

HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS

OLDER PEOPLE AND THE LAW

GOVERNMENT RESPONSE

RECOMMENDATION 1

The Committee recommends that the Government task the Australian Institute of Criminology (AIC) 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).

Response

Accepted in principle, noting the substantial volume of research on fraud and financial abuse which is produced by the AIC and the likelihood of continued research in this area. The AIC was established (and continues to be supported) by the Australian Government to meet a national need: to provide the facilities for the study of the causes and effects of crime and of means for its prevention, and to do so on the basis of formal collaboration between the Commonwealth and the States.

RECOMMENDATION 2

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.

Response

Noted.

The Government believes there is value in exploring options for funding specialised dispute resolution services to assist older people affected by financial abuse and fraud, particularly familial disputes, and in situations where family agreements have broken down. However, as noted in the response to Recommendation 31, existing Family Dispute Resolution services have a focus on family law and separation and may not be an appropriate way of providing these services.

The Government will consult with State and Territory governments to coordinate coverage of any new services and minimise gaps or unnecessary duplications between jurisdictions.

RECOMMENDATION 3

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

Response

Accepted.

Following a number of corporate collapses in the property sector, ASIC in 2007 identified the unlisted and unrated investment sector as a high priority for review.

Following the release in August 2007 of its consultation paper setting out proposals for reforms in the regulation of unlisted, unrated debentures, ASIC released its regulatory guide on 31 October 2007. Following ongoing monitoring, ASIC released an updated guide with a number of clarifications on 29 August 2008. The guide aims to strengthen the role of parties involved in the issue of unlisted and unrated debentures, including trustees, auditors, valuers and advisers. Further guidance was released in December 2007 to address the way debentures are advertised.

The new regulatory guides aim at increasing disclosure requirements to improve the information available to consumers about the risks of investing in the sector. Key features of the guides include the development of eight regulatory benchmarks to assist investors in assessing risks and a requirement that issuers should address the benchmarks in their disclosures on an 'if not, why not' basis. Issuers are also required to ensure that their advertising is consistent with these disclosures.

ASIC has complemented the new regulatory guidance with a publication aimed at consumers *Investing in Debentures? Independent Guide to Investors Reading a Prospectus for Unlisted Debentures*. The publication provides further guidance for consumers, with the intention of increasing financial literacy and understanding of the sector.

On 5 February 2008, the Government announced the formation of the Financial Services Working Group (the Working Group), comprising senior officials from the Treasury, ASIC and the Department of Finance and Deregulation. The Working Group is dedicated to improving the lengthy, complex and often unreadable disclosure documentation in financial services. On 30 May 2008, the Working Group released a consultation paper, *Simple advice on choices within an existing superannuation account*, which sets out a number of proposals to assist in the provision of simple intra-product advice relating to superannuation. The Working Group consulted extensively with its Industry and Consumer Advisory Panel and is finalising its recommendations to the Government on measures to facilitate such simple superannuation advice. The Working Group has also started examining disclosure documentation for superannuation and managed investment products to facilitate short, simple and readable disclosure for those products.

On 2 September 2008, after consultations with stakeholders, ASIC released regulatory guides on the unlisted mortgage and property sectors aimed at providing improved

disclosure to retail investors. The guides provide eight disclosure benchmarks that can help retail investors assess risks and make decisions on whether investments are suitable for them. ASIC has also released companion investor guides to assist investors in understanding the enhanced disclosure environment, thereby enabling consumers to make better informed investment decisions. In June 2009, the Minister for Financial Services, Superannuation and Corporate Law, Chris Bowen, and the Minister for Finance and Deregulation, Lindsay Tanner, welcomed the release of ASIC guidance and class order relief that will enable millions of Australians to access low-cost, simple intra-fund advice on their superannuation investments.

ASIC has also recently updated warnings about investing in fixed interest products, including debentures, unsecured notes and products with higher than usual returns, through its consumer website, www.fido.org.au. This site also contains information and tools to help investors make informed decisions on risk and return when choosing their investments.

RECOMMENDATION 4

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.

Response

Noted.

The question of whether to fund a suitable national body to promote the prevention of elder abuse will be referred to the Ministerial Conference on Ageing for consideration. The issue of the prevention of abuse in the community generally is the responsibility of state and territory jurisdictions.

RECOMMENDATION 5

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.

Response

Accepted in principle.

