Older people and consumer protection

By Karen Williams

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Addressing the issue of consumer protection and older people is complicated both by the dearth of data on the extent of the problem, and the fact that elderly people are not a homogenous demographic group. The wealth, health conditions, race, and culture among people over 65 all vary greatly.

The extent of the problem needs clarification, especially since it is important not to generalise or stereotype the majority of elderly people as being either incapable of entering consumer transactions or likely to fall prey very easily to various scams because of their isolation and vulnerability to undue influence. Nevertheless, while such stereotypes are not always helpful, elderly people are exposed to identifiable patterns of risk and vulnerability with respect to consumer protection.

One specific risk that has been identified is that of consumer fraud. In the younger population, the risk of assault is equal to the risk of fraud. However, among people over 65, the risk of fraud is 2.2 times greater than that of assault.[1] Elderly people are therefore more vulnerable to economic than physical crime. Economic crime includes financial mismanagement and abuse of enduring powers of attorney and guardianship, while consumer fraud is defined as 'victimisation when someone is selling something or delivering a service'.[2]

Not only is consumer fraud the most prevalent crime experienced by older people, but its impact upon elderly people can be particularly severe, as most rely on savings accumulated during their working lives. They are usually unable to recover this money.[3]

This article focuses on the impact of consumer fraud (and measures to prevent its occurrence) rather than financial abuse. The difference has been defined by the Law Institute of Victoria:

'While elements of fraud can overlap with the category of "financial abuse"... fraud generally involves the older person falling victim to strangers who represent themselves as being in positions of authority and trust in order to sell products and services. On the other hand, financial abuse often occurs within the older person's family group where family members have abused the position of trust placed on them (such as through powers of attorney) by the older person.'[4]

SCOPE OF THE PROBLEM

In understanding the nature of the problem, researchers have used US data because of the paucity of data in Australia.[5] One area of high risk to elderly people has been their susceptibility to telemarketing scams. US data indicate that approximately $40 billion are fraudulently taken via telemarketing scams, with up to 10 per cent of firms in this field operating fraudulently. The majority of telemarketing fraud victims were over 50 years old, and most of the victims did not identify the behaviour of the telemarketers as criminal.[6]

Disturbingly, lists of victims have been compiled and sold on the black market, leaving them open to further exploitation.[7]

Another area of consumer fraud that disproportionately affects the elderly is house repairs. The main areas of complaint include work that is not completed after the deposit is paid; builders being uncontactable; unnecessary work being completed to a poor standard; and complicated and expensive finance schemes accompanying larger home repairs and renovations. The latter area was the second highest area of complaints received by the US consumer affairs agencies.[8]

Motor vehicle repair is another area of concern for elderly consumers. It was the issue that generated the most complaints to consumer affairs agencies in the US. One of the difficulties faced by elderly people is keeping up to date with changes in vehicle technology, and this ignorance is exploited by some services.[9]

Savings and investments is another area where elderly people may be vulnerable. Superannuation schemes have been more highly regulated in Australia, unlike overseas, which has rendered them a largely safe investment[10] (from the perspective of vulnerability to fraud, obviously not to the downturn in the global markets).

AUSTRALIA

Particular areas of consumer fraud were identified in the recent *Older People and the Law* report from the House of Representatives Standing Committee on Legal and Constitutional Affairs. It highlighted a range of concerns and the specific characteristics of an elderly population that places them at risk. While the following risk factors do not apply to every older person, they have been identified as relevant factors that make this age group more vulnerable to consumer fraud:

- language or literacy barriers;
- financial literacy barriers;
- insufficient financial preparation for retirement, or inadequate funds to live comfortably in retirement;
- reluctance to pursue their rights, or lodge complaints where appropriate;
- being easily influenced by a group, such as a cultural, sporting or religious group – affinity fraud;
- being an older Indigenous Australian;
- reduced mobility, vision or hearing; and
- cognitive impairment.[11]

These risk factors are compounded by the fact that older people are more likely to rely on others to help them to go through their 'paperwork', who may not always be operating in their best interest.[12]

