

## Fraud and financial abuse

*A crime is a crime, irrespective of the victim's age.*<sup>1</sup>

### Introduction

- 2.1 Research indicates that older people are less likely to be the victims of criminal activity than other segments of the population. Older people face far lower risks than other age groups for personal offences such as robbery, assault, sexual assault and homicide. Similarly, risks for older people are also lower for crimes such as burglary and motor vehicle theft.<sup>2</sup> As the Australian Institute of Criminology (AIC) explained:

It is not old age itself which reduces the risk of crime, but some of the factors associated with it, for example, the tendency to spend more time at home, to live in more secure forms of accommodation, and to not own a motor vehicle. However, some groups of older people will be more at risk than others, as is the case for all Australians.<sup>3</sup>

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1 Council on the Ageing SA, *Submission No. 77*, p. 2.

2 AIC, *Submission No. 40*, p. 1.

3 AIC, *Submission No. 40*, p. 1.

- 2.2 Despite this lower risk, however, older people have a higher fear of crime than the general population.<sup>4</sup> As the Council on Ageing SA explained:

For many people the fear of victimisation is a fear that physical injury or loss of confidence will mean that they can no longer live independently in the community...<sup>5</sup>

- 2.3 Within the older age group, consumer fraud occurs more frequently than other types of crime.<sup>6</sup> While acknowledging that there is little reliable data on the nature and extent of fraud generally in Australia, the AIC referred to a survey conducted in 17 industrialised countries in the year 2000. In that study, figures for Australia showed:

Of those aged 65 or more... about four percent said they had experienced consumer fraud in the past year... Although risks were low, older people were more likely to experience consumer fraud than other offences. Consumer fraud was more than twice as frequent as assault or theft and 13 times more frequent than robbery.<sup>7</sup>

- 2.4 The AIC further noted that the impact of such fraud and financial crime against older people can be particularly severe:

Not only can a comfortable lifestyle collapse, but they may not have the time or the opportunity for financial recovery. A blow to financial security is often a permanent and life-threatening setback, characterised by fear, lack of trust, and is often the onset of acute and chronic anxiety. Loss of assets may ruin a person's otherwise well-planned retirement... it has also be found that the personal, emotional and psychological consequences of fraud for older persons are much more profound than for younger persons.<sup>8</sup>

- 2.5 This chapter examines fraud and financial abuse of older Australians. It explores the nature of such abuse and the factors that place older people at risk, and identifies the more common types of fraud and financial abuse. The chapter examines a number of possible responses and concludes by looking at some issues that have the

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4 AIC, *Exhibit No. 48*. See also Victim Support Service Inc, *Submission No. 150*, p. 2, and *Transcript of Evidence*, 31 July 2007, p. 29.

5 Council on the Ageing SA, *Submission No. 77*, p. 12.

6 AIC, *Submission No. 40*, p. 1.

7 AIC, *Submission No. 40*, p. 3.

8 AIC, *Submission No. 40*, p. 1.

potential to affect the long term financial well-being of older Australians. Financial abuse arising from misuse of substitute decision making mechanisms such as enduring powers of attorney is discussed in Chapter 3, and the issue of retirement village contracts and disputes arising from these type of arrangements is covered in Chapter 7.

## Definitional issues

- 2.6 Given the breadth of what can constitute fraud and financial abuse, the Committee felt it necessary to try and clarify what these terms meant. As the AIC observed:

Criminal fraud is a generic category of crime which includes a variety of offences linked by the common element of the perpetrator seeking to obtain property belonging to another through deception. In Australia, fraud is not recognised as a separate legal category of crime (other than conspiracy to defraud and identity theft in some states). Instead a variety of property offences may be used to prosecute conduct which involves fraud and deception such as crimes of theft and obtaining financial advantage by deception.<sup>9</sup>

- 2.7 Financial abuse, as defined by the World Health Organisation, is ‘the illegal or improper exploitation or use of funds or resources of the older person’.<sup>10</sup>

- 2.8 In its submission the Law Institute of Victoria distinguished between fraud and financial abuse as follows:

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.<sup>11</sup>

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9 AIC, *Submission No. 40*, p. 3.

10 Quoted in Human Rights and Equal Opportunity Commission (HREOC), *Submission No. 92*, p. 26.

11 Law Institute of Victoria, *Submission No. 78*, p. 3.

2.9 The Victorian Government noted that financial abuse is a complex issue and is perpetrated against older people in a range of ways, including:

- Illegal acts;
- Acts which are unfortunate but not illegal;
- Acts which occur because of an older person's diminished capacity to understand the circumstances of the event...;
- Acts which are not deliberate nor have malicious intention yet are detrimental to the older person; and
- Failure to act in a timely manner to protect an older person's interests.<sup>12</sup>

2.10 The Victorian Government went on to argue that:

The width of actions has implications for determining whether or not financial abuse against an older person has occurred, as it can be difficult to determine whether a direct and exploitative act has occurred or whether the action was an unwise, but legitimate financial decision, or simply negligence. Consequently the perspective of both the older person and the individual involved in perpetrating certain behaviours needs to be considered when responding to alleged cases of financial abuse.<sup>13</sup>

2.11 Defining financial abuse is further complicated as the financial norms of families are diverse. There is a need for greater discussion about the meaning of 'family money' and asset management more generally.<sup>14</sup> 'What may be seen as a normal transaction or course of events within one family may be considered abuse by another'.<sup>15</sup>

Asset management does not occur in a vacuum but in a complex web of existing family relationships. For this reason, access to mediation to address family dynamics will be of particular assistance to some families.<sup>16</sup>

2.12 The point at which a situation becomes abusive is not always clear-cut:

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12 Victorian Government, *Submission No. 121*, p. 17.

13 Victorian Government, *Submission No. 121*, p. 17.

14 Alzheimer's Australia, *Submission No. 55*, p. 18.

15 Victorian Government, *Submission No. 121*, p. 18.

16 Carers Queensland, *Submission No. 81*, p. 2.

Determining the exact point at which abuse occurs is a matter of great difficulty and the circumstances may be unclear and evidence impossible to gather.

Generally, a test of whether any given situation is abusive is whether or not the conduct is in the person's best financial interests. A secondary consideration is whether or not the older person has given informed consent to the transaction in question taking place.<sup>17</sup>

- 2.13 As noted in Chapter 1, there are no specific laws in Australia dealing with the broad category of 'elder abuse'. Instead, criminal law at both the state and federal levels encompasses a range of actions that would be included in the term 'elder abuse', but that also apply to the whole population.

## Levels of fraud and financial abuse

- 2.14 As noted earlier, statistics on fraud and financial abuse of the elderly are difficult to obtain, but studies suggest that approximately 3-7 per cent of older people over the age of 65 will experience abuse from someone with whom they have a relationship of trust, with financial abuse identified as the fastest growing type of abuse.<sup>18</sup> It is common that, where abuse is occurring, multiple types of abuse occur at the same time.<sup>19</sup>

- 2.15 Other studies have confirmed financial abuse as the most common form of abuse of the elderly, including in Indigenous and CALD (culturally and linguistically diverse) communities.<sup>20</sup> COTA Over 50s referred to research commissioned by the Office of the Public Advocate in Western Australia which found that:

...financial abuse of older Aboriginal people was the most commonly reported abuse. This could range from harassment

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17 AIC, *Submission No. 40.1*, p. 1.

18 National Seniors, *Submission No. 67*, p. 7. See also Office of the Public Advocate, Queensland, *Submission No. 76*, p. 2; ASIC, *Submission No. 127*, p. 10; Victorian Government, *Submission No. 121*, p. 16.

19 Dr Barbara Black, Alliance for the Prevention of Elder Abuse, WA, *Transcript of Evidence*, 30 July 2007, p. 50. See also Western Australian Government, *Submission No. 74*, p. 4.

20 See for example, Western Australian Government, *Submission No. 74*, p. 4. Also, Ms Michelle Scott, Public Advocate, Western Australia, *Transcript of Evidence*, 30 July 2007, p. 14.

for money on pension day and neglect by people receiving support to care for them to, in some cases, physical abuse or robbery. The research also found that the impact of elder abuse was felt earlier among Aboriginal people where the mortality age was lower and an older person was often considered to be someone in their 40s.<sup>21</sup>

2.16 As the Australian Securities and Investment Commission (ASIC) noted:

The nature and incidence of consumer fraud in Australia is currently not well quantified. In part, the limited data available in Australia results from our reporting methodology, and our reliance on self-reporting. There is an apparent reluctance by consumers to report fraud, probably due to a range of factors including embarrassment, a perception of stupidity or contributory responsibility, or a belief that nothing can be done.<sup>22</sup>

2.17 Balanced against this potential under-reporting is some evidence from overseas that indicates that high levels of reports of financial abuse towards older people have not been substantiated when investigated. For example, in a US study in 1996, 'less than half of the reports received by an Adult Protection Service were substantiated'.<sup>23</sup>

2.18 The lack of reliable statistical data and agreement on what constitutes financial abuse has the potential to hamper the development of appropriate responses to fraud and financial abuse. The Committee sees merit in a national study on the incidence of fraud and financial abuse of older Australians.

2.19 The Committee notes that commencing in 2007 the Australian Bureau of Statistics, as recommended by the Australasian Consumer Fraud Taskforce, will include key questions on consumer fraud in its regular household survey.<sup>24</sup> This will provide some information on one aspect of fraud against older people, but a wider examination of the incidence and causes of fraud and financial abuse would assist policy makers.

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21 COTA Over 50s, *Submission No. 58*, p. 6.

22 ASIC, *Submission No. 127*, p. 10. See also Law Institute of Victoria, *Submission No. 78*, p. 3; HREOC, *Submission No. 92*, p. 24 and p. 28.

23 HREOC, *Submission No. 92*, p. 28.

24 Smith, R., 'Consumer scams in Australia: an overview', AIC publication, February 2007, *Exhibit No. 146*, p. 2.

## Recommendation 1

- 2.20 **The Committee recommends that the Government task the Australian Institute of Criminology with undertaking a detailed study of fraud and financial abuse against those over the age of 65 (over the age of 50 for Indigenous Australians).**

## Risk factors for fraud and financial abuse

- 2.21 National Seniors identified a number of broader societal factors which may contribute towards elder abuse:

...negative societal attitudes towards ageing; the erosion of adult children's sense of responsibility for parents; increasing materialism; family attitudes towards inheritance and the control of assets of older people; and a lack of protective mechanisms against financial abuse.<sup>25</sup>

- 2.22 Among the risk factors for older people for fraud and financial abuse is the fact that 'significant levels of accumulated savings and investments may also increase the risk of fraud':<sup>26</sup>

...older persons often have substantial assets to invest and this may make them attractive targets for investment fraud. In arranging to invest their funds, they often rely on professional advisers – lawyers, accountants and investment advisers – some of whom may act unprofessionally. Older people may also be defrauded by the activities of investment brokers, many of whom are unlicensed and unqualified.<sup>27</sup>

- 2.23 In addition, some financial habits of older people increase their vulnerability. The Country Women's Association of NSW observed that:

...older and less mobile people tend to keep large sums of money in the house – one reason being it is more difficult to access banks, financial institutions every week and often a fee is charged if more than a certain number of face to face

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25 National Seniors, *Submission No. 67*, p. 7.

26 AIC, *Submission No. 40*, p. 2. See also Public Trustee NSW, *Submission No. 72*, p. 1; Trustee Corporations Association of Australia, *Submission No. 68*, p. 2.

27 AIC, *Submission No. 40*, p. 3.

transactions take place in a month. Secondly, many older people do not use electronic methods to pay bills... Therefore some older people keep large sums of money in the house, and this makes them a very easy target and very vulnerable to fraudsters. No paper trail, no cheques to trace, just quick cash payment.<sup>28</sup>

There is also the situation of women living longer than men and some of those women, still today, have had little or no contact with tradesmen, cheque books, bank accounts and money in general until they found themselves widows and then suddenly had the responsibility their late husbands under took.<sup>29</sup>

- 2.24 In addition to having significant financial resources such as a house or superannuation, people as they age often develop health problems. Those who develop dementia may be 'at greater risk of being manipulated and deceived', while those with other health problems may be tricked into purchasing worthless remedies and cures for their particular medical condition.<sup>30</sup>
- 2.25 The risk of exploitation for older people may be exacerbated by other factors, including:
- 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...<sup>31</sup>
- 2.26 For a range of reasons, many older Australians rely on family or close friends to assist them with day-to-day management of their affairs. Research undertaken by the School of Social Work and Social Policy of the University of Queensland into the financial management of assets by older Australians indicated that:

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28 Country Women's Association of NSW, *Submission No. 18*, p. 2.

