
The Parliament of the Commonwealth of Australia

Older people and the law

House of Representatives
Standing Committee on Legal and Constitutional Affairs

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Foreword

It has been noted that Australia faces an inescapable demographic destiny with regard to its ageing population. By 2046, it is estimated that over one-quarter of Australia's population will be aged 65 years and over. This destiny presents a host of challenges for government, most obviously in relation to the provision of services. One key challenge will be to ensure that the legal system adequately meets the needs of older Australians in the same way that it should meet the needs of all other Australians.

Throughout the course of the inquiry the Committee received evidence concerning a wide range of issues faced by older Australians in their interaction with the law. Some of these – such as substitute decision-making, fraud and financial abuse – attracted substantial comment in the evidence to the inquiry, whereas others – such as discrimination – received less attention. The Committee was impressed with the overall level of response to the inquiry – a level of response that clearly indicates the importance of these issues for older Australians.

The Committee is pleased to have had the opportunity to conduct this inquiry. There is no doubt that older Australians face a range of difficulties and challenges in their interactions with the legal system. Although many of the issues confronting older Australians are common to the broader demographic, it is vital that, as Australians age, they retain their rights and access to legal services. The Committee has made a number of recommendations in its report which it believes will assist in meeting this objective.

I would like to thank all Members of the Committee who gave of their time and expertise in examining the issues raised during this inquiry. The Committee received evidence on matters broad and narrow, and Members made every effort to give each area its proper consideration. This was particularly appreciated given the stage in the electoral cycle in which this inquiry took place. I would like to thank all of the individuals and organisations who took the trouble to make their

views known to the Committee during the course of the inquiry. The Committee was impressed by the sincerity and thoughtfulness of the evidence it received both in the form of written submissions and oral testimony.

I would also like to thank the Secretary of the Committee, Ms Joanne Towner, the Inquiry Secretary, Dr Nicholas Horne, Mr Michael Crawford, Dr Mark Rodrigues, and Secretariat staff for their diligence and dedication. This is especially valued as the Committee was keen to table its report prior to the Parliament being prorogued.

Hon Peter Slipper MP
Chairman



Membership of the Committee

Chairman	The Hon Peter Slipper MP
Deputy Chairman	Mr John Murphy MP
Members	Mr Michael Ferguson MP (from 09/02/2006)
	Mrs Kay Hull MP
	The Hon Duncan Kerr SC MP
	Mr Daryl Melham MP
	Mrs Sophie Mirabella MP
	Ms Nicola Roxon MP (to 11/01/2007)
	Mr Patrick Secker MP
	Mr Kelvin Thomson MP (from 11/01/2007)
	Mr David Tollner MP
	Mr Malcolm Turnbull MP (to 07/02/2006)
	The Hon Malcolm Turnbull MP (from 07/02/2006 to 09/02/2006)

Committee Secretariat

Secretary Ms Joanne Towner
(to 11/08/2006 and from 08/01/2007)

Ms Cheryl Scarlett
(A/g from 11/08/2006 to 08/01/2007)

Inquiry Secretary Dr Nicholas Horne
(to 16/02/2007 and from 04/06/2007)

Mr Michael Crawford
(from 16/02/2007 to 04/06/2007)

Principal Research Officer Dr Mark Rodrigues

Research Officers Ms Julia Searle

Mr Anthony Overs

Administrative Officer Ms Melita Caulfield



Terms of reference

To investigate and report on the adequacy of current legislative regimes in addressing the legal needs of older Australians in the following specific areas:

- Fraud;
- Financial abuse;
- General and enduring 'power of attorney' provisions;
- Family agreements;
- Barriers to older Australians accessing legal services; and
- Discrimination.

In conducting this inquiry the Committee will also consider the relevant experience of overseas jurisdictions.

In these terms of reference the definition of 'older' is that of the Australian Institute of Health and Welfare, which defines 'older' as 65 years and over.

(Referred 2 August 2006)



List of abbreviations

ABA	Australian Bankers Association
ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
ADA	<i>Age Discrimination Act 2004</i> (Cth)
AGAC	Australian Guardianship and Administration Committee
AIC	Australian Institute of Criminology
ALRC	Australian Law Reform Commission
AMA	Australian Medical Association
ANPEA	Australian Network for the Prevention of Elder Abuse
ARAS	Aged Rights Advocacy Service Inc
ARQRV	Association of Residents of Queensland Retirement Villages
ARVA	Australian Retirement Villages Accreditation
ASIC	Australian Securities and Investments Commission
CALD	Culturally and Linguistically Diverse
CAV	Consumer Affairs Victoria
CCLC	Consumer Credit Legal Centre (NSW) Inc

CLCs	Community Legal Centres
COTA	Council on the Ageing
EAPU	Elder Abuse Prevention Unit (Queensland)
EPA/ EPOA	Enduring Power of Attorney
FICS	Financial Industry Complaints Service
HREOC	Human Rights and Equal Opportunity Commission
POA	Power of Attorney
PIDs	Public Information Documents
NSW MACA	New South Wales Ministerial Advisory Committee on Ageing
RVA	Retirement Village Association Ltd
SAILS	Seniors Advocacy Information and Legal Service
SCAG	Standing Committee of Attorneys-General
SEQUAL	Senior Australian Equity Release Association of Lenders
TPA	<i>Trade Practices Act 1974 (Cth)</i>
UCCC	Uniform Consumer Credit Code
VCAT	Victorian Civil and Administrative Tribunal



List of recommendations

2 Fraud and financial abuse

Recommendation 1 (paragraph 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).

Recommendation 2 (paragraph 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.

Recommendation 3 (paragraph 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.

Recommendation 4 (paragraph 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.

Recommendation 5 (paragraph 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.

Recommendation 6 (paragraph 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 Advocare, and develop similar initiatives for consideration by their respective state and territory governments.

Recommendation 7 (paragraph 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.

Recommendation 8 (paragraph 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.

Recommendation 9 (paragraph 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.

Recommendation 10 (paragraph 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.

Recommendation 11 (paragraph 2.176)

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

Recommendation 12 (paragraph 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.

Recommendation 13 (paragraph 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.

Recommendation 14 (paragraph 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.

Recommendation 15 (paragraph 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.

3 Substitute decision making

Recommendation 16 (paragraph 3.44)

The Committee recommends that the Australian Government encourage the Standing Committee of Attorneys-General to work towards the implementation of uniform legislation on powers of attorney across states and territories.

Recommendation 17 (paragraph 3.46)

The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General monitor the implementation of mutual recognition provisions in power of attorney legislation and encourage members to amend legislation where

appropriate to maximise the portability of the instrument, prior to the implementation of uniform legislation.

Recommendation 18 (paragraph 3.73)

The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General develop:

- A campaign to promote awareness of powers of attorney and their advantages for older people;
- An information strategy to better inform principals of the implications of making a power of attorney, and attorneys of their responsibilities to principals; and
- A scheme to enable all powers of attorney to be prepared with the advice of a solicitor.

Recommendation 19 (paragraph 3.88)

The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General and the Standing Committee of Health Ministers develop and implement a nationally consistent approach to the assessment of capacity.

Recommendation 20 (paragraph 3.114)

The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General develop and implement a national register of enduring powers of attorney. In developing the national register, a review should be undertaken considering, but not limited to:

- The agency/ies responsible for maintaining the register;
- Possible funding arrangements;
- The use and accessibility of the register;
- The inclusion of other substitute decision making instruments such as advance care directives;
- Privacy considerations;
- The possible use of the register to facilitate further research into substitute decision making; and
- The possible use of the register to assess the activities of a sample of attorneys and how this assessment might be implemented.

Recommendation 21 (paragraph 3.116)

The Committee recommends that, as an interim measure prior to the development of a fully national registration system, the Australian Government propose the development of an integrated state/territory based powers of attorney registration system to the Standing Committee of Attorneys-General.

Recommendation 22 (paragraph 3.144)

The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General develop and implement a campaign to raise awareness of the purpose and intentions of enduring powers of attorney in financial institutions.

Recommendation 23 (paragraph 3.167)

The Committee recommends that the Australian Government include advance health care planning services provided by medical practitioners on the Medicare Benefits Schedule.

Recommendation 24 (paragraph 3.170)

The Committee recommends that the Australian Government should conduct an education campaign to inform the Australian community of the issues and processes involved with advance health care planning and preparing advance care directives.

Recommendation 25 (paragraph 3.179)

The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General work towards national consistency and coverage of legislation governing advance health care planning among the Australian jurisdictions. This work should also include the development of straightforward, nationally-consistent and user-friendly advance care directive documentation and witnessing arrangements.

Recommendation 26 (paragraph 3.183)

The Committee notes that the third Key Priority of the National Framework for Action on Dementia 2006-2010 proposes that the jurisdictions refer the issue of legislative barriers regarding Guardianship, advance care planning, advance care directives, wills, and powers of attorney to the Australian Government and to the State and Territory Attorneys-General Departments.

The Committee recommends that the Australian Government place the third Key Priority of the National Framework for Action on Dementia

2006-2010 on the agenda of the Standing Committee of Attorneys-General.

Recommendation 27 (paragraph 3.188)

The Committee recommends that the Australian Government investigate ways of encouraging those with advance health care planning arrangements to inform their health care providers of their arrangements.

Recommendation 28 (paragraph 3.200)

The Committee recommends that the Australian Government encourage the Standing Committee of Attorneys-General to work towards the implementation of nationally consistent legislation on guardianship and administration in all states and territories.

Recommendation 29 (paragraph 3.220)

The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General conduct a review into the legal needs of older people appearing before guardianship boards and tribunals and consider options for improving their access to legal representation at hearings.

4 Family agreements

Recommendation 30 (paragraph 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;
- 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.

Recommendation 31 (paragraph 4.47)

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

Recommendation 32 (paragraph 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.

Recommendation 33 (paragraph 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 a transfer of property;
- Relevant legislative requirements; and
- Information for legal practitioners on the legal and familial issues surrounding family agreements.

Recommendation 34 (paragraph 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.

5 Barriers to older Australians accessing legal services

Recommendation 35 (paragraph 5.15)

The Committee recommends that the state and territory Law Societies continue to develop and foster expertise in elder law, including encouraging elder law as a practice speciality.

Recommendation 36 (paragraph 5.24)

The Committee recommends that the Australian Government examine a rebate scheme for legal fees for older Australians to improve access to legal services.

Recommendation 37 (paragraph 5.68)

The Committee recommends that the Australian Government require that ten per cent of Commonwealth funding to the Legal Aid Commissions be utilised for assisting older Australians with legal matters that otherwise qualify for legal aid assistance.

Recommendation 38 (paragraph 5.97)

The Committee recommends that the Australian Government increase funding to the Community Legal Services Program specifically for the expansion of services, including outreach services, to older people by Community Legal Centres.

Recommendation 39 (paragraph 5.99)

The Committee recommends that the Australian Government provide funding to Community Legal Centres to expand their community education role, with a specific focus upon older people.

Recommendation 40 (paragraph 5.101)

The Committee recommends that the Australian Government establish a resource service for older people, accessible through a single contact point, such as an 1800 telephone number, that can provide assistance to older people in identifying the legal services that are available to them.

The Committee recommends that this be supported by a media education campaign to alert older people to their legal rights and to advertise the availability of legal assistance.

Recommendation 41 (paragraph 5.111)

The Committee recommends that the Minister for Justice and Customs raise with the Corrective Services Ministers Conference a study being undertaken on the future needs of older offenders within correctional facilities.

6 Discrimination**Recommendation 42** (paragraph 6.28)

The Committee recommends that the Australian Government, in cooperation with state and territory governments, review the application of workers compensation legislation to ensure that older workers are not disadvantaged.

Recommendation 43 (paragraph 6.36)

The Committee recommends that the *Age Discrimination Act 2004* be amended to remove the 'dominant reason' test contained in section 16, thus bringing this legislation into line with other anti-discrimination statutes.

Recommendation 44 (paragraph 6.39)

The Committee recommends that an independent review be undertaken in 2009 of the effectiveness of the *Age Discrimination Act 2004*. The review should consider, among other things, the nature and range of exemptions provided for under the Act.

7 Retirement villages**Recommendation 45** (paragraph 7.43)

The Committee recommends that the Australian Competition and Consumer Commission, together with state and territory fair trading offices or their equivalents, form a working party to examine the nature of retirement village contracts, with a view to improving consumer protection provisions.

Recommendation 46 (paragraph 7.57)

The Committee recommends that, in its review of retirement village contracts, the Australian Competition and Consumer Commission and state and territory fair trading offices also review all aspects of 'exit' and other fees associated with such contracts, including whether they should be abolished.

Recommendation 47 (paragraph 7.76)

The Committee supports the concept of a statutory supervisor and recommends that the Ministerial Council on Consumer Affairs examine the New Zealand model to determine its applicability to retirement villages in Australia.

Recommendation 48 (paragraph 7.82)

The Committee recommends that the Standing Committee of Attorneys-General examine ways in which greater harmonisation of legislation regarding retirement villages could be pursued.

Introduction

*Age is a state of the individual.*¹

- 1.1 The ageing of Australia's population has been well-documented. According to Australian Bureau of Statistics (ABS) figures, in 2006 some 13.3 per cent of the Australian population was aged 65 years and over (with 3.6 per cent of the population aged 80 and over). On ABS projections, by the year 2036, those aged 65 years and over will make up 23.7 per cent of the population, with those over 80 comprising 7.9 per cent of the population.² By 2046 over a quarter of Australia's population will be in the 65 years and over age bracket.³
- 1.2 This demographic shift has far-reaching implications not only for areas such as aged care and health but also more widely in terms of labour market participation, housing and social policy more generally:

This transformation presents a number of challenges for Australian society, not the least of which is the need to ensure

1 Ms Jane Fisher, Council on the Ageing SA, *Proof Transcript of Evidence*, 17 August 2007, p. 2.

2 In some areas, the rate of increase will be even more marked. For example, it is anticipated that the number of people aged 50 years or over is expected to be 46 per cent of the population of Queensland by 2051, reflecting its popularity as a retirement destination. See Caxton Legal Centre Inc, *Submission No. 112*, p. 4.

3 For further information, see [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/DC530D110D39CBD3CA25732F001C7459/\\$File/4102.0%20-%20australian%20social%20trends%20-%20population%20-%202007.xls#Table 1!A1](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/DC530D110D39CBD3CA25732F001C7459/$File/4102.0%20-%20australian%20social%20trends%20-%20population%20-%202007.xls#Table 1!A1) (accessed 14 August 2007).

that older Australians live safely and without fear of abuse, violence or exploitation.⁴

1.3 Other statistics highlight some characteristics of the older section of the Australian population:

- 41 per cent of people aged 65-69 and 92 per cent of people aged 90 and over have a disability⁵
- The number and proportion of older people living alone has increased from around one fifth in 1971 to more than one quarter in 2001⁶
- Older people often find themselves providing care for another person... Twenty two per cent of men and 19 per cent of women aged between 65 and 74 are carers⁷
- Slightly less than three per cent of the Indigenous population is aged 65 years or over compared to 13 per cent of the broader Australian population⁸
- In 2001, there were only 79 men for every 100 women aged 65 years and this number decreases rapidly in all age groups, for people aged over 85 there were only 45 men for every 100 women⁹
- In 2005, there were nearly two million people... in receipt of the Age Pension. This number represents 66.3 per cent of all people who have reached qualifying age for the Age Pension. This means the remaining 33.7 per cent... are either self funded retirees, being supported by another person or have made alternative financial arrangements...¹⁰
- Twelve per cent of the total population of older people aged 65 to 74 years came to Australia from CALD [culturally and linguistically diverse] backgrounds.¹¹

1.4 As with other segments of the population, it is all too easy to stereotype older Australians as being frail, easily duped and in need of protection and assistance in managing their day to day affairs. While some older Australians do indeed need assistance, many are living vital, fulfilling lives, are active within their local communities, and are making significant contributions to Australian society:

4 National Seniors, *Submission No. 67*, p. 3.

5 Carers Australia, *Submission No. 120*, p. 1.

6 Human Rights and Equal Opportunity Commission (HREOC), *Submission No. 92*, p. 8.

7 HREOC, *Submission No. 92*, p. 8.

8 HREOC, *Submission No. 92*, p. 8.

9 HREOC, *Submission No. 92*, p. 44.

10 HREOC, *Submission No. 92*, p. 45.

11 HREOC, *Submission No. 92*, p. 48.

It is not that long ago that the reality of being old was, in general, to be poor and relatively frail. Advances in education, in income and social support, and improvements in fitness and health in the mainstream population mean that many older people will be socially, economically and physically active. These social changes will also see a marked increase in the number of people living into what is currently considered to be very old age, with care and support needs that are not yet understood.

...Older people will be as diverse as the rest of our community, and will include people with many social and cultural experiences. ...All these citizens have a right to legal frameworks that support their continued participation in and contribution to society within each of their capacities.¹²

1.5 As the Council on the Ageing (SA) noted:

...as legal matters happen, the things that affect older people are exactly the things that affect younger people, except where it relates to particular stages of life and matters that people are moving into that they may be unfamiliar with. Likewise, the full force of the law should be available to older people in the same way that it is available to anybody else. That is particularly important in terms of abuse and exploitation of older people. So one of the main areas of interest is access to legal remedy, as it is with anybody else in the community.¹³

1.6 The NSW Ministerial Advisory Committee on Ageing took a similar view:

...older people are citizens of Australia the same as any others. They are covered by the laws of Australia the same as any other citizens. We do not see that they should be categorized and discriminated against, if you like even if it is positive discrimination, in the sense of categorising them as older people with special needs and interests as if they were less than full citizens.¹⁴

12 Council on the Ageing (SA), *Submission No. 77*, p. 2.

13 Ms Jane Fisher, Council on the Ageing SA, *Proof Transcript of Evidence*, 17 August 2007, p. 2.

14 Mrs Felicity Barr, NSW Ministerial Advisory Committee on Ageing, *Transcript of Evidence*, 15 May 2007, p. 48.

- 1.7 Among the nine legal jurisdictions within Australia there are a number of laws that have particular relevance to older Australians. At the Commonwealth level, legislation in the areas of aged care, superannuation, social security and veteran's entitlements is of particular relevance as we age. In state and territory jurisdictions, legislation relating to substitute decision making, guardianship, retirement villages, wills and probate affects the population as it ages. Criminal matters, such as fraud and other forms of financial abuse, are dealt with primarily at the state and territory level, although Commonwealth legislation covers certain criminal matters. Unlike a number of overseas jurisdictions, there are no specific laws in Australia dealing with what might be broadly classed as 'elder abuse'.
- 1.8 While there are various definitions of 'elder abuse', one of the most commonly accepted is 'any act occurring within a relationship where there is an implication of trust, which results in harm to an older person. Abuse can include physical, psychological, financial, sexual and social abuse, as well as intentional or unintentional neglect. It does not include abusive acts committed by a stranger or self-neglect'.¹⁵

Legal needs of older Australians

- 1.9 A number of submissions argued that there are specific characteristics of an older person's engagement with the law which warrant a tailored response in order to ensure that older people have equal access to the law. It was suggested that, while not all of these characteristics are unique to this demographic group, they nevertheless highlight the need for services and delivery mechanisms other than what the rest of the population might require. These characteristics include:
- Older people experience high levels of disengagement and social exclusion. With respect to legal problems, there is often a sense of powerlessness and lack of willingness to engage...
 - Older people utilise informal sources of information and established contacts...
 - Older persons' legal needs span a broad range of legal areas...

15 Elder Abuse Prevention Unit, Queensland, *Submission No. 97*, p. 1. The Committee notes that the Commonwealth *Aged Care Act 1997* does contain mechanisms for dealing with serious physical and sexual assault of residents, but this is in the context of provision of care to this group.

- Older people may not self-identify that they have legal rights. In addition their presenting issue may not be their only issue (legal or non-legal)...
- There is often an intersection between legal and non-legal issues...
- Issues of elder abuse and other legal issues faced by older people are not just about the individual...
- Older people are not a homogenous community. There are significant socio-economic and cultural differences...¹⁶

1.10 Those legal issues most often associated with older Australians, namely those involving succession planning and substitute decision making, are matters that all Australians should be aware of and address as early as possible in their lives. Most people, however, do not address these issues until the later stages of their lives, if at all, and often then action is taken precipitously and without proper advice.

1.11 In any event, the range of legal matters facing older persons is by no means limited to issues regarding wills, powers of attorney, guardianship and administration. Older people may also seek legal advice in areas including accommodation issues (hostels, retirement villages, nursing homes etc); aged discrimination; elder abuse (not necessarily of themselves but friends or relatives); property issues; consumer issues (superannuation, banking, credit and debt etc); family law issues (including a growing number of grandparents with custody of grandchildren); health issues; and welfare issues (social security and veterans affairs matters).¹⁷ Older people may also interact with the legal system as either victims or perpetrators of criminal activities. It is true, however, that older people are more likely to have civil law issues than criminal or family law matters.¹⁸

1.12 It is, therefore, not so much that there is an area of the law relevant only to older people, but rather that it is important to examine whether there are any barriers to older people exercising their legal rights. The Committee agrees with the view that:

...it is the vulnerability of some older people that warrants particular attention to their legal, justice and safety needs. Older people should not, however, be treated as

16 Federation of Community Legal Centres (Vic) Inc, *Submission No. 41*, pp. 9-13.

17 Loddon Campaspe Community Legal Centre, *Submission No. 57*, p. 13.

18 National Legal Aid, *Submission No. 99*, p. 3.

incapacitated, incapable or infantile by virtue of having lived longer than some others in our community.¹⁹

1.13 It is also true that:

A crime is a crime, irrespective of the victim's age. The law should treat older people as it treats all people. Age of itself should not affect how the law applies or is formulated. However older people may be more or less associated with particular needs.²⁰

Elder law

1.14 A number of overseas jurisdictions have seen the emergence of a legal speciality – 'elder law' – particularly in the United States, Canada and the United Kingdom:

In America... elder law is a major area of law practice and most American states have their own legislation. There are specific laws devoted to the interests of older people... Having lawyers specialising in elder law and devoting their practice to this area of the law is a must for our ageing community.²¹

1.15 Elder law is an emerging new field of legal specialisation in Australia. The University of Western Sydney is the only centre in Australia specialising in elder law. While it is taught as an elective subject to undergraduate students, the University is:

...looking at developing a course in elder law that would be suitable for legal practitioners, trust officers, basically to meet the demand in the community from all walks of life and within academic circles to look at issues surrounding elder law.²²

1.16 The Law Institute of Victoria noted that interest in 'elder law' was increasing in the profession:²³

Elder law is a relatively new field that has very few specialists. There is a paucity of elder law courses, although

19 Council on the Ageing SA, *Submission No. 77*, pp. 2-3.

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

21 Public Trustee NSW, *Submission No. 72*, p. 4.

22 Ms Sue Field, University of Western Sydney, *Proof Transcript of Evidence*, 17 August 2007, p. 17.

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

Continuing Legal Education providers are addressing this knowledge deficit. There is a demand among practitioners for elder law subjects which currently is not being met.²⁴

- 1.17 The Public Trustee NSW sponsors the Elder Law Chair at the University of Western Sydney. Its focus is 'consultancies, research, education and training in respect of older persons and the legal issues affecting them'.²⁵

Referral of the inquiry

- 1.18 The question of whether Australia's legal framework is meeting the needs of older Australians emerged for the Committee during its previous inquiry into the lack of harmonisation of legal systems within Australia and between Australia and New Zealand. In its report for that inquiry, the Committee noted the lack of recognition for powers of attorney or similar substitute decision making tools between the states, and recommended that uniform and adequate formal mutual recognition be expedited among the various jurisdictions.²⁶
- 1.19 This is just one aspect of how current legislation affects older members of our society, and, given the growth in the older person demographic group, the Committee felt that it was timely to examine a number of aspects of the experience of older Australians and the law. To this end, in 2006 the Committee requested that the Attorney-General, the Hon Philip Ruddock MP, refer an inquiry into this issue to the Committee.
- 1.20 On 2 August 2006 the Attorney-General responded to the Committee's request and formally asked it to investigate and report on the adequacy of current legislative regimes in addressing the legal needs of older Australians in the following areas: fraud, financial abuse, general and enduring power of attorney provisions, family agreements, barriers to older Australians accessing legal services, and discrimination. The full Terms of Reference for the inquiry were set out earlier.

24 Public Trustee NSW, *Submission No. 72*, p. 9.

25 Public Trustee NSW, *Submission No. 72*, p. 5, 7.

26 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Harmonisation of legal systems within Australia and between Australia and New Zealand*, November 2006, p. 102.

Conduct of the inquiry

- 1.21 The inquiry was advertised in *The Australian* newspaper on a number of occasions, both at the commencement of the inquiry and throughout the process of conducting public hearings around Australia. Public hearings were also advertised in various seniors' publications. Letters inviting submissions were sent to over 180 groups and individuals.
- 1.22 The Committee received 157 submissions, 43 supplementary submissions, and 170 exhibits. Details of submissions and exhibits are at Appendices A and C to this report respectively.
- 1.23 Public hearings were held in Canberra, Sydney, Melbourne, Hobart, Brisbane, Buderim, Perth and Adelaide. Details of witnesses who appeared at the public hearings are at Appendix B to this report. As part of the public hearing process, the Committee thought it important that interested members of the public should be able to make unscheduled contributions. Accordingly, time was allocated at hearings for brief (3 minute) statements from the public on any aspect of the Committee's Terms of Reference. Fifty-seven people took advantage of this opportunity and a number followed their statements with additional written comments.
- 1.24 Submissions authorised for publication by the Committee, together with transcripts of public hearings are available on the Committee's web site:
<http://www.aph.gov.au/house/committee/laca/olderpeople/index.htm>
- 1.25 The Committee would like to place on record its thanks to all who gave evidence to the Committee, either in person or in writing.

The approach of the Committee

- 1.26 The Terms of Reference for the Committee specified that the target group for this inquiry was older Australians, with the definition of 'older' being that of the Australian Institute of Health and Welfare, where 'older' refers to those aged 65 years and over. The Committee did note, however, that for some groups, in particular for Indigenous Australians, a lower chronological age may be more appropriate.²⁷

²⁷ 'When planning services for older people, the Government uses population estimates for the general population aged 70 years or over, compared with 50 years or over for Indigenous Australians': see Human Rights and Equal Opportunity Commission,

- 1.27 The Terms of Reference specified the areas to be covered by the Committee, with the emphasis being on the adequacy of current legislative regimes. While the Terms of Reference were well-advertised, some submissions raised wider concerns about the situation facing some older Australians with regard to physical, emotional and sexual abuse. Although these matters are regrettably part of the experience of older Australians, they are outside the Terms of Reference for the inquiry and the Committee was obliged to restrict its investigation to fraud and financial abuse.
- 1.28 In attempting to answer how well Australia's legal regimes address the needs of this older segment of the population, the Committee was very aware that legislative competence in many of these areas lies with the states and territories. The views of the state and territory governments are therefore essential, not only in identifying the problem areas but also in developing and implementing solutions. The Committee was very grateful for the cooperative way in which some state and territory governments and authorities assisted the Committee, either by way of written submissions or in providing oral evidence.
- 1.29 It is perhaps inevitable that some will see parliamentary committees as complaints bodies that are able to rectify perceived inequities and injustices. This inquiry was no different. The Committee attempted, in its public announcements and correspondence, to explain that it was not in a position to investigate individual cases or provide legal or personal advice. The Committee was nevertheless sent material relating to individual cases, and, although the Committee found those personal stories illustrative, of necessity it focused on the broader policy issues within the Terms of Reference.

The report

- 1.30 The balance of this report comprises six further chapters. Chapter 2 deals with fraud and financial abuse of older members of our society and canvasses a number of possible responses to these issues.

Submission No. 92, p. 51. In its submission the Western Australian Government indicated that any definition of 'older' needs to be applied flexibly so that people who have aged prematurely due to factors such as poor health, physical or intellectual disability, or lifestyle factors are not excluded: *Submission No. 74*, p. 3. The Western Australian Government also referred to a report by the Western Australian Public Advocate which confirms that there is no clear chronological age that can be used to identify an older Aboriginal person: see *Submission No. 74*, p. 3.

Chapter 3 examines the range of substitute decision making mechanisms available to older Australians. Chapter 4 looks specifically at the issue of family agreements, while Chapter 5 examines the barriers to older Australians accessing legal services. The final two chapters deal with discrimination and matters associated with accommodation options for older people, particularly retirement villages.

Fraud and financial abuse

*A crime is a crime, irrespective of the victim's age.*¹

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.² 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.³

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.⁴ 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...⁵

- 2.3 Within the older age group, consumer fraud occurs more frequently than other types of crime.⁶ 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.⁷

- 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.⁸

- 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

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.⁹

- 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’.¹⁰

- 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.¹¹

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.¹²

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.¹³

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.¹⁴ 'What may be seen as a normal transaction or course of events within one family may be considered abuse by another'.¹⁵

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.¹⁶

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

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.¹⁷

- 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.¹⁸ It is common that, where abuse is occurring, multiple types of abuse occur at the same time.¹⁹

- 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.²⁰ 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

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.²¹

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.²²

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'.²³

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.²⁴ 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.

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.²⁵

- 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':²⁶

...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.²⁷

- 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

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.²⁸

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.²⁹

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.³⁰

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...³¹

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:

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.³²
- 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.³³
- 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’.³⁴ 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...³⁵

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.³⁶

- 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.³⁷

- 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.³⁸

- 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

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.³⁹

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.'⁴⁰

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

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.⁴¹

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*.⁴² 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’.⁴³

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).⁴⁴

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’,⁴⁵ 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.⁴⁶
- 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’.⁴⁷
- 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’.⁴⁸ 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’.⁴⁹
- 2.43 Consumer protection relating to the supply of financial services rests with ASIC. As the ACCC explained:

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.⁵⁰

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.⁵¹

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.⁵²

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.⁵³

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.⁵⁴

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.⁵⁵

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.⁵⁶

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

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.⁵⁷

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.⁵⁸

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.⁵⁹

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

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.⁶⁰

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.⁶¹

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.⁶²

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

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.⁶³

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...⁶⁴

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.⁶⁵

2.60 Some have called for 'clawback laws' to recover property that has been inappropriately or illegally transferred from elder persons.⁶⁶ 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

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.⁶⁷

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.⁶⁸

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.⁶⁹

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'.⁷⁰

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

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.⁷¹

- 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.⁷²

- 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.⁷³

- 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'.⁷⁴ 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'.⁷⁵

- 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.⁷⁶ 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.⁷⁷

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'.⁷⁸

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.⁷⁹

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.⁸⁰

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.⁸¹

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.⁸²

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.

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'.⁸³

- 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'.⁸⁴
- 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.⁸⁵
- 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'

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.⁸⁶

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'.⁸⁷

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.⁸⁸

86 American Bar Association, 'Statutory Provisions authorizing and defining threshold eligibility for adult protective services by state', available at 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 (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.⁸⁹

- 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'.⁹⁰

- 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.⁹¹

- 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

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.⁹²

- 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.⁹³

- 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.⁹⁴

- 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.⁹⁵

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'.⁹⁶ 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.⁹⁷ The Committee believes ANPEA, if adequately funded, will provide a vital link in developing best practice and provide links between other services throughout Australia.⁹⁸

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.⁹⁹

- 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’.¹⁰⁰ 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

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.¹⁰¹

- 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’.¹⁰² 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.¹⁰³

- 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

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.¹⁰⁴

- 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.'¹⁰⁵ 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'.¹⁰⁶ 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.'¹⁰⁷

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'.¹⁰⁸

- 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.¹⁰⁹

- 2.105 Concern was expressed that current privacy laws would impose restrictions on the roles that banks can play in reporting financial abuse.¹¹⁰ 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.¹¹¹

- 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'.¹¹²
- 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:

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.¹¹³

- 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.'¹¹⁴

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.¹¹⁵

- 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

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.¹¹⁶

- 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.¹¹⁷

- 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.¹¹⁸ The Committee heard that education in this area should focus on both

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.¹¹⁹

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.¹²⁰

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.¹²¹

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'.¹²²

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.¹²³ The

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'.¹²⁴

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.¹²⁵

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.¹²⁶

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.

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'.¹²⁷ 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.¹²⁸

- 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.¹²⁹

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

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.¹³⁰

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...'.¹³¹

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

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.¹³²

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

132 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.¹³³

2.133 ASIC notes that the market for the most common of equity release products, that of reverse mortgages, is 'burgeoning'.¹³⁴ 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 2006.¹³⁵

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

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 (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 (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.¹³⁶

- 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'.¹³⁷
- 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.¹³⁸
- 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'.¹³⁹ 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.¹⁴⁰ 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'.¹⁴¹

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 (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.¹⁴²
- 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.¹⁴³
- 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

142 SEQUAL Code of Conduct, 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 (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.¹⁴⁴
- 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.¹⁴⁵ 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’.¹⁴⁶
- 2.142 Membership of SEQUAL is voluntary, and therefore the code of conduct is not followed by all lenders.¹⁴⁷ 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.’¹⁴⁸
- 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’.¹⁴⁹ 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.¹⁵⁰
- 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

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.¹⁵¹

- 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'.¹⁵² The Committee supports the introduction of licensing of mortgage brokers as quickly as possible.

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 (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 1996.¹⁵³

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...¹⁵⁴

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.'¹⁵⁵

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

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'.¹⁵⁶

- 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'.¹⁵⁷
- 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'.¹⁵⁸ 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 60.¹⁵⁹ The impact of such collapses on older investors has been well documented.¹⁶⁰
- 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

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.¹⁶¹

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'.¹⁶²

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.¹⁶³

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.¹⁶⁴

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...'¹⁶⁵

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.¹⁶⁶

- 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.¹⁶⁷

- 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.¹⁶⁸ 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

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.¹⁶⁹

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.¹⁷⁰

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.

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.¹⁷¹ 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'.¹⁷²
- 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.¹⁷³

- 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.¹⁷⁴

- 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.¹⁷⁵
- 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.¹⁷⁶

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.¹⁷⁷ 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.¹⁷⁸

- 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).¹⁷⁹ 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.¹⁸⁰
- 2.181 When asked whether Centrelink monitored nominee arrangements for potential abuse, the response was that 'as part of the arrangements

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.¹⁸¹

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'.¹⁸² 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'¹⁸³ 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'.¹⁸⁴

2.183 Centrelink believes that the level of abuse of nominee arrangements is very low.¹⁸⁵

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.¹⁸⁶

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'.¹⁸⁷

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

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.¹⁸⁸ 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...

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.¹⁸⁹

- 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'.¹⁹⁰ 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'.¹⁹¹

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.**

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.¹⁹² Mrs van Wulfften Palthe called for a change in the law so that 'wills should be able to overwrite life insurance and superannuation designations',¹⁹³ 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...'¹⁹⁴
- 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.

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.¹⁹⁵

- 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'¹⁹⁶ 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.¹⁹⁷

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.¹⁹⁸

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.

¹⁹⁷ Mr Brian Herd, *Transcript of Evidence*, 16 July 2007, p. 3.

¹⁹⁸ Mr Brian Herd, *Transcript of Evidence*, 16 July 2007, p. 7.

Substitute decision making

- 3.1 As part of the process of ageing, the likelihood of chronic illness, disability and intellectual impairments increases. For example, about one per cent of people aged 60-64 years display signs of dementia. The rate of dementia increases to about 12 per cent for people aged 80-84 years and almost 40 per cent of those aged 94 years and over.¹
- 3.2 Cognitive impairment is associated with diminished mental capacity to make decisions concerning personal and financial affairs. Substitute decision making instruments or advance directives are relatively new mechanisms to enable the interests of people with impaired decision making capacity to be carried out by others. These instruments cover areas that have traditionally been based on informal family arrangements or carried out by statutory authorities such as public trustees.
- 3.3 While general and enduring power of attorney provisions were a key part of the Terms of Reference for this inquiry, the Committee also received a wide range of evidence on other substitute decision making instruments including guardianship and administration processes and health care planning.
- 3.4 This chapter provides an overview of the current legislative regimes in relation to powers of attorney, guardianship and administration processes and health care planning. It also assesses the adequacy of those legislative regimes and identifies areas for further improvement.

1 Australian Health Ministers' Conference, *National Framework for Action on Dementia 2006-2010*, p. 2.

Power of attorney

- 3.5 A power of attorney refers to the ‘unilateral grant of authority by a donor for someone else to act on their behalf’.² The two main types of power of attorney are ‘general’ and ‘enduring’. A general power of attorney is used where a donor or principal grants authority to another person (attorney) to act on their behalf for a particular period of time or for a particular purpose. A general power of attorney lapses when the agreement expires, the principal revokes the instrument, or the principal no longer has legal capacity to make decisions.
- 3.6 An enduring power of attorney is broadly similar in operation to a general power of attorney with the exception that an enduring power of attorney continues after the principal has lost mental capacity. Once the principal loses capacity they cannot revoke their enduring power of attorney. Relevant state and territory legislation provides for guardianship tribunals to review, revoke or reinstate enduring powers of attorney and appoint guardians and administrators.
- 3.7 What may be included in an enduring power of attorney is covered by state or territory legislation. Enduring powers of attorney were traditionally used by principals to delegate their authority to act in relation to financial matters. Increasingly, enduring powers of attorney are being used to cover personal and lifestyle matters where this is provided for in legislation (this is discussed further below).
- 3.8 An enduring power of attorney has the following benefits:
- Unlike a general power of attorney, an enduring power of attorney is not affected by the subsequent legal incapacity of the donor ... ;
 - Provides a safeguard in the best interests of the donor and the estate should the donor lose capacity to make reasoned decisions;
 - Provides a mechanism for continuity of management of a donor’s financial and property affairs, thereby minimising immediate financial hardship if the donor's decision-making ability is suddenly impaired;
 - Provides the means for the donor to impose conditions or restrictions on the exercise of the power based on his or her wishes for the management of the estate;
 - Enables the donor to maintain confidentiality in respect of his or her financial property affairs; and

2 Attorney-General’s Department, *Submission No. 100*, p. 1.

- Reduces the need for an application for an administration order to be made to the State Administrative Tribunal during the period of incapacity of the donor.³
- 3.9 The Committee received a substantial amount of evidence on powers of attorney in relation to the level of public awareness, the legislative framework, the assessment of capacity, abuse of the instrument, and the need for improved portability and regulation of the instrument. The discussion below examines these matters to the extent that they raise issues of systemic or national concern.

Take up rate of enduring powers of attorney

- 3.10 In evidence to the inquiry, the Committee heard that approximately 11 per cent of the Australian population have a valid enduring power of attorney in place. About 14 per cent of people residing outside capital cities have made an enduring power of attorney compared with 11 per cent of people residing in state capitals. Of Australian states and territories, Queensland has the highest proportion of its population with a valid enduring power of attorney in place at 16 per cent.⁴
- 3.11 Of those with an enduring power of attorney in place, 8 per cent were aged below 35 years, 45.5 per cent were aged between 35-64 years and 45.5 per cent were aged 65 years and over. Women are slightly more likely to have made an enduring power of attorney than men. Those with secondary school or tertiary education are more likely to have an enduring power of attorney than those without.⁵ Lower income and disability also correlate with a lower rate of enduring powers of attorney.⁶
- 3.12 However, there are some constraints on the data. As enduring powers of attorney are, by nature, private agreements between two or more people, there is also uncertainty about the number of such agreements in circulation that have not been activated or registered.⁷ It is also

3 Public Advocate of Western Australia, *Submission No. 80*, p. 5.

4 Office of the Public Advocate Queensland, *Submission No. 76*, p. 7.

5 Office of the Public Advocate Queensland, *Submission No. 76*, p. 7.

6 Law and Justice Foundation of New South Wales, *Exhibit No. 37*, p. 310.

7 Ms Anita Smith, Australian Guardianship and Administration Committee (AGAC), *Transcript of Evidence*, 5 June 2007, p. 6; Prof. Wilson, *Transcript of Evidence*, 16 July 2007, p. 61.

unclear how many people have made more than one power of attorney and how many have been revoked.⁸

- 3.13 Over 80 per cent of financial arrangements between older people and their carers are informal and employ limited accountability processes. Close family and friends are often in the best position to provide support and care when older people experience a decline in capacity.⁹ Older people are at risk of fraud and financial abuse without this support.¹⁰
- 3.14 Most people do not put in place an enduring power of attorney due to a general lack of awareness and understanding of the instrument.¹¹ The complexity of instruments within and between states can also confuse and deter people from making an enduring power.¹² The process of creating an enduring power of attorney can be unattractive because it involves active consideration of mortality, the state of personal and family relationships and one's accomplishments in life.¹³
- 3.15 It was put to the Committee that enduring powers of attorney should be widely encouraged because the risk of losing capacity faces us all, not just the elderly and such arrangements reduce the demand for publicly funded guardianship and administration systems:¹⁴

...we believe that all adults should be taught the value of such forward planning – particularly in relation to wills, EPAs and Advance Health Directives - and that such education should, in fact, begin in schools.¹⁵

We know that Australians are encouraged to plan for their financial security in their retirement, but little encouragement is given to planning for ageing with a physical or mental disability including things like advanced health care

8 Ms Maureen Sellick, *Advocare Inc., Transcript of Evidence*, 30 July 2007, p. 21.

9 Carers Australia, *Submission No. 120*, p. 2.

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

11 Department of Justice Victoria, *Submission No. 121*, p. 24.

12 Office of the Public Advocate Victoria, *Submission No. 70*, p. 14. The issue of the complexity of substitute decision making instruments across jurisdictions is discussed later in this chapter.

