

Family agreements

Introduction

- 4.1 This chapter examines the main issues raised by the evidence in relation to family agreements. Overseas legislation compelling the performance of filial obligations is also considered in this chapter.

The nature of family agreements

- 4.2 Family agreements generally involve an arrangement between an older person and another party or parties (usually family members or carers) whereby the older person provides a benefit to the other party in exchange for continuing (or lifelong) care. The benefit can take various forms, for example a transfer of property or a compensatory payment. In its submission Alzheimer's Australia defined the family agreement as:

...a private commitment between older people and their relatives, friends and carers which is designed to accommodate the needs and wishes of the older person as they age and are consistent with the needs, resources and aspirations of the other person/s who assume the position of counterparty (often the carer). Some family agreements are made *ad hoc*, others involve a significant amount of money

and or property. Most commonly family agreements are between parents and children.¹

4.3 National Seniors noted some alternative nomenclature that is used in relation to these agreements:

Family agreements can also be described as independent care arrangements, personal services contracts or lifetime care contracts...²

4.4 One commentator has observed that the permutations of family agreements are '...almost infinite'.³ In its submission the Human Rights and Equal Opportunity Commission (HREOC) noted a number of factors that have combined to give rise to family agreements:

- a general aversion to 'institutional' residential aged care
- limited access to residential aged care places
- a preference by older people and their families to remain in the community
- difficulties accessing community care
- the ageing population and an increased number of older people living with disabilities
- a desire by older people to preserve their assets, in particular the family home, for future generations and a consequent reluctance to sell the family home so as to pay an accommodation bond or similar for an aged care place or to pay for community based care
- a desire by older people to arrange their assets and incomes so as to maintain eligibility for social security benefits such as the Age Pension
- high levels of workforce participation and high debts (particularly mortgages) among adult children which may make it difficult for them to give up their job or cut back on their hours of work in order to carry out care for parents.⁴

4.5 One widespread version of family agreement is the 'granny flat' arrangement. This involves the construction of a residence for the older person on the property of the other party (for example an

1 Alzheimer's Australia, *Submission No. 55*, p. 20.

2 National Seniors, *Submission No. 67*, p. 11. See also Qld Office of the Public Advocate, *Submission No. 76*, p. 8; Human Rights and Equal Opportunities Commission (HREOC), *Submission No. 92*, p. 34.

3 Rodney Lewis, *Elder Law in Australia* (Sydney: LexisNexis Butterworths, 2004), p. 260.

4 HREOC, *Submission No. 92*, pp. 34-35.

extension to the house of an adult child) with the proceeds from the sale of the older person's previous home.⁵

- 4.6 Family agreements can be either verbal or in writing, and evidence to the inquiry indicated that a common characteristic of family agreements is their informality. HREOC, for example, stated that:

...in general family agreements are often nothing more than a vague and very general promise to take care of the other person for the rest of their life which have been made either verbally or in writing.⁶

- 4.7 The Queensland Office of the Public Advocate informed the Committee that:

There is little statistical or empirical evidence in Australia of families systematically formalising or documenting any such agreements. This is significant given that 15.4% of people 65 years and older live in family households with their children, relatives or friends.⁷

- 4.8 The Public Advocate further observed that:

For many families there is a psychological barrier to formalising care arrangements in a legally binding contract around a family care arrangement where trust is thought to be sufficient.⁸

- 4.9 The Committee was also informed that there is little data on the usage rate of family agreements.⁹ It was suggested however that the usage rate of family agreements will increase for a number of reasons:

...it is likely that family agreements – whether they are formal contracts or informal arrangements – will increase in the future given Australia's growing aging population and that many older persons will arguably prefer to remain in a

5 See NSW Public Trustee, *Submission No. 72*, pp. 5-6; State Trustees Ltd, *Submission No. 88*, p. 13; HREOC, *Submission No. 92*, p. 35; Elder Abuse Prevention Unit, *Submission No. 97*, p. 6.

6 HREOC, *Submission No. 92*, p. 34. See also NSW Public Trustee, *Submission No. 72*, p. 6, and National Seniors, *Submission No. 67*, p. 11.

