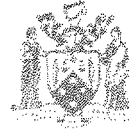


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NH
Committee Secretary
House of Representatives Standing Committee on
Legal and Constitutional Affairs
PO Box 6021
Parliament House
CABERRA ACT 2600

By post and email (laca.reps@aph.gov.au)

Dear Committee Secretary,

Inquiry into Older People and the Law

The Law Institute of Victoria (LIV) is pleased to make this submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs' *Inquiry into Older People and the Law*.

Please contact _____ if you have any queries in relation to this submission.

Yours sincerely

Catherine Gale
President
Law Institute of Victoria



Submission

Elder Law Committee of Law Institute of Victoria (LIV) Council

Inquiry into Older People and the Law

To: House Standing Committee on Legal and Constitutional Affairs

A submission from the Elder Law Committee of the Law Institute of Victoria (Submission: ELD1)

Date: 13 December 2006

Queries regarding this submission should be directed to:

Contact person

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The LIV makes most of its submissions available on its website at www.liv.asn.au

1. Introduction

The Law Institute of Victoria (LIV) is pleased to make this submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs' (the Committee) *Inquiry into Older People and the Law*.

The LIV notes that, under the Committee's terms of reference, it is to investigate and report on the adequacy of current legislative regimes in addressing the legal needs of older Australians in the following specific areas:

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

The LIV's submission raises issues considered by its members to be relevant to older persons. The LIV would also welcome the opportunity to make further oral or written submissions on any of the matters raised in its paper.

2. Executive Summary and Recommendations

In relation to addressing the legal needs of older Australians, the LIV makes the following recommendations:

- (a) To protect older people from fraud, the LIV believes that a combination of strategies should be implemented, including:
 - enacting legislation to protect elderly persons from deceptive practices;
 - training more police to liaise directly with older people in the community to offer constructive information and advice; and
 - targeted education and information campaigns to reinforce the risks of fraud to elderly persons and to prevent further victimisation.
- (b) To address the problem of elder financial abuse, the LIV proposes:
 - giving further clarity to privacy issues relating to elderly persons;
 - introducing clawback laws to recover property that has been inappropriately or illegally transferred from elderly persons;
 - the establishment of an independent body to investigate financial abuse;
 - introducing a provision under social security legislation to enable decision makers to reconsider paying benefits where an elderly person has apparently voluntarily divested themselves of their assets;
 - introducing laws to enable charities and churches to screen so-called "good Samaritans" visiting the elderly; and
 - ensuring police take a more active role in investigating financial abuse by family members.
- (c) The LIV has identified a number of barriers that older people face when attempting to access legal services such as a lack of awareness on where to obtain legal information. In the LIV's view, one of the ways of overcoming these problems is the existence of appropriate dispute resolution mechanisms. Yet, in the LIV's view, the current complaints scheme under the Aged Care Act 1997 (Cth) is far from adequate. While the LIV is aware that the Department of Health and Aging is currently considering changes to the aged care complaints

scheme, full details are not currently available. The LIV will be closely monitoring future developments on this matter and recommends that the Committee consider it in detail as part of its inquiry.

3. Response to Inquiry

3.1 Fraud

Definition of "fraud"

The LIV notes that fraud is one of the three elements of economic crime that can be committed against older people. The other two elements include financial mismanagement and matters associated with enduring powers of attorney and guardianship, which are not the focus of this part of the submission.

In Australia, fraud is not recognised as a separate legal category of crime (other than conspiracy to defraud). Instead, a variety of property offences may be used to prosecute conduct that involves dishonesty such as crimes of theft and obtaining financial advantage by deception. In addition to this, penalties associated with "white collar crimes" are often minimal and prosecution of such crimes is difficult.

While elements of fraud can overlap with the category of "financial abuse" as detailed below, fraud generally involves the older person falling victim to strangers who represent themselves as being in positions of authority and trust in order to sell products and services. On the other hand, financial abuse often occurs within the older person's family group where family members have abused the position of trust placed on them (such as through powers of attorney) by the older person.

Therefore, "fraud" refers to the kind of consumer victimisation that occurs when someone sells a product or delivers a service. It includes areas such as commercial transactions, including telemarketing and door-to-door sales, home repairs, buying and servicing vehicles and financial transactions such as cheque bouncing, credit card purchase problems, health care products and services fraud and the illegal transferring of money and property.

Background

The LIV notes that there is a lack of reliable data on the nature and extent of fraud offences over the whole of Australia (and even then the ages of the victims are rarely included in the existing data). Accordingly, it is not possible to state with any precision the extent to which older persons have been victimised through fraud and whether the rate of victimisation is greater or lesser than for other age groups. It is also not possible to quantify the extent to which older persons from non-English speaking backgrounds or older indigenous Australians have been victimised through fraud.

