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**A Commissioner for Older
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by

Gareth Griffith

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A Commissioner for Older People in NSW?

by

Gareth Griffith

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EXECUTIVE SUMMARY

The purpose of the Briefing Paper is to review international legal and administrative developments relating to older people, specifically the establishment of the first Commissioner for Older People in Wales.

The Welsh model: The question of establishing a statutory, independent Commissioner for Older People has been raised in a number of jurisdictions, notably Wales and Scotland. To date, it is only in Wales that such a body has been set up. The *Commissioner for Older People (Wales) Act 2006* received Royal Assent on 25 July 2006, giving powers to the Welsh Assembly Government to establish the office of the Commissioner and to make regulations relating to the office's tenure and powers. [2]

Considerations in support of a Commissioner for Older People: These were as follows:

- **ageing population** – by 2021 one in three Welsh households will include someone aged 65 or more.
- **strategy for older people** – to address the issues arising from an ageing population, in January 2003 the Welsh Assembly Government published a 10-year *Strategy for Older People in Wales*, the first of its type in the United Kingdom.
- **UN Principles** - adopted in 1991 were the *United Nations Principles for Older Persons*, with these falling into five categories relating to the status of older persons: independence; participation; care; self-fulfilment; and dignity. The UN Principles were said to support the case for a Commissioner for Older People in various ways, for example, through the insistence that older people should be able to live in dignity and security and be free of exploitation and physical or mental abuse.
- **legal developments** - the proposal for a Commissioner for Older People was seen as a further development in the protection of the elderly from discrimination in employment and other areas. [2.2]

Announcing plans for the introduction of a draft Bill for a Commissioner for Older People in December 2004, the Secretary of State for Wales Peter Hain said: 'The older persons' commissioner will also act as a watchdog to help ensure that older people can contribute to society as equal partners, so that we really value our older citizens. This will be the first such commissioner for older people in Britain and we have not so far identified a comparable independent office relating to older people anywhere else in the world'. [2.5]

Commissioner for Older People (Wales) Act 2006: The Commissioner is appointed as an independent statutory officer for a term of 4 years, renewable once only. 'Older people' are defined as a person aged 60 and over. The Commissioner is to have regard to the UN Principles and is to act as a watchdog charged with promotion, consultation, review, advocacy, education and *investigative functions*. In this last capacity, it can be compared with the role of an Ombudsman, although its actual involvement in investigating particular cases of maladministration is more restricted. Effectively, as with the Children's Commissioner for Wales, upon which it is modeled, the Commissioner for Older People is empowered to examine the case of a particular older person or persons if it involves an

issue that has general application to the lives of older people in Wales. The new Commissioner's *review functions* are broadly based, covering the Welsh Assembly itself and, more generally, those organizations charged with the delivery of services to older people in Wales. This review function also extends to the mechanisms available for advocacy, the making of complaints and whistle-blowing. [2.6-2.7]

The proposal for a Scottish Commissioner for Older People: Along similar lines to its Welsh counterpart, a Private Member's Bill proposed by Alex Neil MSP to establish a Commissioner for Older People in Scotland was introduced in the Scottish Parliament on 20 September 2006. The Commissioner for Older People (Scotland) Bill lapsed at dissolution on 2 April 2007 and has not been re-introduced since. Among the issues raised in connection to the proposed Commissioner for Older People in Scotland was that of overlap and duplication. With the proliferation of government regulatory and other agencies under the devolved arrangements, in addition to a full complement of representative bodies, the question was asked whether a Commissioner for Older People was needed. [3.1]

The United States: Commissioners and Ombudsmen for Older People have been established in the US. [3.2]

Australian perspectives and developments: The issue of a Commissioner for Older People is raised in the context of Australia's ageing population. By 2051 around one in 4 people in NSW will be 65 years and over. Differences in emphasis and perspectives notwithstanding, the *policy implications* of an ageing population are real enough. As the Productivity Commission reported: 'In itself, population ageing should not be seen as a problem, but it will give rise to economic and fiscal impacts that pose significant policy challenges'. *Legal implications* also arise, as recognised by the development of 'elder law', concerned with identifying the legal needs of older people and evaluating the adequacy of current legislative regimes in addressing those needs. [4.1-4.8]

Government responses to the ageing population: The challenges posed by Australia's ageing population have been met by a number of government initiatives at federal and State level. On 26 March 2008, COAG (Council of Australian Governments) agreed to establish a new ministerial council on ageing. [4.14] In April 2008 the NSW Government released the report, *Towards 2030: planning for our changing population*. [4.9]

A Commissioner for Older People in NSW? There is no shortage of government and non-government organizations working on behalf of older people in NSW, which begs the question whether a new watchdog and/or advocacy body is needed at all. Would such a body only duplicate the work of existing organizations? Is there a genuine and identifiable gap to be filled, a compelling social and/or legal need that has to be addressed by a Commissioner for Older People? Another consideration is that, as nursing homes are regulated by the Commonwealth Department of Health and Ageing, some of the work such a Commissioner might be expected to undertake would be found more under federal than State jurisdiction. On the other hand, the scope of NSW involvement in the delivery of services to older people and the making of relevant laws remain very considerable. It may be that a NSW Commissioner for Older People could operate as a one-stop shop, providing advice and direction on the availability of services at all levels of government. [5]

1. INTRODUCTION

The purpose of the Briefing Paper is to review international legal and administrative developments relating to older people, specifically the establishment of the first Commissioner for Older People in Wales. The issue is raised in the context of Australia's ageing population.

2. COMMISSIONER FOR OLDER PEOPLE IN WALES

Under the new devolved system of government in the United Kingdom the question of establishing a statutory, independent Commissioner for Older People has been raised in a number of jurisdictions, notably Wales and Scotland. To date, it is only in Wales that such a body has been set up. The *Commissioner for Older People (Wales) Act 2006* received Royal Assent on 25 July 2006, giving powers to the Welsh Assembly Government to establish the office of the Commissioner and to make regulations relating to the office's tenure and powers.¹ Relevant regulations came into force on 16 February 2007, dealing among other things with the appointment of the Commissioner for an initial period of four years, with the possibility of a further four-year term.² Subsequently, Ruth Marks, a former Director of the Royal Institute of Blind People in Wales, was appointed to the position, to take effect from April 2008.

2.1 Background process

The preliminary steps in this legislative process started with the 2002 *Report on a Strategy for Older People in Wales 'When I'm Sixty Four...and More'*, which recommended the establishment of a Commissioner for Older People.³ This formed the basis of a Manifesto commitment made by the Welsh Assembly Government in May 2003, which in turn resulted in the setting up of an expert Advisory Group, chaired by John Griffiths, the then Deputy Minister for Health and Social Services. This Advisory Group reported in March 2004 in favour of a Commissioner 'who can promote the empowerment of older people and the enforcement of their rights'.⁴ Following submission of the report to Ministers, a public consultation exercise on its conclusions and recommendations was held from 11 May to 30 September 2004. Its main findings were that:

¹ The National Assembly for Wales has only executive, not legislative, powers. However, the 'executive' functions devolved include the power, previously exercised by the Secretary of State for Wales, to make subordinate legislation on devolved matters, as listed in Schedule 2 to the *Government of Wales Act 1998*.

² The Commissioner for Older People in Wales (Appointment) Regulations 2007 - http://www.bailii.org/wales/legis/num_reg/2007/20070396e.html Coming into force on the same day was the Commissioner for Older People in Wales Regulations 2007 - http://www.bailii.org/wales/legis/num_reg/2007/20070398e.html

³ For a detailed account of the background process see – T Jarrett, *Commissioner for Older People (Wales) Bill [HL]*, House of Commons Research Paper 06/33.

⁴ *A Commissioner for Older People in Wales: The Report and Recommendations of the Welsh Assembly Government's Advisory Group, March 2004* - <http://new.wales.gov.uk/docrepos/40382/40382313/4038211/strategie?lang=en>

- of the 151 respondents, 92% supported the establishment of a Commissioner, with 74% giving strong support to the recommendation;
- there was strong support for a legally independent Commissioner;
- there was also strong backing for using the Children's Commissioner for Wales as a model, in terms of institutional structure and powers, for the proposed Commissioner for Older People; and
- 59% of respondents wanted to see a Commissioner appointed for 4 years, renewable once.

2.2 Background issues in the Advisory Group report

As discussed in the March 2004 report of the Advisory Group, the main considerations in support of a Commissioner for Older people were as follows:

- **Ageing population:** The ageing population factor, it being noted that Wales has a higher concentration of older people than the rest of the UK. Just over 17% of Wales' population was aged over 64, compared to under 16% of the UK population. Over the next 20 years the number of people of retirement age in Wales will increase by more than 5% of the population, with the number of people over 85 increasing by over a third to 82,000. By 2021 one in three households will include someone aged 65 or more.
- **Strategy for older people:** Following consultation on the *When I'm 64* report, in January 2003 the Welsh Assembly Government published a 10-year *Strategy for Older People in Wales*, the first of its type in the United Kingdom. This was said to be a starting point in addressing the implications of an ageing population.
- **UN principles:**⁵ The rights of older people have been addressed by the United Nations, initially in the *International Plan of Action on Ageing*, endorsed by the General Assembly in 1982. Adopted in 1991 were the *United Nations Principles for Older Persons*, with these falling into five categories relating to the status of older persons: independence; participation; care; self-fulfilment; and dignity. The UN's General Council said it 'encourages governments to incorporate the following principles into their national programmes whenever possible'. Other initiatives include the *United Nations Action Plan on Ageing 2002* which called for 'changes in attitudes, policies and practices at all levels in all sectors so that the enormous potential of ageing in the twenty-first century may be fulfilled'. For the Advisory Group, the UN Principles were said to support the case for a Commissioner for Older People in various ways, for example, through the insistence that older people should be able to live in dignity and security and be free of exploitation and physical or mental abuse.
- **Legal developments:** The development of legal rights against age discrimination in employment and other contexts, including the new United Kingdom Equality and Human Rights Commission (which commenced operation in October 2007).⁶ The

⁵ The UN Principles for Older Persons are set out in full at - <http://www.un.org/esa/socdev/iyop/iyoppop.htm>

⁶ Before the Equality and Human Rights Commission, the Commission for Racial Equality

proposal for a Commissioner for Older People was seen as a further development in the protection of the elderly from discrimination in employment and other areas.

2.3 Defining ‘older people’

The Advisory Group report recognised that there is no legal or generally accepted definition of an older person and that the UN does not supply one. With people often retiring earlier than 65 (the minimum age for entitlement to the State Retirement Pension), it was thought that a lower age limit should be established in law to determine the Commissioner’s jurisdiction.

Further consultation on this matter was recommended, the results of which showed that:

There was a decided public preference for the lower age limit of those whom the Commissioner can support in law in a pragmatic way – normally at 65+, but with discretion for the Commissioner to help people aged 50+ in certain circumstances.⁷

2.4 Functions of proposed Commissioner for Older People

Taking as its model the Children’s Commissioner in Wales and the Northern Ireland Commissioner for Children and Young People, the duties and responsibilities the Advisory Group envisaged for the Commissioner for Older People were summarised as:

- Influencing policy and service delivery;
- Championing and empowerment;
- Source of information, advocacy and support;
- Safeguarding and enforcing, enhancing and promoting rights; and
- Investigating complaints.