29 Country Women's Association of NSW, *Submission No. 18*, pp. 2-3.

30 AIC, *Submission No. 40*, p. 3.

31 ASIC, *Submission No. 127*, p. 13.



- 72.4% of older Australians received help with their paperwork
  - 54.6% received help with paying bills
  - 41% received help with accessing their money and banking
  - 36.9 % received help with their pensions and management
  - 30.8% received help with their property management.<sup>32</sup>
- 2.27 The research also indicated that only 16.8 per cent of the participants in the survey were assisted through some formal mechanism, such as an enduring power of attorney or guardianship order.<sup>33</sup>
- 2.28 The existence of a power of attorney or some other form of substitute decision making mechanism, given current weaknesses in the system (discussed further in Chapter 3), does not appear to protect against the likelihood of financial abuse. Ms Anita Smith, President of the Guardianship and Administration Board in Tasmania, informed the Committee that research has indicated that ‘... a person is no less vulnerable to financial abuse when they have executed an enduring power of attorney’.<sup>34</sup> Issues associated with the potential for financial abuse arising from the exercise of enduring power of attorney arrangements are discussed in more detail in Chapter 3.
- 2.29 While dependency on others, particularly close family members, for assistance with financial matters may create a situation where financial abuse can occur, the Committee believes it is important to remember that, on the statistics available, for most older Australians such arrangements work very well:
- ...in the main, families support and protect older people and keep them safe and well. Where a family member or friend is assisting an older person with their finances these arrangements, on the whole, serve people very well. The overwhelming majority of families are ‘doing the right thing’ – acting with probity and integrity. Intentional abuse is not common...<sup>35</sup>

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32 Quoted in Queensland Attorney-General, *Submission No. 107*, p. 2.

33 Quoted in Queensland Attorney-General, *Submission No. 107*, p. 2. See also Carers Queensland, *Submission No. 81*, p. 2.

34 Ms Anita Smith, President, Guardianship and Administration Board, Tasmania, *Transcript of Evidence*, 5 June 2007, p. 2. This is also in accord with comments by Mr Adam Graycar (Director of the AIC) who has been quoted as stating that powers of attorney was the most abused legal document in America, and that ‘Advocacy organisations in Australia reported similar cases of abuse in Australia’ (see *Alzheimer’s Australia, Submission No. 55*, p. 15).

35 Carers Queensland, *Submission No. 81*, p. 1.

- 2.30 Carers Queensland also observed that legislation does not always recognise the reality of how families operate:

The laws do not always take account of typical family realities such as mutuality and discord. Mutuality generally is at the centre of family life. Reciprocity, financial and otherwise, naturally occurs within families. Families, by definition, typically function as a collective. However, legislation as it is applied to old people tends to view them as individuals. In doing so, it tends to create responsibilities for families and carers that are quite contrary to the way in which families typically act. The most obvious example in this respect is that family members are almost automatically considered to have a conflict of interest with the affairs of the older person. There is a suggestion that family members who exercise a power of attorney in a way that provides them with personal gain are automatically perpetrating abuse, even if these actions reflect the older person's wishes.<sup>36</sup>

- 2.31 The AIC noted that:

Not all financial exploitation is regarded as criminal, and it is sometimes difficult to distinguish abusive conduct from well-intentioned but insensitive behaviour. On occasions, what starts as being in an older person's interest may end up being an abusive situation.<sup>37</sup>

- 2.32 There may be certain events that trigger financial abuse, including family conflict and financial stress. Substance abuse and alcohol use by perpetrators may also be contributing factors.<sup>38</sup>

- 2.33 While the motivation of those who commit financial abuse may be complex and at times mired in past family history, it is possible to make some general statements about who the abusers are most likely to be, and how they see their behaviour:

...close relatives make up some 80% of suspected financial abuse cases. Gender seems to make little difference so that if it is the children who are abusive they may either be the son or daughter. In many cases the abuser has the view that they have some entitlement to the assets on the ground that they will – or at least in their mind they should – ultimately

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36 Mr Graham Schlecht, Carers Queensland, *Transcript of Evidence*, 16 July 2007, pp. 23-24.

37 AIC, *Submission No. 40*, p. 5.

38 Advocare, *Submission No. 71*, p. 5.

inherit them and therefore they are simply advancing the time at which that inheritance is received. Alternatively, they may be seeking to protect their inheritance and, as a consequence, expenses that should be incurred for the benefit [of] the older person are not incurred. In other cases the abuser may believe that they have an entitlement for the burden of care that they carry or that they themselves have been abused in the past and are simply settling old scores.<sup>39</sup>

## Types of financial abuse

2.34 The Public Advocate (Victoria) observed that '[m]ost commonly, financial abuse – in general terms – involves family members in either: a) preserving an inheritance by not spending money on an older person's welfare needs; or b) bringing forward an inheritance by using an older person's assets for their own benefit.'<sup>40</sup>

2.35 A number of submissions identified actions that constituted financial abuse, including:

- Taking, misusing or using, withholding knowledge about or permission in regard to money or property
- Forging or forcing an older person's signature
- Abusing joint signatory authority on a blank form
- Misusing ATMs and credit cards
- Cashing an older person's cheque without permission or authorisation
- Misappropriating funds from a pension
- Getting an older person to sign a will, deed, contract or power of attorney through deception, coercion or undue influence
- Persuading an older person to change a will or insurance policy to alter who benefits from the will or policy
- Using an authorised power of attorney not in the interests of the older person
- Negligently mishandling assets including misuse by a care giver
- Promising long-term or lifetime care in exchange for money and property and not providing such care

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39 Mr Julian Gardner, Public Advocate, Victoria, *Submission No. 70*, p. 7.

40 Mr Julian Gardner, Public Advocate, Victoria, *Submission No. 70*, p. 5.

- Over-charging or not delivering care giving services
- Denying access to money or property
- Getting an older person to go guarantor without sufficient knowledge to make an informed decision.<sup>41</sup>

2.36 The Committee notes that many of the above behaviours would be covered by existing criminal statutes, as actions constituting theft or deception. Other behaviours, however, have the potential to be abusive in character, depending on the circumstances.

## Types of fraud

2.37 The Australian Competition and Consumer Commission (ACCC) was established to protect the rights of consumers and business, through encouraging competition in the market place and by enforcing consumer protection and fair trading laws as set out in the Commonwealth *Trade Practices Act 1974*.<sup>42</sup> The ACCC focuses much of its work on protecting the legal rights of 'disadvantaged and vulnerable consumers', with 'old age' being a '... characteristic which may identify a consumer as being at risk of being exploited in the marketplace'.<sup>43</sup>

2.38 Parts IVA and V of the *Trade Practices Act 1974 (Cth)* contain a number of provisions governing the activities of corporations, and are designed to protect consumers against types of conduct including:

- Unconscionable conduct ('conduct involving the exploitation by a stronger party of a weaker party which goes beyond normal hard commercial dealings, and offends good conscience');
- Undue harassment or coercion (noting that 'actions that may be reasonable for most consumers may distress or intimidate disadvantages or vulnerable consumers'); and
- False, misleading or deceptive conduct (including conduct that is likely to mislead or deceive).<sup>44</sup>

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41 Mr Julian Gardner, Public Advocate, Victoria, *Submission No. 70*, p. 5. See also Advocare Inc, *Submission No. 71*, p. 5; COTA Over 50s, *Submission No. 58*, p. 3.

42 ACCC, *Submission No. 39*, p. 4.

43 ACCC, *Submission No. 39*, p. 4.

44 ACCC, *Submission No. 39*, pp. 7-8.

- 2.39 In addition, fair trading legislation of various kinds is in force in all Australian states and territories. Legislation at the state and territory level mirrors the provisions of the *Trade Practices Act 1974* (Cth) in many ways, but is not limited to activities by corporations. In addition there is, with some variations, legislation among states and territories covering other consumer issues such as product safety and door-to-door trading.
- 2.40 The ACCC noted that within the broader category of ‘fraud’, scams are ‘a growing global problem and target people of all backgrounds, ages and income levels’,<sup>45</sup> with older people becoming more vulnerable to fraud via new technology such as the internet. The ACCC identified a number of common consumer frauds and scams. The scams most commonly reported by consumers over the age of 55 were:
- 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.<sup>46</sup>
- 2.41 The ACCC noted that around 90 per cent of alleged scammers reported to it appear to be based overseas, and that therefore ‘Australian authorities may not be able to take action against many scams’.<sup>47</sup>
- 2.42 In taking enforcement action, the ACCC indicated that it focuses ‘on areas of widespread consumer detriment and where it believes its actions will improve overall compliance with the TPA’.<sup>48</sup> However, while ‘the ACCC can institute proceedings for a breach of the TPA it generally focuses on industry-wide conduct that affects many consumers and cannot mediate between individuals and the suppliers of goods and services’.<sup>49</sup>
- 2.43 Consumer protection relating to the supply of financial services rests with ASIC. As the ACCC explained:

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45 ACCC, *Submission No. 39*, p. 11.

46 ACCC, *Submission No. 39*, pp. 13-14.

47 ACCC, *Submission No. 39*, p. 12 and 15.

48 ACCC, *Submission No. 39*, p. 8.

49 Law Society of South Australia, *Submission No. 94*, p. 3.

...ASIC has regulated financial markets, securities, futures and corporations since 1991... in 1998, the ASIC assumed responsibility for consumer protection in superannuation, insurance, and deposit taking activities. In 2002, the *Financial Services Reform Act 2001* extended the ASIC's consumer protection powers to include credit. To enable it to fulfil its consumer protection functions, the *Australian Securities and Investments Commission Act* was amended to provide consumer protection provisions which mirrored those of the *Trade Practices Act*. This includes prohibitions on misleading and deceptive conduct and unconscionable conduct.<sup>50</sup>

2.44 In 2004 the ACCC and ASIC signed a memorandum of understanding covering liaison, cooperation, assistance, joint enquiries and exchange of confidential information arrangements.<sup>51</sup>

2.45 ASIC's regulatory role with respect to financial services includes:

- Information that must be disclosed to consumers about financial products;
- Misleading or deceptive conduct and other unfair practices;
- Licensing people or businesses who give advice on, or deal in, financial products;
- Conduct of financial services providers; and
- Approval of alternative dispute schemes and industry codes.<sup>52</sup>

2.46 ASIC identified several areas of particular concern in relation to older Australians and the financial services sector:

- Adequate financial planning for retirement and avoiding high risk or illegal investment strategies which 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.<sup>53</sup>

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50 ACCC, *Submission No. 39.1*, p. 1

51 ACCC, *Submission No. 39.1*, p. 2

52 ASIC, *Submission No. 127*, p. 5.

53 ASIC, *Submission No. 127*, p. 6.

## Responses to financial abuse and fraud

2.47 There is no one single solution to the problem of financial abuse and fraud involving older Australians. As the AIC noted:

...solutions to the problem will entail a range of strategies which extend from preventive activities based on the provision of information and education, through informal regulatory measures administered by those who work with older people, to the use of civil and criminal law responses. Each has an important role to play in protecting persons from economic and financial victimisation.<sup>54</sup>

2.48 Financial abuse of older people, particularly by family members, may be difficult to prove due to a reluctance to acknowledge or report that abuse has occurred and then difficulties in substantiating the accusation. Victims are often reluctant to complain to police or other authorities about a family member or take legal action against them, even in the face of advice to do so.<sup>55</sup>

2.49 In part this may be because of community attitudes toward asset management within families in particular. Alzheimer's Australia highlighted what it described as current inconsistencies in community attitudes in this area:

...stealing and exploiting another person's finances is called theft and is a criminal offence. However where misappropriation of finances occurs with an enduring power of attorney or a family member, it is currently referred to as financial abuse and frequently there are no consequences for the abuser.<sup>56</sup>

2.50 While processes can be put in place to protect those who have lost capacity, it becomes more complicated where an older person is very vulnerable, but nevertheless competent:

For example, this Office encountered a women in residential care whose financial affairs were being managed by her son. She expressed great concern about the way in which he was doing this and, in particular, the fact that he was doing so for

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54 AIC, *Submission No. 40*, p. 9.

55 See for example Law Society of South Australia, *Submission No. 94*, p. 5; Mr Julian Gardner, Public Advocate, Victoria, *Submission No. 70*, p. 7; Assets and Ageing Research Team, University of Queensland, *Submission No. 26*, p. 3.

56 Alzheimer's Australia, *Submission No. 55*, p. 17.

his own benefit and to the detriment of her interests. However, she stated that she wanted no action taken given that he was her only relative, that he did continue to visit her from time to time and that if she alienated him she would feel completely abandoned and alone.

This example is, in the experience of this Office, not uncommon. It is not, however, a problem to which we can suggest a legislative solution.<sup>57</sup>

2.51 Empowerment of older people was an important theme in any response to suspected financial abuse:

...in legislative terms I think it is seeking ways of assisting older people rather than taking over. If the fundamental message is, 'Take over,' that just plays into the whole ageism agenda.<sup>58</sup>

2.52 When older people do attempt to report financial abuse to authorities, the response is not always what they would hope. The AIC noted that:

While financial abuse is recognised as a major forum of abuse, it appears to get little attention from service providers, including the police... It is important that the legal mechanisms designed to protect the financial interests of people when they are vulnerable to exploitation are effective. The mechanisms for detecting and responding to financial abuse seem to be qualitatively different to those used in relation to physical and emotional abuse.<sup>59</sup>

2.53 The Committee received anecdotal evidence suggesting that police are reluctant, in some instances, to investigate claims of fraud and financial abuse:

A major deficiency evident in Queensland is the failure to prosecute when family or other people have fraudulently deprived an older person of their assets... The Public Trustee of Queensland's anecdotal evidence provided to our Office is that the police are unwilling to even investigate allegations of fraud under the amount of \$500,000. Effectively the crime of

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57 Mr Julian Gardner, Public Advocate, Victoria, *Submission No. 70*, p. 4.