However, new technologies are creating more risks for older Australians. Telephone and internet fraud have become everyday occurrences in the United States - a situation which is sure to be repeated in Australia.

Effects

Older victims may be too embarrassed to report fraudulent crimes. Sometimes, perpetrators can be loved ones or caregivers and the victims do not want them to get into trouble. Sometimes, the victims are not even aware that they have been defrauded or, even if they are aware, such persons may feel that reporting the crime will do no good or they "don't want to bother the police". More tellingly, victims may not disclose the crime because they are reluctant to confront their own greatest fear: that they will be deemed too incompetent to handle their own financial affairs. By reporting the crime, they fear that they will expose themselves and so risk their independence. Sadly, even then older victims may not be aware that they may have lost everything they worked for during their lives and have nothing to fall back on.

Financial victimisation has a devastating impact on older people. Not only can comfortable, independent lifestyles collapse but often older Australians do not have the time or opportunity for financial recovery. As a consequence, they are often thrown back onto Centrelink benefits. A blow to financial security can often be a permanent and life-threatening setback, characterised by fear, a sense of betrayal, depression, guilt, shame, denial, anger and a lack of trust, which can, in turn, give rise to acute and chronic anxiety and physical illness.

Recommendations

To protect older people from fraud, a combination of strategies involving legislation and law enforcement as well as education and information directed at older people and their families needs to be put into place.

The LIV believes that specific legislation should be enacted to proscribe some of the more flagrant deceptive practices that target older people. In Australia, for example, there are specific laws to protect children as members of our society but there are no laws that specifically protect older people. In the LIV's view, mandatory reporting of fraud is a last resort. While it has been resisted in Australia, mandatory reporting of this kind has been of great benefit in the United States where trained professionals with the expertise and experience in the field are brought in to assist the victim.

More specially-trained police are needed to liaise with older people in the community to offer constructive information and advice regarding the risks of fraud and to suggest appropriate fraud prevention measures.

In particular, the LIV submits that education and information is needed to reinforce the risks and to create the strategies to prevent further victimisation. Older persons who are already victims are often more likely to become future victims. Therefore, information and education on fraud prevention should specifically focus on those who have been victims in the past. Older people can also be encouraged to report their experiences of fraud in order to create a database that will reveal the patterns of victimisation and, in turn, give rise to appropriate preventative action. Consumer remedies need to be published and the functions of different consumer agencies coordinated for the effective collating and processing of complaints. For instance, having a checklist of questions ready by the telephone when a telemarketer calls can be of great assistance to an elderly person.

Business and members of professional organisations such as solicitors, bank staff, police, accountants, real estate agents, social workers and health professionals can play a large part in filtering some of the transactions that lead to fraud. For instance, older persons can authorise their banks to monitor their accounts and raise concerns where unusually large transactions or unusual patterns of transactions occur. The bank can then be authorised to raise its concerns with the account holder and to warn of the possibility of fraud. Further, bank employees can receive special training to identify possible cases of fraud.

Coordination of information for these businesses and organisations along with opportunities for liaison with their members will be essential to fostering awareness of these issues and then implementing solutions.

3.2 Financial abuse

Financial abuse involves the illegal or improper use of a person's finances or property by another person with whom they have a trusting relationship. The LIV notes that financial abuse of elderly persons is an unfortunate, ongoing problem in our society and is one that is likely to increase in the future given our aging population. The problem of elder financial abuse is particularly tragic because it may be that the people who are looking after elderly persons are the very ones deceiving them.

Examples of financial abuse include the misappropriation of property, money or valuables, forced changes to a will or other legal documents, denial of the right to access funds, the forging of signatures and the misuse of enduring powers of attorney.

In terms of addressing the issue of financial abuse, the LIV proposes that the Committee consider:

- (a) giving further clarity to privacy issues relating to elderly persons;

- (b) clawback laws to recover property that has been inappropriately or illegally transferred from elderly persons;
- (c) the establishment of an independent body to investigate financial abuse;
- (d) introducing a provision under social security legislation to enable decision makers to reconsider paying benefits in the situation where an elderly person has apparently voluntarily divested themselves of their assets;
- (e) introducing laws to enable charities and churches to screen so-called "good Samaritans" visiting the elderly; and
- (f) ensuring police take a more active role in investigating financial abuse by family members.