13 Mr Brian Walsh, *Exhibit No. 47*, p. 6.

14 Public Advocate Victoria, *Submission No. 70*, p. 14; Victoria Government, *Submission No. 121*, p. 24; Law and Justice Foundation of New South Wales, *Exhibit No. 37*, p. 307-309.

15 Caxton Legal Centre, *Submission No. 112*, p. 22.

directives, family agreements and the enduring power of attorney.¹⁶

- 3.16 The Committee agrees the enduring powers of attorney are valuable instruments and older people, in particular, should be encouraged to make them.

Legislative framework

- 3.17 Each state and territory has its own legislation on powers of attorney. As a result, requirements for the signing, registration and execution of powers of attorney can differ across jurisdictions. In some states, legislation on enduring powers of attorney also includes lifestyle and health directives. The differing legislation can affect the extent to which powers of attorney in one state are recognised in another.¹⁷
- 3.18 The complex patchwork of power of attorney legislation regarding interstate recognition, registration and requirements for witnessing the documents, is summarised in Appendix D. The paragraphs below provide an overview of relevant state and territory legislation.
- 3.19 In New South Wales, South Australia, Tasmania and Victoria, power of attorney provisions centre on financial and legal matters. The relevant legislation is as follows:
- *Instruments Act 1958* (Victoria);
 - *Powers of Attorney Act 2003* (New South Wales);
 - *Powers of Attorney and Agency Act 1984* (South Australia); and
 - *Powers of Attorney Act 2000* (Tasmania).
- 3.20 Relevant power of attorney provisions in Western Australia and the Northern Territory can be found in:
- *Guardianship and Administration Act 1990* (Western Australia); and
 - *Powers of Attorney Act* (Northern Territory).
- 3.21 The following guardianship legislation enables substitute decision making in relation to lifestyle matters (guardians) and financial matters (administrators):
- *Guardianship and Administration Act 1986* (Victoria);

16 Mrs Joan Hughes, Carers Australia, *Transcript of Evidence*, 22 May 2007, p. 1.

17 Law Institute of Victoria, *Submission No. 78.1*, p. 1; Attorney-General's Department, *Submission No. 100*, p. 2.

- *Guardianship Act 1987* (New South Wales);
 - *Guardianship and Administration Act 1993* (South Australia); and
 - *Guardianship and Administration Act 1995* (Tasmania).
- 3.22 The Queensland and Australian Capital Territory legislation on powers of attorney are the broadest in Australia and cover financial, legal, personal and health matters. The relevant legislation in those jurisdictions is as follows:
- *Powers of Attorney Act 1998* (Queensland); and
 - *Powers of Attorney Act 2006* (Australian Capital Territory).
- 3.23 Examples of personal and lifestyle matters covered in provisions of those acts include:
- (a) where the principal lives;
 - (b) with whom the principal lives;
 - (c) whether the principal works and, if so, the kind and place of work and the employer;
 - (d) what education or training the principal undertakes;
 - (e) whether the principal applies for a licence or permit;
 - (f) day-to-day issues, including, for example, diet and dress;
 - (g) whether to consent to a forensic examination of the principal;
 - (h) health care of the principal;
 - (i) a legal matter not relating to the principal's financial or property matters.¹⁸
- 3.24 Western Australia and the Northern Territory do not have specific legislation addressing the appointment of guardians for personal and lifestyle matters.¹⁹
- 3.25 The different provisions on enduring powers of attorney across jurisdictions can lead to potential confusion about the proper use of the instrument. For example:

18 *Powers of Attorney Act 1998* (Qld), Schedule 2, Part 2.

19 Human Rights and Equal Opportunity Commission, *Submission No. 92*, p. 31; Ms Michelle Scott, Office of the Public Advocate Western Australia, *Transcript of Evidence*, 30 July 2007, p. 12.

- a gift from a donor to an attorney is deemed to be the product of undue influence in Queensland, but would be permissible in Tasmania.²⁰
- in Queensland should a principal appoint two attorneys to act jointly and one of the attorneys predeceases the principal, the remaining attorney can continue to act. This is not the situation in New South Wales where upon the death of a joint attorney the instrument is revoked.²¹
- in NSW, Powers of Attorney only cover financial decision-making; separate instruments called Enduring Guardianship and Advance Care Directives deal with personal and health decision-making. In contrast, in Queensland, Powers of Attorney incorporate two documents which address both financial and personal decision-making.²²

3.26 In a previous inquiry, the Committee identified the lack of recognition of enduring powers of attorney across jurisdictions as an example of ‘senselessness resulting from regulatory inconsistency’.²³ In evidence to that inquiry, the Committee heard that an enduring power of attorney created in NSW is not effective in the ACT and the principal cannot enter into a new power of attorney in the ACT if they no longer had capacity at the time of entering that jurisdiction.²⁴

3.27 In this inquiry, the Committee also heard a number of examples of problems caused by the differing provisions on powers of attorney. For example:

I work at the Alfred, which is Victoria’s largest trauma hospital, and we regularly have interstate victims of trauma arriving with a power of attorney from Queensland or New South Wales that cannot be followed in Victoria simply because it is state based legislation.²⁵

3.28 The lack of portability of powers of attorney is a problem confronting not only parties to the instrument but also public agencies responsible

20 AGAC, *Submission No. 73*, p. 3.

21 New South Wales Ministerial Advisory Committee on Ageing (NSW MACA), *Submission No. 103*, p. 3.

22 NSW MACA, *Submission No. 103*, p. 3.

23 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into harmonisation of legal systems within Australia and between Australia and New Zealand*, December 2006, p. 101.

24 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into harmonisation of legal systems within Australia and between Australia and New Zealand*, December 2006, p. 101.

25 Mr Bill O’Shea, Law Institute of Victoria, *Transcript of Evidence*, 4 June 2007, p. 2.

for guardianship and administration arrangements. According to the Public Advocate of Victoria:

It is the Office's experience that not only do people move between states and territories but that a person may own property or conduct financial or legal transactions in more than one jurisdiction. These facts make it imperative that an Enduring Power of Attorney be recognised and have effect in all states and territories.²⁶

3.29 The Commonwealth Department of Health and Ageing supports the implementation of nationally consistent legislation on powers of attorney:

Nationally consistent legislation governing the execution and operation of these powers would lead to a clearer understanding of the extent of the power conferred by the instrument and the circumstances under which the power may be exercised, irrespective of the location of the parties involved. This would assist those who seek to exercise the role of substitute decision-maker and those whose task it is to deal with those so empowered.²⁷

3.30 The Department of Health and Ageing, through the Australian Health Ministers' Conference, is seeking to develop a nationally coordinated approach across a range of substitute decision making mechanisms including guardianship, advance care planning, and wills. The initiative is part of the *National Framework for Action on Dementia 2006-2010*.²⁸

3.31 The third key priority of the National Framework is to 'refer the issues of legislative barriers regarding Guardianship, advance care planning and advance care directives, wills and powers of attorney to the Australian Government and State and Territory Attorneys-General Departments ...'.²⁹ The lead agency for this priority is NSW Health.

3.32 The Committee heard that Alzheimer's Australia have been unsuccessful in their attempts to refer the National Framework to the

26 Office of the Public Advocate of Victoria, *Submission No. 70*, p. 14.

27 Department of Health and Ageing, *Submission No. 111*, p. 2.

28 Department of Health and Ageing, *Submission No. 111.1*, p. 1.

29 Department of Health and Ageing, *Submission No. 111.1*, p. 1.

Standing Committee of Attorneys-General (SCAG),³⁰ which is made up of Commonwealth and state and territory Attorneys-General.

- 3.33 The Committee considers that principals and attorneys should be confident that the powers of attorney they have entered into are fully executable throughout Australia.

Standing Committee of Attorneys-General initiatives

- 3.34 In 2000, SCAG drew attention to the issue of the differing legislative provisions on powers of attorney and 'endorsed draft provisions for the mutual recognition of powers of Attorney'.³¹ Progress in implementing the draft provisions was considered at SCAG meetings in 2006. The jurisdictions that have implemented the mutual recognition provisions agreed by SCAG are New South Wales, Victoria, Queensland, Tasmania and the Australian Capital Territory.³²

- 3.35 In its 2006 report on harmonisation of legal systems, the Committee recommended that:

...the Australian Government again raise mutual recognition of power of attorney instruments at the Standing Committee of Attorneys-General with a view to expediting uniform and adequate formal mutual recognition among the jurisdictions, especially in relation to those jurisdictions that have not yet implemented the draft provisions endorsed by the Standing Committee in 2000.³³

- 3.36 In a supplementary submission to the inquiry, the Attorney-General's Department stated that the 'effect of the mutual recognition provisions is that registration of a power of attorney in any Australian jurisdiction will satisfy the requirements in a local jurisdiction for certain documents to be registered'.³⁴
- 3.37 Evidence to the Committee indicates that mutual recognition of powers of attorney, where it has been implemented is at best limited.

30 Mr Glenn Rees, *Alzheimer's Australia, Proof Transcript of Evidence*, 17 August 2007, p. 50.

31 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into harmonisation of legal systems within Australia and between Australia and New Zealand*, December 2006, p. 101.

32 Attorney-General's Department, *Submission No. 100*, p. 2.

33 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into harmonisation of legal systems within Australia and between Australia and New Zealand*, December 2006, p. 102.

34 Attorney-General's Department, *Submission No. 100.1*, p. 5.

The mutual recognition provisions do not enable an automatic acceptance of powers of attorney made interstate.

3.38 Section 34 of the Queensland *Powers of Attorney Act 1998* provides for the recognition of enduring power of attorney made in other states to the extent that they could have been made under Queensland legislation:

If an enduring power of attorney is made in another State and complies with the requirements in the other State, then, to the extent the powers it gives could validly have been given by an enduring power of attorney made under this Act, the enduring power of attorney must be treated as if it were an enduring power of attorney made under, and in compliance with, this Act.

3.39 Other jurisdictions that have implemented mutual recognition have included similar provisions in their power of attorney legislation. The relevant mutual recognition provisions are:

- *Powers of Attorney Act 1998* (Queensland) s. 34, Recognition of enduring power of attorney made in other states (noted above);
- *Instruments Act 1958* (Victoria) s. 116, Recognition of enduring powers made in other states and territories;
- *Powers Of Attorney Act 2000* (Tasmania) s.47, Enduring powers of attorney made outside Tasmania;
- *Powers of Attorney Act 2003* (New South Wales) s. 25, Recognition of enduring powers of attorney made in other states and territories; and
- *Powers of Attorney Act 2006* (Australian Capital Territory) s. 89, Recognition of enduring powers of attorney made under other laws.

3.40 In order for an interstate power of attorney to be recognised, each individual document requires interpretation and may only be partially recognised.³⁵ As a result, banks are reluctant to recognise enduring powers of attorney made interstate. Some lawyers advise clients who have made powers of attorney interstate to make new powers of attorney in accordance with the legislation of the state in

35 Mr Brian Herd, *Transcript of Evidence*, 16 July 2007, p. 2.

which they now reside. It is also not clear whether a new power of attorney revokes a previous power of attorney made interstate.³⁶

- 3.41 The issue of mutual recognition of powers of attorney was also raised at the SCAG meeting of April 2007. Mutual recognition of enduring powers of attorney continues to be a problem despite the efforts of SCAG to address the issue. More needs to be done in this area.
- 3.42 The Committee considers that progress towards the recognition of powers of attorney made interstate has been inadequate, particularly considering that the issue was first brought to the attention of SCAG in 2000.
- 3.43 A number of submissions to the inquiry called for uniform legislation on powers of attorney,³⁷ or for the Commonwealth to assume national legislative responsibility in this area.³⁸ The Committee considers that the best means for promoting the acceptance of power of attorney and removing the inconsistencies in power of attorney provisions is the implementation of uniform legislation across jurisdictions.

Recommendation 16

- 3.44 **The Committee recommends that the Australian Government encourage the Standing Committee of Attorneys-General to work towards the implementation of uniform legislation on powers of attorney across states and territories.**
- 3.45 The Committee believes that it is important to build on the existing activities of the states in promoting mutual recognition of powers of attorney made interstate. Since SCAG has been supportive of mutual recognition and some jurisdictions have responded to the issue, states and territories should be expected to continue to work together to monitor the implementation of, and resolve issues concerning, the recognition of enduring powers of attorney made interstate, prior to the implementation of uniform legislation (as recommended above).

36 Mr Brian Herd, *Transcript of Evidence*, 16 July 2007, p. 3; Western Australian Government, *Submission No. 74*, p. 12.

37 See Law Society of Western Australia, *Submission No. 50*, p. 3; State Trustees Ltd, *Submission No. 88*, p. 9.

38 See Law Institute of Victoria, *Submission No. 78.1*, p. 1; National Seniors, *Submission No. 67*, p. 10; Caxton Legal Centre, *Submission No. 112*, p. 27.

Recommendation 17

- 3.46 **The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General monitor the implementation of mutual recognition provisions in power of attorney legislation and encourage members to amend legislation where appropriate to maximise the portability of the instrument, prior to the implementation of uniform legislation.**

Abuse of powers of attorney

- 3.47 The Committee heard evidence on a range of activities that have been used to take advantage of people who have made enduring powers of attorney. Abuse of the elderly using powers of attorney can include the use of undue pressure and/or misleading an older person to sign the instrument. Abuse may also arise through the attorney's neglect of the principal, particularly where the attorney is a beneficiary under the principal's will. Financial abuse can also occur where 'the attorney acts in ignorance of their obligations under a power of attorney'.³⁹
- 3.48 Once an enduring power of attorney is activated, the principal is unable to monitor the activities of the attorney due to their lack of capacity. Ignorance of the implications for the principal and the obligations of the attorney can inadvertently give rise to a breach of trust. For example, an attorney may breach the fiduciary relationship established under the agreement by making unauthorised transactions. There is a risk that an attorney may misrepresent the health of a principal and have the documents signed and witnessed after the principal has lost capacity. An attorney may act on the agreement prior to the loss of capacity of the principal.⁴⁰
- 3.49 Clients of the Aged Rights Advocacy Service (ARAS) have highlighted the potential vulnerability of older people signing enduring powers of attorney, indicating that:
- they were not aware of the power they were investing in the donee through this instrument,
 - they have stated they were told by the family member to sign the document and they complied as they trusted the person concerned,

39 Caxton Legal Centre, *Submission No. 112*, p. 23.

40 Law and Justice Foundation of New South Wales, *Exhibit No. 37*, pp. 310-312.

- they were not aware they could put limitations on the scope of the financial activity that the donee can undertake,
- the signing of the instrument occurred while they were in hospital, or ill, or suffering the effects of medication, and otherwise unable to give valid consent,
- the donee has assumed powers outside of the scope of the instrument, for example deciding where the donor will live, or
- they were induced, coerced or intimidated into signing the instrument.⁴¹

3.50 The making of an enduring power of attorney does not necessarily better protect the interests of an older person than under informal family care arrangements. The Public Trustee of Queensland has identified powers of attorney as the main source of financial abuse.⁴² Of the cases of elder abuse reported to the ARAS, 17 per cent of these cases were related to the improper use of enduring power of attorney.⁴³

3.51 Research indicates that elderly people with enduring powers of attorney are no more protected from financial abuse than elderly people without enduring powers of attorney.⁴⁴ An analysis of a sample of cases before the Queensland Guardianship and Administration Tribunal found that it was more likely that an enduring power of attorney was in place where suspected financial abuse had occurred, particularly where close family members acted as attorneys.⁴⁵

3.52 However, according to the Caxton Legal Centre, the risk of abuse is outweighed by the benefits of having an enduring power in place:

While we sometimes encounter abuse of EPAs, we tend to see even more problematic cases where people have never made an EPA. Family and friends in these cases suddenly find themselves embroiled in disputes with government officials at the office of the Public Trustee and the Adult Guardian and we regularly hear complaints from families who assert that their aged relative or friend had very particular views and

41 ARAS, *Submission No. 38*, p. 3.

42 Office of the Public Advocate Queensland, *Submission No. 76*, p. 6.

43 ARAS, *Submission No. 38*, p. 2.

44 Office of the Public Advocate Queensland, *Submission No. 76*, p. 8. Also see Public Advocate of Western Australia, *Submission No. 80*, p. 5.

45 Assets and Ageing Research Team, *Exhibit No. 97*, p. 28.

preferences and that they are being prevented from caring for their loved one as was always intended.⁴⁶

- 3.53 Fraud and financial abuse within families must be handled carefully. As discussed in Chapter 2, older people may not be aware that abuse is taking place, and if they are, may not know where to seek assistance, may be reluctant to speak out due to a fear of retribution or the reliance of the abuser for care, or may have received unsatisfactory treatment from those they have spoken to.
- 3.54 It is particularly difficult to identify abuse of older people through powers of attorneys because the victims usually lack capacity and attorneys often appear to be acting with legal authority. It is often the case that such abuse is only investigated once relatives or friends raise the matter with a guardianship tribunal.⁴⁷
- 3.55 Cases of suspected abuse of older people through the use of enduring powers of attorney should also be treated carefully for a number of reasons. The erratic behaviour of an older person with dementia could unnecessarily raise suspicions of abuse being perpetrated by an attorney.⁴⁸ The Public Advocate of South Australia advised that this can particularly be the case with certain types of cognitive impairment:
- ...people who have frontal lobe brain damage can still function quite well... The attorney cannot go to the bank and say, 'Don't give that person any more money.'⁴⁹
- 3.56 Also, certain activities that may be acceptable in a particular family context could be suspected as financial abuse if they are not formally provided for in an enduring power of attorney. Figure 3.1 below describes a difficult scenario for an attorney wishing to take action beyond that which has been formally agreed to by the principal, but which could have been authorised if the matter had been foreseen.

46 Caxton Legal Centre, *Submission No. 112*, p. 22.

47 NSW MACA, *Submission No. 103*, p. 4.

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

49 Mr John Harley, Office of the Public Advocate South Australia, *Transcript of Evidence*, 31 July 2007, p. 7.

Figure 3.1 An attorney's dilemma

A daughter was appointed under an EPA to act for her father, who was in an aged care facility and now had little capacity for decision making. Her mother was then diagnosed with cancer. The carer was providing intensive and ongoing support to her mother throughout her treatment and, because of this, the carer had to quit her job. After several months, the carer received her rates notice. As she had exhausted her savings, she was unable to pay her rates. She did not want to ask her mother for assistance, because she did not want to worry her. She did not want to let her siblings know, because she was ashamed and embarrassed. She also did not want them to feel guilty over the fact that she had been forced to quit her job to provide care. The carer used the power of attorney for her father to pay for the rates. She did so with the honest belief that if he had capacity she would have her father's blessing ... is this abuse?⁵⁰

3.57 The Committee heard that the risk of intentional or inadvertent abuse of powers of attorney can increase where the attorney is also a beneficiary under an older person's will.⁵¹ As discussed in Chapter 2, beneficiaries may try to rationalise financial abuse by preserving or bringing forward their inheritance.⁵²

3.58 Abuse can also arise following a poor selection of attorney. As the Public Advocate of Western Australia advised the Committee:

Sometimes an older person who is completely competent in executing an EPA has said, 'I want to nominate Bruce because he is my eldest son. Even though I don't think Bruce will do the best job and I think Jane would do the best job, Bruce will get upset if I give it to Jane.' There is a lot of family dynamics and history that goes on when people are considering these sorts of matters.⁵³

3.59 Another interesting way of conceptualising the financial relationship between older people and their families in the context of powers of attorney was put to the Committee as:

...older people have three thoughts about their families managing their finances: firstly, 'My son deals with everything and he gives me all the statements and I check everything'; secondly, 'My son deals with everything and I'm sure he is doing a wonderful job because he loves me'; and, thirdly, 'I'm too afraid to ask.'⁵⁴

50 Mr Graham Schlecht, Carers Queensland, *Transcript of Evidence*, 16 July 2007, p. 24.

51 Caxton Legal Centre, *Submission No. 112*, p. 24.

52 Office of the Public Advocate Queensland, *Submission No. 70*, p. 5. Some power of attorney legislation has attempted to restrict the formal involvement of the principal's relatives.

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

54 Ms Marilyn Crabtree, ARAS, *Transcript of Evidence*, 31 July 2007, p. 18.

- 3.60 Some states restrict the involvement of family members in powers of attorney in order to overcome the potential for conflict of interest.⁵⁵ According to Carers Queensland, this approach is in conflict with the values of mutuality and collectivism in family life:
- ...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.⁵⁶
- 3.61 It must be remembered that the vast bulk of care arrangements are provided through informal family support mechanisms and the majority of informal carers are 'doing the right thing'.⁵⁷ Also, within the family system communal approaches to asset management are more common.⁵⁸
- 3.62 The potential for the abuse of enduring powers of attorney within families highlights the need for principals to carefully choose their attorneys, seek legal advice on measures for their protection, and review their powers of attorney regularly before they lose capacity.

Suggestions for addressing abuse

- 3.63 The Committee acknowledges the recent work of states and territories to improve their power of attorney provisions and strengthen the protection of principals. These improvements include:
- Providing information on the instrument itself aimed at giving the donor a full appreciation of the nature and importance of the document...
 - The donor must specify the time the power is to commence...
 - Requiring the donor to specify whether or not the attorney can take a benefit...
 - Tighter witness requirements...
 - The need for the attorney to formally accept the appointment...

55 This is discussed further below.

56 Mr Graham Schlecht, Carers Queensland, *Transcript of Evidence*, 16 July 2007, p. 24.

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

58 Mr Brendan Horne, Carers Queensland, *Transcript of Evidence*, 16 July 2007, p. 25.

- Allowing for greater recognition of enduring powers of attorney prepared in other States and Territories.⁵⁹
- 3.64 However, these improvements have not been implemented uniformly across state and territory legislation. Evidence to the Committee indicates that more needs to be done to address the gaps in legislative protections afforded to principals.
- 3.65 A number of suggestions for reducing the potential for abuse of older people through powers of attorney were brought to the attention of the Committee. These suggestions include better provision of information to principals and attorneys, the need for specifying conditions and limitations in deeds, promoting greater awareness of the instrument to service providers, implementing stronger legislative provisions concerning the capacity of principals and the witnessing of deeds, and better regulation of the activities of attorneys.
- 3.66 There is a need for greater awareness of powers of attorney in the general community, particularly for older people, attorneys acting on their behalf and service providers that require proof of the delegated authority to perform certain functions for principals.
- 3.67 Principals particularly need to be better informed of the implications of delegating their authority. Attorneys also need to be aware of their obligations to act responsibly in the interests of the principal. More information should be provided to principals and attorneys regarding the implications of entering into enduring powers of attorney.⁶⁰
- 3.68 The Committee heard a number of examples of how better information about powers of attorney could have prevented abuse. One such example is described in Figure 3.2 below.

Figure 3.2 Abuse of a power of attorney

"I thought at the time that the POA was a good idea but did not realise the extent of power I had handed over to my children, I was not aware of placing conditions in the document to protect me - but these are my children!" Stated by older woman who had major surgery and gave EPOA to adult children for the time she was in hospital, Her bank balance dropped \$20,000 and they threatened to put her away (in a nursing home) if she did not stop causing trouble by asking about her money.⁶¹

59 Trustee Corporations Association of Australia, *Submission No. 68*, pp. 3-5.

60 Law Society of Western Australia, *Submission No. 50*, p. 3; Western Australian Government, *Submission No. 74*, p. 13.

61 ARAS, *Submission No. 38*, p. 3.

3.69 The Committee also heard that state and territory power of attorney provisions also differ in relation to the way attorneys are informed about their duties. For example:

In Western Australia the prescribed form states that the attorney is bound by Part 9 of the relevant Act but there is no requirement to provide the attorney with a copy of Part 9. In Queensland a summary of the obligations of an attorney is attached to the prescribed form.⁶²

3.70 Template power of attorney forms are widely available for free or at low cost without legal advice. For example, the Queensland Department of Justice has a template power of attorney form available on its website. The Committee also heard that power of attorney kits are also available from some local newsagents and supermarkets.⁶³

3.71 The Committee is concerned that the ease with which powers of attorney can be made can facilitate intentional or inadvertent abuse. A number of witnesses to the inquiry have warned against using standard template powers of attorney due to the risk that signatories may not understand the implications of the agreement without independent and/or specialist legal consultation.⁶⁴

3.72 It was suggested to the Committee that there is a need for an education campaign on enduring powers of attorney⁶⁵ and a scheme to subsidise the preparation of the document by a private solicitor.⁶⁶ The Committee agrees that there is a role for government in promoting awareness of powers of attorney and assisting people to make the agreements with adequate protections.

62 Law Society of Western Australia, *Submission No. 50*, p. 3.

63 Office of the Public Advocate Queensland, *Submission No. 76*, p. 7; Alzheimer's Australia, *Submission No. 55*, p. 15

64 Office of the Public Advocate Queensland, *Submission No. 76*, p. 7; Alzheimer's Australia, *Submission No. 55*, p. 15; Ms Rosalind Williams, Caxton Legal Centre, *Transcript of Evidence*, 16 July 2007, p. 18; Assets and Ageing Research Team, *Submission No. 26*, p. 5; Ms Maureen Sellick, Advocare Inc., *Transcript of Evidence*, 30 July 2007, p. 21.

65 Mrs Joan Hughes, Carers Australia, *Transcript of Evidence*, 22 May 2007, p. 1; Ms Margaret Brown, Alzheimer's Australia, *Proof Transcript of Evidence*, 17 August 2007, p. 55.

66 Caxton Legal Centre, *Submission No. 112*, p. 23.

Recommendation 18

- 3.73 **The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General develop:**
- **A campaign to promote awareness of powers of attorney and their advantages for older people;**
 - **An information strategy to better inform principals of the implications of making a power of attorney, and attorneys of their responsibilities to principals; and**
 - **A scheme to enable all powers of attorney to be prepared with the advice of a solicitor.**
- 3.74 A principal can reduce the potential for an attorney to act on the agreement prior to their loss of capacity by specifying the conditions upon which a power of attorney becomes enduring. This may be done by the attorney stating that:
- I require that before the attorney decides that this is an enduring document the attorney will seek a certificate from a general practitioner or a geriatrician,⁶⁷ or specifying the level of medical practitioner that they demand be consulted before it enters the enduring phase.⁶⁷
- 3.75 The use of such conditions that limit the activities of attorneys is good practice in making powers of attorney and should be promoted to all those considering entering into the agreement.
- 3.76 As discussed in Chapter 2, the Committee also heard that the risk of abuse of powers of attorney could be reduced with the assistance of government agencies such as Centrelink and financial institutions providing services to people who have made powers of attorney. Other measures that could be implemented to reduce the risk of abuse through the use of powers of attorney are discussed below.

Capacity issues

- 3.77 The term 'legal capacity' broadly refers to 'the competence of a person to act as principal or agent' to make decisions that will be upheld by

⁶⁷ Ms Anita Smith, AGAC, *Transcript of Evidence*, 5 June 2007, p. 10. The use of limiting conditions in powers of attorney was also supported by Mr Lewis, *Submission No. 152*, p. 2.

the legal system.⁶⁸ Under law, all adults are presumed to be 'of sound mind' and have the capacity to make decisions about important areas of their lives including managing personal finances, medical treatment, buying and selling and making contracts.

- 3.78 A person's capacity may fluctuate depending on a range of factors including the nature of their disability, information and support available, and the method of assessing capacity that is used. According to Professor Wilson of the Assets and Ageing Research Team, University of Queensland:

The issue around capacity is very difficult and very tricky and it can shift from day to day. For a particular matter, someone may not have had capacity yesterday but they may have it today. Similarly, they may not have capacity in the afternoon but they may have had it in the morning. Those sorts of issues are very tricky for other people to determine. It means that the decision needs to be made in the context of an ongoing relationship where people can see the pattern of what is happening rather than it just being a one-off event.⁶⁹

- 3.79 Principals must demonstrate legal capacity in order to make a valid power of attorney and the instrument often becomes 'enduring' once the principal loses capacity. However, there is currently no nationally consistent standard for the assessment of capacity. With respect to enduring powers of attorney, relevant legislation in New South Wales, Northern Territory, South Australia, Victoria and Western Australia broadly relies on the common law test of capacity established by the High Court in *Gibbons v Wright* in 1954:

...the mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained.⁷⁰

68 Lexis Nexis, 'Capacity', *Encyclopaedic Australian Legal Dictionary*, Butterworths; Alzheimer's Australia, *Legal Planning and Dementia*, Position Paper No. 5, 2005, p. 5.

69 Professor Jill Wilson, Assets and Ageing Research Team, *Transcript of Evidence*, 16 July 2007, p. 63.

70 91 CLR 243, p. 438, also see Cockerill, J., Collier, B. & Maxwell, K. 'Legal Requirements and Current Practices', in Collier, B., Coyne, C. & Sullivan, K. (eds.) *Mental Capacity, Powers of Attorney and Advance Health Directives*, Australian Legal Monographs, The Federation Press, pp. 31-32.

3.80 Other jurisdictions generally incorporate the common law test of capacity in their power of attorney legislation. Section 41(2) of the Queensland *Power of Attorney Act 1998*, covers the principal's capacity to make an enduring power of attorney and specifies that in 'understanding the nature and effect of the enduring power of attorney' the principal is to understand the following matters:

- (a) the principal may, in the power of attorney, specify or limit the power to be given to an attorney and instruct an attorney about the exercise of the power;
- (b) when the power begins;
- (c) once the power for a matter begins, the attorney has power to make, and will have full control over, the matter subject to terms or information about exercising the power included in the enduring power of attorney;
- (d) the principal may revoke the enduring power of attorney at any time the principal is capable of making an enduring power of attorney giving the same power;
- (e) the power the principal has given continues even if the principal becomes a person who has impaired capacity;
- (f) at any time the principal is not capable of revoking the enduring power of attorney, the principal is unable to effectively oversee the use of the power.

3.81 The assessment of capacity at the time of signing and at the time of activating an enduring power of attorney is a contentious issue.⁷¹ The assessment of capacity often requires both legal and medical expertise and it is questionable whether lawyers alone have sufficient ability to assess capacity.⁷²

3.82 The issue of assessing capacity becomes more difficult where family members are involved in arranging the power of attorney, as the following quote from the Law Institute of Victoria describes:

The complexity of determinations regarding legal capacity and the interrelationship with health and medical issues, which are outside the scope of a legal practitioner's expertise, create significant difficulties for practitioners when advising

71 AGAC, *Submission No. 73*, p. 4, *Alzheimer's Australia, Submission No. 55*, p. 32; National Seniors, *Submission No. 67*, p. 9; Office of the Public Advocate Victoria, *Submission No. 70*, p. 12.

72 ACT Disability, Aged Care and Advocacy Service, *Submission No. 115*, p. 4.

older clients. Such complexity also compounds the conflict of interest in situations where a family member arranges a legal appointment for an elderly relative and attends with the elderly person. The difficulties faced by older persons due to the complexity of family arrangements is heightened by the lack of clarity regarding the law of capacity and the need for clearer guidance for practitioners in determining a person's legal capacity. The evidentiary difficulties around questions of legal capacity have significant implications for civil litigation as there may be an inability to meet the required standard of proof.⁷³

- 3.83 The Committee heard that health professionals also lack guidance,⁷⁴ interest and incentive to assess the capacity of clients:

Doctors and other health care professionals need special training and education to improve their skills and understanding of the process of assessing capacity and their attitudes toward this task. There is no Medicare item for the assessment of capacity. Currently many practitioners see this as an unrewarding and onerous task.⁷⁵

- 3.84 Submissions to the inquiry have highlighted the need for a more consistent and reliable approach to the assessment of capacity. This may be achieved through the adoption of a single definition of legal capacity to be used nationally.⁷⁶

- 3.85 Currently, lawyers and medical professionals have little guidance on making assessments of the capacity of their clients. Furthermore, definitions of capacity can vary according to common law or statute. In New South Wales alone a mix of approaches to the assessment of capacity have been employed including the status, outcome, functional and decision specific approaches.⁷⁷

- 3.86 The Committee heard that some overseas jurisdictions have established a system of capacity assessment independent of lawyers

73 Law Institute of Victoria, *Submission No. 78*, p. 6.

74 Office of the Public Advocate Queensland, *Submission No. 76*, pp. 6-7.

75 Alzheimer's Australia, *Submission No. 55.1*, p. 4.

76 Public Advocate of the ACT, *Submission No. 7*, p. 1; Office of the Public Advocate Victoria, *Submission No. 70*, p. 12; Alzheimer's Australia, *Submission No. 55*, p. 33.

77 Attorney-General's Department of New South Wales, *Are the rights of people whose capacity is in question being adequately promoted and protected? A Discussion Paper*, Diversity Services 2006, pp. 6-7.

acting on behalf of their clients.⁷⁸ For example, the Capacity Assessment Office of Ontario Canada ‘trains eligible health professionals to be capacity assessors in accordance with the *Substitute Decisions Act*’, ‘maintains a current roster of qualified capacity assessors’ and ‘provides on-going education and consultation services to assessors’.⁷⁹ However, such an approach may not be suitable for non-metropolitan localities.⁸⁰

- 3.87 The Committee considers that Australia’s ad hoc approach to capacity assessment does not provide an adequate level of transparency and protection of the interests of people making enduring powers of attorney. The assessment process for capacity is crucial because the determination may involve the protection of the vulnerable, the denial of a person’s rights or even facilitate the abuse of a person’s rights. Those assessing the capacity of people making wills and powers of attorney should be particularly alert to the possibility of coercion or undue influence.⁸¹

Recommendation 19

- 3.88 **The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General and the Standing Committee of Health Ministers develop and implement a nationally consistent approach to the assessment of capacity.**

Witnesses to enduring powers of attorney

- 3.89 States and territories also have differing provisions for the witnessing of enduring powers of attorney. The table at Appendix D indicates that witnesses to the making of enduring powers of attorney in the Australian Capital Territory, New South Wales, Queensland and Victoria must sign certificates broadly stating that the principal voluntarily signed the deed and that they appeared to understand the implications of making the agreement. Legislation in Queensland, New South Wales, South Australia and Western Australia also

78 Alzheimer’s Australia, *Submission No. 55*, p. 33.

79 Capacity Assessment Office, Ontario Canada, website, <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacityoffice.asp> (accessed 4 September 2007).

80 Mr John Harley, Office of the Public Advocate South Australia, *Transcript of Evidence*, 31 July 2007, p. 8.

81 Darzins, P., Molloy, W. & Strang, D. *Exhibit No. 159*, p. 102.

specifies, to varying degrees, prescribed witnesses such as those authorised by law to make affidavits.

- 3.90 In Tasmania and Queensland relatives of the principal and attorney are excluded from witnessing powers of attorney. The meaning of relative is not defined in the legislation and the Australian Guardianship and Administration Committee (AGAC) considers that this approach offers another layer of protection for principals where a dispute has been raised:

‘Relative’ is quite a broad term. It has been undefined and left relatively broad’... They draw in the wrong witnesses, which automatically invalidates the document, which has been a very useful way for the board to simply say, ‘That document isn’t valid anyway. Now we’ll clean the slate and we’ll start again and put in place some new and accountable financial measures for you.’⁸²

- 3.91 There is little guidance under state and territory legislation on how witnesses are to determine whether the principal understands the implications of a power of attorney. It was suggested to the Committee that the value of witnesses could be strengthened by requiring ‘that the independent witness interview the donor alone, or suggest further exploration be undertaken to ensure that the older person is fully cognisant of the implications of the document, and have not been influenced or under duress to sign’.⁸³
- 3.92 Justices of the Peace (JPs) are often used to witness enduring powers of attorney, based on the assumption that they check the documents and form a view on whether the principal is competent enough to understand the implications of signing the instrument.⁸⁴ However, concerns were raised that JPs are not sufficiently trained in this activity.⁸⁵
- 3.93 The Alliance for the Prevention of Elder Abuse published a *Witnessing Documents* brochure to alert JPs to the issue of elder abuse. The Committee also heard that JPs provide training on witnessing

82 Ms Anita Smith, AGAC, *Transcript of Evidence*, 5 June 2007, p. 10.

83 ARAS, *Submission No. 38*, p. 3.

84 Alzheimer’s Australia, *Decision Making in Advance: Reducing barriers and improving access to advance directives for people with dementia*, Discussion Paper No. 8, 2006, p. 13.

85 Mrs Susan Lyons, ARAS, *Transcript of Evidence*, 31 July 2007, p. 17.

documents to other JPs, although completion of this training is not mandatory.⁸⁶

- 3.94 The Committee heard that some JPs play an active role when called on to witness powers of attorney:

A number of JPs are very keen on and are actively pursuing questioning roles. They see it as their role to question the intention of the older person, and when people arrive with their family members it is quite a usual practice for them to ask to speak to the older person alone in order to gain their intention.⁸⁷

- 3.95 The Committee considers that witnesses to powers of attorney should certainly be alert to any signs of coercion of the principal and be aware that if they have concerns about the principal they can interview the principal or request an independent assessment of their capacity.

- 3.96 The witnessing provisions for powers of attorney is another area for potential legislative amendment. The legislative provisions prescribing witnesses to powers of attorney and their obligations differ across jurisdictions. A consistent approach to witnesses across jurisdictions would bring all witness testimonies up to the same standard and could assist with the recognition of powers of attorney throughout Australia.

Regulation

- 3.97 Along with the lack of consistency on state and territory power of attorney provisions, another key theme to emerge during the inquiry centred on the regulation of the agreements, particularly in relation to monitoring the activities of attorneys and the need for a national register.

Making attorneys more accountable

- 3.98 The main source of review of enduring powers of attorney is through processes of state and territory public guardians, adult guardians and public advocates, and the boards and tribunals that operate under relevant guardianship and administration legislation. These agencies

⁸⁶ ARAS, *Submission No. 38.1*, p. 1.

⁸⁷ Ms Jane Fisher, Council on the Ageing South Australia, *Proof Transcript of Evidence*, 17 August 2007, p. 8.

are empowered to 'protect adults who have a disability that impairs their capacity to make decisions and manage their affairs and together we offer a range of protective mechanisms for older people'.⁸⁸

- 3.99 Under state and territory legislation, attorneys are required to keep records of the transactions they make on behalf of the principal. For example, s. 125D of the Victorian *Instruments Act 1958* provides that an 'attorney under an enduring power of attorney must keep and preserve accurate records and accounts of all dealings and transactions made under the power'.
- 3.100 Guardianship agencies can require attorneys to produce their records when reviewing a power of attorney once a concern has been raised. However, these agencies do not have a monitoring function. It is difficult to assist older people being abused through enduring powers of attorney if they do not have family and friends that are aware of the abuse and willing to notify authorities. One advocacy organisation reported to the Committee that:
- In Advocare's work with older adults who are experiencing elder abuse, it has become apparent that Enduring Powers of Attorney are wide open to abuse. While there are penalties for misuse of an EPA, there is not a system of monitoring applied to all EPAs with the result that financial exploitation is more likely to be perpetrated and go on undetected.⁸⁹
- 3.101 The Committee heard that principals to powers of attorney could be further protected if an auditing system was established:
- Increasing the accountability of the donees, and undertaking regular audits could act as a safeguard and ensure that the donee is properly exercising their powers... Without the potential for an auditing process to be in place, it is difficult to discover transactions in favour of a donee or donee's friends, and if discovered it is difficult to address.⁹⁰
- 3.102 The Trustee Corporations Association of Australia, which includes all of the public trustees and most private trustee corporations, advocated a system or random audit of the activities of attorneys:

88 AGAC, *Submission No. 73*, p. 1.

89 Advocare, *Submission No. 71.1*, p. 1.

90 ARAS, *Submission No. 38*, p. 4. Similar views were expressed by the Public Trustee NSW, *Submission No. 72*, p. 7; Council on the Ageing SA, *Submission No. 77*, p. 77.