The Australian Government will encourage co-operation within the banking and financial sector to develop national voluntary guidelines and protocols to consider and report alleged elder financial abuse. This could include developing awareness raising

exercises to enable financial institutions to be able to communicate and respond better to the needs of older people in the Australian community. This may involve educating banking staff and customers in understanding the rights of the elderly and where they could report potential financial abuse. Alternatively, 'best-practice' guidelines may be a more flexible option for financial institutions. Any protocols or guidelines developed should reflect both the needs of the Australian community and the capacity of Australian financial institutions to undertake such activity.

RECOMMENDATION 6

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.

Response

This recommendation is directed to AGAC. The Government notes the recommendation and will write to state and territory members of the Australian Guardianship and Administration Committee drawing it to their attention.

RECOMMENDATION 7

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.

Response

Accepted.

As the new agency responsible for financial literacy, the Australian Securities and Investments Commission (ASIC) will continue to promote financial literacy among older people and pre-retirees to reduce the financial abuse of older Australians. ASIC is developing an "investing between the flags" initiative to help older Australians protect their retirement dollars by better understanding investment basics as well as how to identify and avoid scams.

On Monday 22 June 2009, ASIC launched *Thinking of using the equity in your home? A new independent guide to reverse mortgages and other equity release product*. The Guide is designed to assist people who are considering whether an equity release product is right for their individual circumstances. In addition, *Ask FIDO*, ASIC's website for consumers and investors, has a section specifically devoted to older Australians and their financial needs. The website includes a number of interactive tools designed to help older Australians plan for their retirement, including an online

retirement planner and a reverse mortgage calculator. The www.fido.gov.au website is a living resource that is updated as needed.

RECOMMENDATION 8

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.

Response

Accepted.

ASIC will continue to fund and develop national initiatives to promote financial literacy, particularly among older people and those approaching retirement age. ASIC, through its FIDO website and associated seminars, provides information on retirement planning and income, superannuation tips, investment products and scams. Financial literacy among older people and pre-retirees is being taken into account in developing ASIC's forward work program.

RECOMMENDATION 9

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.

Response

Accepted in principle.

A nationally consistent consumer credit framework would significantly enhance policy responsiveness to ensure that consumer credit protection in this area remains appropriate and effective. In addition to national consistency, the Commonwealth is strengthening the regulation of consumer credit by introducing a licensing regime for market participants and introducing responsible lending obligations.

As part of Council of Australian Governments (COAG) agreements in 2008, the Commonwealth will assume regulatory responsibility for all consumer credit from the States and Territories. This will involve the Commonwealth enacting the *Uniform Consumer Credit Code* (UCCC) into Commonwealth legislation. The *National Credit Reform Package* was introduced into Commonwealth Parliament on 25 June 2009.

To date, the Ministerial Council for Consumer Affairs (MCCA) has regularly reviewed the UCCC to ensure that it continues to provide an appropriate overall consumer protection regime in the credit area. There are a number of specific projects which were being run under MCCA's auspices which supported this objective.

In May 2007 MCCA noted the recent rapid growth of the reverse mortgage market and initiated investigations into the need for additional consumer protection measures for consumers considering or entering into reverse mortgage arrangements. A working group was subsequently established to develop appropriate amendments to the UCCC. The Australian Government, through the Treasury, was represented on this working group, together with representatives of the States and Territories and ASIC.

As part of its assumption of responsibility of consumer credit matters, the Commonwealth intends to consider the proposed enhancements by the MCCA to the UCCC and the tailored disclosure of reverse mortgages in the second phase of consumer credit reforms.

RECOMMENDATION 10

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.

Response

Not accepted.

In 2008, COAG agreed that the Commonwealth should assume regulatory responsibility for all consumer credit from the States and Territories. This will involve the Commonwealth enacting the UCCC into Commonwealth legislation. The *National Credit Reform Package* was introduced into Commonwealth Parliament on 25 June 2009.

The UCCC currently mandates at s 80(1) that guarantors be provided with a notice in the event the debtor defaults on the loan. In the absence of a default notice, it can be assumed that progress is being made toward the loans by the debtor.

Further, the UCCC at s 34 allows for the guarantor to request a statement of the balance of the loan account and any overdue and payable amounts.

These UCCC provisions will be translated into Commonwealth law.

RECOMMENDATION 11

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

Response

Noted.

In 2008, COAG agreed that the Commonwealth should assume regulatory responsibility for all consumer credit from the States and Territories. This will involve the Commonwealth enacting the UCCC into Commonwealth legislation. The *National Credit Reform Package* was introduced into Commonwealth Parliament on 25 June 2009.

