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THE LAW SOCIETY  
OF SOUTH AUSTRALIA

15 December 2006

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The Secretary  
The House of Representatives Standing Committee  
on Legal and Constitutional Affairs  
PO Box 6021  
Parliament House  
CANBERRA ACT 2601

Dear Sir/Madam

**Inquiry into older people and the law**

Thank you for your letter of 20 September 2006 in which you invited the Society to make a submission to the above Inquiry. The Terms of Reference for the Inquiry have been considered by the Society's Justice Access Committee and I am pleased to provide the attached comments.

Please do not hesitate to contact me if I can be of any further assistance.

Yours sincerely

Margaret Kelly  
PRESIDENT

## HOUSE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

### *INQUIRY INTO OLDER PEOPLE AND THE LAW*

#### **TERMS OF REFERENCE**

The Access to Justice Committee of the Law Society of South Australia notes that the terms of reference of the *Inquiry Into Older People and the Law* (the Inquiry) are stated as:

“To investigate and report on the adequacy of current legislative regimes in addressing the legal needs of older Australians in the following specific areas:

- Fraud.
- Financial abuse.
- General and enduring ‘power of attorney’ provisions.
- Family agreements.
- Barriers to older Australians accessing legal services; and
- Discrimination.”

The Committee’s comments in respect of first five the above issues in the terms of reference are set out below. No comments have been offered on “discrimination” as it is considered that other agencies, with greater experience in that field, will provide comments.

#### **FRAUD AND FINANCIAL ABUSE**

There is no Commonwealth or South Australian legislation in the areas of fraud that is specifically aimed at addressing the special needs of older Australians. There is, of course, legislation that prohibits fraudulent activities, and which creates criminal offences in respect of such activities in certain circumstances. Complaints can therefore be made to the police by older Australians, or civil proceedings instituted, in situations where they have been the victims of fraud and financial abuse in the same way as any other member of the community.

However, the Committee considers that in some situations, as a result of ill health or pressure from family members, older Australians face particular problems in taking remedial steps when they have been the victim of fraud or financial abuse. In summary, it is access to justice that older Australians often find challenging.

## Consumer Fraud

Violence and abuse from strangers affect people every day. Crime statistics from the Australian Bureau of Statistics have consistently shown that people aged 55 and over are much less likely to be victims of personal crime or household crime (such as burglary) than younger age groups. Older people are, however, twice as likely as the general population to be the victims of consumer fraud as they are to be victims of assault<sup>1</sup>. The types of fraud they often fall victim to are scams and dishonest sales.

Both the Federal and State Governments provide consumer watchdog services through the Federal Australian Competition and Consumer Commission (ACCC) and the South Australian Office of Business and Consumer Affairs (OCBA). Recent press releases highlight the potential vulnerability of older consumers.

### Example 1

A News Release, issued by the South Australian Minister for Consumer Affairs on 26 October 2006, stated in part:

*“The Minister for Consumer Affairs, Jennifer Rankine, today warned consumers to be on their guard when itinerant trades people come knocking.*

*The Office of Consumer and Business Affairs (OCBA) has been alerted by Western Australian authorities that two dodgy roof painters may be touting for work in South Australia.*

*[These men] ... known interstate for their involvement with traveling gangs of con-artists taking money from unsuspecting consumers for shoddy painting and roof work.*

*Itinerant con-artists tend to target older consumers, offering repair and maintenance services. Unfortunately history has shown that many of these people are not licensed for the work they do, they significantly over-charge consumers, and the work is often of very poor quality.*

*Consumer Affairs is concerned about a recent claim that a pensioner in Port Augusta had been defrauded \$20,000 by itinerant painters. This complaint, along with other intelligence gathered, suggests that these two have been operating in the Iron Triangle area ...”.*

### Example 2

The following warning was added to the ACCC’s website in November 2006:

***“A surprise lottery win? Chances are it’s a scam!***

*Added November 2006*

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<sup>1</sup> South Australian Seniors and the Law an Information Guide The Law Society of South Australia and Dept for Families and Communities page 51

*SCAMwatch has seen a steady increase in reports about lottery scams, particularly from older Australians. These scams generally arrive through the post or by email. They claim to be from a legitimate overseas lottery (for example, from Spain) and advise you that you have won a big prize. These scams will generally tell you to send money (for 'admin', 'taxes', or 'levies') or your bank account details before your 'prize' is released. Legitimate lotteries do not do this. These scam emails and letters are just a ploy to rip you off.*

*SCAMwatch advises consumers to ignore these scams for another reason. Organised scammers often use these types of scams to generate 'mailing lists' of consumers who respond to these letters or emails. Even if you lose very little or no money at all to a lottery scam, any details you give out may be used to target you with a different scam in the future."*

Most consumer dealings are based on the law of contract. Central to the common law rules of contract is the assumption of a bargain freely struck between equal parties. However, most consumer goods are manufactured, marketed and sold by large corporations operating on a world wide basis.

In recognition of the fact that consumers today do not have the same level of knowledge, expertise, experience, advice and resources as business corporations, both State and Federal Parliaments have introduced laws designed to protect consumers from the unscrupulous trader.

### **Commonwealth Consumer Protection**

The *Trade Practices Act 1974 (Cth)* (TPA) prohibits corporations, in trade and commerce, from engaging in the following conduct:

- S51AB Unconscionable conduct
- S52 Misleading or defective conduct
- S53 False or misleading

The ACCC is charged with a general enforcement role in relation to the *Trade Practices Act 1974 (Cth)* (TPA). While the ACCC can institute proceedings for a breach of the TPA it generally focuses on industry-wide conduct that affects many consumers and, cannot mediate between individuals and the suppliers of goods and services.

Older Australians, as with all other members of the community, can bring their own private actions in court for breaches of the TPA. However, aggrieved consumers (including older Australians) considering instituting legal proceedings generally have to pursue any such actions in person or hire legal representation at their own expense.

### **State Consumer Protection**

OCBA is the South Australian Government body whose functions include the following:

- To receive and act upon complaints from consumers.

- To carry out investigations and research into matters affecting the interests of consumers.
- To publish reports and provide information on consumer matters.
- To give advice to consumers on the protection provided under the law.
- To report on matters of importance to the Minister of Consumer Affairs.
- In certain limited circumstances, to take legal action on behalf of a consumer.

These functions enable OCBA to give protection to consumers in everyday transactions, whether the sum of money involved is large or small.

The main statutes supervised by OCBA are the Building Work Contractors Act 1995, Consumer Transactions Act 1972, Credit Administration Act 1995, Consumer Credit Code 1995, Consumer Credit (SA) Act 1995, Conveyances Act 1994, Fair Trading Act 1987, Land Agents Act 1994, Land and Business (Sale and Conveyancing) Act 1994, Land Valuers Act 1994, Manufacturers' Act 1974, Prices Act 1948, Residential Tenancies Act 1995, Retirement Villages Act 1987, Second Hand Vehicles Dealers Act 1995, Trade Measurement Act 1993, Trade Standards Act 1979 and Travel Agents Act 1986.

There is no specialist consumer law service in South Australia .The Legal Services Commission of South Australia provides advice and minor assistance in this area. Community Legal Centres may provide representation in limited circumstances.

One of the above statutes, the *Fair Trading Act 1987 (SA)* (FTA), prohibits persons, in trade and commerce, engagement in the following:

- S56            Misleading or deceptive conduct
- S57            Unconscionable conduct
- S58            False or misleading representations

Older Australians, as with all other members of the community, can bring their own private actions in court for breaches of the FTA. However, as with the TPA, aggrieved consumers (including older Australians) considering instituting legal proceedings generally have to consider pursuing any such actions in person or hire legal representation at their own expense.

