

Introduction

*Age is a state of the individual.*¹

- 1.1 The ageing of Australia's population has been well-documented. According to Australian Bureau of Statistics (ABS) figures, in 2006 some 13.3 per cent of the Australian population was aged 65 years and over (with 3.6 per cent of the population aged 80 and over). On ABS projections, by the year 2036, those aged 65 years and over will make up 23.7 per cent of the population, with those over 80 comprising 7.9 per cent of the population.² By 2046 over a quarter of Australia's population will be in the 65 years and over age bracket.³
- 1.2 This demographic shift has far-reaching implications not only for areas such as aged care and health but also more widely in terms of labour market participation, housing and social policy more generally:

This transformation presents a number of challenges for Australian society, not the least of which is the need to ensure

- 1 Ms Jane Fisher, Council on the Ageing SA, *Proof Transcript of Evidence*, 17 August 2007, p. 2.
- 2 In some areas, the rate of increase will be even more marked. For example, it is anticipated that the number of people aged 50 years or over is expected to be 46 per cent of the population of Queensland by 2051, reflecting its popularity as a retirement destination. See Caxton Legal Centre Inc, *Submission No. 112*, p. 4.
- 3 For further information, see [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/DC530D110D39CBD3CA25732F001C7459/\\$File/4102.0%20-%20australian%20social%20trends%20-%20population%20-%202007.xls#Table 1!A1](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/DC530D110D39CBD3CA25732F001C7459/$File/4102.0%20-%20australian%20social%20trends%20-%20population%20-%202007.xls#Table 1!A1) (accessed 14 August 2007).

that older Australians live safely and without fear of abuse, violence or exploitation.⁴

1.3 Other statistics highlight some characteristics of the older section of the Australian population:

- 41 per cent of people aged 65-69 and 92 per cent of people aged 90 and over have a disability⁵
- The number and proportion of older people living alone has increased from around one fifth in 1971 to more than one quarter in 2001⁶
- Older people often find themselves providing care for another person... Twenty two per cent of men and 19 per cent of women aged between 65 and 74 are carers⁷
- Slightly less than three per cent of the Indigenous population is aged 65 years or over compared to 13 per cent of the broader Australian population⁸
- In 2001, there were only 79 men for every 100 women aged 65 years and this number decreases rapidly in all age groups, for people aged over 85 there were only 45 men for every 100 women⁹
- In 2005, there were nearly two million people... in receipt of the Age Pension. This number represents 66.3 per cent of all people who have reached qualifying age for the Age Pension. This means the remaining 33.7 per cent... are either self funded retirees, being supported by another person or have made alternative financial arrangements...¹⁰
- Twelve per cent of the total population of older people aged 65 to 74 years came to Australia from CALD [culturally and linguistically diverse] backgrounds.¹¹

1.4 As with other segments of the population, it is all too easy to stereotype older Australians as being frail, easily duped and in need of protection and assistance in managing their day to day affairs. While some older Australians do indeed need assistance, many are living vital, fulfilling lives, are active within their local communities, and are making significant contributions to Australian society:

4 National Seniors, *Submission No. 67*, p. 3.

5 Carers Australia, *Submission No. 120*, p. 1.

6 Human Rights and Equal Opportunity Commission (HREOC), *Submission No. 92*, p. 8.

7 HREOC, *Submission No. 92*, p. 8.

8 HREOC, *Submission No. 92*, p. 8.

9 HREOC, *Submission No. 92*, p. 44.

10 HREOC, *Submission No. 92*, p. 45.

11 HREOC, *Submission No. 92*, p. 48.

It is not that long ago that the reality of being old was, in general, to be poor and relatively frail. Advances in education, in income and social support, and improvements in fitness and health in the mainstream population mean that many older people will be socially, economically and physically active. These social changes will also see a marked increase in the number of people living into what is currently considered to be very old age, with care and support needs that are not yet understood.

