Australian jurisdictions to fast-track this process.

Recommendation #2

A national legislative framework dealing with unfair contract terms in consumer contracts, including consumer credit contracts.

Victoria has legislation dealing with unfair contract terms and intends to amend it to include consumer credit contracts. However, a nationally uniform scheme would provide greater protection for older people throughout Australia.

The Victorian Government believes that the specific vulnerability of older people to fraudulent practices should also be addressed by codes of conduct, cooperative schemes, and greater focus on education about rights and obligations.

See **Part 4.2.3** below for recommendations in the area of financial abuse which also have relevance to the issue of fraud.

See also **Part 4.4** below in relation to family agreements.

²⁶ State Government of Victoria, *Government response to the Report of the Consumer Credit Review* (September 2006) Consumer Affairs Victoria
[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Consultations_Reviews/\\$file/Credit%20Review%20-%20Government%20response%20\(web\).pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Consultations_Reviews/$file/Credit%20Review%20-%20Government%20response%20(web).pdf) accessed 5 March 2007, 7-18.

4.2 Financial Abuse

4.2.1 Introduction and background

The issue of financial abuse of older people must be seen within the broader context of elder abuse. Overseas studies have estimated the incidence of elder abuse to be anywhere between one and five percent of the population aged over sixty five years.²⁷ This means that applying the conservative figure of 3% would mean that some 20,000 Victorians and 80,000 Australians are affected every year.²⁸ Typically, older people who are abused experience more than one form of abuse.

Increasingly, many older people will hold substantial assets, often including the family home. Given the boom experienced in the housing market, the personal wealth of existing home owners has grown significantly.²⁹ There has also been a growth in rates of personal debt, which in part can be attributed to a deregulated finance sector and rising housing costs. However, to date there is little evidence that households as a whole have become overextended in terms of debt. As the Reserve Bank of Australia notes in its January 2007 Statement on Monetary Policy, ‘...household balance sheets appear healthy.’³⁰ However should this situation change, an added impetus to financial abuse would occur. The opening of equity release and reverse mortgage products by the financial services sector creates new opportunities and provides new temptations for family members to pressure their older relatives to access such funds (see **Part 4.1** above).

Older people may experience pressure from the increasing complexity of financial arrangements, in relation to issues such as:

- Recurrent charges for residents of retirement villages, departure fees and the refund of entry fees on departure from the residence;
- Financial arrangements associated with high and low level residential care in Commonwealth funded residential care services;
- Increases in charges controlled by investor owners of home units under strata title;
- Tariff increases for boarding house accommodation;
- Dealing with financial aspects of administration, superannuation and wills/probate matters; and
- Poor access to necessary information to make informed decisions.

These factors may be compounded by a broader lack of experience by some older people in handling their own financial affairs, and a lack of financial literacy among

²⁷ Office of the Public Advocate, Victoria, *Elder Abuse: The Hidden Problem* (2003) Submission to the Victorian Minister for Aged Care (copy on file), Table in part 5.

²⁸ Ibid.

²⁹ Saunders, P, ‘Fix policies to make housing affordable’, *The Advertiser* (Adelaide), 16th March 2005 <http://www.cis.org.au/Exechigh/Eh2005/EH26205.htm> accessed at 11 December 2006.

³⁰ Reserve Bank of Australia, *Statement on Monetary Policy* (January 2007) http://www.rba.gov.au/PublicationsAndResearch/StatementsOnMonetaryPolicy/Statements/statement_on_monetary_0207.pdf accessed at 28 February 2007, 28.

people over 70 years of age.³¹ The move away from face-to-face personal banking may also have contributed to the extent to which older people are isolated from sound financial advice, and more vulnerable to abuse from those they seek assistance from.

Queensland research identified that older people tend to use family members to provide assistance with a financial matter and that many older people have their financial affairs directly managed by a member of their family.³² Interestingly, only a small percentage of these arrangements are formalised through a power of attorney, with most set up through a bank authorisation process.³³

Financial abuse is a complex issue as it is often perpetrated against older people in a variety of ways. This may include:

- Illegal acts;
- Acts which are unfortunate but not illegal;
- Acts which occur because of an older person's diminished capacity to understand the circumstances of the event (eg. due to age related illness or dementia);
- Acts which are not deliberate nor have malicious intention yet are detrimental to the older person; and
- Failure to act in a timely manner to protect an older person's interests.

The width of actions has implications for determining whether or not financial abuse against an older person has occurred, as it can be difficult to determine whether a direct and exploitative act has occurred or whether the action was an unwise, but legitimate financial decision, or simply negligence. Consequently the perspective of both the older person and the individual involved in perpetrating certain behaviours needs to be considered when responding to alleged cases of financial abuse.

Examples of financial abuse of older people can include:³⁴

- Misusing bank accounts, ATMs and credit cards;
- Misappropriating funds from a pension or other sources of income/wealth;
- 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;

³¹ ANZ Bank, *Adult Financial Literacy Survey 2005* (2005) <http://www.anz.com.au/aus/aboutanz/Community/Programs/FinSurvey2005.asp> accessed at 5 March 2007.

³² Tilse, D, Setterlund, D, Wilson, J. and Rosenman, L 'Minding the Money: a growing responsibility for informal carers' (2005) 25 *Ageing and Society* 215.

³³ Ibid.

³⁴ Saunders, Leonie, *Financial Abuse of Older People: A Queensland Perspective*, Elder Abuse Prevention Unit, September 2005 <http://www.eapu.com.au/DownLoads/45-Qld%20perspective%20on%20financial%20abuse%20A.pdf> accessed at 27 February 2007 and State Government of Victoria, *The Mismanagement & Misappropriation of Older People's Assets: How can the Financial Services Sector Help?* (3 November 2005) Office of Senior Victorians, Department of Victorian Communities [http://www.seniors.vic.gov.au/Web19/osv/rwpgslib.nsf/GraphicFiles/MismanagementOlderPeoplesAssets.doc/\\$file/MismanagementOlderPeoplesAssets.doc](http://www.seniors.vic.gov.au/Web19/osv/rwpgslib.nsf/GraphicFiles/MismanagementOlderPeoplesAssets.doc/$file/MismanagementOlderPeoplesAssets.doc) accessed at 27 February 2007.

