

24 November 2006

Submission No. 50
Date Received

RECEIVED
29 NOV 2006
BY: LACA

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The Secretary
House of Representatives Standing Committee
on Legal and Constitutional Affairs
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Sir or Madam

Inquiry into Older People and the Law

The Law Society of Western Australia thanks you for your invitation, dated 20 September 2006, to contribute to this inquiry.

The inquiry's Terms of Reference provide for the investigation and report on the adequacy of current legislative regimes in addressing the legal needs of older Australians in specific areas. Although this is a House of Representatives inquiry, many of the areas of concern to the Society fall within the parameters of State legislation. Therefore, many of the Society's comments relate to State legislation.

Fraud and financial abuse

Guarantees

Many young persons ask older family members to guarantee their personal or home loans. The older family members are often unaware of the repercussions of agreeing to act as guarantor. Some financial institutions insist that the guarantor obtain a certificate of independent legal advice. Others insist that the lawyer also certify that the guarantor has understood the legal advice.

It is the policy of the Law Society of Western Australia that lawyers should not certify that the guarantor has understood the legal advice because it is impossible to know what another person has understood.

However, it is submitted that all guarantors should have to obtain independent legal advice with respect to the effect of the guarantee they have been asked to sign.

Reverse Mortgages

The market for reverse equity products, in particular reverse mortgages, is growing at a rapid rate. SEQUAL was formed in January 2005 by a number of financial institutions offering these products. All participating members are required to adhere to a code of conduct. However, membership of SEQUAL is voluntary. Therefore all financial institutions offering reverse equity products do not have to comply with a code of conduct.

As with guarantees, some lenders require a certificate of independent legal advice. Some lenders require the lawyer to also certify that the borrower has understood this advice. Some do not require the borrower to obtain legal advice. Some lenders require the borrower to obtain financial advice. Others do not.

It is submitted that there should be a mandatory code of conduct for the lenders of reverse equity products which requires that both legal and financial advice must be obtained by the borrower; but not a requirement for certification that the advice has been understood.

Retirement and Nursing Homes

Retirement Villages legislation and the contracts entered into by residents of retirement and nursing homes are not simple and would not be understood by many older persons. Many sell their homes to raise the funds for their relocation and would not fully appreciate the nature and consequences of their legal interest in their new accommodation.

It is submitted that persons entering into these contracts should have to obtain, or at least be advised to obtain, independent legal advice. It is appreciated that some persons who take up residence in a nursing home do not have the capacity to obtain or understand legal advice. In the event that the arrangements are entered into by a person's guardian or attorney, the requirement should apply to the guardian or attorney.

Carers

Carers in nursing homes, hostels and aged care facilities are in a position to influence vulnerable patients. It is not uncommon for persons in need of care, particularly those cared for in their own homes, to be persuaded to make new wills in favour of their carer, to make gifts of money or property to their carer or to be robbed by their carer.

It is submitted that the regulation of aged care workers should be investigated.

Door to door sales

Older persons are often vulnerable consumers, targeted in their homes.

It is submitted that abuse of this kind could be reduced by regulation requiring door to door sales persons to render a tax invoice and prohibit the acceptance of cash advances.

Tradespersons

Older persons can be vulnerable targets for tradespersons because they can be totally reliant on tradespersons to carry out all repairs and maintenance to their homes. They are often not physically able to check the standard of the work or determine if the extent of the work suggested by a tradesperson is in fact necessary.

It is submitted that mandatory registration of tradespersons and their contractors should be investigated.

Real estate agents

Older persons can be pressured by real estate agents to sell their homes particularly if their homes are in 'up-market' locations or on large blocks. Sale prices below the current market can seem attractive to older persons who do not 'follow' the market.

It is submitted that this kind of conduct by real estate agents should be investigated.

General and enduring 'power of attorney' provisions

Many attorneys don't understand that there are limitations on their power. Some don't understand that their power ceases upon the death of the donor. Others believe they can make distributions in accordance with the donor's will while the donor is still alive.

National uniformity of legislation would be advantageous. In Western Australia the prescribed form states that the attorney is bound by Part 9 of the relevant Act but there is no requirement to provide the attorney with a copy of Part 9. In Queensland a summary of the obligations of an attorney is attached to the prescribed form. In Western Australia a subsequent grant of a power of attorney does not revoke a former grant. Concurrent powers of attorneys can lead to confusion.

It is submitted that uniform legislation and a requirement that all relevant information must be provided to attorneys could help to overcome some of the current misunderstanding/abuse by attorneys. This would also be advantageous because attorneys do not always reside in the same State as the donor and when there is more than one attorney, all may not live in the same State. More education programs for donors and attorneys would also assist.

Family agreements

It is not uncommon for parents to assist their children with the purchase of a home on the basis that the parents be accommodated in a 'granny flat' on the children's property. If the children subsequently decide to sell the property, the parents can be left with nowhere to live. More education is required for the parents as to the consequences of their generosity in this circumstance.

It is submitted that the role that could be played by financial institutions in providing this education should be investigated as many parents who enter into family agreements rely on trust in their family members and will not voluntarily obtain legal advice.

Barriers to older Australians accessing legal services

Cost is the greatest barrier to access to legal services for all Australians. However, legal aid is unlikely to be available for the type of legal services older Australians are likely to require. For example, the making a will, an enduring power of attorney, a family arrangement or investigation of financial abuse.

Older Australians, particularly those in receipt of an old aged pension, could not even contemplate obtaining private legal advice and because of the limitations on legal aid have no source of advice available to them.

It is submitted that making a proportion of legal aid funds available for older persons needs should be investigated.

Discrimination

There is often a perception that if an older person is in less than perfect physical health, that he or she must also have less than perfect mental health. As a result, the wishes and views of older persons are often disregarded or disrespected.

It is difficult to cure community perception but the availability of legal advice for older persons through government funded agencies would provide older persons with an avenue for protection.

Yours sincerely

Marta Saraceni
President