2.5 The case for a Commissioner for Older People

The Advisory Group noted that a ‘wide range of public services, backed by significant levels of funding, is in place to ensure that the needs of older people are met’. It explained that, within this context, the proposed Commissioner for Older People would:

play an important role in ensuring that, across these many service, older people’s interests and rights are taken into account. Through monitoring and representation he or she will seek to influence improvement and tailoring of services so that older people suffer no disadvantage in terms of access, delivery or outcomes compared to the rest of the population. He or she will be able to take on an ‘umpire’ role if, as a last resort, an older person is unable to find a public agency which is willing to lead

(CRE), the Disability Rights Commission (DRC) and the Equal Opportunities Commission (EOC) had responsibility for promoting racial, disability and sex equality in Britain.

⁷ *Consultation on the Report of the Advisory Group on a Commissioner for Older People in Wales: Analysis of responses*, para 4.

on finding a solution to his or her problem with a service.

The report continued:

The Commissioner will be able to add value by assisting more vulnerable older people in making a complaint or representation. More generally, the Commissioner will be able to take a rounded and independent view of how public policy impacts on the lives of older people and to consider and comment on new initiatives and developments so that they can impact with most benefit for older people.⁸

Announcing plans for the introduction of a draft Bill for a Commissioner for Older People in December 2004, the Secretary of State for Wales Peter Hain said:

The older persons' commissioner will also act as a watchdog to help ensure that older people can contribute to society as equal partners, so that we really value our older citizens. This will be the first such commissioner for older people in Britain and we have not so far identified a comparable independent office relating to older people anywhere else in the world.⁹

2.6 Summary of the Commissioner for Older People (Wales) Act 2006

The Commissioner: The Commissioner is established as an independent statutory office that is not to be regarded as a servant or agent of the Crown.¹⁰ He or she is to be appointed by the Assembly's First Minister after taking account of such things as the advice of any selection panel and the views of selected older people resident in Wales. The term of office is for 4 years, renewable once only. Prior to expiry of the Commissioner's term of office, his or her term may be ended by the First Minister in the following circumstances: at the Commissioner's request; on the ground of misbehaviour; or by reason of mental or physical infirmity.¹¹

'Older people' defined: By s 24 of the Act, '*older people*' means a person aged 60 and over; '*older people in Wales*' means a person aged 60 and over who is ordinarily resident in Wales and who is the recipient either of 'regulated services' or 'relevant services', terms that are defined under the legislation.

Setting the age at 60 seems to have been a pragmatic response to the results of the consultation process. In the Second Reading speech in the House of Lords, Lord Evans

⁸ *A Commissioner for Older People in Wales: The Report and Recommendations of the Welsh Assembly Government's Advisory Group*, n 4, p 8.

⁹ House of Commons Debate, 7 December 2004 – discussed in Jarrett, n 3, p 14.

¹⁰ *Commissioner for Older People (Wales) Act 2006*, Schedule 1, cl 1.

¹¹ The Commissioner for Older People in Wales (Appointment) Regulations 2007, regulations 3 and 4. Transitional arrangements are also provided for, covering the period after the 2007 Assembly election and prior to the appointment of a new First Minister for Wales under the Government of Wales Act 2006.

explained:

The Bill defines an older person as one of age 60 or over...We consider that that strikes the right age balance. A lower age limit would have significant implications for the commissioner's workload. If it were higher, we would miss an important and growing section of older people.¹²

UN principles: By s 25 of the Act, in considering what constitutes the interests of older people in Wales, the Commissioner must have regard to the United Nations Principles for Older Persons adopted by the General Assembly of the United Nations on 16 December 1991.

Relationship with older people in Wales: While having regard to the needs and circumstances of older people, the Commissioner must take reasonable steps to ensure that:¹³

- older people in Wales are made aware of the existence and functions of the Commissioner's office;
- older people in Wales are made aware of the location of the Commissioner's office or offices and the ways in which they may communicate with the Commissioner and his or her staff;
- such older people are encouraged to communicate with the Commissioner and his or her staff;
- the views of such older people are sought as to how the Commissioner should exercise his or her functions and as to the content of the Commissioner's annual work programme; and
- the Commissioner and his or her staff make themselves available to such older people in the older persons' locality.

General functions: By s 2 of the Act, the Commissioner may, in relation to fields in which the Assembly has functions:

- promote awareness of the interests of older people in Wales and of the need to safeguard those interests;
- promote the provision of opportunities for, and the elimination of discrimination against, older people in Wales;
- encourage best practice in the treatment of older people in Wales;
- keep under review the adequacy and effectiveness of law affecting the interests of older people in Wales; and
- make representations to the Assembly about any matter relating to the interests of older people in Wales;

The Commissioner may make a report to the Assembly about the exercise of these general

¹² House of Lords Debates, 14 June 2005 – discussed in Jarrett, n 3, p 17.

¹³ Regulation 13 of the Commissioner for Older People in Wales Regulations 2007

functions.¹⁴

Research and educational functions: By s 9 of the Act, the Commissioner also has a broadly framed research and educational function, which includes undertaking or commissioning research, and carrying out or commissioning educational facilities.

Guidance function: By s 12 of the Act, the Commissioner may issue guidance on best practice in connection to the interests of older people in Wales. This guidance may be issued to a range of bodies, including the Assembly itself.

Review function - of Assembly and other bodies: By s 2 of the Act, the Commissioner may for the purpose of safeguarding and promoting the interests of older people in Wales:

- review the Assembly's discharge, proposed discharge or failure to discharge of any of its functions;
- review the discharge, proposed discharge or failure to discharge a relevant function of any person mentioned in Schedule 2 to the Act, which includes specified local government, health, social care, educational and arts organisations in Wales.

Review function - of advocacy, complaints and whistle-blowing arrangements: By s 5 of the Act, the Commissioner may review advocacy, complaints and whistle-blowing arrangements. This is for the purpose of ascertaining whether, and to what extent, the arrangements are effective in safeguarding and promoting the interests of 'relevant older people in Wales'. As defined by s 6(2), 'relevant older people' is a narrower group than 'older people', referring to those in receipt of certain services in Wales.¹⁵

By s 6(3), this aspect of the Commissioner's review function covers the Assembly and any person providing regulated services in Wales, and those persons set out under Schedule 3, including county councils, local health boards and institutions of further and higher education.

Review functions - powers of entry and of interviewing: In respect to the functions set out by ss 3 and 5 of the Act, the Commissioner 'or a person authorised by him' has the power, to enter any premises, *other than a private dwelling*, for the purpose of interviewing an older person (but only if the older person consents to be interviewed).¹⁶ Entry could therefore be gained to a retirement village or an old person's home for this purpose.

Review functions - powers to require information: Also in respect to the

¹⁴ Regulation 16(1) of the Commissioner for Older People in Wales Regulations 2007.

¹⁵ Section 6(2) provides: 'Relevant older people in Wales are older people— (a) to or in respect of whom regulated services in Wales are provided, or (b) to or in respect of whom relevant services (within the meaning of subsection (4)) are provided by or on behalf of, or under arrangements with, a person mentioned in Schedule 3'.

¹⁶ Section 13 of the Act.

Commissioner's functions under s 5 – to review advocacy, complaints and whistle-blowing arrangements - he/she has the power to require a relevant person to provide information, recorded in any form. This is where the Commissioner considers it necessary or expedient to receive such information, for the purpose of reviewing the arrangements relating to advocacy, complaints or whistle-blowing and related matters. This power extends to where the Commissioner must determine whether a recommendation made in a report following a review of such arrangements has been complied with.¹⁷

Non-mandatory reporting arrangements for these review functions are set out in the Regulations.¹⁸ While the Commissioner has the power to follow up a recommendation by requiring further information, he/she does not have the power to enforce its implementation.¹⁹

Assistance function: By s 8 of the Act,²⁰ the Commissioner may give financial or other assistance to an older person in Wales in making a complaint or representation to or in respect of a variety of bodies and persons, including:

- the Assembly;
- any person providing a regulated service, about the provision of those services;
- any person mentioned in Schedule 3, about anything done or omitted to be done by that person in respect of a 'relevant function',²¹ or
- any person acting on behalf of Schedule 3 listed person, about the provision of a 'relevant service'.²²

But note that the Commissioner's role is limited by the requirement that the proceedings in question must 'relate to matters which have a more general application or relevance to the interests of older people in Wales than in the particular proceedings concerned'.²³ In other words, the proceedings must raise principles or issues of more general concern.

Examination of cases function: Section 10 of the Act enables the Assembly to make regulations for the examination by the Commissioner of 'the cases of particular [older] persons'. This provides the Commissioner with an Ombudsman-like function in respect of those who are or have been older persons in Wales. The particulars of a case involving a person who has since died could therefore be examined.

¹⁷ Regulation 4 of the Commissioner for Older People in Wales Regulations 2007.

¹⁸ Regulation 14(2) of the Commissioner for Older People in Wales Regulations 2007.

¹⁹ Regulation 15 of the Commissioner for Older People in Wales Regulations 2007.

²⁰ Read with regulations 5 and 6 of the Commissioner for Older People in Wales Regulations 2007.

²¹ As defined in s 3(2) of the Act.

²² As defined by s 6(4) of the Act.

²³ Regulation 5(1)(b) of the Commissioner for Older People in Wales Regulations 2007.

But note again that this role is limited by the requirements that:

- the representation at issue raises a question of principle which has a more general application or relevance to the interests of older people in Wales than in the particular case concerned; and
- the Commissioner must consider whether the issues involved are or have been investigated by the Public Service Ombudsman for Wales, or some like body, and whether they would be more suitable for investigation by another body of that kind.

Examination function - powers of investigation etc: The Commissioner does not have the power to enforce the implementation of a recommendation. On the other hand, he/she can monitor whether a recommendation has been complied with. For this purpose, as well to undertake an examination of a particular case, the Commissioner is provided by s 10(7) with the same powers as the High Court in respect of the attendance and examination of witnesses (including the administration of oaths and affirmations) and the provision of information.²⁴ If it is considered necessary for the purpose of an examination, a person can be required by summons to attend as a witness before the Commissioner, in which circumstances the witness may be permitted to have legal representation.²⁵ By s 11 of the Act, where a person has obstructed the Commission's investigation, proceedings may be instituted in the High Court and he/she may be found guilty of contempt.