- Denying access to money or property;
- Using emotional blackmail to obtain funds from an older person;
- General threats, intimidation, harassment to elicit money or assets;
- Taking, misusing, or 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;
- Cashing cheques without permission or authorisation;
- Using an authorised power of attorney in a manner which is not in the best interests of the older person;
- Promising long term or lifetime care in exchange for money and property and not providing such care (see **Part 4.4** below on this specific issue);
- Overcharging or not delivering care or services;
- Getting an older person to be guarantor without them having sufficient level of knowledge or understanding to make an informed decision;
- Obtaining loans from seniors and then asserting that it was a gift and that the money wont be repaid (verbal agreements are often used between family members); and
- Running up large telephone accounts in the older person's name and then refusing to pay.

In addition to the above, there are more subtle abuses where a family dissuades older relatives from spending money, pretending that it is in their best interests. For example, aversion to payment of accommodation bonds for residential low care. Many perpetrators of financial abuse are family members, who may feel they have a right or entitlement to an older person's assets. Equally, the older person may feel a sense of obligation to the other family member and may not even identify that what may be occurring, could be abuse. Furthermore the financial norms of families are diverse. What may be seen as a normal transaction or course of events within one family may be considered abuse by another.

Wilber and Reynolds (1996) identified that '[s]everal studies have found that financial abuse is a pattern of behaviour rather than a single event and generally occurs over a lengthy period of time.'³⁵ The consequences of financial abuse for the older person can be particularly significant: the emotional insecurity arising from the loss of assets can be just as damaging as the loss of financial security.

Older people who reside in supported residential facilities are often vulnerable to financial abuse, as many residents have a level of impairment which diminishes their capacity to understand and handle their own financial affairs. Victoria has recently amended its legislation to increase regulation of the operation of supported residential services, and it is an area under continuing review (see below the discussion under **Part 4.2.2**).

Older people can also experience problems with security of accommodation in both high and low care facilities. They may lack understanding of the complexity of financial and contractual arrangements in the residential care sector and may

³⁵ Wilber, K.H. and Reynolds, S.L. 'Introducing a Framework for Defining Financial Abuse of the Elderly' (1996) 8:2 *Journal of Elder Abuse & Neglect* 61.

experience incidents of physical or sexual abuse. These issues are largely the responsibility of the Commonwealth; it has recently introduced a range of initiatives and regulations (mainly concerning compulsory reporting to police and the Commonwealth of certain incidents) to address these issues.

4.2.1.1 Banking and Financial Sector

Banks and the finance sector have significant potential to protect their older customers from situations of possible financial abuse. However, regulations relating to privacy have often been interpreted to limit the capacity of a bank to respond to cases of financial abuse. Clients of banks should be able to instruct their bank to both notify them, and trusted family/friends, of any banking activity which is abnormal or uncharacteristic of that individual. There appears to be a limited understanding of substitute decision arrangements such as powers of attorney or administration orders, with banks often either unaware of or confused by such orders. This is despite the increased use of such arrangements by older people.

Examples in the United States have the finance sector taking a more pro-active role in prevention and detection of financial abuse.³⁶ The state of Massachusetts has introduced a system where State Government works collaboratively with banks to teach bank employees who are working in branches, how to recognise and report the financial exploitation of elder customers.³⁷ They are trained to observe:

- Banking activity inconsistent with the customers usual habits; and
- Sudden increases in incurred debt when the older person appears unaware of the transactions;
- Clear understanding of the circumstances where any person can be appropriately authorised to manage the persons account on their behalf; and
- Implausible reasons for banking activity.

Given the role of the Commonwealth in relation to banking regulation, there is an opportunity for it to demonstrate clear leadership by working with the banking industry on:

- Developing training materials to assist bank personnel to recognise signs of potential abuse;
- Developing internal protocols for reporting allegations of abuse to senior management; and
- Implementation of staff training and the protocol for reporting alleged abuse.

³⁶ See for instance, Sandra Hughes, 'Can bank tellers tell?- Legal issues relating to banks reporting financial abuse of the elderly' (2003) American Bar Association Commission on Law and Aging http://www.elderabusecenter.org/pdf/publication/bank_reporting_long_final_52703.pdf accessed at 28 February 2007, 26-30.

³⁷ State Government of Victoria, *The Mismanagement & Misappropriation of Older People's Assets: How can the Financial Services Sector Help?* (3 November 2005) Office of Senior Victorians, Department of Victorian Communities [http://www.seniors.vic.gov.au/Web19/osv/rwpgslib.nsf/GraphicFiles/MismanagementOlderPeoplesAssets.doc/\\$file/MismanagementOlderPeoplesAssets.doc](http://www.seniors.vic.gov.au/Web19/osv/rwpgslib.nsf/GraphicFiles/MismanagementOlderPeoplesAssets.doc/$file/MismanagementOlderPeoplesAssets.doc) accessed at 27 February 2007, 11.

Structured financial transactions

One strategy to prevent and address financial abuse of an older person is to promote the use of certain structured financial transactions. This is particularly an area where voluntary action on the part of banks may significantly reduce older people's vulnerability to fraud and financial abuse in relation to credit and debt. A range of options include:

- Automatic payment of routine bills through scheduled direct debits or by a trusted family member or friend; and
- Asking a friend or family member to review all papers before they are signed, in instances where this involves money to be transferred; and
- Where assets are to be transferred, documenting the arrangements in written form signed by both parties.³⁸

4.2.2 Victorian legislative regime

There is clear overlap between financial abuse and fraud; many of the legislative provisions listed above in **Part 4.1.2** may be relevant here.

4.2.2.1 Supported Residential Services

The *Health Services Act 1988* (Vic) ('the Act'), as amended by the *Health Services (Supported Residential Services) Act 2006* (Vic), regulates the management or control of resident's money by a proprietor of a Supported Residential Service.

The Act requires the proprietor to have the written consent of a resident (or, if applicable, the resident's administrator) before managing or controlling the resident's personal money: s108HA. 'Money of a resident' excludes money paid to the proprietor on account of fees and expenses payable for accommodation or services provided by the proprietor, and by implication includes any other money the proprietor holds on behalf of the resident. There is provision to prescribe a limit on the amount of money managed.

