



Recognising the Rights of Older Australians

Submission to the

National Human Rights Consultation

June 2009

Dahni Houseman

Seniors Rights Victoria (SRV)
Level 4, 98 Elizabeth St
Melbourne VIC 3000

T: (03) 9655 2128

F: (03) 9639 6577

E: srvpolicy@cotavic.org.au

SRV acknowledges the substantial research and drafting assistance provided on a pro bono basis by Maddocks Lawyers (Laura Vickers, Rebecca Dickson and Rugare Gomo)

Seniors Rights Victoria (SRV) at Council on the Ageing (COTA) Victoria
Level 4, 98 Elizabeth St Melbourne VIC 3000
Phone: (03) 9655 2129 Fax: (03) 03 9639 6577
Email: srvadmin@cotavic.org.au Website: www.seniorsrights.org.au

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ACCRONYMS

Age Discrimination Act 2004 (Cth)	ADA
Aged Care Commissioner	ACC
Australian Human Rights Commission	AHRC
Charter of Residents Rights and Responsibilities	The Charter
Complaints Investigation Scheme	CIS
Convention on the Elimination of all forms of Discrimination Against Women	CEDAW
Convention on the Rights of People with Disabilities	CRDP
Council on the Ageing (Victoria)	COTA
Federation of Community Legal Centres (Vic)	FCLC
Human Rights Law Resource Centre	HRLRC
International Covenant on Civil and Political Rights	ICCPR
International Covenant on Economic, Social and Cultural Rights	ICESCR
International Convention on the Elimination of all Forms of Racial Discrimination	CERD
National Mental Health Policy	NMHP
Organisation for Economic Co-operation and Development	OECD
Public Interest Law Clearing House (Vic) Inc	PILCH
Trade Practices Act 1974 (Cth)	TPA
Victorian Civil and Administrative Tribunal	VCAT
World Health Organisation	WHO

PART 1 ABOUT THIS SUBMISSION

1. Executive Summary

- 1.1 Seniors Rights Victoria (**SRV**) welcomes the opportunity to contribute to the National Human Rights Consultation (**the Consultation**), supported by the Commonwealth Attorney General, the Honourable Robert McClelland, into human rights in Australia. We commend the Attorney-General on his initiative in undertaking the consultation.
- 1.2 SRV is a specialist community legal service in Victoria established specifically to work with older people experiencing elder abuse. As the centre of excellence on elder law and elder abuse SRV is well placed to comment on the impact of the current Commonwealth legal system on older people and the lack of human rights protection afforded by this jurisdiction. As SRV provides services solely to older people, or those self identifying as older, the focus of this submission will be limited to an examination of the issues experienced by this sector of the population with specific reference to the issue of elder abuse
- 1.3 As people age their contact with the health system tends to increase. With Australia's current ageing population, the number of people who will come into contact with the health system will arguably also increase. The health system sits exclusively within the Commonwealth jurisdiction. As such this jurisdiction is of particular importance to older people.
- 1.4 The second key area of interest to older Australians is the law governing the aged care sector. The legislation and policy which governs this sector, such as the *Aged Care Act 1997* (Cth), is situated within the jurisdiction of the Commonwealth.
- 1.5 This submission outlines those human rights that particularly affect older people and the ways in which these human rights could be better protected and promoted. A case study based approach has been utilised to best illustrate the need for greater human right protections for older Australians.
- 1.6 The core recommendation of this submission is that Australia should enact a Commonwealth Human Rights Act that protects and promotes all human rights enumerated in international covenants and treaties signed by Australia.
- 1.7 In addition to a Commonwealth Human Rights Act and to assist with the development of a human rights framework at the Commonwealth level it is foreseen that non-legislative measures, particularly education and improved access to legal services, will be implemented to assist in ensuring the rights of older people in Australia are adequately protected.
- 1.8 We call on the Commonwealth to respond to the 'Older People and the Law' Report¹ which contained key recommendations to strengthen the human rights of older people.

¹ Report of the Commonwealth House of Representatives Standing Committee, *Older People And The Law*, September 2007

2. Structure of this Submission

- 2.1 This submission is structured around the terms of reference of the Consultation, being:
- 2.1.1 Which human rights are most relevant to older people? (**Part 2**)
 - 2.1.2 Are the human rights of older people currently sufficiently protected and promoted? (**Part 3**)
 - 2.1.3 How could Australia better protect and promote the rights of older people? (**Part 4**).
- 2.2 Part 2 uses a human rights framework to identify the core issues currently faced by older Australians. It specifically considers the issue of elder abuse, that is, acts that cause harm to older people that are carried out by someone the older person knows and trusts, such as a family member, friend or carer.
- 2.3 Part 3 reviews the current legislative and policy protections for the human rights of older Australians.
- 2.4 Part 4 examines measures Australia should take to better protect the human rights of older people. It recommends the introduction of a Commonwealth Human Rights Act and notes that, given the often private and domestic nature of elder abuse, additional measures are required.

3. Recommendations

- 3.1 SRV submits that the National Human Rights Consultation should recommend:

Recommendation 1

The enactment of a Commonwealth Human Rights Act which reflects the rights and responsibilities contained with the international covenants and treaties signed by Australia with specific reference to the ICCPR and ICESCR

Recommendation 2

The Commonwealth respond directly to the 2007 Older People and the Law Report which made key recommendations to safeguard the human rights of older Australians

Recommendation 3

A national education campaign, targeted at employers, recruitment agencies, the financial sector and the public generally that explains elder abuse and identifies it as a human rights issue

Recommendation 4

A national information and education service for older people to provide information, telephone assistance and referral support about the human rights and legal avenues available to older people

Recommendation 5

A specific education campaign focusing on financial abuse of older people and financial literacy, targeting seniors, the general community and those in the financial sector, plus development of protocols by the financial sector

Recommendation 6

Increased funding for legal services for older people to ensure services such as SRV are available in each jurisdiction and are have long-term viability in ensuring access to justice and the provision of legal assistance to older people at risk of or experiencing elder abuse

Recommendation 7

Amendments to the *Age Discrimination Act 2004* (Cth) including the removal of any scope for arbitrary decision making, the creation of a legal right to enforce the provision of the Act where a breach has occurred and enhanced powers for the AHRC in relation to its ability to enforce provisions of the ADA

In making these recommendations SRV endorses the submissions of PILCH, the FLC and the HRLRC insofar as they recognise the need to protect rights of older Australians and advocate for a comprehensive Commonwealth human rights framework.

4. About SRV

- 4.1 Established in April 2008 and the only service of its kind in Victoria, SRV provides leadership across Victoria in responding to individual older people experiencing abuse, through a network of legal and other supports. It is jointly managed by COTA (as the lead auspice), PILCH, Eastern Community Legal Centre and Loddon Campaspe Community Legal Centre, under a joint venture agreement.
- 4.2 SRV has had the opportunity to develop expertise with regards to the experiences of older people and the law, with a focus on elder abuse. As a result SRV is well placed to comment on the current lack of human rights protections afforded to older people.
- 4.3 SRV seeks to eradicate the abuse of older people in all its forms, and to promote the rights of all older people in Victoria to achieve, or maintain, their independence in a world free of

ageism and abuse. SRV has a role in systemic advocacy, law reform and the promotion of a rights based attitude towards older people and abuse.

4.4 The aims of SRV are to:

- 4.4.1 Provide leadership in knowledge, policy and advocacy on issues of abuse and older people
- 4.4.2 Develop and implement education and awareness raising programs for older people and the general community
- 4.4.3 Develop and implement education programs for service providers and other professionals
- 4.4.4 Engage in collaborative partnerships and networks to improve responses to the needs of older people
- 4.4.5 Provide a key point of contact for older people, their families, professionals working with older people and the general community
- 4.4.6 Assist individuals to receive appropriate services and support to make informed decisions in relation to their situation
- 4.4.7 Provide free and accessible legal services that empower clients to meet their legal needs
- 4.4.8 Establish premises and infrastructure from which to provide information, support and legal services to the target community

4.5 In its first year of operation SRV received upwards of 1304 inquiries to its telephone advice line resulting in the provision of 439 advices and 95 referrals to the advocacy service. SRV lawyers provided 191 formal instances of information resulting in referrals to other agencies, legal services and service providers. Of the 95 referrals to the advocacy service 55 received short term counselling and support whilst the remaining 40 received substantial advice and information with many being referred on to other services for further assistance. An average of six community education sessions have been run each month since SRV began operations. In this same period 69 professional education sessions have been attended by 1814 individuals. Four pro bono outreach clinics have begun operation around metropolitan Melbourne. The clinics see an average of 6 clients per week and are staffed on a voluntary basis by lawyers from five of Victoria's middle and top tier law firms.