Examination function – reports and recommendations: Further to s 10 of the Act, when an examination of a case is finalised a report *must* be prepared by the Commissioner setting out his/her findings. The person adversely mentioned in the report, who was the subject of a recommendation, *may* be required to make an appropriate response within 3 months. Where the response is considered inadequate, the Commissioner may send out a written notice which requires a response within 1 month. Failure to comply, or receipt of an unsatisfactory reply, *may* lead to the issuing of a supplementary notice by the Commissioner. This *must* include a statement that a further failure to respond, or an inadequate response, may be made public 'in such manner as the Commissioner considers appropriate'.²⁶

Examination function - relationship with other Ombudsmen: Where the Commissioner examines a case further to s 10 of the Act, and where the case could be investigated by the Public Service Ombudsman for Wales, by s 16 the Commissioner is directed to inform the Ombudsman about the case and, where appropriate, to conduct a joint examination. By s 17 of the Act, the Commissioner is also encouraged to work collaboratively in appropriate

²⁴ The same privileges – such as legal professional privilege - apply as in civil proceedings before the High Court (s 10(8)). The provision of information is further dealt with by Regulation 11 of the Commissioner for Older People in Wales Regulations 2007.

²⁵ Regulation 12 of the Commissioner for Older People in Wales Regulations 2007.

²⁶ Regulations 14 and 15 of the Commissioner for Older People in Wales Regulations 2007. The same follow up powers apply in respect of the review functions under ss 3 and 5 of the Act.

cases with other Ombudsmen.

Power to disclose information: By s 18 of the Act, the Commissioner may disclose information in certain specified circumstances, but only if it is in the public interest.

Protection against defamation: By s 19 of the Act, the reports of the Commissioner and all the publication of communications to parties relevant to an examination of a case under s 10 are absolutely privileged. The same applies to all relevant communications between the Commissioner and other Ombudsmen.

2.7 Comment

The new Commissioner for Older People in Wales is a unique body, a watchdog charged with promotion, consultation, review, advocacy, education and *investigative functions*. In this last capacity, it can be compared with the role of an Ombudsman, although its actual involvement in investigating particular cases of maladministration is more restricted. Effectively, as with the Children's Commissioner for Wales, upon which it is modeled, the Commissioner for Older People is empowered to examine the case of a particular older person or persons if it involves an issue that has general application to the lives of older people in Wales. It remains to be seen how this function is performed in practice, either working alone or in collaboration with other watchdog bodies, including other commissioners and the Public Service Ombudsman for Wales.

The new Commissioner's *review functions* are broadly based, covering the Welsh Assembly itself and, more generally, those organizations charged with the delivery of services to older people in Wales. This review function also extends to the mechanisms available for advocacy, the making of complaints and whistle-blowing.

The Commissioner may also give financial or other *assistance* to an older person in Wales in making a complaint or representation to or in respect of a variety of bodies and persons

3. COMMISSIONER FOR OLDER PEOPLE IN OTHER JURISDICTIONS

3.1 Scotland

History: A Private Member's Bill proposed by Alex Neil MSP to establish a Commissioner for Older People in Scotland was introduced in the Scottish Parliament on 20 September 2006. The Finance Committee began consideration of the Bill on 31 October 2006 and reported on the Financial Memorandum of the Bill on 25 January 2007. This was with a view to informing a future Bill introduced in the next Session. The Commissioner for Older People (Scotland) Bill lapsed at dissolution on 2 April 2007 and has not been re-introduced since.²⁷

The case for a Commissioner: The background issues and concerns behind the case for a Scottish Commissioner for Older People, as presented by the Bill's sponsor Alex Neil MSP, were broadly similar to those found in the March 2004 Report of the Welsh Advisory Group. The ageing population was discussed, including the estimation 'that by 2040 around 40% of the Scottish population will be aged 65 or older'. Also noted were high profile media stories about the abuse of older people at a number of care homes. It was argued that 'As older people make up an ever larger share of our population it is absolutely vital that their rights and interests are safeguarded'.²⁸

While the part played by existing government²⁹ and non-government agencies³⁰ in advocacy and other roles on behalf of older people was acknowledged, the question was put

is there not still a need for a more powerful, independent and focused agent acting on behalf of the interests of Scotland's older people? A specific Commissioner could fulfil this role, without competing with those organizations in existence but rather complementing them.³¹

²⁷ For an account of the passage of public bills through the Scottish Parliament see - <http://www.scottish.parliament.uk/business/bills/billguidance/gpb-1.htm> - 14 The establishment of a Commissioner for Older People has also been considered by the Northern Ireland Assembly (Debates, 5 June 2007), but no legislative proposal appears to have been introduced to date. Alex Neil also considered legislative initiatives at Westminster, none of which resulted in the establishment of a Commissioner – Neil, n 28, pp 7-8.

²⁸ A Neil, *Commissioner for Older People (Scotland) Bill, Consultation Paper*, October 2004, pp 6-10 - <http://www.scottish.parliament.uk/business/bills/pdfs/mb-consultations/Commissioner-for-Older-People-consultation.pdf>

²⁹ Examples include the Scottish Commission for the Regulation of Care (Care Commission) that regulates services including care homes, housing support services and private hospitals. The Social Work Services Inspectorates inspects all social work services provided by or on behalf of local authorities in Scotland.

³⁰ These include Age Concern Scotland, Help the Aged and the Scottish Pensioners' Forum. The Scottish Executive has also formed an Older People's Consultative Forum.

³¹ Neil, n 28, p 10.

The case for a Commissioner for Older People was further argued by reference to the more or less analogous Commissioner for Children and Young People:

It was right that a Children's Commissioner was created. Children are a vulnerable group in society and their rights and interests deserve that extra level of protection. Alex Neil would argue that equally, older people form a vulnerable group and that their rights and interests deserve a similar level of protection. Of course the two groups cannot be equated entirely equally. Older people are adults and have certain rights that children do not – not least amongst them the right to vote and influence government policy. Nonetheless, the fact remains that many older people are amongst the most vulnerable in our society and a Commissioner designed to specifically look out for their interests would go a long way to helping them as well as those bodies and agencies with whom the Commissioner would deal.³²

The Bill in summary:³³ Just as the case on behalf of a Scottish Commissioner for Older People is broadly along the same lines as that for its Welsh counterpart, so too are the general functions of advocacy and the review of laws, policies and practices relating to the rights and interests of older people aged 60 or over, as proposed in the Commissioner for Older People (Scotland) Bill. Similar, too, is the injunction to have regard to the UN Principles for Older Persons and the requirement to encourage the involvement of older people in the work of the Commissioner. Like his/her Welsh counterpart the proposed Scottish Commissioner had the power to report on investigations but lacked the power to enforce recommendations. In respect to his/her investigation function, the proposed Scottish Commissioner was provided with powers to require the attendance of witnesses and to order the production of papers (cl 9 and Schedule 2).

In other ways the details are somewhat different as between the Welsh and the proposed Scottish models. These can be summarised as follows:

- ***Independence of Commissioner:*** The Commissioner is an independent office, appointed not by the head of the Executive (the First Minister) as in Wales, but by the Sovereign on the nomination of the Scottish Parliament (cl 2). Express provision is made for the independence of the office, which is not subject to the direction or control of any MP, any Member of the Scottish Parliament or the Parliamentary corporation (Schedule 1, cl 2).
- ***Term of appointment:*** Appointment is for 5 years, not 4 years as in the Welsh model (cl 2(3)).
- ***Ineligibility:*** Members of either the Scottish Parliament, the House of Commons and the European Parliament would also be expressly prohibited from appointment (cl 2(2)).
- ***Removal:*** The Commissioner could only be removed from office by the Sovereign

³² Neil, n 28, p 11.

³³ For a detailed overview see – C Smith, Commissioner for Older People (Scotland) Bill, SPICE Briefing, 06/67 - <http://www.scottish.parliament.uk/business/research/briefings-06/SB06-67.pdf> For the full text of the Bill as introduced see - <http://www.scottish.parliament.uk/business/bills/71-CommOldPeople/b71s2-introd.pdf>

in specified circumstances, namely, if requested by the Commissioner, or by a resolution passed by the Scottish Parliament (if passed on a division, the resolution must be voted for by not less than two-thirds of those voting). Such a resolution could be passed either where the Commissioner had breached the terms of appointment, or where the Parliament had lost confidence in the Commissioner's willingness, ability or suitability for office (cl 3).

- **Review and other functions:** Unlike the Welsh model, which includes complex review and assistance functions, the Scottish Bill only provided the Commissioner with a general function to 'promote and safeguard the rights and interests of older people', subsidiary to which were several broad duties to: promote best practice by service providers; assess the adequacy and effectiveness of relevant laws, policies and practices; and undertake and publish research on issues relevant to older people.
- **Jurisdiction:** The Parliament and the Scottish Executive would not be under the jurisdiction of the Commissioner. This is in contrast to the Welsh model where the Commissioner for Older People is charged with the review of the Assembly's discharge of its relevant functions.
- **Investigations:** The Welsh Commissioner has the power to investigate or examine cases involving particular older persons but only where a more general issue of principle is at stake. The investigative powers of the proposed Scottish Commissioner were expressed differently. He did not have an Ombudsman like function to investigate or examine cases relating to a particular older person. Instead, by clause 7 of the Bill the Scottish Commissioner would have the power to investigate how *service providers* take account of the rights, interests and views of older people in the decisions they take and work they do.

For the proposed Scottish Commissioner to undertake an investigation there should be evidence that:

- it is relevant to older people generally or sub-groups of older people;
- and it is not already the responsibility of another body.

The Commissioner could not investigate if the issue related to:

- a matter reserved to Westminster;
- a particular older person; or
- a decision or proceedings in a court or tribunal.

Investigating individual cases: Just how different the Welsh and Scottish investigative models are in a practical sense is not entirely clear. Both models require more general relevance to older people. In the case of the proposed Scottish model, it may be that investigation of a service provider could arise from concerns expressed initially about a case relating to a particular person,³⁴ in which case the difference between the Scottish and Welsh models may not be so great for practical purposes. The two models might be said to arrive at more or less the same practical point by different means.

³⁴

It is said in this respect that 'where an individual case gives rise to a wider issue affecting older people or certain groups of older people the Commissioner can undertake an investigation'. Policy Memorandum, *Commissioner for Older People (Scotland) Bill*, p 22 - <http://www.scottish.parliament.uk/business/bills/71-CommOldPeople/b71s2-introd-pm.pdf>

The Bill's sponsor, Alex Neil, explained that his proposal did not support a model of a Commissioner to resolve individual cases, if for no other reason than such a function would monopolise the Commissioner's time and resources. He noted too that the same conclusion had been reached in respect to the Commissioner for Children and Young People. Mr Neil went on to say:

Rather, it should be the role of the Commissioner for Older People to investigate wider issues. That is not to say an issue such as abuse in care homes would not be for the consideration of the Commissioner. It could be considered providing it is dealing with a wider issue and not an individual case. Individual cases can at present be investigated by the Care Commission...and it is not the intention behind the creation of an Older Person's Commissioner to create an overlap in responsibility.