In this context, a nationally consistent consumer credit framework would significantly enhance policy responsiveness to ensure that consumer credit protection in this area remains appropriate and effective. In addition to national consistency, the Commonwealth is strengthening the regulation of consumer credit by introducing a licensing regime for market participants and introducing responsible lending obligations.

Responsible lending practices will establish a requirement on credit providers to assess a consumer's capacity to repay any credit being extended to them before it is offered. Therefore, credit limit increases will only be able to be offered to consumers after an assessment of their capacity to repay the increased credit has been undertaken and it has been determined that the consumer does have that capacity. In the event that a consumer's existing credit contract is unsuitable, credit assistants will now be obliged to inform consumers of their ability to seek respite from their credit provider.

RECOMMENDATION 12

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.

Response

Accepted in principle.

When Centrelink reviews a customer's primary payment, a review of the adequacy of current nominee arrangements should be undertaken. If Centrelink is advised that a nominee may not be acting in the customer's best interests, a review is undertaken immediately.

The Government appreciates the need for a review framework that addresses the risk that payments are being used inappropriately, and is examining the existing review framework to determine if capacity to address this risk already exists. Centrelink and the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) are currently analysing data to identify any further risks. The Centrelink and FaHCSIA examination of the existing review framework included an independent external review of the nominee program. As a result, Centrelink and FaHCSIA have agreed to incorporate an automated risk based selection process for the review of the nominee arrangements.

RECOMMENDATION 13

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.

Response

Addressed through a review process.

FaHCSIA is the relevant policy department for the assets test hardship provisions as applied to age pensioners. The policy, including the discretionary elements, is outlined in the *Guide to Social Security Law*. Centrelink's role is to administer the legislation and policy as framed in the legislation and directed in the Guide.

Hardship provisions policy guidelines

As with all policy guidelines relating to the income and assets test, the hardship guidelines are subject to regular review. In mid 2007, FaHCSIA reviewed the asset test hardship guidelines, and changes were made to provide additional assistance to age pensioners in hardship; in particular:

- the assessment of investments in companies in financial difficulty were changed, and
- the severe financial hardship allowable funds thresholds were increased.

Further details on these changes are set out below.

The assets test taper rate reduction from 20 September 2007 has reduced the impact of the hardship provisions as it has reduced the withdrawal rate used to calculate the pension payable under the provisions.

The asset test hardship provisions are intended to assist social security recipients whose payment is affected under the asset test but the person cannot be reasonably expected to rearrange their financial affairs. For example, they could have an asset they are unable to sell or use to generate income because of a legal impediment. The assets test is designed so that people with substantial assets, apart from their home, use the assets (either directly or to produce income) to meet their day-to-day living expenses when calling on the social security system for support.

Hardship provisions may mean that these customers are able to have certain assets disregarded when calculating their pension or benefit rate. Assets which are disregarded for hardship purposes are called unrealisable assets. In order to qualify under the hardship provisions a pensioner must be considered to be in severe financial hardship.

Definition of 'severe financial hardship' in hardship provisions

The guidelines have been amended to increase the severe financial hardship allowable funds threshold. Prior to 3 August 2007, before a person was considered to be in

severe financial hardship, they had to have readily available funds of less than \$6,000 for a single person and \$10,000 combined for a couple.

From 3 August 2007, these limits were increased up to the amount of the full Age Pension rate, currently \$26,338.00 for a couple and \$17,469.40 for a single person. These limits are now indexed twice a year in line with pension indexation.

To be considered in hardship a couple could currently have up to \$26,338.00, and a single person have up to \$17,469.40, in readily available funds, and have no other course of action which they could reasonably be expected to take to alleviate their hardship.

The readily available funds limits are aligned to the maximum pension rate and are therefore indexed twice a year in line with pension indexation to ensure the limits keep pace with movements in wages and prices.

In terms of 'financial abuse or fraud' this can encompass a number of possible situations. Some common situations are discussed below, as well as their treatment under the hardship provisions.

Fraud

Where it is established that a person has been defrauded of their money, no asset value is maintained for the purposes of the assets test, and therefore there would be no need for a person to claim for assistance in respect of their money under the hardship provisions.

During the period before the fraud is established, and the person's asset continues to be assessed, the asset could be considered to be unrealisable for the purpose of the hardship rules.

In cases where a person is induced to gift money, perhaps because of the undue influence of another person, the social security gifting rules would not be applied. In these circumstances, the amount gifted would cease to be assessable under the assets test and would not affect a person's income support payment.

