



Submission No. <u>102</u>
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NA
Committee Secretary
House of Representatives Standing Committee on
Legal and Constitutional Affairs
PO Box 6021
Parliament House
CANBERRA ACT 2600
AUSTRALIA

Dear Sir/Madam:

Re: Inquiry into Older People and the Law

Please find attached our submission to the Inquiry. The submission is based on a qualitative research study that we published in December 2004, *The Legal Needs of Older People in NSW*.

The aim of the study was to identify the particular legal issues which often confront older people in NSW and the barriers they face in accessing services to resolve these legal issues. Many of the issues covered by the terms of reference for the inquiry emerged as important issues in our study.

The study method included a review of existing literature and consultations with legal and non-legal service providers, academics, and older people themselves.

The study is part of the Foundation's Access to Justice and Legal Needs research program, which aims to provide a rigorous and sustained assessment of the legal and access to justice needs of the community, especially disadvantaged people, in order to assist government, community and other organisations develop policy and plan service delivery. The research involves an interconnected set of projects employing a range of qualitative and quantitative methodologies. Other qualitative research studies conducted include:

- No Home, No Justice? The Legal Needs of Homeless People in NSW (2005)

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- On the Edge of Justice: the Legal Needs of People with a mental illness in NSW (2006).

Quantitative studies conducted as part of the program include:

- a compilation of legal service use data - *Data Digest: a Compendium of Service Usage Data from NSW Legal Assistance and Dispute Resolution Services, 1999-2002 (2004)*
- a major telephone survey of legal needs - *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas (2006)*.

Although both the *Data Digest* and *Justice Made to Measure* provide a breakdown of the results by age, they were not specifically focussed on the issues covered by the terms of reference for the inquiry.

Just Search, an advanced tool to search Foundation research available at <http://www.lawfoundation.net.au/justsearch> also extracts material from other programs relevant to this inquiry. *The Legal Needs of Older People in NSW*, can be accessed at <http://www.lawfoundation.net.au/report/older>

In addition to our submission, please also find enclosed a copy of *The Legal Needs of Older People in NSW*. If you have any queries about our submission, please feel free to contact the Principal Researcher or myself.

Yours sincerely

Geoff Mulherin
Director
Law and Justice Foundation of NSW



Submission to the Inquiry into Older People and the Law

Our submission to the Inquiry is based on our qualitative research study *The Legal Needs of Older People in NSW*, published in December 2004.

A brief summary of the findings relevant to each of the terms of reference for the Inquiry is provided in turn.

Fraud

The general community perception is that older people are at a higher risk of falling victim to frauds and scams. In reality, older people are often highly aware of the existence of frauds and scams and may be more wary than younger members of society. Nevertheless, it appears that older people can sometimes be vulnerable to scams.

For further detail on fraud affecting older people in NSW please see pages 219-220 of the Report.

Financial abuse

Elder abuse can include financial abuse, psychological abuse, physical abuse, sexual abuse and neglect.

Financial abuse can come in many forms. Perpetrators may have legal control of the older person's finances and assets via a power of attorney or enduring power of attorney and may be siphoning money for themselves. Others may steal money or assets from the aged, for example, "taking Nan's pension, not giving her enough for bus money, getting her to sign over life savings and live in a room above the garage", or pressuring people into changing a will in their favour or giving them money through manipulation or standover tactics.

There is also variation in the nature of the relationships within which abuse of older people may occur, including those with adult children, spouses, other family members, friends, carers or institutions.

There is evidence that elder abuse is under-reported because of a lack of community and professional awareness and understanding of the problem. Other barriers to reporting abuse include:

- ignorance of services which may assist
- isolation of victims, resulting in lack of access to assistance, and continuance of the abuse due to lack of scrutiny
- fear of retribution or of being institutionalised

- shame of being abused by people they should be able to trust, and fear of jeopardising important relationships with family or friends
- health professionals may lack procedures for addressing abuse.

The most effective responses to elder abuse have been those which focus on empowering the victim and emphasise an interdisciplinary partnership approach between the domestic violence and aged care sectors.

For a more detailed discussion of financial abuse, please see pages 271-278 of the Report.

General and enduring 'power of attorney' provisions

An Enduring Power of Attorney (EPOA) enables an older person to pre-arrange substitute decision-making should s/he lose personal capacity. The main barrier identified in this study for accessing EPOAs was a lack of awareness of their existence and function. Some older people also expressed concern regarding the potential for EPOAs to be abused by attorneys. This included fears that:

- an EPOA may be activated on a false representation of incapacity
- an attorney will wrongly take a benefit for him or herself
- an attorney will issue benefits to a third party without authorisation.