Itemised records must be maintained of money managed or controlled, and in particular, expenditure must be itemised and explained to the resident. Records of money received on behalf of a resident must be provided on request, and statements of income and expenditure must be provided at least every three months, and the residents or their administrators must be granted access to their records on request.

In addition, close associates of the proprietor (except employees) are prohibited from handling or controlling residents' money, and staff of the service have only limited powers to handle money under the direction of the proprietor: s108HB.

³⁸ State Government of Victoria, *The Mismanagement & Misappropriation of Older People's Assets: How can the Financial Services Sector Help?* (3 November 2005) Office of Senior Victorians, Department of Victorian Communities
[http://www.seniors.vic.gov.au/Web19/osv/rwpgslib.nsf/GraphicFiles/MismanagementOlderPeoplesAssets.doc/\\$file/MismanagementOlderPeoplesAssets.doc](http://www.seniors.vic.gov.au/Web19/osv/rwpgslib.nsf/GraphicFiles/MismanagementOlderPeoplesAssets.doc/$file/MismanagementOlderPeoplesAssets.doc) accessed at 27 February 2007, 7-8

Proprietors and their close associates (including employees) are specifically prohibited from acting as a resident's guardian or administrator: s108HD. It has been suggested that this may present difficulties in small rural communities, for example, where residents may be related to members of staff or the proprietor. This will be reviewed further in 2007.

A further measure to prevent exploitation has been the introduction of provisions relating to prohibited and reportable transactions: ss108 M to 108S. These prohibit the proprietor or close associates from receiving gifts from residents where the value of the gift exceeds \$100 or another prescribed amount. They also prohibit the proprietor or close associates from entering into transactions about real or personal property that are not at market value. Other transactions with a value greater than \$100 must be in writing, and if the value exceeds \$500, the resident or resident's administrator must have received independent legal or financial advice.

Even where a transaction about real or personal property is at market value, if the transaction's value exceeds \$100, it is nonetheless reportable to the Secretary of the Department of Human Services. Transactions that relate directly to the provision of accommodation and special or personal care are excluded from these requirements. It is hoped that the provisions will deter proprietors and close associates from entering transactions not directly related to the core business of the supported residential service.

Transactions about real and personal property with a value of more than \$100 are also subject to a 5-day cooling off period, and the resident has additional rights to those generally recognised at law to reverse the transaction or to be compensated to the true value of the transaction.

Proprietors are required to give notice of these provisions to residents, their families and administrators, and to close associates. The Department of Human Services has prepared information booklets available to proprietors to distribute.

The provisions of the *Health Services Act 1988* are undergoing further review in 2007, for possible change in 2008. The Department of Human Services is reviewing the Act for compliance with the *Charter of Human Rights and Responsibilities Act 2006*.

An area of particular concern to this Inquiry would be the regulation and protection of amounts paid to proprietors as bonds or ingoing fees.

4.2.3 Recommendations

An effective response to the financial abuse of older people needs to be developed as part of a broader elder abuse prevention strategy. The response to the financial abuse of older people could include the following elements:

- Providing improved support to the older people, empowering them through education, information, advocacy, support and access to legal services;
- Better education of the community, providing information and increased general awareness of the issue of financial abuse of older people;
- Developing relationships between a range of sectors involved in elder abuse prevention, including health, justice, community services, to develop cooperative strategies to address the issue; and
- Ensuring that there are appropriate policies and protocols for addressing cases of financial abuse.

The Commonwealth should also work in collaboration with a range of State and Territory Government initiatives regarding elder abuse, especially where there is a potential benefit by addressing the issue on a national scale. A national approach would aid achieving economies of scale and synergies that lead to more effective and efficient product and service delivery.

The following specific recommendations have been proposed by the Department of Victorian Communities' Office of Senior Victorians:

Recommendation #3

Development of a national finance code of conduct for the prevention of financial abuse.

The development of a national code of conduct and education programs for the financial services sector could assist to prevent, detect and address the financial abuse of older people. The Commonwealth could coordinate round table discussions with the financial services sector, State and Territory Governments, the Banking Ombudsman, and advocates.

Recommendation #4

Development of a national 'clearing house' website promoting effective strategies to prevent financial and other forms of elder abuse.

Currently there is no national clearing house for approaches to the prevention and response to situations of elder abuse by various sectors. At a recent meeting of the Australian Network for the Prevention of Elder Abuse there was widespread support amongst the State and Territory representatives for the establishment of a national website which could provide a clearing house for current information on approaches to elder abuse. A section of this website could relate to information for the finance sector and legal professions on practices and policies. The website could also provide an important reference point for doctors and health professionals who may constitute the only independent advisors many older people have access to. The Commonwealth is in a strong position to facilitate the creation of this important resource to build the

knowledge base for improved national responses to this problem.

Recommendation #5

Undertake national research into the nature and prevalence of elder abuse in Australia.

The development of adequate Australian prevalence data is another area where the Commonwealth could take a lead role. The Commonwealth could also promote research in collaboration with the States and Territories to gain a clearer understanding of the nature and extent of elder abuse. This will assist the development of improved and appropriate responses to the issue.

Recommendation #6

Funding national initiatives to promote financial literacy among older people.

The Commonwealth could also take an increased pro-active role in developing and funding national initiatives to increase awareness and literacy of financial issues.

The Commonwealth funds the Financial Literacy Foundation, which provides a focus for financial literacy issues by increasing learning about money and its uses. The Financial Literacy Foundation has programs which specifically target schools, employers and the vocational and technical education sectors. However, it does not have any specific initiative to focus on older people. The Commonwealth should look to provide funding or prioritising existing funds to specifically target the financial literacy needs of older people and to coordinate this on a national basis.

Accommodation and supported residential services

In relation to supported residential services, any reviews or proposed reforms of relevant legislation should occur through coordination and consultation among States and Territories. The Committee should take into consideration jurisdictions' own review and reform processes.

4.3 Powers of Attorney and related matters

4.3.1 Introduction and background

Powers of attorney provide a means for people to appoint someone else to take care of their financial, legal or personal affairs for either a limited or indefinite period of time. The Victorian Government believes that the use of powers of attorney, especially enduring powers, should be encouraged as they provide for greater autonomy and protection of rights. Powers of attorney provide an opportunity for older people to consider their future needs and desires before losing capacity. Further use of powers of attorney reduces pressure on the government-funded guardianship system. Lack of awareness and understanding of powers of attorney and related documents appears to be the major barrier to their increased uptake.³⁹ For instance there may be confusion among older people as to which kind of power of attorney they have entered into and what activities on their behalf are authorised.