However, S76 of the FTA does provide for the possibility of OCBA conducting proceedings on behalf of a consumer. This assistance is potentially available in circumstances where OCBA is satisfied that the case raises questions of law affecting the interests of consumers generally or that it is otherwise in the public interest to do so. Ministerial approval for such action is also required. It is submitted that consideration could be given to an equivalent provision being added to the TPA to give such a power to the ACCC.

## State Criminal Law

The *Criminal Law Consolidation Act 1935 (SA)* (CLCA) creates offences for:

- S139            Deception (penalty up to 10 years imprisonment for a basic offence)
- S140            Dishonest dealings with documents (penalty up to 10 years imprisonment for a basic offence)
- S142            Dishonest exploitation of position of advantage (penalty of up to 10 years imprisonment)
- S270            Common law offence of fraud (penalty from two to seven years imprisonment)

## Issues

Overall, issues for older Australians, in the area of fraud and financial abuse, include:

- Possible legal remedies are available to older Australians who are the victims of fraud or financial abuse. Both civil and criminal avenues are potentially open. However, there would be scope for changes which would give greater recognition to the difficulties that older Australians may face in instituting such proceedings or making complaints to the police. Some of these difficulties would be common to other groups of Australians, including for instance young people and the disabled, but the vulnerability of the older Australian, in particular to family pressure and problems arising from ill health, are particularly relevant to the older age group.
- Fraud or financial abuse by family or friends against older Australians can be very difficult to prove or substantiate as victims are often reluctant to make a complaint to the police against a family member or institute civil proceedings against them.
- Furthermore, the circumstances in which money or property may have changed hands, or been transferred, from an older Australian to a family member or friend is sometimes shrouded by the close nature of the relationship itself. For instance, it is not uncommon for a family member or friend to claim that the money or property in dispute was "gifted" to them by the older Australian. The situation can be further complicated if the older Australian at the time of discovering the deception, is experiencing the early onset of dementia or ill health.
- Older Australians can find the legal system daunting, intimidating and very costly. Even seeking advice from the telephone advice service can pose hurdles for ill older Australians. In South Australia, the Legal Services Commission is funded by the State and Commonwealth Governments to provide a legal advisory service which covers most areas of law. But generally, only limited legal assistance is available for legal representation as such in civil matters.
- OCBA is able, in certain circumstances, to offer mediation to resolve disputes between a consumer (including an older Australian) and a trader. However, if the dispute is unable

to be resolved through mediation and negotiation the older Australian is left with the difficult decision of deciding whether to pursue the matter in court.

- It is also noted that the Litigation Assistance Fund in South Australia, which is administered through the Law Society of South Australia does enable a person, including an older Australian, to apply for financial assistance to pursue a civil claim in court. An application for assistance from the Fund generally requires a letter of support from a private legal practitioner and there is an application fee which can be waived in certain circumstances. This represents an important potential avenue of assistance in applicable matters.
- The legal process that is available to older Australians is generally not different that what is available in a similar circumstance to any other Australian. There is, in South Australia, a mental impairment court within the Magistrates Court which, in the criminal law field, does provide specialised judicial proceedings for those defendants, including older Australians, admitted to its program. However, as noted, older Australians can face additional challenges compared to other Australians when considering the prospect of other legal proceedings. In particular, their age, and if suffering from a medical condition, may put into question their ability to provide instructions to a solicitor. Further, their stamina to withstand the stress and duration of a trial may be in question. Consequently, many older Australians may reluctantly choose not to pursue meritorious cases in court because it is simply too hard given those difficulties.
- Criminal law avenues of redress can be similarly problematic for the older Australian when the alleged perpetrator is a member of the family. It has already been noted that there can be a natural reluctance to report a family member to the police. Even when a report is made the nature of family relationships, and the possible frailty of the older person, may create additional difficulties for a police investigation in gathering necessary evidence.