Mr Neil concluded that he envisaged

the investigatory role that any Commissioner would play would not be directed towards resolving individual cases, but towards developing strategies and solutions to dealing with wider issues. Involved in this would be allowing for the Commissioner to undertake research programmes to further the development of these strategies.³⁵

Favourable responses to the proposal: In preparing for the introduction of his Private Member's Bill, Alex Neil released a consultation paper, *Commission for Older People (Scotland) Bill*, which was consulted upon between October 2004 and January 2005. The responses were later considered in the Policy Memorandum prepared by the Non-Executive Bills Unit on behalf of Mr Neil. There it was noted that the consultation paper was distributed to 239 organisations and that, of those who responded, 62% supported the establishment of the proposed Commissioner, 20% were unclear, and less than 20% opposed the proposal. The Policy Memorandum explained:

If you include responses that came under the cover of two responses from forums, the actual figures show a significant increase in support. Under these circumstances 75% of those who responded agree with the creation of a Commissioner for older people.

The Policy Memorandum continued:

Significantly, organizations representing older people made up the bulk of responses. Of these 41 responses, 34 (83%) wanted a Commissioner to represent their rights and interests. Of the nine responses that came from the health and care sector, notably seven (78%) were in favour of establishing a Commissioner.³⁶

³⁵ Neil, n 28, p 13.

³⁶ Policy Memorandum, n 34, pp 23-24.

Critical responses to the proposal: In its report on the Financial Memorandum of the Bill the Finance Committee of the Scottish Parliament referred to its earlier *Inquiry into Accountability and Governance*, published on 15 September 2006. Specifically, it referred to its conclusions about legislative proposals for new commissioners and/or Ombudsmen. These included:

- no new officeholder should be proposed unless it can be clearly demonstrated that the function cannot be carried out by an existing body; and
- future proposals for representatives of specific interest groups within society should not be designated as Parliamentary commissioners.

More of a procedural criticism, but one with clear financial underpinnings, was that neither the Bill's sponsor Alex Neil nor the Non Executive Bills Unit had involved the Scottish Parliamentary Corporate Body (SPCB) sufficiently on the financial implications of the proposed Commissioner. In its submission to the Finance Committee the SPCB emphasised that

it is essential that the establishment of any new office needs to be carefully considered at the outset in terms of value for money; whether an existing body could undertake the functions; and the constitutional nature of such a body.³⁷

Duplication: Among the issues raised in connection to the proposed Commissioner for Older People in Scotland was that of overlap and duplication. With the proliferation of government regulatory and other agencies under the devolved arrangements, in addition to a full complement of representative bodies, the question was asked whether a Commissioner for Older People was needed.³⁸

The potential for overlap was recognised in the Policy Memorandum document which stated:

However, the Commissioner for Older People will be empowered under...the Bill to co-operate with other persons in matters relevant to the exercise of the office. That power should help the Commissioner to minimize overlap and duplication with others by co-ordinating the work of the office, and establishing good working relationships with other relevant parties. These might include other commissioners or ombudsmen, statutory organisations including the Parliament and the Executive, and organizations representing older people, such as Age Concern Scotland and Help the Aged. Any potential overlap could for example be addressed by a memorandum of understanding setting out the respective roles of the Commissioner and bodies which may have responsibilities in similar areas.

³⁷ For the text of the Finance Committee report and the SPCB submission see - <http://www.scottish.parliament.uk/business/committees/finance/reports-07/CommitteeReport-commission-for-older-peopleBill.pdf> The SPCB made it clear that it would support the establishment of a Commissioner if that was Parliament's intention.

³⁸ These government and non-government agencies are listed in Smith, n 33, Annex 2.

The Policy Memorandum went on to say:

That power will enable the Commissioner to work collaboratively to examine interlinked factors which can create barriers to older people making a full contribution to society, and highlighting the issues which need to be addressed. He or she will be able to represent the views of older people in these investigations eliciting the opinions of marginalized older people. The Commissioner will have the advantage of being able to tap into the existing network and those he or she will develop to gather views from organisations and individuals to broaden participation in any investigation which may affect them.³⁹

3.2 Commissioners and Ombudsmen for Older People in the United States

The Long Term Care Ombudsman Program: Further to the federal Older Americans Act, since 1978 every State in the US has been required to have an Ombudsman Program that addresses complaints and advocates for improvements in the long term care of older people. This is called the State Long Term Care Ombudsman Program and, while the schemes vary in detail between one State and another, its common aim is to investigate allegations of abuse and neglect relating to older people in institutionalized care. According to the National Long term Care Ombudsman Resource Center, the Long Term Care Ombudsman Program resolves the problems of individual residents in long-term care facilities, assists resident councils, family councils and citizen organisations, and represents the needs and interests of long term care residents to public officials. The national program is administered federally by the Administration on Aging, US Department of Health and Human Services.⁴⁰

To take one example of the program in action, in 2000 the Idaho Ombudsman for the Elderly investigated 2541 complaints, 1369 of these relating to nursing homes. The office of the Ombudsman is required to visit 165 assisted living and residential care facilities twice yearly; the 88 Idaho nursing homes must be visited at least once each quarter.⁴¹

Commissioners for older people: Some jurisdictions have in addition a Commission on the Aging, as in Idaho where a total of six local areas have their own commissioners. Their duties and responsibilities include: advocating within State government for older people; advising on State legislative issues affecting older people; making rules related to programs and services administered by the Commission; and conduct public hearings about the health and social needs of the elderly.⁴²

³⁹ Policy Memorandum, n 34, p 9.

⁴⁰ For further details see - http://www.ltombudsman.org/ombpublic/49_151_3349.cfm For details on the State enabling statutes see - <http://www.ltombudsman.org/uploads/Enablingdoc2.pdf>

⁴¹ Idaho Commission on Aging, 2000 Annual Report - <http://www.idahoaging.com/annualreport/2000report.PDF>

⁴² Idaho Commission on Aging, n 41.

At the sub-State level, New York City has a Department of Aging headed by a Commissioner whose role is to provide a range for health care and social services to people 60 years and over.⁴³ Similarly, in the city of Boston there is a Commission on Affairs of the Elderly, which seeks to enhance the quality of life for Boston's senior citizens through planning, coordinating, and monitoring the delivery of services to the elderly in an efficient and effective manner. Its work includes a Paratransit program, providing door-to door transportation to eligible people who cannot use general public transportation all or some of the time, because of a physical, cognitive or mental disability. The Commission also provides information on heating assistance and other social and financial issues facing the elderly.⁴⁴ At the State level, there is in addition a Massachusetts Commission on End of Life Care. The Commission collaborates with organizations and programs to raise awareness and provide education around end-of-life issues as well as to develop public policy recommendations.⁴⁵

3.3 Stockholm's Ombudsman for the elderly

The City of Stockholm has an Ombudsman for the elderly. The Ombudsman gives support on issues concerning municipal care services and assists the elderly in any grievances they may have. Further details can be found on the Ombudsman's website - <http://www.stockholm.se/Extern/Templates/Page.aspx?id=118756>

⁴³ For further details see – <http://www.nyc.gov/html/dfta/html/about/achievements.shtml>

⁴⁴ For further details see – <http://www.cityofboston.gov/elderly/>

⁴⁵ For further details see - http://www.endoflifecommission.org/end_pages/about.htm

4. AUSTRALIAN PERSPECTIVES AND DEVELOPMENTS

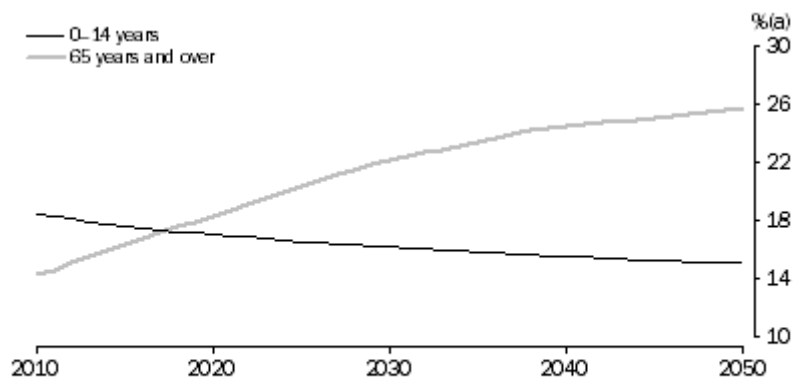
4.1 The ageing population - Australia

The prospect of an ageing population is as true in Australia as it is in other developed countries. The fact is that over the next three decades the maturation of the ‘baby boom’ generation (those born between 1946 and 1964), combined with increased longevity and declining birth rates, will transform the developed world’s demographics. According to the Australian Bureau of Statistics:

Ageing is the most noteworthy population change projected to occur internationally and in Australia over the next 50 years. Population ageing is the change in age structure where the population has an increasing proportion of older people (those aged 65 years and older) in comparison to the proportion of children (those aged 15 years and younger) and is a consequence of sustained low fertility and increasing life expectancy.⁴⁶

The same source notes that the number of people aged 65 years and over is projected to outnumber children aged 0-14 years in 2018. By 2050, 26% of the population is projected to be aged 65 years and over, in comparison to 15% of the population being aged 0-14 years.

Projected young and older Australians



(a) Proportion of the total population.

Source: Population Projections, Australia (32220).

The OECD confirms this trend, reporting that in Australia the percentage of the population aged 65 or more is projected to rise from 12.6% in 2000, to 22.1% in 2030 and 25.2% in 2050. Likewise, the percentage of the Australian population aged 80 or more is projected to rise from 3.1% in 2000, to 6.6% in 2030 and 9.7% in 2050.⁴⁷ Similarly, the Australian

⁴⁶ ABS, 1301.0 – Year Book Australia, 2008
<http://www.abs.gov.au/ausstats/abs@.nsf/bb8db737e2af84b8ca2571780015701e/0046DAF21CAA349BCA2573D20010FE65?opendocument>

⁴⁷ OECD, *Ageing and Transport: Mobility Needs and Safety Issues*, 2001, p 19 -
<http://www.cemt.org/pub/pubpdf/JTRC/01Ageing.pdf>.

Bureau of Statistics projects that the number of people aged 85 years or more will rise from 216,100 in 1997 to between 440,500 and 442,500 in 2021, and reaching between 1.1 and 1.2 million in 2051. People aged 85 years and over as a proportion of the population are projected to rise from 1.2% in 1997 to between 4.4% and 4.8% in 2051.⁴⁸

4.2 The ageing population - international comparisons

Placing Australia in an international setting, its ageing population trend is comparable to that of several other industrialised Western nations, including Canada, New Zealand, France, Sweden and the United Kingdom. Projections for all these countries indicate that, by 2050, around a quarter of the population will be aged 65 years and over. This compares with higher estimates for Greece (31.7%), Italy (32.6%) and Japan (37.7%). Conversely, the projections for other countries are significantly lower, including South Africa (9.7%), India (14.5%) and Indonesia (18.6%). It is projected that 23.7% of the Chinese population will be over 65 by 2050, compared to the figure of 21% for the USA.⁴⁹

4.3 The ageing population - New South Wales

Within Australia, while there is some variation between jurisdictions, with the exception of the Northern Territory the ageing pattern is broadly similar across the States and Territories.⁵⁰ Consistent with Australia as a whole, in NSW the population is ageing both numerically (the increase in the number of older people) and structurally (the increase in the proportion of older people).