The Office of the Public Advocate ('OPA') plays a key role in promoting and protecting the rights of older people. In particular, the OPA has recently been increasing efforts to educate people about powers of attorney and to encourage their use. The Victorian Government has increased funding to the OPA as part of its 2005 policy, *A Fairer Victoria: Creating opportunity and addressing disadvantage*.

In Victoria there are distinctions between different types of powers of attorney and related documents:

- **General powers of attorney** deal with financial and legal matters but only remain in effect while the donor is competent. These are particularly useful for older people who remain competent but have mobility issues or prefer to have someone else manage their affairs.
- **Enduring powers of attorney in relation to financial and legal matters.** Importantly, the referral of authority is not revoked in the event of the donor becoming incompetent.
- **Enduring powers of attorney for medical treatment only** . See also discussion of refusal of treatment certificates in **Part 4.3.3** below.
- **Enduring power of guardianship** can cover all lifestyle decisions including medical treatment but exclude financial and legal matters. See **Part 4.3.2** below.

See **Part 4.3.4** below for the specific legislative provisions regulating each of these documents.

Legislation in Victoria provides for recognition of enduring powers of attorney made in other Australian jurisdictions. It is understood that similar recognition exists in the legislation of most other States and Territories (South Australia has plans to amend its legislation).

The Victorian *Medical Treatment Act 1988* allows competent persons to appoint an agent via the enduring power of attorney (medical treatment) provisions of the Act.

³⁹ See Sarah Ellison, Louis Schetzer, Joanna Mullins et al, *Access to Justice and Legal Needs: The Legal Needs of Older People in NSW* (December 2004) vol 1, Law and Justice Foundation of NSW, 307-310.

The agent can make medical treatment decisions on behalf of the person should they ever become unable to make medical treatment decisions for themselves. The Act also allows the appointment of an alternative agent who can act if the first agent cannot. Unlike some other powers of attorney, the Act does not allow for agents to make joint decisions.

An agent must be sufficiently informed about a person's wishes regarding their condition and treatment to act as their proxy decision maker. An agent can refuse medical treatment where there are reasonable grounds for the view that, if competent and in possession of the relevant facts, the patient would not want the treatment or if the treatment would cause unreasonable distress to the patient.

Due to the substantial power enabled by a power of attorney, there is clearly potential for abuse.⁴⁰ Older people may be bullied into granting powers of attorney before they need to, or may cast the terms of such documents in wider terms than necessary. While it is important to protect older people who have lost capacity, there are also substantial issues of intrusion into personal liberty and autonomy. A related issue arises in relation to monitoring powers of attorney.

4.3.2 Guardianship and administration

As with other jurisdictions, Victoria has a comprehensive legislative regime dealing with guardianship and administration of adults with a disability. The notions of guardianship and administration are distinct but related. A guardian makes 'lifestyle' decisions relating to health, accommodation, access to services, while an administrator makes financial and legal decisions for the represented person.

Guardianship and administrative orders are made by the Victorian Civil and Administrative Tribunal ('VCAT'). A guardian may be appointed as a plenary guardian – having all the powers over the represented person that a parent has over his or her child; or a limited guardian – having only those powers specified by VCAT in the order. An administrator generally has all the powers that a person would have themselves over their financial and legal affairs, subject to any restrictions set out in VCAT's order.

Victorian legislation provides for a carer or relative to be made a guardian or administrator, and it also empowers the Public Advocate to be made the guardian or administrator where necessary.

Enduring powers of guardianship can be made under Victorian legislation, enabling adults to appoint a guardian to make personal or lifestyle decisions in the event that they lose capacity to make those decisions themselves. The appointor is able to specify the limits of the authority voluntarily given to the guardian. VCAT is able to revoke the enduring power of guardianship and can also give advice or directions on the application of the enduring guardian.

There are differences between jurisdictions in Australia as to whether and how guardianship and administrative orders made in other State or Territory are recognised. Some jurisdictions' legislation provides for the automatic recognition of

⁴⁰ See *ibid* 310-316.

guardianship and administration orders made under parallel legislation in another Australian jurisdiction. Others require registration before an order will be recognised, while others require a new order to be made in the court or tribunal within that jurisdiction recognising the out-of-jurisdiction guardianship or administration order. In some jurisdictions the Victorian Public Advocate cannot be recognised as a person's guardian (for instance under Queensland legislation). There is scope for greater uniformity and certainty, especially as people are increasingly mobile and often move interstate to be closer to family as they get older.

4.3.3 Related documents including advance directives

Advance directives are colloquially known as 'living wills'.⁴¹ An advance directive is generally considered to be 'a voluntary statement setting out the types and conditions of medical care that a person would prefer in a given situation, prior to requiring care.'⁴² Although there are clear overlaps with powers of attorney and guardianship orders, advance directives allow people to more clearly articulate their desires in a range of circumstances. There is some current legislation in this area, however the best use of advance directives may be in combination with powers of attorney or guardianship orders, where the directive can be used as the instructions of the incapacitated person to accompany the formal, legal grant of authority. In particular they may be used to focus attorneys and guardians on the best interests of their client and allow for greater self-determination.

Advance directives can be voluntarily entered into as part of the instructions to an agent exercising an enduring power of attorney for medical treatment. Though not specifically enforceable such a directive would constitute evidence that the agent is informed of, and acting in accordance with the best interests of the donee. See the discussion of enduring powers of attorney for medical treatment in **Part 4.3.1** above.

The Victorian *Medical Treatment Act 1988* protects and formalises the common law right of competent persons over 18 to refuse unwanted medical treatment for a current condition. A competent person can refuse medical treatment by completing a refusal of treatment certificate (Refusal of Treatment Certificate - Competent person) that is witnessed by a medical practitioner and another person. In witnessing such a certificate, witnesses vouch that the decision to refuse treatment has been made voluntarily and in an informed manner by the patient.

The Act creates an offence of medical trespass that obtains where a medical practitioner or those acting under their direction, knowingly initiate or continue treatment of a condition that is subject to a refusal of treatment certificate. The refusal of treatment may be of any treatment for a current condition or otherwise refusal of treatment as specified.