3.3 Family agreements

Family agreements or lifetime care contracts are arrangements under which older people transfer property or pay compensation to someone in exchange for a promise of "care for life". A family agreement is one form of such an arrangement where the older person and the carer are part of the same family.

The LIV considers that it is likely that family agreements – whether they are formal contracts or informal arrangements – will increase in the future given Australia's growing aging population and that many older persons will arguably prefer to remain in a familial and familiar environment and have a choice in terms of how and who provides them with care.

3.4 Barriers to older Australians accessing legal services

Legal practitioners undertake significant roles for older people and their families through drawing up wills, powers of attorney and a range of other legal documents and by advising parties about the broad spectrum of legal issues that regularly affect older people. The legal profession is well placed to identify potential financial abuse of older people. Legal practitioners play an important role in advising older people and monitoring out-of-character or sudden changes in wills and asset distribution, which may be indicative of financial abuse.

The LIV notes that interest in "elder law" is increasing in the legal profession and that the LIV has identified a desire among legal practitioners for legal education and seminars regarding emerging issues relevant to older clients. The LIV has an active Elder Law Committee and in 2007 will be conducting community legal education for older people regarding common legal issues.

Australian and international research identifies many barriers for older people in accessing legal services. The experience of members of the LIV confirms many of these barriers and has identified several other difficulties, which create barriers for older people accessing legal services. The Law and Justice Foundation of New South Wales published a research paper entitled *Access to Justice and Legal Needs: The Legal Needs of Older People in New South Wales* (2004), which provides valuable information regarding the barriers that older people face in accessing legal services. This research was intended to examine the ability of disadvantaged people to:

- (a) obtain legal assistance (including legal information, basic legal advice, initial legal assistance and legal representation);
- (b) participate effectively in the legal system (including access to courts, tribunals, and formal alternative dispute resolution mechanisms); and
- (c) obtain assistance from non-legal advocacy and support (including non-legal early intervention and preventative mechanisms, non-legal forms of redress, and community based justice).

The Law and Justice Foundation report identifies a number of characteristics which are common to older people and relate to the obstacles they face when accessing legal services. These include:

- (a) a lack of awareness of legal rights, meaning that older people are less likely to identify that they have a legal problem or that they have a right to complain or seek redress in certain situations;
- (b) a lack of confidence in enforcing their rights;
- (c) the high cost of legal services;
- (d) a lack of awareness on where to obtain legal information;
- (e) a lack of interest and/or expertise by some legal practitioners in handling older clients and their specialist legal needs;
- (f) potential conflict of interest when legal practitioners for older persons are arranged by family members;
- (g) a reluctance by older persons to take legal action and to complain about issues affecting them;
- (h) a perception that the law is disempowering and cannot solve their problems;
- (i) technological barriers, particularly for telephone and web based services;
- (j) a lack of appropriately communicated legal information;
- (k) difficulties in accessing legal aid, including restrictive eligibility tests and a lack of availability of legal aid for civil disputes;
- (l) a lack of specialised legal services for older people, particularly in rural, regional and remote areas; and
- (m) a lack of resources in community legal centres, inhibiting their ability to respond to the needs of older people.

Feedback from LIV members has also identified further issues, which significantly hamper older people's ability to access justice. One issue is the lack of clear law or available guidelines to assist practitioners to determine a person's legal capacity. The complexity of determinations regarding legal capacity and the interrelationship with health and medical issues, which are outside the scope of a legal practitioner's expertise, create significant difficulties for practitioners when advising older clients. Such complexity also compounds the conflict of interest in situations where a family member arranges a legal appointment for an elderly relative and attends with the elderly person. The difficulties faced by older persons due to the complexity of family arrangements is heightened by the lack of clarity regarding the law of capacity and the need for clearer guidance for practitioners in determining a person's legal capacity. The evidentiary difficulties around questions of legal capacity have significant implications for civil litigation as there may be an inability to meet the required standard of proof. This, therefore, serves as a barrier to older people accessing justice.

Another practical issue affecting access to legal services is an older person's lack of physical or mental capacity to pursue such services. Many elderly people have physical disabilities, which prevent them from physically telephoning or travelling to a lawyer or community legal centre. Some have reduced cognitive abilities due to dementia or other causes. It is the LIV's view that the legal system is simply not geared up to meet the needs of this group of people and that their rights are often subsequently overlooked. The LIV submits that such people need information about their rights and assistance to enforce those rights because many have no understanding of their legal rights as aged care recipients or generally. The LIV also notes that many older people are also often dependent on legal and other services coming to them, particularly when their ability to initiate access to those services is severely limited or non-existent.

