



Hon Kerry Shine MP
Member for Toowoomba North

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Attorney-General and Minister for Justice
and Minister Assisting the Premier
in Western Queensland

BY: LACA *MF*

16 JAN 2007

The Hon Peter Slipper MP
Chairman
Standing Committee on Legal and Constitutional Affairs
House of Representatives, Parliament of Australia
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Mr Slipper *Peter*

Thank you for your letter dated 20 September 2006 about the Committee's intent to conduct an investigation and report on the adequacy of current legislative regimes in meeting the legal needs of older Australians, addressed to the former Attorney-General and Minister for Justice and Women, Linda Lavarch MP.

I have now assumed responsibility for this portfolio. Please find enclosed my submission to your inquiry into older people and the law.

I trust this information is of assistance.

Yours sincerely

Kerry Shine

Hon Mr Kerry Shine MP
**Attorney-General and Minister for Justice
and Minister Assisting the Premier in Western Queensland**

Enc

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Submission to the Inquiry into Older people and the law

Needs of Older Australians

Older Australians are faced with different social, economic, emotional and legal needs than younger Australians. Older Australians are more likely to have left the workforce, receive lower incomes, have a physical disability or ill health, have a loss of relationships and may become socially isolated.

Older Australians may also become reliant on family, friends or other members of society for support and care. Research undertaken by the School of Social Work and Social Policy of the University of Queensland into the financial management of assets by older Australians, indicates that 72.4% of older Australians received help with their paperwork, 54.6% received help with paying bills, 41.9% received help with accessing their money and banking, 36.9% received help with their pensions and superannuation, 30.8% received help with their property management, 16% received help with accessing financial advice and 11.1% received help with their investments.¹

Further, this research indicated that 16.8% of the participants in the survey were assisted by way of formal mechanisms, such as an enduring power of attorney or under a guardianship order. Of the participants 18.7% were assisted by semi-formal mechanisms, such as signing authority with the bank.²

The needs of older Australians living in Queensland are quite complex and are supported through a myriad of legislative regimes which aim to protect and enhance the rights and interests of older Australians.

Fraud / Financial Abuse

The 2005 Annual Report of the Elder Abuse Prevention Unit (a community organisation funded by the Department of Communities and operating under the auspice of Lifeline Brisbane, to provide a state-wide service to respond to the abuse of older people in Queensland) identified that older Australians were the victims of substantial financial abuse, with many millions of dollars being exploited from seniors annually. Most victims reporting to their helpline were: capable of making their own decisions; women in their eighties; in receipt of a pension and not home owners (possibly as a result of the abuse).

¹ Rosenman, L. (2006). Assets in old age: The challenge for social research and policy. Seminar presented in the School of Social Work and Social Policy, Trinity College, Dublin, 10 April, 2006.

² Rosenman, L. (2006). Assets in old age: The challenge for social research and policy. Seminar presented in the School of Social Work and Social Policy, Trinity College, Dublin, 10 April, 2006.

Older Australians are more likely to become victims of fraud than any other crime, which can be perpetrated by family, friends or by strangers when goods or services are sold or bought. The Queensland Police Service, the Office for Seniors and the Queensland Department of Communities have published brochures directed to older Australians providing useful information to advise older Australians how to safeguard their interests against fraud.

Older Australians, who are victims of financial abuse by relatives or other persons, have access to both civil and criminal laws for redress. The Criminal Code contains offences, such as Stealing; Fraud; Procuring Execution of Deeds etc by Threats; Trustees Fraudulently Disposing of Trust Property; Making Documents without Authority, amongst others. However, the success of criminal prosecutions may be limited given the difficult evidentiary requirements in criminal matters and the reluctance of victims to give evidence against loved ones. Commencing civil action is also fraught with the financial risk of litigation and the possibility of losing the action.

Adults with Impaired Decision-Making Ability

The *Guardianship and Administration Act 2000* (the GAA Act) and the *Powers of Attorney Act 1998* (the POA Act) provide protection for adults who have impaired decision-making capacity. The Acts provide a substituted decision-making regime for adults who lack capacity to make decisions, to ensure that their well-being and interests are protected. Capacity, under these Acts, is defined as the ability to understand the nature and effect of decisions, being able to make decisions freely and voluntarily and being able to communicate your decisions.

The GAA Act creates the statutory position of Adult Guardian, whose functions include the protection of the rights and interests of adults with impaired decision-making ability. The GAA Act also creates the Guardianship and Administration Tribunal (the Tribunal), which is responsible for the appointment of guardians or administrators for adults with impaired decision-making capacity.

Guardians and administrators are appointed in circumstances where there is a need for the appointment because the decision-making arrangements of the adult are inappropriate and without the appointment, the adult's wellbeing and interests would not be protected. It is not always necessary for a guardian or administrator to be appointed for an adult with impaired capacity and the GAA Act recognises that decisions may be made on an informal basis by the adult's family or friends.