The *Powers of Attorney Act 2003* (NSW) attempts to address some of these issues and provides for greater review of EPOAs by the Guardianship Tribunal.

There is provision for limited substitute decision-making to assist older people who receive pensions with the management of their financial affairs. Centrelink is able to send social security payments to a nominee, to release information to a nominee, and to accept changes in information from a nominee. As social security is administered by the Commonwealth, Centrelink does not automatically recognise powers of attorney drafted under State legislation.

For a more detailed analysis of powers of attorney, please see pages 306-319 of the Report.

Family agreements

Older people may enter into informal family accommodation agreements, where s/he transfers the title of their home, or other significant financial assets to their relative in

consideration for a promise to provide accommodation, and possibly other care assistance. Often these agreements are private and informal, making it difficult to assess their prevalence in the community. Examples of these arrangements include:

- an older person selling their home, and using the proceeds to pay for the relative's mortgage, or to alter the relative's property by, for example, building a 'granny flat' or an extension
- relatives may move in with the older person, and the older person may transfer their property into the names of the relatives, or purchase new property in the name of the relative.

Issues which can affect the accommodation in the long term include:

- changes in the health of the older person which require the relative to provide a greater level of care
- the desire of the relative to move homes
- the breakdown of the relative's marriage, with the sale of the family home as part of matrimonial property proceedings
- the isolation of the older person from their preferred community.

For a more detailed analysis of informal family accommodation agreements, please see pages 131-133 of the Report.

Barriers to older Australians accessing legal services

Many of the obstacles for older people in accessing legal services reflect characteristics of the cohort of older people in this study, including a lack of awareness of their legal rights, a lack of confidence in enforcing those rights, a reluctance to take legal action, and a perception that the law is disempowering and cannot solve their problems.

General barriers relating to the ability to access legal information and advice services which were identified during this research include:

- technological barriers, particularly for telephone and web based services
- a lack of awareness of where to obtain legal information and assistance
- a lack of appropriately communicated legal information
- the high cost of legal services
- a lack of interest by some legal practitioners in older clients
- potential conflict of interests when legal practitioners for older people are arranged by family members.

Barriers for older people in accessing existing legal services which were identified during the research include:

- difficulties in accessing legal aid, including restrictive eligibility tests
- a lack of availability of legal aid for civil disputes
- lack of specialised legal services for older people, particularly in rural, regional and remote areas
- lack of resources in community legal centres to tailor their services to the needs of older people.

Older people's needs in terms of legal service delivery include:

- legal information that is clear and readily accessible — preferably through face-to-face contact
- legal practitioners who provide explanations in simple terms, are friendly, courteous, inexpensive, expert in dealing with older people and do not require the older person to exercise a lot of 'self-help'.

Many service providers and older people alike expressed the view that there was a gap in service provision to older people, particularly to older people who cannot afford private solicitors.

Please see page 29 of the Report for a more detailed analysis of the interaction between older people and legal services in NSW.

Discrimination

In NSW, age-based discrimination is covered in the Anti-Discrimination Act 1977 (NSW). Age discrimination can be direct (i.e. where a person is treated less favourably than others because of their age) or indirect (i.e. where an unreasonable condition is imposed that presents difficulties for older people but not for younger people).

Age discrimination in employment arises in the areas of recruitment, terms and conditions of employment, opportunities for advancement, and dismissal/redundancy. The Anti-Discrimination Board (ADB) reports that many complaints arise from interactions with employment agencies, including:

- employment agencies requiring people to divulge their age
- being told by employment agencies that they were too qualified
- being told that the job would suit a younger person.

Issues of concern relating to discrimination in the provision of goods and services which were identified include:

- denial of contracts or loans because of income level or the limited time older people have for repayment
- denial of travel insurance.

The main barriers to accessing assistance include reluctance to make a complaint, individual disempowerment, ignorance of who to approach for assistance or how to make a complaint, and lack of evidence that the treatment is discriminatory.

The main barriers to effective participation in discrimination complaints processes include:

- the system requires an older person to advocate for him/herself
- the reliance on conciliation conferencing means that there is little attention to the objective fairness or legal soundness of agreements between parties
- the power differentials between individual complainants and respondents
- the confidentiality of the substance and outcomes of conciliation limits the development of case law.

For a more detailed analysis of the discrimination issues facing older people in NSW, please see pages 227-264

Just Search, an advanced tool to search Foundation research available at <http://www.lawfoundation.net.au/justsearch> also extracts material from other programs relevant to this inquiry. *The Legal Needs of Older People in NSW*, can be accessed at <http://www.lawfoundation.net.au/report/older>