## **GENERAL AND ENDURING 'POWER OF ATTORNEY' PROVISIONS**

Legislation governing general and enduring powers of attorney is State based. Although there are similarities between the States there is no uniformity in the legislation. There are some steps currently being undertaken to establish reciprocal arrangements between the States to recognise each others documents but this work is currently incomplete.

The South Australian legislation may have been adequate at the time when it was first introduced but, it is considered by the Commission that it may not now adequately address the current needs of older Australians in several ways as set out below.

### **South Australia**

The *Powers of Attorney and Agency Act 1984* (PAA Act) contains the following main provisions:

- S5 Provides for the creation of a General Power of Attorney (GPA)
- S6 Provides for the creation of an Enduring Power of Attorney (EPA)

- S7 Sets out the general duty of a donee of an EPA to protect the interests of the donor and, that if the donee fails to do so he or she is liable to compensate the donor for the loss occasioned by the failure.
- S8 Creates an offence if a donee fails to keep and preserve accurate records and accounts of all dealings and transactions made pursuant to an EPA.

## Issues

Issues for older South Australians, arising from the PAA Act, include:

- Provisions in the PAA Act to discourage breaches of a donee's duties may be inadequate. For example, it is not an offence as such under the Act if a donee fails to act in the best interest of the donor. Rather than relying on one or more offences under the CLCA, referred to above, it may be more appropriate to stipulate such an offence, or offences, within the PAA Act.
- It is submitted that the duties of the donee, as set out in the PAA Act, are too general and would be more effective and helpful if they were more specific. For example, the tasks and duties expected of a donee could be set out in more explicit detail.
- The penalty of up to \$1,000 which applies if a donee is found guilty of failing to keep and preserve accounts of dealings when acting under an EPA is arguably inadequate. Consequently, it may not play as an effective role as it could as a deterrent, along with other legislative provisions such as the offences in the CLCA referred to above, in discouraging some donees from fraudulent, or dishonest behaviour, in the carrying out of their duties as an attorney.
- Breaches of a donee's duties under an EPA more frequently occur when the donor (usually an older Australian) has lost legal capacity. However, there are no provisions in the PAA Act which allow for the performance of the donee's duties to be monitored. Breaches are therefore often discovered when the damage or loss to the older Australian has been occurring for some time and has become quite substantial.
- The Public Advocate is an independent statutory official appointed under the *Guardianship and Administration Act 1993*. He or she promotes the rights and interests of people with a mental incapacity and, where appropriate, their carers. However, the position does not have legislative authority to monitor the performance of donees' duties under EPA's. Nor does it have authority to pursue individual claims in court to recover monies lost by older Australians as a result of a donee not carrying out their duties as required.
- There is currently no requirement for the registration of GPA's and EPA's. Legislative provisions requiring the registration of these documents could provide a means of monitoring their existence and, more importantly, if they were still in force and had not been revoked.
- Should a problem arise with an EPA and appropriate remedies are sought from a court, the Supreme Court of South Australia has the jurisdiction. It is arguable that a more accessible avenue of redress would assist older Australians and others in this situation.



The Commission therefore supported a proposal, raised in a discussion paper<sup>2</sup> on enduring powers of attorney, to allow the South Australian Guardianship Board to share with the Supreme Court the function of reviewing and monitoring the action of donees, or assessing a donor's legal capacity.

### **Legal representation for hearings before the Guardianship Board**

In South Australia applications may be made to the Guardianship Board for various orders including Administration Orders which provide for the management of a person's finances by another person or Public Trustee, Guardianship Orders which allow a person or the Public Advocate to make lifestyle decisions and Treatment Orders which provide for enforced treatment along with Section 32 Powers which can be used to remove the elderly from their home and place them in nursing homes.

Whilst legal representation is provided free of charge for appeals against these orders to the District Court of SA there is no provision for legal representation for hearings before the Guardianship Board. Many people, including the elderly, are unable to present a case against the orders which are being sought usually by professionals or family members with the help of professionals. They are unaware that they can challenge the evidence and few bring their own expert evidence for reason of ignorance and/or cost.