NSW is projected to remain the most populous State in Australia, with the population as a whole rising from 6.7 million in 2004 to 8.7 million in 2051. The population of Sydney in that time is expected to rise from 4.2 million to 5.6 million. The projected median age, that is the age at which half the population is older and half is younger, for NSW and Sydney is as follows:⁵¹

⁴⁸ ABS, 3222.0 - *Population Projections, 1997-2051*, 1998, p 12.

⁴⁹ 1301.0 – Year Book of Australia 2008 - <http://www.abs.gov.au/AUSSTATS/abs@.nsf/7d12b0f6763c78caca257061001cc588/21b3a6d10ca1b6fcca2573d20010ffc8!OpenDocument>

⁵⁰ For a discussion of these variations see – Productivity Commission, *Economic Implications of an Ageing Australia*, 2005, pp 11-16. South Australia and Tasmania stand out as the States that will have the greatest concentrations of the old by 2044-45. This reflects their present above-average representation of the old and the tendency for migration patterns to disproportionately extract the young (page 11). Several factors make the Northern Territory an exception, including the fact that roughly 30% of the population is Indigenous, with this sub-population having an age structure weighted far more to the young, reflecting high fertility rates and relatively low life expectancy. Also, many non-Indigenous Territorians do not stay in the Territory at older ages (page 15).

⁵¹ ABS, n 48, p 62 – Projected populations, summary statistics – NSW.

Projected population – Median Age (Years)

Year	Sydney	NSW
2006	36.4	37.3
2026	40.5	41.7
2051	43.3	44.5

The projected population of NSW and Sydney aged 65 years and over is as follows:

Projected population aged 65 years and over (%)

Year	Sydney	NSW
2006	12.2	13.5
2026	18.5	20.2
2051	23.0	24.6

In other words, by 2051 around one in 4 people in NSW will be 65 years or over, this compared to around one in 7.5 in 2006. This increase can be compared to the fall in the projected population aged under 15 years, from 19.2% for NSW in 2006 to 15.6 in 2051. The corresponding decrease for Sydney is from 18.7% in 2006 to 15.2% in 2051.

Older People, NSW, 2004, a joint publication by the Australian Bureau of Statistics and the NSW Department of Disability, Ageing and Home Care, states that by 2016 the older population (65 years and over) is expected to outnumber the younger population (people aged 0-14 years) for the first time in the history of NSW. The same publication notes that, by 2023, the projected population 85 years and over will have increased to 2.6%, from 1.5% in 2003 and 2.2% in 2013.⁵² The Productivity Commission explains the significance:

While it is conventional to represent people aged 65 or more as ‘old’, many of the costs and challenges associated with ageing occur with the *oldest* old – those aged 85 years or more. For example, the probability of entry to high level residential nursing homes increases at the oldest ages.⁵³

4.4 The ageing population - regional differences

Not all NSW regions will experience the same rate of ageing, or indeed of population growth generally, over the next few decades. Just as the overall population in some areas of NSW is set to grow faster than others, so some areas are set to age more quickly than others. For example, in the Mid-North Coast the proportion of people 65 and older is projected to increase to 35% by 2031, up from 20% in 2006. Similarly, the Hunter Region (excluding Newcastle) will rise from 20% to 33% in the same time period. This contrasts with the rise from 12% to 18% between 2006 and 2031 for Sydney, which is projected to continue to have the lowest proportion of people aged 65 and older in NSW.

⁵² ABS, 4108.1 – Older People, NSW, 2004 - [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/44E29BA7E1EF82C4CA256F110076AE3C/\\$File/41081_2004.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/44E29BA7E1EF82C4CA256F110076AE3C/$File/41081_2004.pdf)

⁵³ Productivity Commission, n 50, p 13.

For a more detailed account of these projected regional differences see – Office for Ageing Fact Sheet, *Population Ageing Projections in NSW*, October 2007 - <http://www.dadhc.nsw.gov.au/NR/rdonlyres/52620D09-2B36-4296-9B80-9BFC7F7AC8C5/3384/FactSheet2ComparativeProjectionsinAgeing.pdf>

4.5 Statistics highlighting some characteristics of older Australians

As reported in September 2007 by the House of Representatives Standing Committee on Legal and Constitution Affairs, statistics highlighting some characteristics of the older section of the Australian population include:⁵⁴

- 41% of people aged 65-69 and 92% of people aged 90 and over have a disability;
- the number and proportion of older people living alone has increased from around one fifth in 1971 to more than one quarter in 2001;
- older people often find themselves providing care for another person. 22% of men and 19% of women aged between 65 and 74 are carers;
- slightly less than 3% of the Indigenous population is aged 65 or over compared to 13% of the broader Australian population;
- in 2001 there were only 79 men for every 100 women aged 65 years and this number decreases rapidly in all age groups. For people over 85 there are only 45 men for every 100 women;
- in 2005 there were nearly 2 million people in receipt of the Age Pension. This number represents 66.3% of all people who have reached the qualifying age for the Age Pension. This means the remaining 33.7% are either self-funded retirees, being supported by another person or have made alternative financial arrangements; and
- 12% of the total population of older people aged 65 to 74 years came to Australia from CALD (culturally and linguistically diverse) backgrounds.

4.6 Policy implications of the ageing population

The ageing of Australia's population has far-reaching policy implications. There is a tendency is to portray this in a negative light, as if old age were a synonym for disability, treating older people as a drain on the nation's resources, a burden on future generations, contributing nothing positive by way of economic or social benefit. The peak non-government agency in this area, Council for the Ageing (NSW), argued in its submission on the Draft NSW State Plan that the document perceived older people in a negative way, only mentioning them in terms of 'either a population projection, a care need (requiring increased care services) or a workforce deficiency'. The submission continued: 'There is no mention in the document of older people as a resource for the future or a positive influence'.⁵⁵

⁵⁴ Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitution Affairs, *Older People and the Law*, September 2007, p 2.

⁵⁵ COTA (NSW), *Submission – NSW State Plan A New Direction for NSW*, http://ntwebhost2.pacific.net.au/~cotaweb/docs/COTA_submission_on_NSW_State_Plan.doc

This is far from the whole story. Older people play an invaluable role in society, for example, performing unpaid work as carers of grandchildren and as volunteers. Australian research has calculated that the amount of unpaid work contributed by men and women aged 55 years and over to be \$74.5 billion per annum, with \$39 billion of this amount attributable to those over 65.⁵⁶ According to the NSW Office for Ageing:

Older people volunteer as much as the general population, with 32% of the younger-old (aged 55 to 65) and 29% of people 65 years and older reporting they have undertaken voluntary work in the past 12 months, compared to 33% of the general population. This represents an increase for older men in particular, from 23% to 29% since 2002. However, volunteering declines in later old age, with 22% of people 75 and older reporting they have undertaken voluntary work in the past 12 months.⁵⁷

Published in November 2007, the Australian Institute of Health and Welfare's report *Older Australia at a glance* states:

The notion that the vast majority of older people are a burden on the community and are being 'looked after' is challenged by the data presented in this publication...Despite having relatively low average levels of income, 24% of all older Australians were providing direct or indirect financial support for adult children or other relatives living outside the household. Older Australians are active contributors to family and community life. Almost half of people aged 65-74 years (48%) provide unpaid assistance to someone outside their household, one third (33%) provide volunteer services through an organization, 29% are actively engaged with community and social organizations and two thirds in social and support groups of various kinds.⁵⁸

On a positive note it is said that 'the ageing of the population should be seen as a transition rather than a crisis, with opportunities as well as challenges. The main challenge is to promote healthy and productive ageing and to adjust social structures to include older people as contributors to society'.⁵⁹

Nonetheless, the policy implications of an ageing population are real enough. As the

⁵⁶ De Vaus D, Gray M and Stanton D, *Measuring the value of unpaid household, caring and voluntary work of older Australians*, Australian Institute of Family Studies, Research Paper No 34, October 2003, p 19. For a more detailed account see – T Drabsch, *Ageing in Australia*, NSW Parliamentary Library Briefing Paper No 12/2004, pp 18-22.

⁵⁷ NSW Office for Ageing, *Ageing and social engagement*, Fact Sheet, October 2007 - <http://www.dadhc.nsw.gov.au/NR/rdonlyres/52620D09-2B36-4296-9B80-9BFC7F7AC8C5/3383/FactSheet1AgeingandSocialEngagement.pdf>

⁵⁸ Australian Institute of Health and Welfare, *Older Australia at a glance*, 4th edition, 2007, p viii.

⁵⁹ A Borowski, S Encel and E Ozanne eds, *Longevity and Social Change in Australia*, UNSW Press 2007, p 13.

Productivity Commission reported: ‘In itself, population ageing should not be seen as a problem, but it will give rise to economic and fiscal impacts that pose significant policy challenges’. It went on to make the following observations:

- People aged over 55 years have significantly lower labour force participation rates than younger people. As more people move into older age groups, overall participation rates are projected to drop from around 63.5 per cent in 2003-04 to 56.3 per cent by 2044-45.
- Hours worked per capita will be about 10 per cent lower than without ageing. Assuming the average labour productivity performance of the past 30 years, per capita GDP growth will slump to 1.25 per cent per year by the mid 2020s, half its rate in 2003-04.
- While taxation revenue will largely track GDP growth, government expenditure is likely to rise more rapidly, placing budgets under considerable pressure. Although education and some welfare payments are projected to increase more slowly than GDP, government spending on health, aged care and pensions will grow at a faster rate.
- The major source of budgetary pressure is health care costs, which are projected to rise by about 4.5 percentage points of GDP by 2044-45, with ageing accounting for nearly one-half of this.
- In the absence of policy responses, the aggregate fiscal gap will be around 6.4 percentage points of GDP by 2044-45, with an accumulated value over the forty years of around \$2200 billion in 2002-03 prices.

The Productivity Commission closed by noting that ‘On past trends, much of this could be expected to be borne by the Australian Government, but there are significant potential burdens faced by State and Territory Governments’.⁶⁰ In effect the demographic shift towards an older Australia has implications for areas such as aged care and health but also more widely in terms of labour market participation, housing, transport and other areas of social policy. While the Productivity Commission report has come in for some criticism, among other things for its overly conservative assumptions about potential changes in labour force participation rates for men,⁶¹ it is not to deny that there will be policy and resource implications for all levels of Australian government.

