
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.