Many elderly people have never encountered the Guardianship Board and when they find themselves the subject of an application to the Guardianship Board have no idea of the powers which can be exercised by the Board and the possible effect upon their lives.

A recent case example is pertinent.

A 96 year old man was told that the grand daughter with whom he lived had made an application to the Guardianship Board. He had no idea what the Guardianship Board was and did not attend the hearing.

Orders were made which resulted in him being removed from his home of 52 years by police and ambulance and placed in the dementia ward of a public hospital.

Eventually a member of his family found him from there and sought a review of the orders. She was able to prove not only did that he not have dementia but also that he should never have been removed from his home. All orders were subsequently revoked but he was unable to return home as the grand daughter refused to have him back.

The gentleman was a stoic man who was also very deaf. Transcripts of the hearings before the Guardianship Board clearly show that he was unaware of the significance of the initial application and that the Guardianship Board regarded his

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<sup>2</sup> "Discussion Paper: Enduring Powers of Attorney"  
Attorney-General's Department (SA) February 2005

stoicism as evidence of dementia. Had this man had legal representation he would certainly have been saved a great deal of distress.

In addition because the appeal process is limited to a review of the decision, if the person who is the subject of the order has for whatever reason been unable to present evidence competently then it is likely that any injustice occurring at the initial hearing will be perpetuated through the appeal process.

It is submitted that legal representation should be provided fee of charge for all hearings before the Guardianship Board and that a disbursement be provided for all persons the subject of applications to obtain their own medical evidence.

## **FAMILY AGREEMENTS**

Common family agreements or arrangements which involve older Australians can concern the care of grandchildren or financial arrangements that benefit a child or other family member. In some instances, for example, the care of a grandchild or grandchildren has been effectively abandoned by the parent due to drug abuse or mental health problems and the grandparents step in and take over the day to day care of the child or children. These types of agreements are rarely in writing and, consequently, the terms and duration of the agreement can be unclear.

In these circumstances, when a dispute arises, the challenge for the parties involved is to identify the terms of the agreement reached. In relation to being able to see grandchildren, or to continue caring for them as in the example referred to above, it is noted that the provisions of the Family Law Act 1975 recognise the likelihood that grandparents often play a significant role in their grandchildren's upbringing. However, family law proceedings can be extremely stressful particularly if the other party, the parent of the child or children in question, is a son or daughter of the older person.

For lower income earners, and providing the applicant satisfies Commonwealth Guidelines for the provision of legal assistance, legal assistance is usually available with respect to a dispute relating to children initially for dispute resolution or mediation and, if that is not successful, in some cases for legal representation in court. However, those who do not meet the means test, or guidelines for aid, have to consider privately funding any proceedings either in the Federal Magistrate Court or the Family Court. The likely expenses involved are often considered to be prohibitive.

As a result, older Australians who do not qualify for legal assistance and who cannot afford a private solicitor may find themselves being unable to spend time with their grandchildren when a dispute arises between themselves and the parents of the child or children.

Agreements with respect to money and financial arrangements can be problematical for older Australians. Common situations include:

- Guarantees – notwithstanding the introduction of various protective measures sometimes an elderly parent can be encouraged or pressured by an adult child to guarantee the purchase by the adult child of a new home using their parents' property as security. If the adult child fails to meet the payments on their mortgage agreement, the elderly parents can find themselves in a situation where their home may have to be sold to pay the debt.