PART 2 WHICH HUMAN RIGHTS ARE OF MOST RELEVANCE TO OLDER AUSTRALIANS?

5. Introduction

- 5.1 This part identifies the human rights that have the most relevance to older people. Section 6 identifies rights that are violated in the public sphere (being those that a Commonwealth Human Rights Act could protect against), such as the treatment of older people in hospitals, aged care facilities and nursing homes, the right to be free from financial abuse, the right to education about human rights and the right to be free from discrimination.
- 5.2 Each of the human rights listed below should be set out in an Act along with clear pathways and remedies to redress any breach.
- 5.3 Section 7 examines at the issue of elder abuse, that is, harm caused to older people by people they know and trust, occurring largely in the private realm. Elder abuse involves human rights violations, but not always of the type that could be targeted directly by a Human Rights Act. Accordingly SRV recommends a comprehensive human rights framework capable of fully protecting the rights of older people.

6. Examining the problems faced by older Australians through a human rights framework

- 6.1 SRV submits that Australia has an obligation to promote and protect each of the human rights contained in the international covenants and treaties signed by Australia.
- 6.2 There are certain human rights and freedoms that are particularly important to older Australians. This part looks at those rights of older people that could be better protected by the existence of a Commonwealth Human Rights Act.
- 6.3 These rights are a combination of civil and political rights and economic, social and cultural rights. SRV does not distinguish between the two, as the absence of one type of human right affects an individual's ability to enjoy the other.
- 6.4 **The right not to be subject to degrading treatment (ICCPR Article 7)**
- 6.4.1 Degrading treatment is treatment that humiliates or debases a person. It, along with the prohibition on torture and other cruel and inhuman treatment, is what is called an 'absolute' right, meaning that it is not subject to a balance between the rights of the individual and the rights of the wider community. Despite this, the prohibition against torture and ill-treatment of people is not yet comprehensively enshrined in Australian law.²
- 6.4.2 The right to be free from degrading treatment is especially relevant for older people living in Commonwealth Aged Care facilities and nursing homes. This is because their treatment is entirely dependent on facility staff and their carers. Older people

² See *Concluding Observations of the Committee against Torture: Australia*, UN Doc CAT/C/AUS/CO3 (2008).

have limited ability to protect themselves and assert their rights in an environment where efficiency is often the main priority of caregivers.

- 6.4.3 A fine line exists between appropriate treatment and breach of human rights. In the context of carers this may occur unintentionally. That is the treatment does not need to be intentional to be degrading. As such it would be of benefit older people if carers were obliged to turn their minds to this human right in carrying out their functions.
- 6.4.4 The line between appropriate care and breach of human rights exists in all environments where an older person is dependent upon the care of another. This may occur in a number of differing environments such as aged care facilities, nursing homes or in the older person private home.
- 6.4.5 The balancing of these obligations is often most difficult within the confines of an older persons private home, especially where the care is being delivered by friends or family members. Carers of this nature do not perform their duties bound either by professional codes of conduct or in accordance with organisational requirements. Rather, they are often times acting out of the goodness of their heart.
- 6.4.6 Older people reliant on the care of others are a vulnerable population. Whilst the work of carers is both admirable and of vital importance to our society the importance of ensuring the rights of the older person are not negated is paramount.
- 6.4.7 Although often unintentional many older people suffer from degrading treatment whilst in care. The right to be free from degrading treatment is not currently enshrined within Australian law. Yet the right to be free from degrading treatment is of great importance to older people who are often reliant on the actions of others to ensure they are able to maintain a quality of life.

Case Study Example 1

A Victorian welfare organisation refused to visit Robert, whose house was considered in a state of squalor and uninhabitable. The organisation made an application to VCAT for the appointment of a guardian for Robert. VCAT found that Robert did not have a disability and refused to appoint a guardian. The response from the service provider was to suspend its services to Robert. No other service providers agreed to assist Robert in the home. SRV advocacy assisted Robert in finding an alternative service provider.³

³ The following case studies are drawn from the experiences of SRV staff. Where the case example is derived from another source, this source has been referenced accordingly

Case Study Example 2

Older people who do not have incontinence being forced to wear incontinence pads because staff say they do not have time to take them to the toilet.⁴

Case Study Example 3

A consultant came across an older woman on a hospital ward in London who was crying out in distress. The woman was in a wheelchair and, when the consultant lifted up her blanket, she discovered that the woman had been strapped in and that this was why she was so upset. Members of staff explained that they had fastened her into the wheelchair in order to stop her walking around because they were fearful she might fall over and hurt herself. The consultant told the staff members that, while their concerns were understandable, strapping the woman into a wheelchair for long periods was an inappropriate response because her human rights had not been taken into account. The consultant pointed out that this could be considered degrading treatment given the impact on the woman. Staff quickly agreed to unstrap her and, after she was assessed by a physiotherapist, the staff was encouraged to support her to improve her mobility.⁵

Case Study Example 4

A nursing home in London had a practice of routinely placing residents in special 'tilt-back' wheelchairs, regardless of whether they could walk or not. As a consequence, residents who were able to walk unaided were stopped from doing so. This had a severe impact on their ability to make choices about everyday activities, as well as their capacity to feed themselves and use the bathroom. A consultant pointed out to staff members that their failure to consider the different circumstances of individual residents was contrary to human rights principles. She drew particular attention to the right to respect for private life, which emphasises the importance of dignity and autonomy and the right not to be treated in a degrading way. The 'one-size-fits-all' practice was stopped as a result. Residents who could walk were taken out of the chairs and encouraged to maintain their walking skills.⁶

6.5 The right to respect of private life (ICCPR Article 17) and right to the protection of families (ICCPR Articles 23 and 24 and ICESCR Article 10)

6.5.1 The right to privacy includes the right not to have your family or home life unlawfully or arbitrarily interfered with. Similarly, the right to protection of families protects a family's ability to live together and enjoy each other's company.

6.5.2 The right to respect of private life and the rights to the protection of families are relevant to older people using health services or going into residential care, who

⁴ British Institute of Human Rights, *The Human Rights Act – Changing Lives*, [7] available at <<http://www.bihhr.org.uk/sites/default/files/The%20Human%20Rights%20Act%20-%20Changing%20Lives.pdf>>.

⁵ *Ibid*, second edition, 6.

⁶ *Ibid* 15.

may be forced to live in different residences from their partners or suffer a disruption to the rhythm of their family lives without any reasonable justification.

- 6.5.3 Recognition of the right to the protection of the family must recognise the diversity of families. Accordingly recognition of same sex partnerships must be included in the definition of family.
- 6.5.4 Current Commonwealth privacy legislation predominantly relates to personal information only. There is no general right to respect of private life in Australian legislation or common law. Similarly, Australian law offers only limited protections for the family unit.

Case Study Example 5

John and Joan married later in life after meeting at the residential care facility in which they both resided. Joan's health deteriorated and she was subsequently moved to an aged care facility which better met her health requirements. John continued to visit with Joan and take her out for excursions whenever possible. Joan's daughter was not happy with this arrangement and began proceedings in VCAT to have herself appointed as Joan's guardian with a view to limiting John's access to Joan. John approached SRV for assistance and we were able to negotiate with both Joan's daughter and the aged care facility to ensure John had continued access to Joan and was able to take her on excursions for specific purposes.

Case Study Example 6

A husband and wife had lived together for over 65 years. He was unable to walk unaided and relied on his wife to help him move around. She was blind and used her husband as her eyes. They were separated after he fell ill and was moved into a residential care home. She asked to come with him but was told by the local authority that she did not fit its admission criteria. A public campaign launched by the family, supported by the media and various human rights experts and older people's organisations, argued that the local authority had breached the couple's right to respect for family life. The authority agreed to reverse its decision and offered the wife a subsidised place so that she could join her husband in the residential care home.⁷

Case Study Example 7

Arthur, a 75 year old man lives in a residential facility in Victoria. Julia is his only child and is also his financial power of attorney. Arthur is experiencing some memory loss but is still lucid. Julia made a decision to exercise the use of the power of attorney. Julia instructed the facility that all mail should be redirected to her. The facility commenced redirecting mail to Julia without the knowledge or consent of Arthur

⁷ Above n 3, 14.

