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MINISTERIAL ADVISORY
COMMITTEE ON AGEING

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Mr Peter Slipper
Chairman
Standing Committee on Legal and Constitutional Affairs
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Mr Slipper

The following submission has been developed and approved by members of the NSW Ministerial Advisory Committee on Ageing (MACA). The Committee is appointed by the NSW Minister for Ageing to consult with older people in NSW, monitor policies and programs affecting older people, and to provide options and recommendations on ageing issues.

The Committee welcomes the opportunity to make a submission to the House Standing Committee on Legal and Constitutional Affairs regarding the Inquiry into older people and the law.

For further information about the Committee, please contact
Senior Policy and Projects Officer in the MACA's Secretariat on or

Yours sincerely

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Submission from the NSW Ministerial Advisory Committee on Ageing to the House Standing Committee on Legal and Constitutional Affairs Inquiry into Older People and the Law

The Committee would like to begin by commending to the Inquiry the publication *Access to Justice and Legal Needs: The legal needs of older people in NSW* (Dec 2004) published by the Law and Justice Foundation of NSW. This is a comprehensive study of legal issues which confront older people in NSW, with potential relevance across all States and Territories.

The *Access to Justice* report was prepared through an extensive research process including interviews with key stakeholders, focus groups with older people, written and verbal submissions, a literature review and participation in relevant conferences and forums relating to ageing and older people. The report includes several sections relevant to the Inquiry's Terms of Reference: Legal Services; Financial and Consumer Issues; Discrimination; Elder Abuse, and Substitute Decision-making and End of Life Issues.

Fraud

The Committee notes that fraud and financial abuse have been separated into two distinct areas. It is argued, by many, that financial abuse is fraud and as such there is State and Territory criminal legislation which addresses this criminal activity.

Equally there are those who differentiate between fraud and financial abuse of older persons. The latter school of thought generally refer to fraud, in respect of older persons, in the context of 'stranger danger'. Examples of this type of fraud, include, but are not limited to, situations of cold-calling by persons offering to undertake household repairs, at a generally inflated cost; internet scams involving 'banks' demanding access to personal information such as account details, and offers to purchase 'worthless shares'.

Such activities are fraudulent and it is argued that victims can access justice through the various State/Territory criminal legislation. This presupposes, however, that the victims are aware that the activity is fraudulent and that they have recourse through criminal legislation. It also relies on the belief, which may be mistaken, that older persons are more inclined to report instances of fraud perpetrated by a stranger than that perpetrated by someone known to them. It does not, however, take into consideration whether the older person has the physical and mental stamina to pursue a matter through the criminal justice system.

It is submitted, therefore, that education of older persons is essential in combating fraud against older persons. Such education should be directed, in the first instance, to awareness of fraudulent activities and the subsequent prevention (or diminution) of the criminal activity and, secondly, to the avenues available to the victims should they wish to pursue the matter. Further, it is

argued that adequate support, in the form of advocates and legal assistance should also be available to the victims.

Financial Abuse

As stated above, financial abuse is generally perceived as an act carried out by someone known to, and trusted by, the victim. It is argued, by some, that an older person, who has been victim to financial abuse by someone they have known and trusted, is less likely to report the matter and pursue a remedy. Unfortunately there is little statistical evidence to indicate the extent of financial abuse of older persons and, while some research has been undertaken into this area, most of the information is anecdotal.

Criminal legislation and common law remedies are available to victims of financial abuse, but again, in addition to the presumption that the victim has both the physical and mental ability to pursue the matter, it is often compounded by lack of finances to pursue a common law remedy and an inability to report or 'take on' someone who has been close to them and may provide the only social contact in their lives.

Once again it is essential that widespread community education be undertaken by governments to assist in the prevention of such abuse and provide support services to those who may be impecunious and homeless as a result of such criminal activity.

General and enduring 'power of attorney' provisions

Substitute decision-making is the responsibility of State/Territory governments. As such one of the key issues is the lack of uniformity of the legislative provisions across the country. Although, in general, there is recognition of the various Powers of Attorney (both general and enduring) from other States and Territories, this recognition is only to the extent that the instrument complies with the legislation in the jurisdiction other than the originating State or Territory. For example, in Queensland should a principal appoint two attorneys to act jointly and one of the attorneys predeceases the principal, the remaining attorney can continue to act. This is not the situation in New South Wales where upon the death of a joint attorney the instrument is revoked.

There is also a lack of national uniformity regarding coverage of Powers of Attorney. In NSW, Powers of Attorney only cover financial decision-making; separate instruments called Enduring Guardianship and Advance Care Directives deal with personal and health decision-making. In contrast, in Queensland, Powers of Attorney incorporate two documents which address both financial and personal decision-making. The Committee notes that the Inquiry's Terms of Reference do not include Enduring Guardianship and Advance Care Directives. However, given that substitute decision-making is an emerging area in health care and there is considerable community confusion about powers granted under Powers of Attorney, it is appropriate that the Inquiry make recommendations in relation to all forms of substitute decision-making.

