



**National Seniors
Association**

The independent voice of senior Australians

Submission

to

**Parliament of Australia
House of Representatives**

Inquiry into Older People and the Law

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Introduction

The issue of older Australians and the law is clearly a salient one. In Australia, the number of people 65 years and over is projected to increase from approximately 2.49 million now to 5.84 million in 2032, representing 23 percent of the overall population. This transformation presents a number of challenges for Australian society, not the least of which is the need to ensure that older Australians live safely and without fear of abuse, violence or exploitation.

In particular, issues to do with fraud, financial abuse, general and enduring power of attorney provisions, family agreements, barriers to accessing legal services and discrimination are of concern to National Seniors. National Seniors welcomes this opportunity to provide comment on the issues identified in the Terms of Reference for the *Inquiry into Older People and the Law*.

Investigating and reporting on the adequacy of current legislative regimes in addressing the legal needs of older Australians highlights the need for a holistic approach to these areas.

The issues identified in this submission emphasise the need, for not just legislative and Government action, but the need for increased awareness and knowledge within the broader community of older people's legal concerns.

About us

National Seniors is the largest senior's organisation in Australia with over 280,000 individual members in 170 branches across the country. It is a not-for-profit community organisation with the following objectives:

- to provide economic and social benefits for people 50 years and over;
- to represent its members views to Government at all levels; and
- to make donations and provide service and advice to charitable institutions assisting people over 50 years and over.

National Seniors offers members a vast range of services and benefits and is an influential vehicle for contributing to policy debates affecting seniors in Australia. Policies are developed based on membership input, including through branches and member organisation forums and has a pre-eminent role in representing, advocating for, and serving, senior Australians.

The **National Policy Office (NPO)** based in Canberra, facilitates National Seniors overall policy development and implementation process at both the national and state/territory levels. The NPO works closely with the National Seniors Productive

Ageing Centre (NSPAC) in informing the research agenda and the policy development process.

The **National Seniors Productive Ageing Centre (NSPAC)**, established in 2002, is co-funded by National Seniors in collaboration with the Department of Health and Ageing. It is a corporate entity in its own right, that is, a not-for-profit company limited by guarantee and governed by a Board of Directors. NSPAC's role is to research issues, which impact on the ability of seniors to contribute productively to the economy and society. The centre is consumer focused in both the development of its research agenda and conduct of research activities.

The **National Seniors Foundation** is a charitable community service initiative of National Seniors, which was founded in 1983. National Seniors Foundation offers practical support, education and positive responses to individual and community challenges as our population ages.

National Seniors Policy Position

National Seniors has developed a *National Policy Document 2006* with two of the priority areas being Legal Issues and Elder Abuse and continues to be actively involved in advocating for on behalf of the needs, rights and interests of seniors on issues relating to the wellbeing of, and justice for, all seniors, and redressing all forms of disadvantage.

National Seniors supports a more co-ordinated approach across Government to ensure consistency across the States and Territories in developing legislative regimes to address the legal needs of older Australians.

Response to the Terms of Reference

Set out below are National Seniors responses to the specific items identified in the Terms of Reference for the Inquiry.

1. Fraud

National Seniors is particularly concerned about the vulnerability of older people to fraud and acknowledges that frailty, isolation, dependency, disability, loss of capacity, dementia and language barriers are all attributing factors.

One of the difficulties which surround older people is that they are easy targets for acts of fraud and deception. This stems from a perception that they have declining mental abilities and a dependence upon others. As with most perceptions, this view of older people has some basis in reality. Whilst younger people are more likely to be victims of consumer fraud than older people, out of all the crimes perpetrated against older people, fraud is one of the most common (Muscat et.al 2002).

In Australia, fraud is not recognised as a separate legal category of crime. 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.

Anecdotally, there is evidence that older persons continue to be defrauded and abused financially in a variety of ways, which correspond with the activities in which they often engage and the products and services which they frequently use. Fraud against older people is most common when goods or services are bought from telemarketers or door-to-door traders (Seniors Task Force 2005: 35).