The incidence of consumer fraud in Australia is difficult to determine. The combination of people often feeling humiliated and embarrassed when they fall victim to various scams, along with the belief that nothing can be done about them, militates against the problem being reported and documented. To remedy this lack of data, the ABS will be including questions about consumer fraud in their regular household surveys.[13]

Investment scams targeting people with substantial savings, and credit schemes, is another area of consumer fraud concerning older people. The risks come from professional people who may be acting unprofessionally, along with unlicensed and unregulated investment brokers. [14]

Particular consumer fraud scams that place elderly people in Australia at most risk have been identified as:

- fake lotteries;
- unexpected prizes (with costs associated with claiming the prize);
- advanced fee scams (also known as the Nigerian scams);
- computer prediction software (betting); and
- chain letters/pyramid selling schemes.[15]

Protection for consumers is found in Commonwealth and state legislation, most notably parts IVA and V of the *Trade Practices Act 1974* (Cth) and the various state fair trading laws. State laws tend to mirror the Commonwealth legislation, but they often have a broader base.

Consumer protection in relation to financial services rests with the Australian Securities and Investment Commission (ASIC). It has been responsible for regulating securities, financial markets, futures and corporations since 1991. In 2002, the *Financial Services Reform Act 2001* extended the powers of ASIC to cover consumer protection in relation to credit so as to mirror the *Trade Practices Act* provisions covering misleading and deceptive conduct and unconscionable conduct.[16]

In performing its regulatory role, ASIC has identified several areas of concern regarding consumer protection, in the financial and investment sector, for elderly Australians. These include:

- adequate financial planning for retirement and avoiding high risk or illegal investment strategies that may result in significant, irrecoverable financial losses;
- equity release products; and
- scams, such as cold calling and unsolicited share offers, to which a significant number of older Australians fall victim.[17]

SOLUTIONS AND RESPONSES

There is no one solution to this problem. Responses are needed on many levels, ranging from informal measures for local communities to formal legislative responses.

One difficulty in formulating responses has been the reluctance of victims and authorities to characterise the theft of property and assets generally as criminal acts. This >>

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has also been compounded by the reluctance of the police to investigate and prosecute complaints in relation to elderly people.[18]

By comparison, the development of the law and responses of associated institutions in the US have been very different, where consumer fraud is more readily characterised as crimes committed against elderly people. Not only do various American states include specific crimes perpetrated against elderly people in their criminal codes,[19] but other related provisions also facilitate prosecutions of such crimes. They address the difficulties that elderly people giving evidence can face, and the lack of understanding and skills of people within the law enforcement agencies. For example, the difficulties posed by the declining health or memories of some elderly people have been overcome in some states by provisions to 'fast track' criminal charges where elderly people are the victims or major witnesses. Relevant evidentiary acts have also been amended so that elderly people can give evidence via statements from their residential facility. A few American states have fairly robust provisions that enable witness statements (often videotaped) to be used as evidence in criminal proceedings to enable prosecutions to proceed when the elderly person is unable to provide evidence in the usual way.[20]

Police and prosecuting bodies in the US receive special training to enable them to understand the particular vulnerabilities of some elderly people.[21] This training facilitates the development of specialist skills and knowledge, thereby enhancing effectiveness.

Criminalising some acts against elderly people therefore enables the state to act against the alleged perpetrators, rather than wait for an elderly victim, or their legal attorney to take action via a civil claim. For example, California has the crime of 'undue influence' included in their criminal codes against elderly people.[22]

Legislators in Australia are currently reluctant to 'criminalise' acts of consumer fraud or financial abuse, citing the current hesitancy of law enforcement in Australia and reluctance of older people to pursue criminal action.[23]

BANKING SECTOR

Banks are often considered well-placed to identify irregular financial activity in their elderly consumers' accounts. But, in Australia, the banks have been generally reluctant to proactively monitor elderly people's accounts, and have therefore been criticised for failing to act despite being suspicious about the use or potential abuse of an elderly person's account.[24] But taking action is complicated by the fact that they cannot discriminate in their responses to elderly customers, and the uncertainty about whether people with impaired capacity can make decisions – or whether those with capacity therefore have the right to make unwise decisions.

