



COMMONWEALTH OF AUSTRALIA

## Proof Committee Hansard

# HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL  
AFFAIRS

**Reference: Older people and the law**

MONDAY, 4 JUNE 2007

MELBOURNE

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**HOUSE OF REPRESENTATIVES**  
**STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS**

**Monday, 4 June 2007**

**Members:** Mr Slipper (*Chairman*), Mr Murphy (*Deputy Chair*), Mr Michael Ferguson, Mrs Hull, Mr Kerr, Mr Melham, Mrs Mirabella, Mr Secker, Mr Kelvin Thomson and Mr Tollner

**Members in attendance:** Mrs Hull, Mr Kerr, Mr Murphy, Mr Slipper and Mr Kelvin Thomson

**Terms of reference for the inquiry:**

To inquire into 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.

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**Committee met at 9.30 am****CAMPBELL, Ms Elissa, Solicitor, Elder Law Committee, Law Institute of Victoria****O'SHEA, Mr Bill, Co-Chair, Elder Law Committee, Law Institute of Victoria**

**CHAIRMAN (Mr Slipper)**—Good morning. I declare open this public hearing of the House of Representatives Standing Committee on Legal and Constitutional Affairs into older people and the law. The committee has been asked by the Attorney-General to inquire into and report on the adequacy of current legislative regimes in addressing the legal needs of older Australians. We have been asked to focus in particular on the areas of fraud, financial abuse, general and enduring power-of-attorney provisions, family agreements and discrimination, and any barriers to older Australians accessing legal services. Today the committee will be hearing from a number of individuals and organisations from Victoria, and later this morning we will hold a public forum from 11.30 until 12.30. That will be an opportunity for the committee to hear from other members of the public. Individuals will be invited to make a brief three-minute statement during that public forum on any issue within our terms of reference.

I would like to welcome everyone here today, in particular the Law Institute of Victoria. Do you have any comments to make on the capacity in which you appear?

**Mr O'Shea**—I am a former president of the Law Institute of Victoria. I am currently general counsel at the Alfred Hospital.

**CHAIRMAN**—Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We have received your submission and a supplementary submission. We have authorised both for publication. Mr O'Shea, would like to make a brief opening statement to draw together the essential elements of your submission? We will then ask you some questions.

**Mr O'Shea**—Thank you very much, Chairman. We appreciate the opportunity to come here this morning to give oral evidence. Can I congratulate the committee on taking up this issue. It is certainly a major issue with the legal profession in Victoria. We had a conference a week ago last Friday of the Elder Law Committee, which I chair. It is a committee of the council of the Law Institute set up to provide services to older Australians across the board rather than to focus on particular areas of law. We anticipated 60 people turning up at this conference and in fact 170 solicitors turned up. It was a sell-out. You could not get in two weeks before, such is the interest in this area of the law and indeed the legal issues that it raises. I think the fact that your inquiry deals with older persons and the law is entirely relevant, and we are certainly looking forward to the findings that you will produce.

We have made two submissions. The first was on 13 December last year and the second was on 21 March, following a meeting with the chair in Melbourne. The key issues we would like the committee to address are fraud, financial abuse, barriers to older Australians accessing legal services, powers-of-attorney, capacity and reverse mortgages. There is no doubt that fraud is a major issue for older Australians. It is not currently a separate area of crime; certainly not an area

of crime if it occurs against older Australians. There are good reasons to argue that if there was going to be legislation for older Australians then fraud against older Australians, much like mandatory reporting for children, would be something that the government could consider.

We are concerned about the lack of data, the extent of fraud and the effects of fraud. Therefore we would like to see some amendments to current legislation to deal with fraud and deceptive practices against older Australians. We also think that there should be more training for the police in dealing with fraud so that they can talk to older people. Often older people are heavily embarrassed about fraud—they feel ashamed because they have fraud committed on them and they are also concerned that having had a fraud committed on them they might lose some of their independence. So it is a major issue for them, and something that policing needs to be very sensitive about.

The second area is elder financial abuse. We had a gripping presentation a week ago from a solicitor who practises in this area, and it is really quite tragic what is happening with elder financial abuse. This will escalate as properties increase in value, superannuation increases in value, and there is more at stake to abuse older people for. Unfortunately, it is often the people who are closest to them. We would like to see more clarity in relation to privacy surrounding older people and the extent that others can obtain information about them. We have strong restrictions at the moment about health privacy for individuals, even from relatives, but there is not really much in the way of elder law privacy for high net worth individuals. We would also like to see an investigative body established to look at financial abuse of older Australians and to ensure that if older Australians are defrauded they do not lose their entitlements to social security payments. We would also like to see the police trained to deal with elder abuse within families in particular.

The next issue that I would like to speak about, given that we only have a few minutes, is powers of attorney. We talked about this with the chair when he was in Melbourne. We talked a bit about whether or not the Commonwealth could legislate nationally for powers of attorney. 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. We believe that the Commonwealth does have the power, under its ability to legislate in relation to health and finance, to bring in legislation that would set up a national system of powers of attorney. It is a growing area, for the same reasons that I have highlighted before: assets are increasing amongst people, so there is more at stake, and people should be able to appoint someone to act for them when they become incompetent financially, medically and in their lifestyle. So guardianship, administration and medical consent are the three areas. It is crazy that it is state based. We do not have to change trains at Albury anymore and we should be able to have a system of powers of attorney that is national. If you think that there is some doubt about the Commonwealth's capacity, I would be happy to discuss that with the committee.

**CHAIRMAN**—The possible legislative competence on the part of the Commonwealth to legislate in relation to this is an interesting concept. If you have a view on this—and you clearly do—maybe you could let the committee secretariat have a bit more information on why you believe we ought to be able to do that. Having said that, in an earlier report of this committee—the harmonisation report—we recommended that the problems with interstate powers of attorney be fixed. We gather from the evidence that we have had that it was partially fixed, and the

Standing Committee of Attorneys-General is aware of it and appear to be moving in that direction. It might be easier if we could put a bomb, figuratively speaking, under the Standing Committee of Attorneys-General rather than open up a new area of warfare with the states in relation to what you suggest. But of course that is always a possible backup. You mentioned the need for police to be trained. Do you think that it would be useful if older police were sometimes engaged in interviewing older Australians, in the sense that older people prefer to deal at times with someone who is not 21?

**Mr O'Shea**—That is a very interesting suggestion, and one that we had not thought of. Having just heard that, it certainly appeals to me. The real issue is getting the trust of older people. I would have thought that could well be achieved by older police—even retired police who are prepared to come back and deal with these issues, to assist in some capacity in interviewing older Australians.

**CHAIRMAN**—On contract, perhaps. That is a good idea, isn't it?

**Mr O'Shea**—Yes, indeed. There is an element of trust. For a young constable, for all that they might be willing and keen, it is hard to really understand. More important is the perception of the older Australian. Can they really open up and say what is going on? Can they trust them?

**CHAIRMAN**—We have also heard evidence that, if more mature people were the public faces of guardianship tribunals and those sorts of government bodies dealing with older people, the older person might show more confidence in the institution.

**Mr O'Shea**—We would support that. The more things that can break down the barriers in this area, the better. I think there does need to be an element of protection of confidentiality. The evidence from our members is that there is a problem in that a lot of older Australians will not open up for fear of losing their independence, that this will be the last straw for the relatives, that they will be defrauded—notwithstanding that it might be by someone who is acting unconscionably and could have defrauded anybody—and that suddenly they will find their relatives move on them, so to speak. So they clam up about it, and they feel ashamed about it. So if an older person—say, an older policeman or policewoman—is given this role, they need to have the protection of confidentiality. The older person needs to know that the evidence they will give to that policeman will only be used to investigate the complaint, the fraud or whatever it is and will not necessarily be communicated to their relatives, that there will be privacy involved.

**CHAIRMAN**—You talk about the need for police to be trained. Don't you think also, as you said, there is a reluctance and a sense of embarrassment amongst older people, particularly if they have been taken down by a child? How can we encourage older people to come forward? Could you have a mechanism whereby this matter could be civilly fixed up without necessarily charging the relative? If that were the case, more older people might be prepared to lay some sort of complaint.

**Mr O'Shea**—We have mentioned in our submission that at the moment adequate alternative dispute resolution mechanisms are not available in the aged-care sector. It would be quite traumatic, I imagine, for an older person to find themselves in the current legal system where the person across the table is their own offspring—their own child—their brother or sister, or their parent in some cases. I think there would need to be a fairly low-key alternative dispute

resolution system set up to do that. We would certainly support it. The new aged-care legislation that commenced in April has some really good elements in it in terms of resolving disputes, and it seems to me that what we really need are some add-on provisions to that act that would cover this area. I do not think we need to throw the baby out with the bath water. I think we just need to add to it and to really take the advice of people who work with older people as to what they would find acceptable.

**CHAIRMAN**—You talk about the need for police to be trained. Do you think the legal profession—firstly, in Victoria and then, more generally, nationally—adequately trains its own members to be experts or competent in elder law?

**Mr O’Shea**—The Law Society of New South Wales is certainly ahead of the field. Victoria is now running second behind it. We have just started. The Law Institute of Victoria, over the past 12 months, has moved on elder law. But the New South Wales law society is well ahead and is training its members. The conference we had last Friday dealt with reverse mortgages, elder abuse, residential care and powers of attorney, over a full day. That is a start. We will be repeating that. We have to make a recommendation to our council later this year as to whether we should set up an elder law section within the institute. I am as clear as I can be that that will be the recommendation going to our council. It is very important that solicitors take a community role in this. In many ways the sort of counselling we are talking about would not necessarily be seen by the law institute as a revenue-raising exercise for solicitors. Often the family solicitor is a trusted person in the family, and an older Australian can relate to them. I would have thought that that aspect of what they are doing should not necessarily be a fee-earning role. Certainly selling the family home or drawing up documents, yes, should earn fees, but if it involves counselling, intervening and offering confidential advice about what their rights might be, I would have thought that that should be something lawyers do as part of their normal service.

**CHAIRMAN**—I think we have all had clients ring up and say, ‘Will you turn your meter off, I want to talk to you.’

**Mr O’Shea**—Absolutely. I think a lot of them are worried too, because they think, ‘I do not want to have to go along and be charged to get my personal affairs out on the table.’ The solicitor should be seen as a bit like a counsellor for the older person—and they used to be. In the old days the family solicitor did have that role, before the advent of the billable hour. The billable hour really cuts across that ability to sit down with a family client that you have acted for for many years and really talk to them. The flip side is that it can be very difficult for solicitors to take instructions from older clients at the behest of their relatives, particularly if the older client is of doubtful capacity. We have seen a number of cases; there was one recently where we were involved with a 95- and 98-year-old brother and sister. The 98-year-old brother was incompetent and the 95-year-old sister was not, and the solicitor was taking instructions to act for the incompetent brother. That is a very tricky role for a solicitor. Often the instructions were coming from the sister, not from the brother. The whole issue of capacity, which we have dealt with in our submission, needs to be looked at. The law societies need to look at it in terms of how solicitors can act for incompetent clients. How do you take instructions that are in the best interests of an incompetent client? Should health providers who are seeking to have a guardian appointed for an incompetent patient find themselves opposed by the incompetent patient’s

barrister at VCAT? How can that happen? How can a barrister take instructions from an incompetent patient to act against an application for guardianship?

These are very tricky areas of professional practice, and solicitors need to grapple with them. That is part of the training that the Elder Law Committee is looking at. It is one of the issues touched on a week ago at our conference.

**CHAIRMAN**—We have not got the information on what New South Wales is doing. We should get that as well.

**Mr O’Shea**—I would strongly recommend it. The website is excellent and there would be a chair of that committee available in Sydney.

**Mr MURPHY**—Mr O’Shea, does the Law Institute of Victoria believe that the legal profession at large are well educated in special legal needs for older Australians?

**Mr O’Shea**—We think they are beginning to be educated. The fact that more than twice the number we were expecting turned up for this conference last Friday week is evidence of the fact that they are not, and they want to know more about it. Traditionally the profession has been divided into ‘silos’—the new glib word. You have the lawyers who do wills; the lawyers who do residential tenancy, retirement villages; and the lawyers who do superannuation. And they all work like surgeons: one does the knee, one does the elbow and one does the kidneys. We think it is time they were more holistic in the way they offer legal services, particularly in regional Victoria. They should know enough about all the issues affecting older Australians. Instead of being hung up about gripping onto conveyancing as their last monopoly right, they should be offering a whole range of services that deal with this group.

This is the baby boomer bubble going through at the moment, and they are not yet elderly Australians. They are at the moment advocates for elderly Australians. My generation and some of your generation have parents who are in their mid-80s, and these baby boomers are very strong, articulate advocates for their parents—and that is causing some grief in aged-care, particularly with professional children, in terms of their ability to advocate for their older parents. Sometimes they are on song and sometimes they are not. Lawyers need to understand that baby boomer group because, as they move into old age, they are going to be powerful advocates for themselves as well. That is why being able to say to them, ‘We can sell you a domestic house and enable you to downsize’ is not enough. What about the reverse mortgage they have been offered? What about the fact that they have been told, ‘We will lend you as much money as you like and you do not have to repay it’, and that the beneficiaries under the will have never been consulted?