Other common examples of fraudulent behavior targeted at older people include: marketing of health care products and home repairs, pre-paid funerals and internet purchasing.

The impact of victimisation of older persons through fraud may be considerable. Unlike younger people, who are able to “start again” after being defrauded, older people have less time to recoup their losses and often are solely dependent upon their savings to finance their future. Loss of these assets may ruin a person’s otherwise well-planned retirement.

This fact is highlighted by the 2005 ‘Norm Carey mezzanine’ scam, which had a particular impact on older people who, as a group, made up a significant number of the 4 000 investors in the Westpoint property group who lost their savings in its \$320 million collapse (ABC 2006).

In order to raise awareness of the problem of fraud directed at older people, and to ensure cases of deception may be prosecuted effectively, it has been suggested that

specific legislation should be enacted to prescribe some of the more flagrant deceptive practices which target older people. (Department of Families Strategic Plan for the Prevention of Elder Abuse in Queensland)

National Seniors recommends that the Government gives consideration to:

- **introducing an education campaign that informs older Australians of the risks of fraud and suggesting appropriate fraud prevention strategies;**
- **introducing an education campaign informing older Australians of the regulatory bodies who have the power to investigate and prosecute misleading and deceptive practices;**
- **ensuring that penalties for fraud against older people are reviewed with the aim of increasing the current punishment; and**
- **implementing specific legislation to target some of the more blatant deceptive practices, which target older people.**

2. Financial Abuse

Financial abuse of older people is an emerging issue with significant consequences for the community and Government. This issue is compounded by a rapidly ageing population and government policies that encourage older people to ensure their financial independence. Loss of financial security through financial abuse increases reliance on government assistance, as well as hindering the process of productive ageing.

The most reliable Australian prevalence studies suggest approximately 3-7 % of older people over the age of 65 will experience abuse from someone with whom they have a relationship of trust, with financial abuse identified as the fastest growing type of abuse (EAPU 2005). Studies have also shown that victims of financial abuse are primarily women with a disability (69.4%) and that increased disability leads to greater likelihood of abuse. In addition, the majority of abusers have been identified as relatives of the older people (EAPU 2005).

Instances of financial abuse often go unreported because of the relationships involved. The older victim may feel that the perpetrator has some entitlement to their assets even if they went about obtaining them dishonestly (EAPU 2005), and determining cases of abuse can be difficult, especially as most occur over an extended period of time. Research suggests that older people who experience abuse choose not to seek help to overcome it, consistent with expectations of a phenomenon that is deeply personal and individual (Cripps et.al 2002). This is particularly worrying, considering that financial abuse is often accompanied by either physical and/or psychological abuse (EAPU 2005).

Broader societal factors, which may contribute to the conditions that allow the abuse to occur include: negative societal attitudes towards ageing; the erosion of adult children's sense of responsibility for parents; increasing materialism; family attitudes towards inheritance and the control of assets of older people; and a lack of protective mechanisms against financial abuse.

For some older people, financial abuse can arise through fraudulent investments. This fact is highlighted by the 2005 'Norm Carey mezzanine' scam, where investors were promised a 12 % return on their investments, which never eventuated. In this case older people who, as a group, made up a significant number of the 4000 investors in the Westpoint property group lost their savings in its \$320 million collapse (ABC 2006).

Statistics from the Elder Abuse Prevention Unit (EAPU) in Queensland outline the severity of financial abuse showing that 63% of calls received by their helpline identified financial abuse as the primary reason for calling (see *Figure 1* below).