- Granny flat agreements – relates to situations where the elderly parent is encouraged to sell their own home and invest the proceeds in building a granny flat on the property of an adult child with the promise that older person would be taken care of for life. These agreements can become unstuck if the adult child's marriage fails and the house has to be sold, or, if the biological child of the elderly person passes away and the surviving spouse does not wish to be responsible for the care of the elderly in-law.
- Transfer of real property – usually from a parent to an adult child (the consideration being "for love and affection") with the promise of again being taken cared of for life. Sadly, on an anecdotal basis, a number of these promises are not met. Similarly, reverse mortgages may seem enticing but there are a number of risks and disadvantages for the older person look out for
- Direct financial loans or payments – loan agreements between an older person and a member of his or her family may be on a verbal and it is sometimes unclear when repayments are to be made. Statements alleged to have been made such as "*I'll pay you back when I can*" or, "*the payment was always understood to be a gift*", can complicate possible legal proceedings aimed at recovery. Older Australians are also particularly vulnerable to "scams" which can involve, for instance, a "fly-by-nighter" coming to the home, proposing to undertake roof restoration work but requiring a cash deposit before the work is done. After that payment is made the older Australian never sees the person again and has no effective means of recovering their loss.

In all of the above circumstances, the older Australian is potentially able to pursue remedies in court but, as they are civil matters, legal aid is limited and generally plaintiffs must fund the proceedings themselves. This is obviously difficult when due to the very nature of the agreement which is the subject of the complaint, the older Australian may no longer have access to any or adequate savings. Even if the matter involves a minor civil claim, in which legal representation is generally not permitted, the process can sometimes be too daunting for the older Australian to contemplate.

Relevant legislation and law which is applicable includes the *Family Law Act 1975* (Cth) and the common law as it applies to contract law. Possible issues for older Australians arising from that legislation and law include:

- The provisions of the *Family Law Act* now give greater recognition to the fact that in many cases grandparents play an important role in the lives of their grandchildren. It is to be hoped that this recognition will ease some of the difficulties, referred to above, that older Australians face in the family law area.
- In the field of contract it has been noted that agreements between family members, particularly those concerning financial arrangements or transactions, can leave older Australians in a vulnerable position. For instance, due to ill health there may not be equal bargaining power between the older Australian and the family member concerned.
- The older Australian may also be reluctant to seek, or be actively discouraged from seeking, independent legal advice in relation to particular transactions involving close family members. The legal advice service provided by the Commission is of potentially great assistance to many older Australians in this area. Often a brief "one-off" telephone

call or appointment can alert the person to the possible pitfalls of what is being contemplated. The challenge remains to ensure the service is as accessible as possible so that if the decision is made to seek some assistance that can be provided as effectively and promptly as possible.

## **BARRIERS TO OLDER AUSTRALIANS ACCESSING LEGAL SERVICES**

Barriers to older Australians accessing legal services include:

- Persons in ill health, or in a frail condition, can experience physical difficulties in accessing legal services. As noted, even using telephone advice services can be impose difficulties for some people.
- Older people are sometimes more vulnerable to pressure from family members, and others, who may have not have the best interests of the older person in mind. For example, the older person may be subtly discouraged from seeking initial legal advice on an arrangement concerning money or land which arrangement has implications not fully understood by the older person.
- Donees' of enduring powers of attorney can sometimes take advantage of the considerable power that they exercise after the donor, usually an older Australian, has become incapacitated. In relation to this area it is noted that there may be scope for strengthening legislation to facilitate monitoring of the exercise of donees' duties.
- It appears that the judicial, or other, avenue of possible redress is, in some cases, at a level which may represent a barrier to older Australians. As noted, in South Australia, a proposal to allow the South Australian Guardianship Board to share with the Supreme Court the function of reviewing and monitoring the action of donees, or assessing a donor's legal capacity, is supported by the Committee.
- In South Australia, apart from the Litigation Assistance Fund, there are limited opportunities for assistance for legal representation in civil matters. Perhaps consideration could be given, in respect of the TPA, to give the ACCC scope for assisting individuals pursue matters in appropriate situations.
- Older Australians may not be aware of the existence of general legal advice services, or alternatively of the importance of seeking some advice in particular situations. It is therefore considered that the community legal education programs run by legal aid commissions, and community legal centres, are of considerable importance to reducing barriers to older Australians seeking legal assistance.