...Older people will be as diverse as the rest of our community, and will include people with many social and cultural experiences. ...All these citizens have a right to legal frameworks that support their continued participation in and contribution to society within each of their capacities.¹²

1.5 As the Council on the Ageing (SA) noted:

...as legal matters happen, the things that affect older people are exactly the things that affect younger people, except where it relates to particular stages of life and matters that people are moving into that they may be unfamiliar with. Likewise, the full force of the law should be available to older people in the same way that it is available to anybody else. That is particularly important in terms of abuse and exploitation of older people. So one of the main areas of interest is access to legal remedy, as it is with anybody else in the community.¹³

1.6 The NSW Ministerial Advisory Committee on Ageing took a similar view:

...older people are citizens of Australia the same as any others. They are covered by the laws of Australia the same as any other citizens. We do not see that they should be categorized and discriminated against, if you like even if it is positive discrimination, in the sense of categorising them as older people with special needs and interests as if they were less than full citizens.¹⁴

12 Council on the Ageing (SA), *Submission No. 77*, p. 2.

13 Ms Jane Fisher, Council on the Ageing SA, *Proof Transcript of Evidence*, 17 August 2007, p. 2.

14 Mrs Felicity Barr, NSW Ministerial Advisory Committee on Ageing, *Transcript of Evidence*, 15 May 2007, p. 48.

- 1.7 Among the nine legal jurisdictions within Australia there are a number of laws that have particular relevance to older Australians. At the Commonwealth level, legislation in the areas of aged care, superannuation, social security and veteran's entitlements is of particular relevance as we age. In state and territory jurisdictions, legislation relating to substitute decision making, guardianship, retirement villages, wills and probate affects the population as it ages. Criminal matters, such as fraud and other forms of financial abuse, are dealt with primarily at the state and territory level, although Commonwealth legislation covers certain criminal matters. Unlike a number of overseas jurisdictions, there are no specific laws in Australia dealing with what might be broadly classed as 'elder abuse'.
- 1.8 While there are various definitions of 'elder abuse', one of the most commonly accepted is 'any act occurring within a relationship where there is an implication of trust, which results in harm to an older person. Abuse can include physical, psychological, financial, sexual and social abuse, as well as intentional or unintentional neglect. It does not include abusive acts committed by a stranger or self-neglect'.¹⁵

Legal needs of older Australians

- 1.9 A number of submissions argued that there are specific characteristics of an older person's engagement with the law which warrant a tailored response in order to ensure that older people have equal access to the law. It was suggested that, while not all of these characteristics are unique to this demographic group, they nevertheless highlight the need for services and delivery mechanisms other than what the rest of the population might require. These characteristics include:
- Older people experience high levels of disengagement and social exclusion. With respect to legal problems, there is often a sense of powerlessness and lack of willingness to engage...
 - Older people utilise informal sources of information and established contacts...
 - Older persons' legal needs span a broad range of legal areas...

15 Elder Abuse Prevention Unit, Queensland, *Submission No. 97*, p. 1. The Committee notes that the Commonwealth *Aged Care Act 1997* does contain mechanisms for dealing with serious physical and sexual assault of residents, but this is in the context of provision of care to this group.

- Older people may not self-identify that they have legal rights. In addition their presenting issue may not be their only issue (legal or non-legal)...
- There is often an intersection between legal and non-legal issues...
- Issues of elder abuse and other legal issues faced by older people are not just about the individual...
- Older people are not a homogenous community. There are significant socio-economic and cultural differences...¹⁶

1.10 Those legal issues most often associated with older Australians, namely those involving succession planning and substitute decision making, are matters that all Australians should be aware of and address as early as possible in their lives. Most people, however, do not address these issues until the later stages of their lives, if at all, and often then action is taken precipitously and without proper advice.