Policy implications arising from the ageing population were further discussed in a recent Senate Committee report on the cost of living pressures on older Australians. It noted that the shifts in Australia’s demography have various potential impacts

especially on the performance of the economy, the characteristics of the electorate, the nature of services required, as well as costs associated with health, aged care, pensions and other aspects of public administration. The sustainability of economic growth will be put under pressure as a result of lower labour force growth, lower

⁶⁰ Productivity Commission, *Economic Implications of an ageing Australia – key points*, <http://www.pc.gov.au/study/ageing/docs/finalreport>

⁶¹ A Borowski and P McDonald in *Longevity and Social Change in Australia*, n 59, p 35.

productivity, skills shortages and budget pressures, as older people require greater government spending than younger ones. Spending on age pensions is expected to rise from 2.9 per cent to 4.6 per cent of GDP between 2002 and 2042, with rises in the number of eligible recipients (though offset to a certain extent by enhanced superannuation accumulation). Similarly, health and aged care spending is projected to rise from 4 per cent to 8.1 per cent of GDP over this period, as older people have greater requirements for medical treatment and pharmaceuticals. The lower labour market participation that would ensue will be ameliorated to an extent by a (declining) pool of new young workers, increasing participation from women, immigration, improved education and the consequent greater participation rates created, and greater encouragement for older people to work.⁶²

The report concluded that a significant minority of older people, in particular those on low, fixed incomes with little discretionary spending capacity, are vulnerable to cost of living increases. Among the report's findings was that:

Many older people will need to work beyond the retirement ages experienced by preceding generations. Employers will have to be open to employing older people, while older people will need to maintain skills relevance (particularly in an era of rapid technological change). In short, Australians will need to work longer and save harder if they want a decent quality of life in retirement.⁶³

4.7 Older people and the law

The relationship between older people and the law is one that had received considerable attention over past few years. In 1990 NSW Young Lawyers, with the assistance of the NSW Attorney General's Department, produced the first edition of *Older People and the Law*, a publication now in its fourth edition. The publication provides older people with a relevant and accessible guide to their current legal rights in plain English, as well as information on other services available within the community. It is a practical guide setting out the law in NSW on range of topics relevant to older people, including: living wills; age pension entitlements; wills and powers of attorney; housing, age discrimination; and elder abuse and victims of crime.

More recently, as issues concerning the ageing population have come into clearer focus, major inquiries have also been conducted in the field of older people and the law, with the idea of identifying the legal needs of older people and evaluating the adequacy of current legislative regimes in addressing those needs.

Published in December 2004 by the Law and Justice Foundation of NSW was *Access to Justice and Legal Needs: The Legal Needs of Older People in NSW*. Its aim was to identify

⁶² Parliament of Australia, Senate Community Affairs Committee, *A decent quality of life: Inquiry into the cost of living pressures on older Australians*, March 2008, p 4 - http://www.aph.gov.au/senate/committee/clac_ctte/older_austs_living_costs/report/report.pdf

⁶³ Senate Community Affairs Committee, n 62, p xii.

the access to justice and legal needs of older people in NSW and to examine their ability to obtain legal services including legal information, basic legal advice, initial legal assistance and legal representation to meet these needs. It concluded:

The most commonly recurring theme throughout this project was that older people are often reluctant to complain about issues affecting them. Given older people's distrust of the legal system, and limitations of the law in addressing their legal problems sufficiently, there is a danger that the legal needs of older people may be largely hidden from legal and non-legal service providers, courts, tribunals, and complaints handling bodies.

The report suggested that:

A specialist legal service for older people could provide a valuable resourcing role generalist legal services across NSW regarding issues for older people and methods of effective service delivery to older people.⁶⁴

Covering similar ground and published in September 2007 by the House of Representatives Standing Committee on Legal and Constitutional Affairs was *Older People and the Law*. The report dealt with the following areas:

- *Fraud and financial abuse;*
- *Substitute decision making*, including issues relating to power of attorney legislation in the various Australian jurisdictions, advance health care planning, and guardianship and administration;
- *Family agreements;*
- *Barriers to older people accessing legal services;*
- *Discrimination;* and
- *Retirement villages.*

On the issue of *substitute decision making*, the Committee's recommendations included that the Commonwealth encourage the Standing Committee of Attorneys-General to work towards the:

- implementation of uniform legislation on powers of attorney across States and Territories;⁶⁵
- development and implementation of a national register of enduring powers of attorney;
- national consistency and coverage of legislation governing advance health care planning (living wills or advance care directives etc); and
- implementation of nationally consistent legislation on guardianship and administration.

⁶⁴ Law and Justice Foundation of NSW, *Access to Justice and Legal Needs*, December 2004, p xxxvi.

⁶⁵ A table of current power of attorney legislation was set out at Appendix D to the Report.

On the subject of *retirement villages*, the Committee noted that some submissions called for the creation of a retirement village ombudsman or commissioner in each State to investigate and resolve disputes. It was informed that New Zealand had recently passed legislation introducing a statutory supervisor to aid their elderly in addressing their particular retirement village problems.⁶⁶ The idea of a statutory supervisor was supported by the Committee, as was the greater harmonization of legislation dealing with retirement villages.

These reports do not start from the premise that all older people are frail, easily duped and in need of protection and assistance in managing their daily lives. Nor do they assume that older people are a homogenous community. All the same, they do tend to highlight the legal issues of particular relevance to older people, where they may tend to be especially vulnerable or at risk for one reason or another, but also where the needs of older people can be clearly identified. In short, in addition to the broader policy challenges posed by the ageing population, these inquiries suggest the legal implications that follow on from this demographic change.

4.8 The case for and against elder law

One result of the ageing population is the development in some jurisdictions of what is called 'elder law'. That is, the emergence of a new field of legal specialization in the United States, Canada and the United Kingdom dealing with those areas of the law most relevant to older people. Currently, the University of Western Sydney is the only centre in Australia specializing in elder law, where the Public Trustee NSW sponsors the Elder Law Chair. The importance of elder law has also been recognised by the Law Institute of Victoria through the establishment of a dedicated Elder Law Section chaired by Dominique Saunders.⁶⁷

The case against elder law as a distinct specialization is that, unlike children, older people have full legal capacity and should be treated the same as all other adults. There should be nothing different about the law as it deals with a person aged 80 or 30. Age, it is said, is an arbitrary factor to use as a category of legal study, if only because people over 60 or 65 or whatever age is decided upon vary so much in their situation, health and other factors. There is nothing homogenous about older people. It is claimed in this respect that it would make far more sense to consider the law and people lacking in competence, or the law and those living in institutional settings, rather than the law and older people.⁶⁸ The NSW Ministerial Advisory Committee on Ageing has expressed the view that

older people are citizens of Australia the same as any others. They are covered by the laws of Australia the same as any other citizens. We do not see that they should

⁶⁶ *Retirement Villages Act 2003* (NZ).

⁶⁷ 'Elder law section formed' (February 2008) *Law Institute Journal* 15.

⁶⁸ J Herring, 'Older people and the law' (2007) 60 *Current Legal Problems* 148 at 153. Herring puts the case for and against elder law.

be categorized and discriminated against, if you like even if it is positive discrimination, in the sense of categorizing them as older people with special needs and interests as if they were less than full citizens.⁶⁹

Against this, Jonathan Herring argues there are good reasons why the practice and study of the law and older people is necessary and appropriate. Paramount is the need to combat ageism, in his view, with Herring writing:

It is true that age is an arbitrary construct which should have no relevance to a person's legal rights, but the same can be said of sex or race. The sad truth is we do live in a society in which there is deeply ingrained prejudice concerning old age...To seek to ignore the vulnerabilities that affect those of old age as a group and claim they suffer none does nothing to advance their cause.⁷⁰

Alternatively, argues Herring, it might be acknowledged that old age really is different and this needs to be recognised in legal as in other contexts:

The argument here, then, is that although there are prejudices about old age and unfair assumptions that are made, that should not be used to disguise the fact that for most people old age is different from other stages in life. These differences must be recognised and treasured.⁷¹

4.9 NSW Government responses to the ageing population

As discussed in Briefing Paper No 12/2004, the challenges posed by Australia's ageing population have been met by a number of government initiatives at federal and State level. An example in NSW was the *Healthy Ageing Framework 1998-2003*, which had the objective of ensuring 'a society in which all older people lead satisfying and productive lives with maximum independence and well-being'. Under the auspices of the NSW Department of Ageing, Disability and Home Care, on 30 and 31 October 2007 the Government's convened a roundtable on future ageing issues, *Ageing 2030 – Creating the Future*. In preparation for the forum, the following background papers were published:

- Demographic shift and its implications (Professor John Piggott)
- Housing transitions and urban planning for liveable homes and communities in a future with an ageing population (Professor Mike Berry)
- Ageing well and retaining independence (Professor Louisa Jorm)
- Ageing and work in 2030 (Professor Louise Rolland)
- Some spatial dimensions of Australia's future ageing population: a demographic perspective (Professor Graeme Hugo).⁷²

⁶⁹ F Barr, *Transcript of evidence*, 15 May 2007, p 48 - <http://www.aph.gov.au/hansard/reps/commtee/R10171.pdf>

⁷⁰ Herring, n 68, p 153.

⁷¹ Herring, n 68, p 157.

⁷² NSW Office for Ageing - <http://www.dadhc.nsw.gov.au/dadhc/Ageing+2030+>

This was followed by the release in April 2008 of the report, *Towards 2030: planning for our changing population*. In terms of the impact of the changing population on NSW, the report stated:

Population change will impact on State revenue and expenditure. NSW Treasury has projected the fiscal position of NSW over the next 40 years and found demographic and other fiscal pressures could lead to costs being significantly in excess of revenue (“fiscal gap”). Treasury projects that demographic factors account for around 40% of the total gap by 2044, with other growth factors accounting for the remaining 60%. In the absence of policy changes, the fiscal gap is estimated at 3.4% of Gross State Product (GSP) or around \$23 billion in today’s dollars (almost half the current health budget).⁷³

The Premier took the debate a step further in the lead up to the 2020 Summit, arguing that consideration should be given to pushing back the retirement age. He is quoted as saying:

Closing that fiscal gap will require a sustained effort to keep government spending in check and, most importantly, a greater willingness by the Commonwealth to share its considerable resources with the states.⁷⁴

Other recent initiatives include:

- *Seniors Card Scheme* which offers a range of NSW Government funded transport concessions and private sector discounts.⁷⁵
- The NSW Department of Health’s *Future Directions in Dementia 2001-06*.⁷⁶ On 7 April 2006, Australian Health Ministers jointly endorsed the *National Framework for Action on Dementia 2006 – 2010*. This policy is supplemented by the *NSW Dementia Action Plan 2007-2009*.⁷⁷ Delivery of the strategies in the plan is the joint responsibility of the Department of Health and the Department of Ageing, Disability and Home Care, in partnership with service providers and key non-government organizations, such as Alzheimer’s Australia NSW. In 2008 there was

[+Background+papers.htm](#)

⁷³ NSW Government, *Towards 2030*, p 9 - <http://www.dadhc.nsw.gov.au/NR/rdonlyres/65AEF9C3-1CE5-4F53-8204-823569720B9B/3500/Towards2030.pdf>

⁷⁴ C Masters, ‘Retire older, work harder’, *The Daily Telegraph*, 18 April 2008, p 2.

⁷⁵ NSW Department of Ageing, Disability and Home Care, *Annual Report 2006-07*, p 33. The scheme has 1.1 million members, with 3,110 business partners covering 6,969 business outlets, giving discounts to seniors of at least 5%.

