





As Australia's population ages, the legal rights of older Australians are attracting more attention. Carolyn Sappideen and Sue Field examine some of the issues confronting a House of Representatives inquiry into seniors and the law.

Coming of age

"I'm not leaving them anything," was the comment from one 58 year old in a recent report on ageing. "They've had enough of my sweat and tears already."

As baby boomers become senior citizens and, those who are able, adopt lifestyles inconsistent with leaving significant assets to their children, problems of intergenerational conflict are likely to emerge. It's all about money.

It is still the case that for the majority of seniors, the family home is a major asset. The 2002 AMP-NATSEM report (*Live long and prosper, the income and assets of those about to retire*) found that baby boomers on the verge of retirement are likely to be asset rich and cash poor. Most will have little or no superannuation.

Simon Kelly, from the National Centre for Social and Economic Modelling, reported in 2006 that more than 50 per cent of retirees live on less than \$300 per week.

According to the 2003 AMP-NATSEM report (*You can't rely on the old folks' money*), unlike earlier generations, the current crop of baby boomers does not necessarily see the need to leave an inheritance for their children.

This is reinforced by the Australian Housing and Urban Research Institute's *Ageing in place* report, which found that, of the 7,000 survey respondents, more than 30 per cent of the baby boomers thought they would leave no assets in their wills.

Entering the debate is the House of Representatives Legal and Constitutional Affairs Committee, which has commenced a public inquiry into older people and the law. The terms of reference ask the

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committee to report on whether the current legislation is adequate to meet the legal needs of older Australians in the following areas: fraud, financial abuse, general and enduring 'power of attorney' provisions, family agreements, barriers to older Australians accessing legal services and discrimination.

Financial abuse is one area where seniors without significant income are at special risk. The assets of the elderly may be seen as a way of assisting adult children to purchase their own home or other assets. The *'Ageing in place'* report found that one third had given loans to children. The good news is that the loans were largely repaid. Loans might be secured by a guarantee of payment.

The NSW Law Reform Commission's Research Report No.11 found that older Australians were disproportionately likely to act as guarantors for the purchase of assets or businesses by their children. Frequently, there will be inadequate information concerning the borrower's finances and the senior will feel unable to say no to such a request. Acting as guarantor may put at risk the senior's sole or principal asset, the family home. One approach to overcome this risk is to introduce legislation restricting or prohibiting the use of the family home as security for these loans where a vulnerable senior is involved (Cummins, *Alternative Law Journal* 2002).

There are other ways in which seniors may be at the risk of financial abuse. They may sign a power of attorney usually in favour of one or more of their children. A power of attorney allows the attorney to make financial decisions, relating to property and assets. An attorney can, for example, operate bank accounts, pay bills and lease or sell property. A power of attorney will only be valid if the person giving it (the principal) has sufficient knowledge and understanding (mental capacity) to enter into a legal transaction.



Although there are two types of powers of attorney, it is important to remember that a general power of attorney is only effective so long as the principal has sufficient mental capacity to make decisions. An enduring power of attorney, however, continues to operate after the principal can no longer make decisions for themselves. In an attempt to provide safeguards against a person with dementia appointing someone as their attorney, the prescribed witness to the document (usually a lawyer) must state that in their view the principal understood the effect of the power of attorney.

Other safeguards are also available. For example the principal can state when they would like the power of attorney to come into effect. This may be on a certain date (perhaps for the time that the principal is overseas). The principal can also put limitations on the powers of the attorney. There may, for example, be a maximum on the amount of money that the attorney can manage without consulting, for example, the principal's accountant.

A recent Australian study by Tilse and others (University of Queensland) found that the management of complex assets and income often involves specialist knowledge and skills which the attorney may not possess. They also found that family members, when acting as attorney, often mix up their own money with the senior's money. This mingling of the finances can be as simple as the family member (attorney) paying the parent's bills with their own money, then reimbursing themselves at a later stage, by paying their own bills with the parent's money.

The attorney may also 'borrow' some of the parent's money on the assumption that "this is what mum would have wanted". The attorney may consider that the assets of the principal are really theirs—"after all dad is leaving it to me in the will anyway". The family member may also withhold expenditure for the care of their parent because such expenditure "eats away at my inheritance".

Although there is recourse to the various guardianship tribunals when there is a suspicion of an abuse of a power of attorney, in a family situation detection of financial abuse can be difficult. It is essential when choosing an attorney that the person be not only trustworthy but financially capable as well.

There are no 'checking mechanisms' to ensure that the attorney is fulfilling their role in accordance with the requirements set down in the legislation. At present there is no requirement to register a power of attorney, unless the attorney enters into a property transaction. There is also no requirement to present an annual report on the financial transactions that the attorney has undertaken on behalf of the principal. This is in contrast to a tribunal-appointed financial manager who is required to present an annual account. Whether all powers of attorney should be registered and/or annual accounts presented is a subject of much debate.

