

COUNTRY WOMEN'S ASSOCIATION OF NEW SOUTH WALES

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INQUIRY INTO OLDER PEOPLE AND THE LAW

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on Legal and Constitutional Affairs
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INQUIRY INTO OLDER PEOPLE AND THE LAW

We would like to thank the Standing Committee on Legal and Constitutional Affairs for the opportunity to have input into this Inquiry.

There are many problems to consider before any legislation can be effective. Some older people for reasons on physical, psychological or mental deterioration have to rely on others. Whether it be family, friends or strangers they have to act in trust to get on with life, otherwise they lose the ability to enjoy the real and genuine opportunities that are afforded them. Fortunately there are still trustworthy people about. In some instances, those trying to help are acting beyond the law and could find themselves subjects of litigation should the proffered help back fire. Some legislation in this present world can be just as detrimental to the elderly as giving them more protection. When relying on family or close friends it is a two way relationship and often this is forgotten or overlooked.

Fraud

It is not just the elderly who are susceptible to fraud – those committing it these days seem to be more and more credible. One only has to watch any evening current affairs programme to see people who have been talked into mortgaging their home and handing over the money to someone who has convinced them they can double their money in a short time. Often the "victims" are young, well educated and successful business people. One wonders how on earth they could be conned.

No wonder then are elderly and lonely people susceptible. In addition, older and less mobile people tend to keep large sums of money in the house – one reason being it is more difficult to access banks, financial institutions every week and often a fee is charged if more than a certain number of face to face transactions take place in a month. Secondly, many older people do not use electronic methods to pay bills, although Centrepay – a voluntary, free direct bill payer service offered to customers receiving payments from Centrelink will be most advantageous. However, this is limited only to those receiving some form of benefit and we believe it will still be hard to convince some people of the benefit. Therefore some older people keep large sums of money in the house and this makes them a very easy target and very vulnerable to fraudsters. No paper trail, no cheques to trace, just quick cash payment.

The rule that if it seems too good to be true, then is probably is, is more relevant today than ever.

There is also the situation of women living longer than men and some of those women, still today, have had little or no contact with tradesmen, cheque books, bank accounts and money in general until they found themselves widows and then suddenly had the responsibility their late

husbands under took. No wonder they are susceptible to a smooth talking fraudster. We have all heard of older people having their houses re-roofed, guttered or clad at huge cost when it was totally un-necessary. Many are totally unaware of the 10 day cooling off period and even when they do find out, it is often long after it has expired. We need stronger penalties for those found guilty of scams and fraud. It seems there are only very minor penalties and the person just changes the trading name and operates in a different area. Even when they are exposed it seems that television programs have more power to get action than the government bodies set up for the purpose. Not only do they need more teeth but they also need more will to bring the perpetrators to justice.

One assumes the problem of older women not having the education or experience of handling money will be overcome with time. When today's young women are older they will have the expertise to handle their affairs themselves. However, we still need to protect those who have not.

There are organizations such as Financial Information Service, a free education and expert information service available to everyone in the community, assisting in making informed decisions about investment and financial decisions for current and future needs, but sadly often such help is sought after and not before financial decisions are made.

One also needs to be very wary about so called financial advisors. Certainly there needs to be very much tighter control of this industry. This is still a haven for fraudsters. We would recommend much stricter qualification requirements and registration before a party can set themselves up as a financial controller.

Financial Abuse

This section really blends in with the above. At the family level this is hard to prove as there is so much goodwill exchange. It is also an aspect that some elderly people become quite paranoid about money and are known to accuse family members of stealing or cheating them, when this is not the case.

The Federal publication "Seniors" is a wealth of information for older people and is available in alternate formats, however it is only sent to those getting some form of government assistance. This publication should be available to everyone over say 65 with the opportunity to "subscribe" or not.

Another major concern is the use by children of their parents as guarantors for loans when buying houses or setting up businesses. Very often the parent is a victim of familial emotional blackmail and often gives in rather than be seen as mean. Very often the logic is that the child will get the inheritance when the parent dies anyway, so why not give it now "when we can all enjoy it". In some instances this works very satisfactorily however in many it does not. We also believe, that not just in the case of the elderly but in all cases where a guarantor is involved, whether it be in mortgages, leases, business or any other case, the guarantor should receive any

correspondence regarding outstanding or late payments as well as the party for whom the guarantor is acting. This should be a legal requirement. Far too often, the guarantor is completely oblivious that the other party is in trouble and it is only when they are required to respond, do they know the true situation. Very often with disastrous circumstances.