58 Professor Jill Wilson, Assets and Ageing Research Team, University of Queensland, *Transcript of Evidence*, 16 July 2007, p. 67.

59 AIC, *Submission No. 40*, p. 6.



fraud can be said to be non-existent where the prosecution of such offences is so minimal.<sup>60</sup>

2.54 The difficulties faced by the police were also highlighted:

I think often when we have had to involve the police or ask them to come out to see clients they are unsure about the sorts of action that they can take for that older person – even in situations where there is violence they are still unsure about the sorts of things that they can do... [There is] currently... an initiative where they [Queensland Police] are going to provide training to police and I think that is something that should happen across the nation.<sup>61</sup>

2.55 The impact of inadequate responses from authorities can have significant long term implications:

It is important to acknowledge that older people are easily deterred from reporting incidents and if they do not get a good response from Police – e.g. its not adequate or timely, then the older person may never bother calling again.<sup>62</sup>

2.56 The Committee believes it would be useful if special training could be provided to police officers to assist them in liaising with older members of the community and responding to the issues they face. In addition, it would be useful to explore whether retired police officers would be interested in returning to work on a part-time basis to serve as liaison officers for older people.

2.57 In this regard, the Committee notes that, in the United States of America, 'law enforcement gerontologists' have been used:

...to work with older persons and community groups to alert potential victims to new schemes and initiate a variety of self-help programs, some of which make use of older persons as volunteers. Such specially trained officers are able to offer information and advice in a constructive way, rather than

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60 Office of the Public Advocate, Queensland, *Submission No. 76*, p. 4. See also Elder Abuse Prevention Unit, *Submission No. 97*, p. 6, which had reports through its helpline that 'Most callers in these situations have been advised by police to take legal action i.e. sue the son or daughter as the weight of evidence is less'. Also, Mr David Walsh, *Transcript of Evidence*, 23 March 2007, pp. 39-40.

61 Mrs Amanda Hess, Caxton Legal Centre Inc, *Transcript of Evidence*, 16 July 2007, p. 20.

62 Aged Rights Advocacy Service Inc, *Submission No. 38*, p. 7.

creating unnecessary alarm which could be counter productive.<sup>63</sup>

## Legal action

2.58 As noted earlier, there is no Commonwealth, State or Territory legislation that is specifically aimed at addressing abuse of older people, although, as the Law Society of South Australia noted:

There is, of course, legislation that prohibits fraudulent activities, and which creates criminal offences in respect of such activities in certain circumstances. Complaints can therefore be made to the police by older Australians, or civil proceedings instituted, in situations where they have been the victims of fraud and financial abuse in the same way as any other member of the community...<sup>64</sup>

2.59 Legal remedies are available for older Australians who have been subject to financial abuse:

There is redress available... for all people, including older people, who have been targeted for fraud, theft or undue influence... Civil remedies for intentional misuse of property may also apply in certain circumstances. Undue influence and asset stripping that occurs as a result of such influence also may have common law redress. However, such remedies depend first upon the fraud or theft being reported and second, depending upon the older person being prepared or able to press charges or to engage legal counsel. Both remedies are unattractive largely because financial abuse of older people usually occurs in the context of a relationship of trust.<sup>65</sup>

2.60 Some have called for 'clawback laws' to recover property that has been inappropriately or illegally transferred from elder persons.<sup>66</sup> Others argued for a stronger legislative response. Mr David Walsh, a legal practitioner, argued strongly that the current legislative system was inadequate:

The courts, police and lawyers can only work with the available tools. Financial and other abuse of older

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63 AIC, *Submission No. 40*, p. 8.

64 Law Society of South Australia, *Submission No. 94*, p. 1.

65 Assets and Ageing Research Team, University of Queensland, *Submission No. 26*, pp. 2-3.

66 The Law Institute of Victoria, *Submission No. 78*, p. 5.

Australians will continue to increase until and unless specific legislation is introduced that defines such abuse as a crime and/or an actionable case and puts in place significant, meaningful and readily enforceable remedies.<sup>67</sup>

2.61 This view was not unanimously held. As the Victorian Government observed:

...the major problems stem from lack of education and awareness of legal rights, reluctance to take action when rights are affected, and unwillingness to place pressure on family relationships by clearly setting out the terms of care and property agreements in advance. The Victorian Government believes that focusing on education and research will alleviate most of these issues more than specific legislative reform.<sup>68</sup>

2.62 The AIC also advised that in the United States:

Although the criminalisation of elder abuse helps to publicise the problem... the role of criminal law in this area is inevitably limited owing to the impediments which victims and others face in detecting and reporting cases.<sup>69</sup>

2.63 Even where an individual does wish to pursue a matter through the courts '...the cost, standard of proof required, evidential difficulties where the claimant has cognitive difficulties or is frail all inhibit the potential for an outcome that provides redress'.<sup>70</sup>

2.64 Barriers to older Australians accessing legal services are discussed in greater detail in Chapter 5, but it should be noted that cost is a major impediment for those seeking a legal solution to financial abuse and fraud. Access to legal aid to undertake such cases is very limited. Obtaining legal aid assistance requires a person to pass tests of:

...matter type, available funding, means and merits... Once it has been determined that an application for a grant of legal assistance falls within a matter type set out in the Commonwealth Legal Aid Guidelines, and there is available

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67 Mr David Walsh, *Transcript of Evidence*, 23 March 2007, p. 32. See also Ms Lillian Jeter, Elder Abuse Prevention Association, *Transcript of Evidence*, 4 June 2007, p. 86.

68 Victorian Government, *Submission No. 121*, p. 3.

69 AIC, *Submission No. 40*, p. 8.

70 Council on the Ageing SA, *Submission No. 77*, p. 8. See also NSW Ministerial Advisory Committee on Ageing, *Submission No. 103*, p. 2.

funding, then the Guidelines require means and then merits testing in nearly all cases.<sup>71</sup>

- 2.65 Therefore, an older person who has been the victim of a fraudulent activity may possibly have an action for damages, but:

Under the [Commonwealth Civil Law] Guidelines a civil law action for damages or property could be funded 'if the action was likely to be successful, and a conditional cost or similar agreement could not be reached with a private legal practitioner, and the applicant was unable to obtain assistance from another source'. A combination of the conditional costs component of this guideline and the merits ...test would be likely to result in a refusal for most applicants of this type.<sup>72</sup>

- 2.66 The NSW Ministerial Advisory Committee on Ageing (NSW MACA) also highlighted the fact that not all older people will be able to fully pursue criminal legal action:

Such activities are fraudulent and it is argued that victims can access justice through the various State/Territory criminal legislation. This presupposes, however, that the victims are aware that the activity is fraudulent and that they have recourse through criminal legislation... It does not, however, take into account whether the older person has the physical and mental stamina to pursue a matter through the criminal justice system.<sup>73</sup>

- 2.67 It is clear to the Committee that for many older Australians experiencing financial abuse, particularly by close family members, a purely legal remedy is not going to be either effective or acceptable. Pursuing a close relative through the courts and seeking to identify their behaviour publicly as criminal is not something many would want. Alternatives need to be found that provide for investigation of possible financial abuse and intervention short of criminal proceedings.

- 2.68 The Law Institute of Victoria argued that it '...would see the criminalisation of the situations as the last resort, because, while it may help remedy some cases, there are all kinds of issues with enforcement and bringing the claims in the first place. We would
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71 National Legal Aid, *Submission No. 99*, p. 7.

72 National Legal Aid, *Submission No. 99*, p. 8.

73 NSW MACA, *Submission No. 103*, p. 2.

advocate, at first instance, information and education programs on the part of older persons, their families, their carers and solicitors'.<sup>74</sup> This was also supported by State Trustees, who suggested 'having dispute resolution mechanisms available where mediation can be used rather than having people finishing up in courts and tribunals. Mediation can be used as a precursor before things get to the stage of involving lawyers'.<sup>75</sup>

- 2.69 The Committee supports this approach, and in addition to education (discussed below), would like to see mediation or civil dispute resolution services enhanced to deal with such cases. Although the Committee has not specified which particular services might best be placed to carry out this work, it notes that the Australian Government is in the process of establishing 65 Family Relationship Centres around Australia. While primarily established to assist separating couples resolve differences through mediation, they are also a source of information and advice for wider family members such as grandparents. The Committee believes there is potential for these Centres to be funded to deal with other family disputes such as those that arise over management of assets.

## Recommendation 2

- 2.70 **The Committee recommends that the Australian Government, in consultation with its state and territory counterparts, provide additional funding for mediation and dispute resolution services to assist older people to resolve financial disputes within the family situation.**
- 2.71 A number of submissions were critical of the role played by ASIC in failing to protect consumers and in not prosecuting those responsible for various corporate collapses.<sup>76</sup> One submission, for example, commented that:

It is discriminating to try to force older Australians, often in ill health to go to court just because some Commonwealth regulatory bodies are too lazy to enforce the law particularly when it is the duty of the Commonwealth and not older Australians to enforce criminal laws.<sup>77</sup>

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74 Mr Bill O'Shea, Law Institute of Victoria, *Transcript of Evidence*, 4 June 2007, p. 14.

75 Mr Anthony Fitzgerald, State Trustees Ltd, *Transcript of Evidence*, 4 June 2007, p. 76.

76 See for example Mrs Berryl Glasson, *Submission No. 131*; Mr Peter Neil, *Submission No. 134*.

77 Mrs Berryl Glasson, *Submission No. 131*, p. 1.

2.72 One witness commented that:

...when criminal offences are committed, it is not the function of older people to have to commence Supreme Court action'.<sup>78</sup>

2.73 Frustration with the apparently lenient penalties for certain types of financial abuse was also evident:

We need stronger penalties for those found guilty of scams and fraud. It seems there are only very minor penalties and the person just changes the trading name and operates in a different area. Even when they are exposed it seems that television programs have more power to get action...[than] the government bodies set up for the purpose. Not only do they need more teeth but they also need more will to bring the perpetrators to justice.<sup>79</sup>

Disbarment seems an inadequate penalty for legal firms and others who rob people of their life savings. When I see people suffering the humiliation of losing their home, life savings and/or superannuation because of some greedy predator I feel no punishment is too great for the perpetrators. It is unacceptable to have huge Superannuation Funds lost through investment in shoddy schemes. Until severe penalties are imposed these shysters will continue to wreak havoc on workers particularly those reaching retirement.<sup>80</sup>

2.74 The Country Women's Association of NSW was critical of action taken against those who perpetrate fraud:

Our main concern is that the government agencies set up to regulate and prosecute fraudsters seem to have either very little will or very little ability to bring them to account. Those found guilty of fraud should have much stricter penalties against them and be forced to pay back all the money they have fraudulently acquired and not just pay a minimal fine, a good behaviour bond, and be permitted to start up another company under a different name to do it all again.<sup>81</sup>

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78 Mr Peter Neil, *Transcript of Evidence*, 30 July 2007, p. 57.

79 Country Women's Association of NSW, *Submission No. 18*, p. 3.

80 Catholic Women's League Australia Inc, *Submission No. 27*, pp. 6-7.

81 Mrs Patricia Shergis, Country Women's Association of NSW, *Transcript of Evidence*, 15 May 2007, p. 58.

2.75 While ASIC may prosecute those involved in corporate collapses, it did indicate that class action was also available to investors. In addition:

...people who have dealt with a licensed financial adviser or a representative of a licensed financial adviser may have had advice to go into one of these particular schemes, and that appears to have been the case for some with Westpoint, though not everyone by any means. There is the availability of external dispute resolution and the relevant external dispute resolution scheme, FICS, the Financial Industry Complaints Service, accepts complaints of claims up to \$100,000. They are currently working on whether that monetary limit should be raised. The advantage of that particular avenue is that that service is free to consumers, and FICS has the ability to determine claims and to make compensatory orders against their members and they do.<sup>82</sup>

2.76 The issue of prosecution of those involved in corporate collapses is outside the scope of this inquiry. The Committee does note that a number of court cases are underway in regard to recent collapses. Whatever the outcome of such court action, in most cases investors are unlikely to receive full compensation for the funds lost, and those funds that are retrieved may well take many years to make their way back to investors. As part of its review of these corporate collapses, the Committee believes that ASIC, together with other regulatory bodies, should review the appropriateness of current legislation and penalties.

### Recommendation 3

**2.77 The Committee recommends that the Australian Securities and Investments Commission review the current regulatory environment for unsecured investment products, together with disclosure requirements, with a view to improving consumer protection measures.**

### Mandatory reporting?

2.78 The issue of whether there should be mandatory reporting of suspected fraud and financial abuse is complex and the subject of much debate, balancing the autonomy of the individual on the one hand, against the desire to protect those who are vulnerable.