One solution to this problem is to adopt a recommendation made by the Alberta Law Reform Institute. In their report *Enduring powers of attorney: safeguards against abuse* (Report No. 88) it was recommended that attorneys give notice, of their



intention to act under the power of attorney, to specified family members or designated persons (identified by the principal in the enduring power of attorney). Such a requirement would provide an inbuilt checking mechanism without the requirement of registration, or an annual account referred to previously.

It is implicit in the current law that the seniors as autonomous persons can consume all their assets during their life time without any obligation to their non-dependant adult children. While many seniors are asset rich and cash poor the family home remains their principal asset. The introduction of reverse mortgages provides a means for the older person to utilise the equity in the home without having to move out.

Although the *Ageing in place* report found that the preferred option remains selling or renting the home at least for future care needs, according to a landmark survey some 20,000 households have reverse mortgages (*Sydney Morning Herald*, 20 October 2006) and the industry body (SEQUAL) reported that reverse mortgage lending reached \$650 million in 2005 (*SMH*, 4 October 2006).

Under a reverse mortgage, retirees 60 years and over can borrow against assets, typically a family home, to provide continuing income or a lump sum payment. The debt and interest are paid on death, moving into care or on the sale of the property. The seemingly perfect solution for retirees to remain in their own home and to boost retirement income has significant pitfalls.

The Australian Securities and Investment Commission website (www.fido.asic.gov.au) warns that some reverse mortgage products (but not all) may protect against this by setting the maximum repayment as the value of the asset. The guarantee that the loan will not exceed equity should be expressly written into the loan document to assure protection. Even then this protection may be lost if the borrower does not comply with the conditions of the loan, such as payment of outgoings, insuring and maintaining the property in good repair. This could leave borrowers with no equity in their home and at the risk of being tossed out. Payments received may also affect pension entitlements (ASIC, 'Equity release products', November 2005, p.31).

This is an area where special legislative treatment could be possible, as has been the case overseas (British Columbia Law Institute, *Report on reverse mortgages*, February 2006). It is another instance where intergenerational conflict is likely to emerge. Adult children may perceive that their inheritance is being dissipated by elderly parents on day to day living expenses, travel, renovations and lifestyle or increasingly for nursing or aged home care, (AMP-NATSEM report 2003, *You can't rely on the old folks' money*).

One of the terms of reference for the committee's inquiry into older people and the law includes the adequacy of access to legal services. This is especially important because the evidence is that, even if legal protection exists, seniors are frequently reluctant or unable to access legal services.

The Law and Justice Foundation of NSW, in its report on the legal needs of older persons in NSW (2004), confirmed that older Australians have limited access to legal services. The barriers to seeking legal assistance are financial, psychological and practical. Seniors frequently can't afford to consult a private solicitor; they are fearful of legal costs and feel that the legal profession often can't be bothered. Added to that, seniors are reluctant to seek legal assistance where personal relationships may be involved, fear confrontation and conflict, feel powerless to do anything about the problems, and lack the fortitude to pursue their legal rights (Law and Justice report, p.31). This is particularly

pertinent in areas of financial abuse by a family member.

The report also observed that, at the practical level, access may be restricted because many elderly seniors do not use the internet and are uncomfortable with using a touch button phone. This suggests that legal services should be available that are tailored to the special needs of seniors.

The Law and Justice report recommends face to face interviews, easily readable publications and legal advice accessible by referral through the services that seniors utilise such as GPs (p.49). The 65+ age group, especially those with low education, are more likely than other groups not to achieve resolution of a legal problem (see Hazel Genn, *Paths to justice*, 1999). Genn also observes that those with "low levels of competence in terms of education, income, confidence, verbal skill, literacy skill and emotional fortitude" need assistance in gaining access to justice and resolution of their legal problems.

This description may be less apt for baby boomers on the verge of retirement, with better education, higher asset levels and home ownership and a willingness to be more aggressive in pursuit of their rights. What it does suggest is that the most vulnerable are the least likely to seek legal advice and assistance and that specially tailored services are desirable. There is a case for a specialised legal service for senior Australians which meets their special needs. At the time of writing it is understood that such funding is now available in three of the states.

In three areas uniform protective legislation could be considered: reverse mortgages, powers of attorney and loan guarantees. These are areas where intergenerational conflict remains likely. ■

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For more information on the public inquiry into older people and the law, visit www.aph.gov.au/house/committee/laca/olderpeople or email laca.reps@aph.gov.au or phone (02) 6277 2358.