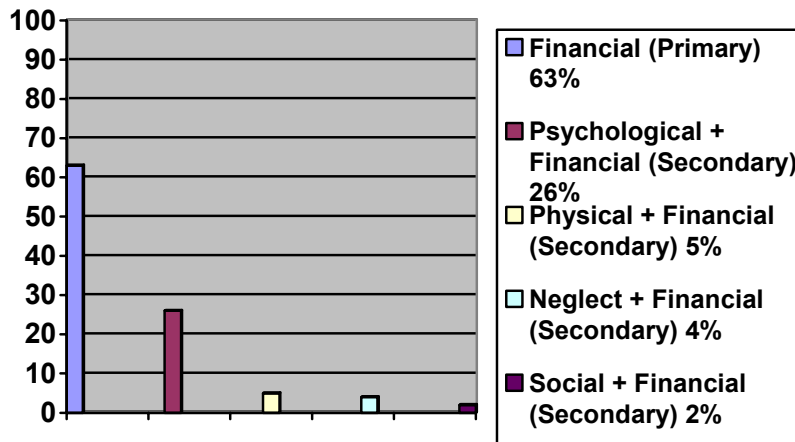


Figure 1

As illustrated in *Figure 1* above, most cases of elder abuse usually involve multiple types of abuse occurring concurrently (e.g. physical and financial). It is because of this concurrence that the 'cost' of elder abuse to the community if not resolved as the population ages is likely to be immense.

Public awareness has been found to be the most effective tool for identifying, preventing and treating elder abuse. A report to the US Select Committee on Ageing found that high levels of public and professional awareness of elder abuse were more effective in terms of identification than reporting laws (Victorian Government 2005: 29).

Lawyers play a crucial role in protecting the interests of older people and assist them to make informed choices. They can also play a key role in recognising cases of abuse. However, few legal practitioners specialise in the rights of clients in residential care, community care or in situations relating to guardianship (Tilse et.al 2002: 1).

National Seniors recommends that the Government gives consideration to:

- continuing funding and strategies in place to require mandatory police checks for all workers in aged care institutions and for all workers who make home visits;
- implementing of a National Elder Abuse Prevention Information Line to provide an information and education resource for older people and their loved ones concerning elder abuse prevention and redress/intervention;
- develop a National Awareness campaign on elder abuse spearheaded by ASIC and ACCC;
- developing strategies to ensure that professionals are aware of elder law issues, such as financial abuse; and
- undertaking a systematic compilation of all current laws at Federal, State and Local level that impact upon financial abuse.

3. General and Enduring ‘Power of Attorney’ provisions

Many older people have a substantial asset base and will need to make judicious decisions about the management of their assets in the event of incapacity.

Lawyers play a crucial role in protecting the interests of older people and assisting them to make informed choices regarding substitute decision making. However, few legal practitioners specialise in the rights of clients in residential care, community care or in situations relating to incapacity.

In order for an Enduring Power of Attorney (EPOA) to be legally valid the donor must have the mental capacity to understand the nature and effect of the power given. This capacity includes the ability to make the EPOA freely and voluntarily. Professional and community understanding about the degree of capacity required making an EPOA and to undertake transactions is a significant concern. Legal and medical practitioners who have a duty to ensure that their clients or patients are competent to sign a EPOA may be uncertain about how to determine whether a person has the necessary capacity or as to which of the widely varying tests of determining competence to use.

Attorneys can be given the power to make decisions about financial matters such as managing finances, selling property, and/or personal matters such as the type of health care received and accommodation choices.

The ACT Legislative Assembly’s Standing Committee on Health and Aged Care conducted an extensive inquiry into elder abuse in the ACT (Elder Abuse in the ACT – Report Number 11). One of the key recommendations made by the Committee was the compulsory registration of all EPOAs to ensure a comprehensive data base for use by professionals, government and business. More recently, a series of focus group sessions were facilitated by the ACT Office for Ageing, which included representatives from the legal profession, medical practitioners and the broader – there was overwhelmingly support for the notion of compulsory registration of EPOAs (Substitute Decision Making in the ACT).

A significant issue for both donors and donees of EPOAs relates to cross-jurisdictional issues where other States and Territories do not recognise each others EPOAs. It would seem apparent that there needs to be Commonwealth legislation governing this issue to ensure some form of mutual recognition between the States and Territories.