Investments in financial difficulty

'Financial abuse' might be considered to encompass situations where a person has been induced to invest their money on the basis of misrepresentations about, for example, the risks relating to an investment, and the investment subsequently faces financial difficulties, such as where a company is placed in administration.

In these situations, investments with debtors such as companies under administration are considered 'unrealisable' for the purposes of the hardship provisions. Where the market value of the investment has reduced (except for loan investments), that reduced value is assessed for assets test purposes.

In the case of loans, the legislation requires that the balance of a loan continues to be assessed until the loan ceases to exist, such as where a company is placed in liquidation.

To provide assistance to people with loan investments, FaHCSIA has amended the policy guidelines.

From August 2007, where decisions made at a second creditor's meeting mean a loan ceases to exist, and the administrator or liquidator confirms the estimated returns for investors, the reduced value of a customer's investment with the failed company may be re-assessed and back-dated to when the company fell into financial difficulty and a company administrator was first appointed. Arrears of income support payments may be payable in these circumstances.

Future review

As with all means test rules, the provisions will continue to be reviewed to ensure they continue to meet the community's expectations of a well-targeted social security means test.

Secure and Sustainable Reform Package

From 20 September 2009, the Government has delivered a package of significant reforms to the pension. The reforms have improved the adequacy of the pension and made its operation simpler. Around 3.3 million age pensioners, disability support pensioners, carers, wife and widow pensioners and veteran income support recipients have received an increase in their pension payments.

Single pensioners on the maximum rate of the pension received an increase of \$60.00 a fortnight (\$30.00 a week) in the base pension, and \$5.00 a fortnight (\$2.50 a week) in the Pension Supplement. On top of this, single pensioners received indexation increases of \$5.50 a fortnight in the base pension, and \$0.33 a fortnight in the Pension Supplement. The total increase for single pensioners on the maximum rate is \$70.83 a fortnight. The single pension for those on the maximum rate is now set at two-thirds of the pension paid to couples combined.

Couple pensioners combined who are on the maximum rate of the pension received an increase of \$20.30 a fortnight (\$10.15 a week) in the Pension Supplement. On top of this, couples received indexation increases of \$9.20 a fortnight in the base pension, and \$0.43 a fortnight in the Pension Supplement. The total increase for couples combined who are on the maximum rate is \$29.93 a fortnight.

The Pension Supplement combines the full value of the Pharmaceutical Allowance, Utilities Allowance, GST Supplement and internet rate of Telephone Allowance into one payment and the total amount has been increased. Pensioners receive the Pension Supplement each fortnight with their usual pension. From 1 July 2010, pensioners will be able to choose to have around half of their Pension Supplement paid quarterly. The maximum Pension Supplement is \$56.10 a fortnight for singles and \$84.60 a fortnight for couples combined.

The pension reform package also included:

- changes to the income test rules to target the largest pension increases to those with the lowest incomes;

- a Pensioner and Beneficiary Living Cost Index to make sure increases to the pension reflect the cost of living changes experienced by pensioner households; and
- an effective benchmarked rate for the combined couple pension of 41.7 per cent and for singles of 27.7 per cent of Male Total Average Weekly Earnings. This has now been guaranteed by legislation.

Government assistance for those affected by the global financial crisis

The Government provided additional assistance to pensioners and other retirees who were impacted by the global financial crisis.

There were two primary impacts. These were the fall in the value of financial investments, and the fall in returns on financial investments

Revaluation of Financial Assets

The Government acted to ensure that the significant falls in financial asset values were reflected in the Centrelink system as quickly as possible.

On 3 November 2008 Centrelink updated customer records to ensure that pensions reflected changes in asset values for listed securities and managed investments. This was in addition to the revaluations that took place on 20 March 2009 and 20 September 2009 as part of the regular half yearly revaluation of listed securities and managed investments.

A pensioner can ask Centrelink to update the asset values of their financial investments at any time.

Deeming Rates

One of the major impacts of the global financial crisis has been on the rates of return from financial investments. Therefore the Government continues to closely monitor deeming rates. Deeming rates need to accurately reflect the returns available to pensioners on their financial assets so their private income can be assessed fairly for their pension.

When impacts in financial markets began to flow through to returns, the Government acted.

While changes to the deeming rates generally occur in March and September along with pension indexation changes, in light of the significant volatility in the world financial markets and the speed of change, it was decided to decrease the deeming rates as soon as possible.

Deeming rates were reduced 3 times between November 2008 and March 2009 by a total of 3 percentage points for the upper deeming rate and 2 percentage points for the lower deeming rate.