The Legal Practitioners Liability Committee, which insures all Victorian solicitors, recommended in its most recent statement that solicitors who do not understand reverse mortgages—which is part of our submission—should not advise on them. It is too dangerous. It is that tricky an area, particularly in relation to beneficiaries. And indeed, what are older people signing up for, particularly if there is no guarantee that they will not be evicted from their house if the loan exceeds the equity?—which happened in the UK.

**Mr MURPHY**—Does the Law Institute of Victoria support the need for a national register of enduring powers of attorney?

**Mr O’Shea**—That is what I was trying to say before; certainly there should be a national system of enduring powers of attorney. Revocation is a problem. Our submission deals with how you find out that someone has revoked their enduring power of attorney. It is very difficult in Australia to know that. It is very difficult for health workers when a person is brought into emergency and someone appears saying they have an enduring medical power of attorney. With an online system it should be possible. If the government refunds AustLII, we could put it on AustLII.

**Mrs HULL**—One of the witnesses this morning raised the issue of insurance policies taken out in earlier years that have a beneficiary attached to them and how when you do a will, the will does not override the beneficiary nominated in the insurance policy. If you read the submission there seems to be quite a disconnect in that. There have been circumstances whereby people have not changed their beneficiary, have forgotten that they nominated a beneficiary years before and then it goes to some person who was part of their life many years ago and is no longer part of their life. In essence, how does the legal profession ensure when they are doing the will that all aspects of a person’s life are covered—particularly with insurance policies sitting in the cupboard—that the beneficiary is current and that that person actually wants to be the benefactor?

**Mr O’Shea**—I have not heard of that before. It is a very interesting issue and something that I will take back to our wills and estates committee. It occurs with superannuation as well, with allocated pensions and what happens to them on death. Also there is what happens to a nominated beneficiary of a do-it-yourself superannuation scheme, in particular. It is an area that we need to look at. It all comes back to how you take instructions for a will and the ability of the solicitor to know what questions to ask, such as, ‘Do you have a policy that you took out in the 1960s that you might have forgotten about?’ If the solicitor does not ask the question, presumably it will just fall through the cracks.

**Mrs HULL**—There has been some suggestion in the submissions that we are able to get insurance companies to send out yearly reminders of who the beneficiary is. I am concerned about the danger of that in the situation of an abused elderly person. Would it not be better for a solicitor to be the trusted person who is always on top of that? If so, what have you got in place to ensure that the training is there and that a solicitor covers all bases? That is why people go to a solicitor—to get all bases covered.

**Mr O’Shea**—We have a specialty in wills and estates where solicitors can submit to examinations. They have increased compulsory professional development every year over and above what a solicitor would normally do to maintain their expertise as accredited specialists. I am not one of those, but I would expect those solicitors to know that sort of information. Your report will be very useful, with the submissions you are receiving, for us to feed into our specialisation committee and indeed to all solicitors. Certainly, you would expect solicitors to know about these issues just from their day-to-day experience and we would be passing that on to our members. It is something that should be looked at right across the board. If there were a national register of powers of attorney or at least a national register of whether a person has a policy—irrespective of what the value of the policy might be and who the beneficiary of that

policy was—it might even help to avoid the problem of lost benefits, which can happen as well. If there were some way that could be put on a register, we would support that.

**Mrs HULL**—I just have one more question. The more I hear about this inquiry, the more I am thinking that there needs to be a different way of ensuring that older people's needs are protected and met. You have attached the family law document to this submission for the purpose of understanding whether or not grandparents are entitled to legal aid, I believe. But have you ever thought, in your Elder Law Committee or whatever you have there, about whether there is a need for a similar type of structure to protect and look after the interests of older people, as a family law court looks after the interests of children—or is supposed to—in the event of breakdown in a family relationship? Is there a view that there could be a possibility of having a similar structure that could look after the interests of an older person as a result of family breakdown, of which we are hearing at all of these inquiries? There are conflicting issues within families that are obviously affecting the care of an older person at times. I know that we have guardianship tribunals, but they seem to be having a lot of trouble.

**Ms Campbell**—In response, I think that is an interesting point and probably something we should take away and have further consideration and thought about. We are dealing with very complex issues here. Our submission generally and on particular issues advocates for a holistic approach in legislation, information and education, both for solicitors and for older people and the people who assist them, such as their carers and family. In terms of what you suggest, I suppose in the first instance we would assume that older people, like any other adults, are independent people with freedom of choice. They have the ability to make decisions for themselves about things that might be affecting them, such as potential financial abuse. When it gets to the stage where intervention may be required, that is a whole other level and, naturally, would need to be carefully considered.

**Mr O'Shea**—But I think there is certainly a role for the Family Court to have jurisdiction over the affairs of older Australians, particularly in relation to one area—that is, where there is elder abuse and you need orders of reinstatement. At the moment, it is not really clear that an older person who is abused and perhaps has their house sold from under them without their knowing can in fact get an order for reinstatement, because you have had a title transferred and there is a bona fide purchaser—how does the older person recover? The courts need to start looking, through legislation I guess, at the ability to reinstate assets that have been taken through abuse. It is very difficult if it is through fraud, but, if it is simply that the proceeds of the family home have been put in the pocket of an abusing relative, there is no reason why there could not be an order to reinstate those assets. That is the sort of thing where the courts should have more jurisdiction than perhaps they do now—perhaps the sort of jurisdiction they have to protect children.

**Mrs HULL**—That is right. So the family law could have an additional arm—

**Mr O'Shea**—Yes, absolutely.

**Mrs HULL**—because, if you look at it holistically, this is about a family.

**Mr O'Shea**—Exactly. The difficulty is that the older person often has no advocate for them—

**Mrs HULL**—That is right.

**Mr O’Shea**—because the person committing the abuse is the person who would normally be the advocate. That is why our profession ought to be there. The family solicitor ought to regain the position they had 30 years ago and start becoming a family adviser and look after those older people.

**CHAIRMAN**—Don’t you think, though, that unfortunately the downside of deregulation of fees, cost cutting and people bidding for work has been that the family solicitor ceases to be the family solicitor, and more and more people tend to use a solicitor for a purpose?

**Mr O’Shea**—Certainly in the corporate world. I think in regional Australia it is still the case that families use family solicitors. In cities like Melbourne, Sydney, Brisbane, Perth and Adelaide, the person in those urban environments tends, in our experience, to look at who the accredited specialists are and use them. It is a one-off; it is not someone your mother and father used. It is an expert, but an expert in that area. It is changing in the cities.

For a lot of really large firms it does not make economic sense, frankly, to have private clients. They would rather have corporate clients. The increasing trend is that older practitioners in the large firms are tending to leave those firms in their late 50s, set up in private practice and do the private client work that the major firms perceive themselves as no longer being able to afford to do. Those former partners are doing very well. I know of a number of firms in Melbourne set up by those sorts of practitioners who are quite committed to their private clients and who have 30 years experience in practice but are still right up with it and can provide that advice. It is a growing trend which is a spin-off from the specialisation of the major firms. It is a pity that there are not more.

**Ms Campbell**—We found also that the members of our elder law committee come from both country and metropolitan Victoria. They tend to be the types of solicitors from both the medium-sized and the smaller firms that you described. They take the holistic approach and try and act as the confidential adviser for elder people on the types of issues that arise.

**Mr KERR**—I suppose there has got to be a little bit of caution. I suspect that the vast majority of people I represent never see a lawyer at all in their lives, so reliance on the family solicitor is far removed from their life experience. I will go to the issue of powers of attorney. Why is it that, for example, the Alfred will not recognise a power of attorney granted in Queensland? It seems to me that the framework for recognition of the laws of other states is in place under the Constitution. There is no reason why you would not recognise that.

**Mr O’Shea**—In practice they would recognise it. I could be wrong, but my understanding is that technically at the moment a power of attorney issued in Queensland cannot be enforced by the attorney interstate. A power of attorney given in Victoria cannot be enforced by the attorney interstate outside Victoria. It does not mean that in the case of a medical power of attorney the hospital would not take cognisance of the fact that an attorney was giving the views of an incompetent patient, particularly if there was no-one else there to give to give those views. That is my understanding, and certainly the information that was given to us by the Office of the Public Advocate last Friday was that that is the case. The mere fact that there is some uncertainty here this morning on this issue shows that it needs to be clarified so that it is a uniform issue

across the nation. It is too important an issue to be state based. It makes no sense for it to be state based. If it can be uniform, that is fine.

**Mr KERR**—That is the case. In Tasmania there is a registration system that coincides with the registration of titles. It is searchable. It is a very efficient way of registering powers of attorney.

**Mr O'Shea**—What about refusal of treatment certificates? The Medical Treatment Act in Victoria does not apply in other states. One of the problems we are experiencing with transplant surgery is that, particularly in donation after cardiac death as opposed to brain death, New South Wales does not have a medical treatment act, a definition of death and an ability to undertake transplants in the way that Victoria does.

**Mr KERR**—Whether it would be a head of power to deal with that in the Commonwealth Constitution would be a very interesting question. Also, if you look at the constitutional tradition, the power is for benefits. It is not for the direct provision of health services or anything in that area. There is a good argument, as the chairman identified earlier, for us to make certain that there is greater clarity and uniformity, but I am not certain that I would superimpose a Commonwealth system—and we do not have any of the mechanisms for registration or any of the other subsets of issues that states already have in place.

**Mr O'Shea**—It is very difficult. What if there is the ability to have alternate powers of attorney in New South Wales but not in Victoria, and you have got someone turning up who says: 'I am not the attorney; I am the alternate. The attorney is overseas, and in our state we can have alternate attorneys'?

What is a registered nurse going to do at two o'clock in the morning when they need to know whether they have valid medical consent? It is an absurd position to be in. There ought to be some system—whether it is in Victoria, in New South Wales or nationally—where the position can be determined. As you said before: using a register. Leaving aside the law on the subject, if we had a national register that would record the position, that would be a huge step forward. I agree with the chair: why would you want to pick a fight with the states? Why not try and get some uniform legislation? That is all I think we are advocating for—uniformity. If we can achieve it another way, that is great.

**Mr KERR**—One issue with powers of attorney that has been suggested is that there should be a random audit of how they are being put into effect—even though it would only be a very tiny percentage—but to at least have some kind of external supervision so that people know that there is somebody watching from time to time in relation to the use of powers of attorney. Most are probably being used quite properly for the purposes for which they are granted. It is a very convenient way to deal with the fact that as we age we want to be able to pass the capacity to exercise our financial affairs or our decisions about health to somebody whom we trust.

**Mr O'Shea**—You would need registration for that. If are you going to run an audit system, you have got to know who is holding the power. I would counsel against giving it to ASIC because they have got enough on their plate. But there might be another body that could do it. Certainly that is an issue that we would support. It also overcomes the problem of revocation: when a person revokes their power of attorney and the attorney does not even know that it has

been revoked. The person might have moved away. Anecdotally there is evidence that persons holding powers of attorney, who are also beneficiaries, have a huge conflict of interest. They can often be tempted to abuse the power of attorney and they really have no fetter at the moment. If mum is unwell and incompetent, you can take money out of her account because you are going to get it in three years time when she dies anyway; so why not take it now?. That is the attitude. It is clear that it does go on.

**Mr KERR**—Is that an abuse?

**Mr O'Shea**—It is.

**Mr KERR**—Why? Wouldn't that perhaps be the person standing in the shoes of the mother making that decision? I am certain there are things that I would regard as abusive but—

**Ms Campbell**—Our point is particularly fraudulent and unconscionable behaviour is key.

**Mr KERR**—I am worried about the overlap between something that is fraudulent and unconscionable and the parent who has large resources and gives a power of attorney to their child expecting them to look after and manage their affairs. Obviously if the parent is left destitute and without means and is scabrous, left in an unattractive place where care is not provided, I accept that. But I am sure most people would say, quite legitimately, 'My mother has given me a power of attorney,' and they were to manage her affairs. In the ordinary course they would have made this decision. You say that it is a conflict of interest in a sense that it involves a person making those kinds of evaluative judgements, but people give their powers of attorney to their children for precisely those reasons, don't they?

**Mr O'Shea**—They do not if they are the beneficiary of the will and in selecting residential care there is a choice between high cost, well-supervised residential care and the cheaper version. Practitioners in the aged-care field tell us that frequently an attorney who is a beneficiary—I am only talking about the person wearing the two hats—has a huge conflict because, 'Why would I pay \$1,000 a month extra for mum's care when I can do it for less?' and that was not the intention of the parent when they issued the power of attorney. The parent wants to be well looked after and properly looked after, but there is that temptation. As you point out, there is no supervision of those persons at the moment. In my example before, I do not think the parent expected the beneficiary to help themselves to the estate before the person died. I do not think that is acceptable. That is fraud and it is no different to a company director helping themselves to shareholders' funds, frankly. It should be prohibited and there should be sanctions against people who do it.

**Mr KERR**—There is an argument for saying that no person who has a direct financial interest can hold a power of attorney.

**Mr O'Shea**—No, it is not behaving properly.

**Mr KERR**—No, wait just a minute. I think this is becoming an absurd argument. Let's assume that I have a power of attorney or I am a trustee of an estate. I have a general power of attorney given to me by a 40-year-old billionaire. They have children. The billionaire for some reason has a stroke and becomes mentally unable to care for himself or herself. They have

another 40 years of life in front of them. Surely it cannot be the case that a person who was even at arm's length would not make very generous provision for the children. Why should you conflate the idea of a child holding the power of attorney exercising proper care—I am not saying being abusive—taking some of that estate for their ordinary affairs over that 40 years? I just think that you are confusing abuse with what these powers of attorney are intended to do.