The Adult Guardian has legislative authority to investigate allegations of abuse, neglect and exploitation of adults with impaired decision-making ability and in particular in relation to enduring powers of attorney. Any person or entity is able to refer a complaint raising allegations of abuse, neglect or exploitation of an adult with impaired capacity to the Adult Guardian for investigation.

The Adult Guardian can also act as a person's guardian when appointed by the Tribunal, in circumstances where there are no other family members or friends who are appropriate for appointment and/or are willing and able to act as guardian for the person. Of the clients the Adult Guardian acted as guardian for during the year ending 30 June 2006, over 28% were aged 65 years or over. Of the investigations undertaken by the Adult Guardian during the year ending 30 June 2006, 67% of the matters investigated were for people aged 65 years or over. Of the matters investigated by the Adult Guardian involving people aged 65 years or over, 98.5% of the matters involved allegations of financial abuse.

Of the applications made to the Guardianship and Administration Tribunal during the year ending 30 June 2005, 47% were for adults aged 61 years and over.

The Tribunal may also appoint an administrator for an adult with impaired capacity to make decisions about financial matters for the adult. Administrators are usually appointed in circumstances where the decision-making arrangements for the adult are inappropriate and the rights and interests of the adult are at risk of abuse, neglect or exploitation. If there are no family or friends who are appropriate or willing and able to act, the Tribunal may appoint the Public Trustee of Queensland as an administrator.

The appointment of an administrator by the Tribunal is often made in situations where there has been or there is the potential for financial abuse, exploitation or neglect of the adult. An administrator is able to take legal action on behalf of the adult to recover moneys or other assets that have been misappropriated or otherwise disposed of by a person.

It should be noted that the Queensland Law Reform Commission is currently undertaking a review of the guardianship laws in Queensland and a final report is expected by the end of 2008.

Enduring Powers of Attorney

The POA Act governs the laws surrounding powers of attorney, including enduring powers of attorney. The principal who has made an Enduring Power of Attorney can appoint one or more attorneys, to make decisions for both personal and/or financial matters for the principal. The authority of the attorney for personal matters does not commence until such time as the principal loses capacity to make decisions, but for financial matters can commence before the adult loses capacity, the time being stipulated by the principal in the enduring document.

The POA Act provides that attorneys are subject to onerous duties and responsibilities towards their principals and may face prosecution in some cases if they breach their duties as an attorney.

Where the principal does not have decision-making capacity, the Adult Guardian is able to investigate actions of an attorney and take protective

action, such as suspending the attorney's powers for a period of 3 months, giving advice to, or supervising an attorney, guardian or administrator for an adult or applying to the Guardianship and Administration Tribunal (the Tribunal) for a guardian or administrator to be appointed for an adult with impaired capacity instead of the person currently making decisions for the adult.

Although enduring powers of attorney may be used by family members or others to exploit the principal, in the majority of cases, enduring powers of attorney are used to assist and help older Australians to make decisions for their personal and financial affairs. The Public Trustee of Queensland offers a free service for the making of enduring powers of attorney.

In circumstances where powers of attorneys are being abused, the legislation provides for referral to an independent statutory officer, the Adult Guardian who has broad investigatory powers to investigate abuse and take action to protect the adult with impaired decision-making ability.

Domestic and Family Violence Legislation

In 2002, amendments to the *Domestic and Family Violence Protection Act 1989* provided that people who were in informal or formal care arrangements were included in the group of people who could apply for a protection order to prevent acts of domestic violence towards them. As well as physical or verbal abuse, an act of domestic violence includes harassment and intimidation for financial gain, such as a child threatening to withdraw care to their parent if the parent does not give to the child the parent's money or property. A protection order can prevent or restrict a perpetrator of family violence from having any contact with the elderly victim.

Applications for a protection order can be brought by the older Australian or some one that they authorise to make the application for them, an attorney, guardian or administrator for the person, the adult guardian or a police officer. This legislation can be used by older Australians who have capacity and also for the benefit of those older Australians who do not have capacity. The legislation is designed so that those people who are responsible for making decisions for the older person or who support the older person can make an application for them on their behalf.

Family Agreements

Family Agreements or Care Agreements as they are sometimes called, involve older parents transferring their property, or other assets, to their children on the understanding that they will be cared for in consideration of that transfer. Although the creation of the agreements may be well meaning, if the agreement is general or vague in nature or may be not more than a promise to care in the future, the expectations of the older Australian may not be upheld. In some cases, older parents may be coerced into signing agreements on the threat that they will not be cared for by their children.

There is no legislation which specifically governs Family Agreements. If an older parent believes that the agreement has been breached by their child or children, the older parent may commence civil litigation on the grounds of breach of the contract or on grounds such as, undue influence or unconscionable conduct on behalf of the child or children.