National Seniors recommends that the Government gives consideration to:

- **supporting a system of compulsory registration of EPOAs that allows easy access for banking institutions, medical and legal professionals and the general public to ascertain the holder of the current EPOA;**
- **developing educational programs and other mechanisms aimed at facilitating the general use of EPOAs;**

- investigating provisions for compulsory registration of all EPOAs that is readily accessible and allows people to identify the holder and nature of current powers;
- undertaking a review of EPOAs operating in each jurisdiction in order to provide some consistency and to look at cross-border issues with the view of EPOA being recognised in all States and Territories;
- developing of 'plain english;' legislation and forms;
- developing safeguards to assess the capabilities of the person handing over the EPOA;
- instituting a requirement that the person handing over the EPOA be given comprehensive information on the legal issues involved, including information on how to report abuse; and
- developing strategies to ensure that professionals understand the complex issues surrounding assessment of competence and are skilled in assessing competence.

4. Family Agreements

Many Australian families care for elderly relatives in the context of loving relationships with no legal complications. However, these arrangements are usually oral agreements and, as a result, can be quite vague. Currently, Australia is seeing an increase in family care agreements, as they are seen as a way of formalising care arrangements, especially where financial matters are concerned. These agreements can be attractive to seniors, as they can continue living with their family in the community. However, there can be negative consequences for seniors and caregivers. Seniors may lose their homes where the living relationship breaks down, or continue to live in care giving relationships that have become unhappy or abusive. These arrangements are almost always made orally and without legal advice, with no detail as to the terms of the agreement without consideration of the changes in circumstances that may occur.

Family agreements can also be described as independent care arrangements, personal services contracts or lifetime care contracts and are arrangements in which older people transfer property or pay compensation to someone in exchange for a promise of 'care for life' (Herd 2002: 24). The informality of these arrangements can cause significant problems for legal interpretation, maintenance of confidentiality, determination of capacity and equitable resolution of family disagreements. Most notably, transaction of property may look like a gift, with the 'taker' obligated to give nothing in return, resulting in a very unfair outcome for the older person. Whilst the senior may be able to prove the existence of a bargain or agreement in court, the demands of the court process in terms of time, expense and personal conflict may be beyond the resources of many older people.

The promise to 'care for life' does not take into account changes in the older person or family's health, finances and relationships. A family agreement goes some way to ensuring that, if and when these situations do occur, there are formal arrangements in place to deal with them. Making a family agreement is seen as a way of preventing legal recourse when accommodation arrangements break down into unhappy or abusive situations resulting in an older person having to take on the court system (Monro 2002: 68).

National Seniors recommends that the Government gives consideration to:

- **developing educational programs and other mechanisms aimed at educating older people of the benefits of formalisation of their financial and health affairs;**
- **developing strategies to increase the awareness of family agreements with lawyers and to promote effective strategies for addressing the issues involved; and**
- **implementing family mediation services that specialise in dealing with the complex nature of family agreements.**

5. Barriers to older Australians accessing legal services

For older Australians to have the ability to access legal services is contingent, at least in part, on that person being aware that they have 'legal rights' that are being infringed. Lack of awareness of legal rights, and a lack of understanding of 'the law', is a significant barrier to many older people accessing assistance.

It is also noted that for older people to have access to legal services, they need to have a level of confidence and empowerment to do so, and this is often hampered by fear of exploitation, retribution, unwillingness to disclose personal information, complex family dynamics and a wide range of attitudes towards the idea of substitute decision making.

However, for others who are aware of the issues and might be able to gain access to legal services, the prospect of future incapacity can be too emotional to deal with as it touches on sensitive areas of family relationships, trust and the stress of physical and emotional difficulties. As a result, some older people choose not to make any arrangements and therefore do not seek the assistance of legal services.

The most significant barriers for older people accessing legal services include: the high cost; restrictive legal aid eligibility guidelines; poor coordination of legal aid services; lack of information and difficulties Culturally and Linguistically Diverse (CALD) people face in accessing interpreter services

The current generation of older Australians continue to hold great esteem for their General Practitioner (GP), relying on them to provide not only information about their health needs but provide advice about legal protection instruments. Unfortunately, many GPs are not aware of the mechanisms or current laws in relation to financial abuse and are unable to provide that level of support.