⁴¹ It is noted that some commentators include enduring powers of attorney and guardianship within the broad term, 'advance directives'.

⁴² Human Rights and Equal Opportunity Commission, *Discussion Paper: Living Wills* (1998) http://www.humanrights.gov.au/disability_rights/hr_disab/Wills_DP/wills_dp.html at 23 February 2007.

The Act does not allow the refusal of palliative care, which includes (a) the provision of reasonable medical procedures for the relief of pain, suffering and discomfort; or (b) the reasonable provision of food and water.

During 2003-2005 the Department of Human Services undertook a communication initiative on the operations of the Act, to improve awareness of its provisions among general practitioners, hospitals, nursing home residents and staff, peak bodies and other members of the community.

At this time the Victorian Government has no plans to amend either policy or legislation relating to the *Medical Treatment Act*.

4.3.4 Victorian legislative regime

General powers of attorney are covered by Part XI of the *Instruments Act 1958* (Vic). Enduring powers of attorney are covered by Part XIA. Section 116 provides for the recognition of enduring powers of attorney made in other Australian jurisdictions.

Section 5A of the *Medical Treatment Act 1988* (Vic) allows agents appointed under an enduring power of attorney (medical treatment) to make decisions on behalf of the patient. Section 5B provides that the agent must be sufficiently informed of the nature of the patient's condition to make a decision to refuse treatment for that patient. Section 5C provides the circumstances when the VCAT may revoke an enduring power of attorney (medical treatment).

Victorian legislation provides for one species of advance directive in relation to health-care for existing medical conditions. Under the *Medical Treatment Act 1988* (Vic) Part 2, patients can have their decision to refuse future medical treatment recognised in a Refusal of Treatment Certificate ('RTC'). These certificates are restricted to current conditions only.

The *Guardianship and Administration Act 1986* (Vic) provides the regime for appointing guardians for adults with a disability. The Act establishes the Public Advocate and sets out the powers and duties of that office. Section 35A of the Act enables persons to appoint an enduring guardian for themselves if they become unable to make their own decisions.

Part 6A of the *Guardianship and Administration Act 1986* (Vic) facilitates the recognition of guardianship and administrative orders made under parallel legislation in other Australian jurisdictions.

4.3.5 Recommendations

The Victorian Government has no current plans to reform the legislation relating to powers of attorney and related documents, however the government recognises that this is an area that is subject to some legislative and policy differences across jurisdictions. Victoria welcomes the opportunity to consider the Committee's findings on the adequacy of legislation in this area.

Most of the States and Territories have amended their legislation to allow the recognition of powers of attorney made in other Australian jurisdictions, the main differences lie in terminology, scope of enduring powers (for instance whether they cover medical as well as financial and legal decisions), requirements as to registration within the State or Territory, and whether a solicitor's certificate is needed to accompany the out-of-jurisdiction power of attorney.

Recommendation #7

Recognition by Commonwealth instrumentalities of powers of attorney, and guardianship and administrative orders.

The Victorian Government supports the recommendation of the Victorian Office of the Public Advocate that Commonwealth instrumentalities such as Centrelink and Veterans' Affairs be required to recognise enduring powers of attorney and enduring powers of guardianship validly made under State or Territory legislation. Such a move would significantly enable greater autonomy in advance decision-making for older people and simplify processes. The Victorian Government considers that the Commonwealth executive is not immune from State laws of general application, such as laws regulating powers of attorney, in line with the High Court's decision in *Henderson's case*.⁴³

⁴³ *Re Residential Tenancies Tribunal of New South Wales and Henderson and anor; Ex parte the Defence Housing Authority* (1996) 190 CLR 410 (High Court of Australia).

4.4 Family Agreements

4.4.1 Introduction and background

The concept of ‘family agreements’ is a fuzzy one – essentially they involve arrangements whereby the older person transfers property or pays compensation to a family member in return for lifetime care.⁴⁴ Most of these agreements are informal, verbal and even ad hoc, however they may involve the transfer of substantial property or the payment of large sums of money. Many of these agreements may be motivated by good intentions to keep older people close to their family and out of ‘institutional’ care (such as nursing homes, retirement villages and supported residential services), or even the lack of availability of institutional services. Clearly, however, there is potential for abuse of informal arrangements and for disputes between family members. There is a clear crossover here with the issue of financial abuse (see **Part 4.2** above). The informal nature of such agreements creates the potential for disputes over the content of the agreement, particularly if other family members are not consulted or not privy to the arrangement, especially on the death of the older person. More tragically, there is potential for disputes and uncertainty if the relationship between the older person and the family carer breaks down: the older person may be left with dissipated resources, anxiety over their future, and depression over the relationship breakdown.⁴⁵ There are many pitfalls that may arise, particularly if the agreement lasts for longer than anticipated, or if the needs of either party changes.⁴⁶

Formalisation of family agreements in the form of written contracts is likely to prevent some of the worst effect noted above, however they will be difficult to enforce and will not prevent breakdown of relationships or unconscionable conduct in coming to agreement.

The informality and familial nature of these agreements may make it difficult for the law to recognise and/or enforce them as contracts, and common law presumptions may assume that the transfer of property is a gift with no obligations attached. Such implications have clear and dramatic impacts on older people. However there may also be significant impacts for carers who may have the property stripped despite providing many years of care, and may have given up careers or paid substantial caring expenses from their own money.

It is difficult to see how legislation can specifically address many of the issues raised by family agreements. However, the British Columbia Law Institute has proposed a legislative provision to deal with situations where the relationship between parties breaks down that would allow courts to dissolve the agreement, restore property and

⁴⁴ Brian Herd, ‘The family agreement – a collision between love and the law?’ (2002) 81 *Reform* 23, 24. Herd notes that such agreements may also be referred to as independent care agreements, personal services contracts, or lifetime care contracts. Some have rejected the limit to family members preferring the term ‘care agreements’ and defining them as any transfer of property in return for lifetime care: see Margaret Hall, ‘Care agreements: property in exchange for the promise of care for life: The British Columbia Law Institute Study’ (2002) 81 *Reform* 29.