In circumstances where it is believed that the older parent did not have capacity to understand the nature and effect of the agreement or may have been coerced into making the decision, the matter can be referred to the Adult Guardian to investigate and take protective action if necessary.

Discrimination

The *Anti-Discrimination Act 1991* (the ADA) provides that it is unlawful to discriminate, either directly or indirectly, on the grounds of "age" in certain areas of a person's life, such as: work and related work areas, education, superannuation, insurance, accommodation, goods and services, sale of land, club membership and affairs, administration of State laws and local government.

The ADA establishes the Anti-Discrimination Commission Queensland (the ADCQ) and the Anti-Discrimination Tribunal (the ADT). During the period from 1 July 2005 to 30 June 2006, a total of 903 complaints were lodged with the ADCQ. Of these complaints, 79 (8.8%) alleged 'age' as a relevant attribute of discrimination under the ADA. However, of the 79 complainants, nine identified as being over the age of 65 years. Of these nine complainants aged 65 years or over, the areas where it was alleged the "age" discrimination occurred was: three in the area of goods and services, four were in the work area and 1 in both the insurance and superannuation areas.

The ADCQ seeks to actively resolve complaints of discrimination, through mediation, before the matter is referred to the ADT for hearing. The ADCQ is proactive in educating the general public with regards to discrimination issues, particularly in the workplace, to avoid breaches of their Act.

Access to Legal Services

The Queensland Government has provided funding to various legal services to assist the legal needs older Australians. Funding has also been provided to community organisations to provide services to assist the social, emotional and other needs of older Australians.

Legal Aid Queensland (LAQ) receives funding from the Queensland and Commonwealth governments and provides a free legal advice service to all members of the community. LAQ has an Anti-Discrimination Unit, specialising in discrimination matters and provides legal assistance to those people who are eligible under their guidelines for legal representation.

Older Australians who are eligible for legal assistance for other matters funded by LAQ can make application for assistance at any time.

People aged 65 or over represent 0.96% of clients who receive legal representation by LAQ. This may be because, LAQ specialises in areas of law that may not be relevant to older people, such as criminal and family law, and also older people may be refused legal aid on the basis of their assets. Older people mainly receive legal representation in civil law matters, predominantly in the 'consumer – sale of goods' area, where people aged 65 year or over represent 12.5% of all clients receiving legal representation in this area of law. In the debt recovery area, people over 65 years represent 6.67% of all clients receiving legal representation.

People over 65 years represent 3.23% of LAQ clients who receive legal advice. Again the main areas of law where older people over 65 years receive legal advice is civil law matters, particularly dividing fences (comprising 21.88% of the clients) and consumer – sale of goods (comprising 13.32% of the clients).

The Queensland Government, provides funding to community legal centres throughout the State, which provide legal advice and services to older Australians.

The Department of Communities funds the Seniors Advocacy Information and Legal Service (SAILS), located at the Caxton Legal Service, a community legal centre. This program supports people over the age of 60 years who are experiencing or at risk of experiencing domestic and family violence. SAILS offers social work support as well as legal assistance to older Australians.

The Department of Justice funds the Queensland Public Interest Law Clearing House (QPILCH), which is responsible for the co-ordination of a State-wide pro bono legal service. QPILCH is able to arrange for legal services to be provided by participating law firms to older Australians in relation to their legal matters.

The Department of Communities provides funding to the Elder Abuse Prevention Unit (EAPU), which provides a state-wide service to respond to the abuse of older people in Queensland. The Seniors Inquiry Line, also funded by the Department of Communities, provides an advice and information service to older Australians in areas such as: social activities, concessions, legal issues, independent living, grand-parenting, health, finance and retirement.

The Office for Seniors, Department of Communities is managing a cross government project to identify leading practice models in the reduction of social isolation of older people in Queensland. Older Australians who are socially isolated are more vulnerable to abuse and exploitation by others.

The Department of Communities has published brochures directed to older Australians regarding a number of legal and other related areas, such as "Seniors and the Law" and "Confident, Safe and Secure: Living in Queensland".

The Queensland Government has established the Seniors Taskforce, comprising government departments and community organisations, which reports to the Minister for Police and Corrective Services. The taskforce has undertaken research and proposed actions relating to the investigation of crime, the fear of crime and the prevention of crime.

The Department of Justice and Attorney-General recently announced funding to the following organisations to provide assistance, legal and otherwise to older Australians:

- Queensland Aged and Disability Advocacy Inc. for an advocacy support worker to assist older Australians through the Guardianship and Administration Tribunal process;
- Bond University for a Queensland impaired competence planning pilot project;
- Carer's Queensland for a Guardianship and Administration Tribunal family support worker program;
- Lawyers' Reform Association for an elder and consumer credit law stakeholder training program; and
- North Queensland Women's Legal Service for an elder & multicultural outreach and legal education service.