Whilst attorneys, administrators and trustees all act in a fiduciary capacity, only administrators and trustees are required to invest funds under their control in accordance with the prudent person principle, as codified in the various regional Trustee Acts.

Consideration might be given to attorneys also being required to manage a donor's funds in accordance with that principle.

Further, attorneys could be required to submit regular reports of their financial dealings under an EPA, eg an annual statement (our members have found that there is often uncertainty on the part of non-professional attorneys as regards the nature of the records they are required to keep).

Enhanced monitoring of attorneys might take the form of auditing the submitted accounts on a random basis, which could be expected to help discourage inappropriate behaviour.⁹¹

- 3.103 There are a number of ways to implement an audit of the activities of attorneys. For example, an audit process can be incorporated into individual powers of attorney:

...it might be one thing to put in your power of attorney that you would like your own accountant to audit the books each year and the money would come out of your estate...⁹²

- 3.104 However, the insertion of an audit condition in powers of attorney may not be appropriate for all agreements.⁹³ The Committee also heard evidence that in some instances it can be unduly difficult to insert protective conditions into the template power of attorney form.⁹⁴ Power of attorney templates should certainly be flexible to incorporate additional conditions, particularly those which strengthen protections for principals.
- 3.105 An audit of a random sample of active enduring powers of attorney may be more appropriate in most cases. The design of an audit system raises a number of questions concerning the responsibility for the implementation, funding for, and scale of, such a function.

91 Trustee Corporations Association of Australia, *Submission No. 68*, p. 6.

92 Ms Susan Field, University of Western Sydney, *Proof Transcript of Evidence*, 17 August 2007, p. 22.

93 Ms Susan Field, University of Western Sydney, *Proof Transcript of Evidence*, 17 August 2007, p. 22.

94 Mrs Esther Morrish, *Transcript of Evidence*, 17 July 2007, p. 2.

- 3.106 The Committee considers that there is potential value in establishing a system of periodic random audit to identify abuse of powers of attorney. However, given the limited evidence on the extent of abuse of older people through powers of attorney and the likelihood that the majority of these instruments operate in fulfilment of interests of principals, an auditing process that is developed should not be too burdensome on instrument holders.⁹⁵

A national register of powers of attorney

- 3.107 Currently, powers of attorney can be registered in the jurisdiction that they are made, and in some cases, they may be recognised and registered in other jurisdictions. It is generally not compulsory to register a power of attorney unless it deals with real estate. The table below provides an outline of state and territory registration provisions.

95 Ms Marilyn Crabtree, ARAS, *Transcript of Evidence*, 31 July 2007, p. 20.

Table 3.1 Current power of attorney registration requirements by jurisdiction

State / territory	Registration requirement
ACT	<i>Powers of Attorney Act 2006</i> , S. 29 Powers of attorney are deeds ...A deed may be registered (see Registration of Deeds Act 1957) and must be registered for a dealing with land by the attorney to be registered (see Land Titles Act 1925 , s 130).
NSW	<i>Powers of Attorney Act 2003</i> , S. 51 Powers of attorney may be registered ...by the Registrar-General in the General Register of Deeds kept under the Conveyancing Act 1919 . S. 52 (1) A conveyance or other deed affecting land executed on or after 1 July 1920 under a power of attorney has no effect unless the instrument creating the power has been registered.
NT	<i>Powers of Attorney Act 1980</i> , S. 7 Registration (1) An instrument creating or revoking a power may be registered.
QLD	<i>Powers of Attorney Act 1998</i> , S. 25 Registration of powers of attorney and instruments revoking powers (1) A power of attorney may be registered. (2) An instrument revoking a power of attorney may be registered...
SA	<i>Powers of Attorney and Agency Act 1984</i> , S. 6 Enduring powers of attorney (1) An enduring power of attorney may be created ... by deed ... Deeds may be registered in accordance with the <i>Registration of Deeds Act 1935</i> , Part 2
Tas	<i>Powers of Attorney Act 2000</i> , S.4. Register of powers of attorney (1) The Recorder must keep a register of all powers of attorney. (2) The register consists of all powers of attorney, instruments varying or revoking a power of attorney and other instruments relating to powers of attorney that are lodged with the Recorder under this or any other Act.
Vic	<i>Instruments Act 1958</i> , S. 125C. Enduring power of attorney to be a deed An enduring power of attorney that complies with this Division is to be taken to be and have effect as a deed, even if it is not expressed to be executed under seal. May be registered as a deed.
WA	<i>Guardianship and Administration Act 1990</i> , Can be registered in accordance with the <i>Transfer of Land Act 1893</i>

3.108 The only state in which an enduring power of attorney must be registered in order to be activated is Tasmania.⁹⁶ However, it appears that not all enduring powers of attorney are registered due to the \$90.50 registration fee. As a consequence it is not clear how many powers of attorney have been made.⁹⁷

⁹⁶ State Trustees Ltd, *Submission No. 88*, p. 10.

⁹⁷ Ms Anita Smith, AGAC, *Transcript of Evidence*, 5 June 2007, p. 5.

- 3.109 The Committee heard a number of arguments for improving and linking the current state based registration systems or establishing a national register of powers of attorney.⁹⁸ Such a register could:
- Serve as a basis for assessing the activities of attorneys;
 - Ensure that revoked enduring powers of attorney are not recognised;
 - Provide a mechanism for Commonwealth, state and other service providing agencies to check whether a person has a power of attorney in place; and
 - Provide governments with better information on the number and types of substitute decision making in use.
- 3.110 The Committee was concerned to hear that the currently poor registration arrangements have hampered the work of Public Trustees resulting in inefficient practices and potentially placing vulnerable people at risk:

We are aware of situations where a person has lost capacity and an administrator has been appointed by the Court, only to later discover that a member trustee corporation had earlier been appointed by that person as their attorney under an EPA... Extending registration to all EPAs would seem to offer potential benefits in terms of enhanced accountability for attorneys and easier monitoring of dealings under EPAs by the authorities.⁹⁹

- 3.111 A registration system can also be used to notify other interested parties to the existence of an enduring power of attorney. Such a mechanism can act as another safeguard against the misuse of the instrument. As one elder law specialist submitted to the inquiry:

...there should be another provision inserted which requires that, when a parent for example appoints a child as an attorney, the child advises the other members of the family that the appointment has been made so that the other members of the family know that the parent has made this

98 See Assets and Ageing Research Team, *Submission No. 26*, p. 5; Public Trustee NSW, *Submission No. 72*, p. 7, Public Advocate of the ACT, *Submission No. 7*, p. 2; State Trustees Ltd, *Submission No. 88*, p. 10; Mr Andrew Stuart, Department of Health and Ageing, *Transcript of Evidence*, 23 March 2007, p. 27; Ms Marilyn Lennon, Law Society of South Australia, *Transcript of Evidence*, 31 July 2007, p. 12.

99 Trustee Corporations Association of Australia, *Submission No. 68*, p. 5.

document. In many cases, these are secretive processes kept away from the other members of the family who only discover what has been going on once the worst has happened. A form of notification and registration is a way of reducing potential misuse of these documents as well.¹⁰⁰

- 3.112 A national registration system for powers of attorney could be implemented in a number of ways. Issues to be addressed in developing such a system include privacy considerations, the ability of interested people to access the register, the type and role of the responsible agency/agencies maintaining the register, the funding arrangements, the level of compulsion to include all powers of attorney in the register and the use of the register for the audit/monitoring of the activities of attorneys.¹⁰¹
- 3.113 The Committee considers that a national system for registering powers of attorney would be valuable in further protecting the interests of principals, enabling an assessment of the activities of attorneys, and facilitating greater recognition of the agreements by service providers. A national register of powers of attorney warrants further investigation.¹⁰²

Recommendation 20

- 3.114 **The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General develop and implement a national register of enduring powers of attorney. In developing the national register, a review should be undertaken considering, but not limited to:**
- **The agency/ies responsible for maintaining the register;**
 - **Possible funding arrangements;**
 - **The use and accessibility of the register;**

100 Mr Brian Herd, *Transcript of Evidence*, 16 July 2007, p. 9; this view was also expressed by Ms Michelle Scott, Office of the Public Advocate Western Australia, *Transcript of Evidence*, 30 July 2007, p. 15; Mr Abrahams, *Submission No. 12*, p. 3.

101 These issues were raised by a number of contributors including Ms Michelle Scott, Office of the Public Advocate Western Australia, *Transcript of Evidence*, 30 July 2007, p. 17; State Trustees Ltd, *Submission No. 88*, p. 10; Ms Susan Field, University of Western Sydney, *Proof Transcript of Evidence*, 17 August 2007, p. 21; Mr Peter Arnaudo, Attorney-General's Department, *Proof Transcript of Evidence*, 17 August 2007, p. 43.

102 This proposal was also suggested by Office of the Public Advocate Victoria, *Submission No. 70*, p. 13; State Trustees Ltd, *Submission No. 88*, p. 10; Mr Peter Arnaudo, Attorney-General's Department, *Proof Transcript of Evidence*, 17 August 2007, p. 43.

- **The inclusion of other substitute decision making instruments such as advance care directives;**
- **Privacy considerations;**
- **The possible use of the register to facilitate further research into substitute decision making; and**
- **The possible use of the register to assess the activities of a sample of attorneys and how this assessment might be implemented.**

3.115 The Committee recognises that the development and implementation of the national register may well be a medium-to-long-term proposition. This being the case, the Committee considers that it would be prudent, as an interim measure, for a comprehensive and integrated state/territory based registration system to be developed. This will ensure that until such time as a national register is achieved, Australia will not lack a registration system in this important area of substitute decision making.

Recommendation 21

3.116 **The Committee recommends that, as an interim measure prior to the development of a fully national registration system, the Australian Government propose the development of an integrated state/territory based powers of attorney registration system to the Standing Committee of Attorneys-General.**

Recognition of powers of attorney by service providers

3.117 Attorneys, carers and others who assist older people to manage their income and assets have to contend with a variety of service providers who may not recognise their legal authority to act on behalf of another person. Carers and attorneys have to 'negotiate a range of complex systems with little support and in doing so; often seek recourse in risky practices'.¹⁰³

3.118 It is possible for an older person to have made an enduring power of attorney under state legislation, but have another person as their 'nominee' for a Centrelink pension under the *Social Security (Administration) Act 1999*, appoint someone else as an 'authorised

103 Assets and Ageing Research Team, *Submission No. 26*, p. 6.

person' under the *Aged Care Act 1997*, and have yet another arrangement for their banking.

- 3.119 As an elder law specialist put to the Committee, '[t]he problem with this kaleidoscope is that different people can perform these roles and all at the same time, and state and federal laws do not acknowledge the existence of the other'.¹⁰⁴

Centrelink

- 3.120 The main issue raised in relation to the recognition of powers of attorney by service providers concerned Centrelink's nominee arrangements.¹⁰⁵ Centrelink allows its clients to nominate a person or organisation (including the Public Trustee) to manage their affairs with Centrelink on their behalf. There are three types of nomination: a person permitted to inquire, a payment nominee and a correspondence nominee.
- 3.121 Nominees are required to act in the best interests of the principal and payment nominees can receive payments on another person's behalf and are required keep a record on how the money was used.¹⁰⁶ Section 123E of the *Social Security (Administration) Act 1999* enables the Secretary to suspend or revoke nominee arrangements. As noted in Chapter 2, Centrelink had 347,047 nominee arrangements in place as of as of 20 July 2007.
- 3.122 In making nominee arrangements, Centrelink is not required to recognise powers of attorney made under state legislation.¹⁰⁷ Nor is Centrelink required to notify the attorney if the principal to a power of attorney intends to appoint another person as their Centrelink nominee.¹⁰⁸ About four per cent of the total nominees also have a power of attorney in place.¹⁰⁹

104 Mr Brian Herd, *Transcript of Evidence*, 16 July 2007, p. 3; this was also supported by Assets and Ageing Research Team, *Submission No. 26*, p. 6.

105 Assets and Ageing Research Team, *Submission No. 26*, p. 6; AGAC, *Submission No. 73*, p. 2; Elder Abuse Prevention Unit (EAPU), *Submission No. 97*, p. 5.

106 Centrelink, 'Someone to deal with Centrelink for you', Factsheet, [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 10 September 2007).

107 Law and Justice Foundation, *Submission No. 102*, p. 2; NSW MACA, *Submission No. 103*, p. 4.

108 Mr Roy Chell, Centrelink, *Proof Transcript of Evidence*, 17 August 2007, p. 33.

109 As at 20 July 2007, Mr Roy Chell, Centrelink, *Proof Transcript of Evidence*, 17 August 2007, p. 34.

- 3.123 According to *Social Security (Administration) Act 1999*, s. 123d provisions relating to appointments:
- (1) A person may be appointed as the payment nominee and the correspondence nominee of the same person.
 - (2) The Secretary must not appoint a nominee for a person (the proposed principal) under section 123B or 123C except:
 - (a) with the written consent of the person to be appointed; and
 - (b) after taking into consideration the wishes (if any) of the proposed principal regarding the making of such an appointment...
- 3.124 Where a principal is unable to consent to the appointment of a nominee due to incapacity, Centrelink requires proof of that incapacity such as a guardianship order or power of attorney arrangement.¹¹⁰ However, powers of attorney are not automatically recognised as authorisation for a nominee where the principal has lost capacity.¹¹¹
- 3.125 Representatives from Centrelink advised the Committee that, in making nominee arrangements, they 'take into account any current arrangements that may exist, such as a power of attorney', and 'in the normal course of events such an arrangement would be sufficient'.¹¹² In a further appearance before the Committee, Centrelink added that whether a power of attorney is accepted for a nominee arrangement 'depends on what is contained in the... agreement'.¹¹³
- 3.126 The Committee heard concerns that Centrelink's nominee arrangements could facilitate the abuse of older people without capacity, particularly since they are not required to monitor this group for potential financial abuse.¹¹⁴ Figure 3.3 below describes a scenario of abuse involving an enduring power of attorney and nominee arrangements.

110 Mr Roy Chell, Centrelink, *Proof Transcript of Evidence*, 17 August 2007, p. 33.

111 Mr Brian Herd, *Transcript of Evidence*, 16 July 2007, p. 3.

112 Mr Paul Cowan, Centrelink, *Transcript of Evidence*, 23 March 2007, pp. 5, 6.

113 Mr Roy Chell, Centrelink, *Proof Transcript of Evidence*, 17 August 2007, p. 32.

114 Assets and Ageing Research Team, *Submission No. 26*, p. 6; NSW MACA, *Submission No. 103.1*, p. 2.

Figure 3.3 Example of elder abuse involving an enduring power of attorney and Centrelink's nominee arrangements

An example of a nominee rip-off was a call involving a son who was operating his father's financial affairs using an EPOA but also managing his pension under a nominee arrangement. To collect more money he failed to notify Centrelink that his father lived with him and that he was renting the father's house for considerable profit (to the son). Centrelink discovered the situation and raised a \$12,000 overpayment against the father as the son knew he would not be responsible for any debt under Centrelink legislation. The son dropped the father off at his sister's house, emaciated and with only with the clothes he stood up in. Before the Adult Guardian could get involved in the retrieval of the rent money and protecting the remaining assets the son had already sold the father's house and moved interstate. Both the nominee form and EPOA were signed by the father well after he was deemed not to have capacity by the family doctor.¹¹⁵

- 3.127 The Committee has discussed in Chapter 2 the potential for abuse through nominee arrangements set up outside formal guardianship and administration processes, and has made a recommendation for greater monitoring of such arrangements (see Recommendation 12).
- 3.128 The Committee also heard that Centrelink is not required to recognise guardianship and administration orders made under state legislation and may impose its own nominee arrangements despite an administration order to the contrary.¹¹⁶ Similar concerns were raised about the reluctance of the Department of Veterans Affairs¹¹⁷ and the Department of Health and Ageing¹¹⁸ to recognise substitute decision making arrangements under state legislation.
- 3.129 According to the Queensland Public Advocate:
- ...there is a clear need for Centrelink to acknowledge the authority of any state based Guardianship and Administration order appointing an administrator for financial decisions. It is of great concern that a person's income may be placed at risk by a failure of a Commonwealth based authority to acknowledge the duly appointed decision-maker.¹¹⁹
- 3.130 The Victorian Government supported the call for Commonwealth instrumentalities to recognise powers of attorney, and guardianship and administration orders:

Such a move would significantly enable greater autonomy in advance decision-making for older people and simplify

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

116 AGAC, *Submission No. 73*, p. 2.

117 Office of the Public Advocate Victoria, *Submission No. 70*, p. 10.

118 NSW MACA, *Submission No. 103*, p. 4.

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

processes. The Victorian Government considers that the Commonwealth executive is not immune from State laws of general application, such as laws regulating powers of attorney, in line with the High Court's decision in Henderson's case.¹²⁰

3.131 Centrelink advised the Committee that guardians who are appointed by tribunals would normally be recognised by Centrelink:

If they have an arrangement in place where it is an order from the court, the Guardianship Tribunal et cetera, we would not override that at all. It is actually recorded on ISIS, which is the Centrelink computer system, whether there is a court order in place or not. We have also included appropriate words in our e-Ref process and procedures that, if there is a court order or a guardianship order in place, we need to contact the guardian, essentially.¹²¹

3.132 The Committee also heard of instances where the requirements for the formal authority of carers seemed unnecessarily burdensome. For example:

- The 'Request for Assets Assessment' form used by Centrelink on behalf of the Department of Health and Ageing 'requires an authorised person to attach documentation of their legal authority.'¹²² Many people called state guardianship boards and tribunals to create substitute decision making arrangements for the purpose of completing the form. The AGAC clarified the issue with the department and found that lower forms of authority are in fact acceptable.

3.133 The Committee considers that attorneys acting under powers of attorney should be informed of instances where their principals seek to appoint another person as their Centrelink nominee. This could serve as a safeguard against other parties placing undue pressure on principals to make nominee arrangements. Powers of attorney for legal and financial matters alone should be sufficient to direct Centrelink in determining nominee arrangements.

120 For the *Henderson's case* see, Residential Tenancies Tribunal of New South Wales and Henderson and anor; *Exparte the Defence Housing Authority* (1996) 190 CLR 410 (High Court of Australia). Victorian Government, *Submission No. 121*, p. 28.

121 Mr Roy Chell, Centrelink, *Proof Transcript of Evidence*, 17 August 2007, p. 39.

122 AGAC, *Submission No. 71*, p. 6.

- 3.134 Furthermore, the implementation of a national registration system in accordance with Recommendation 20 should have the benefit of facilitating the recognition of substitute decision making instruments by Commonwealth instrumentalities.

Financial institutions

- 3.135 Substitute decision making in relation to banking may involve a variety of practices such as informal arrangements for another person to withdraw money using an automatic teller machine, the use of authorised signatories for over the counter transactions and the use of joint bank accounts.¹²³

- 3.136 There is no consistency in the process for verifying enduring powers of attorney from one financial institution to another. There have been cases where people presenting enduring powers of attorney to their bank have been 'told to go away and get an authorization from the donor'.¹²⁴ Banks are often unwilling to recognise powers of attorney made interstate.¹²⁵

- 3.137 Part of the difficulty in having banks recognise powers of attorney may reflect the national bureaucratic structure of banks struggling to deal with a variety of state based legislative arrangements:

One of the problems is that the legal advice that the banks get is from either Melbourne or Sydney, so, when we ring up a particular branch because they have not recognised an EPA, we find they are acting on advice that they got interstate from lawyers who do not understand our law.¹²⁶

- 3.138 Banks also require attorneys to complete their verification system prior to using the principal's account. One witness to the inquiry considered this unduly burdensome:

They required attorneys to complete the bank's 100 point system before being permitted to operate an account. It seems unacceptable that a valid legal document can be ignored by a bank or anyone else.¹²⁷

123 Assets and Ageing Research Team, University of Queensland, *Submission No. 26*, p. 6.

124 State Trustees Limited, *Submission No. 88*, p. 11.

125 Mr Brian Herd, *Transcript of Evidence*, 16 July 2007, p. 3; Professor Jill Wilson, Assets and Ageing Research Team, *Transcript of Evidence*, 16 July 2007, p. 63.

126 Mr John Harley, Office of the Public Advocate South Australia, *Transcript of Evidence*, 31 July 2007, p. 7.

127 Mrs Esther Morrish, *Transcript of Evidence*, 17 July 2007, p. 2.

3.139 Similarly, the South Australian Public Advocate also reported:

We have a lot of complaints about the banks not recognising powers of attorney or introducing another layer of bureaucracy, requiring a statutory declaration every six months that the power of attorney has not been revoked.¹²⁸

3.140 In terms of the recognition of enduring powers of attorney, representatives of the Australian Bankers Association advised the Committee that:

...the bank-customer relationship is contractual and the bank can only act on the mandate of the customer. Where a third party is purporting to represent that authority and mandate, the bank needs to be scrupulously careful that that authority is legitimate and in place and that they can authenticate (a) the identity of the agent and (b) the document that has been produced to execute the customer's mandate.¹²⁹

3.141 The Committee also heard instances where older people have been abused due to a lack of recognition by banks of enduring powers of attorney (and when they are revoked). For example:

- There have been occasions where the older person has a dementia and the EPOA has been enacted, and the bank still allows the older person to withdraw substantial amounts of money that is then given to the abuser who has targeted them.¹³⁰
- We are aware of one case when a client revoked an EPA and although the bank was notified, tellers dealing with the withdrawal through the client's pass book were not aware of the revocation. We propose that bank systems at least should be coordinated so that all parts of a bank are aware of the revocation of an EPA.¹³¹

3.142 The Committee considers that many of the issues in relation to the lack of recognition of powers of attorney by financial institutions could be addressed through the harmonisation of legislation on the instruments and the establishment of a national registration system that could easily verify substitute decision making arrangements and

128 Mr John Harley, Office of the Public Advocate South Australia, *Transcript of Evidence*, 31 July 2007, p. 5.

129 Mr Ian Gilbert, Australian Bankers Association Inc., *Proof Transcript of Evidence*, 17 August 2007, p. 60.

130 ARAS, *Submission No. 38*, p. 5.

131 Caxton Legal Centre, *Submission No. 112*, p. 24.

detect cases where instruments have been revoked, and principals no longer have capacity.

- 3.143 Evidence to the inquiry also indicates that financial institutions lack sufficient awareness of the purpose and intentions of enduring powers of attorney.

Recommendation 22

- 3.144 **The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General develop and implement a campaign to raise awareness of the purpose and intentions of enduring powers of attorney in financial institutions.**

Advance health care planning

- 3.145 Evidence to the inquiry raised the matter of advance health care planning (also known as advance care planning). Advance health care planning has been characterised as:

...a process whereby a patient, in consultation with healthcare providers, family members and important others, makes decisions about his or her future health care should he or she become incapable of participating in medical treatment decisions. It is based on the ethical principle of autonomy, particularly the right to informed consent, and the principle of respect for human dignity, particularly the prevention of suffering.¹³²

- 3.146 Advance health care planning will often result in the preparation of a written statement – an advance care directive – which allows individuals

...who understand the implications of their choices to state in advance how they wish to be treated when they are no longer capable, as a consequence of physical or cognitive incapacity, of making such health care decisions in a particular circumstance'.¹³³

- 3.147 Advance care directives, then, generally deal in advance with the provision of health care in circumstances where the patient has lost

132 Dr William Silvester, Austin Health, *Transcript of Evidence*, 4 June 2007, p. 32.

133 Australian Medical Association (AMA), *Submission No. 66*, p. 3.

the capacity to make decisions and choices regarding such care. One matter commonly covered in advance care directives is the withholding of medical treatment (for example resuscitation or other life-sustaining intervention) in particular circumstances. Advance health care planning can also be put in place by means of proxy medical decision-making, for example by way of enduring power of attorney or guardianship arrangements.

- 3.148 The Committee was informed that advance health care planning and its regulation are of particular relevance and importance for older Australians:

Most people will die after chronic illness, not a sudden event. Up to half of us are not in a position to make our own decisions when we are near death. Our families have a significant chance of not knowing our views without discussion – and we have shown this in research time and again. ...According to the Australian Institute of Health and Welfare, the average life expectancy of Australians is into the late 70s to early 80s. Therefore, the impact of legislation and its application on the mode of death and the delivery and quality of end-of-life care is relevant to this inquiry. Advance care planning is crucial to the application of existing legislation.¹³⁴

- 3.149 In its submission the Australian Medical Association (AMA) expressed its support for advance health care planning and advance care directives:

The AMA supports Advance Care Planning as a way to provide a competent patient with the means to participate in future health care decisions, should he/she lose decision-making capacity in the future. ...As part of the advance care planning process, the AMA supports the use of advance care directives by patients, and/or the designation of a surrogate decision-maker, such as an Enduring Power of Attorney.¹³⁵

134 Dr William Silvester, Austin Health, *Transcript of Evidence*, 4 June 2007, pp. 32-33. The Committee was also informed that some residential aged care facilities require residents to complete a facility-specific 'Advance Care Plan' on admission: Alzheimer's Australia, *Submission No. 55*, p. 11.

135 AMA, *Submission No. 66*, p. 1.

Legislative framework

- 3.150 The Committee understands that, with the exception of New South Wales, Tasmania and Western Australia, advance care directives and advance health care planning are regulated among the Australian jurisdictions under the following legislative regimes:
- *Medical Treatment Act 1994 and Guardianship and Management of Property Act 1991* (ACT);
 - *Natural Death Act 1988* (NT);
 - *Powers of Attorney Act 1998 and Guardianship and Administration Act 2000* (Qld);
 - *Consent to Medical Treatment and Palliative Care Act 1995 and Guardianship and Administration Act 1993* (SA); and
 - *Medical Treatment Act 1988 and Guardianship and Administration Act 1986* (VIC).¹³⁶
- 3.151 A number of these regimes (for example the ACT and Queensland) also incorporate pro-forma advance health care directive documents.
- 3.152 The Committee understands that in New South Wales, guidelines are available regarding advance care directives;¹³⁷ in Tasmania, consent to medical treatment is dealt with by the *Guardianship and Administration Act 1995* (Tas) and that a legislative framework for advance directives is currently at the Bill stage (the Directions for Medical Treatment Bill 2005); and in Western Australia a legislative framework covering advance health care planning is currently at the Bill stage (the Acts Amendment (Advance Health Care Planning) Bill 2006).¹³⁸ The Committee also understands that a committee of inquiry is currently examining advance care directives in South Australia.¹³⁹
- 3.153 The Queensland regulatory framework was singled out for both criticism and praise in evidence to the Committee. The AMA cited the Queensland legislation as being the ‘...most appropriate model that

136 See www.caresearch.com.au (accessed 12 September 2007).

137 ‘Using Advance Care Directives’ (2004), available online at: http://www.health.nsw.gov.au/pubs/2004/pdf/adcare_directive.pdf.

138 See www.caresearch.com.au (accessed 12 September 2007).

139 Mr John Harley, Public Advocate of South Australia, *Transcript of Evidence*, 31 July 2007, p. 2.

we have seen so far',¹⁴⁰ while the Respecting Patient Choices Program expressed the view that :

...in Queensland the advance care plan for the elderly is significantly impeded by the legislated Queensland advance health directive, which is a complex 24-page document that does not get completed even by those who are very keen to document their wishes and to appoint a surrogate decision maker.¹⁴¹

3.154 The Committee also notes that, with the exception of the NT and WA, proxy medical decision-making (for example by power of attorney) is also regulated among the jurisdictions according to relevant legislation.¹⁴²

The Respecting Patient Choices Program

3.155 The Committee was interested to receive evidence regarding the Respecting Patient Choices Program, a national Commonwealth-funded initiative which provides information on advance health care planning. The mission statement of the program is for it to:

- respect every persons right to autonomy, dignity and fully informed consent
- assist individuals to reflect upon, choose and communicate their wishes regarding their current and future health care
- respect individuals wishes
- educate and support health professionals to facilitate this.¹⁴³

3.156 The Committee was informed that the Program:

...is the leader in advance care planning in Australia.
 ...[Commonwealth] funding has led to the development of the program, the gathering of evidence on the best model for advance care planning and on the implementation of Respecting Patient Choices in every state and territory and in aged-care facilities here in Victoria.¹⁴⁴

140 Dr Mark Yates, AMA, *Transcript of Evidence*, 23 March 2007, p. 12.

141 Dr William Silvester, Austin Health, *Transcript of Evidence*, 4 June 2007, p. 33.

142 In June 2007 the ACT Government produced a discussion paper regarding a possible new legislative regime regarding proxy decision-making for medical treatment. This document is available online at: <http://www.jcs.act.gov.au/eLibrary/consent.htm>.

143 See Respecting Patient Choices Program website, <http://www.respectingpatientchoices.org.au> (accessed 13 September 2007).

144 Dr William Silvester, Austin Health, *Transcript of Evidence*, 4 June 2007, p. 33.

- 3.157 The Committee commends the Respecting Patient Choices Program for its important contribution to informed advanced health care planning in Australia.

Appropriate medical practice

- 3.158 One significant issue that was raised in evidence to the inquiry was the question of appropriate medical practice in the context of an extant advance care directive or proxy medical decision-making arrangement. In its submission the AMA emphasised the importance of the clinical independence of medical practitioners:

Whilst respecting the role of patient autonomy in the advance care planning process, doctors' clinical independence must be protected in order for them to act in the best interests of their patients, whether following an advance care plan or deciding not to comply if they have reasonable grounds to believe it is inconsistent with good medical practice.¹⁴⁵

- 3.159 The AMA also stated that:

...the AMA believes every unforeseen possibility, option or health care scenario cannot be encompassed in a single document.¹⁴⁶

- 3.160 The Respecting Patient Choices Program also noted that medical practitioners can be placed in a difficult position with regard to advance care directives and potential legal consequences:

I have seen numerous examples where doctors were aware of a patient's wishes not to have treatment but the patient was now not competent and the doctor was being pressured by the family to treat aggressively, to provide a treatment that the doctor believed was either futile or not in the patient's best interests. Then the patient was subjected to suffering treatment for days, weeks, months or years simply because the doctor was scared about being taken to court.¹⁴⁷

- 3.161 Other evidence to the inquiry emphasised the importance of patients' wishes and suggested that such wishes are not always respected:

...you can have all these safeguards in place, like EPAs and advance health care directives but, at the end of the day, not

145 AMA, *Submission No. 66*, p. 1.

146 AMA, *Submission No. 66*, p. 1.

147 Dr William Silvester, Austin Health, *Transcript of Evidence*, 4 June 2007, p. 35.

only do we have to have a system where they are there, but the people you deal with, like doctors, have to accept them as well, and often that does not happen. They will have other priorities – medical ethics... It is a problem.¹⁴⁸

3.162 The Christian Science Committee on Publication Federal Representative for Australia submitted that:

Individuals should be allowed to have their health care treatment preferences described within the provisions of an advance directive for health care and to have those preferences followed by those persons responsible for their care.¹⁴⁹

View of the Committee

3.163 The Committee recognises the importance of this issue and acknowledges the sincerity of those putting forward their views. Where there is patient incapacity, the intersection of medical ethics and the wishes of the patient or family will sometimes be fraught, particularly where a situation arises that is not covered by an extant advance care directive. There are certainly no easy answers to the dilemmas that can arise in this context. The Committee does note however that it has always been the case that an individual of sound mind has the right to refuse (or accept) medical treatment or advice. The Respecting Patient Choices Program suggested that assigning a Medicare Benefits Schedule number to consultations between medical practitioners and patients regarding advance health care planning would be desirable:

We contend that all elderly Australians have the right and should be given the opportunity to be approached by appropriately trained people about their future healthcare decisions. At present, there is no specific Medicare Benefits Schedule item number for a doctor to discuss advance care planning with a patient. Studies have shown that the simple act of talking to a patient about what sort of treatment they want now and in the future significantly increases a patient's perception of the quality of care being received from that doctor. Indeed, this is probably one of the most important

148 Mr Alan Oakey, *Alzheimer's Australia, Proof Transcript of Evidence*, 17 August 2007, pp. 56-57.

149 Christian Science Committee on Publication Federal Representative for Australia, *Submission No. 89*, p. 8.

things to discuss with a patient and yet at present the doctor does not get paid for the time it takes.¹⁵⁰

3.164 The Public Advocate of South Australia also noted the importance of obtaining advice regarding advance care directives:

...when people prepare advance directives, they really need some advice and some help in framing what their directions might be. [In SA] Apart from my office, there is really not any service available to people to assist them in filling out those advance directives.¹⁵¹

3.165 Alzheimer's Australia commented similarly:

There is increasing evidence that people require assistance when making their advance care plans including the decision about who to appoint and what types of decisions they need to make about their future care. ...Research in South Australia confirmed this need for support with the actual process.¹⁵²

3.166 The Committee agrees with these views and considers that the measure proposed by the Respecting Patient Choice Program would have considerable potential in assisting Australians - old and young - to consider advance health care planning and to make informed advance health care choices.

Recommendation 23

3.167 **The Committee recommends that the Australian Government include advance health care planning services provided by medical practitioners on the Medicare Benefits Schedule.**

3.168 The Committee also considers that an education program on advance health care planning should be undertaken by the Australian Government in order to inform the community of the types of issues and processes involved. The Committee notes here the 2006 report of the Hong Kong Law Reform Commission on substitute decision-making and advance care directives. The Commission indicated in its report that the concept of advance care directives is not widely known

150 Dr William Silvester, Austin Health, *Transcript of Evidence*, 4 June 2007, p. 35.

151 Mr John Harley, Public Advocate of South Australia, *Transcript of Evidence*, 31 July 2007, p. 3.

152 Alzheimer's Australia, *Submission No. 55*, p. 11. Alzheimer's Australia indicated that it had received suggestions to set up a 'one stop shop' information service for those with early memory loss contemplating advance health care planning: p. 11.

in the Hong Kong community, but stated that ‘...there is a need to promote greater public awareness and understanding of the concept of advance directives’, and that:

There are undoubtedly advantages in promoting the wider use of advance directives, both in enhancing patient autonomy and in providing greater certainty for medical staff.¹⁵³

- 3.169 Even though advance care directives and advance health care planning may be established in Australia and reasonably widely-known, the Committee considers that the observations of the Law Reform Commission of Hong Kong are applicable here, particularly given the uncertainty that can attach to the processes of advance health care planning and preparing advance care directives.

Recommendation 24

- 3.170 **The Committee recommends that the Australian Government should conduct an education campaign to inform the Australian community of the issues and processes involved with advance health care planning and preparing advance care directives.**

Legislative reform

- 3.171 Considerable support for greater legislative consistency with respect to advance health care planning and advance care directives was expressed in evidence to the Committee. The Respecting Patient Choices Program, for example, submitted that:

In implementing the program in eight different jurisdictions, each with different laws covering guardianship, advance directives and end-of-life care, we have gained great experience in how the laws are being applied at the coalface and how the law, or the lack of legislation, has impacted adversely on the elderly at their time of need and significant vulnerability. ...The inconsistency of the relevant laws between the states does impact adversely on the rights of the

153 Law Reform Commission of Hong Kong, *Substitute Decision-Making and Advance Directives in Relation to Medical Treatment* (2006), pp. 167, 163. One of the Commission’s recommendations was for the Government to ‘...launch publicity programmes to promote public awareness and understanding of advance directives’: p. 167. The report is available online at: <http://www.hkreform.gov.hk/en/publications/rdecision.htm> (accessed 16 September 2007).

elderly, particularly the different language and the different powers.¹⁵⁴

3.172 The Respecting Patient Choices Program advocated uniformity across the jurisdictions for powers of attorney with regard to medical decisions and advance care directives; simple, user-friendly planning documents; practical, user-friendly witnessing arrangements; and the mandating of advance care planning for appropriate patients.¹⁵⁵

3.173 Alzheimer's Australia submitted that:

...there is not national consistency national recognition or harmonisation of the laws, not just with enduring powers of attorney but very specifically with the enduring powers of guardianship and medical powers of attorney. If you trace a map around Australia you will find there are lots of inconsistencies and lots of concerns... we are really urging the committee to look for some improvement in national consistency, simplification and support.¹⁵⁶

3.174 In its submission the Victorian Office of the Public Advocate suggested that progress on national uniformity with regard to proxy medical decision-making in the form of powers of attorney would be unlikely:

Given the difficulties in achieving interstate recognition of other powers, it is considered unlikely that progress will be made in relation to Enduring Powers of Attorney for Medical Treatment. This is because in some jurisdictions no such powers exist whilst in others it is considered that any legislative amendments are so controversial that there is little political will to deal with them. This seems to be the consequence of a general reluctance to raise issues about medical treatment decisions given that such amendments are seen as likely to give rise to an unwelcome debate about the topic of euthanasia.¹⁵⁷

3.175 The Victorian Office of the Public Advocate submitted that:

...is important to ensure that there is inter jurisdictional recognition between States and Territories for those Enduring

154 Dr William Silvester, Austin Health, *Transcript of Evidence*, 4 June 2007, pp. 33, 34.

155 Dr William Silvester, Austin Health, *Transcript of Evidence*, 4 June 2007, pp. 36.

156 Mr Glenn Rees, Alzheimer's Australia, *Proof Transcript of Evidence*, 17 August 2007, p. 50.

157 Victorian Office of the Public Advocate, *Submission No. 70*, p. 15.

Powers of Attorney for financial matters, Enduring Powers of Attorney for medical treatment and Enduring Powers of Guardianship that are made in another jurisdiction.¹⁵⁸

- 3.176 The AMA called for a national legislative approach with regard to advance care directives that recognises and protects the clinical independence of medical practitioners:

The AMA is calling for clear, nationally consistent legislation across all jurisdictions in Australia that recognises this, and for the development of clear, nationally consistent guidance for the preparation, notification and storage of advance directives, including a consistent proforma.¹⁵⁹

- 3.177 The Committee is of the view that there should be national consistency and coverage of legislation dealing with advance health care planning, including advance care directives, throughout Australia. With today's mobile population, older people (and indeed Australians generally) should not have the burden of dealing with inconsistent regulation added to the already significant and potentially difficult process of advance health care planning. Work towards national consistency and coverage should also encompass developing straightforward, nationally-consistent and user-friendly advance care directive documentation and witnessing arrangements.
- 3.178 Uniformity and mutual recognition of power of attorney legislation are considered separately above.

Recommendation 25

- 3.179 **The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General work towards national consistency and coverage of legislation governing advance health care planning among the Australian jurisdictions. This work should also include the development of straightforward, nationally-consistent and user-friendly advance care directive documentation and witnessing arrangements.**
- 3.180 In evidence to the Committee the Respecting Patient Choices Program also highlighted the existence of legislative impediments to advance health care planning using the example of NSW:

¹⁵⁸ Victorian Office of the Public Advocate, *Submission No. 70*, p. 15.

¹⁵⁹ AMA, *Submission No. 66*, p. 1.

In New South Wales, the greatest impediment for the elderly has been the need for the legislated document, which is the enduring guardianship form, to be witnessed by a lawyer or the registrar of the local court. Such people are not present in hospitals or GPs' surgeries, and so these important forms are not being completed when the time is right. It is just too much for the elderly or infirm to make a special trip to a lawyer, who charges for the service. The irony of this is that, unlike in other states where health professionals can witness these documents, lawyers in New South Wales are attesting to the fact that they believe that the patient understood the future medical directions that they have recorded. The implication is that the lawyers are in a better position to judge a patient's understanding of their health and future medical treatment decisions than the health professionals.¹⁶⁰

- 3.181 As noted above, legislative barriers regarding advance care planning and advance care directives are being examined as part of work undertaken by the states and territories under the auspices of the Australian Health Ministers' Conference as part of broader work towards a national framework for action on dementia.¹⁶¹ While the Committee is heartened to hear that these barriers have been identified as requiring action by the Commonwealth, states and territories, Alzheimer's Australia, as noted above, has attempted to have this work placed on the agenda of SCAG without success:

We have pushed quite hard in the last 18 months for health ministers to make a referral to the Standing Committee of Attorneys General, without success. ...[this] is certainly an initiative that we believe would be very positive. ...¹⁶²

- 3.182 The Committee is of the view that placing the third key priority of the National Framework on the agenda of SCAG would be desirable step in order to maintain momentum with regard to dealing with legislative barriers and to ensure that this work is coordinated with other relevant SCAG activity.