⁴⁵ See anecdotes in Brian Herd, ‘The family agreement – a collision between love and the law?’ (2002) 81 *Reform* 23, 25-27.

⁴⁶ Margaret Hall, ‘Care agreements: property in exchange for the promise of care for life: The British Columbia Law Institute Study’ (2002) 81 *Reform* 29, 29-31.

compensate caregivers.⁴⁷ Such a reform would not prevent the problems that arise with the use of care agreements but it would assist with providing a resolution after the problems have arisen.

4.4.2 Victorian legislative regime

There is no specific legislation governing family agreements, however some arrangements may be formalised in power of attorney or guardianship arrangements.

4.4.3 Recommendations

The Victorian Government acknowledges that there is potential for amendment to legislation to introduce clawback provisions for the reinstatement of property, or reforms to laws relating to restitution in the area of family agreements due to their unique attributes, however it has no present plans to introduce such legislation. The Government welcomes the opportunity to consider the Committee's findings on the adequacy of legislation in this area.

The Victorian Government believes that most family agreements will continue to be largely informal, and that the greatest scope for assisting older people will come in the form of education and advice. See **Part 4.5 Accessing legal services** below.

⁴⁷ See Recommendation #4 in British Columbia Law Institute, *Private Care Agreements Between Older Adults and Friends or Family Members*, BCLI Report No. 18 (2002) at <http://www.bcli.org/> > Publications > BCLI Publications > listed under 2002 accessed at 26 February 2007.

4.5 Accessing legal services

4.5.1 Introduction and background

The majority of legal problems for older people merge around the issue of accessing legal services. The major barriers to access are:

- Financial;
- Lack of knowledge of legal rights;
- Reluctance to formalise arrangements, especially where family members are involved, or a general reluctance to engage with the legal system.

Many older people have lived their whole lives without coming into contact with lawyers or the legal system.⁴⁸ As they grow older and come to need wills or powers of attorney, or need to restructure their finances and assets to deal with diminishing capacity, they are particularly vulnerable to misinformation and anxiety, especially older women whose husbands have traditionally handled any financial and legal matters.⁴⁹ Many older people may be subject to pressure from family members and/or feel that they cannot access independent advice.⁵⁰ Other older people may have no family and be socially isolated, leaving them with little support or guidance. Indigent older people may feel that documents like wills and legal advice generally are only for wealthy people.

It is clearly in both their interest and the interest of society generally, that older people receive timely, accurate and independent advice. Better management of finances and judicious use of documents like powers of attorney reduces pressure on government resources, promotes autonomy, and reduces the chances of family relationship breakdown.

While there is a role for lawyers in improving their levels of service, many of the barriers arise before older people have actually reached the point of contact with a private lawyer or a community legal centre.

4.5.1.1 Financial barriers

Victoria has a large network of 51 metropolitan, rural and specialist community legal centres ('CLCs'). These centres are available to older people as members of the general Victorian population. Specialist centres presently exist in the areas of consumer credit, aboriginal people, women, disability, mental health, domestic violence, tenancy and welfare rights.⁵¹ The community legal centres in Victoria already deal with many legal issues for older people, and some also have financial counselling services available. A few have dedicated programs for older people, such as the Older Persons Legal Program at Loddon Campaspe Community Legal Centre

⁴⁸ Sarah Ellison, Louis Schetzer, Joanna Mullins et al, *Access to Justice and Legal Needs: The Legal Needs of Older People in NSW* (December 2004) vol 1, Law and Justice Foundation of NSW, 33-34, 36.

⁴⁹ *Ibid* 34-35.

⁵⁰ *Ibid* 30-31, 71.

⁵¹ For more information go to Federation of Community Legal Centre (Vic) Inc website <http://www.communitylaw.org.au/community/pages/clc/>.

in Bendigo, and the SouthPort Community Legal Centre which is in receipt of a substantial grant from the Victoria Law Foundation for elder law issues.

In response to the *Report of the Elder Abuse Prevention Project* (December 2005),⁵² the Victorian Government has allocated \$1.2 million over four years for the establishment of a dedicated Older Persons Legal Service. Under the auspices of Victoria Legal Aid, it is anticipated that the new Centre will enable better and more targeted access to legal services and financial counselling for older Victorians. It will also play a key role in educating older Victorians about their legal rights generally.

Community legal centres are funded through a combination of State and Commonwealth funding, with each centre having a unique funding matrix. It is generally dependent on the percentages of 'state' work and 'federal' work they perform.⁵³ Every CLC also has its own criteria for access to its services – some have an assets test, some a geographical catchment area, some an attribute such as gender, while others have no restriction on access at all. All centres have limited resources and have to prioritise their caseload, as well as balance it with other key roles such as education and community development. Many CLCs may act as a first contact point for people seeking legal services, and they are then referred to private lawyers. Some CLCs will perform functions that private lawyers no longer do, such as home visits for physically incapacitated people.

However, despite the key role of CLCs, including the new Older Persons Legal Service, the majority of older people will continue to access mainstream legal services provided by law firms, to deal with routine legal matters such as wills, powers of attorney, family agreements and property matters. In this context legal aid becomes crucial.

Legal aid is subject to restrictive means testing, which may impact especially on older people who may own their own home but have a limited fixed income, and limited capacity to leverage assets because of an inability to make repayments.⁵⁴ Limits to legal aid funding mean that it is rarely available for civil matters. The majority of funding goes to family law matters involving children or family violence, and to criminal matters. Older people are less likely to need legal assistance in such matters. The Commonwealth's distinction, for funding purposes, between 'federal' and 'state' matters is difficult to apply in practice and has led to a drop in funding for the majority of legal issues affecting older people.

Older people are clearly in need of greater access to legal services, and a relaxing of restrictions on access to legal aid is one way of improving outcomes for older people (see **Recommendation #7** below).

⁵² Department of Victorian Communities' Elder Abuse Prevention Project, *Strengthening Victoria's Response to Elder Abuse* (December 2005), [http://www.dvc.vic.gov.au/Web19/osv/rwpgslib.nsf/GraphicFiles/ElderAbuseReportFINAL/\\$file/EldersAbuseReportFINAL.pdf](http://www.dvc.vic.gov.au/Web19/osv/rwpgslib.nsf/GraphicFiles/ElderAbuseReportFINAL/$file/EldersAbuseReportFINAL.pdf) at 26 February 2007.