7 Queensland Office of the Public Advocate, *Submission No. 76*, p. 8. See also Caxton Legal Centre, *Submission No. 112*, p. 25; and Victorian Government, *Submission No. 121*, p. 29.

8 Queensland Office of the Public Advocate, *Submission No. 76*, p. 8.

9 HREOC, *Submission No. 92*, p. 35.

familial and familiar environment and have a choice in terms of how and who provides them with care.¹⁰

- 4.10 In its submission National Seniors noted that ‘...Australia is seeing an increase in family care agreements’.¹¹

Legal status

- 4.11 The legal status of family agreements received some comment in evidence to the inquiry. In its submission the Victorian Government indicated that:

The informality and familial nature of these agreements may make it difficult for the law to recognise and/or enforce them as contracts, and common law presumptions may assume that the transfer of property is a gift with no obligations attached.¹²

- 4.12 The New South Wales Ministerial Advisory Committee on Ageing (NSW MACA) stated that the legal status of written family agreements is ‘unclear’.¹³

- 4.13 In its submission Alzheimer’s Australia suggested that there is nothing in theory to prevent a family agreement being enforced as a contract ‘...if all the relevant requirements of a contract are met’ including ‘...the intention to create legal relations, capacity, offer and acceptance, consideration, and certainty’,¹⁴ but that:

The confusion has arisen because there is a presumption that where family or social arrangements are concerned, the law presumes that there is no intention to create legal relations, thus one crucial requirement for a contract is missing (see eg Balfour v Balfour [1919] 2 KB 571; Cohen v Cohen (1929) 42 CLR 91).¹⁵

- 4.14 Alzheimer’s Australia went on to state, however, that:

...if the family or social arrangement is clearly intended to create a legal relationship (and assuming that the other

10 Law Institute of Victoria, *Submission No. 78*, p. 5. See also HREOC, *Submission No. 92*, p. 35, and COTA Over 50s, *Submission No. 58*, p. 12.

11 National Seniors, *Submission No. 67*, p. 11.

12 Victorian Government, *Submission No. 121*, p. 29.

13 NSW MACA, *Submission No. 103*, p. 5.

14 Alzheimer’s Australia, *Submission No. 55*, p. 22.

15 Alzheimer’s Australia, *Submission No. 55*, p. 23.

requirements of a contract are present), then that social or family arrangements are [*sic*] binding and can be enforced as a contract (see eg *Raffaele v Raffaele* [1962] WAR 29).¹⁶

- 4.15 The Queensland Attorney-General also observed that older parents who are parties to family agreements can commence civil action for breach of contract in cases where the parent ‘...believes that the agreement has been breached by their child or children’.¹⁷ It would seem unlikely to the Committee that there would be very many family agreements prepared and executed as full legal contracts with all of the necessary elements in place, particularly given the frequency of informal agreements.
- 4.16 Both the Queensland Attorney-General and the Victorian Government indicated in evidence to the inquiry that there is no specific legislation in either State governing family agreements.¹⁸ The Committee was informed that, in New South Wales, the only legislation that has relevance to family agreements is the New South Wales *Contracts Review Act 1980*, and that the applicability of this legislation is ‘...highly qualified’.¹⁹ The Committee understands that there is no specific legislation regulating family agreements in the other jurisdictions.
- 4.17 Centrelink informed the Committee that it takes family agreements into account in dealing with clients in accordance with the impact of agreements on client entitlements.²⁰

Advantages and disadvantages of family agreements

Advantages

- 4.18 A number of positive aspects to family agreements were identified in evidence to the inquiry. Alzheimer’s Australia noted that the arrangements put in place by family agreements can have a range of benefits:

16 Alzheimer’s Australia, *Submission No. 55*, p. 23.

17 Queensland Attorney-General, *Submission No. 107*, p. 5.

18 Queensland Attorney-General, *Submission No. 107*, p. 5; Victorian Government, *Submission No. 121*, p. 30.

19 Mr David Walsh, *Transcript of Evidence*, 23 March 2007, p. 32.

20 Mr Paul Cowan, Centrelink, *Transcript of Evidence*, 23 March 2007, p. 7.

Caring for older parents at home has many benefits for both the older person and the family. Benefits include social, individual and economic benefits as well as intangible rewards such as quality and choice of care, quality of life, independence, proper functioning of society and cost containment.²¹