Currently the deeming rates are:

- 2 per cent for the first \$42,000 of a single pensioner's financial investments, or \$70,000 for pensioner couples; and
- 3 per cent for investments above those amounts.

The Government will continue to closely monitor returns on financial investments and the deeming rates.

Superannuation Pension Drawdown Relief

On 18 February 2009 the Government announced the suspension of the minimum drawdown requirement for account based superannuation pensions for the second half of 2008–09.

The suspension was extended to the 2009–10 financial year as part of the 2009–10 Budget. This relief responds to concerns of retirees that meeting the minimum drawdown requirement will mean having to sell investment assets.

This relief may also mean that income tested part-rate age pensioners with these superannuation pensions may receive an increase in pension, depending on their individual circumstances. Pensioners should contact Centrelink to discuss their situation.

RECOMMENDATION 14

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.

Response

Accepted.

The existing regulatory arrangements concerning binding death benefit nominations for superannuation and life insurance policies are designed to provide certainty about the validity of a nomination and to ensure nominated beneficiaries of deceased members and policy holders receive their entitlements. Under these arrangements, in the absence of a valid binding death benefit nomination, the trustee of a superannuation fund has discretion to pay a member's death benefits to either or both the member's legal personal representative or one or more of the member's dependents. The existence of a will does not override the trustee's discretion. Similarly, in relation to 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.

The Government recognises the importance of superannuation fund members and life insurance policy holders understanding death benefit nominations and ensuring that their nominations are regularly reviewed and kept up to date. Superannuation funds

and life insurers already provide members and policyholders with information concerning death benefit nominations, generally in product disclosure Statements and in annual member/policyholder Statements. The Government supports the Committee's recommendation to work with the superannuation and life insurance industries to identify ways of improving member/policyholder awareness of these issues.

RECOMMENDATION 15

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.

Response

Not accepted.

Trustees of superannuation funds must pay death benefits in accordance with the *Superannuation Industry (Supervision) Act 1993* (the SIS Act) and the rules of the fund.

If the fund's rules permit, a member may make a binding death benefit nomination in favour of one or more dependents of the member or his or her legal personal representative. If the nomination is valid under the law, then the trustee must pay the death benefit in accordance with the nomination.

The SIS regulations apply a number of safeguards to ensure that a binding death benefit nomination does not result in an unfair or unjust outcome, particularly where a member's personal circumstances may change.

Under the regulations:

- a trustee must give the member information to make an informed decision in relation to making a nomination
- a nomination is required to be signed, dated and witnessed by two individuals, and
- the maximum operating life of a nomination is limited to three years.

These safeguards are important as the direct payment of a superannuation death benefit to an individual does not form part of a deceased estate.

Where a nomination is no longer valid, the trustee of the superannuation fund would, within the overall constraints of the SIS Act and the rules of the fund, ultimately decide how and to whom the death benefit would be paid. In exercising this discretion, the trustee would be required to act fairly and reasonably and consider all relevant circumstances, including preferences made in a non-binding nomination.

The Government announced the details of a review into the governance, efficiency, structure and operation of Australia's superannuation system on 29 May 2009. The review, which has the goal of ensuring that the superannuation system operates in the most cost effective manner and in the best interests of all its members, may further consider issues relating to binding death benefit nominations.

RECOMMENDATION 16

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.

Response

Accepted in principle.

The Government agrees to continue to promote national consistency for powers of attorney and will work with States and Territories, including through the Standing Committee of Attorneys-General (SCAG) if appropriate, to develop a system of mutual recognition of powers of attorney.

RECOMMENDATION 17

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.

Response

Partially accepted.

At the November 2008 meeting of SCAG, Ministers agreed to undertake a project to improve the effectiveness of mutual recognition of powers of attorney between jurisdictions. This may require greater harmonisation of powers of attorney legislation. The Government will examine both legislative and non-legislative options to achieve outcomes in this area.

RECOMMENDATION 18

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.*

Response

Partially accepted.

The Government would support SCAG overseeing the development of an awareness campaign on powers of attorney. As powers of attorney are a State and Territory matter, it would not be appropriate for the Federal Government to provide funding for an awareness campaign.

If SCAG agrees to further develop uniform legislation it would not be appropriate to develop an awareness campaign prior to its implementation.

RECOMMENDATION 19

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.

Response

Accepted in principle.

The policy issue of how a nationally consistent approach should be implemented, for example through uniform legislation, will require further consideration. Related work on the development of nationally consistent guidelines for advance health care planning and other related matters is currently being progressed through the Australian Health Ministers' Advisory Committee. The Government will forward this matter to the Australian Health Ministers' Conference for consideration.