160 Dr William Silvester, Austin Health, *Transcript of Evidence*, 4 June 2007, p. 33.

161 See also Commonwealth Department of Health and Ageing, *Supplementary Submission No. 111.1*, p. 1; Ms Amanda Davies, Attorney-General's Department, *Transcript of Evidence*, 23 March 2007, p. 59; and Mr Peter Arnaudo, Attorney-General's Department, *Proof Transcript of Evidence*, 17 August 2007, pp. 45-46.

162 Mr Glenn Rees, Alzheimer's Australia, *Proof Transcript of Evidence*, 17 August 2007, p. 50.

Recommendation 26

- 3.183 **The Committee notes that the third Key Priority of the National Framework for Action on Dementia 2006-2010 proposes that the jurisdictions refer the issue of legislative barriers regarding Guardianship, advance care planning, advance care directives, wills, and powers of attorney to the Australian Government and to the State and Territory Attorneys-General Departments.**

The Committee recommends that the Australian Government place the third Key Priority of the National Framework for Action on Dementia 2006-2010 on the agenda of the Standing Committee of Attorneys-General.

- 3.184 It was also suggested to the Committee that the Government should ensure that the Access Card is able to hold information regarding Card holders' advance care directives or proxy medical decision-making arrangements:

...the Commonwealth government should ensure that if proposals for a Medicare smart card [*sic*] do proceed, provision is made for the voluntary inclusion on the card of information about the existence of an Enduring Power of Attorney for medical treatment and other information, including advance directives where applicable, about a person's wishes regarding medical treatment.¹⁶³

- 3.185 The Office of the Victorian Public Advocate also noted that those with powers of attorney in place for proxy medical decision-making '...can be encouraged to ensure that their GP and their local hospital are aware of the existence of a power and therefore of a substitute decision-maker who has knowledge of the person's wishes'.¹⁶⁴

- 3.186 The Committee is of the view that, if the Access Card is implemented – a matter on which there is a divergence of opinion – then it should have the capacity to indicate, on a voluntary basis, that a Card holder has an advance care directive or a proxy medical decision-making arrangement in place. Such a feature would ensure that those providing medical treatment to Card holders with directives or proxy arrangements would be aware of these arrangements in circumstances where the Card holder was unable, by reason of

163 Victorian Office of the Public Advocate, *Submission No. 70*, pp. 15-16.

164 Victorian Office of the Public Advocate, *Submission No. 70*, p. 15.

incapacity, to make the arrangements known or make health care decisions.

- 3.187 The Committee is also of the view that the Government should investigate ways of encouraging those with advance health care planning arrangements to inform their health care providers of their arrangements.

Recommendation 27

- 3.188 **The Committee recommends that the Australian Government investigate ways of encouraging those with advance health care planning arrangements to inform their health care providers of their arrangements.**

Guardianship and Administration

- 3.189 Whereas an attorney can make decisions in relation to the principal's financial affairs under an enduring power of attorney, a guardian generally 'makes 'lifestyle' decisions relating to health, accommodation, access to services, while an administrator makes financial and legal decisions for the represented person'.¹⁶⁵
- 3.190 Enduring guardians can be appointed by the principal while the principal has decision making capacity or by a state or territory based guardianship board or tribunal. Like powers of attorney, there is also a low level of community awareness and take up of enduring guardians.¹⁶⁶
- 3.191 The guardianship scheme in Australia is relatively new having been developed over the past twenty years with little national coordination. Table 3.2 below outlines the range of state and territory statutory authorities in place to assist those with decision making disability.

¹⁶⁵ Victorian Government, *Submission No. 121*, p. 25.

¹⁶⁶ Law and Justice Foundation of NSW, *Exhibit No. 37*, p. 320.

Table 3.2 State and territory protective authorities

<p>Australian Capital Territory</p> <ul style="list-style-type: none"> ▪ Office of the Public Advocate ▪ Guardianship and Management of Property Tribunal ▪ Public Trustee for the ACT 	<p>Western Australia</p> <ul style="list-style-type: none"> ▪ Office of the Public Advocate ▪ State Administrative Tribunal ▪ Public Trust Office
<p>New South Wales</p> <ul style="list-style-type: none"> ▪ Office of the Public Guardian ▪ Guardianship Tribunal ▪ Office of the Protective Commissioner ▪ Public Trustee NSW 	<p>South Australia</p> <ul style="list-style-type: none"> ▪ Office of the Public Advocate [Guardianship Board] ▪ Public Trustee
<p>Northern Territory</p> <ul style="list-style-type: none"> ▪ Office of Adult Guardianship ▪ Office of the Public Guardian ▪ Public Trustee - Community Services Division Department of Justice 	<p>Tasmania</p> <ul style="list-style-type: none"> ▪ Office of the Public Guardian ▪ Guardianship and Administration Board ▪ The Public Trustee
<p>Queensland</p> <ul style="list-style-type: none"> ▪ Office of the Adult Guardian ▪ Public Advocate ▪ Guardianship and Administration Tribunal ▪ Public Trustee 	<p>Victoria</p> <ul style="list-style-type: none"> ▪ Office of the Public Advocate ▪ Victorian Civil and Administrative Tribunal [Guardianship and Administration List] ▪ State Trustees Limited

3.192 Guardianship and administration processes are critical to the freedom of people with decision making disability who are vulnerable to exploitation, abuse and neglect. As the Chairperson of the AGAC stressed:

If done incorrectly, it has the potential to be a fundamental breach of human rights because you are taking away people's ability to make their own decisions in their own lives, so we always adhere to the principles of finding the course of action that is least restrictive of the person's freedom of decision and action, looking for a decision that is in their best interests, and one that reflects as far as possible their wishes. Those three principles are consistent across all states and territories, even though we have remarkably different laws between states and territories.¹⁶⁷

3.193 The main role of guardianship boards and tribunals is to conduct hearings and make guardianship and financial management orders for people with decision making disability. Guardianship boards and tribunals can also review the arrangements for existing powers of attorney and guardians and appoint a new guardian or trustee to manage the personal or financial affairs of the principal.

3.194 Section 17 of the New South Wales *Guardianship Act 1987* outlines the criteria used by the Guardianship Tribunal to appoint a guardian:

¹⁶⁷ Ms Anita Smith, AGAC, *Transcript of Evidence*, 5 June 2007, p. 2.

(1) A person shall not be appointed as the guardian of a person under guardianship unless the Tribunal is satisfied that:

- (a) the personality of the proposed guardian is generally compatible with that of the person under guardianship,
- (b) there is no undue conflict between the interests (particularly, the financial interests) of the proposed guardian and those of the person under guardianship, and
- (c) the proposed guardian is both willing and able to exercise the functions conferred or imposed by the proposed guardianship order...

- 3.195 The role of public advocates broadly includes advocating and promoting services, promoting the protection of, and acting as legal guardian, for people with a decision making disability.¹⁶⁸ The role of the Western Australian Public Advocate also includes investigating concerns raised by financial institutions about unusual transactions.¹⁶⁹
- 3.196 Trustee corporations and protective commissioners provide a range of estate and trust management services and act as an appointed trustee or financial administrator for people with disabilities.
- 3.197 The Committee heard a number of complaints in relation to the operations of guardianship boards and tribunals, trustees and protective commissions. This was particularly the case in New South Wales. These complaints are discussed below.

Legislative inconsistencies on guardianship and administration

- 3.198 As with power of attorney provisions, legislation on guardianship and administration also differs between jurisdictions.¹⁷⁰ There is no automatic recognition of guardianship and administration orders made interstate. Guardianship and administration is certainly another area for potential harmonisation across Australia:

Some jurisdictions' legislation provides for the automatic recognition of guardianship and administration orders made

168 Public Advocate of the ACT, *Submission No. 7*, p. 1; Office of the Public Advocate Victoria, *Submission No. 70*, p. 1; Office of the Public Advocate Queensland, *Submission No. 76*, p. 1.

169 Ms Michelle Scott, Office of the Public Advocate Western Australia, *Transcript of Evidence*, 30 July 2007, p. 11.

170 State and territory legislation on guardianship and administration was outlined in the section 'Legislative framework' above.

under parallel legislation in another Australian jurisdiction. Others require registration before an order will be recognised, while others require a new order to be made in the court or tribunal within that jurisdiction recognising the out-of-jurisdiction guardianship or administration order. In some jurisdictions the Victorian Public Advocate cannot be recognised as a person's guardian (for instance under Queensland legislation).¹⁷¹

- 3.199 In concert with the previous recommendations on consistency in state and territory legislative approaches to powers of attorney and advance health care planning, the Committee also considers that there should be national consistency in relation to guardianship.

Recommendation 28

- 3.200 **The Committee recommends that the Australian Government encourage the Standing Committee of Attorneys-General to work towards the implementation of nationally consistent legislation on guardianship and administration in all states and territories.**

- 3.201 The Committee also heard that guardianship and administration orders made under state legislation are not always recognised by Commonwealth instrumentalities.¹⁷² This again highlights the importance of implementing a national registration system in accordance with Recommendation 20.

The conduct of guardianship authorities

- 3.202 Many of the complaints received by the Committee in relation to the operations of guardianship boards and tribunals raised personal matters concerning on-going or former disputes involving guardianship authorities. The Committee retained some of these as confidential submissions to prevent the publication of allegations and attacks on individuals. These submissions are discussed to the extent that they may raise broader systemic issues.
- 3.203 The complaints received by the Committee concerning the operation of the New South Wales Guardianship Tribunal covered the following matters:

171 Victorian Government, *Submission No. 121*, pp. 25-26. This was also supported by the Office of the Public Advocate Victoria, *Submission No. 70*, pp. 11-12.

172 State Trustees Ltd, *Submission No. 88*, p. 12. This issue was discussed under the subsection, 'Recognition of powers of attorney by service providers' above.

- Claims that the Guardianship Tribunal failed to follow its publicly stated processes;¹⁷³
 - Lack of information provided by the Tribunal regarding avenues for appeal;¹⁷⁴
 - Lack of transparency and accountability in dealing with family members and acceptance of false information and untested allegations;¹⁷⁵
 - Lack of communication from the Tribunal;¹⁷⁶ and
 - Denial of representation at hearing and intimidation by a solicitor present at Tribunal hearing.¹⁷⁷
- 3.204 In addition, a number of witnesses to the inquiry felt that they had been intimidated, bullied or victimised by guardianship authorities.¹⁷⁸
- 3.205 In support of this evidence, the representative from the Redfern Legal Centre advised the Committee that they had received a 'large number' of complaints in relation to guardianship and administration.¹⁷⁹
- 3.206 Guardianship boards and tribunals have procedures in place for responding to complaints from its clients. Decisions of the New South Wales Guardianship Tribunal can be appealed to the Administrative Decisions Tribunal and the State Supreme Court within 28 days.
- 3.207 The President of the NSW Guardianship Tribunal informed the Committee:

173 Mr Richard Richards, *Transcript of Evidence*, 15 May 2007, p. 19; Mrs Patricia Witts, *Transcript of Evidence*, 15 May 2007, p. 27; Mr Michael Vescio, *Transcript of Evidence*, 14 May 2007, p. 70 and *Transcript of Evidence*, 15 May 2007, p. 40; Mr Jack Georginis, *Transcript of Evidence*, 14 May 2007, p. 32.

174 Mr Michael Vescio, *Transcript of Evidence*, 14 May 2007, p. 70; Mr Jack Georginis, *Transcript of Evidence*, 14 May 2007, p. 33; Mr Richard Richards, *Transcript of Evidence*, 15 May 2007, p. 22.

175 Mr Michael Vescio, *Transcript of Evidence*, 15 May 2007, p. 40; Mrs Patricia Witts, *Transcript of Evidence*, 15 May 2007, p. 27; Mr Richard Richards, *Transcript of Evidence*, 15 May 2007, p. 19.

176 Mr Richard Richards, *Transcript of Evidence*, 15 May 2007, p. 19; Mr Jack Georginis, *Transcript of Evidence*, 14 May 2007, p. 33; Mrs Elizabeth Edmiston, *Transcript of Evidence*, 15 May 2007, p. 38.

177 Mrs Irene Kaposi, *Transcript of Evidence*, 15 May 2007, pp. 37-38.

178 Name withheld, *Submission No. 104*, p. 5; Name withheld, *Submission No. 83.1*, p. 1, Mrs Maureen Cahill, *Transcript of Evidence*, 14 May 2007, p. 73. A number of similar submissions were also received as confidential evidence to the inquiry.

179 Ms Helen Campbell, Redfern Legal Centre, *Transcript of Evidence*, 14 May 2007, p. 27.

In the last financial year, we had 13 appeals to the Administrative Decisions Tribunal – three of which were upheld. We had four appeals to the Supreme Court – none of which were upheld. That has to be seen in the context that last financial year we dealt with 5,428 new matters and a total of over 8,000 cases. There were only 13 appeals to the ADT and four to the Supreme Court. As well as that appeal process, we have a complaints process. If a person writes in and complains about some aspect of the tribunal's procedures, we will deal with that by investigating it internally and responding to the person. I think that in the last financial year we had 102 complaints of that nature in total.¹⁸⁰

- 3.208 The Committee notes that appeals of tribunal decisions involve greater legal formality and cost, particularly when the appeal is to the Supreme Court.¹⁸¹ It was also clear to the Committee that some people were not aware of their right to complain about the operation of the Tribunal or appeal its decisions.
- 3.209 On 16 July 2007, the Committee referred a number of the cases it heard (on the public record) to the president of the New South Wales Guardianship Tribunal. At the time of finalising this report, the Committee was yet to receive a response to that letter.

Legal representation at hearings

- 3.210 Hearings of guardianship boards and tribunals are conducted in an 'inquisitorial' rather than adversarial style with minimal formal rules in order to encourage the participation of people with disabilities.¹⁸² Tribunal staff assess applications and gather background information on cases, and may attempt to resolve issues prior to a hearing.
- 3.211 While those who are the subject of applications before tribunals are able to have legal representation, it is normally the case that older people have no legal representation at hearings.
- 3.212 As noted by the AGAC, it is important that people with decision making disability engage legal representation at tribunal hearings:

180 Ms Diane Robinson, Guardianship Tribunal New South Wales, *Transcript of Evidence*, 15 May 2007, p. 4.

181 Law and Justice Foundation of NSW, *Exhibit No. 37*, p. 322.

182 AGAC, *Submission No. 73*, p. 4.

Elderly people with dementia are rarely legally represented in guardianship and administration proceedings, despite the fact that making an order may result in significant changes in their accommodation, financial wellbeing and independence. Although, all Board and Tribunals aim to make proceedings accessible and informal to enhance an unrepresented person's participation, this is not an alternative to having access to independent legal advice and representation.¹⁸³

- 3.213 The need for older people to have legal representation may go undetected and self-representation can be very onerous for that group.¹⁸⁴ The AGAC recommended an investigation into the provision of legal aid for older people appearing before guardianship tribunals.¹⁸⁵
- 3.214 The Committee notes that in New South Wales the subject of an application to the Guardianship Tribunal is entitled to representation by a Legal Aid Solicitor. This service is available without the application of the usual means and merits tests.¹⁸⁶ In Victoria, the Public Advocate provides an officer to assist people with disabilities at the Guardianship Tribunal.¹⁸⁷
- 3.215 In keeping with the informal nature of guardianship proceedings, people involved with guardianship disputes are generally not able to access legal representation unless they are the subject of the application. The President of the New South Wales Guardianship Tribunal advised that:
- If a person who is the subject of the application seeks that leave, we would almost automatically grant that, because they are the person whose rights are most at stake in the matter. We are less likely to grant leave for, say, warring siblings to create a very adversarial process around an issue for an elderly person.¹⁸⁸
- 3.216 The Committee heard concerns that people who are not the subject of an application, but are involved in disputes before tribunals, may be unfairly disadvantaged by not having access to legal representation
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183 AGAC, *Submission No. 73*, p. 4.

184 Law and Justice Foundation of NSW, *Exhibit No. 37*, p. 330.

185 AGAC, *Submission No. 73*, p. 4.

186 Guardianship Tribunal New South Wales, *Submission No. 75*, p. 2.

187 Law and Justice Foundation of NSW, *Exhibit No. 37*, p. 331.

188 Ms Diane Robinson, Guardianship Tribunal New South Wales, *Transcript of Evidence*, 15 May 2007, p. 7.

before guardianship tribunals and that they should also be eligible for legal aid.¹⁸⁹ One witness told the Committee that:

...anybody can front up to the Guardianship Tribunal and make any allegation they wish, and then the Guardianship Tribunal basically rolls on that and makes orders as it sees fit, not in the way it should discern according to law. That is a basic problem that we have... we have no transparency and no accountability in these processes, and this is the main reason we have so much difficulty with this.¹⁹⁰

- 3.217 On balance, the Committee considers that the interests of older people appearing before guardianship boards and tribunals may indeed be better served with improved access to legal representation. The Committee agrees with the President of the New South Wales Guardianship Tribunal that it is not appropriate for other participants in tribunal proceedings to also have legal representation.
- 3.218 There are a number of issues to be addressed when considering a possible increase in access to legal representation for older people at guardianship hearings, such as how a person without capacity could instruct a lawyer, and how legal representation could undermine the informal nature of guardianship hearings.
- 3.219 The Committee believes that improving the access to legal representation for older people appearing before guardianship boards and tribunals should be considered further.

Recommendation 29

- 3.220 **The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General conduct a review into the legal needs of older people appearing before guardianship boards and tribunals and consider options for improving their access to legal representation at hearings.**

189 Mr Frank Graf, *Transcript of Evidence*, 4 June 2007, p. 44.

190 Mr Michael Vescio, *Transcript of Evidence*, 15 May 2007, p. 40.

Alternative dispute resolution mechanisms?

- 3.221 The Committee noted that there was some interest in exploring the value of other forms of family mediation prior to having disputes heard before a guardianship tribunal.¹⁹¹
- 3.222 A representative from the Federation of Community Legal Centres Victoria Inc. told the Committee:
- We need a mediation forum that an older person can attend with the family members and have an advocate who is acting for them, not taking over from them. If you appoint a guardian or an administrator, they actually stand in that person's shoes. I would advocate somebody who stands beside the person and empowers them to have their say without any repercussions in the family because it is mediated and a solution is sought.¹⁹²
- 3.223 Carers Australia operate a type of community based mediation service for carers through the National Carer Counselling Program.¹⁹³ That program focuses on enhancing the resilience of carers through the promotion of practical problem solving techniques and other measures.¹⁹⁴
- 3.224 The Committee considers that community based family mediation services can in some cases, provide a valuable alternative to taking disputes to guardianship boards and tribunals. Governments should continue to support these services.

Trustee corporations and Protective commissioners

- 3.225 Trustee corporations comprise the state and territory public trustees and private trustees such as Elders Trustees Ltd, Equity Trustees Ltd, National Australia Trustees Ltd and State Trustees Ltd, a Victorian Government Business Enterprise.¹⁹⁵

191 Mr Anthony Fitzgerald, State Trustees Ltd, *Transcript of Evidence*, 4 June 2007, p. 76; Mr Brian Herd, *Transcript of Evidence*, 16 July 2007, p. 10.

192 Ms Jeni Lee, Federation of Community Legal Centres Victoria Inc, *Transcript of Evidence*, 4 June 2007, p. 65.

193 Mrs Joan Hughes, Carers Australia, *Transcript of Evidence*, 22 May 2007, p. 7.

194 Carers New South Wales, 'National Carer Counselling Program', <http://www.carersnsw.asn.au/Default.html?/infosupport/nccp.htm> (accessed 15 September 2007).

195 Trustee Corporations Association of Australia, *Submission No. 68*, attachment p. 1; State Trustees Ltd, *Submission No. 88*, p. 5.

- 3.226 The Committee heard that trustee corporations provide wealth management services to over 5,000 individual, family and corporate clients. The services provided by trustee corporations include:
- estate planning
 - administering deceased estates
 - acting as trustee of personal trusts
 - administering client assets under Powers of Attorney
 - acting as financial manager for people unable to look after their own affairs
 - administering charitable trusts and foundations
 - acting as trustee or administrator for superannuation funds
 - acting as corporate trustee / custodian for managed funds
 - debenture and note issues, and securitisation programs.¹⁹⁶
- 3.227 The New South Wales Protective Commissioner provides financial management services to people with decision-making disabilities. People may be appointed to the Protective Commissioner by the Supreme Court, the Guardianship Tribunal or the Mental Health Review Tribunal.¹⁹⁷
- 3.228 The value of assets managed by trustee corporations is estimated at \$2 billion. Public trustees charge administration fees based on a percentage of the value of what they manage.¹⁹⁸
- 3.229 A number of concerns about the administration of funds by public trustees and the NSW Office of the Protective Commissioner were raised during the inquiry.¹⁹⁹ One submission noted:
- The Guardianship Tribunal makes decisions based on its own internal interests and that is to seize as many individuals and their asset base in order that they may be a viable agency and to create other beauracratc [*sic*] bodies such as the OPC and

196 Trustee Corporations Association of Australia, *Submission No. 68*, p. 1.

197 Ms Diane Robinson, Guardianship Tribunal New South Wales, *Transcript of Evidence*, 15 May 2007, p. 11.

198 Ms Ruth Pollard, Public Trustee New South Wales, *Transcript of Evidence*, 14 May 2007, p. 43. By contrast, for example, the NSW Guardianship Tribunal and the Public Guardian do not charge their clients. See Ms Diane Robinson, Guardianship Tribunal New South Wales, *Transcript of Evidence*, 15 May 2007, p. 11.

199 Mr John Mayger, *Transcript of Evidence*, 14 May 2007, p. 51; Mrs Patricia Witts, *Transcript of Evidence*, 15 May 2007, p. 27; Mr Frank Graf, *Transcript of Evidence*, 4 June 2007, p. 44.

OPG which are entirely funded by seized asset base contributions.²⁰⁰

- 3.230 The Committee was told that in 1995, the Department of Social Security (now Centrelink) audited Aged and Disability Pension payments to various public trustees. That audit found that 100 per cent of the sample population were incorrectly paid their pension entitlement because trustees were not accurately reporting the exact assets and income of clients as well as any changes to a their financial situation.²⁰¹
- 3.231 It was claimed that trustees arranged their administrative practices in ways to maximise their own revenue at the expense of the comfort of their clients:
- Centrelink mandates for people in nursing homes to receive 15 per cent of the pension as a comfort fund so that they can send cards, have their hair done, have their nails done and that sort of thing. Yet the public trust offices, especially the New South Wales OPC, establish savings accounts for people on age pensions when they are going to die with these age pensions. All their healthcare costs are covered yet they accumulate these savings funds from the pension, which is not designed to be excessive, so that you can save from it; it is designed to be consumed. They are not even given a comfort fund to maintain a small level of dignity in a nursing home...²⁰²
- 3.232 The Committee was also told that Centrelink and the Office of the Protective Commissioner had not taken action as a result of the audit.²⁰³
- 3.233 On 30 May 2007 the Committee wrote to the New South Wales Office of the Public Guardian and Protective Commissioner to invite a submission to the inquiry and a response to some to the criticisms directed at those organisations. At the time of finalising this report, the Committee was yet to receive a response to that letter.
- 3.234 The Committee notes that the New South Wales Legislative Assembly Public Bodies Review Committee conducted an inquiry into the Office of the Protective Commissioner and the Office of the Public Guardian

200 Mr Frank Graf, *Submission 53.1*, p. 1.

201 Mr John Mayger, *Submission No. 62*, p. 1.

202 Mr John Mayger, *Transcript of Evidence*, 14 May 2007, p. 51.

203 Mr John Mayger, *Transcript of Evidence*, 14 May 2007, pp. 51-52.

in 2001. That Committee uncovered similar issues to those that were raised in the course of this inquiry.²⁰⁴

- 3.235 The Legislative Assembly Committee report led to a review of the funding and fees of the Office of the Protective Commissioner by the Independent Pricing and Regulatory Tribunal. The findings of that review were implemented in 2004.²⁰⁵
- 3.236 The evidence on the practices of the trustees and the Protective Commissioner is limited and may not, in the final analysis, be conclusive. The Committee nonetheless considers that issue of the use of funds by trustee organisations on behalf of their clients should be included in the next review of the New South Wales Office of the Protective Commissioner and in relevant audits of Centrelink payments.

View of the Committee

- 3.237 It is difficult to assess the merits of evidence in relation to claims about the operation of guardianship authorities because inevitably there are at least two sides to the story. While the Committee has heard a number of stories, it cannot investigate individual cases.
- 3.238 The perspectives of organisations that assist people with guardianship disputes are particularly interesting. The Redfern Legal Centre observed that:

There are circumstances where some of our casework would indicate that better decisions could be made, particularly where the person comes to us and clearly, in our view, has a cause of action, either in challenging a liability for a debt or seeking compensation for a wrong, but that person lacks the capacity to legally instruct us to commence proceedings, it is up to the Guardianship Board to do that for them and they will not do that because they do not see that as being a priority. So it is a way of saying, 'Your rights really do not matter to us.' From our point of view, that is unfortunate. Certainly they could take a more rights based approach to

204 Legislative Assembly Public Bodies Review Committee, *Personal Effects: A Review of the Offices of the Public Guardian and Protective Commissioner: Report of the Public Bodies Review Committee*, Parliament of New South Wales, Sydney, 2001, p. 19.

205 Office of the Protective Commissioner, *Annual Report 2003-04*, p. 7.

looking at the entitlements of some of those people they are caring for.²⁰⁶

3.239 A director from the Benevolent Society, which provides a number of services for older people, advised the Committee that in NSW:

...the Guardianship Tribunal, Office of the Public Guardian and Office of the Protective Commission all have fairly detailed complaints procedures... Some of the problems with which they deal are very difficult, almost intractable, but I have not seen any evidence in all my working with a wide group of older people's groups that there are systemic problems.²⁰⁷

3.240 Mr Brian Herd, an experienced elder law specialist, advised the Committee that he had not seen a situation 'where a state government entity has not acted with integrity'.²⁰⁸ He went on to explain that:

The difficulty with institutions is that if they become part of the older person's decision-making process – which in many cases they do, such as, for example, with the public trustee organisations – the older person becomes part of the bureaucracy. And bureaucratic decision making, with all due respect, can be a leviathan, slow process.²⁰⁹

3.241 The Caxton Legal Centre reported that the operational procedures of guardianship authorities in Queensland appear to have improved over the past 18 months.²¹⁰

3.242 It will often be the case that a lack of satisfaction with guardianship processes is due to an unfavourable result.²¹¹ Guardianship processes are commenced in situations where people are at risk of exploitation, abuse or neglect. It is a sad but true fact that dysfunctional families with entrenched conflict are often involved in disputes before boards and tribunals.²¹² It is natural that those involved in guardianship processes will have high expectations, and it is inevitable that there will be dissatisfaction when these expectations are not met.

206 Ms Helen Campbell, Redfern Legal Centre, *Transcript of Evidence*, 14 May 2007, p. 28.

207 Mrs Barbara Squires, The Benevolent Society, *Transcript of Evidence*, 14 May 2007, p. 27.

208 Mr Brian Herd, *Transcript of Evidence*, 16 July 2007, p. 11.

209 Mr Brian Herd, *Transcript of Evidence*, 16 July 2007, p. 11.

210 Mr Scott McDougall, Caxton Legal Centre, *Transcript of Evidence*, 16 July 2007, p. 21.

211 Ms Anita Smith, AGAC, *Transcript of Evidence*, 5 June 2007, p. 3.

212 Mr John Harley, Office of the Public Advocate South Australia, *Transcript of Evidence*, 31 July 2007, p. 4.

- 3.243 Regrettably, some mistakes may have been made. No systems are perfect and there is always room for improvement. Guardianship authorities should be receptive to criticisms and seek to continually improve their practices. The Committee is heartened to note that the Queensland Law Reform Commission is currently undertaking a review of the Queensland *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*.²¹³
- 3.244 In addition to the role of pre-tribunal community based mediation mechanisms, another part of the solution is to invest in community awareness and public information campaigns across a range of areas including the value of advance planning, where to access legal advice, and how protective authorities operate. The Chair of the NSW MACA put it this way:
- The major thing is that people should be doing the planning themselves, thinking the questions through for themselves and making up their own minds as to what they might or might not want later in life [concerning] questions of medical treatment ... the disposition of property and their accommodation arrangements later in life such as if there are care requirements who should give that care, how should it be given and so on.²¹⁴
- 3.245 Knowledge of who to approach in situations where a person has lost capacity can certainly reduce the amount of stress involved. The Loddon Campaspe Community Legal Centre provided the Committee with a case study of how, when approached for assistance, they were able to facilitate the appointment of a substitute decision maker. This case study is outlined in Figure 3.4 below.

213 The final report is expected by the end of 2008 and may be accompanied by draft legislation based on the recommendations of the Commission.

214 Mrs Felicity Barr, NSW MACA, *Transcript of Evidence*, 15 May 2007, p. 51.

Figure 3.4 Appointment of guardian case study

LCCLC was contacted by a woman who had travelled from northern New South Wales to care for her elderly mother who had suffered multiple strokes. Unfortunately the mother had not executed a Power of Attorney or Enduring Power of Attorney document, and the daughter was unclear about what her role should be. A solicitor from LCCLC visited the elderly woman in her home to discuss her options. It was immediately evident that the woman was unable to communicate clearly, notwithstanding the fact that she may have been able to understand the advice provided. LCCLC wrote the elderly woman recommending she attend her General Practitioner to obtain a referral to a Geriatrician to assess either her capacity or ability to communicate with the assistance of aides. It was determined that the woman's capacity was doubtful, and on that basis, LCCLC provided advice to the daughter regarding the process for the appointment of a Guardian and Financial Administrator through the VCAT.²¹⁵

- 3.246 In sum, evidence to the inquiry highlighted the need to break down the 'siloed' state and territory based approaches to substitute decision making and move forward with nationally consistent legislation. It also highlighted the importance of legal awareness and access to legal services for older people. These issues are addressed in Chapter five.

215 Loddon Campaspe Community Legal Centre, *Submission No. 57*, p. 17.

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 VIIIAA 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.**

Barriers to older Australians accessing legal services

Introduction

- 5.1 Older Australians require access to legal services for a variety of reasons, including wills and powers of attorney, property and accommodation issues, family law matters involving grandchildren, health services, consumer and financial issues, and as victims of elder abuse.¹ However, for many older people, their access to legal services is constrained by factors that are largely beyond their control.
- 5.2 The Committee found that the existing legal system is not well equipped to meet the legal needs of older people, who often have complex needs but require low cost solutions that are targeted and delivered in a specific way. Initiatives to address these needs are often constrained by funding and the difficulty of obtaining suitably qualified people.
- 5.3 This chapter discusses the barriers encountered by older Australians in accessing legal services. It also looks at the options that are available to older people to obtain legal assistance and examines how these might be expanded or improved.

¹ Loddon Campaspe Community Legal Centre, *Submission No. 57*, p. 13; Victoria Legal Aid, *Submission No. 101*, p. 5.

- 5.4 The Committee recognises that while a number of the barriers identified in this chapter are specific to older people, others are also relevant to a broader cross section of Australian society.

Legal needs of older people

- 5.5 Older people are not a homogeneous community.² However, previous studies and experiences have identified that, in broad terms, older people have specific needs in relation to the delivery of legal services and that they generally access information and services in a particular way.³ Loddon Campaspe Community Legal Centre characterised older people as requiring legal services that are:

- Face to face;
- Based in the local community;
- Multi-disciplinary;
- In the best interests of the older person; and
- The least restrictive in approach.⁴

- 5.6 In addition, the Law and Justice Foundation of New South Wales highlighted that older people require:

...legal practitioners who provide explanations in simple terms, are friendly, courteous, inexpensive, expert in dealing with older people and do not require the older person to exercise a lot of 'self-help'.⁵

- 5.7 The Committee also heard that older people generally rely upon informal sources of information and established contacts.⁶ This includes service providers and families, or other intermediaries:⁷

...'Will older people come?' No, they do not readily make use of legal services. They like to reveal an issue to their family

2 Federation of Community Legal Centres (Vic) Inc, *Submission No. 41*, p. 13.

3 Federation of Community Legal Centres (Vic) Inc, *Submission No. 41*, p. 10.

4 Loddon Campaspe Community Legal Centre, *Submission No. 57*, pp. 13-14.

5 Law and Justice Foundation of New South Wales, *Submission No. 102*, p. 4.

6 Federation of Community Legal Centres (Vic) Inc, *Submission No. 41*, p. 10; Victorian Government, *Submission No. 121*, p. 33.

7 Assets and Ageing Research Team, University of Queensland, *Submission No. 26*, p. 7; Victorian Government, *Submission No. 121*, p. 33.

first, perhaps, and then perhaps to their physio, their local doctor or their podiatrist, and then they come through to the legal service.⁸

- 5.8 Other participants commented that outreach models of delivery are well suited to the legal needs of older people, particularly where these services are provided in places where older people already congregate and have a level of comfort and trust.⁹

Barriers to access

- 5.9 The Committee heard of numerous barriers to older people accessing legal services.¹⁰ These barriers reflect a complex array of issues that affect older people, including not only the nature of the legal system itself but also a range of personal factors, such as health, mobility, capacity and social networks.

- 5.10 Many older people have a number of issues that require resolution. For example, Caxton Legal Centre told the Committee that:

...many of our older clients' legal problems tend to be multi-layered in nature and often involve a mixture of questions relating to estate planning, social security entitlement, capacity concerns and substituted decision making, undue influence, other forms of abuse and exploitation, family law, property issues and systems abuses.¹¹

- 5.11 Accordingly, this mix of issues also means that a range of laws apply. The Aged Care Crisis Team commented that:

Federal and State laws abound and cover almost every facet of life, from: accommodation, living arrangements, estate

8 Ms Jeni Lee, Federation of Community Legal Centres (Vic) Inc, *Transcript of Evidence*, 4 June 2007, p. 63.

9 Federation of Community Legal Centres (Vic) Inc, *Submission No. 41*, p. 10; Loddon Campaspe Community Legal Centre, *Submission No. 57*, p. 4.

10 See, for example, Assets and Ageing Research Team, University of Queensland, *Submission No. 26*, p. 7; Federation of Community Legal Centres (Vic) Inc, *Submission No. 41*, p. 8; Ms Margaret Jones, *Submission No. 47*, pp. 1-2; Alzheimer's Australia, *Submission No. 55*, pp. 24-29; Loddon Campaspe Community Legal Centre, *Submission No. 57*, pp. 4, 11; Law Institute of Victoria, *Submission No. 78*, p. 6.

11 Caxton Legal Centre Inc, *Submission No. 112*, p. 6.

planning and management, financial affairs, medical treatment, and these are only a few such areas.¹²

- 5.12 The complexity of issues results in many people needing to establish a relationship of trust with their legal practitioner before they are willing to proceed with a matter.¹³ However, the Queensland Government observed that 'general legal services often lack the capacity to spend the time required in order to build rapport and appropriately respond...'¹⁴
- 5.13 Further, legal practitioners do not always have an interest or sufficient expertise in the many legal issues affecting older people.¹⁵ Participants in the inquiry pointed to elder law as an emerging area of law within Australia.¹⁶ Accordingly, 'lawyers generally are not fully conversant with substitute decision making legislation/instruments and Centrelink requirements and other areas affecting older people'.¹⁷
- 5.14 The Committee is concerned that insufficient expertise in the issues affecting older people is a significant impediment to their access to appropriate legal services. The Committee notes that there is growing interest amongst legal practitioners in elder law,¹⁸ and that many state and territory law societies already have elder law committees.¹⁹ The Committee considers, however, that there is a role for law societies to further encourage expertise in elder law among legal practitioners.

12 Aged Care Crisis Team, *Submission No. 86*, p. 8.

13 Queensland Government, *Submission No. 96*, p. 1.

14 Queensland Government, *Submission No. 96*, p. 1.

15 Law Institute of Victoria, *Submission No. 78*, p. 6.

16 Elder Abuse Prevention Unit (EAPU), *Submission No. 97*, p. 3; Ms Susan Field, University of Western Sydney, *Proof Transcript of Evidence*, 17 August 2007, p. 17; Ministerial Advisory Council on Ageing, *Submission No. 103*, p. 5.

17 EAPU, *Submission No. 97*, p. 3.

18 Mr Bill O'Shea, Law Institute of Victoria, *Transcript of Evidence*, 4 June 2007, p. 1; Public Trustee NSW, *Submission No. 78*, p. 5; Ms Susan Field, University of Western Sydney, *Proof Transcript of Evidence*, 17 August 2007, p. 18.

19 Law Institute of Victoria, *Submission No. 78*, p. 1; Mr Rodney Lewis, *Submission No. 152*, p. 1; Mr Brian Herd, Carne Reidy Herd Lawyers, *Transcript of Evidence*, 16 July 2007, p. 2; Ms Margaret Kelly, Law Society of South Australia, *Transcript of Evidence*, 31 July 2007, p. 10; ACT Law Society website, 'Committees', <http://www.lawsocact.asn.au/content/committees/committees.asp> (accessed 18 September 2007).

Recommendation 35

5.15 **The Committee recommends that the state and territory Law Societies continue to develop and foster expertise in elder law, including encouraging elder law as a practice speciality.**

5.16 The Committee notes that it is areas in which older people would greatly benefit from legal advice where they often encounter difficulties. For example, as is discussed in Chapter 7, retirement village contracts were raised by a number of participants as an area requiring considerable time commitments and resources due to the complexity of the contracts. Significant costs are therefore involved in obtaining legal advice. Ms Andrea Simmons of the ACT Disability, Aged and Carer Advocacy Service commented in relation to retirement village contracts:

What we find is that some of the contracts that people sign to go into residential aged care and the contracts that they get involved in in retirement villages are so extraordinarily complex that no ordinary person should be engaging in those without actually getting quite a lot of good advice.²⁰

5.17 Another barrier to obtaining legal services is the reluctance on the part of the legal profession to take on cases with limited prospects of success. For example, the Committee heard of the difficulty in prosecuting fraud and theft offences against older people. The Queensland Public Advocate told the Committee that it had received anecdotal evidence that 'the police are unwilling to even investigate allegations of fraud under the amount of \$500,000'.²¹ The Elder Abuse Prevention Unit (EAPU) informed the Committee that callers to its helpline often report that police cannot bring a charge against a person because of a lack of evidence and that 'there also appears to be a lack of will by some police to follow through with gathering evidence or even to take complaints where older people are the victims of crime'.²²

5.18 Similarly, the ACT Government commented that prosecution difficulties often arise when older people are the victims of crime, such as elder abuse, because they 'are vulnerable and often regarded

20 Ms Andrea Simmons, ACT Disability, Aged and Carer Advocacy Service Inc, *Proof Transcript of Evidence*, 17 August 2007, p. 29.