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82 Mr Greg Tanzer, ASIC, *Proof Transcript of Evidence*, 17 August 2007, p. 15.

Mr J Gardner, Public Advocate Victoria, noted in his submission that '[o]ne of the central tensions for law-makers is to respect and give effect to the balance between the right to autonomy and the right to protection. ...the state, has accepted that it has a duty and a corresponding power to protect those citizens who are not competent'.<sup>83</sup>

- 2.79 It was suggested to the Committee by some that there should be mandatory reporting of suspected financial abuse of older Australians, as occurs in some US jurisdictions. The Committee found that discussion of this issue was often complicated by assumptions about whether all abuse should be reported, or whether particular types of abuse required such action, whether the competence and wishes of the individual concerned was a factor to be considered, and uncertainty regarding the ultimate effectiveness of such an option.
- 2.80 Taking a wide interpretation, Ms Lillian Jeter, Executive Director, Elder Abuse Prevention Association, argued that there should be mandatory reporting by 'all aged care professionals and those who work with vulnerable older persons to report any suspicious, suspected, or actual incidence of abuse, neglect, mistreatment, and/or exploitation...[of] vulnerable older persons in the community and in residential care facilities'.<sup>84</sup>
- 2.81 Ms Jeter called for protective statutes for those older Australians, specifically:
- ...the dependent ones, with or without capacity, who are not living a quality of life either in the community or in residential care. Those are the ones who need to be protected. I still say that they are vulnerable... I say we should bring that vulnerability forward to those who are dependent but still have capacity and are being coerced and manipulated and need to be protected, not just civilly but also criminally.<sup>85</sup>
- 2.82 Most US states have some form of adult protection statutes, covering a range of activities including physical, psychological, sexual and financial abuse, neglect and abandonment. Not all of the statutes are specifically focused on older people – the protection may be aimed at what is variously described as 'vulnerable', 'disabled', 'endangered'

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83 Mr Julian Gardner, Public Advocate, Victoria, *Submission No. 70*, p. 3.

84 Elder Abuse Prevention Association, *Submission No. 132*, p. 3.

85 Ms Lillian Jeter, Elder Abuse Prevention Association, *Transcript of Evidence*, 4 June 2007, p. 87.



or 'impaired' adults (e.g. in Alaska, a 'vulnerable adult' is one who is 18 years of age or older who, because of mental or physical impairment, is unable to meet their own needs without assistance). In several states, most notably in Massachusetts and California, there are specific laws aimed at protecting an elder person (defined as 60 and 65 years and over respectively). In most US states, however, age is not in and of itself a specific trigger for the protective legislation to apply, but rather the critical factor is whether the person is considered vulnerable or disabled.<sup>86</sup>

2.83 The US statutes also vary widely in 'the definition of abuse; types of abuse, neglect and exploitation that are covered; classification of the abuse as criminal or civil; reporting (mandatory or voluntary); investigation responsibilities and procedures; and remedies for abuse'.<sup>87</sup>

2.84 Most submissions did not support mandatory reporting. The Council on the Ageing SA, for example, argued that:

We do not believe reporting [of suspected financial abuse] ought to be mandatory, just as we do not make the reporting of domestic violence or other family relationships mandatory. They are tricky ones. There are people that might be in difficult situations, but we do not believe that you go into it with mandatory reporting and take away the rights, choices and decision making from older people by making these specific laws. It suggests that by virtue of age they have diminished capacity and cannot look to their own interests, just as we believe that children cannot. But older people are not in that category. If they are in the category of diminished responsibly through dementia or some such condition then we have guardianship and administration arrangements that ought to be able to protect those people. If those arrangements are not strong enough, we ought to strengthen them.<sup>88</sup>

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86 American Bar Association, 'Statutory Provisions authorizing and defining threshold eligibility for adult protective services by state', available at [www.elderabusecenter.org](http://www.elderabusecenter.org) (accessed 28 August 2007).

87 American Bar Association Commission on Law and Ageing, *Information about laws related to Elder Abuse*, available at [www.elderabusecenter.org](http://www.elderabusecenter.org) (accessed 28 August 2007).

88 Ms Patricia Reeve, Council on the Ageing Over 50s, *Proof Transcript of Evidence*, 17 August 2007, p. 5.

- 2.85 The Western Australian Government was quite categorical in not supporting mandatory reporting of elder abuse:

There is no evidence from around the world that where mandatory reporting has been implemented that it has been beneficial. There are also some practical issues which need to be considered:

- If mandatory reporting exists and it becomes a crime not to report something, then legislation needs to define what is and is not reported. How will people determine what to report...
- Who will be responsible for investigating reports and how will this be funded?
- Mandatory reporting would require reporting suspicions of abuse against a person because they have reached a certain age (which would need to be determined). This assumes they are incompetent to manage their own affairs purely on the basis of their age and has the potential to take away their rights.<sup>89</sup>

- 2.86 Difficulties were also identified by Ms Anita Smith, President of the Tasmanian Guardianship and Administration Board, who warned '[w]hat worries me about mandatory reporting arrangements is that all you are really creating is an offence for someone who has failed to report. I do not know that it necessarily has that effect of meaning that you get more reports'.<sup>90</sup>

- 2.87 Looking at the issue from a different perspective, Mr John Harley, Public Advocate, SA, also indicated that he did not support mandatory reporting:

Knowing some of the people that we deal with, it could be a very abusive tool in the hands of other disaffected members of the family... I do not think it would work well, and it would just create another layer of bureaucracy. I do not think it would be effective.<sup>91</sup>

- 2.88 Doubt was further expressed about the usefulness of mandatory reporting:

All of the overseas research indicates that it does not necessarily impact positively on the outcomes. ...some US

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89 Western Australian Government, *Submission No. 74*, p. 7.

90 Ms Anita Smith, President, Guardianship and Administration Board, Tasmania, *Transcript of Evidence*, 5 June 2007, p. 8.

91 Mr John Harley, Public Advocate, SA, *Transcript of Evidence*, 31 July 2007, p. 5.

states do have mandatory reporting by financial institutions of allegations of abuse. The research has shown that it has not led to any improved outcomes over states where it was not mandatory. So, where you have worked cooperatively with financial institutions to develop programs, services and protocols, the outcome has been the same as where there is mandatory reporting.<sup>92</sup>

- 2.89 Professor Wilson from the Assets and Ageing Research Team also argued against mandatory reporting:

I think mandatory reporting has a very poor track record in almost all areas. In the context of older people you need to assess what is happening in the overall situation. You can make bad much worse by reporting it rather than acting in other ways.<sup>93</sup>

- 2.90 The applicability of such a system in the Australian context was questioned:

...further research would be needed in Australia to determine whether or not the implementation of mandatory reporting of financial offences against older persons would be effective in reducing the incidence of such crimes through enhanced deterrence or otherwise.<sup>94</sup>

- 2.91 The Committee noted that, as part of recent amendments to aged care legislation, there is now to be compulsory reporting of serious physical and sexual abuse at residential aged care facilities and the establishment of an Aged Care Commissioner. The Committee notes, however, that:

Although the new measures against abuse in residential aged care are specifically directed at sexual assault and serious physical assault and do not extend to financial or other forms of abuse, these issues have been raised in consultations. Accordingly, the Department [of Health and Ageing] supports a focus on these issues in this Inquiry for coordinated action across States and Territories.<sup>95</sup>

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92 Ms Michelle Scott, Public Advocate, Western Australia, *Transcript of Evidence*, 30 July 2007, p. 18.

93 Professor Jill Wilson, Assets and Ageing Research Team, University of Queensland, *Transcript of Evidence*, 16 July 2007, p. 62.

94 AIC, *Submission No. 40.1*, pp. 3-4.

95 Department of Health and Ageing, *Submission No. 111*, p. 3.

- 2.92 On the basis of the evidence before it, the Committee does not support the introduction of mandatory reporting of suspected financial abuse. The Committee does believe it is important, however, that voluntary reporting of suspected abuse be encouraged and protection provided to those who take such action. The Committee acknowledges that there needs to be some mechanism for those wishing to either report suspected financial abuse or obtain more information about the options available to deal with it. The Committee notes the excellent work done by a number of state based groups, including the Elder Abuse Prevention Unit (EAPU) in Queensland and Advocare in Western Australia.
- 2.93 The EAPU commenced operating in 1997 and its approach is 'focused on empowerment through raising community awareness about the issue [of financial abuse] so that prevention measures can be taken. Community awareness raising is therefore seen as a major prevention strategy for this type of abuse'.<sup>96</sup> This is supported by very practical measures including a confidential and anonymous help line.
- 2.94 Similar community support and information services are already available in most states and territories and the Committee would not want to see needless duplication of those bodies already working in this field. Coordination and sharing of ideas would be more productive and maximise the impact of available resources.
- 2.95 The Committee is aware that the Australian Network for the Prevention of Elder Abuse (ANPEA) has been recently reactivated and has as two of its goals the sharing of information about new developments, ideas and approaches in the identification and prevention of and response to the abuse of older people; and the identification of opportunities for improvements in policies, programs, community education and the training of professionals.<sup>97</sup> The Committee believes ANPEA, if adequately funded, will provide a vital link in developing best practice and provide links between other services throughout Australia.<sup>98</sup>

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96 EAPU, *Submission No. 97*, p. 2.

97 ANPEA brochure, available at <http://www.agedrights.asn.au/pdf/ANPEA%20Brochure%20June%202007.pdf> (accessed 3 September 2007).

98 Elder Abuse Prevention Unit, *Submission No. 97*, p. 1.

## Recommendation 4

- 2.96 **The Committee recommends that the Australian Government provide ongoing funding to the Australian Network for the Prevention of Elder Abuse to assist it in its information sharing role among the many community and government bodies working in the field of elder abuse.**

### Role of banks and financial institutions

- 2.97 The role of banks and financial institutions is particularly important in safeguarding older Australians from financial abuse. Among a number of possible indicators of a person being abused financially are the following:

- Unexplained movements in bank accounts or investments – large amounts of money withdrawn or transferred to another person’s account...
- Financial/legal documents missing
- Finances not properly conducted by a third party appointed for that purpose
- Personal cheques being cashed
- Cash being withdrawn from bank account but not given to victim.<sup>99</sup>

- 2.98 The Australian Bankers Association (ABA) noted that the extent of financial abuse in the community is not known, but that their ‘member banks indicate that they have very low numbers of complaints about this issue, and the banking ombudsman has said that he has seen only a handful of complaints in this area’.<sup>100</sup> As noted earlier in this chapter, however, the actual extent of financial abuse is not known and it could be argued that a lack of consistent reporting mechanisms across banks and financial institutions may in fact be one of the reasons for low reporting rather than an actual low incidence of such abuse.

- 2.99 Banks have been criticised for not taking more action in protecting their older customers:

Banking institutions appear to be well-aware of the prevalence of financial abuse – particularly that arising

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99 Public Trustee NSW, *Submission No. 72*, p. 2. See also Mr Julian Gardner, Public Advocate, Victoria, *Submission No. 70*, p. 9; Alliance for the Prevention of Elder Abuse: Western Australia, *Submission No. 114*, p. 4.

100 Mr Ian Gilbert, ABA, *Proof Transcript of Evidence*, 17 August 2007, p. 60.

through the misuse of enduring powers of attorney. However, it does not appear that banks are overly motivated to assist elderly clients who may wish to protect themselves against the risk of elder abuse.<sup>101</sup>

- 2.100 Mr Brian Herd, a legal practitioner, indicated that ‘most of the cases of financial abuse [he comes]... across are the abuse of bank accounts. Now that abuse can only occur if the bank allowed that to happen. That allowance is generally in the nature of a blind eye as opposed to a conscious concern about the way a particular bank account is being operated’.<sup>102</sup> Mr Herd acknowledged the difficulties faced by banks and other financial institutions:

The banks have an invidious choice here of course. Their choice is to alert customers of the potential abuse and thereby create an almighty problem for themselves and the family – that is, a war – or alternatively turn a blind eye and not get involved in any controversy within the family. Banks tend to take the more conservative line in most things – that is, the three wise monkeys approach. Generally speaking, I am waiting at this stage for someone to sue a bank for that... approach, in other words failing to disclose or inform on concerns about the operation of a bank account and as a consequence losing money from that bank account which is never recovered. I think banks are fair game in a litigation sense for an action for negligence arising out of that failure to act.<sup>103</sup>

- 2.101 The ABA noted that the bank-customer relationship is contractual and the bank can only act on the mandate of the customer. In addition, they noted:

Banks also need to be very careful not to discriminate against people on the grounds of age or disability... Elder financial abuse is a complex situation and it requires subjective judgements. In identifying it, a person is placed in the position of having to evaluate whether, on the particular facts before them, the transaction is a legitimate transaction or one that is improvident but nevertheless agreed to by the older person or is an abuse of a trust relationship. I am sure you

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101 Caxton Legal Centre Inc, *Submission No. 112*, p. 19.