**Ms Campbell**—I think our suggestion is that financial advantage and financial abuse most often occur in situations where there are care givers and family members who are in a close and trusting relationship and are able to use that power. Our argument is not that the fact of a child holding such a power is not an appropriate use of a power of attorney; rather, it is that history and the case studies show that people in those positions, the children who are close to the elderly person, are more able to, and more effectively, leap to that.

**Mr KERR**—But there are a lots of instances where children without powers of attorney will prevail upon their parents to give them money in advance of their death. This happens routinely—for goodness sake, it is quite common.

**Mr O'Shea**—I admire your confidence in the relatives—

**Mr KERR**—I do not have any confidence in the relatives, but I—

**Mr O'Shea**—but we have people over there who are in need of and offered an aged-care low-impact bed and the relatives will not sign the ACAS forms because they prefer for the relative to stay in an acute care bed at public expense for as long as possible. They will refuse to sign up, and there is no power currently under the act to force families to sign up. You give them 10 days to go and look at six locations, and at the end of the day if they say, 'I'm not going to accept any of those,' on it goes.

**Mr KERR**—What is the difference between having a power of attorney and not?

**Mr O'Shea**—None, except that when you take on a power of attorney—

**Mr KERR**—None.

**Mr O'Shea**—you take on responsibilities and you should be held accountable for those.

**Mr KERR**—The power of attorney does not constitute you in the same way as a trustee—

**Mr O'Shea**—Not at the moment.

**Mr KERR**—it puts you in the shoes of the person who grants the power.

**Mr O'Shea**—Yes, that is right. It does not give you the right to—if you take the case of the beneficiary who has the power of attorney, it does not give the beneficiary under the will a right to exercise the power in their favour if it disadvantages the person who gave them the power in the first place, and that is what we are saying: if it means you get lower quality aged-care because the person does not want to diminish their bequest, that is wrong, and it should be policed, in our view.

**Mr KERR**—Let's take powers of attorney out of this matter, because we are overlapping here. A person who is the beneficiary under a will may resist all kinds of things that cost an elderly parent. Now, I can think that it is immoral and wrong for people to do that, but the current law does not require those people—

**Mr O'Shea**—Certainly a guardian could be appointed.

**Mr KERR**—Exactly.

**Mr O'Shea**—The guardian could be appointed to act if—

**Mr KERR**—And it could be in that situation too, if there was real abuse.

**Mr O'Shea**—Indeed, the attorney could be removed if people believed that the attorney was not acting appropriately. But I think the problem with the attorney is that the person giving them the power in the first place expects them to exercise it in the interests of the person who gave it to them, not in their own personal interests.

**Mr KERR**—Well, do they?

**Mr O'Shea**—Mostly we think they do. Not always.

**Mr KERR**—I am not certain that is the case. I know that many people, as they age, give their children powers of attorney on the understanding that 'if I become senile and old then you look after my affairs and stand in my shoes'. They would hope that they would be cared for in the appropriate way, but they are doing it in the interests of those they are giving the power of attorney to. If you want to have a position that a trustee cannot benefit from their own trust, then you disallow powers of attorney which give general capacity. You make a rule like that. But, if you do not do that, how can you criticise people for exercising something that many elderly parents would wish? I have no doubt that many elderly parents, believing that they are going to or will perhaps become mentally unsound for a protracted period of time, would expect the holders of their powers of attorney to exercise it.

**Mr O'Shea**—What if the attorney was one of three siblings and all three siblings were beneficiaries and that attorney was taking the money out for their own benefit? I have to drive to see Mum at Balranald every three months. It takes me a day to drive there. I will take out all my expenses and, what is more, I will take out a bit of 'time off work' money and on it goes. The other siblings are basically not given an opportunity to intervene. Of course, they can go and remove the attorney and have a guardian appointed. That is available to them.

**Mr KERR**—That is possible.

**Mr O'Shea**—I am only raising this, because it was suggested that we should have supervision. We would support supervision and we would support random audits of attorneys; therefore, we would support, as a corollary, a national registration system.

**Mr KERR**—My suggestion is that there be supervision, but I am very troubled if the idea of supervision is that any holder of a power of attorney is acting in an improper way if they

advance any funds for their own use when, in family circumstances, I am certain that is precisely what is intended on many occasions.

**CHAIRMAN**—That is an interesting point made on both sides.

**Mr O'Shea**—It is a good debate, which the community should be having about this.

**Ms Campbell**—We would agree and hope that powers of attorney be exercised responsibly in all cases. But what we are talking about and what practitioners who are part of the Elder Law Committee and the legal profession more generally are seeing are examples of the more extreme, complex and very troubling cases in dealing with these issues. So we are advocating some kind of measure to deal with that.

**Mr KERR**—Why does the law not already deal with those things? Why aren't you liable in civil law for an act which extends to fraudulent use of a power of attorney?

**Mr O'Shea**—You could be liable for intention to permanently deprive—essentially, theft. But someone has to bring the prosecution. I suppose it could be done under a civil remedy. Who will bring it on behalf of the older person? Who will advocate for them when it is a close relative who has been responsible? We had an issue previously, where the older person does not want to have the whole family in the courts and have their child prosecuted. It becomes a very difficult area. In Victoria, the holder of an enduring financial power of attorney has to keep books of account under the changes to the act two years ago. So at least there is now more of a requirement that an attorney act more like a trustee than previously. You are right. Is the criminal justice system the way to deal with these things? I guess that is the discussion we had previously. Should there be some ability in the aged-care legislation to provide a form of dispute resolution that enables families to resolve these matters other than through the criminal justice system?

**Mr KERR**—Can I take you up on this reinstatement point that you raised earlier. I accept that the worst thing that could happen to an older person is to have their home sold out from under their feet because that is the one place where they feel secure. But, equally, isn't it a little difficult for a bona fide purchaser, without any notice of the circumstance, to find that the property they have paid for is going to be returned to somebody else?

**Mr O'Shea**—I agree with you.

**Mr KERR**—It is a very difficult choice here.

**Mr O'Shea**—We would accept, though, that the reinstatement of the proceeds would be sufficient for—

**Mr KERR**—I would accept that.

**Mr O'Shea**—I think I said that in my evidence: it is hard for the bona fide purchaser for value and at the very least we would want reinstatement of the proceeds.

**Mr KERR**—I certainly accept that, but I was worried—

**Mr O'Shea**—You cannot throw the property law system into turmoil by not knowing whether you have clear title.

**Ms Campbell**—Finally, the Law Institute 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 people bringing the claims in the first place. We would advocate, at first instance, information and education programs on the part of older persons, their families, their carers and their solicitors. The new aged-care investigation scheme came in on 1 May this year and it is still early days. Under the previous scheme, if a complaint was not resolved through negotiation the secretary had a power to refer it to mediation, whereas under this current new scheme, which came into effect on 1 May, that point is not clear. At the moment, there are transitional provisions until 1 September whereby people whose complaints have been accepted under the new scheme have the choice of having their complaint resolved under the new scheme or going with the old scheme. I suppose that, in terms of low-impact civil dispute resolution procedures, the new complaints investigation scheme that we have is inadequate.

**Mr KELVIN THOMSON**—On the issue of reverse mortgages, you suggest that there should be a mandatory requirement for independent legal advice for people who are considering equity release products. Do you have any examples of where those sorts of products have had a detrimental effect on older Australians?

**Mr O'Shea**—I cannot give you examples here, but there are examples. The Sequel guidelines are not mandatory at the moment. Sequel presented last Friday week at our conference. Frankly, the Consumer Credit Legal Centre, which now has a new name, would say that the Sequel rules are at least the minimum, a floor that we should go with, as a mandatory requirement, particularly in relation to no negative equity—that is, where the debt exceeds the value of the home. There are a number of reverse mortgage companies operating outside the Sequel rules at the moment that will in fact enforce a negative equity pledge and take over the house—effectively, throw the person out. That is what happened in the UK when these first came in. There was a scandal in the UK over them. We would say that, at the moment, at the very least they should all sign up to Sequel. Clearly, Sequel is pushing its own barrow, but Sequel's requirements are a good basis for protection. At the end of the day, you cannot protect everyone from themselves. There are good reasons why a reverse mortgage can help people who do not have adequate superannuation or who are asset rich and cash poor and so on, but they need a basic floor under them.

**CHAIRMAN**—Thank you for appearing before the committee today. We are sorry that we held you up a bit longer than was anticipated.

**Mr O'Shea**—It is great that you are so interested and we can have this discussion. We appreciate it very much. We appreciate the invitation to be able to do this.

**CHAIRMAN**—We will forward you a transcript of what you have said so that you can check it and make sure it is accurate. Would you please check with the secretariat to see if they have any questions in relation to matters you have raised. I think you have undertaken to give us some more information. It would be appreciated if you could get that to the secretariat as soon as possible.

[10.22 am]

**JACKSON, Ms Susan Ada, Secretary, Melbourne Bayside Branch, Association of Independent Retirees Ltd**

**MORGAN, Mr Richard David, President, Melbourne Bayside Branch, Association of Independent Retirees Ltd**

**TURNER, Mrs Patricia M, Committee Member, Melbourne Bayside Branch, Association of Independent Retirees Ltd**

**CHAIRMAN**—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that these are proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We have received your submission and we have authorised it for publication. I now invite you to make a brief opening statement to pull together the threads of your submission, and then we will proceed to questions.

**Ms Jackson**—Just to give you a bit of an understanding, Dick is 80, I am 59 and Pat is a little younger than me. Nationwide, 77 per cent of members of the Association of Independent Retirees are between 65 and 84 and five per cent are over 85. So we are the type of people we hope you are trying to look after with this inquiry.

**CHAIRMAN**—I have had quite a lot to do with the AIR, particularly on the Sunshine Coast and in Kingston, since its inception. You are speaking on behalf of the Bayside branch, but not on behalf of the Victorian head body?

**Ms Jackson**—I sent our submission through to the Victorian division and through to our national board's chairperson. They have authorised me to speak on behalf of AIR, but we are presenting the submission through the Melbourne Bayside branch.

**CHAIRMAN**—That clarifies things, thank you.

**Ms Jackson**—I wonder whether Pat would be allowed to hand you each one of our latest brochures and magazines and a list of our speakers?

**CHAIRMAN**—We will pick it up.

**Ms Jackson**—Details of all our branches, division directors, AIR secretariat and the board of directors of the Association of Independent Retirees Ltd are listed under 'Roll call' in the back of our quarterly independent retiree journal, along with our latest information brochure. We appreciate this opportunity to have input into your inquiry into older people and the law. The areas of your terms of reference are supported by many cases where adequacy of the current legislative regimes would seem to need improvement or consolidation. We would be happy to comment on some of the recommendations put forward by other eminently qualified organisations during your question period.

We have taken the positive tack to your inquiry of suggesting ways in which current and improved future legislation could have wider effect in significantly reducing the incidents of cases affecting older Australians. We argue that rules should be constantly improved, but the real root of many problems is isolation, lack of knowledge, disparity of understanding and lack of confidence. Our submission suggests ways of empowering older people to make better informed decisions with more confidence and offers a way to obtain more data rendered in a non-threatening atmosphere for input into future legislation.

Monthly general meetings of the Melbourne Bayside branch of the Association of Independent Retirees typically welcome and inform members of member branch division and national independent retiree happenings for about 30 minutes, introduce an informative guest speaker who speaks for about 40 minutes and then answers questions from the floor for 20 minutes, and then joins us for 30 minutes during afternoon tea to personally speak with any members. We have a carefully selected array of speakers to educate us in as broad a way as possible. This structure enables gaining a strong knowledge base and encourages mutual support in networking. We believe all self-funded and partly self-funded retirees gain from this structure and as a not-for-profit volunteer organisation ask that all levels of government recognise our service and help us in promotion to other retirees. This could include links to our website under 'Other sources of information' on relevant government and semi-government websites such as NICRI, FIDO, ATO, seniors.gov.au, FaCS, DVA, health and COTA; our brochures be provided at all financial information services areas of Centrelink; our national quarterly magazine in all libraries; our brochures at all community information and support centres; and representation of AIR board of directors on major relevant planning and review committees for older Australians.

The Association of Independent Retirees does not purport to cover individual specialist advice. Hence we recommend expansion of the supportive network of committee information and support centres nationwide. Trained community information workers are more often experienced, older persons themselves as younger workers normally move on to paid employment. They can relate to older people's needs in a non-threatening, confidential interview providing options and information on a wealth of topics, sounding out the person's real problems and needs and referring onto specialised auxiliaries services. They also can record confidential facts as data, which, on compilation, could influence future legislation.

Community information centres cover such a broad range of issues that they provide a cloak of privacy over the contents of an interview, allowing people to be more forthcoming with their real issues. Increased funding and broadening of the services of their auxiliary agents for financial advice, legal advice, counselling and tax help for older persons would cut off a lot of problems in the bud and encourage people to ask for advice when they are unsure or confused. This early, personal, direct approach would help eliminate the scare and sensationalising of problems that are out of control.