6.6 The right to freedom from arbitrary detention and humane treatment in detention (ICCPR Articles 9, 10 and 12)

6.6.1 This right is of specific relevance to older people in aged care facilities and nursing home who are detained in locked wards without reasonable justification.

Case Study Example 8

Wanda was placed in the locked ward of her nursing home following concerns of the staff regarding her capacity to look after herself. However, there was no evidence to support Wanda's placement in such a ward. After seeking legal assistance and the appointment of a guardian Wanda was moved back into the general section of the nursing home, on the basis that there was no evidence to sustain her being kept in the locked ward.

6.7 The right to health (ICESCR Article 12)

6.7.1 The right to health provides that people are entitled to access services that afford them the opportunity to achieve the highest attainable level of health. A country's available resources need to be taken into consideration when determining the funding and attention that is given to promoting health and well-being. Ensuring population health requires substantial funding across a range of sectors, including the health sector. This is because physical and mental health are essential pre-conditions for the enjoyment of many other rights.

6.7.2 The right to health is important to older people as they often require greater and more intensive resources to ensure the delivery of appropriate and adequate care across both aged care facilities and other health care services than is required by other sectors of the population. There is no general right to health in Australian law. This right will become more pertinent with the needs of our ageing population.

Case Study Example 9

Nora had been admitted to hospital due to illness. After the prescribed amount of time the hospital sought to move her on. A determination was made by the hospital that Nora's health needs could be met at home. Nora lived alone and her daughter was only able to visit for a couple of hours a day after work. Neither Nora nor her daughter were comfortable with the hospital's decision as they did not feel that Nora was well enough to be moved or that her health needs would be adequately met once she returned home. The hospital refused to engage in a discussion with either Nora or her daughter regarding their concerns.

6.8 The right to access (liberty of movement and freedom of association) (ICCPR Articles 12 and 22)

6.8.1 In the context of older people, the right to access, liberty of movement and freedom of association is important because it ensures residents in aged care facilities and nursing homes are allowed access to family and friends. It further limits the ability

of care providers to arbitrarily restrict older people to their place of residence without evidence supporting such a restriction.

Case Study Example 10

Olive sought legal assistance on behalf of her friend, Laura, a resident of an aged care facility. Olive was concerned for Laura as a guardianship and administration order had recently been granted. However, Laura did not understand what this meant. Through Olive, Laura arranged for a lawyer to visit and explain the order. When the lawyer (and an interpreter) arrived at the aged care facility they were refused entry. This was despite having contacted both the guardian and administrator seeking permission to visit with Laura. The lawyers were able to use the Patients' Charter of Rights to gain access to Laura. However, there was much confusion on the parts of the guardian, administrator and the aged care facility as to Laura's rights whilst a resident of the facility.

Case Study Example 11

Maria was refused access to visit her friend who resided in an aged care facility, based on the directions of the friend's attorney. The attorney did not have the power to refuse access and neither did the aged care facility.

6.9 The right to be free from financial abuse

6.9.1 Financial abuse has been defined as the 'illegal or improper exploitation or use of funds or resources of the older person'.⁸

6.9.2 It includes:

- (a) taking or misusing funds or property without permission;
- (b) abusing joint signatory authorities or forging or forcing signatures;
- (c) denying access to use of funds or property;
- (d) using a power of attorney in a manner which is not in the interests of the older person;
- (e) over-charging or not delivering care-giving services;
- (f) getting an older person to go guarantor without sufficient knowledge to make an informed decision;
- (g) promising long-term care in return for money or property; and
- (h) improper changes to, or use of, legal documents such as power of attorney, insurance policies and wills.⁹

⁸ WHO (2002) *Missing Voices: Views of Older People on Elder Abuse*, [1.2].

⁹ Above n1, [2.35].

- 6.9.3 There are a number of broader societal factors which contribute to the financial abuse of older people, including negative societal attitudes towards ageing, the erosion of adult children's sense of responsibility for parents, lack of financial literacy amongst older people (especially women or those with language barriers), lack of protective measures and financial abuse not being acknowledged as both a phenomenon and a problem.
- 6.9.4 Financial abuse is a complex issue that is perpetrated against older people in ways that range from illegal acts, acts that occur because of the older person's diminished capacity to understand their circumstances, lack of financial literacy, acts which are unintentional and without malice but still detrimental to the older person and failures to act in a timely manner to protect an older person's interests.¹⁰
- 6.9.5 Whilst some incidents of financial abuse are captured by the current legal framework, others are not. In contrast, by tackling the problem through a human rights framework, all incidents of financial abuse can be captured. Financial abuse potentially violates several human rights, including rights to social security, protection of the family, privacy and education.
- 6.9.6 The government can target financial abuse through a number of measures including the enactment of specific legislation supported by education campaigns directed towards older people, the public and the financial sector and through the development of industry-wide protocols in the financial sector for identifying and reporting financial abuse.¹¹ SRV does not support the mandatory reporting of any form of elder abuse.

Case Study Example 12

Nine months ago Vivian was diagnosed with a brain tumour. Following an operation, she has successfully completed courses of both chemotherapy and radiation. Despite being given only 6 months to live at the time of diagnosis, Vivian's prospects have greatly improved. Whilst Vivian was in hospital recovering from surgery her sisters (both of whom jointly held financial power of attorney) sold Vivian's home and all her belongings. As a result Vivian is now living in a nursing home. However, she is capable of living alone and would like to return to independent living. Unfortunately she is not getting the support to do so.

Case Study Example 13

A son was operating his father's financial affairs using an enduring power of attorney (EPOA) but also managing his pension under a nominee arrangement. To collect more money he failed to notify Centrelink that his father lived with him and that he was renting the father's house for considerable profit (retained by the son). Centrelink discovered the situation and raised a \$12,000 overpayment against the father, as the son knew he would not be responsible for any debt under Centrelink legislation. The son dropped the father off at his sister's house, emaciated and with only with the clothes he stood up in. Before the

¹⁰ Ibid [2.9].

¹¹ Ibid [2.97] to [2.113].

Adult Guardian could get involved in the retrieval of the rent money and protecting the remaining assets the son had sold the father's house and moved interstate. Both the nominee form and EPOA were signed by the father well after he was deemed not to have capacity by the family doctor

6.10 The right to be free from discrimination (ICCPR Article 26)

6.10.1 As discussed in section 9.2, Australia already has legislative protections in place to guard against age discrimination. However, human rights protection is still a live issue for many older people and not just in the workplace.

6.10.2 Section 13.4 recommends changes that could be made to the Commonwealth Age Discrimination Act (**ADA**) to strengthen current anti-discrimination provisions. However, the right to be free from discrimination should also be included in a Commonwealth Human Rights Act reinforcing discrimination as a human rights issue.

Case Study Example 14

The aged care facility in which Rhonda resides sought an administration order at the VCAT. The application was made on the basis that the facility managers believed that, as an older woman, Rhonda was being unduly influenced by a male resident of the facility who had a history of attempting to withdraw substantial funds from co-residents' bank accounts. The aged care facility did not express any concerns regarding Rhonda's capacity. Rhonda did not dispute the fact that she had been befriended by the male resident. However, she did not believe that undue influence had been exerted and, further, she had no intention of providing her bank account details to the other resident.

6.11 The right to an adequate standard of living, including adequate food, clothing and housing (ICESCR Article 11)

6.11.1 The right to an adequate standard of living is not expressly protected in Australian law. In *Green v Daniels* (1977) 51 AJJR 463, Stephen J of the High Court went so far as to say that 'unemployment benefit is no more than a gratuity, to payment of which the plaintiff can have no rights enforceable at law'.

6.11.2 Some laws, such as those that enable the provision of Centrelink payments, improve older people's ability to access an adequate standard of living. However, many older people still do not have adequate or affordable housing or access to adequate food and water. In 2008, the OECD reported that fifty percent of single people aged over 65 live on less than half of the median average income (being the definition of living in poverty).¹² As Australia's population ages, government respect for the right to an adequate standard of living will become even more crucial to older people.

¹² Organization for Economic Cooperation and Development, *Country Note: Australia, Growing Unequal?: Income Distribution and Poverty in OECD Countries* (2008), 1.