4.19 Carers Queensland informed the Committee that:

The most beneficial thing about such agreements is that they provide an avenue for people to discuss and consider their, often previously unstated, expectations and assumptions regarding the provision and receipt of future care for older people.²²

4.20 The Queensland Office of the Public Advocate expressed the view that family agreements:

...are an important safeguard for older people who may have invested their life savings into the building of a granny flat of a family member's home in exchange for services to be provided by the family.²³

4.21 Carers Queensland noted that family agreements can also function to compensate the carer party for income lost, career prospects foregone and expenses incurred as a result of caring for the older person.²⁴

Disadvantages

4.22 Several submissions identified the existence of disadvantages in relation to family agreements. Perhaps the most commonly-cited disadvantage was the potential for problems and disputes to arise where agreements are informal or vague. In its submission the Victorian Government stated that the '...informal nature of such agreements creates the potential for disputes over the content of the agreement',²⁵ and also that:

The informality and familial nature of these agreements may make it difficult for the law to recognise and/or enforce them

21 Alzheimer's Australia, *Submission No. 55*, p. 21.

22 Carers Queensland, *Submission No. 81*, p. 5.

23 Queensland Office of the Public Advocate, *Submission No. 76*, p. 8.

24 Carers Queensland, *Submission No. 81*, p. 5.

25 Victorian Government, *Submission No. 121*, p. 29. Alzheimer's Australia noted the risk that family agreements can "'go wrong'" and negatively impact on both the older person and the other party: *Submission No. 55*, p. 21.

as contracts, and common law presumptions may assume that the transfer of property is a gift with no obligations attached.²⁶

4.23 The Caxton Legal Centre informed the Committee that:

...the biggest problem faced by most of our clients entering into family agreements is that the terms of any purported agreement are never reduced to writing and evidence is lacking. Even if something is reduced to writing, other family members may well turn around and argue that there was never any intention for the agreement to be legally binding or the payment was a gift etc.²⁷

4.24 Alzheimer's Australia too recognised that '...there is always the potential for an issue of whether or not there is sufficient evidence to show there was an intention to create a legal relationship'.²⁸ National Seniors noted that:

The informality of these arrangements can cause significant problems for legal interpretation, maintenance of confidentiality, determination of capacity and equitable resolution of family disagreements. Most notably, transaction of property may look like a gift, with the 'taker' obligated to give nothing in return, resulting in a very unfair outcome for the older person. Whilst the senior may be able to prove the existence of a bargain or agreement in court, the demands of the court process in terms of time, expense and personal conflict may be beyond the resources of many older people.²⁹

4.25 Carers Queensland observed that, where family agreements are written and formalised as contracts, they can still be limited in their scope and capacity to respond to changes in circumstances:

There are things that quite simply cannot be provided for in a written contract. Such contracts can oversimplify arrangements and fail to acknowledge the complexities involved in providing care, the uncertainty often inherent to

26 Victorian Government, *Submission No. 121*, p. 29.

27 Caxton Legal Centre, *Submission No. 112*, p. 25.

28 Alzheimer's Australia, *Submission No. 55*, p. 23. The Aged Rights Advocacy Service Inc (ARAS) also identified a lack of documentary evidence as an issue: Ms Marilyn Crabtree, ARAS, *Transcript of Evidence*, 31 July 2007, p. 21.

29 National Seniors, *Submission No. 67*, p. 11.

care situations and the fact that other factors in a person's life also change and may have implications for care.³⁰

4.26 The Queensland Office of the Public Advocate identified the possibility of disadvantageous tax and welfare implications where family agreements involve property transfers:

One of the down sides of Family Agreements is that there are, potentially, significant income tax and social security implications following the transfer of assets or payment of compensation from a parent to an adult child in return for care.³¹

4.27 In regard to financial abuse or mistreatment, the Victorian Government observed that '...there is potential for abuse of informal arrangements' and that there is '...a clear crossover here with the issue of financial abuse'.³² The Committee heard that there are a number of possible scenarios where the older person can suffer detriment in relation to a family agreement, including:

- A family member uses the opportunity presented by living with the older family member to take financial advantage of the older family member;
- A family member gains access (as nominee) to the older family member's Centrelink payments and does not account for their use;
- A family member gains unrestricted access to and misuses the older family member's bank account and/or other assets;
- A family member obtains rent-free accommodation by living in the home of the elderly person, but without providing any benefit in return; and
- A family member arranges the sale of the older family member's home contrary to their best interests, forcing them to live elsewhere.³³

4.28 State Trustees Ltd indicated that, in its experience, family agreements '...are an area of considerable risk to older people; they can result in significant depletion of the older person's assets for minimal tangible benefit'.³⁴ The Queensland-based Elder Abuse Prevention Unit (EAPU), which operates an information and support Helpline service

30 Carers Queensland, *Submission No. 81*, p. 6.

31 Queensland Office of the Public Advocate, *Submission No. 76*, p. 8.

32 Victorian Government, *Submission No. 121*, p. 29.

33 State Trustees Ltd, *Submission No. 88*, p. 13.

34 State Trustees Ltd, *Submission No. 88*, p. 12.

for those who suffer elder abuse, informed the Committee that a number of reports of financial abuse received by the service over 2002-06 related to family agreements:

A number of financial abuse calls involve informal (verbal) family agreements... Unfortunately, calls where the son or daughter reneges on the agreement are common, often claiming the money/asset was given as a gift with no strings attached. The older person who could have been funding their own retirement may find themselves thrown onto the welfare system with no ability to recover the money other than through an expensive civil action. In some calls the older person may not only find themselves without cash or assets but the "gifts" have adversely affected their pension entitlements.³⁵

4.29 The Victorian Office of the Public Advocate also indicated that it has '...had experience of informal arrangements that have resulted in the exploitation of the older person'.³⁶

Possible reform measures

4.30 Various suggestions and recommendations to address the disadvantages and problems associated with family agreements were proposed to the Committee. These include:

- Legal review and legislation;
- Guidelines and model agreement provisions; and
- Education and awareness-raising.

Legal review and legislation

4.31 A number of submissions recommended legal review or the introduction of specific legislation in regard to family agreements. The Queensland Office of the Public Advocate, for example, recommended that:

...there is a need to review the law. The common law presumption of advancement and resulting trusts should be

35 EAPU, *Submission No. 97*, pp. 4-5.

36 Victorian Office of the Public Advocate, *Submission No. 70*, p. 16.

closely considered. Consideration of protective legislation is needed to protect property rights. It may be that legislation similar to legislation creating and protecting rights and protections for people in de-facto relationships is desirable.³⁷

- 4.32 In its submission Alzheimer's Australia supported a legislative response:

...vulnerable older people (and those with early onset dementia) need to be protected by a legislative framework that prevents exploitation and guarantees that they will be cared for with dignity and compassion.³⁸

- 4.33 Alzheimer's Australia recommended that the Commonwealth should legislate to comprehensively regulate family agreements in concert with any necessary complementary state/territory legislation; Alzheimer's Australia did note however that there may be a constitutional issue regarding the Commonwealth's competency to enact legislation regarding family agreements.³⁹ The Aged Rights Advocacy Service Inc (ARAS) submitted that:

It is worth considering making a requirement for a formal contract essential and requiring registration where property is involved...⁴⁰

- 4.34 Alzheimer's Australia also recommended that the Commonwealth should commission a discussion paper on family agreements '...to commence the development of this emerging area of Elder Law.'⁴¹

- 4.35 The Victorian State Government expressed some scepticism over the ability of legislation to address the disadvantages of family agreements, but also suggested that a Canadian proposal for legislation enabling courts to dissolve family agreements and restore property could have merit:

It is difficult to see how legislation can specifically address many of the issues raised by family agreements. However, the British Columbia Law Institute has proposed a legislative provision to deal with situations where the relationship

37 Queensland Office of the Public Advocate, *Submission No. 76*, p. 9. See also Mr David Walsh, *Transcript of Evidence*, 23 March 2007, p. 32.