We particularly recommend that persons over 75 years be encouraged to regularly seek information and advice from community information centres to help retain their confidence. We see no reason why self-funded retirees of adequate means could not be asked to pay for auxiliary services but do believe the means test should be based on income and capacity of the person, not on assets. As stated in submission 40 from the Australian Institute of Criminology:

... impropriety can only be dealt with if it is identified and brought to official attention.

That is the basis of our simple submission.

**CHAIRMAN**—How many members are there in your branch?

**Ms Jackson**—In our branch we have 194. Nationwide there are about 15,300.

**CHAIRMAN**—Is that nationwide or Victoria-wide?

**Ms Jackson**—Nationwide.

**CHAIRMAN**—You now cover self-funded and partially self-funded retirees. What proportion are partially self-funded?

**Ms Jackson**—I have some facts here.

**Mr Morgan**—A very small proportion.

**Ms Jackson**—We did a national survey last year which gives a tremendous amount of detail. I do not know whether that could be of value to your committee.

**CHAIRMAN**—If you could let the secretariat have it we would appreciate it.

**Ms Jackson**—The basis of it is that about one-third of those members who responded to our survey earn less than the after-tax value of mean average weekly earnings. In the categories below a taxable income of \$21,600, 8.6 per cent have difficulty with maintaining their health, undertaking local travel and enjoying social outings. This is consistent with the Westpac study. Sixty-six per cent of our members believe they are on the Westpac comfortable income of \$43,350 and 5.2 per cent believe they are on the modest income of \$23,550.

**CHAIRMAN**—I will cut back to some evidence we have had from other seniors. They were saying that older people find it difficult to access the law, and we have had evidence that older people need more access to competent community legal centres. Do you find that most of your members have a solicitor or would have had a family solicitor during their lives and that maybe your organisation might not be as much in need of community legal centres as pensioners would be?

**Mr Morgan**—As full pensioners?

**CHAIRMAN**—People who are maybe not independent retirees—who have not made provision or have not been able to make provision for their own retirement.

**Ms Jackson**—I think that a lot of independent retirees would have had legal help during the years, but unfortunately their legal help is very old too. It is hard for them to adjust to a younger person who is up with the latest regulations. This is why we have made the suggestion of going to a community information centre—that is, for anyone over 75 to be invited along just to have a chat. An interview would allow the trained person to ask the relevant questions as to whether people have had recent legal advice, what sorts of problems they have encountered and what

changes are happening in their lives so that they could then be referred to appropriate services or have it suggested to them that maybe it would be a good idea to go and see their lawyer again.

**CHAIRMAN**—You mentioned that you focus on people aged over 75 and you also mentioned that legal advisers are ageing too. As they say, the only thing wrong with ageing is when it stops. How would the costs involved with counselling for over 75-year-olds be met?

**Ms Jackson**—The actual services of the community information and support centre are free. A general support centre would have a paid manager. Expenses are normally covered by local, state and Commonwealth grants.

**CHAIRMAN**—But if everyone over 75 had to go and do this, then surely that would place incredible demands on the facilities available?

**Mr Morgan**—Not everyone over 75 needs legal advice.

**Ms Jackson**—The idea is to ask everyone, particularly self-funded retirees, because we believe self-funded retirees over 75 have been terribly discriminated against in the fact that they have not normally been able to gain any superannuation. They are not now allowed to put any money into superannuation. All the latest government policies have completely ignored them and they are often still quite confused about the GST apart from anything else. They need help. I still believe that as a free service we will get more and more volunteers helping out in community information centres if people know about it. Then the volunteer would ascertain what services were needed, so you would not have people going off to legal services that charge a lot of money. Capacity can be argued. Some older people I have known have been in a delusional state. They may think they are being abused, but they are not. A trained interviewer could intervene to mediate and sort out these sort of things before the professional are brought in. The professionals would need to be paid. Some independent retirees who could afford to pay could be asked to pay. I believe the means test should be set, as I was saying earlier on, not on their assets but on their income and their capacity. They are the ones who get help. It may just be very general help at the legal aid stage and then they could be told to go on to their lawyer, but they have somewhere they can go to relax and feel they are getting the information to know what to do.

**CHAIRMAN**—Mr Morgan, you would have heard the vigorous discussion between Mr O'Shea from the Law Institute and Mr Kerr in relation to family members who have been granted a power of attorney and may be helping themselves to what will be their inheritance a few years down the track. What is your view of someone doing about?

**Mr Morgan**—We have heard that viewpoint expressed before, haven't we? I do not know. It is a personal thing, isn't it? I am inclined to agree with Mr Kerr. The whole idea of granting a power of attorney is to give it to someone trustworthy, generally a member of the family although not always. If there is abuse, it is a problem. I really do not know. Among our members we have had guest speakers who have told us how to go about getting a power of attorney. We do not know how many amongst our members have done it. Some would; some would not.

**Ms Jackson**—According to the national survey, a third of our members have enduring powers of attorney, but there is only a very small percentage that have the medical and guardianship.

**Mr MURPHY**—I want to know why you only concentrated on people over the age of 75 in your submission and recommendations and why you did not also include people over 60.

**Ms Jackson**—Because, as you were bringing out, of the expense of it anyway. To me, people over 75 are the most disadvantaged.

**Mr MURPHY**—That is all I wanted to ask you. Thank you.

**Mr KELVIN THOMSON**—First, I will pass on a cheerio from the north-west group of the Association of Independent Retirees. They are an excellent outfit and do a lot of good work in my neck of the woods.

**Mr Morgan**—Joan Heard's branch.

**Mr KELVIN THOMSON**—Exactly. You are quite enthusiastic about the community information and support centre in your submission, and what you have had to say about them is very positive. I guess the questions we are interested in are: how useful is their advice on a one-to-one level? How detailed is it? How long do people have to wait for it? Is there a queue for that sort of advice or other barriers to it?

**Ms Jackson**—I have worked in community information support centres over a number of years, particularly the one at Mornington. That one is amazing because it offers so many services. Anybody can walk in at any time. You do not have to have a set appointment. Volunteers are on duty who will speak to you in the order that you appear at the centre. The qualified community information workers will take you in for a private interview and will know how to help you with your problems. They do not advise; they give you your options. They will give you a full range of options of anything that may help you in your situation. They can refer you on to get advice and that is where the payment comes in. It could involve a financial adviser or family counselling. Tax help is another thing that definitely should be expanded to the older age group. Of course legal advice is essential. The ability to receive general legal counselling, to know whether you should go on and seek further advice I think is very important.

**Mr KELVIN THOMSON**—Is there some restriction on the tax help?

**Ms Jackson**—Yes, there is. You have to be a pensioner for tax help.

**Mrs HULL**—Is there a view, particularly in your local branch, as to the benefit of a family agreement? Do you think people understand what a family agreement means and how it operates?

**Ms Jackson**—It is one area we have not really handled. That is a good thing for us to bring up very soon at one of our meetings. I think it is incredibly important that people be made aware of that.

**Ms Turner**—I think that your question points out exactly where groups like ours see ourselves: the fence on top of the cliff. Lots of the problems to do with older people and the law are little things and people do not have the knowledge to deal with them or know what is available to them, nor do they have the confidence to access the services that are there. Groups

like ours are the ones that should be telling people that family agreements exist, how to use them, what they offer and what the free legal service down the road offers. If something happens, we should be telling people where they can go to get help. Our advice is general and very much aimed at the fence on top of the cliff to maybe steer people to make smart choices, do the right thing, get the right advice at the right time and not fall into some of these more major problems.

**Mrs HULL**—And prevent the pitfalls. An association such as yours is of great benefit to people, but you need to have the right tools in order to be of greater benefit to others. Family agreements have been raised on a number of occasions in submissions. I think they are really important, but there seems to be limited knowledge about family agreements and how they work.

I think you were here for the earlier evidence in respect of reverse mortgages. Is it your experience that people are having difficulties with the reverse mortgage process? A recent *Choice* survey indicated that of the hundreds of reverse mortgage options available, only about four or five actually stacked up and provided particular coverage. A simple thing like failing to pay the rates could see a person default. Are your members using reverse mortgages? Are they experiencing difficulties?

**Ms Turner**—In our particular branch, no-one is using them. But, again, that supports exactly what we are saying. We have had a speaker on that.

**Ms Jackson**—We have had three, actually.

**Ms Turner**—At the end of that AIR meeting, everyone in the room knew that they were not going to sign up until they got legal advice. If nothing else, we achieved that; that is the purpose of our group. We did not tell them whether to get a mortgage or not. We did not tell them whether it suited them. But we at least put the point across that, 'It is going to seem like a lot of money at the time, but pay the local solicitor to look through the documents before you sign.'

One of the problems with our group is accessing the speakers. If we want to talk about these agreements, who is going to come—we do not pay—to a little group of people in the suburbs and tell us about them? It is our role to get that information out there. We do not give the specific advice. We cannot tell them what to do, but we can get that information there for them to make some smart choices.

**Mrs HULL**—What do you think are the biggest issues confronting older Australians, particularly in the independent retiree scene? They do not get a lot of information. If you are a Centrelink beneficiary, you get a significant amount of information provided to you—not all, but you do get a lot more than if you are of independent means and have to source that information for yourself. What would be the biggest issues your membership sees confronting them in the area of financial abuse and like issues?

**Mr Morgan**—Just concentrating on the financial abuse area or the issues generally?

**Mrs HULL**—No, not just that.

**Mr Morgan**—Issues generally, of course, are those that affect self-funded retirees.

**Mrs HULL**—Outside taxation and things like that. I am talking about more to do with the terms of reference for the inquiry. So it is fraud, financial abuse, power of attorney issues, family agreements, barriers to accessing legal services and discrimination issues.

**Mr Morgan**—Fraud, of course, is a potential problem for everyone in the community. When it comes to older people, they are vulnerable; there is no question about that. Our members have not expressed any specific problem. We aim to get speakers out to explain the complications. We do that regularly. I am talking about around Australia now. Our branch does it every month. All the other branches around Australia do it.

**Ms Turner**—Very few of them, speaking to as many as you can, anticipate any family problems. By their very nature, that is why the family problems are the insidious ones. They would more likely to be nervous of being ripped off by some unscrupulous retirement village manager. That sort of thing makes people nervous. ‘Where am I going to be living, is my money going to last and, if I have a massive problem, health or whatever, how will I cope?’ As people get older they lose confidence in their ability to cope, which is why legal things become more and more important to them—because that is your backup if you are really not coping.

**Mr KERR**—The irony is that the legal instruments that they are confronted with are probably more complex at this time of their life than they have ever been.

**Ms Turner**—And intimidating.

**Mr Morgan**—Most of our members would be intimidated by them. Our membership is characteristically made up of people who are fiercely independent. They have been described as ‘frugals’. They were born between the wars, in that period of the Great Depression.

**Mr KERR**—Dad and mum.

**Mr Morgan**—Yes, and they have saved all their lives. They are fiercely independent. But in their old age, particularly if they are in their late 70s and early 80s, they do need help and advice. We aim to give them as much help and advice as we can and lead them in the right direction. When it comes to the law, yes, they are struggling at times—they really are.

**Mr KERR**—This is not a dig at anybody, but it is just a fact that part of the deregulation of the financial markets and everything else has created all these quite complex products. It has had a considerable number of advantages. Things like reverse mortgages never existed in the past. They are very good for some people—not the shonky ones, but the well-designed reverse mortgage can enable somebody to release capital that they need.

**Mr Morgan**—That sums up our membership in many cases. They do have assets, but their income in many cases is very meagre. The concept and the idea of a reverse mortgage has a big appeal to some people. It is a fairly new invention, as we know—a couple of years old, maybe. It is being marketed, we think, in a way that is a little bit unfair at times and risky. We have had a number of speakers out to talk to us. In fact, one of our sponsors, the Bendigo Bank, is offering that product. That is fine. We have heard about Sequel and the rules that are applicable. All that is something that our members take on board. We do not know how many of them have actually taken it up. Some have.

**Ms Jackson**—We have had many letters in our independent retiree magazine, where we have actually covered the potential problems of reverse mortgages and equity releases for a good two years. We have been trying to educate people that way.

**Mr KERR**—I just think, though, that what older people confront are increased legal complexities. When you were young—and my mum and dad were young—legal products were very simple. You could have insurance policies, you could buy a home—there were very few complex legal transactions.

**Mr Morgan**—Everyone had a life insurance policy, because the salesman came to the door and took your shilling from you.

**Mr KERR**—Now you have such a raft of investment products and at a time when your experience does not equip you as well to cope with that choice. It must be very difficult. In many ways it would help if we had some greater uniformity with these products. One of the problems is not so much the well-designed reverse mortgage; it is the products that were described to us in Sydney, which are not reverse mortgages at all; they are secured borrowing arrangements with a whole set of triggers for default.

**Mr Morgan**—Sure.

**Mr KERR**—With all these products on the market, all you can do is provide the best advice you can. It is almost a case for saying that there should be some standardised, simplified products. Remember when some changes came in—I cannot remember what area it was, Kay, where the government insisted on a standard simplified product for something; maybe it was the deeming account or something.

**Mrs HULL**—Yes, the deeming account.

**Mr KERR**—It is almost as if there should be a benchmark product in some of these areas that gets accredited so that if you want to have a safe product you go with that one and if you have a greater willingness to accept higher risk or what have you you can go with something else.