A report by the Law and Justice Foundation of NSW's 2004 report into the legal needs of older people found that many older people operated under the assumption that access to legal services were beyond their means, and felt that lawyers did not give them value for money or misrepresented their legal costs (Ellison et.al 2004). Research conducted in Queensland in relation to legal service provision to older people concluded that key issues are that the legal practitioner effectively communicates with them and demonstrates legal skill. (Tilse et.al 2002: 38).

CALD older people face difficulties accessing interpreter services and translated legal information material; lack of knowledge about the availability of legal service providers or lack of trust in the services which are available; lack of awareness and sensitivity to the needs of diverse cultures; and little knowledge about newly emerging ethnic communities amongst service providers (Schetzer and Henderson 2003).

National Seniors recommends that the Government gives consideration to:

- **developing strategies to raise the issue of elder abuse with GPs and promoting effective strategies for addressing the issue;**
- **increasing the funding to State legal aid bodies to improve access to legal aid assistance for older people;**
- **ensure providers of legal services to older people are given adequate opportunities to participate in law reform processes;**
- **increasing the funding to community legal centres to enable them to provide enhanced community legal education for older people; and**
- **encouraging and assisting collaborative relationships between lawyers and welfare agencies to ensure that disadvantaged older people have access to appropriate legal services.**

6. Discrimination

An ageing society means that greater numbers of older people may want and even need to remain in the workforce for longer periods.

Social expectations of employment today dictate that individuals are increasingly being made responsible for finding their own employment, bargaining for their own conditions of work and supporting themselves when they reach retirement age, regardless of their special needs and circumstances. Although expected to be responsible for their employment and income, older people often encounter barriers to full participation in society. This is most marked with respect to employment. It is also reflected in the provision of goods and services. For example, educational institutions rarely depict older persons in their advertisements due to the perception in society that they are too 'old to learn' (HREOC 1999).

National Seniors was consulted extensively about the content of the Federal Age Discrimination Act and was pleased to see its final adoption into Australian Law. As well as addressing individual cases of age discrimination, the Act is intended to be a catalyst for attitudinal change, with the stated objective of raising community awareness that people of all ages have the same fundamental rights and equality before the law (Federal Discrimination Law 2005).

A common stereotype of older workers is that they are less productive in the workplace than younger workers. Employers believe that an older worker may bring attributes such as maturity and experience to a job. But 'these attributes are offset by older workers' perceived lack of enthusiasm and drive' and by employers' belief 'that older workers are difficult to retrain'. (HREOC 1999) In a 1999 study, 500 Australian senior executives and managers were asked about what age groups they preferred when hiring new staff or laying-off current staff. No one wanted to hire a person above the age of 50, but approximately 65% preferred to lay-off people in this age group if necessary (OECD 2005: 100).

Health care for older people is costly, and as Australia ages there will be more and more demands on our health system. Hospital use is greater amongst older people than the general population and older patients generally stay in hospital longer (HREOC 1999).

Although doctors are trained to save lives without discrimination, it is difficult for doctors to ignore resource constraints, and this raises some difficult ethical dilemmas. As the population ages and resources become tighter, these decisions about rationing resources may increasingly discriminate against older people, as surgeons and medical ethic experts are increasingly having to consider their budgets when making decisions such as whether a patient is 'too old' to be treated.

Currently, there are significant barriers preventing access to assistance and effective participation in discrimination complaints processes. These barriers include: disempowerment; uncertainty on who to approach and how to lodge a complaint;

inability to advocate for oneself; power differentials between the complainant and the respondents; and lack of evidence that the treatment is discriminatory. In 2005, the Age Act's first year in use, the Human Rights and Equal Opportunity Commission heard only 78 complaints, with twice as many men as women initiating complaints (ABS 2006), suggesting the shrinkage of the job market for older males. The Age Act appears to be having little effect on employers who, whilst subject to the laws prohibiting compulsory retirement and age discrimination, continue to harbour negative age stereotypes and practice discriminatory behaviour.