Older people have only made a few complaints to Australian agencies, such as the banking ombudsman.[25]

Indicators that financial abuse may be occurring include:

- unexplained movements in bank accounts or investments – large amounts of money withdrawn or transferred to another person's account;
- missing financial/legal documents;
- finances not properly conducted by a third party appointed for that purpose;
- personal cheques being cashed; and
- cash being withdrawn from bank accounts but not given to the victims.[26]

The US and Canada have initiated a range of protective laws and responses in the banking sector. Oregon has passed laws providing immunity for those in the banking sector who notify suspected financial abuse. A response that has been adopted in some areas of Canada involves elderly people authorising their bank to:

> 'monitor their accounts for unusually large transactions or unusual patterns of transactions. The bank is then authorised to raise its concerns with the account holder and to warn of the possibility of fraud. Account-holders, however, retain full rights over their accounts and may elect to disregard any warnings given.'[27]

A similar scheme may easily be adapted to Australia, as people already give these types of authorities to their banks when they travel overseas.[28] It could be argued that if a bank is currently requested to do so, it may provide such assistance in accordance with its duty of care obligations. These types of changes to the banking system have been recommended as an easy protective strategy.

MANDATORY REPORTING

Many US states have mandatory reporting provisions that include a 24-hour, seven days per week, response to issues concerning elder abuse.[29]

Australian agencies are uncertain about a mandatory reporting response, their concerns being similar to proposals to criminalise consumer fraud. Concerns about both mandatory reporting and criminalisation of consumer fraud and financial abuse of elderly people stem from the general reluctance of elderly people to take action, along with concerns about the efficacy of taking action, and the possibility that this may also involve pursuing family members through the court system.

Taking these factors into account, Australian agencies have recommended mediation as an option that is less public and traumatic, and which provides a venue for a private negotiated settlement.[30]

Many Australians are concerned about the efficacy of mandatory reporting legislation, in that it only creates an offence against the non-reporter and has little impact on the alleged perpetrator. Another concern is that mandatory reporting may provide another avenue for people to pursue illegitimate complaints. It has also been shown to be no more effective than the development of co-operative protocols and programs with financial institutions.[31]

PUBLIC AWARENESS

Campaigns to raise the awareness of consumer fraud and financial abuse and its negative effects on elderly people have been identified as one of the most effective ways of combating these problems. Some states have already embraced such campaigns, with education that covers:

> 'providing consumers with advice and information on a number of key areas such as banking, cold calling, door-to-door sales, internet and mail order shopping, investments and scams'.[32]

Some states specifically seek to educate elderly people about the specific risks. For example, NSW has developed specific comprehensive legal and consumer information for elderly people.[33]

ASIC has a national mandate to educate the public about improving the financial literacy of the nation, with one of its

> 'priorities for the coming year is to develop initiatives to assist retail investors to better manage and protect their investments' wealth, with a particular focus on the needs of retirees and baby boomers who are soon to become retirees... Those initiatives will include work to better educate consumers about the importance of diversification and what this involves and the issue of the risk-return premium.'[34]

Victoria's Council on the Ageing has recently participated in a survey regarding credit uptake, and credit traps affecting older people. Many identified difficulties with the reverse mortgage industry.[35]

Equity release schemes and, in particular, reverse mortgages, have become a burgeoning industry, particularly among older Australians. The average age of borrowers is 74 years, with mortgage-brokers and financial-planners providing 47 per cent of the products.[36] While it has been acknowledged that some schemes provide a legitimate service, concerns surround the lack of independent legal and financial advice, posing significant risk to borrowers. ASIC has noted that equity release schemes pose risks including 'negative equity, terms and conditions, access to advice for consumers, and the potential impact on Centrelink benefits, and fees associated with some products'.[37] These risks are obviously magnified in the current economic climate.

ASIC does not have regulatory authority over the equity release market. Consumer credit is regulated by the states via the Uniform Consumer Credit Code.[38] Not all products currently on the market fall within the scope of the current code.