**Mr Morgan**—Which is not likely to happen. The risk factor is very important for our members. They are not used to taking risks, generally speaking. I think it is important that your committee should be made aware of the fact that AIR has, I think, been targeted by reverse mortgage brokers and, of course, fixed interest and debenture type salesman who are selling, as we will know, products right now that are inherently unsafe. They approach us because they know we represent that demographic that probably needs some more cash and is very vulnerable and maybe ignorant. So they ask us to support them. They provide speakers. They ask us about advertising in our magazine. In other words, they are targeting a very vulnerable group of people—that is, some of the members we represent.

**Mr KERR**—I have not talked about it with anyone on this committee or given it much thought myself, but maybe there is some role for government and organisations such as yours to come together to identify some kind of benchmark for safe financial products.

**Mr Morgan**—Sure there is.

**Mr KERR**—There was some suggestion I think from an earlier witness—I cannot remember the name of the organisation—that the Sequel model be the minimum for reverse mortgages. But maybe more generally in some of these areas there might be some agreement about at least a benchmark product. You will never stop people offering more exotic products into the marketplace and perhaps we never should try to, but, at the moment, I think you have to be pretty financially sophisticated. The idea in a competitive market is that people scan everything and read it carefully and make careful judgements and thoughtfully select the product best for their needs. But my experience is that that is far from the reality.

**Ms Turner**—They are often written so as not to be easy to read.

**Ms Jackson**—You have that in so many different spheres too. For example, when people go into retirement villages there are ridiculously great, complex agreements that they are supposed to understand and sign—and they are given about two hours to do it.

**Ms Turner**—And on the last page they give their rights away to some unscrupulous owner.

**Ms Jackson**—This happens everywhere. That is why, having read through some of the other submissions, I would like to highlight our acceptance of the simplicity of the Country Women's Association of New South Wales's recommendations and also those of the assets and ageing research team of the University of Queensland, which are in submission 26. I think they have got some wonderful ideas there that would really help to empower older people to know where they stand and give them a bit of guidance. The only thing that I do not agree with is that a number of the submissions talk about dedicated funding for legal services specifically for older people. I personally do not agree with that. I like the idea of legal aid being financed better and broadened so that everything is normalised. The other thing with older people is that, if you have a family member who is abusing an older person and the older person is going off to an older persons legal service, it will not give them that cloak of cover. If they were just going into an information service, they could be getting any sort of advice. They would be getting put through to the correct area of advice there—it would give them that element of protection and they could be more honest with what is going on in their world.

**ACTING CHAIR (Mr Murphy)**—Thank you for your evidence today. The secretariat will give you a copy of the transcript of the evidence that you have given here today for any potential corrections that need to be made. Could you also liaise with the secretariat about any additional questions the committee may have or material that you have undertaken to provide.

**Mr Morgan**—I would like to make one final comment. Mr Kerr made a remark a moment ago along the lines that maybe there is room for some cooperation between AIR and government in relation to establishing benchmarks. He was talking about the reverse mortgages. There has been a spate of property developers asking the public to subscribe money—Westpoint, Fincorp and now ACR. They all advertise in the seniors newspapers that circulate around Australia. They all advertise with big, glossy, expensive advertisements. There is no question that they are targeting that very vulnerable age group. ASIC has come under extreme criticism lately for not doing anything about it. Sure, they vet their prospectuses and approve them or hand them back for revision. They do all that. But finally the money is subscribed and lost and many people are hurt badly. My point is that we, AIR, could come in and talk about some of these pitfalls. The

question of risk is just not dealt with in those advertisements. It is in the fine print but nowhere else.

**ACTING CHAIR**—Thank you, Mr Morgan, and other witnesses for your attendance today.

[10.59 am]

**van WULFFTEN PALTHE, Mrs Janne, Private capacity**

**ACTING CHAIR**—Although the committee does not require you to give evidence under oath, I advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament.

We ask that in providing evidence today you do not name individuals or provide information that would adversely identify individuals. The committee is interested in the broader principles relating to the terms of reference and is not prepared to provide the protection of parliamentary privilege to allegations about particular individuals. The committee has received your submission and it has been authorised for publication. I invite you to make a brief opening statement and then we will ask you some questions.

**Mrs van Wulfften Palthe**—I understand that the one minute allotted to opening statements is basically to address any changes to my submission. The one major change that has really come to my attention since I made my submission is the fact that on the death of my husband I rang up to change the beneficiary with the superannuation fund, and I was told by the superannuation fund not to bother them with the paperwork but to put it in my will. I said, ‘Who has told you this information? I want to speak to your supervisor.’ I went up a level and spoke to the supervisor in person, who said, ‘Yes, that is correct.’ When I identified the fact that we have this campaign, she refused to give her name. My whole point is, if people ring a superannuation company and are being told incorrect information—because of my previous experience, I was aware that what they were telling me was incorrect—many of them will have then done what they said—that is, ‘Don’t bother with our paperwork; put it in your will.’ Contrary to what I have addressed in my submission about changes to get the life insurance and superannuation companies to provide detail in their annual statements and also to have an education campaign, I now strongly believe that wills should be able to overwrite life insurance and superannuation designations, given this more recent event.

**ACTING CHAIR**—On that point, would you please expand on why you believe that a will cannot override a life insurance or superannuation policy.

**Mrs van Wulfften Palthe**—It is currently the law.

**ACTING CHAIR**—But can you expand on that?

**Mrs van Wulfften Palthe**—I have a three-page letter from the office of the Hon. Peter Dutton explaining to me why this is the law and why it is satisfactory as per the federal government.

**ACTING CHAIR**—I do not think that we have a copy of that. I will ask Ms Towner to make copies available to the other members.

**Mrs van Wulfften Palthe**—I would also like to make the point that it took approximately six months before anybody took any legislative responsibility. I wrote initially to the federal Attorney-General who said that it was not his department. He referred it to the state Attorney-General, who then referred me back to the federal level and finally the responsibility was taken by the office of the Treasurer. It is something that people do not want to take responsibility for.

**ACTING CHAIR**—How many people are involved in your campaign to honour the wishes of deceased people according to their wills?

**Mrs van Wulfften Palthe**—I believe that there are several hundred. It is a campaign to email the attorneys-general and I know that there are at least several hundred. I have received a lot of comments back because people are not aware—like you—that this is the current state of the law.

**ACTING CHAIR**—Yes, I would agree with that. Do you have copies of those emails?

**Mrs van Wulfften Palthe**—I have not. I have asked people to email the attorneys-general requesting that immediate action be taken. Currently no-one has any legal standing. People find out that their husband has perhaps left the life insurance to the first de facto thinking that of course it is in the will. Then they go to a solicitor and are told that legally they have no leg to stand on. The only way out is if you can take the life insurance company to court and prove that you do not have enough money—that is, you will literally be on the poverty line without receiving that life insurance money. I have a daughter who is at a public school and I was left with a mortgage of \$350,000. That was not deemed to be acceptable because I was not physically unable to buy my food.

**ACTING CHAIR**—What sort of response have the other members of the campaign had in their email representations or other representations that they have made?

**Mrs van Wulfften Palthe**—Basically from the state level saying that it is a federal matter, and the federal government have not replied. It took six months before I got a response from the Treasurer, as you will see in the letter that you will get. The letter was sent initially in December, and I believe the response was dated June.

**ACTING CHAIR**—Did you get any explanation for the delay?

**Mrs van Wulfften Palthe**—They are quite happy with the standard laws how they are. Basically—and I do not know a lot about the actual registry requirements of superannuation and life insurance companies—from what I understand, how they invest the money is regulated quite heavily. However there is no regulation in terms of how they deal with their actual policyholders. I have been getting from the letters such as the one which you will get a copy of that they do not want to regulate these companies any more. Obviously there is a huge void of information out there. People like yourselves, members of parliament, are unaware that you cannot leave your life insurance or change it in your will. I have actually spoken to solicitors about this. This whole campaign was aired on *Today Tonight*. The reporter rang me up very excited just after I had been interviewed to tell me the fact that the *Today Tonight*'s solicitor, the Channel 7 solicitor, had looked this over—as they do with every case—and said that this is not right. He asked me, 'Was it not a legally binding will?' I said, 'Of course it was legally binding.' They offered me the services of the Channel 7 solicitor—because the money was mine since it

was detailed in the will. I spoke to the Channel 7 solicitor. He was absolutely adamant. He said to send him a copy of the will. He got back to me a week later and said, 'No, sorry, you're actually right. I did not realise myself.'

**ACTING CHAIR**—I think we will all be enlightened when we read the copy of Mr Dutton's reply to you. We should see that shortly.

**Mrs HULL**—I found this a particularly interesting submission. It is very different to the general submissions that we have received. I was very impressed with it. I see a major problem. Many years ago, when a husband did all of the financial work and all of the planning work for the family, if he predeceased his partner then he may have had a different beneficiary altogether on his insurance. So it may very well have been that people did not know who those beneficiaries were. The problem that I have is the exact point of this inquiry. If, for instance, the insurance company were to detail, as you have suggested in your submission, the names of your beneficiaries on your renewal, your bonuses or any sort of correspondence maybe once a year, does that actually expand the way in which an older person can be financially abused? Because if it is recognised that someone is not a beneficiary then that may be a way of coercing or forcing an older person to change that ruling or change that beneficiary from, say, a child to a new carer or something like that. So I see that as a bit of a two-edged sword here in respect of the inquiry that we are having now. At times, when there is fraud taking place or there is financial abuse, having more knowledge can sometimes be a bad thing because it enables even greater fraud to be exercised more rigorously. I did ask the Law Institute of Victoria when they appeared before us this morning about this very thing. They were not aware of it. I am not so sure how much the Commonwealth should intervene in the lives and wishes of people in respect of how they nominate a beneficiary in an insurance policy. Could you explain to me what sort of control you think the Commonwealth should have over this and how they would play Big Brother over somebody's personal wishes to nominate beneficiaries?

**Mrs van Wulfften Palthe**—It is not a question of playing Big Brother; it is a question of having the person's will honoured. Yes, I can see that it would be easier getting an adult to change the beneficiary if it comes in a printed form but no easier than changing somebody's will if someone wanted to commit that sort of fraud against an individual, no different from seeing bank account details and changing things. What needs to be changed is the fact that everybody believes that a will overrides everything, and it does not. When you go to a solicitor and write what you think is your last will and testimony, that is actually not correct. The person who needs protection is the widow in the will who has been with that husband. This is going to become increasingly important with time. Back in the seventies, people were living together and it was acceptable. Those people may have moved on and perhaps married other individuals. That first person they lived with back in the seventies is the nominated beneficiary of the life insurance and superannuation. We are heading into the age where those people are going to start dying in the next two decades, and a widow who was married for maybe 40 years is going to find she has nothing and the Australian government is going to have to give her a pension because basically all the life savings, everything that they thought they had for their future, will go to the first de facto.

**Mrs HULL**—Is it not the case, as I put to the Law Institute of Victoria this morning, that their practitioners are the ones who should be responsible for ensuring that beneficiaries of insurance

policies and superannuation are in line with a will, that it is the obligation of the practitioner to ensure that they cover all those bases?

**Mrs van Wulfften Palthe**—A lot of their own solicitors do not know this—that is my whole point. They are not aware. I have an MBA. I do not consider myself to be an unintelligent individual, and I never knew this. I did a major in law in a commerce degree at the University of Melbourne. We were never taught things like this. We were told that a contract is a contract. When people write a will which says, ‘This is my last will and testimony,’ they are not aware that there are certain things that cannot go in a will. Accountants tell you, ‘Address your life insurance and superannuation in your will.’ Accountants are not aware.

I know we are not supposed to speak about individual cases, but my husband consulted an accountant. The person who was the executor was an accountant. He was my husband’s best friend. He renounced his executorship in disgust at the fact that he knew that this money was not going to go the way his best friend wanted. Can I also make the point that the reason that I am spearheading this case is that there are absolutely unequivocal reasons that my husband did not want the money to go to the original beneficiary. In all the other cases that I have heard about, the initial beneficiary has normally been an ex-girlfriend. What happens is that the ex-girlfriend says: ‘No, he was always secretly in love with me. He wanted me to have his life insurance.’ The wife has no case. I have clearly documented a disownment and also the fact that there was a period of four years after a disownment before my husband died and there was no contact et cetera. No-one reading the documentation would ever think, ‘No, there would even be a one percent chance that’—in my case—‘the husband would not want her to have the money.’ Mine is the only case where that is clear.

I know of another case in respect of a gentleman who was killed in the Bali bombings. He had a wife and had three kids all at school. He had forgotten to change the beneficiary when he got married. Sixty thousand dollars later, they came to an agreement where the de facto got the largest chunk of the life insurance. I do not believe that is fair. I do not believe it is equitable, and that is why I believe that the Commonwealth government should do something to, in fact, make valid wills able to include life insurance and superannuation. That is all.

**CHAIRMAN**—The government might not have legislative competence to do that; it might be a matter for state legislation.

**Mrs van Wulfften Palthe**—Not according to the states. In that last letter the Commonwealth government has actually taken responsibility.