21 Office of the Public Advocate, Queensland, *Submission No. 76*, p. 4.

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

by the legal system as unreliable, and potential disabilities of cognition make them problematic witnesses'.²³ The Law Institute of Victoria also highlighted the evidentiary difficulties surrounding questions of legal capacity and the resultant impact on older people accessing justice.²⁴ The Committee further heard that in some circumstances many police do not know if they can actually respond to a particular issue.²⁵

- 5.19 Many people are prohibited or discouraged from taking legal action where they require an expeditious solution because existing legal systems are limited in their capacity to provide swift and effective legal remedies, quick and effective decision making or dispensation of justice in times of dispute.²⁶ The Aged Care Crisis Team told the Committee in relation to aged care that:

If the health and well being of the resident is being compromised, speedy action is needed to prevent further deterioration (or death). At present, the avenues of redress are limited and the courts and tribunals are ill-equipped to deal quickly and cheaply with such an issue.²⁷

- 5.20 For many people, private legal advice is beyond their means, principally due to cost:

You must realise that all of us at this age are on the age pension, an income of something like \$37 each day. We certainly cannot afford a private solicitor so we are dependent upon the free services of the community legal centres and the others that are available.²⁸

- 5.21 The Law Society of Western Australia expressed the view that cost is the greatest barrier to accessing legal services.²⁹ While many older Australians 'could not even contemplate obtaining private legal advice', the Law Society points out that because of limitations upon legal aid many have 'no source of advice available to them'.³⁰

23 ACT Government, *Submission No. 108*, p. 7.

24 Law Institute of Victoria, *Submission No. 78*, p. 6.

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

26 Aged Care Crisis Team, *Submission No. 86*, p. 8.

27 Aged Care Crisis Team, *Submission No. 86*, p. 8.

28 Ms Margaret Jones, *Transcript of Evidence*, 14 May 2007, p. 21.

29 Law Society of Western Australia, *Submission No. 50*, p. 4.

30 Law Society of Western Australia, *Submission No. 50*, p. 4.

- 5.22 The Committee considers that there may be merit in establishing a one off payment or annual rebate to older Australians to assist them to overcome the financial limitations on obtaining legal advice. This might encourage older people to obtain assistance in establishing an enduring power of attorney or advance care directive, or to seek advice about other issues affecting them.
- 5.23 During the hearings, Ms Rosalind Williams of Caxton Legal Centre highlighted some of the issues that people need to consider when establishing an enduring power of attorney, such as the trigger for when the document should begin to operate, upon which older people would benefit from obtaining legal advice.³¹

Recommendation 36

- 5.24 **The Committee recommends that the Australian Government examine a rebate scheme for legal fees for older Australians to improve access to legal services.**
- 5.25 The Assets and Ageing Research Team at the University of Queensland submitted that legal practitioners also encounter difficulties because of the length of time taken to explain matters to older people and the limited ability of such people to pay.³² Many older people are unable to ‘exercise a lot of self help’ and therefore have a high level of reliance upon practitioners to anticipate their needs.³³ This can also contribute to reluctance on the part of legal practitioners to take on matters.
- 5.26 Potential conflicts of interest can also arise where legal practitioners are arranged by family members. This situation can be exacerbated in more remote locations, where there may be only one solicitor.³⁴
- 5.27 The Committee heard that for many people a lack of awareness as to where to obtain legal information or difficulties in accessing this information is their main barrier. For example, technology can present a significant barrier:

We are talking about people of 70 or 80: we do not have computers; we do not know how to make them go. We often

31 Ms Rosalind Williams, Caxton Legal Centre Inc, *Transcript of Evidence*, 16 July 2007, p. 20.

32 Assets and Ageing Research Team, University of Queensland, *Submission No. 26*, p. 7.

33 Council on the Ageing South Australia, *Submission No. 77*, p. 4.

34 Assets and Ageing Research Team, University of Queensland, *Submission No. 26*, p. 7.

try to telephone, and then there is this choice, this menu: 1, up to 10 – and you’ve lost it!³⁵

- 5.28 Alzheimer’s Australia argued that in most states and territories ‘there is no obvious place for older people to go to access the information and the support they want to attend to their affairs...’³⁶
- 5.29 Similarly, information may not be appropriately communicated. The National Seniors Association observed that many culturally and linguistically diverse people can encounter difficulties not only in obtaining translated information but also in accessing interpreter services.³⁷

Social and cultural barriers

- 5.30 In addition to the barriers already identified, the Committee received evidence as to a range of social and cultural issues that are particularly relevant to the current generation of over 65s. Many participants commented that older people generally are unaware that they may have a legal problem or the right to complain or seek redress in certain situations. Ms Susan Field of the University of Western Sydney observed that:

I think one risk factor for older people is a general lack of information – I hesitate to use the word ‘ignorance’, but a lack of information – in respect of their rights.³⁸

- 5.31 Caxton Legal Centre also commented that:

It is apparent that, due to the numerous barriers that older people are confronted with, many do not even seek to raise or identify, their legal problems, let alone attempt to obtain legal advice about their rights and options for remedying the situation... Similarly, we have learnt that older people do not usually self identify that they have legal rights or a legal problem...³⁹

- 5.32 Mr Robert Harvie, a 72 year old resident of a retirement village, expressed the view that many older people:

35 Ms Margaret Jones, *Transcript of Evidence*, 14 May 2007, p. 23.

36 Alzheimer’s Australia, *Submission No. 55*, p. 27.

37 National Seniors Association, *Submission No. 67*, p. 12.

38 Ms Susan Field, University of Western Sydney, *Proof Transcript of Evidence*, 17 August 2007, p. 19.

39 Caxton Legal Centre Inc, *Submission No. 112*, p. 7.

...have no idea as to what the law is about, let alone how it pertains to them and what the language used by the legal profession is about.⁴⁰

- 5.33 The Committee heard that because many older people do not conceptualise an issue as a legal one, they do not see the need for legal advice.⁴¹ This can result in older people placing themselves in vulnerable situations from which, when an adverse event consequently occurs, they are unable to obtain a legal remedy. For example, as discussed in Chapter 4, many older people frequently encounter difficulties in this respect with family agreements that are not documented. Older people often do not envisage that such agreements could be financially disastrous if the arrangements fail or that that they could be left vulnerable, with few assets to pay for care needs.⁴² For many in this situation, an additional barrier is then a lack of confidence in enforcing their rights:

It is all very well to increase access to legal services ... but at the same time there needs to be some assistance for the older person to make the psychological commitment to get to that service.⁴³

- 5.34 The Committee heard that many older people are reluctant to take legal action and to complain about issues affecting them.⁴⁴ The National Seniors Association told the Committee that:

...for older people to have access to legal services, they need to have a level of confidence and empowerment to do so, and this is often hampered by fear of exploitation, retribution, unwillingness to disclose personal information, complex family dynamics, and a wide range of attitudes towards the idea of substitute decision making.⁴⁵

- 5.35 This is often compounded where the issue involves a family member. For example, the Alliance for the Prevention of Elder Abuse: Western Australia highlighted that:

...older people are reluctant to press charges because of family ties and the responsibility they feel for the

40 Mr Robert Harvie, *Transcript of Evidence*, 15 May 2007, p. 43.

41 Assets and Ageing Research Team, University of Queensland, *Submission No. 26*, p. 7.

42 Assets and Ageing Research Team, University of Queensland, *Submission No. 26*, p. 7.

43 Miss Claudia Ferrante, EAPU, *Transcript of Evidence*, 16 July 2007, p. 53.

44 Law Institute of Victoria, *Submission No. 78*, p. 6.

45 National Seniors Association, *Submission No. 67*, p. 12.

perpetrator's welfare. They do not want to get their relative 'in trouble' or thrown in jail, and want to maintain a personal relationship with the perpetrator, or to be able to have contact with their grandchildren.⁴⁶

- 5.36 There is also a widespread fear of reprisals or retribution,⁴⁷ which in many cases is unlikely to occur.⁴⁸
- 5.37 The Committee also heard that in some cases an older person perceives that the law is disempowering and cannot solve their problems.⁴⁹ Further, a person may feel that the legal system will be unable to address their principal problem. For example, an injury to an older person can affect their quality of life in a way from which they may never recover.⁵⁰ Accordingly, as a legal remedy is not going to give them back their physical ability or lifestyle, they are often reluctant to take legal action.

Personal barriers

- 5.38 Many barriers are distinctly personal: declining health and mobility, disability, ethnicity, language, gender and social isolation.⁵¹
- 5.39 An older person may lack the physical or mental capacity to pursue legal services through physical disability, dementia or other reduced cognitive ability.⁵² They may not be able to travel to services:⁵³

For many, the problem may be as simple as having an impairment or disability that makes it virtually impossible to seek out and travel to the offices of a legal provider.⁵⁴

...my elderly mother's health made it impossible for her to address her situation via legal channels and I don't believe many elderly people could cope with the added burden of

46 Alliance for the Prevention of Elder Abuse: Western Australia, *Submission No. 114*, p. 6.

47 Law Institute of Victoria, *Submission No. 78*, p. 7; Aged Care Crisis Team, *Submission No. 86*, p. 1; Ms Helen Campbell, Redfern Legal Centre, *Transcript of Evidence*, 14 May 2007, p. 25.

48 Ms Helen Campbell, Redfern Legal Centre, *Transcript of Evidence*, 14 May 2007, p. 26.

49 Law Institute of Victoria, *Submission No. 78*, p. 6.

50 Aged Care Crisis Team, *Submission No. 85*, p. 9.

51 National Legal Aid, *Submission No. 99*, pp. 2, 7.

52 Law Institute of Victoria, *Submission No. 78*, p. 6.

53 Aged Care Crisis Team, *Submission No. 86*, p. 7.

54 Aged Care Crisis Team, *Submission No. 86*, p. 7.

finding an appropriate lawyer to instruct, let alone cope in the court system.⁵⁵

5.40 Similarly, many people in aged care facilities or without a strong support network:

...are virtually prisoners of their infirmity and may not have an emotional or cognitive awareness that would motivate them to take action to protect their legal rights or interests.⁵⁶

5.41 Caxton Legal Centre commented that ill health can also present additional barriers, such as the inability to sit for lengthy periods during interviews or capacity issues where a client may be taking strong pain medications, which can lengthen and complicate the process.⁵⁷

5.42 Frequently an older person does not have access to independent advice where they are reliant upon family members to set up appointments or take them to appointments. Many older people no longer have a drivers licence and are dependent upon family, carers and friends to help them both arrange and travel to and from appointments.⁵⁸ Where a situation may be abusive, carers may not provide assistance.⁵⁹ Additionally, older people often find it difficult or are deterred by the need to use public transport.⁶⁰

5.43 Failing eyesight and hearing can compound the difficulty in accessing printed materials and/or making telephone calls.⁶¹ Caxton Legal Centre commented that:

This, combined with mobility difficulties means that older clients become increasingly reliant on obtaining advice and gleaning information about legal issues “third hand” – that is, by asking neighbours and family to find out answers to questions for them – and often, in turn, receive misinformation.⁶²

5.44 Ms Helen Campbell of the Redfern Legal Centre told the Committee that one of the major barriers to accessing legal services for older

55 Ms Narelle McDonald, *Submission No. 2*, p. 8.

56 Aged Care Crisis Team, *Submission No. 86*, p. 8.

57 Caxton Legal Centre Inc, *Submission No. 112*, p. 9.

58 Caxton Legal Centre Inc, *Submission No. 112*, p. 8.

59 Caxton Legal Centre Inc, *Submission No. 112*, p. 9.

60 Ms Margaret Jones, *Submission No. 47*, p. 1.

61 Caxton Legal Centre Inc, *Submission No. 112*, p. 9.

62 Caxton Legal Centre Inc, *Submission No. 112*, pp. 9-10.

people within the Waterloo area, the largest public housing area in New South Wales, was fear of crime:

Even though they are in the middle of a bustling metropolis with many services readily available to them, they were essentially isolating themselves because of distrust of their neighbours and distrust of the services that would otherwise be available to them.⁶³

5.45 The Alliance for the Prevention of Elder Abuse: Western Australia told the Committee that barriers are compounded for older people of Indigenous and culturally and linguistically diverse backgrounds for the following reasons:

- Aboriginal people age more rapidly than non-Aboriginal people due to inter-generational health and socio-economic issues;
- Many Aboriginal people live in rural and remote communities where there is only limited access to legal and other services;
- Many people distrust the police and legal services based upon past discriminatory experiences; and
- Mainstream services can have variable cultural and linguistic relevance to Aboriginal and culturally and linguistically diverse people.⁶⁴

5.46 Mrs Maureen Sellick of Advocare commented that:

We do not get many Aboriginal clients ringing us up, because they do not like the idea of approaching mainstream services.⁶⁵

5.47 The Public Advocate in Queensland highlighted that many people with limited English language skills may have little or no familiarity with services and therefore rely heavily upon family and others within their social networks for assistance.⁶⁶

5.48 The Committee considers that many of the barriers that have been identified can be addressed through legal services that are conversant with the issues generally affecting older people and that are able to provide advice or other assistance in a setting and manner that older people can readily access.

63 Ms Helen Campbell, Redfern Legal Centre, *Transcript of Evidence*, 14 May 2007, p. 25.

64 Alliance for the Prevention of Elder Abuse: Western Australia, *Submission No. 114*, p. 5.

65 Mrs Maureen Sellick, Advocare, *Transcript of Evidence*, 30 July 2007, p. 23.

66 Office of the Public Advocate, Queensland, *Submission No. 76*, p. 11.

Legal Services

Legal Aid

- 5.49 Legal Aid Commissions provide a number of services—including telephone and face to face legal advice, minor assistance, duty lawyer assistance, information and referral services and community legal information—that are free of charge and therefore generally available to anyone in the community, including older people.⁶⁷
- 5.50 Other services, including grants of legal assistance, primary dispute resolution services and legal representation, are contingent upon meeting the requirements of funding agreements.⁶⁸ For example, state and territory commissions receive funding from the Australian Government to provide assistance for matters arising under Commonwealth laws. Grants are then provided by commissions in accordance with Commonwealth priorities and guidelines.⁶⁹ Legal Aid Commissions are therefore required:
- To ascertain that each application for a grant of assistance for legal representation falls within the guideline relevant to the Commonwealth Law matter type for which assistance is sought; and
 - To apply a means test to the application; and
 - To apply a merit test to the application; and
 - To grant legal aid in accordance with the prescribed Commonwealth “priorities”.⁷⁰
- 5.51 The Committee notes that where a Commission does not have sufficient funds to satisfy demand, then aid may be refused on the basis of competing priorities.⁷¹
- 5.52 The Committee was informed by the Attorney-General’s Department that:
- Older persons can access legal aid through legal aid commissions and community legal centres in the same way

67 National Legal Aid, *Submission No. 99*, p. 2.

68 National Legal Aid, *Submission No. 99*, p. 2.

69 Attorney-General’s Department, *Submission No. 100*, p. 3.

70 National Legal Aid, *Submission No. 99*, p. 6.

71 National Legal Aid, *Submission No. 99*, p. 6.

and under the same conditions as other members of the community.⁷²

- 5.53 However, many participants to the inquiry expressed the view that while Legal Aid assistance is notionally available to older people, restrictive eligibility tests and minimal funding for civil disputes effectively excludes or limits the ability of older people from obtaining this assistance.⁷³
- 5.54 The Committee notes, for example, that in Queensland people aged 65 years or older represent 0.96 per cent of clients who receive legal representation by Legal Aid Queensland.⁷⁴ Similarly, approved legal aid applications for people aged 65 and older comprised only 2.87 per cent of the total number of applications approved across Australia in 2005-06 relating to Commonwealth laws.⁷⁵
- 5.55 National Legal Aid and individual commissions informed the Committee that most grants of legal assistance are provided for family law matters where children are involved, and family violence and criminal law matters, whereas older people are more likely to need assistance with civil law matters.⁷⁶ The Legal Aid Commission of NSW told the Committee that the most common issues that older people bring to the Commission are civil: housing and loss of dwelling, tenancy issues, consumer protection, discrimination, entitlements for social security, and veterans' entitlements.⁷⁷ Ms Paula Stirling of the Law Society of South Australia observed that civil law is a major unmet legal need for older Australians.⁷⁸ The Committee notes that changes to the funding arrangements for legal aid implemented in 1996, whereby the Australian Government

72 Attorney-General's Department, *Submission No. 100*, p. 2.

73 National Legal Aid, *Submission No. 99*, pp. 1-13; Ms Patricia Reeve, Council on the Ageing Over 50s, *Proof Transcript of Evidence*, 17 August 2007, p. 7; Mr Michael Vescio, *Alternative Guardian, Transcript of Evidence*, 14 May 2007, p. 72; Assets and Ageing Research Team, University of Queensland, *Submission No. 26*, p. 7; Human Rights and Equal Opportunity Commission (HREOC), *Submission No. 92*, p. 37; Law and Justice Foundation of NSW, *Submission No. 102*, p. 4; Queensland Government, *Submission No. 107*, p. 6; ACT Government, *Submission No. 108*, p. 5.

74 Queensland Government, *Submission No. 107*, p. 6.

75 Attorney General's Department, *Submission No. 100*, p. 3.

76 National Legal Aid, *Submission No. 99*, p. 2; Victoria Legal Aid, *Submission No. 101*, p. 5; Mr Stephen O'Connor, Legal Aid Commission of NSW, *Transcript of Evidence*, 14 May 2007, p. 5.

77 Mr Stephen O'Connor, Legal Aid Commission of NSW, *Transcript of Evidence*, 14 May 2007, p. 5.

78 Ms Paula Stirling, Law Society of South Australia, *Transcript of Evidence*, 31 July 2007, p. 9.

determined it would only fund matters arising under Commonwealth laws, led to grants for civil matters dropping by 90 per cent in Victoria.⁷⁹

5.56 Mr David Walsh, a private legal practitioner, observed that:

We all know that the bulk of legal aid is given in criminal matters, usually to people, often men, who are charged with property offences or domestic violence type situations... When legal aid budgets are completely dominated by those sorts of considerations, any attempt by people to get aid because they would argue that their son, daughter, cousin or whatever has defrauded them of their money or kicked them out of the granny flat or whatever, is doomed to failure.⁸⁰

5.57 The means test was raised as an issue by a number of inquiry participants. Caxton Legal Centre highlighted that many older people who are home owners are ineligible for legal aid despite being reliant upon a pension or other government benefit as their main means of support.⁸¹ National Legal Aid told the Committee that the means test 'has a low threshold for assets' and does not sufficiently recognise the financial position of those people with 'very modest savings'.⁸² Accordingly:

...many people who presently do not qualify under the Means Test are not able to afford the services of private lawyers to conduct their cases or at least not able to do so without undue hardship.⁸³

5.58 The Committee was pleased to see that this issue has been recognised by legal aid commissions and that work has been undertaken to address the matter. Mr Norman Reaburn of National Legal Aid told the Committee:

We have to operate a means test. The means test is not particularly well crafted to accommodate a range of the problems and issues that face older Australians. A high proportion of older Australians have comparatively low incomes but are reasonably well off in terms of assets. That

79 Victoria Legal Aid, *Submission No. 101*, p. 5.

80 Mr David Walsh, *Transcript of Evidence*, 23 March 2007, p. 41.

81 Caxton Legal Centre Inc, *Submission No. 112*, p. 18.

82 National Legal Aid, *Submission No. 99*, p. 2.

83 National Legal Aid, *Submission No. 99*, p. 11.

tends to mean that they will fail our means test, even though their actual disposable income is not particularly significant.⁸⁴

I do have to say that National Legal Aid, in conjunction with the Commonwealth, has had this feeling for some time in a range of areas. We have been doing some work on the means test in an attempt to try and find ways to make it fairer and to allow it, particularly in the area that this committee is looking at, to accommodate a greater range of available services to older people. That is the first thing that we need to stress to the committee.⁸⁵

- 5.59 The Committee recognises that National Legal Aid has a number of initiatives in progress to address these issues.⁸⁶
- 5.60 The Committee also received evidence that many older people require assistance to sort out their affairs rather than proceed with litigation:
- The expansion of “Minor Assistance” or “Brief Services” programs with a relaxed means and merit test would allow Commissions to spend limited time assisting people, including older people, to negotiate and resolve a range of legal issues without recourse to litigation. In many consumer areas there are national external dispute resolution schemes... Many people require assistance to gather and present the facts of their cases so as to be able to access these schemes and resolve a range of common consumer disputes.⁸⁷
- 5.61 Further, as noted by the Victorian Government, funding for minor assistance and particularly civil matters ‘has the potential to prevent small problems becoming large ones...’⁸⁸
- 5.62 While the Committee acknowledges the need to prioritise available funding, it is concerned that limited funding combined with the existing eligibility criteria results in many older people being unable to access legal services. As Mr Stephen O’Connor of the Legal Aid Commission of NSW highlighted to the Committee:
- Our funding is an area of anxiety. It limits the way we can provide services and limits the number of people who can receive those services.⁸⁹

84 Mr Norman Reaburn, National Legal Aid, *Transcript of Evidence*, 5 June 2007, p. 12.

85 Mr Norman Reaburn, National Legal Aid, *Transcript of Evidence*, 5 June 2007, p. 13.

86 Mr Norman Reaburn, National Legal Aid, *Transcript of Evidence*, 5 June 2007, p. 14.

87 National Legal Aid, *Submission No. 99*, p. 12.

88 Victorian Government, *Submission No. 121*, p. 36.

- 5.63 The solution, in National Legal Aid's view, is:
- An increase in funding so as to enable the easing of the means test would result in more people qualifying for legal aid.⁹⁰
- 5.64 This was echoed by the Victorian Government, which suggested that relaxing the restrictions upon access to legal aid would be one way to improve the legal outcomes for older people.⁹¹
- 5.65 A number of participants also agreed that providing Commissions with flexibility in the use of some of their funds would facilitate improved outcomes for older people, particularly in areas of civil law.⁹²
- 5.66 The Committee notes that additional funding for legal aid was announced in the 2007-08 Budget for services in regional, rural and remote areas, for separated families and for serious criminal prosecutions.⁹³ However, it is not clear to the Committee whether this will assist older people, particularly in the area of greatest demand: civil law. National Legal Aid told the Committee:
- ...we anticipate increasing demand over the coming years for an expansion of our civil law services. It will not be possible for Commissions to meet this demand without funding adequate for the purpose and funding agreements which support the delivery of the required services.⁹⁴
- 5.67 The demands and needs of older people for legal services are only likely to increase in the future given the ageing Australian population and increased life expectancy. The Committee considers that, while increased flexibility for Commissions regarding funding use may assist in meeting this need in respect of legal aid, it could equally transpire that it does not. The Committee is of the view therefore that the best way to ensure that the legal aid needs of this growing sector

89 Mr Stephen O'Connor, Legal Aid Commission of NSW, *Transcript of Evidence*, 14 May 2007, p. 7.

90 National Legal Aid, *Submission No. 99*, p. 11.

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

92 Victoria Legal Aid, *Submission No. 101*, p. 5; Ms Marilyn Lennon, Law Society of South Australia, *Transcript of Evidence*, 31 July 2007, p. 11.

93 Media Release by the Attorney-General's Department, 'Boost for Legal Aid', 8 May 2007, <http://www.ag.gov.au/www/agd/agd.nsf/Page/RWP64E4CC74F037B1DCCA2572D400014763>.

94 National Legal Aid, *Submission No. 99*, p. 13.

of the population are met is for a portion of existing legal aid funding – 10 per cent – to be dedicated to matters involving older people.

Recommendation 37

- 5.68 **The Committee recommends that the Australian Government require that ten per cent of Commonwealth funding to the Legal Aid Commissions be utilised for assisting older Australians with legal matters that otherwise qualify for legal aid assistance.**

Family Relationship Centres

- 5.69 The Council on the Ageing Over 50s identified grandparents as one group of older people who face a number of distinct legal, financial and support issues.⁹⁵ The Committee received evidence that changes to the *Family Law Act 1975* have been implemented to better recognise the role of grandparents.⁹⁶

- 5.70 According to the Attorney-General's Department, the Family Relationship Centres that have been established around Australia provide information, advice and referral 'for anyone who is affected by family relationship or separation issues and difficulties, including grandparents'.⁹⁷

- 5.71 The Committee heard that around ten per cent of the clients accessing one particular centre are grandparents. Ms Jennifer Hannan of Family Services Australia and Anglicare Services in Western Australia told the Committee:

I think there is evidence to suggest that the advertising around the new family law changes and the family relationship centres has certainly engaged somewhat with grandparents and they are certainly more aware of their rights in relation to seeing their grandchildren.⁹⁸

- 5.72 Ms Hannan went on to comment that 'the services have been highly successful, partly because they are highly visible'.⁹⁹

95 Council on the Ageing Over 50s, *Submission No. 58*, pp. 10-11.

96 Attorney-General's Department, *Submission No. 100*, p. 4.

97 Attorney-General's Department, *Submission No. 100*, p. 5.

98 Ms Jennifer Hannan, Family Services Australia and Anglicare Services in Western Australia, *Transcript of Evidence*, 23 March 2007, p. 44.

99 Ms Jennifer Hannan, Family Services Australia and Anglicare Services in Western Australia, *Transcript of Evidence*, 23 March 2007, p. 46.

- 5.73 The Committee notes that the new services include targeted information for grandparents, research and training for practitioners to promote good practice, as well as mediation.¹⁰⁰

Community Legal Centres

- 5.74 Community Legal Centres (CLCs) are independent and community managed non-profit services which provide a range of assistance on legal and related matters.¹⁰¹ There are around 200 community legal centres throughout urban, regional and rural Australia,¹⁰² with 128 funded by the Australian Government.¹⁰³

- 5.75 The Attorney-General's Department commented that:

Assistance is directed towards people who experience some form of systemic or socio-economic barrier to accessing legal services and/or whose interests should be pursued as a matter of public interest.¹⁰⁴

- 5.76 The Committee heard that CLCs are open to providing services for older people, providing they meet the requirements in terms of level of disadvantage.¹⁰⁵ The Committee notes that in the period of 2000-01 to 2005-06, between 5 and 6 per cent of clients seen by CLCs were 65 years or older.¹⁰⁶

- 5.77 The Committee received evidence that CLCs are well placed in terms of their manner of operation to provide legal services to older people. For example, Ms Jeni Lee of the Federation of Community Legal Centres (Vic) Inc told the Committee:

We believe that we are in a very good position to act as gatekeepers to some of those more highly sophisticated and intimidating issues that face people as they age.¹⁰⁷

100 Ms Jennifer Hannan, Family Services Australia and Anglicare Services in Western Australia, *Transcript of Evidence*, 23 March 2007, p. 46.

101 Attorney-General's Department, *Submission No. 100*, p. 4.

102 National Association of Community Legal Centres website, 'What is a CLC?', <http://www.naclc-qat.socialchange.net.au/topics/2000.html> (accessed 5 September 2007).

103 Attorney-General's Department, *Submission No. 100*, p. 4.

104 Attorney-General's Department, *Submission No. 100*, p. 4.

105 Ms Katherine Jones, Attorney-General's Department, *Transcript of Evidence*, 23 March 2007, p. 57.

106 Attorney-General's Department, *Submission No. 100*, p. 4.

107 Ms Jeni Lee, Federation of Community Legal Centres (Vic) Inc, *Transcript of Evidence*, 4 June 2007, p. 62.

5.78 Professor Jill Wilson of the Assets and Ageing Research Team at the University of Queensland also commented:

It is clear from our research that older people will benefit from timely and independent legal advice. However, many are unlikely to contact a solicitor in private practice. In addition, many solicitors find it difficult to charge adequately for the time taken by people who wish to take a more conversational approach to the issues.

It is in this context that community based legal services are most appropriate. They can raise awareness of the financial management issues that are a key part of aged care, they can support service providers ... and they can provide appropriate legal advice to older people. Such services can also provide much-needed outreach services to those who are unable or loath to access legal services that are more formal. The combination of social worker and legal practitioner in such services also allows older people to access short-term counselling and referral to community services as well as legal information and advice.¹⁰⁸

5.79 The Committee heard that the Seniors Advocacy Information and Legal Service (SAILS), operated through Caxton Legal Centre, provides the following services to people over the age of 60 who are at risk of abuse:

- Court representation;
- Crisis and short term counselling, including the development of safety plans;
- Referral to other legal and/or support organisations;
- Information, advice and support to service providers;
- Arranging pro-bono legal assistance (where possible) for more complex legal matters such as recover of money or property; and
- Community legal education.¹⁰⁹

5.80 Similarly, the Federation of Community Legal Centres (Vic) Inc told the Committee that the 52 CLCs across Victoria assist people with free legal advice, information, assistance, advocacy and representation,

108 Professor Jill Wilson, University of Queensland, *Transcript of Evidence*, 16 July 2007, p. 64.

109 Office of the Public Advocate, Queensland, *Submission No. 76*, p. 9.

and community legal education.¹¹⁰ The Committee heard that these CLCs take a multidisciplinary approach:

...by looking beyond the strictly legal issues and working collaboratively with other disciplines, such as health, financial counselling, housing and others.¹¹¹

5.81 The EAPU in Queensland also told the Committee that the 'Legal Outreach for Older Persons' program that operated from Caxton Legal Centre paired a lawyer with a social worker to provide a more holistic approach to the legal matters affecting older people.¹¹² The EAPU commented that:

This model recognised that older people may need the support of a social worker when accessing the law as an older person may require assistance with a number of unaddressed needs.¹¹³

5.82 The Committee notes that the mode of delivery is an essential component to many of the services provided by CLCs. For example, in its submission, the Federation of Community Legal Centres (Vic) Inc highlighted a number of initiatives, including:

- Home based service for the frail elderly during the day;
- Evening 'road shows' through aged care facilities;
- Visits to public housing estates to offer a legal service in a safe setting;
- Community legal education workshops; and
- Involvement of final year law students in clinics.¹¹⁴

5.83 Similarly, the Loddon Campaspe Community Legal Centre commented that in its experience:

Service models for older people should include outreach services in local communities, partnerships with local community agencies and groups, community legal education to raise awareness of issues and options, legal services that

110 Federation of Community Legal Centres (Vic) Inc, *Submission No. 41*, p. 3.

111 Federation of Community Legal Centres (Vic) Inc, *Submission No. 41*, p. 3.

112 EAPU, *Submission No. 97*, p. 3.

113 EAPU, *Submission No. 97*, p. 3.

114 Federation of Community Legal Centres (Vic) Inc, *Submission No. 41*, pp. 5-7.

specialise in older people's legal issues, legal assistance and education in simple terms.¹¹⁵

- 5.84 This was echoed by both the Law Society of South Australia and the Aged Rights Advocacy Service.¹¹⁶ Ms Paula Stirling of the Law Society of South Australia observed that:

Outreach services have proven to be highly effective in reaching client target groups who would not normally access traditional legal services. Given the restricted ability of some older people to attend additional legal appointments, outreach services to locations frequented by older people may be an effective way to deliver legal assistance to where it is needed.¹¹⁷

- 5.85 The Federation of Community Legal Centres (Vic) Inc commented that outreach models can work well with volunteer and pro bono support and increase the number of locations where outreaches are conducted.¹¹⁸

- 5.86 The Committee notes that many of the issues dealt with by CLCs relate to civil law. For example, Caxton Legal Centre commented that approximately half its work involves civil law.¹¹⁹ In addition, CLCs provide advice in areas of law not traditionally considered commercially viable by private legal practitioners. Accordingly, they have developed expertise in certain areas of the law.¹²⁰

- 5.87 The Committee considers CLCs to be well placed to provide information, advice, counselling, and advocacy to older people in one location. Ms Jeni Lee of the Federation of Community Legal Centres (Vic) Inc observed:

And that is exactly what they want. They want a one-stop shop where they get legal services but they also get legally related information. It may not identify for them their legal

115 Loddon Campaspe Community Legal Centre, *Submission No. 57*, p. 4.

116 Ms Paula Stirling, Law Society of South Australia, *Transcript of Evidence*, 31 July 2007, p. 10; Mrs Susan Lyons, Aged Rights Advocacy Service Inc, *Transcript of Evidence*, 31 July 2007, p. 21.

117 Ms Paula Stirling, Law Society of South Australia, *Transcript of Evidence*, 31 July 2007, p. 10.

118 Federation of Community Legal Centres (Vic) Inc, *Submission No. 41*, p. 11.

119 Caxton Legal Centre Inc, *Submission No. 112*, p. 6.

120 Caxton Legal Centre Inc, *Submission No. 112*, p. 7.

problem but it will tell them about what advocacy services are available and give them other sorts of information.¹²¹

5.88 In addition, the Committee considers that initiatives that focus specifically upon the legal issues affecting older people are also important. During the hearings, Ms Susan Field of the University of Western Sydney told the Committee:

I would certainly see community legal centres having staff experienced in elder law issues such as retirement villages, aged-care facilities, reverse mortgages, substitute decision making and Centrelink issues, of course. They would have a hotline people can ring—not one where you press several numbers but a number where an actual person will speak to you—and they could have the carriage of matters and take matters to court if needs be.¹²²

5.89 During the course of the inquiry, the Committee heard of a number of initiatives focussed specifically upon services for older people, including:

- An Elder Abuse Information, Support and Legal Service, to commence in mid 2007 with funding from the WA Government.¹²³
- An Older Persons Legal Service that had been allocated \$1.2 million over four years to provide general legal education and advocacy services, and which will operate under the auspices of Victoria Legal Aid.¹²⁴
- \$1.9 million from the Queensland Government to fund a trial legal service in Cairns, Townsville, Toowoomba, Hervey Bay and Brisbane based upon the SAILS model but with an expanded focus upon financial abuse.¹²⁵
- An Older Persons' Rights Service that commenced on 1 July 2007 and which will be jointly delivered by Northern Suburbs Community Legal Service and Advocare in Western Australia.¹²⁶

121 Ms Jeni Lee, Federation of Community Legal Centres (Vic) Inc, *Transcript of Evidence*, 4 June 2007, p. 64.

122 Ms Susan Field, University of Western Sydney, *Proof Transcript of Evidence*, 17 August 2007, pp. 21-22.

123 Alliance for the Prevention of Elder Abuse: Western Australia, *Submission No. 114*, p. 5.

124 Victorian Government, *Submission No. 121*, pp. 8, 32.

125 Mr Gregory McDougall, Caxton Legal Centre Inc, *Transcript of Evidence*, 16 July 2007, p. 14.

126 Mr Stephen Boylen, WA Government, *Transcript of Evidence*, 30 July 2007, p. 6.

This service will provide legal and social support for people affected by elder abuse and community legal education.¹²⁷

- An Older Persons Legal Program, established by Loddon Campaspe Community Legal Centre in May 2006 and funded by philanthropic trusts to provide casework, community legal education and policy/law reform for older people.¹²⁸ The Committee was interested to note that this program has established outreaches at a number of community health centres and Bendigo Base Hospital to 'acknowledge the convergence of health, social and legal issues for many older people'.¹²⁹

5.90 Caxton Legal Centre pointed to the SAILS model as one that could be implemented on a national basis to provide assistance 'with a broad range of legal issues affecting older people including claims arising out of elder abuse'.¹³⁰

5.91 The Committee heard that many older people are unable to access the services of CLCs simply because the CLCs lack resources.¹³¹ This includes funding limitations and the difficulties in attracting suitable staff:

I cannot miss this opportunity to say that the wages of community legal centres are notoriously hopeless and it is becoming increasingly difficult to attract and retain quality staff.¹³²

5.92 Accordingly, CLCs must prioritise their caseload as well as balance it with their role in providing education and community development.¹³³

5.93 Mr Gregory McDougall of the Caxton Legal Centre told the Committee that in his view:

The legal problems faced by older people have been hidden, obviously, but in our view they are going to become more

127 Mrs Maureen Sellick, *Advocare, Transcript of Evidence*, 30 July 2007, p. 23.

128 Loddon Campaspe Community Legal Centre, *Submission No. 57*, p. 13.

129 Loddon Campaspe Community Legal Centre, *Submission No. 57*, p. 14.

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

131 Law and Justice Foundation of New South Wales, *Submission No. 102*, p. 4; Law Institute of Victoria, *Submission No. 78*, p. 6; Aged Care Crisis Team, *Submission No. 86*, p. 7; HREOC, *Submission No. 92*, p. 37.

132 Mr Gregory McDougall, Caxton Legal Centre Inc, *Transcript of Evidence*, 16 July 2007, p. 21.

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

acute and much more publicly visible in the next 10 to 15 years, not just because of the ageing population but also because of the increasingly complex legal environment that older people are finding themselves in. We have found in the last 10 years that generally, across the board, matters that are coming to community legal centres are becoming increasingly multilayered and complex, and particularly so with older clients.¹³⁴

5.94 He went on to argue that :

The government needs to invest heavily now to avoid these problems that are going to impact downstream. We say that a logical investment would be to inject substantial funding into the community legal sector to provide services to older people. In Queensland, it has been the Department of Communities that has taken the lead to provide legal services to older people. That is because our approaches to the Commonwealth, Attorney-General's and state legal aid to date have not been successful. We are hoping that as part of the pilot outcome there will be recurrent funding made available...¹³⁵

5.95 For many older people, their key need in terms of adequate legal services is access to free or low cost, easily accessible and appropriate targeted services. Ms Andrea Simmons of the ACT Disability, Aged and Carer Advocacy Service observed:

What we are really looking for is certainly a low-cost provision of legal advice to elderly people on specific areas that affect them.¹³⁶

5.96 The Committee considers that CLCs, particularly where they can provide outreach or home visits, are well placed to fill this need within the community. The Centres have developed expertise in many areas of law that affect older people and are able to deliver services in a manner that meets the needs of many older people.

134 Mr Gregory McDougall, Caxton Legal Centre Inc, *Transcript of Evidence*, 16 July 2007, p. 14.

135 Mr Gregory McDougall, Caxton Legal Centre Inc, *Transcript of Evidence*, 16 July 2007, p. 15.

136 Ms Andrea Simmons, ACT Disability, Aged and Carer Advocacy Service Inc, *Proof Transcript of Evidence*, 17 August 2007, p. 29.

Recommendation 38

- 5.97 **The Committee recommends that the Australian Government increase funding to the Community Legal Services Program specifically for the expansion of services, including outreach services, to older people by Community Legal Centres.**
- 5.98 The Council on the Ageing Over 50s told the Committee that, in its view, more work needs to be undertaken to raise awareness of and familiarity with legal issues, rather than just focusing upon legal remedies.¹³⁷ The Committee concurs with this view. In addition, while it was clear to the Committee that there is a role for CLCs in addressing many of the barriers to legal services experienced by older people, it notes that the number of older people utilising the service is still small. The Committee believes there is a need for CLCs to be able to improve their visibility as a source of legal services for older people and raise awareness of the services they can provide.

Recommendation 39

- 5.99 **The Committee recommends that the Australian Government provide funding to Community Legal Centres to expand their community education role, with a specific focus upon older people.**
- 5.100 The Committee also sees merit in the establishment of a central resource or referral service that older people can utilise to obtain basic information about where to go to obtain legal assistance. This could take the form of a 1800 telephone number in a similar manner to that which has been utilised for government campaigns.

Recommendation 40

- 5.101 **The Committee recommends that the Australian Government establish a resource service for older people, accessible through a single contact point, such as an 1800 telephone number, that can provide assistance to older people in identifying the legal services that are available to them.**
- The Committee recommends that this be supported by a media education campaign to alert older people to their legal rights and to advertise the availability of legal assistance.**

137 Ms Jane Fisher, Council on the Ageing Over 50s, *Proof Transcript of Evidence*, 17 August 2007, p. 4.

Older people as offenders

5.102 Although not specifically mentioned in the Terms of Reference, the Committee did receive a submission regarding the particular situation of older people as offenders. The concerns revolve around whether a custodial sentence was appropriate for some older offenders; and secondly, if a custodial sentence was given, whether appropriate facilities were available to deal with this category of prisoner.

5.103 The Legal Aid Commission of NSW argued that with an ageing population:

Given the nature of the demographic, it is not surprising that offences involving social security fraud constitute a significant proportion of offences that older people are charged with. The case law is well established that general deterrence required that offences involving social security fraud will generally attract a custodial sentence. The issue for the criminal justice system is balancing the purposes and principles of sentencing to ensure that the sentence reflect not only the offence but the offender... It is also important where the priority given to general deterrence results in a harsh or oppressive sentence. Incarceration without effective geriatric prison care can result in deterioration of physical and mental health, reduced life expectancy and can result in premature death.¹³⁸

5.104 The Legal Aid Commission indicated that 'the Commonwealth legislative regime should take into account the age of offenders in the way that it deals with them on conviction and sentence'.¹³⁹

5.105 Australian Bureau of Statistics figures on prisoners in Australia as at 30 June 2006 indicate that 1.4 per cent of the prison population were aged 65 years and over. Men were significantly more represented than women (1.5 per cent of male prisoners were in this age bracket, compared to 0.5 per cent of female prisoners).¹⁴⁰ Statistics on the length of sentences and severity of crimes perpetrated by this older group are not available.

138 Legal Aid Commission of NSW, *Submission No. 91*, p. 2.

139 Mr Stephen O'Connor, Legal Aid Commission of NSW, *Transcript of Evidence*, 14 May 2007, p. 5.

140 For more information:

<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4517.02006?OpenDocument> (accessed 30 August 2007).