The LIV notes that another obstacle for aged care residents and / or their families is a widespread fear of reprisals from approved care providers when an issue is raised with the management of the aged care home about problems with the care or services being provided or external assistance is sought to resolve complaints. (The fear is much greater than the actual occurrence of reprisals). The fear of reprisals often keeps residents and / or their families from taking action to resolve complaints or enforce their rights.

The LIV considers that the inadequacies of alternative dispute resolution mechanisms in the area of aged care residential services also create a barrier to older persons accessing justice. For example, the LIV notes that under the Aged Care Principles 10.58(1) made pursuant to the *Aged Care Act 1997* (Cth) (the Act), parties who attend mediation are not entitled to be represented by a person engaged to provide legal representation. This could prove a barrier to the interests of older persons or their families being met at mediation and their ability to negotiate an effective resolution to complaints.

As identified in the Law and Justice Foundation's report, older people tend to be reluctant to take legal action and, therefore, alternative dispute resolution is desirable. Yet, in the LIV's view, the current complaints scheme under the Act – the Aged Care Complaints Resolution Scheme (the Scheme) – is inadequate in meeting the needs of older people.

The LIV considers that the Scheme does not meet the needs of residents and their families, particularly when the issues are complex. The Scheme sometimes refuses to accept complaints simply on the basis of information provided to it by the approved provider without checking with the complainant whether that information is accurate. Further, it can take many months (sometimes six months or more) from the time of lodging a complaint until a determination hearing takes place and the outcome of the hearing is known. The LIV considers that this is hardly justice for vulnerable residents and their families.

Further, the LIV submits that the hearing outcomes do not always adequately address the breaches of the Act committed by the approved provider. That is, the approved providers are not held sufficiently accountable for their non-compliance and the adverse effects that their breaches have had, or are continuing to have, on residents. Complainants frequently report that using the Scheme leaves them emotionally drained and frustrated. It is extremely burdensome for residents and / or their family members to have to lodge complaints, compile evidence, write submissions and then give evidence at hearings (which can last one or more days) when all they want is for the approved provider to meet its responsibilities to residents under the Act. The LIV considers that the experience of going through all this and then finding that the approved provider is not held sufficiently accountable at the end of the process only compounds the frustrations of the complainant. The LIV submits that complainants want a system, which compels the Department of Health and Ageing to respond quickly when a complaint is lodged (i.e. within days if the issues are serious) and requires the approved provider to fulfill its statutory obligations to residents.

The LIV is also aware that changes to the Scheme are currently being considered by the Department of Health and Ageing. While full details are not yet available, the LIV notes that the Minister for Aging Senator Santo Santoro has indicated that the Scheme's proposed replacement will be administered by a new Office for Aged Care Quality and Compliance and will likely come into operation by 1 April 2007. While the LIV supports Minister Santoro's intention to improve aged care complaints procedures, it is concerned that the Scheme's proposed replacement may not go far enough in addressing the inadequacies of the current Scheme and wishes to have further input into these changes.

3.5 Other issues

In Appendix A, the LIV has provided the Committee with an overview of aspects of the *Family Law Act 1975* (Cth), *Children and Young Persons Act 1989* (Vic), *Child Support Acts* (Cth) and *Property Law Act 1958* (Vic), which it considers are relevant to elder members of the community.

Of particular concern to the LIV is that elderly persons may require financial assistance to fund the cost of proceedings initiated in the Family Court in respect of a child. However, it is not clear if grandparents or persons concerned with the care, welfare and development of the child are eligible for legal aid.

APPENDIX A

Family Law Act 1975 (Cth)

Prior to 1 July 2006, the *Family Law Act* provided that a person concerned with the care, welfare and development of a child (including grandparents) could make an application to the Family Court for parenting orders (including residence, contact and specific issues orders) in respect of a child under 18 years of age.

Notwithstanding the existing rights of grandparents to make application, the recent amendments to the *Family Law Act* included an express provision that "grandparents" (in addition to "anyone concerned ...") may make such an application.

An application may be made as to the person with whom a child is to live, spend time or communicate. Orders may also be sought in relation to specific issues, for example, involvement in a child's education, health care, and transportation arrangements.

However, a Victorian court exercising jurisdiction under the *Family Law Act* – the Family Court, Federal Magistrates' Court and Victorian Magistrates' Court - is prohibited from making orders in respect of a child whose care and welfare is the subject of intervention by a state welfare authority.

Children and Young Persons Act 1989 (Vic)

Under this Act, the state welfare authority may intervene where the child is considered to be "at risk" or "in need of care and protection".

Extended family members may be assessed by the state welfare authority as to their ability and willingness to provide for the care of the child.