**CHAIRMAN**—To what extent do you think that people taking out life insurance policies actually nominate a beneficiary? In my prior life as a lawyer, and I had a bit to do with insurance, I recall that most people did not actually nominate a beneficiary of their life insurance policy.

**Mr KERR**—It went to the estate.

**CHAIRMAN**—It would have gone to the estate and, in that case, it would have been dealt with in accordance with the will. You are obviously going to those cases when an insurance

policy is taken out and a beneficiary is not nominated. To what extent do you think that actually happens?

**Mrs van Wulfften Palthe**—An individual is nominated for 80 per cent of the time. It is very unusual for it to be an estate. One of the solicitors that I have spoken to said that he is now trying to get that as an increasing trend to overcome these issues. That way, if it is left to the estate—and I am not 100 per cent sure of this—I believe that it does fall under the will.

**CHAIRMAN**—It forms part of the estate and is left in accordance with how the estate is apportioned under the will or how it is left in the will.

**Mrs van Wulfften Palthe**—Very few people do that. It is just an emerging trend.

**CHAIRMAN**—I have never nominated a beneficiary with an insurance policy—ever.

**Mrs van Wulfften Palthe**—I have spoken to people about this and have received a number of emails saying, ‘Thank you so much. When my husband looked we realised who the beneficiary was,’ and it was not the wife.

**CHAIRMAN**—There is another sort of insurance policy whereby someone is deemed to have an insurable interest in someone else—for instance, you would be able to take an insurance policy out on your husband’s life. But you are not referring to those policies—

**Mrs van Wulfften Palthe**—No, not at all.

**CHAIRMAN**—because they are owned by the beneficiary.

**Mrs van Wulfften Palthe**—I am talking about the policy where someone takes out a life insurance and believes that the beneficiary—it is normally the wife or, if they are really young, maybe their parents et cetera—will get the money in life insurance.

**CHAIRMAN**—I have seen very little of that.

**Mrs HULL**—I assure you, Mr Chairman, that it is the norm rather than being abnormal. I worked in insurance and it was a question that was asked. It is a death policy. You asked, ‘Who is going to be your beneficiary?’ Generally, the beneficiary is named. If the policy is for the children and at the moment they are not married, then they will say their parents. It is a thing that you do when you join the defence forces: you nominate your beneficiary. You did when you joined up for World War I and World War II.

**CHAIRMAN**—I wonder why. When people join the defence forces we encourage them to sign a will and, even if they are under age, they can sign a will if they are in the defence forces. Maybe there ought to be some code of practice for insurance agents to not push the fact that a beneficiary should be nominated. I do not see the advantage in it, really, because you can cover it with a will, can’t you?

**Mrs van Wulfften Palthe**—But you have probably got 40 years of people that have been made beneficiaries, so even if you legislated the change now you have got all the baby boomers

going through that were in the seventies and lived with people that have a first de facto on those life insurance policies.

**CHAIRMAN**—You have inspired me to go and look at my insurance policies!

**Mrs van Wulfften Palthe**—Exactly. Every time I meet people—my dentist, my accountant—I ask them about it and everyone tells me that I am wrong. As you can see from the answer from Mr Dutton, currently the Commonwealth government is very happy with this situation. But it is going to get worse. In the next two decades when more life insurance policies see the light of day you will find that a lot of families will not be provided for.

**Mrs HULL**—I think that you have really made your point, and more so than just for this inquiry. I think that each of us will go away and do some work on this to try to assist you in this. Indeed, whilst it is associated with this inquiry, it is a much greater issue and something that we need to pursue. I am sure that each of us will do our bit on doing that.

**Mrs van Wulfften Palthe**—Thank you very much. It is not going to go away. There are a lot of very outraged people out there.

**Mr KELVIN THOMSON**—Do you have any comment on the present process for updating beneficiaries in superannuation or insurance arrangements?

**Mrs van Wulfften Palthe**—There is no requirement by life insurance or superannuation companies to detail the beneficiary or spell out how beneficiaries should be changed. In fact some life insurance companies detail that the only way to change a beneficiary is to do it on their particular form. You cannot just write a letter and change it; it has to be on their form.

The other point is that when you take out a life insurance policy you are on average in your 20s or 30s and you have a lot of life experiences—you get married, you have children—and even though they make it very clear when you first take out the policy that a beneficiary can only be changed by contacting them directly and it has to be on their particular little form, with the passage of time—say, a decade, three kids, the death of a parent—people do not remember.

**Mr KELVIN THOMSON**—Let us say that you do remember and you want to change—

**Mrs van Wulfften Palthe**—You then have to contact the company. They will send you out their particular form—the change of beneficiary form—which these days is downloadable on the internet. It has to be lodged and received. I believe there might also be a requirement not to have died within X days of sending it.

**CHAIRMAN**—I apologise if you covered this when I was not here, but would you like to see it mandated that, whenever an insurance policy renewal is sent, that renewal outlines who the beneficiaries are?

**Mrs van Wulfften Palthe**—Yes, that was on my initial submission. But, having had the experience with the superannuation company, I strongly believe that the law needs to be changed so that superannuation and life insurance can be left in a will. Even sitting and listening to the

testimonies, as people are getting older and with the challenges that people are facing in their 80s, they might not realise what that means.

**CHAIRMAN**—But there are some superannuation trusts which mandate that, for instance, a spouse would get something or children would get something. Are you suggesting that those trusts or those superannuation arrangements ought to be changed so that the person who has the superannuation is able to leave it in accordance with the will?

**Mrs van Wulfften Palthe**—I believe they should, yes. Even with the superannuation, where you are detailed as a beneficiary, superannuation companies take four months and they delve through before they decide whether they will pay out to that beneficiary; it is not automatic.

**CHAIRMAN**—Thank you very much.

**Mrs HULL**—Thank you very much for raising the issues.

**CHAIRMAN**—It is a very thought-provoking submission. We will send you a transcript of your evidence for you to check and to correct. If you would like to let us have any other information between now and when we report, feel free to do so. Thank you very much for attending. As a committee, can we resolve to receive the letter from the office of the Hon. Peter Dutton MP as an exhibit?

**Mr MURPHY**—Yes.

**CHAIRMAN**—It is so ordered.

[11.28 am]

**GARDNER, Mr Julian, Member, National Reference Group, Respecting Patient Choices Program; Chair, Ethico-Legal Subcommittee, Respecting Patient Choices Program**

**SILVESTER, Dr William, Staff Specialist, Intensive Care Unit, Austin Health; Director, Respecting Patient Choices Program**

**CHAIRMAN**—Welcome. Do you have any comments on the capacity in which you appear?

**Dr Silvester**—Austin Health is the largest health service here in Victoria.

**Mr Gardner**—Wearing a former hat, I in fact put in another submission to this inquiry, as a month ago I was the Public Advocate in Victoria, but I am not here in that capacity.

**CHAIRMAN**—Although the committee does not require you to give evidence under oath, these are legal proceedings of the parliament and they warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and might be regarded as a contempt of parliament. We do not have a submission from you, but we have invited you to come along. Would you like to give us a brief opening statement and then we will ask you some questions.

**Dr Silvester**—Thank you for inviting me to address the committee. As an intensive care specialist I have broad experience in caring for patients over the age of 65 for more than 20 years. I contend that the Respecting Patient Choices Program specifically and advance care planning generally have significant pertinence to the inquiry's term of reference 'general and enduring "power of attorney" provisions'.

What is the importance of advance care planning? Advance care planning is particularly important to all Australians aged 65 and over. Advance care planning is defined 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.

So how is this relevant to people over the age of 65? It is for the following reasons. 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. And as doctors, if we are uncertain about what to do and we have to make a decision, we will often treat aggressively and then regret it later. As a consequence, many of us will be kept alive in circumstances that are not dignified, where frequently we are suffering and in a way that we would not have wanted.

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.

The Respecting Patient Choices Program is the leader in advance care planning in Australia. We are grateful for the support received from the Minister for Health and Ageing, the Hon. Tony Abbott, and from the palliative care branch of the Department of Health and Ageing, which has provided funding of several million dollars. This 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. We are also grateful to the Victorian Minister for Health, the Hon. Bronwyn Pike, for the significant funding from the Victorian state government to implement and maintain the program in numerous health services in metropolitan and regional Victoria and to develop policy around advance care planning.

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. For example, we have found 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. Patients have been much more willing to complete the Respecting Patient Choices advance care plan.

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.

**CHAIRMAN**—Do you disagree with that?

**Dr Silvester**—I do disagree with that. The same requirement for a lawyer to witness the documents applies to Queensland. New South Wales is also impeded by the absence of a legislated form of refusal of treatment.

In the Northern Territory, the elderly are not able to appoint a surrogate decision-maker for medical decisions. Furthermore, the legislated form to limit unwanted treatment is only relevant to a terminal illness, thereby preventing the elderly who may not have a terminal illness from completing a form to express their wishes for future treatment.

I note that, in April 2006, the Australian health ministers, when considering a national framework on dementia, recognised that there were legislative barriers to advance care planning and advance directives by resolving to refer such issues to the Australian government and state and territory attorneys-general departments. The inconsistency of the relevant laws between the states does impact adversely on the rights of the elderly, particularly the different language and the different powers.

I believe that the committee will be interested in our findings from implementing advance care planning in 17 residential aged-care facilities in Melbourne. This potentially involved 1,100 aged-care residents. The median age was 86 and only one-third of the residents retained the capacity to make legal decisions. We trained the nursing staff in those facilities to talk to the residents and/or their families about what the resident would want near the end of life. More than half of those approached by the staff completed written advance care plans. Nearly two-thirds of these were completed by family members on behalf of non-competent residents, many of whom had severe Alzheimer's disease. You will be interested to know that the vast majority of written requests were for no life-prolonging measures but for the receipt of palliative care near the end of their lives, and less than 20 per cent wanted to go to hospital at all.

The outcome of this model of discussion and documentation was that, for all the residents who died during the period of 2004-05 who had an advance care plan, nearly 100 per cent of their wishes were respected. Specifically, 85 per cent received their end-of-life care in their facility; whereas, of those residents without an advance care plan, 67 per cent were transferred to hospital to die either in the emergency department on a trolley or in a ward being cared for by staff who did not know them.

This model illustrates several previously established facts that the committee will be interested in. Firstly, the vast majority of elderly Australians welcome discussions about their future health-care decisions. Indeed, only 2.3 per cent of the residents approached about advance care planning wanted no further discussion. Secondly, families welcome the opportunity to discuss and make decisions regarding these sensitive and deeply personal issues involving frail elderly relatives. In fact, I often find, when I raise this with the families, their look of relief that someone has come to speak to them about it is paramount. They often say, 'I didn't know how to bring it up because I thought that people would think that I was wanting to pull out on mum or dad, but really I want to be able to have a say about how to care for them in the most compassionate way in the future.'

Thirdly, the simple notion of ensuring that health professionals communicate optimally with the elderly in our society about what they want in the future empowers them to have a say. Both the likelihood of this empowerment occurring and its effectiveness would be supported by legislated provisions that are critical to determining the extent to which an older person's right to autonomy can be exercised. We have witnessed cases where doctors have been outside in the corridor trying to decide with the family what treatment to give or to withhold from a patient when one of the nurses who is trained in advance care planning has suggested to them: 'Why not go into the room and ask the patient?' After momentary surprise, the doctors have done so and have found out exactly what the patient wanted and then proceeded with the patient's request.

Fourthly, optimising communication with the residents determines a better quality of care at the end of their lives. This is achieved both by ensuring that what is delivered is wanted and by

avoiding unwanted and unnecessary investigations, procedures and operations which have their own risks and complications. We observed a great peace of mind in the residents, their families and the staff from knowing what would be done in the future.

Fifthly, the discussion and documentation of these future decisions greatly diminished any uncertainty that the doctors had about what to do regarding end-of-life care. They were clearer about their role and were reassured that, in acting in good faith and in the best interests of the patient concerned, they were not exposed to medicolegal repercussions.

So what are the problems with the existing legislation? The advance care plans that we used for the residents were documents that expressed their wishes, attested to their competence and were witnessed by a health professional. We consider that they would hold significant weight under common law, but we cannot be sure, and herein lies one of the problems of not having commonly available advance directives, supported by legislation, that would protect both the patient and the doctors.

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. I could give you numerous examples of that. Such examples include undergoing an operation and then dying, going to intensive care and dying connected by tubes to a breathing machine or having a feeding tube inserted into the stomach in the presence of severe dementia or having suffered a severe stroke with major disability and from which the patient has no hope of recovery.

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

We have found that the vast majority of patients approached about advance care planning wish to appoint a family member or a close friend as a medical enduring power of attorney to make decisions on their behalf if they reach the point of not being able to make or to communicate such decisions. A difficulty that we have observed is the wide variation between different jurisdictions in the names and powers of enduring powers of attorney and even the ability to appoint such powers. For example, in the Northern Territory and Western Australia a person cannot appoint their own power of attorney for health matters. This prevents them from appointing someone that they trust to make such future healthcare decisions.

The use of different terms throughout Australia increases the difficulty in educating doctors and nurses on what the terms mean and to respect the intention of the appointments. In Victoria, the legislated term is 'medical enduring power of attorney'; in South Australia it is 'medical power of attorney'; in New South Wales it is 'enduring guardian'; in Queensland it is 'enduring

power of attorney for personal and health matters'; in Tasmania it is 'enduring guardian'; and in the ACT it is 'enduring power of attorney'.