The terms and conditions and rights and responsibilities of everyone contemplating a move to a Retirement Village, Hostel or Nursing Home, should be perused and discussed with the elderly by an independent, trained adviser, before any document is signed. Certainly some of the Retirement Village legislation has been tightened but it needs to go further.

Family problems can occur when the older person contemplates going to live in aged care facilities – the question arises of whether to sell the home – if they do, this affects their assets and their pension will be changed accordingly. The family often expects to receive the proceeds of the sale of the home to go to them as their inheritance, so emotional trouble erupts.

Reverse mortgages are currently being seen as a desirable way for retirees to tap into the equity in their property to fund their retirement. The market has more than doubled in the past two years. While it is accepted that a party cannot draw more than the value of their home, there are still areas of concern – for example, a party believes they will live in their home forever, draws against the reverse mortgage, but then finds they need to move into a retirement home but do not have sufficient equity in their home to fund the move.

Again, anyone contemplating a reverse mortgage needs to ensure they are fully informed on all the implications of the plan.

Very often people are reluctant to seek independent advice as it appears they are distrusting and do not want to be seen as such. We believe that in some instances it should be a legal requirement that they have sought independent advice (and a signed document to say they have). This removes the stigma that they are doubting the other party's information.

General and enduring "Power of Attorney" provisions

From discussion with many people and also from Information Days such as those run by the Rural Women Access Groups, it appears that very few people really understand Power of Attorney and Enduring Power of Attorney – it is not only the elderly who seem to be confused. There should be an education program undertaken, perhaps by the Law Society, who would only benefit from it, as people would then see their solicitors and either seek further clarification or have one drawn up – at a fee. Some members have fears that Powers of Attorney can be abused. There are kits available and some feel that the new current legislation is sufficient, particularly as it scales over state boundaries. However, while there is still a large degree of ignorance of what is involved and exactly how they operate, there will be fear and skepticism of them. "Do it yourself" kits while financially attractive, are

not ideal where there is confusion and some of our members strongly believe that there should be the requirement for 2 attorney signatories to the document.

The Law Society Journal March 2006 states *"As enduring powers of attorney are not effective until the attorney signs it, a common practice is that the donor signs the power which is then held by the solicitor until such time as the donor instructs the solicitor to have it accepted by the attorney or the solicitor has received a certificate from a medical practitioner to the effect that the donor is not capable of action on their own behalf. The attorney accepts the appointment at that stage, as an attorney can accept at the time of execution or at any other time aft it is executed"*.

One of the greatest problems is that of recognizing our mortality. Unfortunately to many the making of a Will and/or Enduring Power of Attorney brings them face to face with the fact that they are going to die. Very often these are made when the person is ill or aged and so naturally, it brings realization for the reason for it.

However, again, education. We should all be encouraged to make Wills and for that mater Enduring Powers of Attorney early on in life, while we are healthy and clear thinking. Again, an opportunity for the Law Society to get involved with information days either in the community or in schools. If we all took this action as easily as we renewed our driver's license or club membership, it would not have the stigma attached to it. Certainly, Wills need to be updated, but it becomes a normal procedure. It also means that people who are aged and dying are less likely to be influenced by a family member or a "kindly" helper as that aspect is already in place. Many people believe they have nothing of value to leave anyone, but it should be considered a normal transaction, not related to their "estate".

A further concern for people is the fear that their wishes in their Will can be overturned by a court. We don't want to go down the route of some European countries of every child having an equal share of the estate, (by law) regardless of their input which means there are very few cases of dispute, but many instances of what started as a large estate being broken up into smaller and smaller parcels with each generation. However, we do need to encourage those making a Will to give a clearly stated reason why one person is specifically excluded, so there can be no misunderstanding to the adjudicator who is unaware of all the circumstances.