⁵³ An example of state work would be a motor vehicle accident, while federal work includes family law.

⁵⁴ Sarah Ellison, Louis Schetzer, Joanna Mullins et al, *Access to Justice and Legal Needs: The Legal Needs of Older People in NSW* (December 2004) vol 1, Law and Justice Foundation of NSW, 76-78.

4.5.1.2 Knowledge of legal rights

Many older people lack understanding about legal issues and their legal rights, or have trouble accessing information about where to go for services.⁵⁵ Further, many lack empowerment to act confidently on those rights. This may be further exacerbated by technological barriers to accessing legal assistance, a lack of knowledge about where to access legal information and may perceive the cost of legal services to be prohibitive, whether that is true in reality or not.⁵⁶ There is clearly a place for greater education about legal issues older people are likely to confront, and about the services available. Dedicated programs targeted at older people, like the new Victorian Older Persons Legal Service, can investigate ways to educate and inform.

Older people may experience a lack of understanding of their rights in dealing with the health system and a lack of experience in questioning the perceived authority of health officials and staff. Older people may feel that decisions regarding their health care are taken by other parties and may experience poor levels of communication between health professionals and family members. The Victorian Government funds the Health Services Commissioner to provide conciliation between consumer and provider and to mediate in complaints. Many older people are unaware of their right to make a power of attorney and are unaware of the laws relating to guardianship and administration. Information is available on these topics, but is not widely understood or known about.

Many older people still largely rely on information being obtained from family, friends and from face to face contact, with written information as a secondary support. Measures such as websites have limited likelihood of success in reaching older people as the uptake of technology remains limited among older people, there are also financial barriers and physical disability issues in the use of computers. There is a significant overlap between legal and other issues for older people – one solution is to provide printed information on legal issues and services for older people in doctor's surgeries and other health professionals. For some older people, health officials or welfare services such as Centrelink, provide their first point of contact for problems that have legal solutions. Such service providers are in a valuable position to inform older people about where to go for legal advice, without getting involved in the provision of advice itself.

Older people who are Indigenous or who are from a culturally and linguistically diverse ('CALD') background have information needs that should take account of any particular social, cultural, political context. Strategies need to be developed such as:

- Increasing the number and range of formal talks by lawyers to older people, for example in housing commission areas, retirement villages and senior citizens' centres, on issues such as enduring powers of attorney and guardianship, family/care agreements and planning for the future, and accessing legal services generally;
- Development of pamphlets and brochures on financial matters, with appropriate referral to other services or information.

⁵⁵ Ibid 43-50.

⁵⁶ Ibid 65-69.

4.5.1.3 Reluctance to engage with the legal system

Some older people are reluctant to engage with the legal system because they do not want to cause trouble, or because they do not want to cause problems within their families. This is particularly an issue where financial abuse is involved, as it is often family members themselves who are pressuring older people to make legal arrangements that benefit their abusers. Further older people may mistrust lawyers and the legal system, or have had bad experiences in the past.⁵⁷

Even where there are low-cost or no-cost alternatives to litigation such as discrimination complaints processes, older people may be reluctant to access these options, feel that the process is futile, or lack knowledge of how to make a complaint.⁵⁸ When older people do know that a complaint process is available, they may be put off by the need to represent themselves before a tribunal.⁵⁹ This could be helped by greater access to legal aid services to enable older people to be represented in tribunal processes, for instance where age discrimination is alleged.

Ideally, lawyers should be able to communicate with older people with a friendly and positive attitude and they should also reflect the diversity of cultural backgrounds older people come from. Lawyers should be trained in issues relevant to older people. Under Victorian legislation, lawyers *must* ensure that information regarding costs of legal service is made known ahead of time, as well as the right to review. Practically speaking, lawyers can improve their explanation of costs to older people and ensure that there is ongoing communication. Older people present a challenge for lawyers as they may require more time than needed for other clients, and at the same time they need costs to be kept down. Cheryl Tilse et al put it like this: '[f]rom a practice perspective it is not very remunerative – more of a community service which we are willing and able to provide.'⁶⁰ It is noted that increased education and awareness about legal issues affecting older people should reduce the amount of time that lawyers need to spend explaining basic principles, and therefore reduce the cost of legal services.⁶¹

Lawyers and solicitors can play an important role in identifying and responding to potential issues of financial abuse against older people, by:

- Understanding the legal needs of older people in relation issues such as powers of attorney, guardianship and administration;
- Advising older people to make a considered and informed choice about the authority to grant power of attorney;
- Making sure that the older person is not being coerced into completing or changing Wills and Powers of Attorney;
- Understanding the risk factors of elder abuse and legal options for prevention or remedy;

⁵⁷ Ibid 60-76.

⁵⁸ Ibid 251-254.

⁵⁹ Ibid 257-258.

⁶⁰ Tilse, C., Deborah Setterlund, Jill Wilson and Brian Herd, 'Legal Practitioners and Older Clients: Challenges and Opportunities for Effective Practice' (2002) 1 *Elder Law Review* 34, 37.

⁶¹ Ibid 40.

- Ensuring they obtain clear instructions from the older person independent of other family members and satisfy themselves of the persons capacity to provide instructions;
- Supporting, where appropriate, older people to be medically assessed for their legal capacity; and
- Taking complaints by older people seriously and acting promptly where appropriate.⁶²

Victorian legislation contains robust requirements for dealing with complaints and disputes; as with many of the issues in the terms of references, the final point above relates more to the issue of awareness of legal rights.

Specialised services such as the Older Persons Legal Service, and programs within other services should redress some of these issues, particularly in terms of providing broader community education and awareness. There is also scope for the wider legal profession to improve service provision to older people, whether through self-regulation or via statute. This may be an issue for the continuing national reforms to the legal profession, however there are some ameliorating measures already in place (such as improved disclosure of costs and review mechanisms).

4.5.2 Victorian legislative regime

The *Legal Profession Act 2004* (Vic) provides a comprehensive regime for the regulation of legal practitioners in Victoria including mandatory requirements for disclosure and review of the costs of legal services (Part 3.4). It is part of a uniform national scheme regulating legal practice in Australia. Part 2.9 of the *Legal Profession Act 2004* regulates community legal centres.