6.11.3 The current maximum Aged Pension rate payable to single people over the age of 65 is \$14, 814.80, or just under \$285 per week.¹³ This figure places older Australians whose sole income is the Aged Pension approximately \$50 below the poverty line.¹⁴ Even with the \$30 weekly pension rate increase announced in the 2009-2010 Federal Budget this still leaves older Australians in a precarious position financial position.

6.12 **The right to education, and more specifically education about human rights (ICESCR Article 13)**

6.12.1 Education is both a human right in itself and a valuable means of realising other human rights. It has particular relevance to older people as many of the problems older people experience derive from a lack of awareness of their legal rights and the available means to enforce them. This is especially the case with financial literacy which ensures that older people have the skills to manage their finances effectively, avoid being defrauded and to know where they can seek recourse if financial abuse does occur.

7. The private sphere - human rights violated by elder abuse

7.1 This submission supports the enactment of a Commonwealth Human Rights Act that targets acts and decisions of public bodies that violate the rights of older people. In addition to a Human Rights Act further measures for the private sphere will be required to target harm caused by someone an older person knows and trusts, such as family, friends or carers, a phenomenon described as 'elder abuse'.

7.2 The Older People and the Law Report 2007 by the Commonwealth House of Representatives Standing Committee on Legal and Constitutional Affairs identified and made recommendations concerning elder abuse.¹⁵ However, these have not been responded to by the Commonwealth government.

7.3 **Defining elder abuse**

7.3.1 Elder Abuse is defined by the WHO as

“. . . a single or repeated act or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person”¹⁶

7.3.2 That is elder abuse is any knowing, intentional, or negligent act by a caregiver or any other person that causes harm (physical, psychological, financial or social) or a serious risk of harm to a vulnerable adult, where the older person and the person carrying out the action or behaviour are in a relationship which involves trust, dependency or proximity.

¹³ Centrelink, *Australian Pension News*, Issue 24, April 2009, 4

¹⁴ Melbourne Institute of Applied Economic and Social Research, *Poverty Lines: Australia*, December Quarter 2008, 3

¹⁵ Above n 1, Recommendations 1 – 15 and Section 2 of the report

¹⁶ WHO, *A Global Response to Elder Abuse and Neglect*, 2008, 1

- 7.3.3 Elder abuse presents in many forms and includes a range of potential harms. Examples of these include:
- (a) physical (such as slapping, pushing, burning, physical restraint, inappropriate use of medication);
 - (b) psychological (such as verbal intimidation, threats, shaming, loss of privacy, humiliation, loss of dignity, harassment, isolation, deprivation and withholding of affection);
 - (c) sexual (such as rape, indecent assault and sexual harassment);
 - (d) financial (discussed at 6.9); and
 - (e) neglect (such as leaving the older person with no means to care for his or herself and with poor hygiene and personal care, the presence of bedsores and a lack of social, cultural, intellectual or physical stimulation).
- 7.3.4 While some forms of elder abuse are extreme and involve criminal acts (and are thus captured by the current law), more often the problem is subtle and hidden, occurring between older people, their families, neighbours, carers or financial planners.
- 7.3.5 In the words of the Victorian Elder Abuse Prevention Project:
- The abuse and neglect of older people is a complex problem. While it can occur in institutional care, such as aged care residential services or hospitals, it is more likely to occur in the community. As such, it has often been referred to as a hidden problem, under-recognised and under-reported due to a stigmatisation and lack of community awareness.¹⁷
- 7.3.6 In addition to a Commonwealth Human Rights Act further protections are required to ensure people and activities falling outside its jurisdiction are still afforded sufficient protections. Abusive acts constituting elder abuse are not always perpetrated by public bodies or people carrying out public functions and as such are not afforded the protections a Human Rights Act has to offer. Additional measures are required to ensure that the protection of human rights carries over to the private sphere.
- 7.3.7 Accordingly Part 4 of this submission recommends a range of reform measures to protect the rights of older people in addition to a Human Rights Act.
- 7.3.8 These include education of the community, recognising and identifying elder abuse as a human rights issue, education of seniors about their rights, an increase in available services and rates of financial literacy and provision of additional legal services to enable older people to make use of protective laws. The Older People and the Law Report recommended this at Recommendation 7.

¹⁷ Report on the Elder Abuse Prevention Project (2005) *Strengthening Victoria's Response to Elder Abuse*, 12.

7.4 Statistics

- 7.4.1 It is difficult to document the prevalence of elder abuse. Much of the problem is hidden and data is not collected in a systematic manner. In 2003, the Australian Society of Geriatric Medicine in their Position Statement on Elder Abuse estimated a 3-5% incidence of elder abuse in the community, as did the Victorian Elder Abuse Prevention Project in 2005.¹⁸ The American National Elder Abuse Incidence Study in 1998 results indicate that over five times as many new incidents of abuse and neglect were unreported than those that were reported.¹⁹
- 7.4.2 Research indicates that the age bracket 75 to 85 years is the time when elder abuse is most likely to occur.²⁰ No statistics are available for the number of people experiencing elder abuse who currently fall within the specific age group.
- 7.4.3 In 2007, there were approximately 2.8 million people in Australia aged over 65 and 344,000 aged 85 and above. By 2056, it is estimated there will be approximately 7.2 million people over 65. By then, people aged 65 years or over will make up approximately 25 per cent of Australia's population, compared to only 13 per cent in 2007.²¹ Similarly, by 2056, people aged 85 years or over will make up 5 per cent to 7 per cent of Australia's population, compared to only 1.6 per cent in 2007.²²
- 7.4.4 As Australia's population ages the prevalence of Dementia is projected to increase. According to the Access Economics 'Making Choices' report²³ Dementia prevalence will increase from 230,000 in 2008 to 465,000 in 2030 and to over 730,000 in 2050.
- 7.4.5 As a mental health issue, Dementia falls within one of the seven National Health Priority Areas²⁴. Older Australians who have Dementia are vulnerable in relation to their human rights as many become more reliant on a range of services as they age. The National Mental Health Policy 2008 (NMHP) recognises ageing as a risk factor for deteriorating mental health.
- 7.4.6 In addition to recognising ageing as a risk factor the NMHP further acknowledges that:

People with mental health problems . . . are vulnerable to human rights violations in the community and in a variety of services due to stigma, discrimination and the absence of legal protection.²⁵

¹⁸ Ibid, 12.

¹⁹ National Center on Elder Abuse at the American Public Human Services Association (1998) *The National Elder Abuse Incidence Study* 9. Available at <http://purl.access.gpo.gov/GPO/LPS104188>.

²⁰ Teaster P (2002) *A Response to the Abuse of Vulnerable Adults: the 2000 Survey of State Adult Protective Services*, National Centre on Elder Abuse, Washington DC.

²¹ Above n 1, [1.1]

²² Australian Bureau of Statistics, Report 4102.0 - Australian Social Trends, available at [http://www.abs.gov.au/ausstats/subscriber.nsf/LookupAttach/4102.0Data+Cubes-25.03.091//\\$File/41020_population_indicators_2008.xls](http://www.abs.gov.au/ausstats/subscriber.nsf/LookupAttach/4102.0Data+Cubes-25.03.091//$File/41020_population_indicators_2008.xls).

²³ Access Economics (April 2009) *Making Choices: Future dementia care: projections, problems and preferences*.

²⁴ See generally Australian Institute of Health and Welfare, National Health Priority Areas website <<http://www.aihw.gov.au/nhpa/index.cfm>> accessed on 9 June 2009.

²⁵ Commonwealth of Australia (2009) *National Mental Health Policy 2008*, page 13

- 7.4.7 Older people from non English speaking backgrounds who also have dementia are particularly vulnerable to human rights abuses as they commonly revert to their native tongue making access to information difficult if it is not available their native language.
- 7.4.8 The ageing of Australia's population, as well as the increasing number of adults with dementia, will contribute to anticipated increases in prevalence of elder abuse cases if action is not taken. The enactment of a Commonwealth Human Rights Act and associated measures ensuring adequate human rights protections in the private sphere will assist in reducing the prevalence of elder abuse.

PART 3 ARE THE HUMAN RIGHTS OF OLDER AUSTRALIANS SUFFICIENTLY PROMOTED AND PROTECTED?