⁷⁶ For details of the policy see - <http://www.dadhc.nsw.gov.au/NR/rdonlyres/D87FA83D-4E00-446B-A6B9-7CCE54143820/647/FutureDirections.pdf>

⁷⁷ For details of the policy see - http://www.health.nsw.gov.au/policies/gl/2007/pdf/GL2007_025.pdf

a commitment of \$2.6 million to the *dementia support strategy*, which includes the provision of 12 dementia advisory services in NSW and 10 dementia clinical nurse consultants working in area health services across the State.⁷⁸

- A further NSW Department of Health initiative was the *Framework for integrated support and management of older people in the NSW health care system, 2004-06*. Additional resources have been allocated to services that enable older people with multiple care needs to return home from hospital safely and without unnecessary delay. These same services also provide support in the home to minimise the risk of avoidable re-admission to hospital.
- *Stronger Together – a new direction for disability services in NSW, 2006-2016* includes reference to working with the Commonwealth to improve the interface between disability and ageing.
- The NSW Carers Action Plan, 2007-2012 outlines the Government's commitment to carers over the next 5 years.
- An *Interagency Protocol for Responding to Abuse of Older People* has been developed which emphasises the principle that older people are entitled to the same level of protection as any other member of the community. The Protocol details a framework and provides information and resources for agencies and staff to assist them to better respond to the abuse of older people.⁷⁹

Generally, the NSW Government states that it is committed to providing quality services for older people and their carers which promote their health and wellbeing, optimise their independence and participation in community life, and facilitate their timely access to appropriate care and support. The Government argues in this respect:

This commitment is strongly reflected in both the State Plan and the State Health Plan ('A New Direction for NSW — Towards 2010') which were developed after extensive community consultation.⁸⁰

4.10 Federal/State jurisdictional issues

Relevant to any discussion about the protection of the rights and interests of older people in Australia is the division of powers and responsibilities between the Commonwealth, State and Territory governments. In terms of legislation, the main areas of responsibility can be summarised as follows:

- At the *Commonwealth level*, legislation of particular relevance to older people includes the areas of aged care, superannuation, social security and veteran's entitlements. The Age Pension is a Commonwealth responsibility. So, too, is the control of subsidies for residential care.⁸¹

⁷⁸ NSWPD, 3 April 2008, p 48 (Hansard draft).

⁷⁹ For a survey of such initiatives see – *Towards 2030*, n 73, pp 10-11 and Appendix 2.

⁸⁰ Productivity Commission, *Report on Government Services 2008*, vol 2, para 13.64 - http://www.pc.gov.au/_data/assets/file/0005/74876/chapter13.rtf

⁸¹ The Productivity Commission reports that 'In February 2007, the Australian Government

- At the *State and Territory level*, legislation of particular relevance to older people include the areas of substitute decision making, guardianship, retirement villages, and wills and probate. Criminal matters, such as fraud and other financial abuse, are also dealt with primarily at the State and Territory level (although Commonwealth legislation covers certain criminal matters).

4.11 Commonwealth regulation of nursing homes

The upshot is that certain very significant areas, such as the accreditation of nursing homes, are not regulated under NSW laws, but fall rather under the jurisdiction of the Commonwealth Department of Health and Ageing. Appointed by the Department Secretary under the *Aged Care Act 1997* (Cth) is the Aged Care Standards and Accreditation Agency Ltd, a Commonwealth owned corporation established by the Howard Government to manage to the residential aged care accreditation process.

In 2005 the Aged Care Standards and Accreditation Agency's work was critically reviewed by the Senate Community Affairs References Committee, as were the complaints mechanisms available under *Aged Care Act 1997* (Cth). The *Quality and Equity in Aged Care* report explained that all aged care services were required to establish an internal complaints system. The Department of Health and Ageing, in addition to funding care advocacy services in each State, also administered a Complaints Resolution Scheme, headed by a Commissioner for Complaints who had a statutory requirement to oversight the effectiveness of the Scheme. This Scheme operated on an alternative dispute resolution basis, which meant that an outcome had to be mediated between the parties.⁸²

The Senate Committee report arrived at the conclusion that there 'are deficiencies with the operation of the Complaints Resolution Scheme'. This followed on from stakeholder submissions about the Scheme, which was said to be inaccessible and not sufficiently responsive to the needs of consumers. On the other hand, the Committee did not go so far as to endorse calls for an independent complaints agency, favouring instead reform of the current arrangements.⁸³

Both in response to the Senate Committee report and ongoing issues relating to abuse in nursing homes, important reforms were introduced. Mandatory reporting of sexual abuse and physical assault in nursing homes started on 1 April 2007.⁸⁴ The complaints system

announced a further increase in the provision ratio from 108 to 113 operational places per 1000 people aged 70 years or over, to be achieved by June 2011. The proportion of places offered has been adjusted from 20 to 25 places for community care, with 4 of these places for every 1000 people aged 70 years or over to be for high level care. In residential care, the provision ratio for high level care was increased from 40 to 44 places, while the ratio for low level residential care was adjusted from 48 to 44 places for every 1000 people aged 70 years or over' - *Report on Government Services 2008*, vol 2, n 80, para 13.9.

⁸² Senate Community Affairs References Committee, *Quality and equity in aged care*, June 2005, p 59.

⁸³ Senate Community Affairs References Committee, n 82, p 64.

⁸⁴ For an overview of the legislation see – Commonwealth Parliamentary Library, *Aged Care*

was also overhauled, with the establishment of a new Aged Care Complaints Investigation Scheme, administered by the Office of Aged Care Quality and Compliance within the Department of Health and Ageing.⁸⁵ Further, a new office of Aged Care Commissioner was established to oversight the Department's handling of complaints under the Investigation Principles which were inserted in the *Aged Care Act* in 2007.⁸⁶ While the Aged Care Commissioner is appointed by the Minister, he/she may only be removed from office on certain defined statutory grounds, including 'misbehaviour or mental or physical incapacity'.⁸⁷

4.12 NSW and older people – law and administration

However, a very broad area of law, policy and administration relevant to older people remains within State jurisdiction. Transport is an obvious example, the delivery of health services another, as is the delivery of home care and other social services. Infrastructure issues, crime, planning and many other areas are also relevant. Indeed, there may be an actual or potential older people dimension to most policy areas, everything from gambling, to disputes with tradesmen, to drivers' licences.

Even in the area of residential care various State laws govern certain regulatory arrangements. The Productivity Commission points out in this respect that:

State and Territory legislation may prescribe matters such as staffing, the dispensing of medication and/or certain medical procedures, occupational health and safety, workers compensation requirements, building standards, and fire prevention and firefighting measures. Staff wages and conditions are generally set by jurisdiction-based awards. Local government bylaws may also apply (for example, waste disposal rules).⁸⁸

The State legislation of most direct or particular interest to some or all older people in NSW includes:

- *Aboriginal Housing Act 1998*
- *Anti-Discrimination Act 1977*
- *Community Welfare Act 1987*
- *Consumer Trader and Tenancy Act 2001*
- *Crimes Act 1900*

Amendment (Security and Protection) Bill 2007, Bills Digest No 120, 2006-07.

⁸⁵ For an overview see - <http://www.health.gov.au/internet/main/publishing.nsf/Content/ageing-quality-factsheet-cis.htm>

⁸⁶ *Aged Care Act 1997* (Cth), s 94A.1 (Investigation principles) and s 95A.1 (Aged Care Commissioner).

⁸⁷ *Aged Care Act 1997* (Cth), s 95A.10.

⁸⁸ *Report on Government Services 2008*, vol 2, n 80, para 13.9.

- *Disability Services Act 1993*
- *First State Superannuation Act 1992*
- *Guardianship Act 1987*
- *Health Services Act 1997*
- *Home Care Service Act 1988*
- *Housing Act 2001*
- *Mental Health Act 2007*
- *Powers of Attorney Act 2003*
- *Protected Estates Act 1983*
- *Public Health Act 1991*
- *Public Trustee Act 1913*
- *Residential Parks Act 1998*
- *Residential Tenancies Act 1987*
- *Retirement Villages Act 1999*
- *Road Transport (Driver Licensing) Act 1998*
- *State Authorities Superannuation Act 1987*
- *Strata Schemes Management Act 1996*
- *Succession Act 2006*

Department of Ageing, Disability and Home Care: Heading the administration and development of policies relating to older people in NSW is the Department of Ageing, Disability and Home Care, the Minister. Included within the Departmental structure is the Office for Ageing (OFA) which outlines its role in these terms:

The OFA's role is to provide rigorous analysis of the policy implications arising from research on ageing issues and to undertake projects that have a strategic whole-of-government focus. The OFA particularly focuses on areas without specific agency ownership, such as social marginalisation, abuse of older people, and workforce issues. The emphasis is on areas where public policy responses are required to address current or emerging social justice issues.⁸⁹

NSW Ministerial Advisory Committee on Ageing: The OFA provides secretarial assistance for the NSW Ministerial Advisory Committee on Ageing. This body is appointed to advise the Minister for Ageing on issues affecting older people in NSW and on the impact of the ageing of the population. The Committee:

- consults with older people and fosters debate about issues affecting older people and options for change;
- monitors policies and changes that affect older people; and
- provides options and recommendations to inform and assist Government policy.

Disability Council: The NSW Department of Ageing, Disability and Home Care is the host department for the Disability Council, the role of which is set out under the *Community*

⁸⁹ NSW Office for Ageing - <http://www.dadhc.nsw.gov.au/dadhc/Older+People/About+the+Office+for+Ageing.htm>

Welfare Act 1987. They are:

- To advise Government on disability matters;
- To raise community awareness about people with disability and their aspirations; and
- To promote participation by people with disability.

Guardianship Tribunal: The NSW Department of Ageing, Disability and Home Care is also the host department for the Guardianship Tribunal, an independent statutory body operating under the *Guardianship Act 1987*. The Tribunal considers applications about people who normally reside in NSW or who have property or other financial assets in NSW. The Tribunal can:

- make guardianship orders to appoint a private guardian (family member or friend) and/or the Public Guardian
- make financial management orders to appoint a private financial manager and/or the Protective Commissioner
- provide consent for treatment by a doctor or dentist
- review enduring powers of attorney
- review an enduring guardianship appointment
- approve a clinical trial so that people with decision-making disabilities can take part.⁹⁰

Office of the Protective Commissioner: Established in 1985 under the *Protected Estates Act, 1983*, the Office of the Protective Commissioner forms part of the NSW Attorney General's Department. It is an independent public official legally appointed to protect and administer the financial affairs and property of people unable to make financial decisions for themselves (where there is no other suitable person willing to assist).

Public Trustee NSW: Operating under the *Public Trustee Act 1913* its role is to act as an independent and impartial executor, administrator and trustee.

Complaints and other mechanisms: Specific complaints and resolution dispute mechanisms are also in place, including the Health Complaints Commission which deals with complaints about anything to do with health care or a health care service in NSW.