National Seniors recommends that the Government gives consideration to:

- **legislating to ensure uniformity throughout Australia, as at present there are substantial State and Territory differences, such as in compulsory and voluntary retirement, redundancy packages and workers compensation;**
- **ensuring that complainants under the Commonwealth Age Discrimination Act are not prevented from taking cases forward due to cost or other barriers; and**
- **Implementing a public awareness campaign about the Age Discrimination Act and how to use it.**

References

ABC. 2005. *Norm Carey to be questioned over Westpoint collapse*. Available online at: <http://www.abc.net.au/worldtoday/content/2006/s1679253.htm>. Accessed 30 November 2006.

ACT Government, Office for Ageing 2006, *ACT Elder Abuse Policy Framework assisting ACT Government agencies in developing policy and service responses*.

ACT Government, Office for Ageing 2005, *Substitute Decision Making in the ACT – Report on Outcomes of Focus Group Sessions*.

Australian Bureau of Statistics (ABS). 2006. *Retirement and Retirement Intentions, Australia, Aug 2004 to Jun 2005*. ABS: Canberra.

Australian Institute of Criminology 1999, *Trends and issues in crime and criminal justice – No. 139 Fraud and Financial abuse of older people*.

Australian Institute of Criminology 1999, *Trends and issues in crime and criminal justice – No. 139 Substitute Decision making and older people*.

Cripps, D. Biven, J., Northey, J. and Rigger, P. 2002. 'Abuse of older people: issues for lawyers'. In *Elder Law Review* 8.

Elder Abuse Prevention Unit 2005, *Financial abuse of older people: A Queensland perspective*.

Elder Abuse Prevention Unit, 2005. *Annual Report 2005*. Available online at: <http://www.eapu.com.au/?TM=4&SM=24>. Accessed 30 November 2006.

Ellison, S, Schetzer, L, Mullins, J, Perry, J & Wong, K. 2004. *The legal needs of older people in NSW*, Law and Justice Foundation of NSW: Sydney. Available at: <http://www.lawfoundation.net.au/report/older/755611D4E2F9FA27CA25708100066846.html>. Accessed 4 November 2006.

Federal Discrimination Law. 2005. *Introduction to the ADA*. Available at <http://www.hreoc.gov.au/legal/fed%5Fdiscrimination%5Flaw%5F05/index.html>. Accessed 10 November 2006.

Herd, B. 2002. The Family Agreement – a collision between love and the law? In *Reform* 81: 23-28.

Human Rights and Equal Opportunity Commission. 1999, *Age matters: A discussion paper on age discrimination*.

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Law and Justice Foundation 2004, *The legal needs of older people in NSW*.

Legislative Assembly for the ACT, Standing Committee on Health and Community Care 2001, *Elder Abuse in the ACT – Report Number 11*.

Monro, R. 2002. Family agreements: all the bet of intentions. In *Alternative Law Journal* 27(2): 68-71.

Muscat, G., James, M. and Graycar, A. 2002. *Older People and Consumer Fraud*. Australian Institute of Criminology: Canberra.

OECD. 2005. *Ageing and Employment Policies Australia*. Available at: <http://www1.oecd.org/publications/e-book/8105111E.pdf>. Accessed 2 November 2006.

Office of Senior Victorians 2005, *The mismanagement & misappropriation of older people's assets: How can the financial service sector help?*

Office of the Public Advocate 2003, *Elder Abuse – The hidden problem*.

National Seniors Association 2006, *National Policy Document*.

Queensland Government, Department of Families 2001, *The Strategic Plan for the Prevention of Elder Abuse in Queensland*.

Schetzer, L & Henderson, J. 2003. *Access to justice and legal needs, a project to identify legal needs, pathways and barriers for people in NSW*. Law and Justice Foundation of NSW: Sydney.

Seniors Task Force. 2005. *Confident, Safe and Secure Living in Queensland*. Queensland Government.

Tilse, C., Setterlund, D. Wilson, J. and Herd, B. 2002. 'Legal Practitioners and Older Clients: Challenges and Opportunities for Effective Practice'. *Elder Law Review* 1: 34-42.

University of Western Sydney, *Care for life – Private Care Agreements between older adults and friends or family members*

Victorian Government. 2005. *Report of the Elder Abuse Prevention Project*. Melbourne: Office of Senior Victorians.