102 Mr Brian Herd, *Transcript of Evidence*, 16 July 2007, p. 9.

103 Mr Brian Herd, *Transcript of Evidence*, 16 July 2007, p. 9.

would appreciate that they are very difficult judgement calls for people to make.<sup>104</sup>

- 2.102 The Committee notes that in California, 'legislation has been introduced making it compulsory for banking and financial staff to report any suspected cases of financial abuse. Where a report is made, adult protective services are called in to investigate.'<sup>105</sup> In Canada, older persons have begun 'authorising their banks 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'.<sup>106</sup> More details are provided in Figure 2.1.
- 2.103 The Committee agrees with the Victorian Public Advocate's approach of seeking a 'co-operative solution that does not impose mandatory reporting requirements. First there is a need for awareness of the problem and the role of banks and financial institutions in dealing with it and, indeed, their duty of care to their customers and their duty to avoid carelessly becoming party to a fraud.'<sup>107</sup>

Figure 2.1 The Saskatchewan model

In Saskatchewan, Canada, the RCMP [Royal Canadian Mounted Police] developed a form letter that seniors can sign, giving bankers permission to call their clients before they process cheques that may be going to telemarketing scams. The text of the letter is:

*I, (name), give permission to the (bank name) and/or its employees to monitor the activity of my bank accounts and any other financial instruments I have with the bank. I also give permission for the bank and/or its employees to raise with me any concerns they may have about the nature of my transactions, and in particular, as those transactions relate to telemarketing frauds; and, to advise the Royal Canadian Mounted Police at their discretion. I reserve the right of final decision on all aspects of my financial affairs. (signed, dated and witnessed)*

This method ensures 'the seniors are not losing any independence if they sign the form; it also reinforces the client's right of financial decision on all aspects of their financial affairs'.<sup>108</sup>

- 2.104 Dr Smith from the AIC observed that a similar scheme to that operating in Canada:

...would be very simple to implement, because the banks already do it in respect to overseas transactions. If a person

104 Mr Ian Gilbert, ABA, *Proof Transcript of Evidence*, 17 August 2007, p. 60.

105 Office of the Public Advocate, Queensland, *Submission No. 76*, p. 3.

106 AIC, *Submission No. 40*, p. 8.

107 Mr Julian Gardner, Public Advocate, Victoria, *Submission No. 70*, p. 9.

108 Zanin, B., 'Helping Seniors Help Themselves', *Exhibit No. 49*.

travels and starts making transactions in another country, the bank will telephone them and alert them that those transactions have appeared in the records. Exactly the same procedure could be used for an older person's accounts. Of course, there would be no obligation for the bank to stop payments. It is really just a notification system.<sup>109</sup>

- 2.105 Concern was expressed that current privacy laws would impose restrictions on the roles that banks can play in reporting financial abuse.<sup>110</sup> However, it was noted that overseas:

One of the strategies for addressing this has been the introduction of advanced directives by clients that specifically permitted banks to notify account holders and other named parties of any activity inconsistent with the account holder's usual banking patterns.<sup>111</sup>

- 2.106 When the Committee raised this matter with officials from the Attorney-General's Department, it was advised that the *Privacy Act* 'has in place arrangements to allow disclosure of information where that is appropriate – for example, with the consent of the person whose personal information it relates to or where a law authorises or requires the disclosure as well'.<sup>112</sup>

- 2.107 In the Committee's opinion, banks and financial institutions should be providing such assistance to customers as part of their normal duty of care. It is vital that the staff of banks and financial institutions are trained to recognise signs of potential abuse and that there are specific protocols with the bank or financial institution, and indeed across the industry, for dealing with such reports.

- 2.108 The Western Australian Government has been working with the banking and financial sector to 'identify how the government can work with that sector to help them recognise and respond to situations of financial abuse of older people'. In response, the banking and financial sector has raised concerns about confidentiality and privacy legislation, and the need for training modules about elder abuse to be developed at the national level:

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109 Dr Russell Smith, AIC, *Transcript of Evidence*, 23 March 2007, p. 22. See also Victorian Government, *Submission No. 121*, p. 19; Caxton Legal Centre Inc, *Submission No. 112*, p. 13.

110 See for example, Western Australian Government, *Submission No. 74*, p. 5; Council on the Ageing SA, *Submission No. 77*, p. 8.

111 Western Australian Government, *Submission No. 74*, p. 5.

112 Mr Peter Arnaudo, Attorney-General's Department, *Proof Transcript of Evidence*, 17 August 2007, p. 47.



It was made very clear that it is very difficult to introduce training of this type of issue either at a state level or for one banking organisation and that there very much needs to be a consistent national approach.<sup>113</sup>

- 2.109 In evidence to the Committee, the ABA also commented on the work being done with the Western Australian Government and indicated that a national approach would be desirable, including a national awareness-raising campaign, and that their members 'could facilitate getting information through to customers... The other side obviously is in relation to informing bank staff.'<sup>114</sup>

## Recommendation 5

- 2.110 **The Committee recommends that the Australian Government work in cooperation with the banking and financial sector to develop national, industry-wide protocols for reporting alleged financial abuse and develop a training program to assist banking staff to identify suspicious transactions. The experience of Canada in this area should be drawn on in developing such protocols.**

- 2.111 Under existing legislation in Western Australia, where an individual does not have capacity or there are concerns in that area, banking institutions can report their concerns to the Public Advocate; if they think the person has capacity, they would take their concerns to Advocare, a non-government organisation funded by the federal Department of Health and the WA Department of Health, through the Home and Community Care program. There is a protocol between the Public Advocate and Advocare to refer matters to each other if they feel it necessary.<sup>115</sup>

- 2.112 In contrast, in South Australia, the Public Advocate indicated that:

...through our office we get a number of inquiries and reports regarding fraud that has been perpetrated on the elderly. Unfortunately, unless there is an application made to the Guardianship Board, we do not have any power to investigate. In fact, there is no agency that is dedicated to

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113 Mr Stephen Boylen, *Transcript of Evidence*, 30 July 2007, p. 2. In contrast to the Western Australian experience, some other banking authorities have been less cooperative. See for example, Professor Jill Wilson, Assets and Ageing Research Team, University of Queensland, *Transcript of Evidence*, 16 July 2007, p. 62.

114 Mr Ian Gilbert, ABA, *Proof Transcript of Evidence*, 17 August 2007, p. 63.

115 Ms Michelle Scott, Public Advocate, Western Australia, *Transcript of Evidence*, 30 July 2007, p. 16.

investigating financial elder abuse. If a person makes an application to the Guardianship Board, the board then has power to direct us to conduct an investigation and report to the board. Any report that we provide then attracts qualified privilege. If we did a report without that direction, it would not be privileged... One of the matters that I have been seeking is for my office to obtain greater powers to investigate.<sup>116</sup>

- 2.113 The Committee believes that a more uniform approach should be pursued among the states and territories, in line with the Western Australian model.

### **Recommendation 6**

- 2.114 **The Committee recommends that the members of the Australian Guardianship and Administration Committee examine the Western Australian legislation relating to reporting by banks and other financial institutions of suspected abuse to the Public Advocate and Advocate, and develop similar initiatives for consideration by their respective state and territory governments.**

## **Education and awareness campaigns**

There can be no doubt that all of the areas listed in the terms of reference are of great concern to older people, but the major problems stem from lack of education and awareness of legal rights, reluctance to take action when rights are affected, and unwillingness to place pressure on family relationships by clearly setting out the terms of care and property agreements in advance.<sup>117</sup>

- 2.115 Increasing education and raising public awareness are central to preventing and responding to financial abuse and fraud. National Seniors indicated that 'the most effective tool for identifying, preventing and treating elder abuse' was public awareness.<sup>118</sup> The Committee heard that education in this area should focus on both

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116 Mr John Harley, Public Advocate, SA, *Transcript of Evidence*, 31 July 2007, p. 2.

117 Victorian Government, *Submission No. 121*, p. 3.

118 National Seniors, *Submission No. 67*, p. 8. See also Assets and Ageing Research Team, University of Queensland, *Submission No. 26*, p. 4.

older people vulnerable to financial abuse and potential abusers. The NSW MACA told the Committee that:

...education of older persons is essential in combating fraud against older persons. Such education should be directed, in the first instance, to awareness of fraudulent activities and the subsequent prevention (or diminution) of the criminal activity and, secondly, to the avenues available to the victims should they wish to pursue the matter. Further, it is argued that adequate support, in the form of advocates and legal assistance should also be available to the victims.<sup>119</sup>

2.116 On specific consumer issues, the Committee is aware that consumer protection authorities in many states and territories are already undertaking consumer protection education activities, 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.<sup>120</sup>

2.117 ASIC has a role in educating consumers of financial services:

...[with] a statutory mandate to promote the confident and informed participation of investors and consumers in the financial system. It aims to foster a financially literate community in which Australian consumers can make informed decisions about financial products and services, understand their rights and responsibilities, and identify and avoid scams and swindles.<sup>121</sup>

2.118 One of ASIC's six priorities for the coming year is to 'develop initiatives to assist retail investors to better manage and protect their investment's 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'.<sup>122</sup>

2.119 The ACCC has an Infocentre hotline accessible to all consumers, and in addition provides material via its web site and in a range of publications to promote consumer education and awareness.<sup>123</sup> The

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119 NSW MACA, *Submission No. 103*, pp. 2-3.

120 See for example, Western Australian Government, *Submission No. 74*, p. 14.

121 ASIC, *Submission No. 127*, p. 5.

122 Mr Greg Tanzer, ASIC, *Proof Transcript of Evidence*, 17 August 2007, p. 11.

123 ACCC, *Submission No. 39*, p. 9.

SCAMwatch website in particular aims to warn consumers about common scams and how 'to recognise, avoid and report scams'.<sup>124</sup>

2.120 The Committee endorses the observation of the AIC that:

Regulatory authorities have highlighted the crucial need for consumer and professional education if financial services regulation is to be effective. The enactment of financial services regulations reflects an awareness of the increasing complexity of financial management and the relative lack of preparation by Australians, particularly vulnerable groups including the aged, to identify, understand and challenge fraud and mismanagement of assets by financial advisors.<sup>125</sup>

2.121 Despite the work that is currently being undertaken in this area, the Committee sees merit in a campaign along the lines of the domestic violence campaign, to raise public awareness about the wider issue of elder abuse. In evidence to the Committee, Mr Peter Brady, National Policy Manager, argued:

The clear conclusion we come to is to draw the states, territories and the Commonwealth together and develop a national campaign [in respect of elder abuse] that is very strong. One thing the campaign should do is like a shame situation, '...How could you do that?' We should not pussyfoot around; they should be the same as you are seeing at the moment with domestic violence and around sexual abuse in the movies, et cetera. That is the sort of campaign we believe is really needed. From National Seniors' point of view, we have a very strong community awareness, we have magazines, we have a national newsletter that goes out to 180,000 households across Australia to seniors, so we could support that sort of education regime.<sup>126</sup>

2.122 The Committee sees merit in a campaign along the lines of the domestic violence campaign, in raising awareness of the general public about the wider issue of elder abuse.

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124 ACCC, *Submission No. 39*, p. 11.

125 AIC, *Submission No. 40*, p. 2.

126 Mr Peter Brady, National Seniors Association, *Transcript of Evidence*, 22 May 2007, p. 21. An education campaign along the lines of the national domestic violence campaign was also supported by Caxton Legal Centre – see *Transcript of Evidence*, 16 July 2007, p. 19; the Alliance for the Prevention of Elder Abuse WA, *Transcript of Evidence*, 30 July 2007, p. 51.

## Recommendation 7

- 2.123 **The Committee recommends that the Australian Government, in consultation with states and territories, undertake a national awareness campaign dealing with financial abuse of older Australians, and the bodies responsible for investigating such abuse.**

### Financial literacy

- 2.124 Financial literacy has been defined as '[t]he ability to make informed judgements and to take effective decisions regarding the use and management of money'.<sup>127</sup> This is a skill needed by all sections of the community, not just older people. Unfortunately the Committee heard that despite financial education and assistance being available, it often is not sought until abuse has occurred:

There are organizations such as Financial Information Service, a free education and expert information service available to everyone in the community, assisting in making informed decisions about investment and financial decisions for current and future needs, but sadly often such help is sought after and not before financial decisions are made.<sup>128</sup>

- 2.125 The Financial Literacy Foundation was established in 2005 to assist all Australians and provide them with an opportunity to increase their financial knowledge and better manage their money. Located within the Department of the Treasury, the Foundation has four key aims:

...to develop, devise and deliver a media campaign to promote the issue of financial literacy; to establish a website for financial literacy information and education resources; to act as a coordinating body to push for financial literacy education to be taught in schools, perhaps in workplaces and adult education environments more generally; and to undertake relevant research in the field.<sup>129</sup>

- 2.126 Mr McCray, from the Foundation, noted that several aspects of its work target older Australians:

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127 Quoted in ASIC, *Submission No. 127*, p. 13.