The elderly often question us as to whether their requests or documents would be complied with if they travelled interstate. It would appear that the legislated documents are valid interstate only under common law and, therefore, are more easily contested. The problem with existing legislation can be illustrated here in Victoria. Of the many hundreds of advance care plans completed, almost none use the statutory law document, which is called the refusal of treatment certificate. These were not used partly because older people are offended by the name itself and partly because they are limited to being valid for a current illness, which was not relevant for many of the frail aged who did not have a specific illness but who were still very clear about what they did or did not want in the future.

We have examples of elderly women who were very clear and determined about what they did not want should their condition deteriorate, but the moment they were invited to consider filling out a refusal of treatment certificate they were quite concerned about upsetting their doctor by being seen to refuse their offerings in writing. There has been similar difficulty with the equivalent document in the Northern Territory, where it is referred to as 'Regulation 2, Notice of Direction pursuant to the Natural Death Act'. There is a natural reluctance for any patient to complete a form with such a title. The health professionals in the Northern Territory using the Respecting Patient Choices Program have had much more success using our advance care plan, referred to as a statement of choices.

Finally, I wish to draw your attention to experience overseas. In the US states of Oregon and Wisconsin, where they have legislation to support advance care planning, there has been a significant increase in advance care planning, and there is also evidence that there has been an increase in access to good end-of-life care. Which state has the best legislation? The Tasmanian enduring guardian document is simple, easy to complete, and one can write any treatment preference within the document. The ACT also has an enduring power of attorney in which authority can be given to consent to withholding or withdrawing medical treatment. It is not restricted to a current illness. South Australia has many choices; for example, a person can add whatever they want to anticipatory direction and it has a medical power of attorney. If you wish to inquire further into the delivery of the Respecting Patient Choices Program for elderly Australians, I would refer you to our website, which is [www.respectingpatientchoices.org.au](http://www.respectingpatientchoices.org.au).

We respectfully make the following recommendations: (1) please work with your state counterparts to achieve uniformity across Australia regarding the laws covering enduring powers of attorney for medical decisions, the terminology used and the use of advance care plans, (2) ensure that the advance care planning documents are simple and user friendly, (3) ensure that the witnessing of such documents is practical and user friendly and that documents can be witnessed by health professionals, (4) ensure that doctors are adequately remunerated for the time involved in undertaking advance care planning and include a specific MBS item number, (5) consider legislation that mandates the practice of advance care planning in appropriate patients.

**CHAIRMAN**—How have the churches reacted to what you are doing with your program?

**Dr Silvester**—Initially the Catholic Church had some concern that the government were supporting a program which was trying to limit treatment and resources. But I have met on

several occasions with the Australian Catholic Bishops Conference advance care planning working party which is looking at this. Indeed, we worked very closely together in the end. I received a letter of commendation and thanks from Bishop Anthony Fisher, who works with Archbishop George Pell, acknowledging that the work we are doing is very worth while, honourable and, in fact, they have gained a lot from the work we are doing in terms of the advance care planning that they have been developing.

**CHAIRMAN**—I imagine that there could have been a suspicion to start with that it could be euthanasia by another name.

**Dr Silvester**—That was a suspicion that was suggested, but I believe the fact that I have had several meetings with Tony Abbott and he has supported increased funding to our program would lend support to the fact that this is not. I think it is interesting that you asked that, because I have had a number of patients who, after having done advance care planning, have turned to me and said: ‘You know, I was thinking about euthanasia but now I feel empowered. I feel that people are going to take notice of what I want in the future, and I don’t feel that I now need to do something drastic before I reach a point where I cannot do anything at all.’

**CHAIRMAN**—But there is flexibility under the law as it is. Also, I think even the church accepts that, in the process of giving palliative care, increasing the level of drugs to alleviate pain is in order, provided the principal purpose was to alleviate pain and not to terminate life—even if an earlier termination of life were to occur as a result of the administration of that pain-relieving drug. That is correct, isn’t it?

**Dr Silvester**—That is correct. That is covered in the Medical Treatment Act and in legislation in a number of other states, to really ensure that people receive good palliative care.

**CHAIRMAN**—You mentioned a couple of American states. How widespread throughout the world is the sort of thing that you are doing?

**Dr Silvester**—Advance care planning is really spreading quite quickly, not only in the US but in Canada, in a number of countries in Europe and in the UK. I was recently invited to speak at an inaugural Canadian conference on advance care planning, and it really gave us a good insight into how rapidly advance care planning is spreading around the world.

**CHAIRMAN**—The AMA has indicated in evidence before the committee that advance care plans need to be updated on a regular basis, that what a person determines at one stage in his or her life might not be what they want a number of years down the track. Do you have a comment on that?

**Dr Silvester**—I support that. In our program we ensure that, when patients are readmitted or they come back to the outpatient clinics, if they have an advance care plan they are asked whether it still fits with their wishes. In fact we find that, because in our process we are very careful about speaking to our patients about advance care planning and giving them time to consider their wishes, we have had absolutely no patients revoke their advance care plan; indeed, they usually add further conditions. So you might have a patient, for example, with cancer who initially said that they will still want cardiopulmonary resuscitation if the doctors think it will be of benefit. When they come back for further admissions, as their cancer progresses and they are

having ongoing chemotherapy, they reach a point where they say they do not want cardiopulmonary resuscitation at all.

**CHAIRMAN**—What about in circumstances where what the patient wants might conflict with your medical view of what is good medical practice?

**Dr Silvester**—In such a case it is important that as a doctor I ensure that the patient is fully informed about their condition and their treatment options and that they understand the ramifications of the decision they make. If at that point they still make the decision that they want to withdraw from or not have further treatment, then we support them in that—having ensured that it is not a completely out-of-perspective position. So, if they are requesting to withdraw from something that we think they would have wanted, we explain why we think that it would be appropriate. If at that point they still say they do not want it then that is within their right. As I am sure you would know, if any of you had a particular condition and the surgeon said, ‘You should have this operation,’ you have a right to say that you do not want that operation.

**Mr MURPHY**—Dr Silvester, following on from the chairman’s question in relation to Queensland and the AMA believing they have the best advance care plans, would you see any benefit in the creation of a national register of advance care plans?

**Dr Silvester**—If by a register you mean an easily accessible database for people who have to look up what is appropriate for their particular jurisdiction, I do not think that would be a bad idea. But I think it is just as helpful if, in each jurisdiction, the relevant body—for example, the Office of the Public Advocate in Victoria—ensures that all this information is widely available or easily accessible within that jurisdiction. I think it would be much better if we worked towards uniformity of language, uniformity of titles and uniformity of powers, and worked towards ensuring that an advance care plan completed in one jurisdiction will be honoured in another jurisdiction.

**Mr KERR**—You raised the issue of somebody who comes to your hospital from Queensland or some other jurisdiction and you said that at the moment you are only covered by what you call the common law. Is there, in practice, respect for instruments that are issued under the various state laws across jurisdictional boundaries?

**Dr Silvester**—My honest answer as a clinician is that in fact there is not great respect. I think there is a healthy—‘healthy’ is the wrong word. There is a significant level of—I do not know if ‘distrust’ is the right word; perhaps ‘scepticism’—scepticism about what is coming from elsewhere. So the average doctor, if they are shown a document from elsewhere or if they are told that a document exists—because someone is not necessarily going to bring that document with them—they are much more likely to rely on their own opinion rather than take into account what has come from elsewhere. For example, if a doctor has a copy of a Queensland advance care directive and a patient has ticked that they do not want certain treatment under certain conditions—for example, they have requested that ‘any treatment that obstruct my natural dying either not be initiated or be stopped’—the doctor would see that as a document from Queensland that does not necessarily have to be adhered to here in Victoria.

**Mr Gardner**—I would like to add to that. My experience is that the complexity of the law for doctors is very difficult to cope with, even within one state. Within the last year, I have come across a case where a major public hospital was withdrawing treatment, contrary to the wishes or the views of the doctors, because the person holding the power of attorney had said, ‘I want that treatment withdrawn’—only to discover that in fact it was a financial power of attorney not a medical power of attorney. That degree of ignorance and misunderstanding is a result of the complexity of the law. So to introduce an interstate document—I agree with Dr Silvester: I think it would probably have very little weight.

**Mr KERR**—I am puzzled by this because the foundational principle is that any act of surgery or anything is an assault. If you start with that premise, which is the fundamental starting point of any legal discussion—that you cannot chop me up or have a go at me in any way without my consent—then if I have withdrawn consent, under a legally effective arrangement under the jurisdiction in which I normally reside, I would have thought it would be your prime responsibility to abide by that and that any conduct that was inconsistent with it would be, *prima facie*, an assault and would be illegal.

**Mr Gardner**—I think, though, that once you are dealing with a patient who is no longer competent and on whose behalf, therefore, decisions are being made by other persons, you will find that in practice you are going to get less adherence to a document such as you describe.

**Dr Silvester**—I will tell you what happens in practice—

**Mr KERR**—I am interested in the practice, because, if it is the case, it has a very different imperative than if people were respecting these across borders.

**Dr Silvester**—What happens in practice, particularly for the elderly, is so often that the clinicians are only speaking to the family. I see it time and time again. I had a case on the weekend where the relevant doctors went in and spoke to the family about what to do, and they all decided they were going to withdraw treatment. They then rang me, because I was in charge of the intensive care unit, and said, ‘This is what we are planning to do, and the cardiologist has reluctantly agreed to this.’ And I said, ‘So have you spoken to the patient?’ and they said, ‘No.’ And I said, ‘Well, I want you to go back to those three daughters and that son and say, “I am not happy to comply with this until we have spoken to the patient about what he wants.”’ And, indeed, they did go back to the patient and he said, ‘Yes, I do want the treatment.’ I absolutely guarantee, right now, that that patient would have died by now—would have died by Monday morning—if he had not received the treatment we gave him on Saturday night, and it only came about because I insisted they go and speak to the patient. That happens time and time again.

**CHAIRMAN**—Although he was unwell he had full mental capacity.

**Dr Silvester**—He did, but he was unwell—

**Mr KERR**—Well, if you have a patient who is mentally capable you don’t ask someone else. When you start consulting Peter Slipper about how I am going to die, I am in big trouble! Surely—

**CHAIRMAN**—Not as much as you think!

**Dr Silvester**—But jokes aside, it happens all the time that the elderly are left out of the picture. That is the whole point about what the church originally thought and about this euthanasia thing: people think advance care planning is all about stopping treatment. It is not. It is about talking to the elderly and finding out what they really want, now and in the future, and getting it documented so that if it comes to the point where they are now not competent, all we have to do is refer to what has previously been recorded by a competent patient about what they want.

**Mrs HULL**—What would you say to Mr Murphy's question about it being registered? For instance, I wear a MedicAlert, and I have it registered so that, wherever I am, if somebody were to look at it they could ring up and access all of my details in a system and a register. So could you have such a thing on this care plan—a nationally registered sort of plan? Or would you just rely on a piece of paper? How is it registered? How is it formal? How is it legal? Is it registered legally?

**Dr Silvester**—Now I understand what you meant by 'registered'. I thought Mr Murphy was referring to a register being just a register of what advanced care plans are all about. But if it is a specific register of advanced care plans that people could record—

**Mrs HULL**—I think that is what he was talking about.

**Dr Silvester**—in the same way that we now have the Australian Organ Donor Register, then, yes, I would applaud that and support it, because then there would be a central way of people being able to make contact electronically or by phone to find out what it is that a patient wants, here or in whichever state they might be. And that would lead to a uniformity that we currently do not have. In fact, in developing that, we could achieve a uniform way of recording whether people want cardiopulmonary resuscitation or to go onto a ventilator or end up in intensive care or whether they want nasogastric feeding or whatever their request might be. So if that were the case then I would support that.

**Mrs HULL**—How would you be able to ensure the living document, so to speak, was an up-to-date view of the particular person's decision or desire? Would you have, say, a national register with a clearly registered process that all the family is involved in?

**Dr Silvester**—Yes.

**Mrs HULL**—And then would you get it updated, say, every 12 months? I have nursed three of my family members under exactly the same plan. We knew what we were going to do, and it was a family decision. But how would you make sure that it is a living decision and that it is updated if somebody changes their mind?

**Dr Silvester**—You could ensure that through legislation and through policy and protocol. In the US they have the Federal Patient Self Determination Act, which was enacted a few years ago, where they ensure that every patient admitted to a hospital or to a nursing home is approached about their views on advance care planning—whether they have an advance care plan; if they do not, whether they would like one. They are given the information and the support from the staff to be able to complete it, and then it can be sent back to the appropriate body. In Oregon, for example, where they legislated to support advance care planning, every resident in a

nursing home and the elderly in the community have an opportunity to fill out what is called a POLST form, the physician orders for life-sustaining treatment, where they can record what it is that they want. They have legislated that when that patient comes into the hospital then the doctors have to take that into account. In fact, in Wisconsin they have done the same thing in the community of La Crosse. A doctor cannot order a single investigation or a single medication until they have taken into account the patient's resuscitation status and views about advance care planning. So it can be done through legislation and through protocols.