1.11 In any event, the range of legal matters facing older persons is by no means limited to issues regarding wills, powers of attorney, guardianship and administration. Older people may also seek legal advice in areas including accommodation issues (hostels, retirement villages, nursing homes etc); aged discrimination; elder abuse (not necessarily of themselves but friends or relatives); property issues; consumer issues (superannuation, banking, credit and debt etc); family law issues (including a growing number of grandparents with custody of grandchildren); health issues; and welfare issues (social security and veterans affairs matters).¹⁷ Older people may also interact with the legal system as either victims or perpetrators of criminal activities. It is true, however, that older people are more likely to have civil law issues than criminal or family law matters.¹⁸

1.12 It is, therefore, not so much that there is an area of the law relevant only to older people, but rather that it is important to examine whether there are any barriers to older people exercising their legal rights. The Committee agrees with the view that:

...it is the vulnerability of some older people that warrants particular attention to their legal, justice and safety needs. Older people should not, however, be treated as

16 Federation of Community Legal Centres (Vic) Inc, *Submission No. 41*, pp. 9-13.

17 Loddon Campaspe Community Legal Centre, *Submission No. 57*, p. 13.

18 National Legal Aid, *Submission No. 99*, p. 3.

incapacitated, incapable or infantile by virtue of having lived longer than some others in our community.¹⁹

1.13 It is also true that:

A crime is a crime, irrespective of the victim's age. The law should treat older people as it treats all people. Age of itself should not affect how the law applies or is formulated. However older people may be more or less associated with particular needs.²⁰

Elder law

1.14 A number of overseas jurisdictions have seen the emergence of a legal speciality – 'elder law' – particularly in the United States, Canada and the United Kingdom:

In America... elder law is a major area of law practice and most American states have their own legislation. There are specific laws devoted to the interests of older people... Having lawyers specialising in elder law and devoting their practice to this area of the law is a must for our ageing community.²¹

1.15 Elder law is an emerging new field of legal specialisation in Australia. The University of Western Sydney is the only centre in Australia specialising in elder law. While it is taught as an elective subject to undergraduate students, the University is:

...looking at developing a course in elder law that would be suitable for legal practitioners, trust officers, basically to meet the demand in the community from all walks of life and within academic circles to look at issues surrounding elder law.²²

1.16 The Law Institute of Victoria noted that interest in 'elder law' was increasing in the profession:²³

Elder law is a relatively new field that has very few specialists. There is a paucity of elder law courses, although

19 Council on the Ageing SA, *Submission No. 77*, pp. 2-3.

20 Council on the Ageing SA, *Submission No. 77*, p. 2.

21 Public Trustee NSW, *Submission No. 72*, p. 4.

22 Ms Sue Field, University of Western Sydney, *Proof Transcript of Evidence*, 17 August 2007, p. 17.

23 Law Institute of Victoria, *Submission No. 78*, p. 5.

Continuing Legal Education providers are addressing this knowledge deficit. There is a demand among practitioners for elder law subjects which currently is not being met.²⁴

- 1.17 The Public Trustee NSW sponsors the Elder Law Chair at the University of Western Sydney. Its focus is 'consultancies, research, education and training in respect of older persons and the legal issues affecting them'.²⁵

Referral of the inquiry

- 1.18 The question of whether Australia's legal framework is meeting the needs of older Australians emerged for the Committee during its previous inquiry into the lack of harmonisation of legal systems within Australia and between Australia and New Zealand. In its report for that inquiry, the Committee noted the lack of recognition for powers of attorney or similar substitute decision making tools between the states, and recommended that uniform and adequate formal mutual recognition be expedited among the various jurisdictions.²⁶
- 1.19 This is just one aspect of how current legislation affects older members of our society, and, given the growth in the older person demographic group, the Committee felt that it was timely to examine a number of aspects of the experience of older Australians and the law. To this end, in 2006 the Committee requested that the Attorney-General, the Hon Philip Ruddock MP, refer an inquiry into this issue to the Committee.
- 1.20 On 2 August 2006 the Attorney-General responded to the Committee's request and formally asked it to investigate and report on the adequacy of current legislative regimes in addressing the legal needs of older Australians in the following areas: fraud, financial abuse, general and enduring power of attorney provisions, family agreements, barriers to older Australians accessing legal services, and discrimination. The full Terms of Reference for the inquiry were set out earlier.

24 Public Trustee NSW, *Submission No. 72*, p. 9.

25 Public Trustee NSW, *Submission No. 72*, p. 5, 7.

26 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Harmonisation of legal systems within Australia and between Australia and New Zealand*, November 2006, p. 102.