5.106 The Committee notes that the Australian Law Reform Commission (ALRC) released a report on sentencing of federal offenders in April 2006.¹⁴¹ In that report the ALRC identified a number of categories of federal offenders that might require special consideration in regard to sentencing of federal offenders. These include young offenders; those with a mental illness or intellectual disability; women; offenders with family and dependants; Aboriginal and Torres Strait Islanders; those from linguistically and culturally diverse backgrounds; offenders with a drug addiction; and those with problem gambling issues. Interestingly, the ALRC in its report noted:

These are not the only categories of federal offenders with special needs that arise in the context of sentencing. During the course of the Inquiry stakeholders expressed concern about sentencing options for elderly offenders and access to rehabilitation programs by non-citizen offenders. It has not been possible to discuss every possible category of offender with special needs in the Inquiry. Nevertheless, stakeholders have highlighted the need for other categories to be considered further.¹⁴²

5.107 The Committee notes that it is difficult to balance the need for general deterrence and punishment against concerns that offenders be dealt with appropriately. The Committee was not persuaded, however, that age in and of itself should be a factor for consideration in sentencing, but rather there should be some link to physical and mental capacity when deciding what might be appropriate.

5.108 In regard to accommodation for older prisoners, in the UK there is a purpose built unit for older prisoners located at Norwich. The unit can only house 15 prisoners as the Prison Service has restricted admissions to those serving life sentences, who might ordinarily not expect to be released:

It is operated as a secure nursing home and can cope with all but acute illness. The facilities can adapt to all disabilities.¹⁴³

5.109 It was suggested that state governments could examine whether such a facility would be appropriate in Australia.¹⁴⁴ The Committee notes that this issue has been recognised in some jurisdictions already. The

141 ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No. 103, April 2006.

142 ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No. 103, April 2006, p. 710.

143 'Social Security fraud committed by older people', *Exhibit No. 33*, p. 5.

144 'Social Security fraud committed by older people', *Exhibit No. 33*, p. 5.

NSW Department of Corrective Services has indicated that a prison hospital wing is to be built for such prisoners. There may also be alternatives to full time prison sentences, such as community service options and home imprisonment. The Tasmania Prisons Infrastructure Redevelopment program has recognised that the 'planning process has taken into account that in any prison population there will be some older inmates. The smaller accommodation units included in the new prisons will provide the capacity to separate prisoners with different needs from each other'.¹⁴⁵

- 5.110 Correctional facilities are an issue for state and territory governments. However, the Committee is concerned that the matter be addressed across all Australian jurisdictions and a national approach adopted. It would therefore propose that the Corrective Services Ministers Conference consider the matter of accommodation needs of older prisoners.

Recommendation 41

- 5.111 **The Committee recommends that the Minister for Justice and Customs raise with the Corrective Services Ministers Conference a study being undertaken on the future needs of older offenders within correctional facilities.**

¹⁴⁵ http://www.justice.tas.gov.au/pirp/background/special_needs#Older%20prisoners (accessed 30 August 2007).

Discrimination

...the problem with age discrimination and the negative stereotyping, where it is strongly expressed and accepted by everyone as normal, is that it creates a fertile ground for abuse and other crimes against older people.¹

Introduction

- 6.1 Underpinning much of the discrimination against older people are negative attitudes towards ageing and stereotypes of older people.² Popular culture's obsession with youth and beauty, combined with negative portrayals of older people in the media reinforce this view of older people as incapable, frail and a burden. As Mr James Redner observed in regard to advertising and program content:

The media tends to portray seniors in a way that denigrates, demeans and mocks ageing. It makes the minority of frail and disabled seniors appear to be the majority. Social

1 Ms Patricia Reeve, COTA Over 50s, *Proof Transcript of Evidence*, 17 August 2007, pp. 5-6.

2 See for example, Australian Pensioners and Superannuants' League Qld Inc, *Submission No. 10*, p. 3; Country Women's Association of NSW, *Submission No. 18*, p. 8; Catholic Women's League Australia, *Submission No. 27*, p. 1; Ms Margaret Jones, *Submission No. 47*, p. 2, and *Transcript of Evidence*, 14 May 2007, p. 20; Law Society of Western Australia, *Submission No. 50*, p. 4; Mrs Betty Roberts, Catholic Women's League of Australia, *Transcript of Evidence*, 5 July 2007, p. 23; Maida Lilley, *Transcript of Evidence*, 16 July 2007, p. 43.

attitudes are clearly linked to advertising and program content over the long-term.³

- 6.2 Older people, as is the case in the wider population, may also be subject to discrimination for a number of other reasons. Sexual orientation⁴, race and disability may intersect with age and result in what the State Government of Victoria termed 'a compounding of disadvantage'.⁵ However, an examination of discrimination more generally is outside the scope of this inquiry, and the Committee has focused on discrimination on the basis of age.
- 6.3 The Committee also noted that the term 'discrimination' was widely used in submissions and at public hearings during this inquiry as a synonym for unfairness, unjustness or indeed any situation where an individual felt that they had not received their desired outcome. For this reason, the chapter commences with a review of what discrimination is, in the legal sense, before going on to examine the legislative framework around anti-discrimination activities and the remedies available to those subject to illegal discrimination.

Legislative framework

- 6.4 The *Age Discrimination Act 2004* (Cth) (ADA) came into operation in June 2004. The ADA addresses Australia's obligations under a range of international human rights instruments, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. In addition, Australia has obligations under the UN endorsed Principles for Older Persons.⁶
- 6.5 The ADA 'prohibits direct and indirect discrimination on the basis of age in key areas of public life'.⁷ These include 'employment, education, accommodation, provision of goods and services, the administration of Commonwealth laws and programs, access to premises, selling or other dealings with land, and requests for information'.⁸ In addition, each state and territory jurisdiction has

3 Mr James Redner, *Submission No. 61*, p. 3.

4 See for example Dr Jo Harrison, *Submission No. 6*.

5 State Government of Victoria, *Submission No. 121*, p. 37.

6 Australia's international obligations are detailed in the Human Rights and Equal Opportunity Commission, *Submission No. 92*, pp. 52-63.

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

8 HREOC, *Submission No. 92*, p. 12

legislation that prohibits discrimination against individuals and groups on the basis of age.⁹ As the Human Rights and Equal Opportunity Commission (HREOC) observed, the ADA prohibits discrimination on the basis of age generally, and is not specifically aimed at older people or younger people.¹⁰

6.6 The simplified outline of the Act sets out a number of basic points. It is:

- unlawful to discriminate on the ground of age
- unlawful to discriminate on the ground of age in relation to work... and certain other areas...
- not unlawful to discriminate on the ground of age if a particular exemption is applicable...¹¹

6.7 A number of exemptions to the ADA apply. For example, it is not unlawful for a person to discriminate against another person on the ground of the person's age, by an act that:

- Provides a bona fide benefit to persons of a particular age (e.g. discount for a particular service for holders of a Seniors Card or similar);
- Is intended to meet a need that arises out of the age of persons of a particular age (e.g. provision of welfare services to a particular age group); and
- Is intended to reduce a disadvantage experienced by people of a particular age (e.g. provision of additional notice requirements for older workers because they are more disadvantaged by retrenchment).¹²

6.8 Exemptions also apply to charities and religious bodies; admission and provision of benefits to members of voluntary bodies; matters dealing with superannuation, insurance and credit, based on actuarial or statistical data; the provision of credit, again based on actuarial or statistical data; and in compliance with a range of legislation in the areas of taxation, pensions and benefits, health, Commonwealth employment programs, migration and citizenship.¹³ Other exemptions may be sought by application to HREOC.

9 For details, see HREOC, *Submission No. 92*, p. 16.

10 HREOC, *Submission No. 92*, p. 12

11 *Age Discrimination Act 2004*, section 4.

12 *Age Discrimination Act 2004*, section 33.

13 *Age Discrimination Act 2004*, Part 4, Division 3.

- 6.9 HREOC has, as part of its mandate, responsibility for receiving complaints of unlawful discrimination, including on the basis of age, as well as promoting understanding and compliance with the act, and undertaking research and educational programs for the purpose of promoting the objects of the act.¹⁴

Nature of age discrimination

- 6.10 The ADA makes it clear that discrimination can be both direct and indirect.¹⁵ HREOC described the difference in the following terms:
- Direct discrimination takes place when an individual is disadvantaged or treated less favourably than another person because of a particular characteristic. An example of direct discrimination against an older person is failing to employ someone because of their age.
 - Indirect discrimination happens when a practice or policy appears to be fair because it treats everyone the same but actually disadvantages people from a particular group. An example of indirect discrimination against an older person might be requiring all people who apply for a certain job to pass a fitness test, even though a high level of fitness is not necessary for the job. This test might exclude more older people than younger people.¹⁶
- 6.11 HREOC noted that, although 'many older people feel they have been discriminated against or treated unfairly because of their age, this treatment does not amount to unlawful discrimination under either federal or state law or may be perceived to be difficult to prove in the context of making a complaint'.¹⁷
- 6.12 Confusion over what constituted illegal discrimination was evident in a number of submissions.¹⁸ For example, differences in the way in which increases to pensions for former public servants are calculated

14 See *Age Discrimination Act 2004*, Part 6.

15 *Age Discrimination Act 2004*, Part 3, sections 14 and 15.

16 HREOC, *Submission No. 92*, p. 11.

17 HREOC, *Submission No. 92*, p. 11.

18 See for example, Mr Joseph Dignan, *Submission No. 144*, p. 2, where he claims discrimination as an older person as he is unable to vote in Australian elections due to his inability to have his 410 visa converted to permanent residency; and Mr Richard Manthorpe, *Transcript of Evidence*, 4 June 2007, p. 48 on issues related to his status under the 410 visa; see also Mr Neal Lucas, *Submission No. 147*, p. 2, citing discrimination on the basis of his legal claim being dealt with under common law rather than a statute; Mrs Dorothy Lyons, *Transcript of Evidence*, 16 July 2007, p. 41 regarding access to government pensions; Mr John Sullivan, *Transcript of Evidence*, 17 July 2007, p. 22, regarding provisions in retirement village legislation.

was characterised as a form of discrimination¹⁹, although it does not meet the definition of 'illegal discrimination'. In addition, it can be difficult to prove that illegal discrimination has occurred. The Country Women's Association of NSW observed:

How often does one hear a person claiming they didn't get the job because of their colour, race, religion, sex etc., when in fact they didn't get it because their qualifications were not as good as the other person, who just happened to be a different colour, race, religion, sex etc.²⁰

Level and nature of complaints

6.13 As of 30 June 2006, HREOC had received 184 complaints of age discrimination since the introduction of the ADA. Of these 29 were from people aged 65 years and over, and 44 from those in the group 55-64 years.²¹ The majority of complaints were in the area of employment, with complaints in relation to the provision of goods and services (for example in insurance coverage) being the next two highest categories:

Age discrimination occurs primarily, although not exclusively, in the area of employment, and may be generated by negative attitudes and stereotypes about older people. The experience of age discrimination can generate enormous personal distress for older people and may prevent them from playing a valuable role both in the workforce and in the community generally.²²

6.14 Of the 86 per cent of complaints so far finalised, HREOC reports:

19 Mr David Bywaters, *Submission No. 137*; and Transcript of Evidence, 17 July 2007, p. 19; see also Mr Merv Hazell, *Submission No. 149*; Mr Garnet Foley, *Transcript of Evidence*, 16 July 2007, pp. 41-42. This matter was addressed in the report of the Senate Committee on Superannuation's 2002 report on Superannuation and standards of living in retirement, available at:

http://www.aph.gov.au/Senate/committee/superannuation_ctte/completed_inquiries/2002-04/living_standards/index.htm.

20 Country Women's Association of NSW, *Submission No. 18*, p. 8.

21 The age of 35 complainants was unknown. See HREOC, *Submission No. 92*, p. 14. Figures for the period from 1 July 2006 to 11 May 2007 were provided subsequently at a public hearing. Complaints were 'running at about the same level as they were for the 2005-06 year. Fifty per cent of these are from applicants 55 years or older, and 67 per cent relate to discrimination in employment', see The Hon John von Doussa, HREOC, *Transcript of Evidence*, 15 May 2007, p. 68.

22 The Hon John Von Doussa, HREOC, *Transcript of Evidence*, 15 May 2007, p. 67.

- 25.5 per cent have been resolved through conciliation;
 - 15 per cent have been withdrawn;
 - 25 per cent have been terminated by HREOC (of the 46 complaints terminated, 8 were terminated because the alleged conduct was not found to be unlawful; 33 were trivial, vexatious, misconceived or lacking in substance and in five cases there was no prospect of conciliation); and
 - The balance were closed for administrative reasons e.g. the complainant had previously lodged a complaint with a State anti-discrimination agency or they were not an aggrieved party.²³
- 6.15 HREOC further advised that to date only one complaint of age discrimination under the ADA has been filed in the Federal Court of Australia and at the time of making submission to this inquiry, the complaint had not yet proceeded to hearing.
- 6.16 While a complaints system exists, the small number of complaints lodged is of concern, given the strong anecdotal evidence regarding the extent of discrimination against older Australians. National Seniors has called for action to address barriers to making discrimination complaints. These barriers include 'disempowerment; uncertainty on who to approach and how to lodge a complaint; inability to advocate for oneself; power differentials between the complainant and the respondents; and lack of evidence that the treatment is discriminatory'.²⁴

Work-related issues

- 6.17 As the State Government of Victoria noted, discrimination 'in employment is of primary concern, particularly in the context of an ageing workforce and skills shortages. It is vital to Australia's economy that the skills and experience of older people are utilised.'²⁵
- 6.18 National Seniors noted that greater numbers of people may want or need to remain in the workforce beyond the age when many would have retired in the past. They note a common stereotype among employers that older workers are less productive in the workplace than younger workers:

23 HREOC, *Submission No. 92*, p. 15.

24 National Seniors Association, *Submission No. 67*, pp. 14-15. See also NSW Law and Justice Foundation, *Submission No. 102*, p. 5.

25 State Government of Victoria, *Submission No. 121*, p. 37.

The Age Act appears to be having little effect on employers who, whilst subject to the laws prohibiting compulsory retirement and age discrimination, continue to harbour negative age stereotypes and practice discriminatory behaviour.²⁶

6.19 For some individuals, discrimination occurs well before the age of 65:

...I know in the discrimination area we are finding, for example, public servants in their fifties who have been 'forced out' because of the superannuation rules. They are forced out and then when they try to get back in again, there is a discrimination problem. That definition rules them out strictly but I am sure somewhere along the line we will have to face that issue.²⁷

6.20 Having a workforce that is broadly representative of the population is important. For some older people, being able to deal with a mature person is a benefit:

Certainly our members indicate that, on occasion, dealing with people who have not had the same life experiences or extent of life experience that they have is very important in terms of them being able to get the information that they need. I suspect, though, that the nature of our workforce and the fact that very shortly a quarter to a third of our population will be aged over 50 anyway will mean that that matter will start to resolve itself because older people will be continuing to be in the workforce.²⁸

6.21 COTA went on to argue that while younger people are not necessarily unable to show empathy and understanding when dealing with older people, 'we would be looking for diverse and inclusive workforces, just as we like to see ethnic and gender diversity amongst the workforce'.²⁹ The Committee was heartened to note that, in regard to the Australian Public Service, the median age of employees at June 2006 was 42 years. Employees in the 45-54 age group represented 19.2 per cent of all employees 15 years ago, but now represent 30.1 per

26 National Seniors Association, *Submission No. 67*, p. 15.

27 Mr Brendon Kelly, ACT Ministerial Advisory Council on Ageing, *Transcript of Evidence*, 22 May 2007, p. 14.

28 Ms Jane Fisher, COTA SA, *Proof Transcript of Evidence*, 17 August 2007, p. 5.

29 Ms Patricia Reeve, COTA Over 50s, *Proof Transcript of Evidence*, 17 August 2007, p. 5.

cent. The 55 years and over age group has increased from 5.7 per cent to 10.6 per cent over the past 15 years.³⁰

- 6.22 The Committee supports this approach to diversity in the workplace, and would encourage both the public and private sectors to aim for a range of age groups and experience levels in their workforces. Ensuring that older workers are recognised as an important part of the Australian workforce will help address some of the negative attitudes that still exist towards this group.
- 6.23 COTA Over 50s pointed out that there are problems with workers compensation and rehabilitation acts in particular in regard to entitlement to weekly payments ceasing on account of age. 'This is a disincentive for seniors to remain in the workforce and is an inappropriate provision in an era of healthy ageing. It is also counter-productive in the current context, when all encouragement should be extended to seniors wishing to remain in paid work. This discrimination should be amended'.³¹ Under current legislation, such treatment is not illegal.
- 6.24 The Committee took evidence from Mr Malcolm Burton in Perth on his experiences under the Commonwealth's *Safety, Rehabilitation and Compensation Act 1988*. Having sustained a workplace injury at the age of 62, his claim was accepted by Comcare and he underwent a series of operations that have to date failed to fully correct the original injury and he remains unfit for work:

...I am now 65. In a letter dated 7 May received from Comcare, they advised me that my fortnightly payments from Comcare would cease when I reached the age of 65. In other words, I am not recompensed for any of my loss of wages now. The legislation allows for reimbursement of medical expenses but not for loss of earnings. The government is encouraging people to work after the age of 65, but those with a work-related injury are not covered at all. If further surgery is required then my non-compensable time off work is likely to blow out to around 12 months in total. The reason for Comcare's decision not to compensate me is stated as in sections 23 of the SRC Act, and sections 19, 20, 21, 21A and 22. I was advised also that this decision will not be reviewed.

30 Australian Public Service Statistical Bulletin, 2005-06, p. 7.

31 COTA Over 50s, *Submission No. 58*, p. 13.

The effect of this legislation is that I will lose many thousands of dollars in earnings purely because of my age. Somebody a lot younger than me gets recompensed right through until they are back at work again. I do not. I assume also that, as I receive no pay, I am no longer eligible to receive the nine per cent superannuation contribution. I understand that premiums paid for the workers compensation insurance of workers aged 65 or over are not adjusted downwards in keeping with the decrease in cover given those older workers under the current legislation. The SRC Act urgently needs amending to correct this discrimination.³²

6.25 Mr Burton also stated that:

I was shocked to discover that the Safety, Rehabilitation and Compensation Act 1988 discriminates against workers aged 65 and over. A person whose injury occurs at work after his or her 65th birthday has no cover under workers compensation. It is also my understanding that a worker injured between his or her 63rd and 65th birthdays is limited to 104 weeks of compensation for loss of wages resulting from the injury.³³

6.26 The financial implications for an individual who fully expected to work beyond the age of 65 can be severe, placing at risk financial plans for their eventual retirement. However, simply amending the legislation to establish a later chronological age where income support ceases would not resolve the problem. Commenting on proposed amendments to workers compensation in South Australia to provide for the payment of weekly income support benefits to ill and injured workers over the age of 65, COTA SA argued:

While the intention is laudable, the effect is simply to shift discrimination from workers who are aged more than 65 to those who are aged more than 70 years. The framework in which older workers are employed requires consideration in its entirety rather than being addressed piecemeal if discrimination is to be removed. For example, access to training and career development opportunities throughout a workers life is... key to fairness for older citizens in the workforce. Likewise, the use of redundancy as a de facto

32 Mr Malcolm Burton, *Transcript of Evidence*, 30 July 2007, p. 39.

33 Mr Malcolm Burton, *Transcript of Evidence*, 30 July 2007, p. 39.

form of retirement continues to be a form of discrimination against older workers.³⁴

- 6.27 Taking a broader view of these issues was also supported by National Seniors, who indicated they would like to see 'greater uniformity of legislation throughout Australia in areas such as compulsory and voluntary retirement, redundancy packages and workers compensation'.³⁵

Recommendation 42

- 6.28 **The Committee recommends that the Australian Government, in cooperation with state and territory governments, review the application of workers compensation legislation to ensure that older workers are not disadvantaged.**

Proposals for legislative amendment

The 'dominant reason' test

- 6.29 Section 16 of the ADA sets out what is known as the 'dominant reason' test. It states:

If an act is done for 2 or more reasons, then, for the purposes of this Act, the act is taken to be done for the reason of the age of a person only if:

- (a) one of the reasons is the age of the person; and
- (b) that reason is the dominant reason for doing the act.³⁶

- 6.30 The insertion of this provision into the act was opposed by HREOC when the legislation was before Parliament in 2003. HREOC remains concerned:

...that a dominant reason test would make it harder for people to make successful complaints as an act will only be taken to be done on the basis of the age of a person if their age is the dominant reason for doing an act.³⁷

34 Council on the Ageing SA, *Submission No. 77*, p. 6.

35 National Seniors Association, *Submission No. 67*, p. 15.

36 *Age Discrimination Act 2004*, section 16.

37 HREOC, *Submission No. 92*, p. 22.

- 6.31 HREOC also noted that the ‘dominant reason’ test was not the same test that applied under other discrimination legislation:

In most events in life there is usually more than one thing that is acting to produce a result in a complex situation.

To identify the dominant purpose is difficult. It was removed from the Racial Discrimination Act in 1990 because it was perceived then as effectively rendering the act almost useless in providing a remedy. My personal view, when I saw the dominant purpose sneaking in here, was that it was largely gutting what was otherwise going to be an effective remedial process. I suspect that as cases start to unfold we are going to find people who are able to prove that age was one of the factors that brought about a result but fail to prove that it was a dominant reason as opposed to one of perhaps equal or lesser importance than some other issue.³⁸

- 6.32 This question was considered by the Senate Legal and Constitutional Affairs Committee in its review of the Age Discrimination Bill in 2003. That Committee noted:

3.9 The Committee is concerned that the dominant purpose has been proposed without broad consultation. This test was removed from the Racial Discrimination Act in 1990 on the basis of its impractical application. In the Committee’s view, the proposed test’s inconsistency with other anti-discrimination law will present significant problems for the bill, particularly in achieving the aim of attitudinal change. A more stringent test than other anti-discrimination law signals to the community the lesser importance of age discrimination when compared with other prohibited discriminatory conduct.

Recommendation 1

*The Committee recommends that ‘dominant reason’ referred to in clause 16 be defined to minimise the risk of uncertainty over the scope of the term and specify who is to bear the onus of proving the reason.*³⁹

38 The Hon John Von Doussa, HREOC, *Transcript of Evidence*, 15 May 2007, p. 70.

39 Senate Legal and Constitutional Affairs Committee, report on the *Age Discrimination Act 2003*, p.7, available at http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/age03/report/report.pdf.

- 6.33 In a dissenting report, three Senators recommended ‘replacing the proposed test with the test that is used in other Commonwealth anti-discrimination law’.⁴⁰
- 6.34 Concerns were raised in a number of other submissions about this provision. For example, the ACT Government recommended that further thought should be given to the provision as ‘establishing that age was the dominant reason for a refusal [e.g. in regard to employment or advancement] could be problematic...’⁴¹ The Caxton Legal Centre observed:
- As you are probably aware by now, there has been very little uptake of the age discrimination provisions and, aside from the huge evidentiary burden of actually proving discrimination, that dominant reason test makes it that much harder to succeed.⁴²
- 6.35 The Committee can see no reason why the ‘dominant reason’ test should apply only to age discrimination legislation, and believes this matter should be reconsidered by Government, with a view to standardising the application of anti-discrimination legislation.

Recommendation 43

- 6.36 **The Committee recommends that the *Age Discrimination Act 2004* be amended to remove the ‘dominant reason’ test contained in section 16, thus bringing this legislation into line with other anti-discrimination statutes.**

Other suggested legislative changes

- 6.37 HREOC also raised concerns about the ‘breadth and details of exemptions and the issue of coverage of ‘relatives or associates under the ADA’.⁴³ As the President of HREOC explained:
- HREOC believes that the capacity of the legislation to protect older people still requires some further strengthening... There is the removal of the exemption for direct compliance with

40 Senate Legal and Constitutional Affairs Committee, report on the *Age Discrimination Act 2003*, p. 37, available at http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/age03/report/report.pdf.

41 ACT Government, *Submission No. 108*, p. 4.

42 Mr Scott McDougall, Caxton Legal Centre, *Transcript of Evidence*, 16 July 2007, p. 19.

43 HREOC, *Submission No. 92*, p. 42.

Commonwealth laws and orders, particularly insofar as that exemption applies to the Defence Force. There is the removal of the exemption for religious bodies. Failing the complete removal of that, the exemption should be limited to acts necessary to avoid injury to the religious sensibilities of adherents to the religion. There is also the removal of the exemption for voluntary organisations. We would argue for the extension of the act's coverage to include relatives and associates of older people within the range of people who may bring a complaint.⁴⁴

- 6.38 The Committee received very little evidence on this matter, other than the views of HREOC itself. The Committee does not feel it is in a position to make a substantive recommendation in favour of or against these provisions at this stage. However, the Committee would like to see a review of the operations of the Act in 2009 (5 years after its passage) and would propose that the nature and range of exemptions be examined in that review.

Recommendation 44

- 6.39 **The Committee recommends that an independent review be undertaken in 2009 of the effectiveness of the *Age Discrimination Act 2004*. The review should consider, among other things, the nature and range of exemptions provided for under the Act.**

Public awareness and attitudes

- 6.40 Having legal redress may assist in some cases of illegal discrimination, but it is not the only solution:

...studies indicate that legislation alone is not adequate to change attitudes and put an end to discrimination there must be education of employers, recruitment agencies and the public in general.⁴⁵

- 6.41 HREOC recently commissioned research on community awareness about age discrimination. Key findings included:

44 The Hon John Von Doussa, HREOC, *Transcript of Evidence*, 15 May 2007, p. 68.

45 Public Trustee NSW, *Submission No. 72*, p. 12.

- Age discrimination is prevalent in Australia; widespread reports of age discrimination are not commensurate with the small number of complaints registered by anti-discrimination agencies as many were wary of making a complaint;
- The experience of age discrimination generates enormous personal distress. Older people frequently feel demeaned, rejected or ignored on the basis of age;
- There are considerable barriers to preventing age discrimination. Prejudicial stereotypes about older people form a significant part of this problem;
- On its own, the ADA is limited in its effectiveness in preventing age discrimination in the community;
- There was little awareness among employers of the benefits of recruiting older people, such as higher productivity, lower recruitment costs and higher retention rates; and
- Older people wanted public education that was positive about their contribution and role and were concerned that campaigns focusing solely on the complaints process could have a negative impact.⁴⁶

6.42 The negativity towards older Australians appears widespread and likely to emerge in a number of different ways:

When you are first treated like a silly old cow, it is offensive, but after a while you just accept it as inevitable. It does not happen to men as much as it happens to us. My husband is an academic. The first time it happened to him, when he was treated like an idiot by the bank, he came home in shock. I said, 'I've been putting up with that for years.' ...it is worsening and because the larger part of the population is about to be older people. They are deserving of respect. It is particularly bad in nursing homes, where people who have achieved much in their lives are treated like children – or backward children, really.⁴⁷

6.43 National Seniors advocates a public awareness campaign about the Age Discrimination Act and how to use it.⁴⁸ 'A media campaign

46 HREOC, *Submission No. 92*, pp. 20-21.

47 Mrs Betty Roberts, Catholic Women's League of Australia, *Transcript of Evidence*, 5 July 2007, p. 28.

48 National Seniors Association, *Submission No. 67*, p. 15.

directed at the value of older people and the positive contribution they make to the community would go some way to addressing this'.⁴⁹

- 6.44 The NSW Ministerial Advisory Committee on Ageing noted that, while there was legislation at both state/territory and federal level to address age discrimination:

...the effectiveness of these laws in transforming social attitudes and practices has been limited. In part, this is due to the difficulties associated with bringing a successful discrimination case.

...

The Committee recommends a greater focus on community education to deal with the range of age discrimination experienced by older people.⁵⁰

- 6.45 The Caxton Legal Centre indicated it had 'serious concerns that there is a lack of community awareness about age discrimination and believed that the government must do more to promote awareness about age discrimination.'⁵¹ Similarly, the Public Trustee NSW would like to see HREOC, under the role given to it by the ADA, 'hold public awareness and education campaigns, develop monitoring strategies and develop effective policies against age discrimination'.⁵²

- 6.46 As noted earlier, HREOC has a statutory responsibility for promoting understanding and compliance with the act, and educating the community more generally about the objects of the act. HREOC advised that the 'act does not create a statutory position of age discrimination commissioner. However, HREOC appointed one of its commissioners to be responsible for age as soon as the act commenced and committed staff to assist the commissioner. In promotion of the act, the commissioner has given speeches, made press releases and published opinion pieces.'⁵³ Further:

Whilst the act aims to operate as a catalyst for attitudinal change, this goal cannot be achieved by legislation alone. It must be complemented by community education awareness about age discrimination. Work to this end is being

49 National Seniors Association, *Submission No. 67.1*, p. 4.

50 NSW Ministerial Advisory Committee on Ageing, *Submission No. 103*, p. 6.

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

52 Public Trustee NSW, *Submission No. 72*, p. 12.

53 The Hon John Von Doussa, HREOC, *Transcript of Evidence*, 15 May 2007, p. 68.

undertaken by HREOC and the responsible commissioner. To date HREOC's work on age discrimination has been focused primarily on improving accessibility to the complaints mechanism and has targeted younger workers as well as older workers. However, HREOC is currently in the process of developing a national community awareness campaign about age discrimination, which in particular promotes the benefits of engaging older employees. It is envisaged that this campaign will be released in the second half of this year. HREOC will tie it in with its current Work Out Your Rights campaign in the employment situation.⁵⁴

- 6.47 The Committee supports this initiative by HREOC and would like to see the effectiveness of such a program assessed as part of the review of the Act in 2009 (see Recommendation 44).

54 The Hon John Von Doussa, HREOC, *Transcript of Evidence*, 15 May 2007, p. 68.

Retirement villages

In the end the prospective resident signs the documents in good faith and hopes that the village owner/developer has acted in good faith also.¹

Introduction

- 7.1 Access to housing is a basic human right. For older Australians, secure accommodation, both in terms of personal security and tenure, are particularly important.
- 7.2 Older Australians reside in a range of accommodation types. These include remaining in the family home or in private rental accommodation (often with some support services provided either by family or under programs such as the Home and Community Care program); residing with family members, either under the same roof or in 'granny flat' style accommodation; living in purpose-designed community type housing for over-55s; entering retirement village developments or residential parks; and entering hostels and nursing homes when higher levels of support are required.
- 7.3 The Committee received a number of submissions concerning retirement villages, particularly in relation to the issue of contracts and the difficulties in obtaining legal assistance when in dispute with management of such facilities. For this reason, the Committee has examined some of these issues in this chapter. However, wider

1 Mr Robert Boyne, *Submission No. 157*, p. 3.

accommodation issues, including those related to aged care facilities, are beyond the scope of this inquiry.

- 7.4 Retirement villages are regulated under state and territory legislation, and there is significant variation among those jurisdictions as to the nature of what is covered, including in areas such as residents' rights and dispute resolution mechanisms.² While there are specific statutes regarding retirement villages, fair trading and consumer legislation may also apply to certain aspects of their marketing and operations.

What are retirement villages?

- 7.5 The exact definition of what constitutes a 'retirement village' varies from state to state. For example, in NSW, the *Retirement Villages Act 1999* defines a retirement village as:

(1) For the purposes of this Act, a "retirement village" is a complex containing residential premises that are:

(a) predominantly or exclusively occupied, or intended to be predominantly or exclusively occupied, by retired persons who have entered into village contracts with an operator of the complex, or

(b) prescribed by the regulations for the purposes of this definition.³

- 7.6 In Victoria, the definition is:

"retirement village" means a community-

(a) the majority of which is retired persons who are provided with accommodation and services other than services that are provided in a residential care facility; and

(b) at least one of whom, before or upon becoming a member of the community, pays or is required to pay an in-going contribution;⁴

- 7.7 Most acts specifically exclude a number of types of accommodation from the definition, including residential care provided under the

2 For a summary of legislation, see Rodney Lewis, *Elder Law in Australia* (Sydney: LexisNexis Butterworths, 2004), pp. 255-259.

3 *Retirement Villages Act 1999* (NSW), section 5.

4 *Retirement Villages Act 1986* (VIC), section 3.

Commonwealth Aged Care Act 1997, nursing homes, residential parks and boarding houses.⁵

- 7.8 Retirement villages have been growing in number and popularity over recent years. Retirement villages provide an option for many older people seeking housing appropriate to their changing needs. They provide maintenance free, community style living, often with the benefit of facilities such as a swimming pool, hobbies room, library and other amenities.⁶
- 7.9 Villages are structured in a range of ways, including lease-for-life arrangements; strata title; loan/license arrangements; and 'purple title'.⁷ They can be operated on a 'not-for-profit' or 'for-profit' basis. As there is no system of registration of such villages⁸, it is difficult to estimate how many of each type of facility exist⁹ and the nature of the resident profile. One submission suggested that widows and widowers make up probably about 55 per cent of village occupancy, and that the ratio of elderly women to men is 4:1.¹⁰ It was suggested that the average age of residents was around 80 years.¹¹
- 7.10 The level of unhappiness with retirement village arrangements is very difficult to assess. The Committee was conscious that it was only hearing from those who have concerns about certain aspects of this style of accommodation – those who are happy with their circumstances would be unlikely to write to the Committee and say so. Some submissions suggested that the demographic profile of the villages themselves meant that there was under-reporting of issues arising from the management of these facilities. As COTA Over 50s commented:

5 See for example, *Retirement Villages Act 1999* (NSW), section 5.

6 Ms Joan Adams, *Submission No. 145*, pp. 4-5.

7 Under 'purple title' residents purchase an undivided share in the whole of the village including the land and improvements, such that each resident owns an undivided share in all of the other residents units, the community centre and all of the common property...', Mr Clement Allsworth, *Submission No. 32*, p. 3.

8 Ms Joan Adams, *Submission No. 145*, p. 3.

9 One industry website, www.villages.com.au (accessed 14 September 2007) indicated there were over 1750 villages throughout Australia.

10 Mr Keith Topham, *Submission No. 54*, p. 1.

11 See for example, Mr Stanley Hall, *Submission No. 16*, p. 1; Mr Keith Topham, *Submission No. 54*, p. 1; ARQRV, *Submission No. 19*, p. 2; Mr Robert Harvie, *Submission No. 85*, p. 2.

Many residents are older women, who are less likely to be assertive when faced with either disputes or conditions imposed on them.¹²

- 7.11 Mr Robert Harvie noted the reluctance of older people to actively participate in the management of their own affairs, and the potential for intimidation:

...only approximately 10 per cent of the elderly are thinking persons, despite being retired. Those like me can see what is being unjustly perpetrated on them. However, most elderly tend to be apathetic and think that retirement is a place where one can forget that life carries on without their participation in it ... whilst not condoning this demeaning attitude, it should be the way that the elderly can spend their declining years, should they so desire, without worrying that coercion and intimidation can occur because of their lack of knowledge.¹³

- 7.12 Mr Harvie also stated that he is considered a troublemaker in his village because he is prepared to stand up against the operator and argue against him about different things. When asked if he had been victimised, Mr Harvie stated:

Yes. I have had a death threat, and I have had oil spilled on my front porch so that if I stepped out the door I would have gone head over charlie. I believe that both of those are attributable to the village that I live in or have been put there by somebody in connection with the village.¹⁴

- 7.13 Other submissions also commented on the difficult situation facing some residents in retirement villages:

In our experience the current regulatory regimes do not draw an appropriate balance between the rights of residents and scheme operators and in many cases scheme operators blatantly abuse their power. This is because residents, having sold their homes to get into a village are increasingly vulnerable in the private rental market... They are concerned to maintain secure accommodation suited to their needs, and therefore are reluctant to challenge unfair and exploitative practices within villages despite inadequate repairs,

12 COTA Over 50s, *Submission No. 58*, p. 14.

13 Mr Robert Harvie, *Transcript of Evidence*, 15 May 2007, pp. 43-44.

14 Mr Robert Harvie, *Transcript of Evidence*, 15 May 2007, p. 45.

inappropriate use of residents' funds and bullying and intimidating behaviour by scheme operators.¹⁵

- 7.14 The Committee took evidence from a number of individuals and community groups as well as the peak industry body, the Retirement Village Association (RVA). The RVA has a membership of over 400 operators, owners and developers and has developed an Australian Retirement Village Accreditation (ARVA) Scheme.¹⁶ While the Committee acknowledges that establishing standards across the industry is important in addressing the concerns raised by residents, on RVA figures, only 25 to 30 percent of its members are accredited, and the take up rate was 'not as we would like and it is something that we are working on to improve'.¹⁷

Issues surrounding retirement villages

- 7.15 A number of issues relating to transparency and accountability in contracts were raised in evidence to the inquiry. These included:
- The complex nature of contracts;
 - Fees and charges;
 - Misleading advertising; and
 - Lack of low-cost and speedy dispute resolution mechanisms.

Each of these is discussed below.

Retirement village contracts

- 7.16 There is, it was argued, a mistaken belief that in entering such contracts, potential residents and developers were equal participants in the process. Complaints focused on the nature of the contracts, in particular their complexity, and the greater access to legal advice by developers.¹⁸

15 National Legal Aid, *Submission No. 99*, pp. 8-9. See also Mr Philip Phillips, ARQRV, *Transcript of Evidence*, 17 July 2007, p. 14; Mr Frank Reed, *Transcript of Evidence*, 4 June 2007, p. 49; Name withheld, *Submission No. 13*, p. 1.

16 www.retirementvillagesaust.com.au/About_Us.htm (accessed 14 September 2007).

17 Mr Adrian Pagett, RVA, *Transcript of Evidence*, 30 July 2007, p. 47.

18 See for example, Mr Robert Boyne, *Submission No. 157*, pp. 2-3.

- 7.17 Mr Robert Boyne, a resident of a retirement village in Western Australia, made the point that the contracts are complex, long and difficult for the average person to understand:

Few prospective retirement village residents can understand the complex documents presented to them by sales people. These documents are supposed to be understood fully by prospective residents, some of whom are more than 80 years of age... Within the village...[where I reside]... the pre-contract and contract documents presented to another resident weighed 1.5 kg on kitchen scales. Thus residents were unlikely to understand at least some of the implications of the contract documents.¹⁹

- 7.18 Seeking the views of those already resident in the facility was also not always an option, due to a number of different contracts often applicable within the one complex. As the Committee was told, 'there is no standardisation within the industry and contracts vary between villages as well as between residents in the same village'.²⁰

- 7.19 This has implications in trying to seek legal redress collectively. As one witness indicated:

In my own village we probably have anything up to 20 or 30 different contracts. Therefore you cannot mount a class action against the operator because whatever my contract says it does not mean to say that your contract says the same thing... as one operator found that such and such applied to him and he was able to get that through without any query then another operator would adopt that and therefore you have another different contract, and so it goes on down the line. The uniformity of contract is one of the big problems in the industry.²¹

- 7.20 The experience was similar in other states. In Queensland, for example, there was criticism about the Public Information Documents (PIDs) that are provided along with contracts:

...a Public Information Document... can and usually does amount to about seventy pages. Where the contract is in respect of a 'strata title' accommodation unit (a small

19 Mr Robert Boyne, *Submission No. 157*, pp. 2-3.

20 Ms Joan Adams, *Submission No. 145*, p. 5.

21 Mr Robert Harvie, *Transcript of Evidence*, 15 May 2007, p. 48. See also, COTA Over 50s, *Submission No. 58*, p. 14.

proportion of villages – 12% or so) the contract involves a freehold title and not a lease agreement. However, there is still the same voluminous Public Information Document in respect of the facilities provided by the “scheme operator” - the village owner.²²

7.21 The Association of Residents of Queensland Retirement Villages (ARQRV) went on to note:

...there are generic parts of PIDs which are mandatory but other parts vary widely from village to village. Not only that, they differ widely even within a single village; there may be half a dozen different PIDs, according different entitlements and responsibilities to residents within the same village. For example, in one group of villages in Queensland, PIDs issued over the last couple of years forbid residents to have meetings of more than five people on the common property (in the Community Hall) without the operator's approval.²³

7.22 The Committee sought the views of the RVA on the notion that retirement village agreements can be complex, difficult for older people to understand and skewed in favour of village operators and managers.