An order providing for the child's alternative care may be made by an application to the Children's Court initiated by the state welfare authority or by application to the Family Court initiated by a grandparent or person concerned with the care, welfare and development of the child.

Child Support Acts (Cth)

A person responsible for the care of a child may apply to the Child Support Agency for an administrative assessment of child support based on the paying parent's capacity to pay. Child support may be periodic (cash) or non-periodic (for example private school fees, mortgage, utilities, private health insurance).

A Child Support Agreement may be executed to record any private agreement as to child support and registered for enforceability with the Child Support Agency and/or Family Court.

In the event of dispute, the obligation to pay child support may be reviewed by the Family Court.

Financial Issues

Family Law Act 1975

- **Property settlements** - A party to a marriage may make application to the Family Court for a settlement of the property including the assets and financial resources of the marriage. This settlement will be determined by the application of a four step process:
 - (1) Identify and value the assets, liabilities and financial resources of the marriage;
 - (2) Assess the financial and non-financial contributions of the parties to the accumulation of the net assets and financial resources, including all contributions made at the date of co-habitation or marriage, during the marriage and following separation. This includes financial contributions such as income, inheritances and gifts. It also includes non-financial contributions - parenting and homemaker duties, which are to be given significant and not token weight relative to all financial contributions. Initial financial contributions will usually be offset (or "eroded") by the offsetting impact of contributions made during the marriage, more particularly in the case of a long marriage and where equality will be the usual starting point.

Financial and non-financial contributions made by parents on behalf of a party to a marriage may also be recognised and taken into consideration in any property settlement.

(3) Assess the "future needs" of the parties (also known as the "spousal maintenance" considerations) to determine whether either of the parties has a need for a further adjustment of the assets and/or financial resources on the basis of, for example, a party's lesser income and income-earning capacity arising from their role in the marriage of parent and/or homemaker, poor health, lesser superannuation or entitlement to an income-tested pension benefit or allowance.

The "future needs" component will usually be recognised by an award of an additional percentage / lump sum division of the net assets and / or financial resources or payment of periodic (cash) or non-periodic support (for example mortgage, utilities, health insurance); and

(4) Assess whether the adjustment is "just and equitable" and, if not, make a further adjustment between the parties.

A property settlement may be effected by the parties retaining, transferring or disposing of assets and financial resources, which may lead to capital gains tax, stamp duty and other taxation consequences.

- **Superannuation entitlements** – Superannuation entitlements are now able to be "split" between a husband and wife by way of a Family Court order. A member spouse's superannuation pension entitlement in the payment phase may be "split" and divided between the member and non-member spouse to provide an income stream to each of them. A member spouse may retain all or part of their superannuation entitlements in return for their interest in the former matrimonial home to be transferred to the non-member spouse.
- **Financial agreements** - Parties may enter into a financial agreement prior to or during the marriage or following separation, ousting the jurisdiction of the Family Court for certain specified purposes. These purposes include the treatment of assets and financial resources owned by the parties at the commencement of co-habitation or marriage, of assets and financial resources accumulated during the marriage or following separation and the treatment of "spousal maintenance" in the event of the breakdown of the marriage. The LIV notes that family agreements are a private contract between the parties, requiring certification by a solicitor of independent legal advice having been obtained.
- **Personal protection orders** - Personal protection orders may be obtained from the Family Court providing a party to a marriage with the exclusive use of the former matrimonial home and restraining a party to a marriage from approaching the other party at his or her place of work.
- **Injunctive orders** – Injunctive orders may be made by the Family Court protecting the assets and financial resources of the marriage pending the final determination by the Court of the issues in dispute and property settlement.
- **Case guardian** - A case guardian may be appointed where a party to a marriage has a disability that may adversely impact on their ability to conduct proceedings on their own behalf in the Family Court and they are incapable of understanding the nature of the possible consequences of the proceedings or of providing adequate instructions for the conduct of the case.

Property Law Act 1975 (Vic)

Disputes in respect of the division of the assets and financial resources of the parties to a domestic partnership (formerly known as "de facto relationships") will be determined by the *Property Law Act 1975 (Vic)*.

Certain threshold criteria must be met, including the existence of the domestic partnership for not less than two years, minimum period of residence in Victoria and the location of a minimum proportion of the assets and financial resources in Victoria must be met.

Whilst the state courts apply a process similar to steps 1, 2 and 3 of the four step process adopted by the Family Court in determining the adjustment of the assets and financial resources of a marriage, step 4 is not considered as the relevant legislation does not provide for the consideration of the "future needs" of either party.