Conduct of the inquiry

- 1.21 The inquiry was advertised in *The Australian* newspaper on a number of occasions, both at the commencement of the inquiry and throughout the process of conducting public hearings around Australia. Public hearings were also advertised in various seniors' publications. Letters inviting submissions were sent to over 180 groups and individuals.
- 1.22 The Committee received 157 submissions, 43 supplementary submissions, and 170 exhibits. Details of submissions and exhibits are at Appendices A and C to this report respectively.
- 1.23 Public hearings were held in Canberra, Sydney, Melbourne, Hobart, Brisbane, Buderim, Perth and Adelaide. Details of witnesses who appeared at the public hearings are at Appendix B to this report. As part of the public hearing process, the Committee thought it important that interested members of the public should be able to make unscheduled contributions. Accordingly, time was allocated at hearings for brief (3 minute) statements from the public on any aspect of the Committee's Terms of Reference. Fifty-seven people took advantage of this opportunity and a number followed their statements with additional written comments.
- 1.24 Submissions authorised for publication by the Committee, together with transcripts of public hearings are available on the Committee's web site:
<http://www.aph.gov.au/house/committee/laca/olderpeople/index.htm>
- 1.25 The Committee would like to place on record its thanks to all who gave evidence to the Committee, either in person or in writing.

The approach of the Committee

- 1.26 The Terms of Reference for the Committee specified that the target group for this inquiry was older Australians, with the definition of 'older' being that of the Australian Institute of Health and Welfare, where 'older' refers to those aged 65 years and over. The Committee did note, however, that for some groups, in particular for Indigenous Australians, a lower chronological age may be more appropriate.²⁷

²⁷ 'When planning services for older people, the Government uses population estimates for the general population aged 70 years or over, compared with 50 years or over for Indigenous Australians': see Human Rights and Equal Opportunity Commission,

- 1.27 The Terms of Reference specified the areas to be covered by the Committee, with the emphasis being on the adequacy of current legislative regimes. While the Terms of Reference were well-advertised, some submissions raised wider concerns about the situation facing some older Australians with regard to physical, emotional and sexual abuse. Although these matters are regrettably part of the experience of older Australians, they are outside the Terms of Reference for the inquiry and the Committee was obliged to restrict its investigation to fraud and financial abuse.
- 1.28 In attempting to answer how well Australia's legal regimes address the needs of this older segment of the population, the Committee was very aware that legislative competence in many of these areas lies with the states and territories. The views of the state and territory governments are therefore essential, not only in identifying the problem areas but also in developing and implementing solutions. The Committee was very grateful for the cooperative way in which some state and territory governments and authorities assisted the Committee, either by way of written submissions or in providing oral evidence.
- 1.29 It is perhaps inevitable that some will see parliamentary committees as complaints bodies that are able to rectify perceived inequities and injustices. This inquiry was no different. The Committee attempted, in its public announcements and correspondence, to explain that it was not in a position to investigate individual cases or provide legal or personal advice. The Committee was nevertheless sent material relating to individual cases, and, although the Committee found those personal stories illustrative, of necessity it focused on the broader policy issues within the Terms of Reference.

The report

- 1.30 The balance of this report comprises six further chapters. Chapter 2 deals with fraud and financial abuse of older members of our society and canvasses a number of possible responses to these issues.

Submission No. 92, p. 51. In its submission the Western Australian Government indicated that any definition of 'older' needs to be applied flexibly so that people who have aged prematurely due to factors such as poor health, physical or intellectual disability, or lifestyle factors are not excluded: *Submission No. 74*, p. 3. The Western Australian Government also referred to a report by the Western Australian Public Advocate which confirms that there is no clear chronological age that can be used to identify an older Aboriginal person: see *Submission No. 74*, p. 3.

Chapter 3 examines the range of substitute decision making mechanisms available to older Australians. Chapter 4 looks specifically at the issue of family agreements, while Chapter 5 examines the barriers to older Australians accessing legal services. The final two chapters deal with discrimination and matters associated with accommodation options for older people, particularly retirement villages.