7.23 RVA explained that retirement village agreements are of necessity quite lengthy documents so as to adequately deal with a substantial number of essential terms. RVA stated that contracts usually deal with the following:

- (a) The grant or provision of occupancy rights subject to necessary reservations
- (b) The consideration payable on entry and the financial entitlements of residents following termination
- (c) The budgeting for, consulting on, fixing and payment of ongoing village operating costs
- (d) The terms for payment of deferred fees and reserve fund contributions
- (e) The operator's management, maintenance and marketing obligations
- (f) Insurance, damage/destruction provisions

22 ARQRV, *Submission No. 19*, p. 1.

23 ARQRV, *Submission No. 19*, p. 1.

- (g) Residents' obligations to maintain their residence
- (h) The marketing procedures and obligations of the parties incidental to "re-sales" of residences
- (i) Operator's financial reporting to residents obligations
- (j) Procedures for residents' meetings
- (k) Termination rights and controls
- (l) Dispute provisions
- (m) Emergency call service provisions
- (n) Rules for occupancy and use of communal facilities
- (o) Modification of scheme procedural provisions.²⁴

7.24 RVA further explained that, although agreements are written succinctly and in plain English, the very nature of their subject matter meant they were often lengthy:

The terms of the agreement must balance the rights, obligations and duties of the parties and ensure the professional long term management of the village. Villages are not self governed by residents, they are proprietor managed. The RVA considers that for the most part agreements are written on reasonable terms which allow the proper management of the village scheme.²⁵

7.25 Given the highly detailed nature of retirement village contracts, obtaining independent legal advice would seem to be the prudent thing to do. However, the very complexity of the contracts and the associated legal costs involved in examining them work against many older people seeking such advice prior to entering into the contract:

This is the sort of contract which is pre ordained and is not a contract negotiated between the parties. It is a take it or leave it contract which most prospective residents are inclined to take because "it must be alright". The contract is unbelievably long, complicated and repetitive. To have a lawyer scrutinise such a contract, which includes the PID, really thoroughly would be expensive, possibly two or three thousand dollars; not the sort of expense one wants to incur just to see if a village contract is "alright".²⁶

24 RVA, *Submission No. 143.1*, pp. 1-2.

25 RVA, *Submission No. 143.1*, p. 2.

26 ARQRV, *Submission No. 19*, p. 1.

- 7.26 The cost of legal advice to scrutinise such contracts was also confirmed by Ms Julie Van Dort, a Victorian solicitor, who noted that ‘the cost of legal advice prior to signing contracts is prohibitive’, as the nature of the contracts required many hours of careful reading.²⁷ Finding someone with expertise in the area was also problematic:

You can have the best lawyer in the world, but if he does not know the Retirement Villages Act he can say, ‘Yes, that contract looks A-okay,’ and then suddenly you find you have committed yourself for the rest of your life to something that you would not normally have committed to if it had been fully explained to you.²⁸

- 7.27 The RVA acknowledged the lack of expertise in this area among the legal profession and the costs involved:

...there are not a large number of solicitors with expertise in retirement village law in WA... Part of the problem in accessing legal advice appears to be consumer resistance to legal costs. Those costs cannot be minor due to the detail necessarily involved in retirement scheme documentation and the time taken to give sound advice thereon. The Government is addressing this issue in its current review.²⁹

- 7.28 Given the highly complex nature of the contracts and the financial implications of the transaction being entered into, the Committee cannot stress enough the importance of people seeking independent legal advice prior to signing the contract. While the cost may seem high at the time, when compared to the financial outlay being undertaken and the longer term costs, it is ‘penny wise and pound foolish’ to avoid obtaining such legal advice.

Standardisation of retirement village contracts

- 7.29 Evidence to the inquiry suggested that the simplification and standardisation of retirement village contracts could assist older people to make better informed decisions about their accommodation options.
- 7.30 ARQRV suggested that unless and until residence contracts are completely standardised in a village and preferably across the

27 Ms Julie Van Dort, *Submission No. 125*, p. 1.

28 Mr Robert Harvie, *Transcript of Evidence*, 15 May 2007, p. 45.

29 RVA, *Submission No. 143*, p. 2.

retirement village industry, residents will be bewildered and quite uncertain as to their obligations and entitlements.³⁰

- 7.31 When asked if more regulation or legislation was necessary to tighten up and limit the variety in retirement village contracts, Mr Pagett, representing the RVA stated:

I would argue against standardisation and limiting the variety. I understand the position where you can have a village – and a village is a long-term proposition – and after day one the contracts of residents might be varied, but the benefit of having the flexibility in our legislation that we have now is that it gives proprietors and prospective proprietors the opportunity to offer a broader range of services and financial arrangements in the retirement village context ... although uniformity in some respects would be helpful ... there is a limit to the subject matter that can be covered by uniform terms and conditions. When you get to the fine detail of the financial and service arrangements, I think the community is better served by the competition that takes place in the marketplace between proprietors in making different offerings.³¹

- 7.32 RVA further explained that consideration is being given to introducing standard approved contractual terms, however, due to the diversity of schemes offered to the public, standardisation has its limitations.³² It added:

The diversity of the title and legal arrangements on offer in the marketplace preclude a “one contract fits all” approach. The Standing Committee should also be mindful that various different taxation treatments apply to different title/scheme arrangements which is also not conducive to a standard contract approach.³³

- 7.33 RVA explained that the imposition of a standard contract would be a very difficult task which would have to allow for the inclusion of a substantial number of non standard terms:

The resulting contract is likely to be disjointed and may not in fact produce a simplified, easy to understand contract for

30 ARQRV, *Submission No. 19*, p. 1.

31 Mr Adrian Pagett, RVA, *Transcript of Evidence*, 30 July 2007, p. 43.

32 RVA, *Submission No. 143*, p. 1.

33 RVA, *Submission No. 143.1*, p. 2.

consumers. It is also noted that no other sector of the real estate industry has a compulsory standard contract imposed by law. In a free market society the RVA remains steadfastly in support of the current contractual system.³⁴

7.34 RVA does consider, however, that there are a limited number of contractual issues which could be subject to standard agreed terms. Examples for consideration are:

- (a) Operating costs financial reporting and consultation terms
- (b) Contract termination rights
- (c) Dispute and mediation process terms
- (d) Procedures for the conduct of residents' meetings
- (e) Contract/scheme variation terms
- (f) Resident committee terms.³⁵

7.35 The Committee notes that South Australia recently gazetted amendments to that state's legislation on retirement villages. As the Council on the Ageing noted:

The amendments have provided for standardised and comprehensible documentation for contracts. This model is being well received in the industry and is a model that could be adopted across jurisdictions.³⁶

7.36 COTA suggested that this model of standard documentation that is comprehensible to older consumers would also be well placed in the provision of a wide range of goods and services, including financial products.³⁷

7.37 The Committee was also advised that:

...a committee of State Commissioners of Fair Trading started to look into 'unfair terms in contracts'; substantive unfairness, not just procedural unfairness, from a consumer's point of view. A comprehensive paper was published inviting submissions from the public.³⁸

34 RVA, *Submission No. 143.1*, p. 2.

35 RVA, *Submission No. 143.1*, p. 2.

36 Council on the Ageing SA, *Submission No. 77*, p. 10.

37 Council on the Ageing SA, *Submission No. 77*, p. 10.

38 ARQRV, *Submission No. 19*, p. 1.

- 7.38 ARQRV suggested that the committee's proposition seems to be 'dead in the water'.³⁹
- 7.39 While the Committee acknowledges that complete standardisation of contracts would not be possible, given the diverse legal nature of retirement villages, it does believe that key terms and conditions could be standardised, not just within states, but across the industry throughout Australia. The Committee would like to see the State Commissioners of Fair Trading revive the re-examination of retirement village contracts, and include in this examination the experience of South Australia as a starting point for standardisation.
- 7.40 A number of submissions argued that the regulation of retirement villages should be transferred to the Australian Government:
- ...it would be better for state governments to depart from the scene and hand the reins to a federal authority, introducing controls similar to that applied to hostels and nursing homes.⁴⁰
- 7.41 In discussing this matter with the Australian Competition and Consumer Commission (ACCC) the Committee was advised that:
- While the ACCC acknowledges that retirement village concerns are quite pertinent for older Australians ...each of the states and territories have their own regulatory frameworks which deal with issues such as pricing and fees.
- Of course, coverage under state specific legislation does not preclude the more general application of the TPA - in particular, provisions relating to unconscionability and misleading and deceptive conduct. The ACCC will review complaints received to date to determine whether there are any issues of relevance to the TPA. We will also raise the issues identified with the Committee with our colleagues in the Offices of Fair Trading (OFT) and the Fair Trading Operations Advisory Committee.⁴¹
- 7.42 The Committee believes that the ACCC, in consultation with its state and territory fair trading colleagues, should be playing a stronger role in monitoring consumer protection for retirement village residents. While the matter should continue to be managed at the state level for

39 ARQRV, *Submission No. 19*, p. 1.

40 Mr Keith Topham, *Submission No. 54*, p. 1; see also Mr R Boyne, *Submission No. 157*, p. 6.

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

the time being, should there be insufficient improvement in the level of protection for consumers, the Australian Government should consider regulating this industry using its powers under Corporation legislation.

Recommendation 45

- 7.43 **The Committee recommends that the Australian Competition and Consumer Commission, together with state and territory fair trading offices or their equivalents, form a working party to examine the nature of retirement village contracts, with a view to improving consumer protection provisions.**

Fees and charges

- 7.44 One of the areas of greatest complaint among submissions related to the issue of deferred fees and other charges associated with retirement villages, including exit fees.⁴² Mr Clement Allsworth, from Western Australia, outlined the fees that a retirement village resident is required to pay upon leaving the village in which he is resident. These included:

- Deferred facility fee – payable upon the sale of the unit, equivalent to 2.5% of the Estate Sale Price multiplied by the number of days that the resident has been entitled to occupy the residence, and then divided by 365. If the resident has been in the unit for more than 3, 650 days, the Deferred Facility Fee will be the greater of either 25% of the Estate Sale Price or 50% of the amount by which the Estate Sales Price exceeds the Estate Purchase Price;
- Refurbishment and Improvements contribution – this can be up to, but not exceed, 5% of the Estate Sale Price
- Upgrading of the unit, as the discretion of the Manager of the facility
- GST on the amount of Deferred facilities fee paid to the developer.⁴³

- 7.45 The above fees are in addition to payments by residents into a Refurbishment Fund (also called Sinking Funds), ‘the proceeds of which are or should be applied to covering the long-term liabilities of repair, replacement etc.’ Alternatively, in some villages, a percentage of the monthly contributions are set aside for long-term liabilities.

42 See for example, Mr Kenneth Leslie, *Submission No. 21*, p. 3.

43 Mr Clement Allsworth, *Submission No. 32*, pp. 8-9.

Concern was also expressed about the accountability of such funds, with little transparent accounting.⁴⁴

- 7.46 Mrs Jean Lehmann suggested that legal documents should have clear definitions of capital expense, capital improvement, repairs and maintenance, to ensure that residents are not subsidising the capital improvement of the operator from their maintenance fees.⁴⁵ In commenting on her retirement village Ms Lehmann stated that the operator had:

...breached the Act and lease contracts by using residents funds on items of capital expenditure and was forced to refund over \$100,000 to the residents' funds following a Tribunal decision.⁴⁶

- 7.47 In Queensland, many contracts in recent years have required residents to be responsible for the maintenance, repair and replacement of all fixtures, fittings, etc., on or in their accommodation unit:

...despite the fact that scheme operators contribute, compulsorily, to a Capital Replacement Fund and residents, compulsorily, to a Maintenance Reserve Fund. Earlier PIDs in those villages do not contain such restrictions or stipulations so cannot be made to apply to their holders. It is a silly, bizarre, inconsistent situation but scheme operators get away with it because although they are required, in Queensland, to submit 'new PIDs' to the Office of Fair Trading, that Office does not scrutinise them, simply registers them.⁴⁷

- 7.48 The level of fees may become an issue where a resident wishes to sell their residence and leave the complex because they are unhappy or because their health has deteriorated, but they then find the exit fees are such that they are unable to leave.⁴⁸

- 7.49 The RVA explained what the particular retirement village exit fees are and why they are necessary and important.

In most substantial retirement villages, there are substantial community facilities that are also supplied. That amenity or

44 Mr Clement Allsworth, *Submission No. 32*, pp. 9-10.

45 Mrs Jean Lehmann, *Submission No. 15*, p. 1.

46 Mrs Jean Lehmann, *Submission No. 15*, p. 1.

47 ARQRV, *Submission No. 19*, p. 1.

48 Ms Joan Adams, *Submission No. 145*, p. 2.

asset is a long-term investment for the proprietor and he gets a return in part by way of what you call exit fees and what I would call facility fees or amenity fees.

...

In my experience, it is true to say that the management fees that are recovered in those operating costs charged on an annual basis are not likely to provide a fair return to the manager for that role. I would say another justification for what are sometimes called exit fees is that true management costs have not been recovered during the process of managing the village through the operating costs.⁴⁹

7.50 RVA further explained that:

...a retirement village is a long-term property investment that has to be managed over a long term for the benefits of both the proprietor and the residents ... in a retirement village context we have to have reserved funds – whether you call them reserved funds, capital maintenance funds or what have you – in order to maintain the assets very long term. The benefits of the scheme are that we can defer that charge to the resident until he leaves.⁵⁰

7.51 RVA summarised exit fees, and how they are calculated:

...if you have a normal, reasonably substantial retirement village in Western Australia, you are looking at, after 10 years, a deferred fee or exit fee of about 25 per cent of the then rollover value or the then market value of the unit, and you are looking at anything between five and 10 per cent for the reserve fund contribution ... the deferred fee is calculated in most cases on a time basis. In schemes that I have prepared it is calculated on a fee-day basis. Once a resident goes into occupation we calculate that fee over the period of occupation that that person enjoys the amenity.⁵¹

7.52 Some submissions to the inquiry suggested that retirement village developers and the managers are engaging in deceptive and misleading conduct in not explaining the nature of ongoing charges and other fees. When asked if there should be a clearer explanation to any new applicants that there will be ongoing charges and that they

49 Mr Adrian Pagett, RVA, *Transcript of Evidence*, 30 July 2007, pp. 43-44.

50 Mr Adrian Pagett, RVA, *Transcript of Evidence*, 30 July 2007, p. 44.

51 Mr Adrian Pagett, RVA, *Transcript of Evidence*, 30 July 2007, p. 44.

will have to pay for all these services while they are in the village, RVA stated:

Absolutely. And there is. Before someone signs a resident's contract to come into a retirement village, they receive disclosure.⁵²

7.53 In addressing a specific example, RVA explained:

...the fact of the matter is that before he went into his retirement village he would have received full disclosure of the financial arrangements that apply under his scheme. That includes a section which gives examples of your refund entitlements and the calculation of the deferred fees and sinking fund contributions after one year, two years, five years and 10 years. That is a code requirement. We go to great lengths in our disclosure booklets to explain these things.⁵³

7.54 RVA further added:

...unfortunately, it can occur where people, despite being given detailed disclosure, fail to absorb it. This is an issue that has come out in a review of the legislation in that there seems to be a shortage of legal advice available for the consumer in the area.⁵⁴

7.55 The Committee acknowledges that the level of fees, particularly 'exit' fees, is a significant issue for those wishing to leave a village. While it is the responsibility of village proprietors to make potential residents aware of any fees, charges and conditions and fully disclose such information openly and honestly, it is equally the responsibility of potential village residents to make themselves fully aware of, and seek legal and financial advice concerning, the particular fees, charges and contract conditions before engaging in a retirement village contract.

7.56 The Committee is concerned about a lack of transparency in regard to the setting of the level of these fees and charges and the lack of discretion in their application. The Committee believes that, as part of the review of retirement village contracts (Recommendation 45) the ACCC should consider all aspects of 'exit' and other fees, including whether they should be abolished.

52 Mr Adrian Pagett, RVA, *Transcript of Evidence*, 30 July 2007, p. 44.

53 Mr Adrian Pagett, RVA, *Transcript of Evidence*, 30 July 2007, pp. 46-47.

54 Mr Adrian Pagett, RVA, *Transcript of Evidence*, 30 July 2007, p. 47.

Recommendation 46

- 7.57 **The Committee recommends that, in its review of retirement village contracts, the Australian Competition and Consumer Commission and state and territory fair trading offices also review all aspects of 'exit' and other fees associated with such contracts, including whether they should be abolished.**

Advertising

- 7.58 Evidence to the inquiry suggested that some retirement village operators may be involved in misleading advertising. For example, Mrs Jean Lehmann reported:

Advertising material of [the village] claimed that a nursing home was part of the village when final plans [had] not yet received approval. If/when approved, the nursing home would not be part of the village but a separate income-earning facility, admission to which will be governed by external factors... [this] is not mentioned to unsuspecting prospective residents ...⁵⁵

- 7.59 Mrs Lehmann went on to note:

From personal experience it is desirable to ensure that operators of retirement villages advertise their village in a truthful manner. Many prospective retirees, including widows who may not have made decisions for themselves for many years, are inexperienced, and are easily influenced by clever sales persons who fail to clearly and fully disclose all matters which will materially affect prospective residents.⁵⁶

- 7.60 The Committee believes that there are sufficient legislative safeguards against deceptive and misleading advertising, but acknowledges that not all older people will feel willing and able to pursue complaints in this area.

Complaints mechanisms

- 7.61 Depending on the nature of the contract signed, residents may have limited mechanisms through which to raise their concerns. Usually,

55 Mrs Jean Lehmann, *Submission No. 15*, p. 1. See also Mr and Mrs Leo and Frances Kelly, *Submission No. 31*, p. 1.

56 Mrs Jean Lehmann, *Submission No. 15*, p. 1.

issues can be raised directly, in the first instance, with the complex manager, or through the residents' association. However, in some cases, the Committee was disturbed to hear that even these avenues had been closed through contract provisions. For example, the Committee was told of cases where:

- There was no provision for a manager to be removed;⁵⁷
- Managers claim there is no body corporate or that the manager is the body corporate, and therefore owners have no rights in respect of entering into cost agreements for legal action as required by state legislation;⁵⁸
- The agreement gives the manager irrevocable enduring power of attorney;⁵⁹
- The agreement states that the manager is the agent of the owner and can sign documents on behalf of the owner in relation to changes in title, entering into agreements and to sell the apartment or unit;⁶⁰
- Owners do not have the capacity to petition meetings of the body corporate, and consequently have no capacity to vote on the financial expenditure or examine financial documents relating to the management of the community;⁶¹
- The developer has a right to appoint Residents Representatives of its choice to a village's advisory board.⁶²

7.62 The ARQRV described this loss of rights of older people living in retirement villages in the following terms:

Residents in retirement villages find, in practice, that they have lost some of the freedoms which all Australian citizens enjoy as [a] right. Freedom of speech, freedom of assembly, freedom to dissent are all circumscribed to some extent by some operators of retirement villages. Threats to evict are not unknown even though eviction is not something that can be done at the whim of a village operator. Intimidation is not a

57 Mr Clement Allsworth, *Transcript of Evidence*, 30 July 2007, p. 30; also Mr Clement Allsworth, *Submission no. 32*, p. 11.

58 Ms Julie Van Dort, *Submission No. 125*, p. 2.

59 Ms Julie Van Dort, *Submission No. 125*, p. 2.

60 Ms Julie Van Dort, *Submission No. 125*, p. 2.

61 Ms Julie Van Dort, *Submission No. 125*, p. 4.

62 Mr Clement Allsworth, *Submission No. 32*, p. 11.

figment of anyone's imagination, it is widespread in retirement villages...⁶³

7.63 Should internal mechanisms fail to resolve disputes, residents are able to take their concerns to consumer bodies or tribunals. The experience of these appears to be mixed. One resident outlined his attempts to have his disputes resolved in this manner:

- The resident approached Consumer Affairs Victoria (CAV) with a verbal complaint in early 2004, and a written complaint in November 2005. The resident claimed that little has been done by CAV other than to try to arrange meetings between the resident and the operator. The resident stated that the operator failed to attend those arranged meetings.
- The resident approached the Victorian Civil and Administrative Tribunal (VCAT) in 2004. The VCAT informed the resident that it would only deal with each village resident on an individual basis, whereas the village residents would have preferred a class action. The complaint lapsed on learning of this process.⁶⁴

7.64 In Queensland, where there is a dispute between a resident or residents and a scheme operator, the resident may take a case to the Queensland Commercial and Consumer Tribunal. ARQRV stated that this is meant to be an inexpensive avenue to justice, however:

... the village operator can afford to have and often does have a solicitor and a barrister to represent him; so too may the ... residents [but few] have the necessary financial resources or the resources of spirit. Residents are thus at a distinct disadvantage.⁶⁵

7.65 ARQRV believes that if a scheme operator appeals a tribunal decision to a higher court the resident should be afforded legal aid to defend against that appeal. ARQRV added that even the threat of going to a higher court is most likely to cause a resident to withdraw from the whole dispute, which is in many cases the whole object of such a threat.

7.66 In a recent case in NSW, where a scheme operator appealed a tribunal decision to a higher court, the Office of Fair Trading took over the role of defending against the appeal. ARQRV explained that:

63 ARQRV, *Submission No. 19*, p. 1.

64 Name withheld, *Submission No. 13*, p. 2.

65 ARQRV, *Submission No. 19*, p. 2.

It would have been beyond the resources of the residents concerned. In that instance residents were in effect given legal aid. But legal aid in such matters needs to be a matter of right; residents need to be certain of being able to access it.⁶⁶

7.67 The barriers faced by older people in accessing legal services were discussed in Chapter 5, and are relevant in this context. Taking formal legal action to pursue apparent breaches of contract by village operators can be costly and time consuming. Many retirement village residents rely on limited fixed incomes. The considerable costs of legal services can be quite daunting for many, and can be the deciding factor in pursuing any apparent breaches of contract by retirement village operators.

7.68 In Victoria, for example, the:

...jurisdiction to seek injunctions, orders and declarations relating to the complex title, property maintenance and ownership disputes is the Supreme Court. Estimates of costs of taking a matter to the Supreme Court are from \$30,000 to \$300,000 with a possibility of a 1 to 3 year wait for a decision. The cost and accessibility of the Supreme Court to resolve disputes is no longer appropriate to deal with community style living, promoting harmonious living and good practice in management.⁶⁷

7.69 Some village residents have been threatened with legal action, something which residents cannot readily afford:

The vast majority of residents in this village cannot afford Supreme Court action. The operators know this and constantly threaten us with Court action. They are relatively wealthy individuals and one of them in particular has been to Court many times on occasions not relevant to our particular dispute, but certainly related to other retirement entities and tax matters.⁶⁸

7.70 Mr Harvie suggested even if older people are aware of their rights, often they feel intimidated to the point where they will not do anything about their situation:

66 ARQRV, *Submission No. 19*, pp. 2-3.

67 Ms Julie Van Dort, *Submission No. 125*, p. 2.

68 Name withheld, *Submission No. 13*, p. 2.

Say you think you have got rights and you want to take a matter to the tribunal. An operator will turn around and say, 'If you take me to the tribunal and win I will take you to the Supreme Court'. 'Take you to the Supreme Court' are the operator's words and most people will shy away ... it is intimidation, coercion, bullying – whatever you like to call it.⁶⁹

Statutory supervisor

7.71 Some submissions called for the creation of a retirement village ombudsman,⁷⁰ or commissioner⁷¹ in each state to investigate and resolve disputes. The Committee was therefore interested to hear that New Zealand has recently passed legislation introducing a statutory supervisor to aid their elderly in addressing their particular retirement village problems. The statutory supervisor provision was established in the New Zealand *Retirement Villages Act 2003*.⁷²

7.72 Mr Robert Harvie, who brought this to the Committee's attention, described:

...this statutory supervisor as a person the elderly can go to as a starting point to find out: 'How can I get this fixed up? How can I achieve this? How can I do this? What can I do if I do this?' et cetera. There needs to be a starting point somewhere.⁷³

7.73 In New Zealand, all retirement villages have a statutory supervisor, which is an independent third party, often a trustee company. The statutory supervisor is appointed to supervise the security aspects of a resident's interests in the village. They also will monitor the financial position of the village. Most statutory supervisors will also, by contract, supervise other aspects of the arrangements between a village and its residents, including, for example, consultation on budgets and provision of services.⁷⁴

69 Mr Robert Harvie, *Transcript of Evidence*, 15 May 2007, p. 46. See also Ms Joan Adams, *Submission No. 145*, p. 14.

70 Mrs Jean Lehmann, *Submission No. 15*, p. 2; Mr Robert Harvie, *Submission No. 85*, p. 3.

71 Ms Julie Van Dort, *Submission No. 125*, p. 5.

72 www.legislation.govt.nz/libraries/contents/om_isapi.dll?clientID=77720&infobase=pal_statutes.nfo&jump=a2003-112&softpage=DOC, (accessed 11 September 2007).

73 Mr Robert Harvie, *Transcript of Evidence*, 15 May 2007, p. 47.

74 seniors.co.nz/articles/comm/legal.php, (accessed 11 September 2007).

- 7.74 The Hon Clayton Cosgrove, New Zealand Minister for Building and Construction, discussed the implementation of the legislation during an address to the retirement village sector in May 2007. Some key points from the address included:

...any new villages will have to be registered with the Retirement Village Registrar before they can make offers of occupation, known as an occupation right agreement

...

In order to be able to register, all operators will need to supply a series of documents, including a copy of their occupation right agreement, and details of their appointed statutory supervisor, although the Registrar may in some cases grant an exemption to appointment.

...

I am aware that there has been some concern in the industry, in particular among those running smaller villages, about the cost of statutory supervisors, but this cost can be minimised by sharing a statutory supervisor rather than having one for each individual village.

...

They play an important role in the village. They act as guardians of the collective interests of the residents by monitoring the financial position and the management of the village, and provide an avenue for residents to complain to statutory supervisors if they feel their rights have been breached.⁷⁵

- 7.75 The Committee was impressed with the New Zealand model of having statutory supervisors installed for each retirement village as a safeguard measure for residents. The Committee supports further research into the provision of statutory supervisors for Australian retirement villages.

⁷⁵ www.beehive.govt.nz/ViewDocument.aspx?DocumentID=29578 (accessed 11 September 2007).

Recommendation 47

- 7.76 **The Committee supports the concept of a statutory supervisor and recommends that the Ministerial Council on Consumer Affairs examine the New Zealand model to determine its applicability to retirement villages in Australia.**

Greater legislative harmonisation

- 7.77 The Committee found in its previous inquiry that one of the effects of a lack of harmonisation was increased difficulties or uncertainties for individuals and unacceptable differences in impacts for individuals due to inconsistent treatment of the same action across jurisdictions.⁷⁶ This is also the case with retirement villages. The increased diversification of types of retirement accommodation services has raised questions about the adequacy of current consumer protections.⁷⁷
- 7.78 A number of states have or are in the process of conducting reviews of legislation relating to retirement villages. In Western Australia, for example, the *Retirement Villages Act 1992* and the *Fair Trading (Retirement Villages Code) Regulations 2003* are being reviewed by the Department of Employment and Consumer Protection. In New South Wales, a review of retirement village legislation was commenced in 2004 and a bill introduced into State parliament at the end of 2006. That proposed legislation lapsed with the general election and has not yet been re-introduced.⁷⁸
- 7.79 The ACT Government is currently reviewing its *Retirement Villages Code of Practice* with a view to strengthening the protection for consumers:

In the ACT we have a code of practice for villages. It is not state legislation as some of the other states have, but we have a retirement village's code of practice in the ACT with a committee that actually looks at disputes. It has not been anywhere near as volatile as some of the other states are and have been. The abuse in the ACT is not as great as elsewhere

76 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Harmonisation of legal systems within Australia and between Australia and New Zealand*, November 2006, p. 6.

77 ACT Government, *Submission No. 108*, p. 4.

78 Mr Robert Harvie, *Submission No. 85*, p. 4.

...we were horrified with some things that were happening interstate. We then tried to make sure that what we put into the code what was learnt from the other states as well and to build on that. A couple of the matters that had been brought to the committee have been outside the jurisdiction and they are actually currently reviewing that at the moment.⁷⁹

- 7.80 Considerable scepticism about such reviews was evident in submissions to this inquiry. Mr Kenneth Leslie stated that legislative reviews do not adequately consider the views of retirement village residents:

Legislative reviews, such as they are, are orchestrated to limit input by residents ... there is unequal input into legislation resulting in it being weighted, heavily, against the resident (consumer) that it is ostensibly protecting.⁸⁰

- 7.81 However, the Committee believes that greater coordination among the states and territories in this area would assist in addressing a number of concerns of residents of retirement villages, minimising the different experiences of residents from state to state.

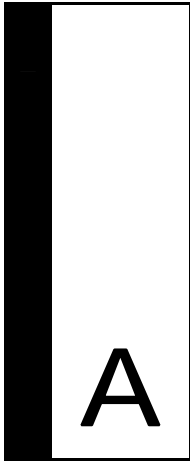
Recommendation 48

- 7.82 **The Committee recommends that the Standing Committee of Attorneys-General examine ways in which greater harmonisation of legislation regarding retirement villages could be pursued.**

Hon Peter Slipper MP
Chairman

79 ACT Government, *Submission No. 108*, p. 4; ACT Government, *Transcript of Evidence*, 22 May 2007, p. 12.

80 Mr Kenneth Leslie, *Submission No. 21*, p. 1.



Appendix A: List of Submissions

- 1 Mr Jack Backer
- 2 Ms Narelle McDonald (partially confidential)
- 3 CONFIDENTIAL
- 4 CONFIDENTIAL
- 5 Mr Oswald Mackay
- 6 Dr Jo Harrison
- 7 Public Advocate of the ACT
- 8 Ms Rosemary Jacob
- 9 CONFIDENTIAL
- 10 Australian Pensioners and Superannuants' League Qld Inc
(partially confidential)
- 11 Ms Janne Van Wulfften Palthe (partially confidential)
- 12 Mr Julius Abrahams (partially confidential)
- 13 Name Withheld
- 14 Mr David Paton
- 14.1 Mr David Paton (supplementary)
- 15 Mrs Jean Lehmann (partially confidential)
- 16 Mr Stanley Hall (partially confidential)
- 17 CONFIDENTIAL

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- 18 Country Women's Association of NSW
- 19 Association of Residents of Queensland Retirement Villages Inc
- 20 Mr Rodney Finn (partially confidential)
- 21 Mr Kenneth Leslie OAM
- 22 Queensland Country Women's Association
- 23 Mr Fred Graf
- 24 CONFIDENTIAL
- 25 Miss Beryl Gardner
- 26 Assets & Ageing Research Team, University of Queensland
- 27 Catholic Women's League Australia Inc
- 28 Mr John Sanderson (partially confidential)
- 29 CONFIDENTIAL
- 29.1 CONFIDENTIAL
- 30 Mr Aveo Newmarket
- 31 Mr & Mrs Leo & Frances Kelly (partially confidential)
- 32 Mr Clement Allsworth (partially confidential)
- 33 Association of Independent Retirees Limited (Melbourne Bayside Branch)
- 34 CONFIDENTIAL
- 35 CONFIDENTIAL
- 35.1 CONFIDENTIAL
- 36 Mr John Maschmedt (partially confidential)
- 37 CONFIDENTIAL
- 38 Aged Rights Advocacy Service Inc
- 38.1 Aged Rights Advocacy Service Inc (supplementary)
- 39 Australian Competition and Consumer Commission
- 39.1 Australian Competition and Consumer Commission (supplementary)

-
- 40 Australian Institute of Criminology
 - 40.1 Australian Institute of Criminology (supplementary)
 - 41 Federation of Community Legal Centres (Vic) Inc
 - 42 Ms Gwen Dowling
 - 43 CONFIDENTIAL
 - 44 CONFIDENTIAL
 - 45 Mr John Sullivan
 - 46 Dr Norma Duncan
 - 46.1 Dr Norma Duncan (supplementary)
 - 47 Ms Margaret A Jones
 - 48 Mr Bryan J Milner
 - 49 Mr Anthony J Walsh
 - 50 The Law Society of Western Australia
 - 51 CONFIDENTIAL
 - 52 Mrs Josephine Smyth (partially confidential)
 - 52.1 Mrs Josephine Smyth (supplementary)
 - 53 CONFIDENTIAL
 - 53.1 Mr Frank J Graf (supplementary)
 - 54 Mr Keith Topham CPA
 - 55 Alzheimer's Australia
 - 55.1 Alzheimer's Australia (supplementary)
 - 56 CONFIDENTIAL
 - 57 The Loddon Campaspe Community Legal Centre (partially confidential)
 - 58 COTA Over 50s
 - 59 Consumer Credit Legal Centre (NSW) Inc (partially confidential)
 - 60 CONFIDENTIAL
 - 61 Mr James Redner

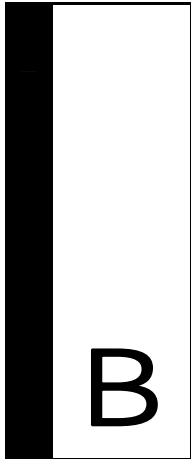
- 62 Mr John Mayger (partially confidential)
- 62.1 Mr John Mayger (supplementary)
- 62.2 CONFIDENTIAL
- 63 CONFIDENTIAL
- 64 Ms Merril Williams
- 65 CONFIDENTIAL
- 65.1 CONFIDENTIAL
- 65.2 CONFIDENTIAL
- 66 Australian Medical Association
- 67 National Seniors Association
- 67.1 National Seniors Association (supplementary)
- 68 Trustee Corporations Association of Australia
- 69 Redfern Legal Centre
- 70 Office of the Public Advocate (Victoria)
- 70.1 Office of the Public Advocate (Victoria) (supplementary)
- 71 Advocare Incorporated
- 71.1 Advocare Incorporated (supplementary)
- 72 Public Trustee NSW
- 72.1 Public Trustee NSW (supplementary)
- 73 Australian Guardianship and Administration Committee
- 74 Western Australian Government
- 75 NSW Guardianship Tribunal
- 76 Public Advocate Qld
- 77 Council on the Ageing SA
- 78 Law Institute of Victoria
- 78.1 Law Institute of Victoria (supplementary)
- 79 CONFIDENTIAL
- 79.1 CONFIDENTIAL

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- 80 Public Advocate of Western Australia
 - 80.1 Public Advocate of Western Australia (supplementary)
 - 81 Carers Queensland
 - 81.1 Carers Queensland (supplementary)
 - 82 The Benevolent Society
 - 83 Name withheld
 - 83.1 Name withheld
 - 84 Mr E. A. Atkinson (partially confidential)
 - 84.1 Mr E. A. Atkinson (supplementary)
 - 85 Mr Robert Harvie
 - 86 Aged Care Crisis Team
 - 87 CONFIDENTIAL
 - 88 State Trustee Limited
 - 89 Christian Science Australia
 - 89.1 Christian Science Australia (supplementary)
 - 90 Mr Michael Vescio (partially confidential)
 - 90.1 CONFIDENTIAL
 - 91 The Legal Aid Commission of NSW
 - 91.1 The Legal Aid Commission of NSW (supplementary)
 - 92 Human Rights and Equal Opportunity Commission
 - 92.1 Human Rights and Equal Opportunity Commission (supplementary)
 - 93 Mrs Maureen Cahill
 - 94 Law Society of South Australia
 - 95 Bendigo Health
 - 96 Queensland Government
 - 97 Elder Abuse Prevention Unit
 - 98 Mr Abraham Sher
 - 99 National Legal Aid Secretariat

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- 100 Attorney General's Department
 - 100.1 Attorney General's Department (supplementary)
 - 101 Victoria Legal Aid
 - 102 Law and Justice Foundation of NSW
 - 103 NSW Ministerial Advisory Committee on Ageing
 - 103.1 NSW Ministerial Advisory Committee on Ageing (supplementary)
 - 104 Name withheld
 - 104.1 CONFIDENTIAL
 - 105 CONFIDENTIAL
 - 106 CONFIDENTIAL
 - 106.1 Mr & Mrs Douglas & Jean Giles (supplementary)
 - 107 Queensland Government
 - 108 ACT Government
 - 109 Mr G H Schorel-Hlavka (partially confidential)
 - 110 Dr John Myers
 - 111 Department of Health and Ageing
 - 111.1 Department of Health and Ageing (supplementary)
 - 112 Caxton Legal Centre Inc
 - 113 Family Services Australia
 - 113.1 Family Services Australia (supplementary)
 - 114 Alliance for the Prevention of Elder Abuse: Western Australia
 - 115 ACT Disability Aged and Carer Advocacy Service Inc
 - 116 Centrelink
 - 117 Mrs Dawn Brophy
 - 118 Citizens Committee on Human Rights NSW
 - 119 Mr John A McLennan
 - 119.1 Mr John A McLennan (supplementary)
 - 120 Carers Australia

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- 121 State Government of Victoria
- 122 CONFIDENTIAL
- 122.1 CONFIDENTIAL
- 123 CONFIDENTIAL
- 124 Mr Milroy Martin
- 125 Ms Julie Van Dort
- 126 CONFIDENTIAL
- 126.1 CONFIDENTIAL
- 127 Australian Securities and Investments Commission
- 128 ACT Ministerial Advisory Council on Ageing
- 129 Name withheld
- 130 Older Women's Network - Melbourne
- 131 Ms Berryl Glasson (partially confidential)
- 131.1 Ms Berryl Glasson (supplementary) (partially confidential)
- 131.2 Ms Berryl Glasson (supplementary) (partially confidential)
- 131.3 Ms Berryl Glasson (supplementary)
- 132 Elder Abuse Prevention Association
- 133 Migrant Resource Centre (Southern Tasmania) Inc
- 134 Mr Peter Neil (partially confidential)
- 134.1 Mr Peter Neil (supplementary) (partially confidential)
- 135 CONFIDENTIAL
- 136 Mr John Howard
- 137 Mr David Bywaters
- 138 CONFIDENTIAL
- 139 Mrs Maureen Walsh
- 140 Mr Lynton Freeman
- 141 Mr Chris Jenkinson
- 142 Mr Terry Izzard

- 143 Retirement Village Association Ltd
- 143.1 Retirement Village Association Ltd (supplementary)
- 143.2 Retirement Village Association Ltd (supplementary)
- 144 Mr Joseph Dignan
- 145 Ms Joan Adams
- 146 Ms Carol O'Connor
- 147 Mr Neal Lucas
- 148 CONFIDENTIAL
- 149 Mr Merv Hazell
- 150 Mr Michael Dawson
- 151 CONFIDENTIAL
- 152 Mr Rodney Lewis
- 153 Public Advocate of South Australia
- 154 Ms Audrey Cooke
- 155 Mr Jack Backer
- 156 CONFIDENTIAL
- 157 Mr Robert Boyne



Appendix B: Public hearings

Friday, 23 March 2007 - Canberra

Individuals

Mr David Walsh

Attorney General's Department

Mr Peter Arnaudo, Assistant Secretary, Family Law Branch

Ms Amanda Davies, Assistant Secretary, Classification Policy Branch

Ms Katherine Jones, Acting First Assistant Secretary, Indigenous Justice and Legal Assistance Division

Ms Philippa Lynch, First Assistant Secretary, Information Law and Human Rights Division

Ms Gabrielle Mackey, Acting Assistant Secretary, Human Rights Branch, Information Law and Human Rights Division

Australian Institute of Criminology

Dr Toni Makkai, Director

Dr Russell Smith, Program Manager, Global, Electronic and Economic Crime Program

Australian Medical Association (AMA)

Mr John O'Dea, Director

Dr Mark Yates, Federal Councillor/President AMA Victoria

Centrelink

Ms Aurora Andruska, Deputy CEO, Stakeholder Relationships

Mr Paul Cowan, National Manager, Seniors, Carers and Means Test Branch

Mr Brendan Jacomb, National Manager, Legal Services Branch

Department of Health and Ageing

Ms Melinda Bromley, Acting Assistant Secretary, Office for an Ageing Australia, Ageing and Aged Care Division

Mr Malcolm Gibson, Director, User Rights and Complaints

Ms Carolyn Scheetz, Assistant Secretary, Compliance Branch

Ms Carolyn Smith, First Assistant Secretary, Office of Aged Care Quality and Compliance

Mr Andrew Stuart, First Assistant Secretary, Ageing and Aged Care Division

Family Services Australia

Ms Jennifer Hannan, Vice Chairperson

Ms Samantha Jane Page, Chief Executive Officer

Financial Literacy Foundation

Mr Peter McCray, General Manager

Ms Linda Rosser, Manager, Strategic Planning Unit

Monday, 14 May 2007 - Sydney**Individuals**

Mrs Maureen Cahill

Mr Jack Georjinis

Mr Jeremy Holderness

Ms Margaret A Jones

Mr John Mayger

Ms Dawn Moss

Mrs Lynette Parkes

Consumer Credit Legal Centre (NSW) Inc

Ms Karen Cox, Coordinator

Ms Katherine Lane, Principal Solicitor

Legal Aid Commission of NSW

Ms Annmarie Lumsden, Executive Officer to CEO

Mr Stephen O'Connor, Deputy CEO - Legal

Public Trustee NSW

Ms Ruth Pollard, Principal Legal Officer

Redfern Legal Centre

Ms Helen Campbell, Executive Officer

The Aged Care Rights Service

Mr Stephen Newell, Principal Solicitor

Ms Janna Taylor, Executive Officer

The Benevolent Society

Mrs Barbara Squires, Director, Centre on Ageing

The Oppressed People of Australia Inc

Mr Michael Vescio, OPA National President, and President, The
Alternative Guardian