38 Alzheimer's Australia, *Submission No. 55*, p. 23.

39 Alzheimer's Australia, *Submission No. 55*, p. 23.

40 ARAS, *Submission No. 38.1*, p. 3. See also Ms Marilyn Crabtree, ARAS, *Transcript of Evidence*, 31 July 2007, p. 21.

41 Alzheimer's Australia, *Submission No. 55*, p. 23.

between parties breaks down that would allow courts to dissolve the agreement, restore property and compensate caregivers. Such a reform would not prevent the problems that arise with the use of care agreements but it would assist with providing a resolution after the problems have arisen.⁴²

4.36 The Committee notes that the main element of the legislative provision formulated by the British Columbia Law Institute is as follows:

1. Where the consideration for a disposition of property of any kind is, in whole or in part, the provision of services for the care of the transferor, the Court may, on the application of the transferor or, if provision of the services is not practicable, on the application of the transferor or the transferee, grant such relief as is appropriate in the circumstances including an order that,

(a) the disposition be set aside,

(b) the transferee pay to the transferor an amount not to exceed the value of the property at the time the order is made,

(c) the transferor pay compensation to the transferee for care provided to the transferor, in an amount not to exceed the value of the property at the time the order is made,

(d) any obligation of the transferee under an agreement to provide care, or any other obligation of the transferee promised in consideration of the disposition, is terminated and is no longer enforceable by the transferor,

(e) security be provided for any payment ordered under this section.⁴³

4.37 The NSW Public Trustee also envisaged legislation to resolve disputes arising in relation to family agreements:

Legislation may be required to assist in the interpretation of and providing [*sic*] a solution for both formal and informal agreements. For example, the court may be given the power

42 Victorian Government, *Submission No. 121*, pp. 29-30.

43 British Columbia Law Institute, *Private Care Agreements Between Older Adults and Friends or Family Members*, BCLI Report No. 18, March 2002. This document is available online at: <http://www.bcli.org> (accessed 5 September 2007). The Institute has also formulated other elements of the provision including factors that the court must consider in making an order.

to set aside or revoke the conveyance of the property or set aside or vary any agreement.⁴⁴

- 4.38 The NSW Public Trustee further noted the need for related legislation to recognise the impact of any specific family agreement legislation, for example the *Family Law Act 1975* '...and the various State based Succession and Family Provision Acts'.⁴⁵
- 4.39 The Committee was informed by the Attorney-General's Department that, currently under Part VIII A of the *Family Law Act 1975*, the Family Court of Australia is able to take the interests of third parties, such as older people who have made a family agreement, into account in property settlement proceedings.⁴⁶

View of the Committee

- 4.40 The Committee considers that the regulation of family agreements, either on a Commonwealth or state-by-state basis, should be thoroughly investigated by the Standing Committee of Attorneys-General (SCAG). The potentially disastrous consequences that can be suffered by parties to family agreements due to uncertainty, dispute or abuse warrant some form of regulation, particularly if the use of family agreements increases in the future.
- 4.41 To begin with, it would seem to the Committee that a greater degree of formalisation of family agreements would be desirable. While formalisation will not obviate all of the potential problems that can arise in relation to family agreements, the advantages of written agreements over informal, verbal agreements – greater transparency, clarity and certainty – strike the Committee as significant, notwithstanding the fact that formalising an agreement in writing will not appeal to some. As one witness noted to the Committee:

...the documenting of these arrangements by what we call a family agreement can, firstly, serve the purpose of both forcing the parties to confront the what ifs of family caring, secondly, clearly set out the rights and obligations of the parties and, finally, enable the parent in particular a clear exit strategy.⁴⁷

44 NSW Public Trustee, *Submission No. 72*, p. 6.

45 NSW Public Trustee, *Submission No. 72.1*, p. 4.

46 Attorney-General's Department, *Submission No. 100.1*, p. 4.

47 Mr Brian Herd, *Transcript of Evidence*, 16 July 2007, p. 5.

- 4.42 The Committee also believes that registration of agreements would go quite some way towards reducing uncertainty (particularly in cases involving significant property transfers or where there are multiple versions of agreements), and would also assist the courts in cases where disputes reach litigation. One witness suggested to the Committee that a registration system for family agreements could be implemented along the lines of a registration system for powers of attorney.⁴⁸
- 4.43 The Committee is also attracted to the concept of legislation that would enable the courts to dissolve family agreements and grant appropriate relief to the parties involved – as set out, for example, in the provisions proposed by the British Columbia Law Institute. While it is important that the *Family Law Act 1975* enables the Family Court to take account of the interests of older people who are parties to family agreements in property settlement proceedings, the Committee believes that there may need to be a specific mechanism in place for the equitable resolution of family agreement disputes. Not every family agreement issue or dispute will arise in connexion with property settlement proceedings. If it becomes apparent that any regulation of family agreements should be at the Commonwealth level, however, the legislation may well be best located within the *Family Law Act 1975*.
- 4.44 The Committee also considers that, as part of its investigation, SCAG should commission and release a discussion paper on the regulation of family agreements.