128 Country Women's Association of New South Wales, *Submission No. 18*, p. 3.

129 Mr Peter McCray, Financial Literacy Foundation, *Transcript of Evidence*, 23 March 2007, p. 50.

For example, the television campaign had four different advertisements; one of the four was targeted specifically at older Australians, with prompts on nest eggs, retirement issues, superannuation and so on. We produced a handbook with material on rights and responsibilities, scams and how to avoid them and who to contact if you are concerned about scams, and retirement insurance. The website covered those sorts of issues, as well as who to report to if you have a complaint, losing a partner, making wills and dealing with windfalls.<sup>130</sup>

2.127 As Mrs Josephine Smyth observed, 'I think the matter of financial literacy is something that is vital... I stress the point that older people must take responsibility for their own actions: they must become more financially literate...'.<sup>131</sup>

2.128 The Victorian Government recommended:

The Commonwealth could also take an increased pro-active role in developing and funding national initiatives to increase awareness and literacy of financial issues.

The Commonwealth funds the Financial Literacy Foundation, which provides a focus for financial literacy issues by increasing learning about money and its uses. The Financial Literacy Foundation has programs which specifically target schools, employers and the vocational and technical education sectors. However, it does not have any specific initiative to focus on older people. The Commonwealth should look to provide funding or prioritising existing funds to specifically target the financial literacy needs of older people and to coordinate this on a national basis.

2.129 The Committee believes that ensuring people have the skills necessary to manage their finances effectively and avoid being defrauded is central to the prevention of financial abuse. The Committee supports the proposal for a national financial literacy program for older Australians. In addition to providing targeted financial advice, such a campaign should inform older people of the processes by which they can seek recourse after abuse has occurred

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130 Mr Peter McCray, Financial Literacy Foundation, *Transcript of Evidence*, 23 March 2007, p. 51.

131 Mrs Josephine Smyth, *Transcript of Evidence*, 16 July 2007, p. 33.

and the regulatory bodies who have the power to investigate and prosecute misleading and deceptive practices.<sup>132</sup>

## Recommendation 8

- 2.130 **The Committee recommends that the Australian Government, in conjunction with states and territories, continue to fund and develop national initiatives to promote financial literacy particularly among older people and those approaching retirement age.**

## Other issues

- 2.131 During the course of the inquiry, the Committee was made aware of a number of other areas of potential financial risk for older people. While these may not always be fraudulent activities or examples of financial abuse as such, they do have the potential to impact on the financial well-being of older Australians. These areas are discussed below.

## Equity release schemes

- 2.132 Equity release products are a class of products that include reverse mortgages, home reversion schemes and shared appreciation mortgages. In brief these involve:
- *Reverse mortgages* – the consumer borrows money against the equity in his or her home and the principal and interest are not repaid until the home is sold (usually when the consumer dies or voluntarily vacates the home)
  - *Home reversion schemes* – the consumer sells part or all of his or her home to a reversion company. The home is sold for less than its market price (typically between 35% and 60%), but the consumer can remain in the property until they die or voluntarily vacates the home. There are at least two types of home reversion schemes – a sale and lease model and a sale and mortgage model.
  - *Shared appreciated mortgages (SAMs)* – the consumer gives up the right to some of the capital gain on the property in

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<sup>132</sup> National Seniors, *Submission No. 67*, p. 6. See also NSW MACA, *Submission No. 103*, p. 2.

return for paying reduced or no interest on that part of his or her borrowings.<sup>133</sup>

2.133 ASIC notes that the market for the most common of equity release products, that of reverse mortgages, is 'burgeoning'.<sup>134</sup> A survey undertaken by Trowbridge Deloitte on behalf of the Senior Australian Equity Release Association of Lenders (SEQUAL), released in April 2007, found that market growth over the past year was at 80 per cent, with \$520 million worth of settlements in 2006 (compared with \$315 million in 2005). Also of interest, the study found:

- More than 80 per cent of loans were taken as lump sums (with the remainder taken as regular draw downs);
- The average age of borrowers remains constant at 74 years (average age for new borrowers is 72);
- 45 per cent of loans are taken by couples;
- The size of the average loan is \$54,200; and
- Mortgage brokers and financial planners have significantly increased their share of the reverse mortgage market, from just 17 per cent of all loans in 2004, to 47 per cent of the market in 2006.<sup>135</sup>

2.134 From evidence to the Committee it appears that the exact nature of a number of products on offer is not always explained to potential consumers, with some products being described as reverse mortgages when they are in fact quite different. The Consumer Credit Legal Centre (NSW) Inc (CCLC) warned that:

Equity loans are loans where the borrower can access the equity in their property by getting a loan. Equity loans are widely available and offered by all major lenders. The lender will usually lend up to 70% of the value of the property. This is to be distinguished from 'reverse mortgages'... Lenders who provide reverse mortgages rarely lend more than 25% of the value of the property. This is because interest capitalises

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133 ASIC, Report 59, *Equity release products*, November 2005, p. 4. Note, there are currently no SAM products available in the Australian market (see [www.fido.gov.au/fido/fido.nsf/byheadline/Equity+release?openDocument](http://www.fido.gov.au/fido/fido.nsf/byheadline/Equity+release?openDocument) (accessed 27 August 2007))

134 ASIC, *Submission No. 127*, p. 21.

135 Report available at [http://www.sequal.com.au/images/stories/seqal\\_trowbridge\\_deloitte\\_research\\_relese\\_april\\_2007.doc](http://www.sequal.com.au/images/stories/seqal_trowbridge_deloitte_research_relese_april_2007.doc) (accessed 27 August 2007)



over many years and the lender wants to be sure that the sale of the property will cover the debt.

The significance of this is that a vulnerable older person can access up to 70% of the value of their home.<sup>136</sup>

- 2.135 This was supported by the findings of a recent report by *Choice* magazine. It found that in some cases, 'consumers enquiring about reverse mortgages were offered very high risk "asset loans" instead'.<sup>137</sup>
- 2.136 A number of submissions commented on positive aspects of reverse mortgages, provided that the consumer was aware of the exact nature of the product and had appropriate legal advice. For example, the Council on the Ageing SA noted:
- ...there is no reason why older people should not have access to financial products that allow them to utilise the wealth they have accumulated over their life times. Legal regimes that support the development and use of lending products appropriate to those who have equity in property will allow people to remain living independently in their communities for longer.<sup>138</sup>
- 2.137 In a 2005 report ASIC concluded that 'while equity release products could provide a useful and legitimate tool to meet the needs of some consumers, they also involved significant risk'.<sup>139</sup> Of particular concern to ASIC were issues involving negative equity, terms and conditions, access to advice for consumers, the potential impact on Centrelink benefits, and fees associated with some products.<sup>140</sup> ASIC also pointed to overseas experience, in particular that of the UK where 'there was heavy promotion of reverse mortgages to retirees in the 1980s. But when prices moved against consumers and their debt exceeded the value of their homes, many were evicted'.<sup>141</sup>

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136 CCLC, *Submission No. 59*, p. 3.

137 *Choice* magazine, March 2007, 'Trading your home for a holiday'.

138 Council on the Ageing SA, *Submission No. 77*, p. 5. See also Mr P Brady, National Seniors Association, *Transcript of Evidence*, 22 May 2007, p. 19.

139 ASIC, *Submission No. 127*, p. 22.

140 ASIC, *Submission No. 127*, pp. 22-23. See also Department of Communities, Queensland, *Submission No. 96*, p. 2.

141 [www.fido.gov.au/fido/fido.nsf/byheadline/Equity+release?openDocument](http://www.fido.gov.au/fido/fido.nsf/byheadline/Equity+release?openDocument) (accessed 27 August 2007)

- 2.138 SEQUAL was formed in January 2005 by a number of financial institutions offering these products. All members are required to adhere to a code of conduct which includes:
- Ensuring that the borrower obtains independent legal advice (and strongly encouraging the borrower to seek independent financial advice);
  - Ensuring that all products carry a 'no negative equity' guarantee i.e. that the borrower will never owe more than the net realisable value of their property provided that the terms and conditions of the loan have been met;
  - Participation in an ASIC approved External Dispute Resolution Scheme; and
  - Ensuring that all loans are written under the Uniform Consumer Credit Code (UCCC) irrespective of the use of proceeds of the loan.<sup>142</sup>
- 2.139 In recognition of 'the importance of educating intermediaries on the unique characteristics of reverse mortgages' and given the growth of mortgage brokers and financial planners, SEQUAL has established an accreditation standard and has accredited two courses (offered by the Mortgage and Finance Association of Australia and Bluestone Equity Release) which offer specialised training on reverse mortgages to intermediaries.<sup>143</sup>
- 2.140 Despite the laudable efforts of organisations such as SEQUAL, bodies such as National Seniors Association do not believe that the 'current regulatory framework provides sufficient protection for older people or requires providers to fully inform consumers of the pros and cons of the product... it does not seem... [that self-regulatory initiatives]... have managed to deter unscrupulous operators from the marketplace or result in greater community awareness of the benefits and drawbacks of reverse mortgages'. National Seniors Association called for more effective regulation of the reverse mortgage industry, so that:
- All mortgage providers are licensed
  - Suitable accreditation standards are introduced

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142 SEQUAL Code of Conduct, [http://www.sequal.com.au/images/stories/sequal\\_conduct\\_code.pdf](http://www.sequal.com.au/images/stories/sequal_conduct_code.pdf) (accessed 27 August 2007)

143 See [http://www.sequal.com.au/images/stories/sequal\\_trowbridge\\_deloitte\\_research\\_release\\_april\\_2007.doc](http://www.sequal.com.au/images/stories/sequal_trowbridge_deloitte_research_release_april_2007.doc) (accessed 27 August 2007)

- Better information is provided to consumers, particularly older people; and
  - An appropriate and effective dispute resolution mechanism is put in place.<sup>144</sup>
- 2.141 The Law Institute of Victoria argued that the requirement for independent legal advice should be mandatory for all providers of equity release products.<sup>145</sup> Caxton Legal Centre also noted that ‘of particular concern to us... [was] ...the marketing and use of products such as Reverse Mortgages to elderly clients, without adequate information regarding the cost of the product/alternative products. Disclosure obligations associated with reverse mortgages should be made more stringent’.<sup>146</sup>
- 2.142 Membership of SEQUAL is voluntary, and therefore the code of conduct is not followed by all lenders.<sup>147</sup> ASIC also noted that ‘most of the lenders in this area do not tend to be mainstream banks; they tend to be other sorts of lenders – mortgage originators and so on.’<sup>148</sup>
- 2.143 Concern was expressed even about those adhering to the SEQUAL code. *Choice* magazine rated the ‘no negative equity guarantee’ as the most important protection measure offered with these products. While all companies assessed by *Choice* offer a ‘no negative equity’ guarantee, most contracts indicate ‘they may not honour it if you are in default at the time of sale’.<sup>149</sup> Similarly:
- If at any time you breach the so-called ‘default conditions’ of the loan the lender can charge enforcement expenses, which could include a higher interest rate. They could even ask for repayment of the loan and sell your home if you can’t raise the money any other way – a devastating experience. All the contracts we’ve looked at include unfairly broad default clauses.<sup>150</sup>
- 2.144 In regard to regulation of equity release products, the UCCC regulates product disclosure of all credit products, including reverse mortgages. Such products are not considered to be financial products

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144 National Seniors Association, *Exhibit No. 57*, pp. 1-2.

145 Law Institute of Victoria, *Submission No. 78.1*, p. 2.

146 Caxton Legal Centre Inc, *Submission No. 112*, p. 20.

147 Law Society of Western Australia, *Submission No. 50*, p. 2.

148 Mr Greg Tanzer, ASIC, *Proof Transcript of Evidence*, 17 August 2007, p. 16.

149 *Choice*, March 2007, p. 13.

150 *Choice*, April 2007, p. 13.

and are therefore not subject to ASIC regulation and the products are available not only from financial planners but also mortgage brokers.

- 2.145 The 2005 report by ASIC noted that the existing regulatory system was not designed to address the issues raised by equity release products 'which take the form of credit arrangements but nevertheless have some of the attributes of an investment product':

At the product level, the principal vehicle for regulation of credit, the Uniform Consumer Credit Code... does not provide for disclosure of risk, nor provide a mechanism for disclosing elements of the cost of the product, such as the forgoing of equity, that are not translatable into an interest rate. Finally, it will not apply at all where the funds obtained are to be used for investment purposes.

The principal vehicle for the regulation of investment products, the Corporations Act 2001... has limited application to some home reversion and shared appreciation products, depending on their terms, but generally does not apply to reverse mortgage products...

Industry statistics indicate that most equity release products are being distributed by mortgage brokers who are, at present, far less regulated than advisers in other sectors of the financial services industry, although there are proposals for further regulation at the state level.<sup>151</sup>

- 2.146 The regulation of consumer credit, including the activities of mortgage brokers, is the responsibility of state and territory governments. In September 2006 the Ministerial Council for Consumer Affairs agreed to a uniform approach to the regulation of mortgage brokers. This will involve the imposition of licensing, conduct and disclosure requirements on brokers. A draft bill, for use by all other states, is being prepared by the New South Wales Government and its release is imminent. The Commonwealth Treasurer has recently called on the states 'to accelerate work on the licensing conduct and disclosure of mortgage brokers'.<sup>152</sup> The Committee supports the introduction of licensing of mortgage brokers as quickly as possible.