Trustee Corporations Association of Australia

Mr Ross Ellis, Executive Director

Tuesday, 15 May 2007 - Sydney**Individuals**

Dr Norma Jean Duncan

Mrs Elizabeth Edmiston

Mr Robert Harvie

Mrs Irene Kaposi

Dr Allan Martin

Mrs Lynette Parkes

Mr Richard Richards

Mrs Patricia Witts

Christian Science Australia

Ms Margaret Clark, Federal Representative

Country Women's Association of NSW

Mrs Patricia Shergis, Chair, Social Issues Committee

Human Rights and Equal Opportunity Commission

Ms Allison Corkery, Assistant to the President

Ms Cassandra Goldie, Director, Sex/ Age Discrimination Unit

Mr Jonathon Hunyor, Acting Director, Legal Services

Mr John von Doussa QC, President

NSW Guardianship Tribunal

Ms Diane Robinson, President

NSW Ministerial Advisory Committee on Ageing

Mrs Felicity Barr, Chair

Ms Angela Chan, Committee Member

Ms Megan Nicholson, Senior Policy and Projects Officer

Ms Geetha Varughese, Policy and Projects Officer

The Oppressed People of Australia Inc

Mr Michael Vescio, OPA National President, and President, The Alternative Guardian

Tuesday, 22 May 2007 - Canberra

ACT Ministerial Advisory Council on Ageing

Mr Kanti Jinna, Member

Mr Brendon Kelly, Member

Ms Gayle Sweaney, Member

Carers Australia

Mrs Joan Hughes, Chief Executive Officer

Ms Colleen Sheen, Senior Policy Advisor

National Seniors Association

Mr Peter Brady, National Policy Manager

Ms Alice Ruxton, Policy Officer

Monday, 4 June 2007 - Melbourne**Individuals**

Mr Frank J Graf

Mr Ernst F Kriesner

Mr Richard Manthorpe

Mr Frank Reed

Ms Julie Van Dort

Mrs Janne van Wulfften Palthe

Aged Care Crisis Team

Ms Lynda Saltarelli, Media Liaison Officer

Ms Linda Sparrow, Community Affairs Coordinator

Mr Barrie Woollacott, Legal Adviser

ANZ Trustees

Mr Robert Muir, Manager, Estate Services

Association of Independent Retirees Limited

Ms Susan Jackson, Secretary, Melbourne Bayside Branch

Mr Richard Morgan, President, Melbourne Bayside Branch

Ms Patricia Turner, Committee Member, Melbourne Bayside Branch

Australian Competition and Consumer Commission

Mr Mark Pearson, Executive General Manager, Enforcement and Compliance Division

Mr Nigel Ridgway, General Manager, Compliance Strategies Branch

Elder Abuse Prevention Association

Ms Lillian Jeter, Executive Director

Federation of Community Legal Centres (Vic) Inc

Ms Jeni Lee, Southport Community Legal Centre

Ms Sally Smith, Loddon Campaspe Community Legal Centre

Housing for the Aged Action Group Inc

Mr Jeff Fiedler, Tenancy Advice Worker

Law Institute of Victoria

Ms Elissa Campbell, Elder Law Committee Solicitor

Mr Bill O'Shea, Co-Chair, Elder Law Committee

Older Women's Network - Melbourne

Ms Maureen Pearl, Committee Member

Outlaw Poverty

Mr John Murray, Owner

Respecting Patient Choices Program

Mr Julian Gardner, Member, National Reference Group

Dr William Silvester, Director

State Trustee Limited

Mr Alistair Craig, Senior Corporate Lawyer

Mr Anthony Fitzgerald, Managing Director

Tuesday, 5 June 2007 - Hobart**Individuals**

Mr Clifford Grosse

Advocacy Tasmania

Ms Mechthild Neumann, Advocate

Catholic Women's League Australia Inc

Mrs Colleen Cowen

Ms Jennifer Hawkes

Mrs Betty Roberts, National Social Issues Convenor (CWLA)

Migrant Resource Centre (Southern Tasmania) Inc

Ms Suzanne Feike, Project Officer, Community Partners Program

National Legal Aid

Mr Norman Reaburn, Director, Legal Aid Commission of Tasmania

Ms Louise Smith, Executive Officer

National Seniors Association

Mrs Jean Grosse, Member

Tasmanian Council of Social Service

Ms Pauline Marsh, Project Officer

The Australian Guardianship and Administration Committee

Ms Anita Smith, AGAC Chair, and President, Guardianship and Administration Board, Tasmania

Monday, 16 July 2007 - Brisbane

Individuals

Mr Edward Atkinson

Ms Ida Bailey

Mr Colin Donkin

Mr Lynton Freeman

Mr Chris Jenkinson

Mrs Prue Leggoe

Mr Neal Lucas

Mrs Noreen Rintoul

Mrs Helen Sava

Ms Josephine Smyth

Assets & Ageing Research Team, University of Queensland

Dr Anne-Louise McCawley, Project Manager

Dr Cheryl Tilse, Director, Post Graduate Research Studies

Prof Jill Wilson, Head of School

Australian Justice and Reform Inc

Mrs Dorothy Lyons, Secretary/Treasurer

Australian Pensioners and Superannuants' League Qld Inc

Mr Raymond Ferguson, Policy Coordinator

Carers Queensland

Ms Toni Cannon, Senior Policy Officer

Mr Brendan Horne, Manager, Regional Services

Mr Graham Schlecht, Executive Director

Carne Reidy Herd Lawyers

Mr Brian Herd

Caxton Legal Centre Inc

Mrs Amanda Hess, Coordinator, Seniors Legal and Support Service

Mr Scott McDougall, Director

Ms Rosalind Williams, Solicitor, General Legal Program

Christian Science Churches in QLD

Dr Richard Phillipps, Christian Science Committee on Publication for QLD

Elder Abuse Prevention Unit

Miss Claudia Ferrante, Senior Project Officer

Older People Speak Out (OPSO)

Maida Lilley, Vice President

Self Litigants Association

Ms Joyce Baker, Associate

Ms Lillian Geddes, Manager

Mr John Howard, Member

Superannuated Commonwealth Officers (SCOA)

Mr Garnet Foley, President Qld Branch

Tuesday, 17 July 2007 - Buderim**Individuals**

Mr Jack Backer

Mr John Bright

Ms Lucy Craddock

Dr Peter Keogh

Mrs Esther Morrish

Ms Elizabeth Noakes

Mr John Sullivan

Association of Independent Retirees Limited

Mrs Helen Sava, Company Secretary, Deputy President

Association of Residents of Queensland Retirement Villages Inc

Mr Philip Phillips, President

Christian Science Church Nambour

Mrs Meg McCaulay, Member

Manufactured Home Owners Association Inc

Mr David Paton, Central Area Coordinator and Consultant

Sunshine Coast Crime Prevention Group

Mr Graham Keir, President

Superannuated Commonwealth Offices Association (SCOA)

Mr David Bywaters, Representative

Monday, 30 July 2007 - Perth**Individuals**

Mr Clement Allsworth

Mr Malcolm Burton

Mr Joseph Dignan

Mr Terry Izzard

Mr Peter Neil

Mrs Anne Robinson

Advocare Incorporated

Mrs Maureen Sellick, Manager, Policy and Support

Alliance for the Prevention of Elder Abuse: Western Australia

Dr Barbara Black, Executive Officer

Government of Western Australia

Mr Stephen Boylen, Director, Planning and Policy, Office for Seniors
Interests and Volunteering

Public Advocate of Western Australia

Ms Michelle Scott, Public Advocate

Public Trustee WA

Ms Kate Malcovic, Executive Officer

Retirement Village Association Ltd

Mr Adrian Pagett, Associate Member

Tuesday, 31 July 2007 - Adelaide

Individuals

Mr John Maschmedt

Aged Rights Advocacy Service Inc

Ms Marilyn Crabtree, Chief Executive Officer

Mrs Susan Lyons, Team Leader

Alzheimer's Australia

Dr Ronald Sinclair, Chairman, National Consumers Committee

Law Society of South Australia

Ms Margaret Kelly, President

Ms Marilyn Lennon, Member and Immediate Past President, Justice
Access Committee

Ms Paula Stirling, Chair, Justice Access Committee

Older Women's Advisory Committee

Mrs Helen Storer, President

Public Advocate of South Australia

Mr John Harley, Public Advocate

Victim Support Service Inc

Mr Michael Dawson, Chief Executive

Friday, 17 August 2007 - Canberra**Individuals**

Mr Rodney Lewis

ACT Disability Aged and Carer Advocacy Service Inc

Ms Andrea Simmons, Manager

Alzheimer's Australia

Ms Margaret Brown, Consultant

Ms Anne Eayrs, National Policy Officer

Mr Alan Oakey, family carer

Mr Glenn Rees, National Executive Director

Attorney General's Department

Mr Peter Arnaudo, Assistant Secretary, Human Rights Branch

Mr Matthew Osborne, Acting Assistant Secretary, Family Law Branch

Dr Albin Smrdel, Acting Assistant Secretary, Legal Assistant Branch

Mr David Syme, Acting Assistant Secretary, Family Pathways Branch

Australian Bankers Association Inc

Mr Ian Gilbert, Director, Retail Regulatory Policy

Ms Diane Tate, Director, Corporate and Consumer Policy

Australian Securities and Investments Commission

Ms Delia Rickard, Deputy Executive Director, Consumer Protection

Mr Gregory Tanzer, Executive Director, Consumer Protection

Centrelink

Mr Dom Bilbie, Acting National Manager, Legal Services

Mr Roy Chell, Business Manager

Mr Paul Cowan, National Manager, Seniors, Carers and Means Test Branch

Ms Carla Harvey, Business Manager, Debt Management Branch

Council on the Ageing (COTA) Over 50s National Office, and COTA South Australia

Dr Geoffrey Bird, Executive Director, Policy, COTA Over 50s

Ms Jane Fisher, Policy Manager, COTA South Australia

Ms Patricia Reeve, Policy consultant, COTA Over 50s

University of Western Sydney

Ms Susan Field, Public Trustee NSW Fellow in Elder Law



Appendix C: Exhibits

- 1 CONFIDENTIAL
- 2 *Stop Abuse of Older People* (brochure produced by The Australian Pensioners' and Superannuants' League Queensland Inc)
- 3 CONFIDENTIAL
- 4 CONFIDENTIAL
- 5 CONFIDENTIAL
- 6 *Citizens Advice Bureau et al in Australia* (list of contact details)
- 7 CONFIDENTIAL
- 8 CONFIDENTIAL
- 9 CONFIDENTIAL

- 10 CONFIDENTIAL
- 11 Newspaper extracts and advertisements (provided by Mr & Mrs Leo & Frances Kelly)
- 12 *Are You Retired or About to Retire?*(brochure produced by the Association of Independent Retirees Ltd)
- 13 *Newsletter of the Association of Residents of Queensland Retirement Villages Inc, May 2006*
- 14 CONFIDENTIAL
- 15 CONFIDENTIAL
- 16 Extract of US report '*Undue Influence and Financial Exploitation with case study*'
- 17 CONFIDENTIAL
- 18 CONFIDENTIAL
- 19 *IN FACT Newsletter, September 2006*
- 20 CONFIDENTIAL
- 21 *Queensland Retirement Village Industry* (brochure of the Association of residents of Queensland Retirement Villages)

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- 22 CONFIDENTIAL
- 23 CONFIDENTIAL
- 24 CONFIDENTIAL
- 25 CONFIDENTIAL
- 26 CONFIDENTIAL
- 27 Additional material from members of the Association of Residents of Queensland Retirement Villages (Inc), provided by Mrs Maureen Walsh
- 28 CONFIDENTIAL
- 29 Material on US jurisdictions with religious accommodations in their civil adult abuse and neglect laws, provided by Christian Science Australia
- 30 CONFIDENTIAL
- 31 *Warning: Systematic Stealing of Peoples Homes and Assets*, flyer from the Alternative Guardian, a division of The Oppressed People of Australia Inc
- 32 CONFIDENTIAL
- 33 *Social Security Fraud Committed by Older People* (provided by the Legal Aid Commission of NSW)

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- 34 *Public Justice, Private Lives* (CD ROM), Queensland Law Reform Commission
- 35 *Prevention and Protection - Responding to Abuse of Older Persons - A guide for Aged Care Workers*, Bendigo Health Care Group
- 36 Extract from Legal Aid Agreement for Tasmania:
Commonwealth Aid Priorities
- 37 *Access to Justice and Legal Needs*, report of the Law and Justice Foundation of NSW, December 2004
- 38 CONFIDENTIAL
- 39 CONFIDENTIAL
- 40 CONFIDENTIAL
- 41 CONFIDENTIAL
- 42 CONFIDENTIAL
- 43 CONFIDENTIAL
- 44 *Does attitude to provision by "case managers" or "liaison officers" affect acceptance of services?* By Dr John Myers
- 45 *Submission on Elder Abuse Prevention to the Office of Senior Victorians*, by Dr John Myers

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- 46 *Advising on Reverse Mortgages and Other Equity Release Products*, by the Legal Practitioners' Liability Committee, Law Institute of Victoria
- 47 *Laws and Lawyers: Should we be doing more for Elders?* Copy of speech by Mr David Walsh
- 48 *Preventing Crime Against Older Australians* (AICrime Reduction Matters, No. 29, 12 January 2005), Australian Institute of Criminology
- 49 *Helping Seniors Help Themselves*, RCMP Gazette, November 1998
- 50 *Understanding Money: How to make it work for you*, by Financial Literacy Foundation
- 51 *Grandparenting - Present and Future*, Family Issues Series No. 2, January 2007, Family Services Australia
- 52 *Seniors Relationship Care Program*, Family Services Australia
- 53 *A New Family Law System: Putting the focus on kids*, folder of material from Attorney General's Department
- 54 Correspondence from Mr Michael Vescio, President Oppressed People of Australia Inc
- 55 CONFIDENTIAL
- 56 *Strategic Plan 2003-2005 and related material*, from the ACT Ministerial Advisory Council on the Ageing

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- 57 Correspondence from the Chief Executive Office, National Seniors Association to the Parliamentary Secretary to the Treasurer, dated April 2007
- 58 *Complaints received by HREOC under the Age Discrimination Act: Statistics for the period 1 July 2006 – 11 May 2007*, Human Rights and Equal Opportunity Commission
- 59 Correspondence to Mrs J van Wulfften Plathe from Ms J Hutchinson, Adviser to the Hon Peter Dutton MP, Minister for Revenue and Assistant Treasurer
- 60 Correspondence from Mr E F Kriesner to the Premier of Victoria dated 12 April and 3 May 2007
- 61 *List of Recent Speakers and Information Pamphlet*, Association of Independent Retirees Ltd, Melbourne Bayside Branch
- 62 *Independent Retiree - Official Journal of A.I.R Limited - Autumn 2007*, Association of Independent Retirees Limited
- 63 *National Survey of Members 2006 Detailed Report, 30 October 2006*, Association of Independent Retirees Limited
- 64 *United Nations Principles for Older Persons* (provided by the Elder Abuse Prevention Association)
- 65 *Rights – Charter of Residents' Rights and Responsibilities* (Elder Abuse Prevention Association 2003)
- 66 *Minnesota Attorney General issues fraud alert* (article provided by the Elder Abuse Prevention Association)

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- 67 *Extract on US legislation relating to elder abuse (provided by the Elder Abuse Prevention Association)*
- 68 *Attorney General's Office Launches Financial Abuse Task Force and Elder Abuse Awareness Campaign (press release provided by the Elder Abuse Prevention Association)*
- 69 *Violations Against Elders (Hawaii legislation) – HB1306 SD1 (provided by the Elder Abuse Prevention Association)*
- 70 *Financial Institutions/Financial Abuse (Hawaii legislation) SB1400 CD1 (provided by the Elder Abuse Prevention Association)*
- 71 *Extract from An Act to Facilitate Reporting by Main Financial Institutions of Elder Financial Exploitation – Maine (provided by the Elder Abuse Prevention Association)*
- 72 *Secretary Galvin files new regulations on Senior Financial Designations as well as written administrative record supporting regulations (notice of final regulations) (provided by the Elder Abuse Prevention Association)*
- 73 *Nursing Home Residents' Legal Rights (article provided by the Elder Abuse Prevention Association)*
- 74 *Nursing Home Malpractice (Negligence) (article provided by the Elder Abuse Prevention Association)*
- 75 *Bill No. AB 853 (relating to business and professions code relating to home care services), California Legislature (provided by the Elder Abuse Prevention Association)*

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- 76 *Submission to Senator Santoro on Aged Care Policy 9 June 2006*
(provided by the Elder Abuse Prevention Association)
- 77 CONFIDENTIAL
- 78 CONFIDENTIAL
- 79 CONFIDENTIAL
- 80 *Retirement Villages Industry Code of Practice* (ACT Office of Fair
Trading, November 1999)
- 81 *Review of the Chamber Magistrate Service in NSW: Executive*
Summary
- 82 *Statutory Supervisors: extract from web site of New Zealand*
Companies Office, May 2007
- 83 *Elder Abuse in the ACT- Report 11, Standing Committee on*
Health and Community Care, ACT Legislative Assembly,
August 2001
- 84 CONFIDENTIAL
- 85 CONFIDENTIAL
- 86 *2007 Law Institute of Victoria Elder Law Conference Handbook*
- 87 *Your Future Starts Now - A Guide for the Over 50s, by the*
Benevolent Society

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- 88 *Information About Laws Related to Elder Abuse, American Bar Association Commission on Law and Aging, 2005*
- 89 *Uncovering elder abuse: powers of attorney, administration orders and other issues for banks, copy of speech by Mr J Gardner, Public Advocate, Victoria*
- 90 *A Report for ASIC on Consumer Decision Making at Retirement by Chant Link and Associates, July 2004*
- 91 *Exposing Financial Exploitation of Impaired Elderly Persons, article by Michael J Tueth, MD, 1999*
- 92 CONFIDENTIAL
- 93 CONFIDENTIAL
- 94 CONFIDENTIAL
- 95 *Safe as Houses - Home and Community Care Consumer Consultation Project Report 2007, Tasmanian Council of Social Service*
- 96 CONFIDENTIAL
- 97 Folder of material provided by the Assets and Ageing Research Team, University of Queensland
- 98 *Elderly Robbed by Own Family - Article from The Sunday Mail 15 July 2007*

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- 99 *The Law of Family*, copy of presentation by Mr Brian Herd, Carne Reidy Herd Lawyers
- 100 *Position Statement on Mandatory Reporting on Elder Abuse*, Elder Abuse Prevention Unit, Queensland
- 101 *Elder Abuse Prevention Unit Annual Report 2005-2006*
- 102 *Financial Abuse of Older People - A Queensland Perspective*, Elder Abuse Prevention Unit
- 103 CONFIDENTIAL
- 104 *APRA Media Releases*, provided by Mr Peter Neil
- 105 Extract from NSW *Hansard* 13 December 1995 and associated material, provided by Mr G Keir
- 106 *7000 hit by third collapse*, article in *The Senior* newspaper, provided by Mr John Howard
- 107 CONFIDENTIAL
- 108 CONFIDENTIAL
- 109 Extract from Queensland *Hansard*; copy of newspaper articles; and DVD '*Bank Bastardry*', Today Tonight, 4/4/06 relating to activities of the National Australia Bank
- 110 Newspaper articles provided by Mrs Maureen Walsh

- 111 CONFIDENTIAL
- 112 CONFIDENTIAL
- 113 *High Court of Ireland Decisions 1998 No. 89*, provided by Mr Lynton Freeman
- 114 *High Court of Ireland Decision 1998 No 89*, provided by Mr Lynton Freeman
- 115 *Report on 'Shadow Ledgers' and the Provision of Bank Statements to Customers*, report of the Parliamentary Joint Statutory Committee on Corporations and Securities, October 2000, provided by Mr Lynton Freeman
- 116 *National Australia Bank v Freeman 2001, Federal Court of Australia*, provided by Mr Lynton Freeman
- 117 *Outline of Submissions on behalf of National Australia Bank*, provided by Mr Lynton Freeman
- 118 *Reasons for Judgement: National Australia Bank v Freeman*, provided by Mr Lynton Freeman
- 119 *National Australia Bank v Freeman, Supreme Court of Queensland*, provided by Mr Lynton Freeman
- 120 *National Australia Bank v Freeman, Supreme Court of Queensland*, provided by Mr Lynton Freeman
- 121 *High Court of Australia - Transcript of Proceedings: B96 of 2001*, provided by Mr Lynton Freeman

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- 122 *Pawning your home?* Article in *Choice* magazine, April 2007
- 123 CONFIDENTIAL
- 124 *National Dementia Manifesto 2007-2010 (Alzheimer's Australia)*, provided by Mr John Maschmedt
- 125 *Elder Abuse Protocol: Guidelines for Action*, APEA:WA
- 126 CONFIDENTIAL
- 127 *You Can Complain: a guide to solving problems with financial products and services*, ASIC, provided by Aged Rights Advocacy Service Inc
- 128 *Regaining Your Control - to assist older South Australians to maintain or regain control over their lives and future decisions*, Aged Rights Advocacy Service Inc, South Australia
- 129 *Dealing with book up: key facts*, ASIC, provided by Aged Rights Advocacy Service Inc
- 130 *Moola Talk*, ASIC, provided by Aged Rights Advocacy Service Inc
- 131 *Australian Retirement Village Accreditation*, Retirement Village Association Ltd
- 132 *Review of Retirement Villages Legislation*, submission by the Retirement Village Association Ltd to the Department of

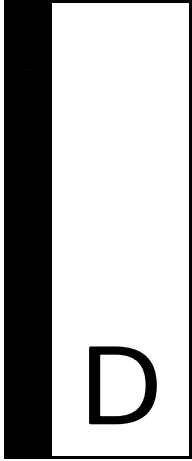
Consumer and Employment Protection, Western Australia,
September 2006

- 133 *Safeguard Your Finances - Prevent Financial Abuse* (brochure by the Alliance for the Prevention of Elder Abuse - SA)
- 134 *Protecting Rights: Witnessing Documents* (brochure by the Alliance for the Prevention of Elder Abuse - SA)
- 135 *High Court Ruling/No Bonus for Directors*, document provided by Mr E A Atkinson
- 136 CONFIDENTIAL
- 137 CONFIDENTIAL
- 138 CONFIDENTIAL
- 139 CONFIDENTIAL
- 140 *Shortcomings of the present Legislation in WA*, Extract of Submission (WARCRA) to Review of Retirement Village legislation, Western Australia, provided by Mr C Allsworth
- 141 *Fair Trading Act: Review of Unconscionable Conduct*, extract from WARCRA submission to Review of Retirement Village legislation, Western Australia, provided by Mr C Allsworth
- 142 *Detrimental Points in the Deed*, provided by Mr C Allsworth

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- 143 *Comparisons with another modern Fini Village Deed*, provided by Mr C Allsworth
- 144 *Did You Know (Comparisons with another modern Fini Village Deed)* – table provided by Mr C Allsworth
- 145 *Risk and Fear of Fraud Among Older People* (AICrime Reduction Matters, No. 46, 6 June 2006), Australian Institute of Criminology
- 146 *Consumer Scams in Australia: An Overview, Trends and Issues in Crime and Criminal Justice*, No. 331, February 2007, Australian Institute of Criminology
- 147 *Various newspaper articles*, provided by Mrs D J Lyons
- 148 Copy of letter from Comcare to Mr Malcolm Burton, regarding his compensation under the *Safety, Rehabilitation and Compensation Act 1988*, dated 7 May 2007
- 149 *The role of crime victims in the criminal justice system*, Position Paper No. 6, Victim Support Australasia
- 150 CONFIDENTIAL
- 151 *07-63 Struck off Queensland Solicitor Sentenced*, copy of email, provided by Mr E A Atkinson
- 152 CONFIDENTIAL
- 153 CONFIDENTIAL

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- 154 *Putting 'the Powers' in Place: Planning for the Future*, Final Report, Alzheimer's Australia SA Inc, December 2005
- 155 *Planning Ahead: Your Health, Your Money, Your Life – An Issues Paper for the Review of South Australia's Advance Directives*, 2007
- 156 *Living with Dementia*, folder of materials provided by Alzheimer's Australia
- 157 *The Long and Lonely Road: Insights into living with younger onset dementia*, Alzheimer's Australia
- 158 *Worried about your memory?*, brochure from Alzheimer's Australia
- 159 *Who can decide? - The six step capacity assessment process*, edited by Dr P Darzins, Dr D Molloy and Dr D Strang
- 160 *Mind your Mind - A user's guide to dementia risk reduction*, Alzheimer's Australia
- 161 *Dementia - Continuing education from the Pharmaceutical Society of Australia*, April 2007
- 162 *Dementia: Can it be prevented?* Alzheimer's Australia Position Paper 6, August 2005
- 163 *Advance Directives and Palliative Care in a Residential Facility; Diana's Story*, provided by Mr Ron Sinclair
- 164 CONFIDENTIAL

- 165 *Like father, like son - James Packer weaves that old tax magic*, copy of article provided by Mr J Backer
- 166 CONFIDENTIAL
- 167 *Various newspaper articles*, provided by Mr N Sharp
- 168 CONFIDENTIAL
- 169 CONFIDENTIAL
- 170 *Various newspaper articles and photographs*, provided by Mr N Sharp



Appendix D: Power of attorney legislation comparison table

Power of attorney legislation comparison table

State/Territory Power of Attorney Legislation	Recognition provision	Registration provision	Witnesses provision	Other proxy decision-making legislation (eg. lifestyle)	Advance care planning legislation	Protective agencies
ACT Powers of Attorney Act 2006	Sec. 89 Recognition of enduring powers of attorney made under other laws (1) This section applies if— (a) a document (the interstate enduring power of attorney) is expressed to be a power of attorney or guardianship document made under the law of a State or another Territory; and (b) the interstate enduring power of attorney is not— (i) revoked if the principal loses decision-making capacity; or (ii) expressed to be irrevocable, whether completely or for a stated period. (2) An interstate enduring power of attorney to which this section applies is taken to be an enduring power of attorney made under, and in compliance with, this Act, to the extent that the powers it gives could validly have been given by an enduring power of attorney made under this Act	S. 29 Powers of attorney are deeds (1) A power of attorney that complies with this Act is, for all purposes, taken to be a deed, even though it is not expressed to be a deed or to be sealed. Note A deed may be registered (see Registration of Deeds Act 1957) and must be registered for a dealing with land by the attorney to be registered (see Land Titles Act 1925 , s 130). (2) In this section: "power of attorney" includes— (a) an amendment of a power of attorney; and (b) a revocation of a power of attorney.	S. 22 Certificates by witnesses to powers of attorney (1) If a power of attorney is signed by the principal, the power of attorney must include a certificate signed by each witness stating that— (a) the principal signed the power of attorney voluntarily in the presence of the witness; and (b) at the time the principal signed the power of attorney, the principal appeared to the witness to understand the nature and effect of making the power of attorney. Note A principal must understand the matters in s 17 to understand the nature and effect of making a power of attorney. However, in the absence of evidence to the contrary, the principal is taken to understand the nature and effect of making the power of attorney (see s 18).	Covered by Powers of Attorney Act 2006	Medical Treatment Act 1994	Guardianship and Management of Property Tribunal Office of the Public Advocate Public Trustee
NSW Powers of Attorney Act 2003	Sec. 25 Recognition of enduring powers of attorney made in other States and Territories (1) An interstate enduring power of attorney has effect in this State as if it were an enduring power of attorney made under, and in compliance with, this Act, but only to the extent that the powers it gives under the law of the State or Territory in which it was made could validly have been given by an enduring power of attorney made under this Act. (2) In particular, an interstate enduring power of attorney to which subsection (1) applies: (a) has effect in this State subject to any limitations on the power that apply to it under the law of the State or Territory in which it was made, and (b) does not operate to confer any power on an attorney in this State that cannot be conferred on an attorney under an enduring power of attorney made in this State.	S. 51 Powers of attorney may be registered (1) Any instrument executed before or after the commencement of this Act that creates a power of attorney may be registered by the Registrar-General in the General Register of Deeds kept under the Conveyancing Act 1919 . (2) An instrument revoking a registered power of attorney may also be registered by the Registrar-General in that Register. S. 52 (1) A conveyance or other deed affecting land executed on or after 1 July 1920 under a power of attorney has no effect unless the instrument creating the power has been registered.	S. 19 Creation of enduring power of attorney (b) execution of the instrument by the principal is witnessed by a person who is a prescribed witness (not being an attorney under the power), and (c) there is endorsed on, or annexed to, the instrument a certificate by that person stating that: (i) the person explained the effect of the instrument to the principal before it was signed, and (ii) the principal appeared to understand the effect of the power of attorney, and (iii) the person is a prescribed witness, and (iv) the person is not an attorney under the power of attorney, and (v) the person witnessed the signing of the power of attorney by the principal. (2) ... a "prescribed witness" means: (a) a registrar of a Local Court, or (b) a barrister or solicitor of a court of any State or Territory of the Commonwealth, or	Guardianship Act 1987	No legislation covering this. Guidelines have been published in 2005 for end-of-life care and decision-making, and health services are encouraged to develop policies based on this. Information about informed consent requirements: Circular 2004/84 – Patient information and consent to medical treatment.	Guardianship Tribunal Office of the Public Guardian Office of the Protective Commissioner Public Trustee

	<p>(3) Subsection (1) does not apply to any power of attorney (or class of powers of attorney) prescribed by the regulations.</p> <p>(4) A document signed by a qualified interstate legal practitioner that certifies that an interstate enduring power of attorney was made in accordance with the formal requirements of the law of the State or Territory in which it was made is admissible in any proceedings concerning that power and is prima facie evidence of the matter so certified.</p> <p>(5) In this section: "interstate enduring power of attorney" means a power of attorney made in another State or a Territory that, under the law of that State or Territory, has effect in that State or Territory as a valid power of attorney even if the principal loses capacity through mental incapacity after the execution of the instrument creating the power of attorney. "qualified interstate legal practitioner", in relation to an interstate enduring power of attorney, means an individual: (a) who has been admitted to legal practice in the State or Territory in which the power of attorney was made, and (b) who holds a certificate or other form of authorisation that confers an authority to practise in that State or Territory that corresponds to the authority conferred by a practising certificate issued under Part 3 of the Legal Profession Act 1987 , and (c) who practises in that State or Territory.</p>		<p>(c) a licensee under the Conveyancers Licensing Act 1995, or an employee of the Public Trustee or a trustee company within the meaning of the Trustee Companies Act 1964, who has successfully completed a course of study approved by the Minister, by order published in the Gazette, for the purposes of this paragraph, or (d) a legal practitioner duly qualified in a country other than Australia, instructed and employed independently of any legal practitioner appointed as an attorney under the instrument, or (e) any other person (or person belonging to a class of persons) prescribed by the regulations for the purposes of this paragraph.</p>			
<p>NT Powers of Attorney Act 1980</p>	<p>S. 7 Registration (1A) An instrument creating a power of attorney that is a copy of an instrument that has been registered under a law in force in a State or another Territory of the Commonwealth may be registered under subsection (1).</p>	<p>S. 7 Registration (1) An instrument creating or revoking a power may be registered.</p>	<p>S. 6 Execution of instruments creating or revoking powers (4) Where a person executes an instrument creating a power by direction and in the presence of the donor of the power, the instrument shall be attested by 2 other persons (the donor of the power excepted) present as witnesses. S. 14 Execution of instrument creating enduring powers An instrument creating an enduring power shall be executed in the presence of a witness who is not the donee of the power or</p>	<p>No specific legislation addressing this</p>	<p>Natural Death Act 1988</p>	<p>Office of Adult Guardianship Office of the Public Guardian Public Trustee Department of Justice</p>

			a near relative of the donee.			
QLD Powers of Attorney Act 1998	Sec. 34 Recognition of enduring power of attorney made in other States If an enduring power of attorney is made in another State and complies with the requirements in the other State, then, to the extent the powers it gives could validly have been given by an enduring power of attorney made under this Act, the enduring power of attorney must be treated as if it were an enduring power of attorney made under, and in compliance with, this Act.	S. 25 Registration of powers of attorney and instruments revoking powers (1) A power of attorney may be registered. (2) An instrument revoking a power of attorney may be registered. (3) Subject to another Act or a contrary intention in the power of attorney, if the power of attorney has been registered under an Act, it does not cease to authorise the attorney to do for the principal anything relevant to the purpose for which it was registered until an instrument revoking the power of attorney has been registered. (4) This section also applies to a power of attorney made before the commencement of this Act. ²⁶	S. 31 Meaning of eligible witnesses (1) An eligible witness, for a document, is a person who-- (a) except for a document revoking an advance health directive--is a justice, ³¹ commissioner for declarations, notary public or lawyer; ³² and (b) is not the person signing the document for the principal; and (c) is not an attorney of the principal; and (d) is not a relation of the principal or a relation of an attorney of the principal; and (e) if the document gives power for a personal matter--is not a paid carer or health provider of the principal; and (f) for an advance health directive--is at least 21 years and not a beneficiary under the principal's will. (2) To avoid any doubt, it is declared that a person is not excluded from being an eligible witness merely because the person is an attorney's employee who is the witness for the document while acting in the ordinary course of employment. S. 44 Formal requirements (4) If an enduring document is signed by the principal, it must include a certificate signed by the witness stating the principal-- (a) signed the enduring document in the witness's presence; and (b) at the time, appeared to the witness to have the capacity necessary to make the enduring document.	Powers of Attorney Act 1998	Powers of Attorney Act 1998	Office of the Adult Guardian Public Advocate Guardianship and Administration Tribunal Public Trustee
SA Powers of Attorney and Agency Act 1984	The Act has no specific provision addressing the recognition of powers of attorney made in other jurisdictions.	May be registered in accordance with the Registration of Deeds Act 1935, Part 2	S. 6 Enduring powers of attorney (2) A deed is not effective to create an enduring power of attorney unless-- (a) The attesting witness to the deed, or, where there is more than one attesting witness, at least one of them, is a person authorised by law to take affidavits ... Guardianship and Administration Act 1993 S. 3 Interpretation "authorised witness" means—	Guardianship and Administration Act 1993 Office of the Public Advocate	Consent to Medical Treatment and Palliative Care Act (1995)	Office of the Public Advocate [Guardianship Board] Public Trustee

			<p>(a) a justice of the peace for this State or any other State or Territory of the Commonwealth; or</p> <p>(b) a commissioner for taking affidavits in the Supreme Court; or</p> <p>(c) a notary public;</p> <p>S. 25 Appointment of an enduring guardian</p> <p>(c) it is witnessed by an authorised witness who completes a certificate in the form or to the effect of the certificate set out in the Schedule.</p> <p>Under the Schedule, the witness must certify that 'the above appointer signed in this instrument freely and voluntarily in my presence and appeared to understand its effect'.</p>			
<p>TAS Powers of Attorney Act 2000</p>	<p>S. 42. Recognition of registration in other States and Territories</p> <p>(1) An instrument creating a power of attorney that is registered in another State or a Territory under a law that corresponds to this Act is taken to be registered in Tasmania for the purposes of this Act.</p> <p>(2) For the purposes of this section, the provisions for filing and noting of instruments of the Transfer of Land Act 1893 of Western Australia are taken to be a corresponding law.</p> <p>S. 47. Enduring powers of attorney made outside Tasmania</p> <p>(1) The application of this Part extends to a power of attorney that has the same, or substantially the same, effect as an enduring power of attorney and is registered under this Part.</p> <p>(2) The Board may exercise its powers under Part 4 for the purpose of giving effect to any order, whether made by a court or not, that is in force under a law of another State or a Territory corresponding with this Act or the Guardianship and Administration Act 1995.</p>	<p>4. Register of powers of attorney</p> <p>(1) The Recorder must keep a register of all powers of attorney.</p> <p>(2) The register consists of all powers of attorney, instruments varying or revoking a power of attorney and other instruments relating to powers of attorney that are lodged with the Recorder under this or any other Act.</p> <p>(3) The register may be kept wholly or partly-</p> <p>(a) on paper, microfilm, magnetic tape, magnetic disk, optical disk or any combination of those media or in or on such other medium as may be approved by the Recorder; or</p> <p>(b) in such device for storing or processing information as may be approved by the Recorder –</p> <p>and the Recorder may at any time rearrange the register or change any such medium or device accordingly.</p> <p>(4) The Recorder may include in the register any power of attorney that, immediately before the commencement of this Act, is registered under the Registration of Deeds Act 1935.</p>	<p>S. 30. Creation and effect of enduring powers of attorney</p> <p>(2)(b)_ there are at least 2 attesting witnesses to the deed or instrument neither of whom is a party to it nor a relation of a party to it and each of whom has witnessed it in the presence of the donor and each other</p>	<p>Guardian and Administration Act 1995</p>	<p>No legislation providing for advance health directives.</p> <p>Consent to Medical Treatment is covered in the Guardianship and Administration Act 1995</p>	<p>Guardianship and Administration Board</p> <p>Office of the Public Guardian</p> <p>Public Trustee</p>
<p>VIC Instruments Act 1958</p>	<p>S. 116. Recognition of enduring powers made in other States and Territories</p> <p>If an enduring power of attorney is made in another State or Territory and complies with the requirements of that other State or Territory, then, to the extent the powers it gives could validly have been given by an</p>	<p>S. 125C. Enduring power of attorney to be a deed</p> <p>An enduring power of attorney that complies with this Division is to be taken to be and have effect as a deed, even if it is not expressed to be executed under seal.</p>	<p>125A. What must the witnesses certify?</p> <p>(1) If an enduring power of attorney is signed by the donor, it must include a certificate signed by each witness stating that-</p> <p>(a) the donor signed the enduring power of attorney freely and voluntarily in the</p>	<p>Guardianship and Administration Act 1986</p>	<p>Medical Treatment Act (1988) Vic</p> <p>Guardianship and Administration Act (1986) Vic</p>	<p>Victorian Civil and Administrative Tribunal [Guardianship and Administration List]</p>

	<p>enduring power of attorney made under this Part, the enduring power of attorney is to be taken to be an enduring power of attorney made under, and in compliance with, this Part.</p>		<p>presence of the witness; and (b) at the time, the donor appeared to the witness to have the capacity necessary to make the enduring power of attorney. (2) If an enduring power of attorney is signed by a person for the donor, it must include a certificate signed by each witness stating that- (a) the donor of the power directed the person to sign the enduring power of attorney for the donor; and (b) the donor of the power gave that direction freely and voluntarily in the presence of the witness; and (c) the person signed it in the presence of the donor and the witness; and (d) at the time, the donor appeared to the witness to have the capacity necessary to make the enduring power of attorney.</p>			<p>Office of the Public Advocate State Trustees Limited</p>
<p>WA Guardianship and Administration Act 1990</p>	<p>104A . Recognition of powers of attorney created in other jurisdictions (1) The donee of a power of attorney created under the laws of another State, Territory or country may apply to the Board for an order recognizing that power of attorney as an enduring power of attorney for the purposes of this Part. (2) Where the Board is satisfied, on an application made under subsection (1), that- (a) a power of attorney created under the laws of another State, Territory or country corresponds sufficiently, in form and effect, to a power of attorney created under section 104; and (b) it is appropriate to do so, the Board may make an order recognizing that power of attorney as an enduring power of attorney for the purposes of this Part. (3) Sections 41(1) and (3) and 42 apply, with all necessary changes, to an application under subsection (1) as if it were an application for an administration order. (4) The Board may at any time on the application of a person who in the opinion of the Board has a proper interest in the matter revoke an order made under subsection (2).</p>	<p>Powers of attorney can be registered in accordance with the Transfer of Land Act 1893</p>	<p>104 . Execution of enduring power of attorney (2) (a) there are 2 attesting witnesses to the instrument and both of them are persons authorised by law to take declarations</p>	<p>Covered by Guardianship and Administration Act 1990</p>	<p>No specific legislation addressing this. Amendments to the Guardianship and Administration Act 1990 are being planned, which will develop a legislative framework for advance care planning</p>	<p>State Administrative Tribunal Office of the Public Advocate Public Trust Office</p>