Elderly people have also been subject to aggressive marketing by high-risk and unsecured investments – and it may be extremely tempting for many people over 60 years of age to top up their retirement savings by placing their superannuation into such high-risk schemes.[39]

ACCESSING LEGAL SERVICES

Elderly people often go to their existing support network when confronted with a legal problem. Often their 'legal problems' are multi-layered in nature, involving questions about carers, family and friends, as well as professional legal advice. As a result, more time is often required of practitioners in order to understand the complexity of the problem and to establish rapport with their older clients. Some community legal centres, in response to these particular needs of older people, have developed a multi-disciplinary approach to legal problems to assist their clients in a broader way.[40]

Overall, insufficient numbers of legal practitioners are in tune with the needs of the older population. Given the growing need for services as our population ages, this area of law requires greater attention, and appropriate encouragement from both government and professional bodies.[41] ■

Notes: 1 Dr Adam Graycar and Marianne James, *Older Persons and Consumer Fraud*, Australian Institute of Criminology, 2001, p2. **2** *Ibid.* **3** House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older Persons and the Law*, 2007, p12. **4** *Ibid*, p13. **5** Note 1,p2. **6** *Ibid.* **7** *Ibid*, p3. **8** *Ibid.* **9** *Ibid*, p4. **10** *Ibid.* **11** As above note 3, p19. **12** Ibid, p16. **13** *Ibid.* **14** *Ibid*, p17. **15** *Ibid*, p23. **16** *Ibid*, p24. **17** *Ibid.* **18** *Ibid*, p26. **19** 'Domestic Elder Abuse and the Law', *American Journal of Public Health*; Dec 2003, Vol. 93, Issue 12, pp21-32 and Elder Abuse and the Criminal Justice System: A New Awareness', *Generations*, Sumer 2000, Candace J Heisler, p54. **20** American Prosecutors Research Institute, *Prosecution of Elder Abuse, Neglect and Exploitation, 2003,* pp36, 40-42 *at* www.ndaa.org/pdf/elder_abuse_web.pdf. **21** Office of Victims of Crime, Officie of Justice Programs, US Department of Justice, *Identifying and Responding to Elder Abuse: The Vital Role of Community Corrections Professionals*, supplement at www.appa-net.org/grant%20special%20projects/IEAEA_Neglect.pdf. **22** California Penal Code, s368(b)(1)(2)(3) – Causes or permits infliction of physical pain or mental suffering on elder or dependent adult under any circumstances or conditions likely to produce great bodily harm or death. This provision increases maximum penalty if committed against a person over 70; see also sections relating to criminal undue influence , s368(2)(a). '*Criminal undue influence" means the exploitation by a person of a known physical or mental infirmity or other physical, mental, or emotional dysfunction in a vulnerable elder or dependent adult for financial gain.'* **23** *Older people and the Law*, p29. **24** *Ibid*, pp39-40. **25** *Ibid.* **26** *Ibid.* **27** *Ibid*, p41. **28** *Ibid*, p42. **29** See National Centre on Elder Abuse at http://www.ncea.aoa.gov/NCEAroot/Main_Site/Find_Help/Help_Hotline.aspx#al. **30** *Older Persons and the Law*, p31. **31** *Ibid*, p37. **32** *Ibid*, p45. **33** NSW Attorney General and NSW Young Lawyers, *Older People and the Law: A Plain English Guide for Seniors in NSW*, 4th edition, 2005, chapter 6, 'Your Consumer Rights', http://www.lawlink.nsw.gov.au/lawlink/corporate/ll_corporate.nsf/vwPrint1/attorney_generals_department_older_people_and_the_law, accessed 24 November 2008 and Law and Justice Foundation of NSW *Access to Justice and Legal Needs – The Legal Needs of Older People in NSW*, 2004, see chapter 6 'Financial and Consumer Issues' at http://www.lawfoundation.net.au/report/older/EC5945702D6737F4CA25708100034EA8.html. **34** *Ibid*, p51. **35** Council on the Ageing Victoria, *Annual Report 2007*, p5. **36** *Older Persons and the Law*, p50. **37** *Ibid*, p51. **38** *Ibid*, p55. **39** *Ibid*, p56. **40** *Ibid*, pp159-60. **41** *Ibid.*

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