RECOMMENDATION 20

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.*

Response

Partially accepted.

The Government will encourage SCAG to consider a review of a potential national register of enduring powers of attorney in the context of developing uniform legislation on powers of attorney.

RECOMMENDATION 21

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.

Response

Not accepted.

The development of any register would likely take some time and would delay the objective of developing uniform legislation and a national registration system.

RECOMMENDATION 22

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.

Response

Partially accepted.

The Government would support SCAG overseeing the development of an awareness campaign on powers of attorney. As powers of attorney are a State and Territory matter, it would not be appropriate for the Federal Government to provide funding for an awareness campaign.

If SCAG agrees to further develop uniform legislation it would not be appropriate to develop an awareness campaign prior to its implementation.

RECOMMENDATION 23

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

Response

Not accepted.

Medicare benefits are claimable only for 'clinically relevant' services rendered by an appropriate health practitioner. A 'clinically relevant' service is one which is generally accepted by the profession in question as necessary for the appropriate treatment of the patient. Where advance health care planning is part of consultations that are clinically relevant to an existing condition for which the medical practitioner is providing appropriate treatment, they are currently covered by the Medicare Benefits Schedule (MBS).

In relation to older people specifically, recognition of advance health care plans is currently included under Geriatrician Referred Patient Assessment and Management Plan (MBS items 141–147) and the Comprehensive Medical Assessment (MBS item 712) for new and existing residents of Commonwealth funded aged care facilities.

Advance health care planning services may not be covered where they are general in nature or unrelated to a current course of treatment. Any change to this requirement would be a substantial change in the intent of the services covered by the MBS.

RECOMMENDATION 24

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.

Response

Noted.

The Commonwealth Government will continue to support the development of a nationally consistent approach to advance care directives.

The Commonwealth Government provides funding for a number of initiatives which raise awareness and support the development of advanced care directives.

The Commonwealth Government, through the Department of Health and Ageing, is providing \$2.9 million over three years (2007-2010) to Austin Health's *Respecting Patient Choices* program. The program is to develop advance care planning in acute care settings and to pilot the model in a number of residential aged care facilities. The *Respecting Patient Choices* website (www.respectingpatientchoices.org.au) offers a range of free downloadable guides and leaflets suitable for individuals living at home and their families as well as acute care patients, aged care residents and care workers.

The need for a national education campaign may be considered following harmonization of approaches between jurisdictions.

Implementation of this outcome must therefore await the outcome of the implementation of Recommendation 25.

Once this has been achieved, the Government will consult with State and Territory Governments to develop a national education strategy on these issues.

RECOMMENDATION 25

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.

Response

Partially accepted.

The policy elements of any approach to governing advance health care planning is a matter for Health Ministers. The development of nationally consistent guidelines for

advance health care planning and other related matters is currently being progressed through the Australian Health Ministers' Advisory Committee.

The Government will refer this issue to the Australian Health Ministers' Conference for consideration. The Government would support SCAG working with the Australian Health Ministers' Conference to develop model laws once an agreed policy position has been reached.

RECOMMENDATION 26

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.

Response

Partially accepted.

The third Key Priority relates to the provision of information and education about dementia. To a large extent, these activities would fall outside the responsibility of SCAG. The aspects of Key Priority three which could be appropriately be dealt with by SCAG are legislative barriers regarding guardianship, wills and powers of attorney. The Government's response to Recommendations 16 and 28 already address referral of powers of attorney and guardianship to SCAG. Succession law is currently on SCAG's agenda.

RECOMMENDATION 27

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.

Response

Accepted.

The Government supports health care providers being fully informed of the needs and wishes of their patients. Under the National Palliative Care Program the Government has provided funding (from 2002–2010) for the implementation of the Respecting Patient Choices Program, a training program for health professionals that aims to

ensure patients' choices about their end of life care decisions are considered and communicated. The Department of Health and Ageing will also continue to work with federal and state and territory Attorneys-General to create consistent advance care planning laws, enabling consistent information to those with advance health care planning arrangements, including the importance of notifying their health care providers.

RECOMMENDATION 28

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.

Response

Accepted in principle.

Guardianship and administration are matters for the States and Territories. However, the Government will bring this issue to the attention of States and Territories through SCAG.

RECOMMENDATION 29

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.

Response

Accepted in principle.

Guardianship and administration are matters for the States and Territories. However, the Government will bring this issue to the attention of States and Territories through SCAG.

RECOMMENDATION 30

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.