Again, while we welcome the "do it yourself" Will kits, we would urge parties who use these to have them checked by a solicitor to ensure that they are binding and there are no misunderstandings.

While on the subject of Wills, there is also the problem of elderly people promising certain things to certain people in the hope of finding favour with them. One hears of the elderly aunt who promises her niece that if looks after her, she will leave her the house. After years of care, the helper then

finds the house has in fact been left to someone else, who has contributed nothing. Or the case of several persons being promised the same items. This can cause extreme distress, not necessarily from the value of the inheritance, but that parties feel cheated and so it's off to court!!

Wills still seem to be a rather "hit and miss" affair. When a person dies, unless their affairs are totally in order and their executor knows their role and is organised, it can be a case of searching through family drawers etc., looking for the latest Will - sometimes not even knowing if one exists. Perhaps some consideration to having Wills registered should be considered. However this would have to be available at a very low cost, otherwise it would further discourage people from making and updating their Wills regularly.

Family agreements

Some of our comments above, certainly relate to this section.

In current affairs programmes, we regularly see older people upset financially and emotionally by action taken by their children at a stage of their life when they should be enjoying life.

However, most families we believe want only the best for their parents. It is a sad but true assertion that while people are living longer, their properties once thought modest have increased so much in value that taxes and rates and their income (pension or super) are not keeping pace. Councils that permit an older person to defer payment of the rates plus a small interest charge, until the property is sold or taken over by the beneficiary on the death of the party, should be applauded and all councils should be encouraged to do this. Selling the house for its value and moving into something more modest is not necessarily the answer and many want to live out their lives in familiar circumstances. Such removal of pressure is to be welcomed.

The irony today is that while it has always been the culture for a person to own their own home before they retire, (if at all possible), it is becoming harder and harder to pay for and maintain a home. Those who have been less frugal live in rented homes, with no rates, no upkeep and get rent assistance. Certainly they do not have the security, but in many cases, they are financially better off.

Parents should also not be made to feel that it is assumed they will pass the family home on to the children as their inheritance. The children's inheritance should be growing up in a loving, caring home, as good an education as can be afforded and life skills, not bricks and mortar! The sooner we get over that mentality the better!

There is also another aspect to Family Agreements.

While some family members have no patience with the elderly and in extreme cases, can't wait for them to die to receive their inheritance, there is the other side of the situation. That of family members who are under extreme stress and pressure caring for someone whose personality has completely changed and are very demanding (not just verbally, but also their physical needs). While the government (both state and federal) encourages older people to stay in their own homes (naturally it is much cheaper for the tax payer!) there still needs to be better respite care available. In some instances there is very good help, but this is not across the board and again, "education". It is not well known by some carers, nor just where to access it. Carers are also made to feel guilty that they admit to needing some respite. It should become the "norm" rather than having to ask for it when they need it. That way the person being cared for and the person doing the caring accept it rather than it being a last resort.

Barriers to older Australians accessing legal services

Older people have difficulty accessing legal services because of the cost. As already stated many are asset rich but cash poor. We all know that Legal Aid has been wound back to a pittance. While Legal Aid is not free and is means tested, perhaps a rethink of this along the lines of deferring payment offset against an asset for specific legal matters (Wills etc). If the person has no asset, they are probably entitled to legal aid anyway. Legal action is often discouraged because of the cost and stress involved (not just for the elderly) but if a matter is genuinely a case for litigation, the problem will not go away just because a person feels its not worth the money or the effort. Perhaps we could explore special courts for the elderly, along the lines of the residential tenancy tribunal, where solicitors are not permitted and each person is initially encouraged to compromise before mediation, which is then final. Often all people want is to be able to state their case and have an umpire! This tribunal has a very low fee of \$55.00 to bring a matter. Such a situation may be worth trialling.

Another barrier to seeking legal advice is due to the influence of family members, in the form of conflicting advice, confidentiality, etc. Often a person will sign a document without any safety check by a solicitor. Lawyers could offer a "Legal health check" e.g. Wills, Deeds, Power of Attorney, Guardianship etc. If this becomes a normal procedure, then families are not so suspicious of why they are seeing a solicitor. It is also preferable, if someone must accompany them, it be someone other than a family member.