The Consumer, Trader and Tenancy Tribunal provides for the resolution of a wide range of disputes, including those arising over tenancy issues in the private rental market. The Tribunal also has a Residential Parks Division and a Retirement Villages Division. Other relevant bodies include the NSW Anti-Discrimination Board, formed under the State's anti-discrimination regime which outlaws discrimination on grounds of age in work and other contexts. Compulsory retirement from employment on the ground of age is unlawful under the legislation. Also covered is discrimination on the ground of a person's

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The Guardianship Tribunal website - <http://www.gt.nsw.gov.au/about/>

responsibilities as a carer.⁹¹

Information services: Various publicly funded information services are available for older people. For example, funded and managed by the NSW Department of Ageing, Disability and Home Care, through its Office for Ageing, is the NSW Seniors Information Service. This provides older people, their families and carers with information on the range of services and options available to them. The gateway facility is organized around the subject of: health; education; accommodation; concessions; safety; and support services.⁹² Other information gateways deal specifically with issues relevant to retirement, caring for others, victim support and death and bereavement.⁹³

Funded and managed by NSW Health is the Disability and Aged Information Service (DAISI), which is based in Lismore and services the Far North Coast region from just North of Woolgoolga to Tweed Heads. A free information service assists people with disabilities, older people and their families, carers and advocates.

4.13 Non-government agencies

In addition to these governmental bodies and initiatives a number of non-government agencies also operate in support of older people, in general advocacy and other more specific roles. These include:

- ***Council On The Ageing (NSW)*** (COTA) is a peak non-profit community organisation serving all persons aged 50 and over in NSW. It aims to mobilise older people, those who work with them, government and the community towards achieving wellbeing and social justice for older people. Its core functions include: policy development, representation and advocacy; brokering, referring, collaborating, coordinating, and networking among seniors organisations and services to seniors; and informing and educating older persons and all those concerned with their welfare.⁹⁴ Its policy function is supported by grants from the South East Sydney Area Health Service and the NSW Department of Ageing, Disability and Home Care.
- ***Combined Pensioners and Superannuants Association*** (CPSA) serves pensioners of all ages, superannuants and low-income retirees. It has a broad mission to improve the living standards, community services and lifestyle choices of pensioners of all ages, superannuants and low-income retirees, as well as promoting their rights and dignity.
- ***Older Persons Tenants' Service*** (OPTS) operates within NSW to assist older

⁹¹ An overview of age discrimination legislation at the NSW and Commonwealth level is set out in Briefing Paper No 12/2004, pages 44-50.

⁹² See - http://www.seniorsinfo.nsw.gov.au/about_us

⁹³ NSW Government - <http://www.nsw.gov.au/life.asp>

⁹⁴ Council On The Ageing (NSW) - <http://www.cotansw.com.au/index.asp?arID=2>

tenants, both public and private, in all aspects of tenancy-related matters, but with particular focus on 'protected tenants'. A project of the Combined Pensioners' and Superannuants Association of NSW, OPTS is a member of the Tenants Advice and Advocacy Service Network and is funded through the NSW Office of Fair Trading (primarily from the interest accrued from bond money paid by tenants). OPTS provides tenancy and housing advice to superannuants, pensioners and people 55 years and older, conducts education sessions on tenants rights and obligations, housing choices and home safety and security.⁹⁵

- **Carers NSW** is a non-profit association for relatives and friends who are caring for people with a disability, mental health problem, chronic condition or who are frail aged.
- **Meals on Wheels Association Inc (NSW)** develops meals on wheels and food services organizations and represents other community services organizations to ensure eligible clients have access to high quality services.
- **Alzheimers Association of NSW** represents the interests of for people affected by dementia in NSW. It provides support, information, education and community advocacy.
- **Aged-care Rights Service (TARS)** is a community legal centre that provides advocacy for the residents of Commonwealth funded hostels and nursing homes, self-care retirement villages and recipients of in-home aged care in NSW. The organization also provides information on the costs associated with entering an aged care facility and gives advice on retirement village contracts. TARS participates in the National Aged Care Advocacy Program, a free and confidential service funded by the Commonwealth Department of Health and Ageing promoting the rights of people receiving aged care services.⁹⁶
- **Older Women's Network (OWN)** promotes the rights, dignity and wellbeing of older women. Groups organize a wide range of activities and advocate on issues of concern to older women.⁹⁷

4.14 COAG Ministerial Council on Ageing

Over the years several COAG (Council of Australian Governments) initiatives have dealt directly with issues affecting older people. For example, in February 2006 COAG agreed to establish an initiative to simplify access to care services for the elderly, people with a disability and people leaving hospital. The initiative consists of two components: more timely and consistent assessments for frail older people by aged care assessment teams (ACATs); and simplified entry and assessment processes for the Home and Community Care Program.⁹⁸

⁹⁵ OPTS - http://www.cpsa.org.au/OPTS/O_Home.html **Park and Village Service (PAVS)**, which is organized on the same basis as OPTS, provides advocacy and information services to residential park and manufactured home estate residents.

⁹⁶ TARS - <http://www.tars.com.au/>

⁹⁷ OWN - <http://www.own.org.au/>

⁹⁸ *Report on Government Services 2008*, vol 2, n 80, para 13.7.

A further significant development is that, at its meeting on 26 March 2008, COAG agreed to establish a new ministerial council on ageing, stating:

The new Ministerial Conference on Ageing is to facilitate a consistent and coordinated approach to ageing and aged care policy across all levels of government, including reduced duplication of effort and better continuity of service delivery.⁹⁹

⁹⁹ COAG meeting, 26 March 2008 - <http://www.coag.gov.au/meetings/260308/index.htm> - [councils](#)

5. A COMMISSIONER FOR OLDER PEOPLE?

There is therefore no shortage of government and non-government organizations working on behalf of older people in NSW, which begs the question whether a new watchdog and/or advocacy body is needed at all. Would such a body only duplicate the work of existing organizations which already have a seat at the policy table? Is there a genuine and identifiable gap to be filled, a compelling social and/or legal need that has to be addressed?

Another consideration is that, as nursing homes are regulated by the Commonwealth Department of Health and Ageing, some of the work a Commissioner for Older People might be expected to undertake would be found more under federal than State jurisdiction. On the other hand, the scope of NSW involvement in the delivery of services to older people and the making of relevant laws remain very considerable. In the context of complex federal structures and processes, where there is potential for gaps and uncertainties, a potential role for a Commissioner for Older People would be to help co-ordinate Commonwealth-State services, while acting as a conduit for the communication of initiatives and concerns. It may be that such a Commissioner could operate as a one-stop shop for older people, providing advice and direction on the availability of services at all levels of government. In its recent report, *Towards 2030: planning for our changing population*, the NSW Government comments in this respect:

Professor John Piggott of the University of NSW notes that because ageing policy responsibilities are split between governments, policy coordination is more difficult. He observes the interconnectedness between discrete policy areas and suggests coordination of policy approaches to the workplace, financing, living arrangements and care.¹⁰⁰

Still the case for a Commissioner for Older People needs to be made out. To say that Australia's ageing population has far-reaching policy implications, in health and other areas, and that 'elder law' as it is called is a subject demanding increasing government and academic attention is not to establish a claim for such a Commissioner. It is only to say that, with more older people about in numerical and proportional terms, there is likely to be a greater need for such things as aged care, retirement living arrangements, transport facilities, access to health and legal services. It is to suggest that, as the need for facilities for older people increases, the problems that tend to arise in their delivery and administration will also tend to increase, as will conflicts and debates over the relative allocation of scarce resources to the ageing population. Following on from this, one might also argue that these prospective developments might also point to the need for a watchdog and an advocate for older people.

It in its submission to the Commonwealth *Older people and the law* inquiry the NSW Guardianship Tribunal argued:

In NSW there is no body that has a general mandate to investigate matters and advocate for systemic change. The establishment of a body that was authorised and

¹⁰⁰ *Towards 2030*, n 73, p 11.

adequately resourced to undertake systemic advocacy could benefit many older Australians in NSW by effectively eliminating some of the barriers and practices that currently disadvantage older persons.¹⁰¹

It is true that Governments in Australia, as elsewhere, are turning their attention towards the challenges posed by the ageing population, as indicated by the recent announcement of the COAG ministerial council on ageing and the release in April 2008 of the NSW Government's report, *Towards 2030: planning for our changing population*. The question is whether a distinct and independent body is needed to act as an advocate for older people at the State level?

If so, the powers of such a body would have to be clearly defined, as would its functions. Would it be empowered to handle complaints or not? Would it have an investigative function and, if so, how would this be formulated? Would it have a research and inquiry function independent of government? The analogous NSW Commission for Children and Young People might be looked at as a model.

The leading overseas model is the Welsh Commissioner for Older People whose functions encompass promotion, consultation, advocacy and education, but also extend to the review of the performance of relevant public bodies, as well as the review of the mechanisms available for advocacy, the making of complaints and whistle-blowing. The Commissioner is also empowered to undertake the examination of individual cases, but only where these raise a question of principle of general application to older people. The Commissioner is further directed to work collaboratively in appropriate cases with other Ombudsmen, including the Public Service Ombudsman for Wales.

As discussed, the establishment of a similar body has been proposed in Scotland. There the review functions proposed in the relevant Bill were narrower in scope. They provided the proposed Commissioner with a general function to 'promote and safeguard the rights and interests of older people', subsidiary to which were several broad duties to: promote best practice by service providers; assess the adequacy and effectiveness of relevant laws, policies and practices; and undertake and publish research on issues relevant to older people. The proposed Commissioner also had the power to investigate how service providers take account of the rights, interests and views of older people in the decisions they take and work they do.

As a minimum, the functions of any Commissioner for Older People in NSW might include:

¹⁰¹ NSW Guardianship Tribunal, *Submission No 75 – Law and older people inquiry*, 1 December 2006 - <http://www.aph.gov.au/house/committee/LACA/olderpeople/subs/sub75.pdf> In the same context, the NSW Ministerial Advisory Committee on Ageing explained it was appointed by the NSW Minister for Ageing to consult with older people and to provide options and recommendations on ageing issues - NSW Ministerial Advisory Committee on Ageing, *Submission No 103 – Law and older people inquiry*, 5 December 2006 - <http://www.aph.gov.au/house/committee/LACA/olderpeople/subs/sub103.pdf> It was further explained in evidence by the Chair, Felicity Barr, 'We are a policy advisory body; we are not an advocacy body that would deal with a single issue' - F Barr, *Transcript of evidence*, 15 May 2007, p 54 - <http://www.aph.gov.au/hansard/reps/commtee/R10171.pdf>

- Advocacy on behalf of older people in governmental and other contexts;
- Promoting ways for older people to participate in the community;
- Promoting awareness and understanding about issues affecting older people;
- Initiating, undertaking and publishing research and inquiries about issues affecting older people;
- Assessing the adequacy and effectiveness of relevant laws, policies and practices;
- Having input into laws and policies that affect older people;
- Promoting best practice by service providers;
- Investigating how service providers take account of the rights, interests and views of older people in the decisions they take and work they do; and
- Assisting older people to formulate and progress complaints.

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