Response

Accepted in principle.

The Government will raise the issue of legislation regulating family agreements at SCAG. The Government agrees that the role of family agreements and the issues of how the scope for abuse can be limited or ameliorated need to be further studied. Rather than SCAG directly developing a discussion paper, the Government will encourage the states to refer the matter to a State law reform commission to allow the issues to be better identified and options for possible legislative reform to be carefully considered and developed.

RECOMMENDATION 31

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

Response

Not accepted.

These recommendations characterise 'family agreements' as an aspect of family law. However, family law and Family Dispute Resolution services are focused on matters related to family separation and post-separation parenting. For example, 'Family Dispute Resolution' has a specific meaning under the *Family Law Act 1975* and is

generally to assist separating couples to reach agreement on matters including the parenting, care and residence of their children and financial and property issues associated with family separation.

'Family agreements' are better seen as related to contract law and equitable principles such as trusts and estoppel. As such areas of law are generally areas of State and Territory responsibility, the provision of dispute resolution services by the Australian Government would need to be considered in the context of SCAG's consideration of legislation to regulate family agreements (see recommendation 34).

RECOMMENDATION 32

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.*

Response

Accepted in principle.

The Family Law Council's primary expertise is in the operation of the *Family Law Act 1975*. As discussed above at Recommendation 31, family agreements raise issues beyond the scope of that Act. The Council is therefore not the most suitable body to develop the materials described in this recommendation.

The Attorney-General's Department will consult with the Family Law Section of the Law Council of Australia in relation to these issues.

RECOMMENDATION 33

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.*

Response

Accepted in principle.

The Family Law Council's primary expertise is in the operation of the *Family Law Act 1975*. As discussed above at Recommendation 31, family agreements raise issues beyond the scope of that Act. The Council is therefore not the most suitable body to develop educational material in this area.

The Attorney-General's Department will consult with the Family Law Section of the Law Council of Australia in relation to these issues.

RECOMMENDATION 34

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.

Response

Not accepted.

The functions of the Australian Institute of Family Studies do not extend to advising the Australian Government about the desirability and feasibility of implementing legislation.

As the issues fall within State and Territory jurisdictions, State and Territory SCAG Ministers may like to refer the question of the desirability of such legislation to SCAG for consideration.

RECOMMENDATION 35

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.

Response

Accepted.

The Attorney-General's Department proposes to send letters to State and Territory law societies to bring recommendation 35 of the report to their attention.

RECOMMENDATION 36

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

Response

Not accepted.

There are many cost pressures of relevance to older Australians and to design a solution for each individual problem would create unnecessary complexity. The impact of legal costs should be considered as part of the ongoing review of the adequacy of social and income support for older Australians. A rebate scheme may not be practical because a lot of aged pensioners and superannuants do not have to pay tax as a result of targeted concessions in the tax system.

Older persons can access legal assistance through legal aid commissions and community legal centres in the same way and under the same conditions as other members of the community.

Commonwealth legal aid grants are intended for all disadvantaged sections of the Australian community. A limited pool of funding exists and eligibility criteria are applied to ensure that aid meets those in most need. Special circumstances, such as hardship are taken into account when assessing an application for aid.

RECOMMENDATION 37

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.

Response

Not accepted.

The Australian Government does not support this recommendation, but the Attorney-General's Department will consult with legal aid commissions on options for improving services for older people within the framework of current legal aid service provision.

Services provided by Legal Aid should be available on the same basis for all disadvantaged sections of the Australian community. Setting aside funds for one demographic group would raise significant policy and equity issues in respect of other disadvantaged people seeking legal aid.

RECOMMENDATION 38

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.

Response

Noted.

The Government recognises the important role that community legal centres play in assisting older people.

The Government currently provides funding to 128 community legal centres across Australia under the Commonwealth Community Legal Services Program. In 2009–2010, \$23.55 million has been allocated direct to community legal centres funded under the Commonwealth Community Legal Services Program.

Community legal centres funded under the Commonwealth Community Legal Services Program are required to provide services which meet the needs of their client communities, including older people. Most centres provide assistance to older people and some centres provide services that are specifically targeted to older people.

In June 2009, the Attorney-General announced the provision of \$350,000 in one-off additional funding to assist a number of community legal centres in managing demand for legal services from disadvantaged and vulnerable older clients in the community.

Consideration of the allocation of any ongoing additional funding under the Commonwealth Community Legal Services Program for the expansion of services would need to be balanced against the many competing priorities for Government funds.

RECOMMENDATION 39

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.