Recommendation 30

- 4.45 **The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General undertake an investigation of legislation to regulate family agreements. Areas to be investigated should include, but not be limited to:**
- **Whether the legislation should be implemented at the Commonwealth level or at the state/territory level, or as a cooperative scheme between the Commonwealth and the states and territories;**

48 Mr David Walsh, *Transcript of Evidence*, 23 March 2007, p. 41. Registration of powers of attorney is considered in Chapter 3 of this report.

- Requiring or providing for the formalisation of family agreements in writing;
- Requiring or providing for the registration of family agreements;
- The provision of a mechanism to enable the courts to dissolve family agreements in cases of dispute and grant appropriate relief to the parties involved; and
- The impact on any related Commonwealth or state/territory legislation.

The Committee also recommends that, as part of this investigative process, the Standing Committee of Attorneys-General should commission and release a discussion paper on the regulation of family agreements.

4.46 In addition, National Seniors recommended to the Committee that ‘family mediation services’ specialising in family agreements should be implemented.⁴⁹ The Committee agrees that such a service would be desirable (particularly in the context of the difficulties and expense that often accompany court action). The Committee notes that the Australian Government currently provides Family Dispute Resolution Services including mediation and conciliation as part of the Family Relationship Services Program. While these services are specifically oriented towards disputes involving divorce or separation, the Committee considers that they should also be available to those in dispute over family agreements.

Recommendation 31

4.47 **The Committee recommends that the Australian Government provide Family Dispute Resolution Services for those in dispute over family agreements.**

Guidelines and model agreement provisions

4.48 It was suggested to the Committee that guidelines on the use of family agreements, as well as model family agreement provisions, should be developed. The Victorian Office of the Public Advocate recommended that ‘...guidelines be established recommending the

⁴⁹ National Seniors, *Submission No. 67*, p. 11.

use of family agreements and providing suggestions for model provisions of such agreements'.⁵⁰

4.49 In its submission COTA Over 50s recommended that:

...funding be allocated to the development and trialling of Model Family Agreements, which may go some way to preventing financial abuse of older people, and will assist in clarifying arrangements and terms of agreements which aim to mutually support family members through the transfer of property and funds, and the provision of care.⁵¹

View of the Committee

4.50 The Committee sees considerable merit in the development of guidelines for prudent family agreement use and the development of model family agreement provisions. Such initiatives would assist those intending to make a family agreement to better understand the matters involved and would provide examples of suitable text for agreement provisions. Guidelines and model provisions would also assist in raising awareness of and obviating some of the problems that can arise with family agreements.

4.51 The Committee envisages that the development of these guidelines and model provisions could be undertaken by the Family Law Council. Matters that would need to be covered by the guidelines would include, but not be limited to:

- Advice on the formalisation of family agreements;
- The taxation and welfare implications of property transfers made under family agreements; and
- Any relevant legislative requirements.

50 Victorian Office of the Public Advocate, *Submission No. 70*, p. 16.

51 COTA Over 50s, *Submission No. 58*, p. 12.

Recommendation 32

4.52 **The Committee recommends that the Family Law Council or other appropriate body investigate and develop:**

- **Guidelines on the prudent use of family agreements; and**
- **Model provisions for family agreements.**

The Committee further recommends that the guidelines should cover, but not be limited to, the following matters:

- **Advice on the formalisation of family agreements;**
- **The taxation and welfare implications of property transfers made under family agreements; and**
- **Any relevant legislative requirements.**

Education and awareness-raising

4.53 A number of submissions raised the importance of education and awareness-raising in regard to family agreements. The Caxton Legal Centre proposed that the Australian Government:

...should campaign to educate the public about the importance of documentation in family agreements and introduce reforms which can make obtaining agreements more accessible and affordable.⁵²

4.54 Also regarding the formalisation of family agreements in writing, HREOC suggested in its submission that the Government could consider:

...the development of community education resources which can be made available to older people and their families.⁵³

4.55 Evidence to the inquiry also suggested that specific education of the legal profession regarding family agreements would be desirable. In its submission National Seniors recommended that the Australian Government should give consideration to:

- **developing strategies to increase awareness of family agreements with lawyers and to promote effective strategies for addressing the issues involved...**⁵⁴

52 Caxton Legal Centre, *Submission No. 112*, p. 26.

53 HREOC, *Submission No. 92*, p. 36.

- 4.56 The EAPU recommended that an education campaign be mounted ‘...targeted at Lawyers [*sic*] and training on the use of “Family Agreements”’,⁵⁵ and the NSW Public Trustee also noted the desirability of education for the legal profession regarding family agreements.⁵⁶
- 4.57 Evidence to the inquiry further noted the need for parties contemplating family agreements to seek legal and/or financial advice or to have the agreement prepared by a legal practitioner. NSW MACA, for example, indicated that:
- Unless a Family Agreement is prepared by a legal practitioner, it may be drawn up without consideration to all the legal and financial implications associated with the transaction.⁵⁷
- 4.58 ARAS indicated that ‘In those cases where people are seeking information prior to entering an arrangement ARAS recommends that people seek legal advice’,⁵⁸ and also stressed the importance of family agreements that are deeds or contracts reflecting the fact that legal advice has been obtained.⁵⁹ The EAPU submitted that any education campaign regarding financial abuse should recommend that ‘...legal advice should be sought prior to entering into a granny flat type arrangement’.⁶⁰

View of the Committee

- 4.59 The Committee takes the view that there is a clear need for education and awareness-raising with regard to family agreements, both for parties to these agreements and for the legal profession. Indeed, the Committee considers that education is crucial in assisting older people to avoid the disadvantages of family agreements and in encouraging the informed and prudent use of agreements. The Committee agrees with the Victorian Government’s observation that

54 National Seniors, *Submission No. 67*, p. 11.

55 EAPU, *Submission No. 97*, p. 6.

56 NSW Public Trustee, *Submission No. 72*, p. 6. HREOC identified education for legal practitioners regarding ‘...the use and operation of family agreements’ as a possible matter for consideration by the Australian Government: *Submission No. 92*, p. 36.

57 NSW MACA, *Submission No. 103*, p. 5. See also State Trustees Ltd, *Submission No. 88*, p. 13; NSW Public Trustee, *Submission No. 72*, p. 6.

58 ARAS, *Submission No. 38.1*, p. 2.

59 ARAS, *Submission No. 38.1*, p. 3.

60 EAPU, *Submission No. 97*, p. 6.

‘...the greatest scope for assisting older people will come in the form of education and advice’,⁶¹ and also with the statement of Carers Queensland that ‘There is great merit in assisting families to devise their own informed solutions for the future’.⁶²

4.60 The Committee considers that the consideration and development of educational material regarding family agreements could be undertaken by the Family Law Council. The development of any such material should also be coordinated with the development of the guidelines and model agreement provisions recommended above. Matters that would usefully be covered by educational material regarding family agreements would include, but not be limited to:

- The advantages and disadvantages of family agreements, including informal agreements as opposed to formal agreements;
- Common problems and difficulties associated with family agreements;
- The importance of obtaining legal and/or financial advice prior to making a family agreement, particularly where there may be a transfer of property;
- Relevant legislative requirements; and
- Information for legal practitioners on the legal and familial issues surrounding family agreements.

Recommendation 33

4.61 **The Committee recommends that the Family Law Council or other appropriate body investigate and develop educational material regarding family agreements. This material should cover, but not be limited to:**

- **The advantages and disadvantages of family agreements, including informal agreements as opposed to formal agreements;**
- **Common problems and difficulties associated with family agreements;**
- **The importance of obtaining legal and/or financial advice prior to making a family agreement, particularly where there may be**

61 Victorian Government, *Submission No. 121*, p. 30.

62 Carers Queensland, *Submission No. 81*, p. 6.

a transfer of property;

- Relevant legislative requirements; and
- Information for legal practitioners on the legal and familial issues surrounding family agreements.