The *Legal Aid Act 1978* (Vic) establishes Victoria Legal Aid ('VLA') and governs the provision of legal aid in Victoria.

⁶² Cripps, D, Biven, J., Northey, J. and Rigger, P. 'Abuse of Older people: issues for lawyers' (2002) 1 *Elder Law Review* 14.

4.5.3 Recommendations

The Victorian Government considers that the legislative regimes currently in place in Victoria are adequate to cover the issue of accessing legal services. The government continues to participate in the national legal profession reform process.

The Victorian Government believes that the specific barriers to accessing legal services are best addressed by initiatives such as the Older Persons Legal Service currently being set up in Victoria, and by greater focus on education about rights and obligations.

Recommendation #8

Increasing Commonwealth legal aid funding, relaxing the restrictions on access for older people, and increasing access to legal aid for civil matters.

The Victorian Government recommends an increase in federal funding for legal aid, including funding targeted especially at programs and support for older people. Funding for minor assistance, and particularly for civil matters, has the potential to prevent small problems becoming large ones, and therefore reduce the ultimate financial burden on government.

4.6 Discrimination

4.6.1 Introduction and background

Older people face discrimination on the basis of age and on the basis of actual or perceived mental or physical disabilities. Discrimination in employment is of primary concern,⁶³ particularly in the context of an ageing workforce and skills shortages. It is vital to Australia's economy that the skills and experience of older people are utilised.⁶⁴ Perhaps even more than other sectors of the community, flexibility in work practices and the ability to work part-time may be crucial in keeping older people in paid employment.⁶⁵ However it must be noted that older people also provide significant contributions to unpaid work in Australian society, particularly in the provision of child care and home duties.

Age discrimination can be direct or indirect. *Direct* discrimination occurs when a person is treated less favourably than other people specifically because of their age or because of some attribute that generally relates to their age group. *Indirect* discrimination occurs when there is an appearance of non-discrimination but the generally applied requirements or conditions impact disproportionately (and negatively) on older people.

It is noted that older people, as with all members of the community, may face other types of discrimination including on the basis of sex, gender identity, sexual orientation and race, and '[t]hese other grounds of discrimination can intersect with age and can result in compounding disadvantage.'⁶⁶ This submission focuses on age discrimination.

In its 2006 election platform, the Bracks Government committed to improving the framework for addressing systemic discrimination. The review of the current framework will seek to identify:

- the incidence of discrimination among more marginalised communities and
- whether the powers and functions of the Victorian Equal Opportunity and Human Rights Commission should be improved.

The structure and terms of the review are currently being determined.

While discrimination is an area subject to both State and Federal regulation, this submission focuses solely on Victorian legislative provisions.

⁶³ Sarah Ellison, Louis Schetzer, Joanna Mullins et al, *Access to Justice and Legal Needs: The Legal Needs of Older People in NSW* (December 2004) vol 1, Law and Justice Foundation of NSW, 240-44.

⁶⁴ See for instance, John MacCallum and Jeanine Parsons, 'Older workers in an ageing society: the case for legal & policy reform' (2002) 81 *Reform* 5; Sev Ozdowski, 'Addressing age discrimination' (2002) 81 *Reform* 11, 12-13; Sol Encel, 'Age discrimination in law and practice' (2003) 3 *Elder Law Review* <http://www.uws.edu.au/about/acadorg/clb/sl/research/elderlaw/elderlawreview/volume3#4>.

⁶⁵ John MacCallum and Jeanine Parsons, 'Older workers in an ageing society: the case for legal & policy reform' (2002) 81 *Reform* 5, 10.

⁶⁶ Sarah Ellison, Louis Schetzer, Joanna Mullins et al, *Access to Justice and Legal Needs: The Legal Needs of Older People in NSW* (December 2004) vol 1, Law and Justice Foundation of NSW, 228.

4.6.2 Victorian legislative regime

Age is a specific attribute on the basis of which discrimination is prohibited in specific areas in Victoria: *Equal Opportunity Act 1995* (Vic) s6(a). The Victorian Act covers both direct and indirect discrimination: ss7-8.

Division 1 of the *Equal Opportunity Act* prohibits discrimination in employment; Division 3 prohibits discrimination in education; Division 4 prohibits discrimination in the provision of goods and services and the disposal of land; Division 5 prohibits discrimination in accommodation. Part 7 covers complaints to the Victorian Equal Opportunity and Human Rights Commission and the methods of resolution. The Act applies generally throughout Victoria with some statutory exceptions.

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) s8 provides for recognition and equality before the law, including the right to enjoy human rights without discrimination: s8(2). The Charter further provides the right to participate in public life without discrimination, including the right to vote: s18. The Charter applies to the actions of public authorities: Part 3 Div 4. The definition of 'public authorities' allows a wide construction: s4.

The *Public Administration Act 2004* (Vic) Part 2 sets out anti-discrimination principles to be applied in the work and employment practices of the Public Sector.

4.6.3 Recommendations

The Victorian Government is reviewing its legislative framework as it applies to systemic discrimination of marginalised groups, as part of its 2005 policy, *A Fairer Victoria: Creating opportunity and addressing disadvantage*. Age discrimination and older people will be included in this general review.

The Victorian Government believes that initiatives such as the Older Persons Legal Service currently being set up in Victoria, and a greater focus on education about rights and obligations will go some way to addressing discrimination issues facing older people.⁶⁷

⁶⁷ On this point see John MacCallum and Jeanine Parsons, 'Older workers in an ageing society: the case for legal & policy reform' (2002) 81 *Reform* 5, 9-10; Sev Ozdowski, 'Addressing age discrimination' (2002) 81 *Reform* 11, 15.

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Equal Opportunity Act 1995 (Vic)

Fair Trading Act 1999 (Vic)

Guardianship and Administration Act 1986 (Vic)

Health Services Act 1988 (Vic)

Health Services (Supported Residential Services) Act 2006 (Vic)

Instruments Act 1958 (Vic)

Legal Aid Act 1978 (Vic)

Legal Profession Act 2004 (Vic)

Limitation of Actions Act 1958 (Vic)

Medical Treatment Act 1988 (Vic)

Public Administration Act 2004 (Vic)

Trade Practices Act 1974 (Cth)

Transfer of Land Act 1958 (Vic)