Response

Noted.

The Government recognises the importance of community education (commonly known as community legal education) in the suite of services provided by community legal centres.

Some community legal centres currently undertake community legal education activities which specifically focus on the legal needs of older people. However, consideration of the allocation of any additional funding under the Commonwealth Community Legal Services Program for the expansion of community legal education, with a specific focus on older people, would need to be balanced against the many competing priorities for Government funds.

RECOMMENDATION 40

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.

Response

Partially accepted.

The Australian Government does not support the establishment of a separate 1800 telephone number for older persons, but the Attorney-General's Department will consult with legal aid commissions about options for providing targeted community legal education and information and advice services for older people.

All legal aid commissions have 1800 or equivalent telephone numbers and accessible websites. Another national number would duplicate existing services.

RECOMMENDATION 41

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.

Response

Accepted.

The Australian Government is not a standing member of the Corrective Services Ministers Conference but has observer status and regularly contributes to strategic discussion.

The Minister for Home Affairs has written to all State and Territory correctional services ministers bringing the recommendation to their attention and seeking their consideration of further steps that could be taken to ensure appropriate facilities are made available for older prisoners in Australia.

RECOMMENDATION 42

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.

Response

Accepted.

The Australian Government believes there is nothing more important for working Australians and their families than ensuring the health and safety of Australian workers. When a worker is injured we must ensure they have appropriate support, both financially and in returning to work where possible.

The Australian Government has established Safe Work Australia as a new national independent tripartite body to lead the reform and implementation of nationally consistent occupational health and safety laws and streamlined access to workers' compensation. Safe Work Australia's functions include the development of national policy relating to workers' compensation and the development of proposals for harmonising workers' compensation arrangements across jurisdictions. The Australian Government will refer this recommendation to Safe Work Australia for consideration.

RECOMMENDATION 43

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.

Response

Accepted.

The *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* has now passed through Parliament. The Act removes the 'dominant reason' test in section 16.

RECOMMENDATION 44

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.

Response

Noted.

The Government appointed an independent committee of eminent persons to consult with the community on options for recognising and protecting human rights and responsibilities in Australia. The adequacy of existing human rights protections in Australia, including Commonwealth anti-discrimination laws, were raised during the consultation. The Committee reported to Government on 30 September 2009. The Government is considering the report and its recommendations and will respond in the coming months.

In addition, SCAG has established a working group to consider options for harmonising anti-discrimination laws nationally for the consideration of ministers. The *Age Discrimination Act 2004* will be considered as part of this process.

RECOMMENDATION 45

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.

Response

Partially accepted.

The Government agrees in principle to an examination of the nature of retirement village contracts, including fees associated with retirement village contracts, by federal, State and Territory governments.

However, the ACCC is not the agency best placed to lead such an examination. As acknowledged by the ACCC in the report, each of the States and Territories have their own regulatory frameworks which deal with issues such as pricing and fees.

The COAG-agreed Australian Consumer Law (ACL) will create an economy-wide consumer protection regime, including provisions regulating unfair contract terms in standard form consumer contracts, which will apply to retirement village contracts in conjunction with any sector-specific regulation which might apply.

The recommendation for a working party to examine the nature of retirement village contracts will be raised with the Standing Committee of Officials of Consumer Affairs.

RECOMMENDATION 46

The Committee recommends that, in its review of retirement village contracts, the Australian Competition and Consumer Commission (ACCC) 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.

Response

Partially accepted.

The Government agrees in principle to an examination of the nature of retirement village contracts, including fees associated with retirement village contracts, by federal, State and Territory governments.

However, the ACCC is not the agency best placed to lead such an examination. As acknowledged by the ACCC in the report, each of the States and Territories has their own regulatory frameworks which deal with issues such as pricing and fees.

The COAG-agreed Australian Consumer Law (ACL) will create an economy-wide consumer protection regime, including provisions regulating unfair contract terms in standard form consumer contracts, which will apply to retirement village contracts in conjunction with any sector-specific regulation which might apply.

The recommendation for a working party to examine the nature of retirement village contracts will be raised with the Standing Committee of Officials of Consumer Affairs.

RECOMMENDATION 47

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.

Response

Accepted.

RECOMMENDATION 48

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

Response

Accepted in principle.

The Government accepts the recommendation in principle. It will refer the matter to the Ministerial Council on Consumer Affairs, which is a more appropriate body to deal with this matter.

NSW, WA and the ACT are all conducting reviews and implementing legislation to ensure that retirement villages are regulated and the rights of their residents are protected.