To address the lack of uniformity in substitute decision-making described above, the Committee recommends the standardisation of terms relating to all forms of substitute decision-making across all Australian jurisdictions. Simplification and differentiation of powers is required to facilitate increased use of substitute decision-making instruments by older people.

In view of the fact that many older Australians are now spending considerable time travelling around the country ('the grey nomads'), it is essential that the discrepancies between the various instruments are addressed, either through legislative changes and/or education of older persons so that they are aware of the differences as they travel through the various States and Territories. Even more importantly, it is essential that an instrument validly executed in one jurisdiction whilst a person is legally competent remain valid if that person should move or be moved interstate to be close to relatives after capacity has declined.

Further issues arise in respect of substitute decision-making when one considers that the Commonwealth *Aged Care Act* refers to the 'person responsible' who may not be the appointed attorney. This same situation also occurs in respect of Centrelink, allowing payments to be made to a person other than the nominated attorney. The Committee recommends that the Commonwealth *Aged Care Act* and *Social Security Act* be amended to recognise the authority of individuals nominated under Powers of Attorney and/or Enduring Guardianship.

There is also significant variation in the recognition of Powers of Attorney by financial institutions. There is a need for engagement with the financial services sector to ensure there is greater awareness of Power of Attorney legislation, including how the legislation is applied within in each State and Territory.

Generally there is no requirement to register an Enduring Power of Attorney, unless the attorney wishes to enter into property transactions. As such there is no monitoring of the activities of the appointed attorney. This lack of monitoring creates the opportunity for unscrupulous attorneys to act in their own interests, rather than in the interests of the principal. It is not until a complaint is made to the relevant statutory authority or an application is lodged with a Guardianship Tribunal that the matter is investigated, by which time the assets of the principal may be severely, if not totally, depleted. The Committee suggests that these issues are referred to the Standing Committee of Attorneys General, the Ministerial Council on the Administration of Justice and the Australian Health Ministers' Conference for consideration.

Your Committee is also referred to the National Framework for Action on Dementia, approved by the Australian Health Ministers Conference and noted by the Community and Disability Services Ministers' Conference in 2006. The Framework includes a 'priority for action' in relation to Powers of Attorney:

Refer the issue for legislative barriers regarding Guardianship, advance care planning, advance care directives, wills and powers of attorney to Australian Government, State and Territory Attorneys General Departments.

This 'priority for action' reflects the importance of Power of Attorney documents for people with dementia and their families and carers.

Family Agreements

Family Agreements usually involve provision of services by a family member in exchange for the transfer of funds or title of property (usually the family home). Although a written agreement between the parties, the legal status of Family Agreements is unclear.

Unless a Family Agreement is prepared by a legal practitioner, it may be drawn up without consideration to all the legal and financial implications associated with the transaction. For instance, where an ageing parent sells their family home and gives money to a family member to build a granny flat and provide care, factors to be addressed in the Family Agreement should include: whose name would appear on the title deeds; the degree of ownership of the parties to the agreement; the care that the older person is to receive; the costs associated with the care; the arrangements to be made in respect of holidays; the length of the agreement; the implications for accommodation bonds, and charges should the older person require accommodation in an aged care facility and exit clauses. Additionally, it is essential that the parties to a Family Agreement are aware of the need to take into consideration the impact on Centrelink payments and the associated taxation issues.

Barriers to older Australians accessing legal services

The most significant barriers to older people's access to legal services in NSW are difficulties associated with finding specialist legal advice for older people, insufficient funds to pay for private legal services (if found), and the absence of community legal services specialising in the legal needs of older people. Recently the Queensland and Victorian Governments announced funding for community legal centres specialising in elder law. While there are some other limited legal services available to older persons, the absence of such centres is limiting access to justice to one of the most vulnerable groups in our society.

Even with the provision of community legal centres specialising in elder law, physical accessibility is a key issue. The Committee recommends that the location of any new services is given careful consideration, to ensure the maximum effectiveness is obtained.

At present the University of Western Sydney (UWS) is one of only two universities in Australia teaching the subject Elder Law. As a result of great demand from legal practitioners for further education in this area, Elder Law at UWS is currently examining the feasibility of developing a program for legal practitioners.

The Committee supports the expansion of specialist training in Elder Law for solicitors and expansion of community legal services specialising in legal services for older people. The Committee would also support establishment of a directory and website to advertise the availability of practitioners specialising in this area of law.

Discrimination

Age discrimination is legislated for at both State/Territory and Commonwealth level. However, the effectiveness of these laws in transforming social attitudes and practices has been limited. In part, this is due to the difficulties associated with bringing a successful discrimination case.

Several examples of ongoing discrimination on the basis of age are detailed below:

- Age discrimination in employment, evidenced by high levels of unemployment and under employment among older people.
- Higher insurance premiums for older people seeking income protection.
- The requirement for photo identification in a range of settings, such as air transport, also potentially discriminates against older people who do not have such photo ID. In NSW, this issue has been addressed through the availability of a Photo Card issued by the Roads and Traffic Authority for \$41.

The Committee recommends a greater focus on community education to deal with the range of age discrimination experienced by older people. In particular, governments have a role to play in promoting recruitment and retention of older workers.