8. Introduction

- 8.1 Human Rights are currently not sufficiently promoted or protected within the Commonwealth jurisdiction. Due to the nature of Australia's legal system the signing of international human rights documents does not automatically provide protection of the relevant rights within Australia. The human rights contained within international documents are only enlivened when the Commonwealth enacts legislation reflecting their international obligations under such documents.
- 8.2 Although section 15AB of the *Acts Interpretation Act 1901* (Cth) contains limited provisions for the use of international documents in the interpretation of Commonwealth legislation, this is not a sufficient mechanism for ensuring that the relevant human rights are promoted and protected in Australia.
- 8.3 Section 9 of this submission reviews the current legal and policy mechanisms available at both the international and Commonwealth level for protecting human rights with a specific focus on the rights of older people.
- 8.4 Although the Commonwealth legislation and schemes referred to below were arguably enacted to assist in limiting human rights breaches, for a variety of reason many of them have proven unsuccessful.

9. Current mechanisms for protecting and promoting human rights of older people

9.1 International protection

- 9.1.1 The International Bill of Rights (comprising the Universal Declaration of Human Rights, the ICCPR and the ICESCR) affords international recognition of human rights to the individuals of its signatory states.
- 9.1.2 In addition to the rights recognised in the International Bill of Rights, the CERD, the CEDAW and the CRPD respectively provide protection against racial discrimination, discrimination levelled against women and for the dignity, autonomy and freedom of people with a disability.
- 9.1.3 In addition, the United Nations Principles for older people (**UN Principles**) aim to ensure that priority attention is given to 'the independence, participation, care, self-fulfilment and dignity of older people'.²⁶ The UN Principles recognise that, although an individual's needs change as he or she ages, older people should remain active members of society, whilst having access to appropriate social, health care and legal services.

²⁶ United Nations Programme on Ageing, *United Nations Principles for older people*. Available at http://www.un.org/ageing/un_principles.html#Principles.

9.1.4 Australia is a signatory to the ICCPR, ICESCR, CERD, CEDAW and CRPD but, as yet, has not fully incorporated the provisions of these documents into Australian domestic law. This means that, within Australia, these documents do not guarantee that a breach of human rights will give rise to a cause of action or legal remedy.

9.1.5 Certain Commonwealth Acts recognise some of Australia's international human rights obligations and provide a degree of protection to the rights of older people. These are set out below.

9.2 Commonwealth protection

Age Discrimination Act 2004

9.2.1 The Age Discrimination Act (**ADA**), in part, gives domestic recognition to Australia's international obligations under the ICCPR, ICESCR and the UN Principles.

9.2.2 The ADA distinguishes between discrimination on the basis of age that is **direct** and discrimination that is **indirect**. The former occurs where one individual treats another less favourably by reason of that other's age. In comparison, indirect discrimination occurs where one individual imposes on another person a condition, requirement or practice, which, by reason of that other person's age, is an unreasonable condition, requirement or practice (sections 14 and 15 of the ADA).

9.2.3 However, the protection of the rights of older people under the ADA is limited in that the ADA does not protect people against discrimination on the basis of age if the act of discrimination (or omission giving rise to discrimination) is carried out:

- (a) by an organisation which offers membership, services and benefits to people who voluntarily elect to become members;
- (b) in direct compliance with, for example, taxation, superannuation, social security and credit laws; and
- (c) by an individual's relative or carer.

9.2.4 Key recommendations of the Older People and the Law Report related to the ADA and discrimination. See Section 6, Recommendations 42-44 of the report. This has not yet been responded to by government.

The Aged Care Complaints Investigation Scheme

9.2.5 The Aged Care Complaints Investigation Scheme (**CIS**) was established on 1 May 2007 with a view to 'helping to safeguard older Australians in care'.²⁷ The CIS model is an expansion of the previous Complaints Resolution Scheme which was only able to hear substantiated complaints:

²⁷ The Hon Christopher Pyne MP, Minister for Ageing, 'Aged care complaints to get a better hearing' (Press Release, 1 May 2007)

It was envisaged that the move to a more accessible complaints model would increase the number of issues raised and subsequent activity by the CIS.²⁸

- 9.2.6 The CIS is available to any person (**the informant**) who wishes to make a complaint or is concerned about an Australian Government residential or community aged care service. The complaint must be related directly to potential breaches of the service providers' responsibilities under the *Aged Care Act 1997* (Cth) and/or the *Investigative Principles 2007* (Cth).
- 9.2.7 Following a complaint, a delegate from the Office of Aged Care Quality and Compliance may choose to investigate the allegation and where a breach is identified issue a 'notice of required action' to health care providers who have failed to meet their responsibilities under the *Aged Care Act 1997* (Cth) or the *Investigative Principles 2007* (Cth).
- 9.2.8 If the informant is dissatisfied with the delegate's findings their only recourse is to have the decision referred to the Aged Care Commissioner (**the Commissioner**). However, the Commissioner has neither an overseeing nor determinative role. As such any finding by the Commissioner may be ignored by the delegate. This is of great concern as in 2007-2008 the Commissioner recommended that 50% of the matters that came before her be varied or set aside.²⁹
- 9.2.9 As the delegate is not independent, part of the role of the Commissioner, as an independent body, is to review the manner in which the CIS handles complaints. This lack of independence on the part of the delegate raises two concerns:
- (a) This is arguably a breach of the obligation to provide independent investigation. This obligation has been recognised in regard to a number of rights including the right to be free from degrading treatment;³⁰ and
 - (b) The delegate is in effect making decision on behalf of the Minister for Ageing and as such is unlikely to make determinations which go against government policy.
- 9.2.10 Current investigations undertaken by the CIS are inherently flawed as their investigations centre not around whether the alleged breach occurred, but rather on whether the service provider has complied with the mechanisms required by the Aged Care Standards and Accreditation Authority.
- 9.2.11 As such the CIS is ostensibly reinforcing practices of service providers which it was established to assist in eliminating. Further, the investigative process as engaged in by the CIS is arguably a breach of the right to a fair hearing. As the Human Rights Committee observed in its General Comment on the right to equality before

²⁸ Australian Government, Department of Health and Ageing, Office of Aged Care Quality and Compliance, *Report on the Operation of the Office of Aged Care and Compliance 1 July to 31 December 2007*, 1

²⁹ Commonwealth of Australia, Aged Care Commissioner, *Annual Report 1 July 2007 – 30 June 2008*

³⁰ As contained within the United Nations Covenant Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

the law and a fair hearing, what is protected by the right to a fair hearing “is based on the nature of the right in question rather than on the status of one of the parties or the particular forum provided by domestic legal systems for the determination of particular rights”.³¹ The concept of what is protected by the right includes “areas of administrative law”.

Trade Practices Act 1974 (Cth)

- 9.2.12 Part IVA of the *Trade Practices Act 1974* (Cth) (**TPA**) prohibits a corporation from engaging in unconscionable conduct in its supply of goods and services to individuals (sections 51AA and 51AB). In assessing whether a corporation has conducted itself in an unconscionable manner, a court may have regard to the relative strengths of the bargaining positions of the corporation and consumer and whether the corporation used any undue influence, pressure or unfair tactics against the consumer (section 51AB(2)).
- 9.2.13 Part V of the TPA relates to consumer protection. It prohibits a corporation, in its supply of goods and services to an individual consumer, from engaging in conduct which:
- (a) is misleading or deceiving (section 52);
 - (b) constitutes a false or misleading representation (section 53); or
 - (c) imposes physical force, undue harassment or coercion on that individual consumer (section 60).
- 9.2.14 Parts IVA and V of the TPA may assist the protection of the rights of older people by ensuring that older people do not receive unfair or unequal treatment in their dealings with providers of goods and services. However, it is important to note that both Parts do not apply to conduct which relates to the supply or possible supply of 'financial services'.
- 9.2.15 Section 12BAB of the *Australian Securities and Investment Commission Act 2001* (Cth) defines 'financial service' to include providing financial product advice or advice relating to financial investments (see also section 12BAA). Therefore, in relation to the provision of financial advice relating to, for example, the investment of retirement savings, Parts IVA and V of the TPA may not apply.

Charter of Residents Rights and Responsibilities (the Charter)

- 9.2.16 The Charter outlines rights and responsibilities of residents of residential care services as defined by the *Aged Care Act 1997* (Cth). The charter contains 21 enumerated rights. Its focus is predominantly on ensuring that residents are engaged in all decisions which will impact on their well-being, be they decisions regarding health, accommodation or access to legal services.