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151 ASIC, Report No. 59, *Equity release products*, November 2005, pp. 8-9.

152 Press release: Commonwealth Treasurer, Regulation of Mortgage Brokers, 19 August 2007, available at [www.treasurer.gov.au/tsr/content/pressreleases/2007/077.asp](http://www.treasurer.gov.au/tsr/content/pressreleases/2007/077.asp) (accessed 27 August 2007).

2.147 From a wider perspective than just equity release products, it was noted that:

...Australia's credit market is undergoing profound changes such as greater numbers of lenders; increased range of credit products; higher volume of credit flow; more aggressive marketing; and new channels of delivering credit to consumers. Many consumer credit products, including reverse mortgages, were not contemplated at the time of implementing the Uniform Credit Code in 1996.<sup>153</sup>

2.148 ASIC itself in its 2005 report on equity release products agreed that the Code does not cover some new products:

...the Code was drafted in the mid 1990s to apply to traditional credit products with regular payments and, accordingly, it is not specifically adapted to the issues raised by equity release products...<sup>154</sup>

2.149 With the growth in this type of product, the Committee believes that it would be timely for states and territories to review the UCCC.

### **Recommendation 9**

**2.150 The Committee recommends that the Ministerial Council on Consumer Affairs undertake a review of the Uniform Consumer Credit Code, in light of the new range of products and services available in the market.**

## **Targeting of older people for unsecured risky investments**

2.151 While older Australians are only half as likely as younger people to be victims of most types of consumer fraud, in relation to 'investment and insurance fraud... older Australians experience a higher incidence of victimisation than younger Australians.'<sup>155</sup>

2.152 Following recent legislative changes, from 1 July 2007 Australians aged 60 years and over have the opportunity to withdraw their superannuation savings at retirement as a tax-free lump sum. ASIC has warned that '[t]hose accessing their funds in this way will need to

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153 Western Australian Government, *Submission No. 74*, p. 9. See also Ms Karen Cox, Consumer Credit Legal Centre (NSW) Inc, *Transcript of Evidence*, 14 May 2007, p. 14; Ms Helen Campbell, Redfern Legal Service, *Transcript of Evidence*, 14 May 2007, p. 27.

154 ASIC, Report No. 59, *Equity Release Products*, November 2005, p. 41.

155 ASIC, *Submission No. 127*, p. 11.

be especially cautious about decisions relating to their retirement funding, to ensure it lasts as long as they do'.<sup>156</sup>

- 2.153 There may well be a 'desire to improve retirement living standards... [resulting] in a growing willingness of older Australians to experiment with their retirement savings by investing in risky schemes, or complex financial products'. ASIC noted that it was aware of 'scams, illegal schemes and high-risk investment ventures that have been aggressively marketed to target older Australians over recent years'.<sup>157</sup>
- 2.154 A number of highly publicised collapses of investment schemes, such as Westpoint and Fincorp, have been well-documented and are the subject of ongoing investigation by regulators. It is beyond the scope of this report to examine the reasons for those collapses. The Committee notes, however, that ASIC is currently 'in the process of an extremely large and complex investigation into the affairs of the Westpoint Group and the role and conduct of not only the directors of the Group, but also of the licensed and unlicensed advisers'.<sup>158</sup> Similar activity is underway in regard to other corporate collapses.
- 2.155 These collapses affected not just older investors, but they are a significant percentage of those caught up in the collapses. As part of its investigation into the Westpoint collapse, ASIC conducted a survey of known investors. Of the 1,800 responses received, approximately one-third were self-funded retirees and the average age of investors was almost 60.<sup>159</sup> The impact of such collapses on older investors has been well documented.<sup>160</sup>
- 2.156 As noted earlier:

National regulation of finance brokers is now being developed by the Ministerial Council for Consumer Affairs along lines consistent with the Western Australian model... Furthermore, pooled mortgage investments are now regulated as managed investment schemes under the Corporations Act by... ASIC ...However, the recent collapse of Westpoint Corporation and the likely resultant losses to investors (including older people) would seem to

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156 ASIC, *Submission No. 127*, p. 15.

157 ASIC, *Submission No. 127*, p. 19.

158 ASIC, *Submission No. 127*, p. 19.

159 ASIC, *Submission No. 127*, p. 19.

160 See for example, National Seniors, *Submission No. 67*, p. 7.

demonstrate the continued need for stronger regulation by the Commonwealth of property investment schemes generally.<sup>161</sup>

2.157 One of ASIC's key priorities over the next 12 months and beyond is to 'focus on the education of retail investors... [with particular emphasis on] strategies which aim to improve quality of advice, and the level of investor education in relation to diversifying risk through asset allocation, and understanding the relationship between risk and return for particular asset classes such as debt securities. ASIC also intends to focus attention on simpler, better-targeted disclosure; advertising of complex investment products targeted to retail investors; and, early detection and elimination of illegal operators'.<sup>162</sup>

2.158 It is clear to the Committee that the role of ASIC is not generally well understood. ASIC described its role in the following terms:

We are not a regulator that undertakes prudential functions so we do not exist to prevent failure occurring. But we do exist to make sure that there is appropriate disclosure to investors of the risks of investment products that they are investing in. We are concerned about that particular sector and whether or not people properly understand the risks of investment in those particular types of products.<sup>163</sup>

2.159 As Mr A Sher observed:

There is obviously a need to dispel any belief in the mind of the public, that the mere issue of an investment license, or the standing of any person, or an investment company or bank, or building society, as the case may be, holding such a license, implies government approval beyond the mere issue of the license itself, in which the rights and obligations of the licensee are detailed.<sup>164</sup>

2.160 It was also put to the Committee that 'a lot of people will think that, because the regulator is involved, it has actually looked at this. People think things are safe because ASIC has looked at them. Most people think that, if these things have gone into ASIC, they must be okay. But it is the opposite...'<sup>165</sup>

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161 Western Australian Government, *Submission No. 74*, p. 10.

162 ASIC, *Submission No. 127*, pp. 20-21.

163 Mr Greg Tanzer, ASIC, *Proof Transcript of Evidence*, 17 August 2007, p. 12.

164 Mr Abraham Sher, *Submission No. 98*, p. 3.

165 Mr Peter Neil, *Transcript of Evidence*, 30 July 2007, p. 59.

- 2.161 The role of ASIC and other regulators needs to be better explained to the general public and improved education of investors (see Recommendation 8) should assist in this regard.

## Guarantees

- 2.162 It is human nature to want to assist family members in a range of areas. Concern has been expressed at the possible abusive nature of such assistance, particularly in the area of older Australians acting as guarantor for family members. The Law Society of Western Australia identified a number of areas where fraud and financial abuse might occur, including where younger family members might ask older family members to guarantee their personal or home loans:

The older family members are often unaware of the repercussions of agreeing to act as guarantor. Some financial institutions insist that the guarantor obtain a certificate of independent legal advice... it is submitted that all guarantors should have to obtain independent legal advice with respect to the effect of the guarantee they have been asked to sign.<sup>166</sup>

- 2.163 The Human Rights and Equal Opportunity Commission (HREOC) also raised concerns about older people being pressured into acting as guarantors, while acknowledging the need and desire of older people to assist family members in financial ways. HREOC indicated it would be:

...supportive of Government moves to investigate providing further statutory protections to older people in relation to acting as guarantors for the debts of family members and particularly in relation to the use of the family home as security for the debts of a third party.<sup>167</sup>

- 2.164 The Committee notes that there have been a number of cases involving guarantors 'with an emotional dependence on the borrower such as parents of adult borrowers', with mixed legal outcomes.<sup>168</sup> For most reputable lenders, it is now common practice to ensure that separate independent legal advice is available for borrowers and guarantors to ensure that they understand the nature of the commitment they are signing. However, as with other aspects of consumer credit arrangements, a small percentage of providers are
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166 Law Society of Western Australia, *Submission No. 50*, p. 1.

167 HREOC, *Submission No. 92*, p. 28.

168 See Lewis, R., *Elder law in Australia*, LexisNexis Butterworth, Chapter 4.



not following best practice. Others seek to alter the nature of the arrangements to avoid those protections that are in place.

2.165 In regard to guarantees, while they were still available, CCLC found:

...lenders and mortgage brokers now go to great lengths to avoid guarantees. Instead mortgage brokers and the person receiving the benefit structure the transaction for the older person to receive a benefit even though they did not want the benefit. There are also 'family equity' products where the children and the parents sign agreements indicating a 'benefit' was received. When a benefit is received it is much harder to show that the transaction was unjust.<sup>169</sup>

2.166 The Committee hopes that the proposed licensing and registration of mortgage brokers (see paragraph 2.146) will also assist in addressing this issue.

2.167 The Country Women's Association proposed that those who act as guarantors should be kept informed of progress with the transaction so that they had early advice if anything was starting to go wrong:

If a borrower were to fail to make their repayments to a financial institution or other party on time, then their guarantor should be made aware of this. Family members sometimes bully older members into acting as guarantors. With the knowledge that the guarantor will be kept informed, this may not be such an attractive option for some. For those doing the right thing, it would be no issue.

We do not believe that privacy is a sufficient reason not to make this amendment. If the person asking someone to act as guarantor does not want them to know their business, then they do not have to ask them to act as guarantor.<sup>170</sup>

2.168 The Committee is attracted to this proposal, as one way of assisting those who are willing to act as guarantors retain some degree of control and knowledge about the undertaking.

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169 CCLC, *Submission No. 59*, p. 2.

170 Mrs Patricia Shergis, Country Women's Association of NSW, *Transcript of Evidence*, 15 May 2007, p. 59.

## Recommendation 10

- 2.169 **The Committee recommends that the Treasurer, in conjunction with his state and territory counterparts, initiates discussions with credit providers to mandate that guarantors be advised regularly of the progress with the loans they have provided surety for, and notified should any default occur. Such guarantees should not be enforceable if this advice has not been provided.**

## Credit

- 2.170 The Committee also received evidence of irresponsible lending by credit card providers that, it was argued, in some cases amounted to financial abuse.<sup>171</sup> While such behaviour also affects other sections of the community, the ability of older Australians to meet their financial commitments is more limited as many are no longer fully employed.
- 2.171 The CCLC argued that lenders have a duty of care to borrowers to lend responsibly and that there is 'no real or effective penalty for irresponsible lending'.<sup>172</sup>
- 2.172 While the Committee acknowledges that poor financial skills and money management by individuals can result in unmanageable debt levels, it is clear that lending practices undertaken by some financial institutions exacerbate problems for certain sections of the community.

### Figure 2.2 Case studies: Credit card debt

Mr H was working earning \$25,000 p.a. He owns his own home. He has \$43500 in credit card debt. The credit card was used...[for] strata management fees and to buy household goods. Now he is on the aged pension and cannot afford to pay the credit card. The bank has suggested he get a reverse mortgage to pay the credit card debt...

In 1998 Mrs C applied for a credit card with a bank. She declared on the application form that her sole source of income was Centrelink benefits. The application was declined. She queried this and then the bank offered her a credit card with a limit of \$3000. Through unsolicited limit increases the limit on her credit card was increased from \$5000 to \$7000 to \$10000 to \$15000 to \$25000 to \$35000 to \$45000. Mrs C has no way to repay the debt...

Mr B is a pensioner and 72 years old. He has 3 credit card debts totalling more than \$35000. He has no way to repay the debt.<sup>173</sup>

- 2.173 It was put to the Committee that action should be taken on unsolicited credit limit increases:

171 CCLC, *Submission No. 59*, p. 6.

172 CCLC, *Submission No. 59*, p. 6.

173 CCLC, *Submission No. 59*, pp. 8-9.

Unsolicited credit card limit increases may not be financial abuse but they are certainly affecting a lot of people. A lot of people call us about this problem. Self-regulation has failed to stop irresponsible lending... We feel that regulation needs to be considered urgently to introduce a penalty for this type of lending to ensure that there is an incentive for lenders to stop this practice.<sup>174</sup>

- 2.174 The Committee understands that, at least as far as major financial institutions are concerned, there has been a move away from automatic credit card increases. While offers may be made to individual customers, based on their credit history, it is up to the customer to accept the increased limit or not.<sup>175</sup>
- 2.175 While the Committee has no objection to banks and other financial institutions making such offers to customers, it believes that the Government should consider a ban on unsolicited automatic credit limit increases.

### **Recommendation 11**

- 2.176 **The Committee recommends that the Australian Government consider a ban on unsolicited automatic credit limit increases.**

## **Charities and churches**

- 2.177 Concerns were raised with the Committee about the operations of some charities and churches in targeting vulnerable older Australians:

Some charity groups benefit enormously from the loneliness of elderly people, particularly with telemarketing. Older people desperate for company enjoy the regular callers and agree to donate money when at times they are unable to afford the donation. Some religious groups also sign up vulnerable members of their congregation to regular donations (generally linked to the promise of salvation) via direct debit arrangements, limiting their available income.<sup>176</sup>

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174 Ms Karen Lane, CCLC, *Transcript of Evidence*, 14 May 2007, p. 13.