Overseas legislation compelling the performance of filial obligations

4.62 During the course of the inquiry the Committee was alerted to the existence of legislation in the United States of America requiring adult children to provide a measure of support for their parents in certain circumstances. The California *Family Code*, for example, provides that:

Except as otherwise provided by law, an adult child shall, to the extent of his or her ability, support a parent who is in need and unable to maintain himself or herself by work.⁶³

The promise of an adult child to pay for necessities previously furnished to a parent described in Section 4400 is binding.⁶⁴

4.63 The California *Family Code* further provides that:

A parent, or the county on behalf of the parent, may bring an action against the child to enforce the duty of support under this part.⁶⁵

4.64 The *Code* also provides that, when a court determines an amount to be ordered for support, it must take into account the earning capacity and needs, obligations and assets, age and health, and standard of living of each party, along with any other factors the court deems just and equitable.⁶⁶ The provisions of the *Code* are not drafted specifically in relation to older parents.

4.65 Laws compelling the performance of filial obligations exist in a number of other American states as well, for example Indiana,

63 Section 4400. This legislation is available online at: <http://www.leginfo.ca.gov/calaw.html> (accessed 21 August 2007).

64 Section 4401.

65 Section 4403.

66 Section 4404.

Maryland, and Rhode Island.⁶⁷ The Committee was informed that the only legislation in Australia that bears any comparison to the Californian *Family Code* is section 285 of the Queensland *Criminal Code 1899*, which provides that:

It is the duty of every person having charge of another who is unable by reason of age, sickness, unsoundness of mind, detention, or any other cause, to withdraw himself or herself from such charge, and who is unable to provide himself or herself with the necessaries of life, whether the charge is undertaken under a contract, or is imposed by law, or arises by reason of any act, whether lawful or unlawful, of the person who has such charge, to provide for that other person the necessaries of life; and the person is held to have caused any consequences which result to the life or health of the other person by reason of any omission to perform that duty.

4.66 The Committee notes that this provision is not drafted specifically in relation to the parent-adult child relationship and is narrower in scope than, for example, the relevant provisions in the California *Family Code*. Unlike the *Family Code*, section 285 of the Queensland *Criminal Code 1899* will only operate in relation to circumstances where one party already has charge of another. It is also possible that 'necessaries of life' in section 285 could be interpreted more narrowly than 'support' in the California *Family Code*, particularly given that under the *Code* 'support' can encompass a range of specified factors including earning capacity and standard of living.

4.67 It was suggested to the Committee that legislation compelling the performance of filial obligations should be investigated in Australia, particularly in the context of Australia's ageing population:

Family caring is not an idea embraced by the law. For one thing, we are less than advanced in acknowledging any legal duty on family to care. ...It is my view that we need to visit, as a seminal issue in relation to our demographic destiny, the duty of family to care for family along the lines of the American provision.⁶⁸

67 Title 31 Article 16 of the Indiana Code (available online at: <http://www.in.gov/legislative/ic/code/title31/ar16/>); Title 13 of the Maryland Code (available online at: http://www.dsd.state.md.us/comar/Annot_Code_Idx/FamilyLawIndex.htm#Title%2013); and Title 15 Chapter 15-10 of the Rhode Island Code (available online at: <http://www.rilin.state.ri.us/Statutes/Statutes.html>).

68 Mr Brian Herd, *Transcript of Evidence*, 16 July 2007, p. 4.

- 4.68 The Committee agrees that legislation compelling the performance of filial obligations in Australia would be worth investigating. The Committee is cognisant of the problematic nature of legislating to compel right conduct (particularly in the context of familial relationships), and it may well become apparent upon further scrutiny that such legislation would not be effectual or appropriate in Australia. At the same time, however, the Committee is also very conscious of the ramifications that Australia's ageing population may have for both the care of older people and the potential for elder abuse. Given this, legislation compelling the performance of filial obligations warrants at least further study.

Recommendation 34

- 4.69 **The Committee recommends that the Australian Institute of Family Studies investigate the desirability and feasibility of implementing legislation in Australia compelling the performance of filial obligations.**