³¹ UN Human Rights Committee, *General Comment 32* (1997) at [16].

- 9.2.17 Although the Charter itself is not specifically contained within the *Aged Care Act*, it is the enumeration of the User Rights Principles as outlined in Part 4.2 of the *Aged Care Act*. The *Users Rights Principles 1997* (Cth) (the Principles) have been drafted in accordance with section 96-1(1) of the *Aged Care Act*. The Charter is contained with schedule 1 of the Principles.
- 9.2.18 Although designed to promote and protect the rights of residents in Commonwealth Aged Care facilities, the rights contained within the Principles are often breached for a variety of reasons including a lack of awareness on the part of service providers and a limited understanding of the scope of these rights.
- 9.2.13 Further, as a legal document the rights and responsibilities contained within the Principles do not hold the same weight as equivalent rights contained within an act of Parliament.

9.3 Protection via civil remedies

- 9.3.1 In its September 2007 report "Older People and the Law", to the Commonwealth of Australia, the Standing Committee on Legal and Constitutional Affairs recognised that civil remedies are available to older people who have suffered financial abuse. The Committee cited part of the submission received from the Assets and Ageing Research Team from the University of Queensland. The Team outlined possible limitations on the availability and benefits of civil remedies:

There is redress available ... for all people, including older people, who have been targeted for fraud, theft or undue influence ... Civil remedies for intentional misuse of property may also apply in certain circumstances. Undue influence and asset stripping that occurs as a result of such influence may also have common law redress. However, such remedies depend first on the fraud or theft being reported and second, depending upon the older person being prepared or able to press charges or to engage legal counsel. Both remedies are unattractive largely because financial abuse of older people usually occurs in the context of a relationship of trust.³²

- 9.3.2 Therefore, whilst civil remedies (and criminal avenues) are available to older people seeking to redress acts of fraud, theft or undue influence which have caused them loss, because these remedies are time and cost intensive, they are not always accessible where urgent remedy is required and, therefore, may be of limited assistance.

³² *Older people and the Law*, above n 8, [2.59].

PART 4 HOW COULD AUSTRALIA BETTER PROMOTE AND PROTECT THE RIGHTS OF OLDER AUSTRALIANS?

10. Introduction

This part examines the measures the Consultation should recommend be taken to better protect the rights of older Australians. Section 11 explains why SRV considers that a Human Rights Act would be beneficial for older people. Section 12 sets out the key elements of a Human Rights Act. Finally, section 13 outlines additional measures required to complement a Human Rights Act, specifically education of the community, the financial sector and older people themselves and increased access to legal services.

11. A Commonwealth Human Rights Act

11.1 SRV supports the normative role that a Human Rights Act would play in fostering a culture of increased understanding and respect for human rights. This type of attitudinal change would travel beyond the realm of public decision-making into the private lives of older people and those they interact with.

11.2 A requirement for the Commonwealth government and its employees to consider human rights when making laws and policies will benefit older people. A comprehensive human rights framework at the Commonwealth level would extend the great gains made by the anti-discrimination movement to other norms of human rights such as fairness, dignity and respect which may fall outside the protection offered by current anti-discrimination measures for older people.³³

11.3 Of most importance to older people is the framework a Human Rights Act would provide for public service providers (and their contractors) to improve older people's experience of public services, particularly health care services. The active process of identifying and balancing human rights (against other rights and the needs of the community generally) will turn the minds of public service providers to the human rights issues involved in caring for older people. As the examples detailed in Part 2 demonstrate, often the human rights violations experienced by older people are not done with malice or even intention, but from lack of awareness about the human rights issues involved.

11.4 There have been some significant human rights cases heard in the United Kingdom as a result of the introduction of the *Human Rights Act 1998* (UK) which illustrate the points raised in the case study examples in Part 2. Summaries of these cases are provided in the annexure to this submission.

British Institute of Human Rights, *The Human Rights Act – Changing Lives* (second edition) [24] available at <<http://www.bihhr.org.uk/sites/default/files/BIHR%20Changing%20Lives%20FINAL.pdf>>

12. Key elements of a Human Rights Act

12.1 SRV submits that a Commonwealth Human Rights Act should:

- 12.1.1 incorporate the human rights protections in the ICCPR and ICESCR, specifically the rights referred to in section 6 above;
- 12.1.2 include an express provision protecting a person's freedom from discrimination on the basis of age;
- 12.1.3 create a free-standing cause of action for breaches of civil, political, economic, social and cultural rights protected by the Act;
- 12.1.4 be based on a legislative dialogue model with a general limitations provision that allows for rights to be limited where reasonable and proportionate; and
- 12.1.5 be extended to public authorities and those carrying out functions of a public nature, ensuring that the definition of public authorities is broad enough to ensure that private entities performing outsourced public functions are part of the human rights dialogue.

Recommendation 1

The enactment of a Commonwealth Human Rights Act which reflects the rights and responsibilities contained with the international covenants and treaties signed by Australia with specific reference to the ICCPR and ICESCR

13 Other measures necessary to ensure an effective Human Rights Act

13.1 Educating the community

13.1.1 In April 2009, the Human Rights Committee of the UN released its Concluding Observations on Australia, which recommended that Australia:

consider adopting a comprehensive plan for human rights education including training programmes for public officials, teachers, judges, lawyers and police officers on rights protected under the [ICCPR] and the First Optional Protocol. Human rights education should be incorporated at every level of general education.³⁴

13.1.2 In particular, limited attention has been given by Australian governments to community education about elder abuse and the rights of older people. Community education could name and bring the problem out into the open, promote awareness of the issue and involve communities in better supporting older people.

³⁴ Human Rights Committee, *Concluding Observations on the Human Rights Committee: Australia*, CCPR/C/AUS/CO/5, 2 April 2009.

- 13.1.3 This submission supports the establishment of an ongoing national education campaign, targeted at employers, recruitment agencies and the public, with the aim of increasing community awareness about age discrimination and the rights of older Australians. The campaign should be delivered in a way that cultivates a public sense of responsibility to respond to the issue and which empowers older people with knowledge and community support, rather than reinforcing negative stereotypes about ageing.
- 13.1.4 The campaign would be similar to those campaigns against child abuse and domestic violence. These campaigns developed awareness of the issue of abuse and decreased societal tolerance towards it. The campaigns changed attitudes and behaviours, empowered those experiencing abuse to speak up and emphasised to those perpetrating the abuse that it was unacceptable.³⁵
- 13.1.5 Coordinated efforts across all sectors would be required not simply in the fields of healthcare and community service. Efforts should extend to banking and financial services (specifically about financial abuse), the legal sector, accountants, real estate agents and spiritual leaders who play important educative roles in some communities.
- 13.1.6 Strategies that may assist in promoting human rights awareness include:
- (a) providing information and education at community legal centres, welfare agencies and council offices;
 - (b) placing information about human rights in public spaces such as on public transport;
 - (c) teaching human rights syllabi in schools and tertiary institutions; and
 - (d) requiring community workers and those working in public authorities undertake human rights training.
- 13.1.7 The campaign should acknowledge the diversity of older Australians and any written information should be translated into various community languages.
- 13.1.8 The importance of community education and the need for an education campaign specifically targeting the issue of financial abuse amongst older Australians was one of the key recommendations of the 2007 Older People and the Law Report.³⁶

Recommendation 2

The Commonwealth respond directly to the 2007 Older People and the Law Report which made key recommendations to safeguard the human rights of older Australians

³⁵ Elder Abuse Prevention Project, above n 15, 31-32.