175 Mr David Bell, Australian Bankers Association, in House of Representatives Standing Committee on Economics, Finance and Public Administration, *Transcript of Evidence*, Roundtable on home loan lending practices and processes, 10 August 2007, p. 70.

176 Australian Guardianship and Administration Committee, *Submission No. 73*, p. 3

- 2.178 It was suggested that the 'Do Not Call' register should be extended to religious organisations and charities to increase protection for vulnerable older persons.<sup>177</sup> While the Committee has some sympathy with this view, the effectiveness of the 'Do Not Call' register as it currently operates has not yet been formally assessed.

## Centrelink arrangements

- 2.179 The Committee received a number of comments critical of the way in which the Centrelink nominee arrangements interact with guardianship arrangements or powers of attorney. These are dealt with in more detail in Chapter 3. Concerns were also raised about the potential for financial abuse by people holding nominee authority on behalf of Centrelink clients:

Centrelink also has a role here to ensure that taxpayer's money is used for the purpose intended, either to provide care under a carer's pensions/benefits or not ripped off by a person under a Nominee arrangement... there should be... a review of Centrelink legislation as it refers to Nominee arrangements and regular checks to determine if this arrangement is being abused. If Centrelink becomes aware that an individual who is receiving a Carer pension/benefit is not providing adequate care, then this should be a mandatory report to the relevant guardianship body if the person does not have decision making capacity and reporting policies and procedures developed around situations where the person does have capacity.<sup>178</sup>

- 2.180 As at 20 July 2007, there were 347,047 nominee arrangements in place (25,753 payment arrangements; and 285,398 correspondence only arrangements; and 35,896 with both payments and a correspondence nominee arrangement in place).<sup>179</sup> Of these only 2.5 per cent of the total 347,047 are court appointed, and the figure rises to only 4 per cent when those operating under a power of attorney arrangement are considered.<sup>180</sup>
- 2.181 When asked whether Centrelink monitored nominee arrangements for potential abuse, the response was that 'as part of the arrangements

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177 State Trustees Ltd Victoria, *Submission No. 88*, p. 17.

178 EAPU, *Submission No. 97*, p. 5.

179 Mr Roy Chell, Centrelink, *Proof Transcript of Evidence*, 17 August 2007, p. 34.

180 Mr Roy Chell, Centrelink, *Proof Transcript of Evidence*, 17 August 2007, p. 34.

we do not, no, but we do have existing procedures in place', and that they would act on any instances of abuse they would encounter.<sup>181</sup>

2.182 Centrelink have advised that there is no set schedule for reviews of nominee arrangements. 'The regular review framework for Centrelink payments varies from payment to payment'.<sup>182</sup> While Centrelink documents state that a payment nominee must keep records detailing how payments have been spent, and 'respond to a request by Centrelink to provide records of how... payments have been used'<sup>183</sup> it also indicated 'there is no set schedule for these reviews. This would form part of our ongoing review framework that we have within Centrelink with respect to reviewing people's circumstances so as to ensure that their entitlements are correct'.<sup>184</sup>

2.183 Centrelink believes that the level of abuse of nominee arrangements is very low.<sup>185</sup>

The instances that we actually find are very small numbers. Of course, we do not know, but I think we have so many customers and such connections into the community and with representatives of customer groups that we would become aware of it if it were occurring in significant numbers. It is not indicating that to us.<sup>186</sup>

2.184 A Centrelink representative noted that '[w]e do not ignore those cases when we come into contact with them, but it is probably fair to say that, with a large number of our customer group in the age pension group, we are not in regular contact with them in the same way that we would be with Centrelink's working-age customers, who we have on regular two-week reporting and we are actively engaged with them'.<sup>187</sup>

2.185 While the Committee would not support instituting such a level of contact with those with nominee arrangements in place, it does

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181 Mr Roy Chell and Mr Paul Cowan, Centrelink, *Proof Transcript of Evidence*, 17 August 2007, p. 36.

182 Centrelink, *Submission No. 116*, p. 1.

183 For more information, go to:

[http://www.centrelink.gov.au/internet/internet.nsf/MultiFilestores/mcco255/\\$File/mcco255\\_0512en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/MultiFilestores/mcco255/$File/mcco255_0512en.pdf) (accessed 3 September 2007).

184 Mr Paul Cowan, Centrelink, *Transcript of Evidence*, 23 March 2007, p. 6.

185 Mr Roy Chell and Mr Paul Cowan, Centrelink, *Proof Transcript of Evidence*, 17 August 2007, p. 36.

186 Mr Paul Cowan, Centrelink, *Proof Transcript of Evidence*, 17 August 2007, p. 36.

187 Mr Paul Cowan, Centrelink, *Proof Transcript of Evidence*, 23 March 2007, p. 3.

remain concerned that such nominee arrangements, particularly those that are for both payment and correspondence, are not monitored in any systematic way. The Committee would like to see Centrelink, as part of its duty of care to its clients, institute a regular review schedule so that a representative sample of nominee arrangements in each year are reviewed each year to determine that the payments are being appropriately used. The nominee arrangements need not include those where a public trustee or financial manager has been appointed by a Guardianship Board or Tribunal under state/territory legislation, as some form of recording of expenditure activity is already in place and there are mechanisms for raising concerns about such arrangements.

## Recommendation 12

**2.186 The Committee recommends that Centrelink establish a process by which a representative sample of nominee arrangements in each year (other than those established by order of a guardianship tribunal or other similar body) are examined to determine that the payments are being used appropriately.**

2.187 The Committee was also advised of difficulties faced by older Australians who may have invested in financial schemes or businesses that subsequently collapsed.<sup>188</sup> Although they were no longer receiving a return from their investment, under social security laws they were deemed to still be in receipt of an income, and in possession of an asset.

2.188 The Committee raised this with Centrelink officials, who advised that there were mechanisms to waive the deeming provisions, and that this had occurred in a number of high profile recent cases:

In general terms, when an event occurs such as Fincorp or whatever else, very quickly decisions are usually taken by the ministers... to waive the deeming provisions. They assume those assets are not delivering an income, so they do not assume an income is coming through. With respect to treating those investments as assets, we have to await the deliberations of the administrator...

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188 See for example, Mrs Dorothy Lyons, *Transcript of Evidence*, 16 July 2007, p. 40; Mrs Betty Roberts, Catholic Women's League Australia, *Transcript of Evidence*, 5 June 2007, pp. 23-25.

We do have hardship provisions. If people find themselves in a position where they have limited alternative income, they have limited cash on hand and they do have the capacity to realise their assets... then we have hardship provisions. If they meet certain criteria with respect to lack of income, lack of cash on hand and lack of capacity to sell their assets, then they can gain access to income support.

...the rules apply for anyone's circumstances. Even if, for example, they invested in a small business and the small business failed, the same provisions would apply.<sup>189</sup>

- 2.189 The Committee does not have all of the private financial information relating to the individuals who made claims that they were ineligible for any Centrelink assistance. However, the Committee remained concerned that the actual experience of the application of hardship provisions was different from the policy intent as described by Centrelink officials.
- 2.190 It is the experience of the Caxton Legal Service that 'Centrelink can be very difficult to engage in these types of matters and that the hardship test is applied very rarely'.<sup>190</sup> The Centre would like to see changes to the hardship test to enable Centrelink to 'recognize victims of elder abuse and to enable greater latitude in situations where the elderly person may have been subjected to undue influence in the way they have arranged their affairs and where they meet certain other requirements. Centrelink should also undertake training to ensure that their staff is aware of the prevalence of elder abuse to enable their officers to recognise the signs'.<sup>191</sup>

### **Recommendation 13**

- 2.191 **The Committee recommends that Centrelink, in consultation with the Department of Families, Community Services and Indigenous Affairs, review the application of the 'hardship' provisions as they apply in particular to older Australians who have suffered financial abuse or fraud.**

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189 Mr Paul Cowan, Centrelink, *Proof Transcript of Evidence*, 17 August 2007, pp. 37-39.

190 Caxton Legal Centre Inc, *Submission No. 112*, p. 16.

191 Caxton Legal Centre Inc, *Submission No. 112*, p. 17.

## Life insurance and superannuation issues

- 2.192 The Committee received a submission from Mrs Janne van Wulfften Palthe regarding the dispersal of benefits from superannuation and life insurance policies. While not specifically limited to older people, the matter nevertheless has the potential to impact on this particular demographic group.
- 2.193 Ms van Wulfften Palthe indicated that, contrary to what she believes most people understand, the making of a will cannot alter the beneficiary nominated in a life insurance or superannuation policy. This can lead to significant financial and emotional stress when, following a death, the beneficiaries of the will may find that they are not listed as beneficiaries of the life insurance or superannuation and have no claim on it.
- 2.194 Ms van Wulfften Palthe indicated that people are unaware of the requirement to change the beneficiary details with the company concerned, and often do not realise that they may have failed to reflect changed personal circumstances in this way (due to the passage of time since taking out the policy), or believe that a later will overrides such a nomination.<sup>192</sup> Mrs van Wulfften Palthe called for a change in the law so that 'wills should be able to overwrite life insurance and superannuation designations',<sup>193</sup> and that both superannuation and life insurance can be left in a will.
- 2.195 Under current legislation, the proceeds of a person's life policy 'may be paid to the person's trustee or executor upon death, or to a nominated beneficiary under the terms of the policy (in which case the proceeds do not form part of the deceased estate) or to an assignee of the policy...'<sup>194</sup>
- 2.196 Mrs van Wulfften Palthe raised her concerns with the Treasurer. In a response from an adviser to the Minister for Revenue and Assistant Treasurer, it was stated:

In the case of life insurance, the Insurance Contracts Act 1984 provides that where a life insurance policy is to provide benefits to someone other than the insured, the proceeds do not form part of the estate of the insured and hence will not be distributed in accordance with a will.

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192 Mrs Janne van Wulfften Palthe, *Submission No. 11*.

193 Mrs Janne van Wulfften Palthe, *Transcript of Evidence*, 4 June 2007, p. 25.

194 Rodney Lewis, *Elder Law in Australia* (Sydney: LexisNexis Butterworths, 2004), p. 368.



This mechanisms ensures the effectiveness of the facility for policyholders to nominate beneficiaries by eliminating any doubt about the validity of a nomination...

I am advised that many superannuation and life insurance companies, although not obliged, already include beneficiaries' names in their annual statements. Information about nominating beneficiaries, including information about changing nominations, generally is disclosed to consumers through product disclosure statements at the time of the purchase of the financial product.<sup>195</sup>

- 2.197 Mrs van Wulfften Palthe advised the Committee that there is 'no requirement by life insurance or superannuation companies to detail the beneficiary or spell out how beneficiaries should be changed'<sup>196</sup> although from the above comments it is clear that some companies already do this.
- 2.198 The Committee acknowledges that the level of public knowledge about this issue is likely to be limited as most of the members of the Committee were themselves unaware of the issues this might raise on the death of an individual. Given the low number of Australians who actually make wills, the Committee does not support a change in legislation to allow wills to override nominated beneficiary arrangements in superannuation and life insurance policies. However, the Committee does support the beneficiary details being included on policy renewal documents and/or annual statements as suggested.

#### **Recommendation 14**

- 2.199 **The Committee recommends that the Australian Government work with superannuation and life insurance companies to provide for regular notification to policy holders of the beneficiary details and the way in which those details can be amended.**

- 2.200 There is also an issue with superannuation death benefits and binding death benefit nominations. As Mr Brian Herd, a legal practitioner, explained:

...a person can sign a binding death benefit nomination in which they direct the trustee of a superannuation fund as to

195 Letter from Ms J Hutchison, Advisor, Office of the Minister for Revenue and Assistant Treasurer, to Mrs J van Wulfften Palthe, dated 20 April 2006, *Exhibit No. 59*, p. 2.

196 Mrs Janne van Wulfften Palthe, *Transcript of Evidence*, 4 June 2007, p. 30.

who to pay the member's death benefit to and the trustee then has no discretion. However, such a nomination only lasts three years unless it is renewed. Lawyers consistently ask the question: 'If a member loses capacity and their enduring power of attorney is called upon to make decisions, can that enduring power of attorney make changes, or fail to renew, or renew the binding death benefit nomination?' The answer is not provided for by the *Superannuation Industry (Supervision) Act*, but it needs to be.<sup>197</sup>

2.201 Mr Herd suggested that the *Superannuation Industry (Supervision) Act 1993* be amended to enable a substitute decision maker to make or renew a binding death benefit nomination.<sup>198</sup>

2.202 The Committee supports this proposal.

### **Recommendation 15**

**2.203 The Committee recommends that the Australian Government introduce legislation into Parliament to amend the *Superannuation Industry (Supervision) Act 1993* to enable a substitute decision maker to renew, or if required to do so, to make a binding death benefit nomination.**

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<sup>197</sup> Mr Brian Herd, *Transcript of Evidence*, 16 July 2007, p. 3.

<sup>198</sup> Mr Brian Herd, *Transcript of Evidence*, 16 July 2007, p. 7.