Transport or lack of it, in many regional and rural areas is certainly a barrier for older Australians accessing legal services. The local solicitor could hold "help days" either in the hostel/facility or home. Bring back some old fashioned service. Again, this would be in their interest as they would have the party as a client and simple matters such as Wills etc could be handled by the junior partner with a standard template.

While we speak of influence of family members, we must also remember, that older people, sometimes in the early stages (undiagnosed) of dementia

do strange things. It is therefore very important that family members are encouraged to state their cases. As already claimed, it is not unheard of for a person to become quite paranoid about their financial affairs and accuse, quite wrongly, family members of trying to steal or cheat them. Not everything an older person says or does is correct! They are no different from the rest of the community and it can cause huge heartbreak for a family member to be maligned in these ways.

Discrimination

Discrimination on any level can be an extremely difficult matter. In many cases it is subjective. How often does one hear a person claiming they didn't get the job because of their colour, race, religion, sex etc., when in fact they didn't get it because their qualifications were not as good as the other person, who just happened to be a different colour, race, religion, sex etc.

Certainly the general public perception of older people is a negative one. It is hard to grow old with a positive attitude if your family and the community believe the negative stereotypes about older people. However there are many, many older people just quietly getting on with their lives, learning computer skills, travelling Australia in motor homes and caravans, sky diving and running marathons. Our society and culture does not value older people as some communities do. This may be changing with more and more grandparents being asked to shoulder the responsibility of caring for grandchildren, when child care is found to be too expensive. The irony of this is that the grandparents are still young and active and have their own lives and don't fit the stereotype of grey haired oldies, sitting at home with nothing better to do than look after the grandchildren! Many of them resent being expected to undertake these tasks.

One of the greatest aspects of discrimination and it is an unconscious one, is the ability to access transport. We do not have good public transport systems in place. Those we do have run on tight timetables and the driver does not have the time or patience for the older frail passenger to take his or her time in getting on and off the bus or train. For this reason many older people, who should not still be driving because of failing eyesight, heart problems etc. are continuing to do so, often at risk to themselves or worse still, to others. Family members who report the person to their doctor or the RTA are seen negatively. Better community transport is a must and as with every other facility, it must be well publicized so that people know where and how to access it.

Summary

Older people have so very much to contribute to society. However, as with any group, we cannot make suggestions based on the fact that older people are all the same. They are not. Each and every person is an individual as they have always been and will continue to be. One person at 80 years of age is "old" whereas another person at 80 is "still young". Certainly some matters, such as aged care, nursing homes etc. are specific to older people. However any legislation we consider must be inclusive to everyone.

Fraud and financial abuse are suffered by all. The regulations and penalties must be tightened up, increased and so must the will of those investigating the offences and finally the judicial system trying the case.

General and Enduring Power of Attorney provisions need to be understood by all members of society. We all need to be encouraged to make Wills at a time when it is simply another business matter and not an emotion charged undertaking. Learning about them at school helps clear the mystique surrounding them.

Family agreements – any person in any situation acting as guarantor should be included in every aspect of the undertaking. This includes notification if the other party/parties is defaulting in any way. Privacy legislation is not a good enough excuse to exclude the guarantor. They are an “interested party” and must be advised. If the other party does not want the guarantor notified, then they should not ask that person to be guarantor in the first place. THIS SHOULD BE LAW.

The barriers to older Australians accessing legal services are similar to many younger Australians accessing legal services – usually of cost and the feeling of inferiority, facing a solicitor. The time taken to bring a case to court and finally have the matter settled is a deterrent to many people, young and old. The system needs to be streamlined and often days and days of straight “legal argument” without anyone giving any evidence seem to the litigants quite un-necessary. Mediation in all matters should be encouraged with court as a last resort. If this was the case many people would be prepared to seek legal assistance knowing that it would be a short matter, not a long drawn out and naturally expensive situation. It is often the unknown factor of the final cost that discourages people to seek any sort of resolution. However, the problem does not go away, it just goes unresolved and resentment builds.

Discrimination can be experienced by all – not just older Australians. We need to learn to appreciate one another for what they can bring to our world and in each case it will be something different. Tolerance, understanding and education are necessary.

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