³⁶ Above n 1, [2.123]

Recommendation 3

A national education campaign, targeted at employers, recruitment agencies, the financial sector and the public generally that explains elder abuse and labels it as a human rights issue

13.2 Providing support and information to older people in need of assistance

- 13.2.1 Recognising and identifying elder abuse as a problem and educating older people about their rights is only the first step. Older people experiencing abuse also need to be provided with the best available information to assist them make decisions about their lives, including information about the services they are able to access.
- 13.2.2 This submission recommends that a national information and education service be established to provide telephone assistance and referral support to older people who are suffering elder abuse. This could take the form of a 1800 telephone number similar to other numbers used for government campaigns.³⁷
- 13.2.3 Once established, older people would need to be alerted to the existence of the service through a media campaign that should also reiterate the messages discussed above, promoting awareness of elder abuse and the rights of older Australians.
- 13.2.4 The service would also act as a central point to distribute materials on best practice to older people, service providers and the general community by combining the professional knowledge of all relevant government, community and private agencies.
- 13.2.5 Whilst a number of agencies do already exist to respond to requests for assistance by older Australians, many are limited to the responding to their existing clients and no national service exists to provide specialist information, assistance and support.³⁸

Recommendation 4

A national information and education service for older people to provide information, telephone assistance and referral support about the human rights and legal avenues available to older people

13.2.6 Specific focus on financial abuse

- (a) The media campaign and information service should particularly focus on promoting financial literacy and financial planning among older people and

³⁷ See also Recommendation 40, Report of the Commonwealth House of Representatives Standing Committee, *Older People And The Law*, September 2007

³⁸ Elder Abuse Prevention Project, above n 15, 40.

people approaching retirement so they are empowered to prevent financial abuse³⁹.

- (b) Specific training should take place in the financial services sector so banking staff are trained to identify suspicious transactions.
- (c) Submissions to the Commonwealth Standing Committee report on 'Older People and the Law' note the difficult position banks are put in when financial abuse is suspected. Banks are in a very powerful position when it comes to detecting and acting on financial abuse. However, they can only act on the mandate of their customer, they need to be careful not to discriminate against people on grounds of age and disability and they cannot disclose information contrary to privacy laws.⁴⁰
- (d) Whilst mandated reporting requirements have been demonstrated to be inappropriate for combating financial abuse of older people, this submission supports the increased training of staff in banks and financial institutions to identify signs of potential financial abuse and the development of consistent national protocols as to how banks should respond to these situations. The experiences of Canada and Western Australia, which are referred to in the Standing Committee, could be drawn on in this regard.⁴¹

Recommendation 5

A specific education campaign focusing on financial abuse of older people and financial literacy, targeting seniors, the general community and those in the financial sector, plus development of protocols by the financial sector

13.3 Access to legal advice and services

13.3.1 The measures recommended above aim to make older people aware of their rights, give them confidence to enforce them, let them know where to go to get assistance and, in the case of human rights violations by public bodies, give them a legal avenue by which to challenge them. What is missing is access for disadvantaged older Australians to the legal services to enable them to utilise these legal mechanisms.

13.3.2 The UN Human Rights Committee has noted how the availability of legal assistance can determine whether individuals can access and participate in the justice system in a meaningful way and has encouraged states that are party to the ICCPR to provide free legal aid to those who not have the means to pay for it.⁴²

³⁹ See also Recommendation 8, Report of the Commonwealth House of Representatives Standing Committee, *Older People And The Law*, September 2007

⁴⁰ Ibid.

⁴¹ See also Recommendation 7, Report of the Commonwealth House of Representatives Standing Committee, *Older People And The Law*, September 2007

⁴² UN Human Rights Committee, *General Comment No. 32: Right to Equality before Courts and Tribunals and to a Fair Trial* (23 August 2007), [6] and [10].

- 13.3.3 In 2004, the Law and Justice Foundation of NSW examined the issue of access to the law by older people.⁴³ It highlighted the following problems:
- (a) technological barriers, particularly for telephone and web based services;
 - (b) a lack of awareness of where to obtain legal information and assistance;
 - (c) the high cost of legal services;
 - (d) a lack of interest by some legal practitioners in older clients;
 - (e) potential conflicts of interest when legal practitioners for older people are arranged by family members;
 - (f) a lack of availability of legal aid for civil disputes; and
 - (g) lack of resources and specialised knowledge in community legal centres to tailor their services to the needs of older people.
- 13.3.4 It reported that older people expressed a desire for legal information that was clear and accessible, preferably through face to face contact.
- 13.3.5 This submission recommends that increased funding be given to the community legal sector to be used to improve the access of disadvantaged older people to justice, specifically in relation to the emerging issue of financial abuse.⁴⁴
- 13.3.6 This could be achieved through the funding of specialised community legal services,⁴⁵ or by training existing community legal centres so they are better equipped to advise on 'elder law'. The training could include training in testamentary capacity and powers of attorney, how to gather evidence of financial abuse and identifying conflicts of interest when legal practitioners for older people are arranged by family members. The training could be made available to other members of the legal profession.

Recommendation 6

Increased funding for legal services for older people to ensure services such as SRV are available in each jurisdiction and are have long-term viability in ensuring access to justice and the provision of legal assistance to older people at risk of or experiencing elder abuse

⁴³ Sarah Ellison, Louis Schetzer, Joanna Mullins, Julia Perry and Katrina Wong, *Access to Justice and Legal Needs, Volume 1, The Legal Needs of Older People in NSW*, Law and Justice Foundation of NSW, December 2004.

⁴⁴ See also Recommendation 38, Report of the Commonwealth House of Representatives Standing Committee, *Older People And The Law*, September 2007

⁴⁵ Elder Abuse Prevention Project, above n 15, 27.

13.4 Changes to existing law

13.4.1 In combination with the above recommendations, which relate to additional measures necessary to ensure the effective operation of a Human Rights Act, the *Age Discrimination Act (ADA)* should be amended to strengthen its ability to protect the rights of older people.⁴⁶ This could be done in the following ways.

13.4.2 *Increase the content covered*

- (a) Currently, the ADA prohibits discrimination on the basis of age in relation to employment and employment related matters, education, access to premises, provision of goods, services and facilities, provision of accommodation, administration of Commonwealth laws and programs and requests for information.
- (b) With respect to the provision of goods, services and facilities, section 6 of the ADA defines 'services' as including services relating to:
 - (i) banking, insurance, superannuation, and the provision of grants, loans, credit or finance;
 - (ii) entertainment, refreshment or recreation;
 - (iii) transport or travel;
 - (iv) telecommunications,and services of a kind ordinarily provided by:
 - (i) a member of a trade or profession; or
 - (ii) a government, government authority or local government body.
- (c) One of the highest risk areas for the violation of older people's rights and, potentially, elder abuse, is the provision of health care. The definition of 'services' does not appear to include the provision of medical care by a private hospital. In fact, section 42 expressly allows a person to take into account another person's age when making a decision relating to health services. Therefore, should an older person be refused medical treatment by a private health care provider on the basis of his or her age, the provider's conduct may not be prohibited by the ADA.
- (d) Whilst there are important policy reasons for exempting health care from the ADA's anti-discrimination provisions (for example, where an older patient requests a medical procedure which may be dangerous for a person of their age), the exemption may create scope for decision making by health care professionals which is arbitrary.

⁴⁶ See also Recommendations 42 and 43, Report of the Commonwealth House of Representatives Standing Committee, *Older People And The Law*, September 2007

- (e) The ADA should be amended to remove any scope for arbitrary decision making and to better protect the rights of older people in areas of particular relevance to their lives.

13.4.3 Enforcement

- (a) Part 5 of the Age Discrimination Act (**ADA**) relates to offences. The specific offences relate to advertising an act which would be unlawful under Part 4 of the Act and engaging in conduct which amounts to victimisation within the meaning of section 51 of the Act. However, section 49 provides:

Except as expressly provided by this Part, nothing in this ADA makes it an offence to do an act that is unlawful because of a provision of ... Part 4.

- (b) Section 59(1) of the ADA provides that a breach of Part 4 of the Act does not give rise to a civil remedy:

This Act does not confer on a person a right of action in respect of the doing of an act that is unlawful under a provision of Part 4 unless a provision of this Act expressly provides otherwise.

- (c) Sections 49 and 59(1) render the 'teeth' of the ADA almost negligible because an individual who has suffered due to a breach of a provision deeming it unlawful for a person to discriminate against on the basis of age has no means to enforce the provisions of the ADA against the discriminating party.
- (d) The ADA should be amended such that a person who is the victim of a breach of the ADA has a legal right to enforce the provisions of the ADA and seek (and potentially obtain) compensation.

13.4.4 Exemptions

- (a) Paragraph 13.4.2 notes that exemptions under the ADA may produce arbitrary decision making. Section 43 provides that anything done by a person in relation to the administration of the Migration Act 1958 (**Migration Act**) is not unlawful within the provisions of the ADA.
- (b) Under the Migration Act, the number of visas available to older people is less than the number available to younger people. For example, a 46 year-old individual who comes to Australia on a valid visitor visa is not eligible to apply independently under the general skilled migration scheme to remain in Australia permanently because that person is over the age of 45.
- (c) These provisions suggest that people, over the age of 45, who are not Australian citizens but may be resident within Australia, have no worthy

contribution to make to Australian society and, in particular, the Australian workforce.

- (d) SRV emphasises that the scope for arbitrary decision making is of concern. People who are charged with statutory decision making authority should be given greater guidance so as to remove the possibility of arbitrary and discriminatory outcomes.

13.4.5 Australian Human Rights Commission's power

- (a) Part 6 relates to the Australian Human Rights Commission's (**AHRC**) functions under the Age Discrimination Act (**ADA**). Section 53 defines AHRC's functions as including:
 - (i) the power to grant exemptions to the Part 4 anti-discrimination provisions;
 - (ii) the promotion of the ADA, including through education programs;
 - (iii) the examination of enactments to determine whether the provisions of those enactments are inconsistent with the ADA (and to report its findings to the Minister);
 - (iv) with the leave of the Court and at the Commission's discretion, intervene in proceedings which involve issues of discrimination on the basis of age.
- (b) In light of section 53, the AHRC's functions are limited because, under the ADA, it does not have the power to, for example, initiate proceedings on behalf of a person aggrieved by an act of discrimination. Moreover, its ability to voice issues relating to the enforcement of the ADA in a judicial forum are dependent on the AHRC obtaining leave of the court. In this sense, the AHRC has a strong policy role, but its ability to enforce the provisions of the ADA are restricted

Recommendation 7

Amendments to the *Age Discrimination Act 2004* (Cth) (**ADA**) including the removal of any scope for arbitrary decision making, the creation of a legal right to enforce the provision of the ADA where a breach has occurred and enhanced powers for the Australian Human Rights Commission in relation to its ability to enforce provisions of the ADA

PART 5 CONCLUSION

- 14 Part 2 of this submission engaged in a discussion of the human rights of most relevance to older people in Australia. Through the use of case study examples the importance of particular human rights was emphasised. The rights of specific concern to SRV as enumerated in this submission are:
- (a) The right not to be subject to degrading treatment
 - (b) The right to respect of private life
 - (c) The right to the protection of families
 - (d) The right to freedom from arbitrary detention and human treatment in detention
 - (e) The right to health
 - (f) The right to access (liberty and freedom of movement)
 - (g) The right to be free from financial abuse
 - (h) The right to be free from discrimination
 - (i) The right to an adequate standard of living
 - (j) The right to education and
 - (k) The right to legal advice and services
- 15 Part 2 also identifies human rights abuses occurring in the private sphere. Issues such as elder abuse will arguably increase over the coming decades as the Australian population ages and the prevalence of Dementia increases.
- 16 Part 3 of this submission recognises that the human rights of older Australians are not currently sufficiently promoted and protected. Although Australia is signatory to a number of international human rights documents, the rights protections envisaged by these documents are not adequately contained within the current Commonwealth legislative framework.
- 17 Although some attempts have been made at the Commonwealth level to protect the rights of older people, many of these ultimately are unable to provide the protections arguably envisaged by their creation. The Commonwealth has also failed to respond to the recommendations of the 'Older People and the Law Report' which proposed key reforms to assist older people.
- 18 Part 4 makes recommendations as to how Australia could better promote and protect the rights of older Australians. The core recommendation of this submission being the enactment of a Commonwealth Human Rights Act.

ANNEXURE

Below are examples of cases decided under the UK Human Rights Act providing examples of how arguments regarding the human rights of older people may play out in the courts, both successfully and unsuccessfully.

YL v Birmingham City Council and others (Secretary of State for Constitutional Affairs intervening) [2008] 1 AC 95

Facts

The claimant was an 84 year old female suffering from Alzheimer's, for whom the Council was obliged to provide with residential accommodation for her under the National Assistance Act 1948.

The Council contracted with an independent provider of health and social care services (the Company) for the claimant to be placed in one of its private care homes. The claimant's fees were paid by the Council, save for a small top-up fee that was paid by the claimant's relatives. There was a contract between the complainant's daughter and the Company regarding the top-up fee.

The Company sought to terminate this contract with four weeks notice on the grounds of an irreconcilable breakdown of the relationship between the claimant's daughter and the Company's management. The claimant commenced proceedings, seeking a declaration that it would not be in her best interest to be moved out of the home.

The claimant argued that in providing accommodation and care for the claimant, the Company was exercising public functions within the meaning of section 6(3)(b) of the UK Human Rights Act and that the Company would breach her right not to be subjected to degrading treatment and her right to private and family life if she was forced to move out of the home.

Outcome

The House of Lords distinguished between the function of a local authority making arrangements for those in need of care and accommodation and that of a private company providing such care and accommodation under contract on a commercial basis. It found that the Company was not exercising an inherently public function and fell outside the ambit of the Human Rights Act. The House of Lords did note, however, that the claimant retained her public rights against the authority that arranged the accommodation, even though she could not enforce her human rights as against the private residential care home.

R (on the application of Weaver) v London and Quadrant Housing Trust [2009] 1 All ER 17

Facts

The defendant was a not-for-profit charity whose primary object was to provide housing services to poor, aged, disabled or chronically sick individuals and their families. It was a registered social landlord (RSL) under the Housing Act 1996 (UK), which meant it was obliged to reasonably cooperate in offering accommodation to people whose needs were not met by the market

The claimant was a tenant of the defendant. She sought review of the defendant's decision to seek an order for possession against her on the ground that she was at least eight weeks in arrears in paying rent. She alleged the decision was incompatible with the right to respect for the home.

Under s 6(1) of the UK Human Rights Act, a public authority may not act in a way which is incompatible with a Convention right. The question therefore arose whether an RSL and, in particular the defendant, was a public authority within the meaning of the Act. The claimant argued that the defendant was a 'hybrid' or 'functional' public authority, in that some of its functions were public in nature (including the decision to grant or terminate social housing tenancies).

Outcome

The Queens Bench agreed that the management and allocation of housing stock by the defendant was a function of a public nature and that the defendant was to be regarded as a public authority under section 6(3)(b) of the UK Human Rights Act.

It came to this conclusion because the nature of the defendant's activities and the context within which it operated made it different from an ordinary commercial business. This is despite the fact it was constituted and governed by its own rules and entered into private contracts with tenants,

This is because the public rental sector is characterised by state control, as the government's agenda emphasised the aim of providing accessible housing. Under this agenda, RSLs worked side by side with, and took the place of, councils.

Of particular importance was the substantial extent to which the defendant's activities were subsidised by government funds. The voluntary transfer of housing stock to RSLs from the public sector reflected the fact that RSLs performed functions of the same kind as councils in providing public housing. It was, therefore, open, in principle, to the claimant to bring a challenge against the defendant as a public authority over its decision to terminate her tenancy.

Regina (Haggerty and Others) v St Helens Borough Council, 30 April 2003, Times Law Report

This case held that the decision of a local authority in England not to allow an increased weekly fee by a private nursing home for places there, resulting in its closure, did not breach the elderly residents' human rights.

Facts

Nine of the twenty-six residents of Delamere House in St Helens Merseyside challenged the decision of St Helens Borough Council not to enter into a revised and more onerous arrangement with Southern Cross Healthcare Services Ltd who operated the Home in which the claimants were residents.

It was argued on behalf of the residents that there had been no proper consideration of the fact that moving the residents "could be their death" and their right to life under Article 2 of the European Convention had been infringed. As a public body, the Council must comply with the UK Human Rights Act, section 6 of which states that a public body must not act in a way which is incompatible with a Convention right.

It was conceded that there had been some assessment by St Helens Council but it was insufficient.

It was not contended that the alternative accommodation proposed by the Council for the claimants was defective or that it did not comply with the statutory obligation owed by the Council to the claimants.

Outcome

The Judge was prepared to assume that there was a positive obligation on the Council to take measures to protect the life of the individuals but that obligation was limited in that the obligation must not impose an impossible or disproportionate burden on the authorities. The Court held that the financial resources of the Council were an important element to be considered and that the Council was entitled to a substantial degree of deference relating to the way in which it allocated its resources and provided services.

The Judge also held that there was insufficient evidence that the risk to life would reach the level needed to engage Article 2 of the Convention. The challenge therefore failed. The Judge refused the residents permission to appeal, saying St Helens Council had agreed to liaise with 'suitable consultants in old age psychiatry' on the best way to move the residents.