**Mrs HULL**—During the compilation of this plan, is there a stipulated group of people that must be there so that there is no opportunity for abuse or coercion? Would you need to have some external people—professional or whatever—to ensure that there is no room for any question of coercion or abuse? My mother would not have cared. She would have battled. She was going to fight death until it absolutely claimed her. There was no way she was going to succumb. I just wonder if there is an additional protective factor in the compilation of this plan to make sure that it is absolutely kosher and above board.

**Dr Silvester**—That would involve the appropriate training of the health professionals—both the doctors and the nurses. But that is no different to the current situation, where doctors are consenting patients to an operation, and there is always the theoretical possibility of abuse. But it is all about ensuring that the staff are appropriately trained. I do not know whether Julian may have other suggestions.

**Mr Gardner**—The only comment I would make is that, whilst the risk that you raise exists, the same thing should be true about wills. You should pull them out of the drawer every two years to refresh them. But do we? The same risks arise with the signing of wills. It is not clear to me why we are so hung up about decisions about medical treatments when we are not hung up about wills. The reality is that if you have gone through this process of talking about it and if it has been witnessed by somebody who has the capacity to say, 'Yes, you did understand what you were doing,' you are far more likely to have your wishes involved than what happens at the moment where, as Dr Silvester has just discussed, often decisions are made by third parties who really have not talked to you. I hope that has helped.

**Mrs HULL**—Yes, it has.

**CHAIRMAN**—I found your evidence very interesting, and I think I approached it from the state of not entirely understanding what you did. I am very heartened by the fact that Archbishop Pell and the church are happy with it. It seems that you have gone out of your way to try to make sure that you eliminate any negatives in the community. I think that is very positive.

**Dr Silvester**—Thank you very much. Initially the church thought that we were poles apart. But in fact I have worked closely not only with Anthony Fisher but also with Nick Tonti-Filippini and we have found that we actually have a lot of common ground. There is much more common ground than was originally anticipated.

**Mrs HULL**—It was very enlightening and extremely well presented.

**Dr Silvester**—Thank you.

**CHAIRMAN**—Thank you very much. If there are any further details that you might like to share with us, please pass them on to the secretariat. Thank you very much for your attendance.

[12.05 pm]

**FIEDLER, Mr Jeff, Tenancy Advice Worker, Housing for the Aged Action Group Inc.**

**GRAF, Mr Frank, Private capacity**

**KRIESNER, Mr Ernst Friedrich, Private capacity**

**MANTHORPE, Mr Richard, Private capacity**

**MURRAY, Mr John, Owner, Outlaw Poverty**

**MUIR, Mr Robert, Manager, Estate Services, ANZ Trustees**

**PEARL, Ms Maureen, Committee Member, Older Women's Network**

**REED, Mr Frank Ernest, Chairman, Residents Committee, Stage 2 Illawong Retirement Village**

**VAN DOORT, Ms Julie Anne, Solicitor, Coadys Barristers and Solicitors**

**CHAIRMAN**—We will now move to the public forum. Eight people have indicated an intention to make a three-minute statement. We have done a number of these public forums. The opportunity is given to people in the community who might not have made a submission to express a view. We have a very strict time limit of three minutes. Everything you say is taken down by Hansard, and we will send to you a copy of what we recorded you as saying for you to check. We do not subject forum participants to examination by members of the committee usually. So you have three minutes.

These are proceedings of the parliament and warrant the same respect as the parliament itself. We do not require you to give evidence under oath, but the giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We ask that you do not identify individual cases because we do not want to give the shield of parliamentary privilege to what would otherwise be a defaming of a person who is not here to defend himself or herself. We are interested in your comments in relation to the broader principles of the terms of reference.

**Mr Fiedler**—Thank you very much for the opportunity. I feel sorry that I only heard about the inquiry about a week ago and was not able to make a formal submission. My position in the Housing for the Aged Action Group is funded by Consumer Affairs in Victoria. We also receive federal government funding through the ACHA program, through the Department of Health and Ageing. Further to comments I heard earlier today regarding reverse mortgages and retirement villages, there is an area that our organisation is very concerned about, and that is what we generically call rental villages. There was an incident recently that had national media coverage that I was involved in, regarding a particular company that planned to evict 450 elderly people from their rental villages. It highlighted the issue in this type of accommodation. I will put it into

context. People in retirement villages who have some assets that they pay as an ingoing contribution can in a sense buy a long-term lease into a retirement village. But the people in rental villages in all states of Australia—and I am concerned about Victoria in particular—under the Residential Tenancies Act have very limited security of tenure.

In this situation in Victoria, where the company decided to serve orders of possession on 450 elderly people in their 80s and 90s, residents could be given 60 days notice to vacate. This caused enormous trauma to the residents involved, and it was only because of a public outcry and good work by departments like Consumer Affairs that the company in that situation backed off and another management company was brought in to take it over. There needs to be legislative change to provide long-term tenure protection for people in this situation. We see it as a low-income issue because people on low incomes do not have the assets to buy security of tenure as people in retirement villages do. Where we have state legislation around Australia that provides limited tenure protection, there needs to be an opportunity for people in this situation to have longer term leases. In retirement villages people have, say, 99-year leases. We think it would be reasonable to have similar levels of protection for people in a rental village situation.

We see this as an issue of longer term government policy because of a lack of affordable housing. In an ageing society, governments need to address this very seriously. These companies are coming into the market because they can target people who formerly would have been looking at public housing as an option. There are two steps that we need. One is more affordable housing, but until we get to that stage we need more regulatory regimes and improved legislation to give people greater security of tenure. If the Commonwealth is not directly involved in this case because it is a state legislature issue, we would like to see coordination at a national level—and with this company it was a national issue; they have villages right across Australia—so that one state does not provide extra protection that others do not. Secondly, there is a need for—

**CHAIRMAN**—Sir, your time is up, but if any of you want to tell us more than three minutes will allow you to tell us, feel free to write to us. Even though technically the time for submissions is closed, our practice—without committing the members of the committee—is to accept late submissions and we will certainly take that into account. We will now hear from Mr Graf.

**Mr Graf**—My submission is one of the 21 submissions considered too sensitive or critical of the New South Wales Guardianship Tribunal, OPC and OPG bodies. They have not been published. Is this hearing an open and transparent hearing? My submission, together with submissions Nos 12, 23, 46, 52, 62, 83, 90 and 104, is very critical of these bodies. I suspect the other 21 confidential submissions were also critical of these bodies; however, they were not published. Why not block out the sensitive names and show the submissions? I have read the *Hansard* transcript of the Sydney hearings and understand that committee members are aware that a considerable number of submissions were very critical of the New South Wales tribunal, OPC and OPG bodies. I ask whether this committee intends to address criticism of these New South Wales bodies with further federal investigation into the following issues.

Firstly, the Guardianship Tribunal is not adhering to the Guardianship Act when it ignores family members who are willing, able and capable, and appoints government agencies, such as the OPC and the OPG, as guardians and financial managers of the family members. Secondly, legal aid is not made available to applicants who intend to dismiss the OPC or OPG in

Guardianship Tribunal hearings or hearings against guardianship decisions. I have a document to support this. Thirdly, the Guardianship Act legislation should be amended to limit the power of the guardian so that persons appointed to this body do not allow staff within this body to give medical consents. They are not medically qualified to do so. Fourth, the Guardianship Act legislation should be amended so that all applicants to Guardianship Tribunal hearings have legal representation paid by legal aid, as suggested by the AGAC submission.

Fifth, power of attorney and enduring power of attorney can be overridden by the New South Wales Guardianship Tribunal. I think that is not acceptable and should be left to the Supreme Court. Sixth, the federal government Attorney-General's submission, No. 100, states that 'older persons can access legal aid'. That is not so as the states administer legal aid and they intentionally withhold funds if the applicant intends to dismiss any government agency or body that have seized family members. I have documentation in support of that. It is also very conflicting that the New South Wales Guardianship Tribunal submission clearly states that there are 'funds available for legal aid'. That is not so—

**CHAIRMAN**—Thank you. You have a lot to tell us. Maybe you would like to send us a submission outlining in greater detail what you have started to tell us here.

**Mr Muir**—I have come here today because ANZ Trustees have a concern. We see things from the other perspective, when people pass on and we administer their estates. There is a huge increase in the number of fraud cases involving financial powers of attorney. In some instances, the fraud can be of amounts as high as \$500,000, or more. It is difficult to deal with these cases simply because the people who have held the power of attorney are normally either a relative or a trusted friend who do not have many records and are very reluctant to give us records anyway. You have to do a lot of investigative work to find out that these sorts of things have occurred.

Once you have established that fraud has occurred, the difficulty is trying to get the money back. That not only is difficult in that aspect but also raises problems and issues with the family and it brings them undone. We think that, although there are a large number of powers of attorney out there at the moment, banks seem to be able to pay the person willy-nilly. There does not seem to be any control or regulation to protect the funds of the person. When we have uncovered these fraud instances, there have been lots of withdrawals made. For example, in one case, in the one week there had been a withdrawal every day. Banks should wake up to these sorts of things and say: 'Hang on. There is a little alarm bell going off here. Is this right?' When someone buys an overseas holiday for somebody who is in a nursing home and cannot possibly get out, banks should be able to question those sorts of things. In our own bank, we drew this problem to their attention and they are now trying to implement some sort of policy to guard against that abuse. The other thing that would be helpful, and was mentioned previously, is some kind of register of powers of attorney. There does not seem to be anything of that nature at the moment.

**CHAIRMAN**—Thank you. Are you appearing in your own capacity or on behalf of the bank?

**Mr Muir**—On behalf of ANZ Trustees.

**CHAIRMAN**—Thank you very much.

**Mr Kriesner**—I am 78 years of age. I am a native of the free state of Danzig. I was a prisoner of war for 4½ years. I have been a victim of Allied war crimes. I was forced to clear landmines all over the Danish isles. I am here on my own behalf. I have been in correspondence with the Attorney-General of Australia, who has advised me to seek legal aid. I have been trying to do so now for a period of three years or more. It is not that I am refused legal aid; it is more the fact that they will not even entertain me applying for it. I have written to the Premier of Victoria. I have written to the Attorney-General. I have also written to Mr Kelvin Thomson, who was here but has now left.

The fact of the matter is that I have been shut out from the legal process because I have no resources. I want to access the workings of the law, and I have found it impossible to do so. I have in front of me two letters which I would like to submit. At this stage, as time is limited, I will close and hand over to the next person. But I would like to stress that my case is also a social issue. That I am forbidden—or I have been barred—from any access to the law is a public scandal.

**CHAIRMAN**—Thank you, sir. If you can pass the documents on to the secretariat, the committee will consider them. I would anticipate that we would receive them as exhibits or as a submission.

**Mr Kriesner**—Thank you very much.

**Mr Murray**—I come from Ireland. I am an Irish Sinn-Feiner. I come from Northern Ireland, which is under British rule. You have the same Westminster legal system there as we have here in Australia. I am just on 81 years of age. I belong to several Australian organisations—for example, Law Watch, Whistleblowers, a debit tax organisation and a few others. These are Australian organisations. Under Australian laws, the only world I know is that in power you start by attacking your officials and your Labor politician comrades in crime. To bash and rob 60-year-old workers of their basic human rights and liberties is bad for their families. These criminals have tortured the sick mothers of workers' children and stolen the money in their children's piggy banks. I happen to be a victim.

On lawyer-framed laws: as we know, all our laws in Australia here are lawyer framed, passed by the parliaments. As an example, our lawyer-framed laws empower the banks to rob the people, and that is just one example. I feel that the legal system is the whole problem in Australia: lawyers in the country, lawyers in the parliaments. The previous speaker here from the medical profession was talking about lawyers framing laws to protect people and those things. But what the medical profession have to do is frame their legislation themselves and give it to the parliament for the parliament to adopt it, because, if you leave it to the lawyers, the lawyer-framed laws will be full of loopholes to benefit the lawyers. As far as I am concerned, and I can prove this—my leaflet is there, and I will give you all leaflets—lawyers are the scourge of society and should be ostracised. Jesus Christ condemned the lawyers. Christ said of lawyers, 'Woe to you lawyers, because you load men like beasts with burdens.' Under our Westminster lawyer-mafia system that we have in Australia, you are not innocent till proven guilty; you are only innocent till you are proven broke. So the answer is to ostracise the lawyers and treat them for what they are—robbers, rorters, looters and torturers and the dregs and scum of society.

Lawyers are in parliament not to frame laws and legislation to benefit people; lawyers are in parliament to frame the laws and legislation that benefit the lawyers. I will discuss this with any lawyer, any top lawyer. These are the facts of the situation. I know one lawyer from the Springvale legal service, and he himself referred to the lawyers as the 'lawyer mafia'. When you are the lawyer mafia, you are the agent of poverty because poverty breeds crime and without crime there would be no work for lawyers. So that is how it will be until we get all the lawyers out of parliament.

Now, in the popularity stakes, lawyers and union officials are judged by the public to be in as low a category as used-car salesmen and drug pushers, yet we are compelled by law—the only country in the world I know of where you are compelled—under threat of a fine to go out on election day to the polling booths and vote to give these thieves of all persuasions a mandate to continue their policy of robbing, rorting and looting. At the present time, the federal government, I believe, has got \$20 billion for pork-barrelling for the forthcoming federal election. That is money that is stolen from the poor, stolen from evangelists, and we cannot get to that money. And you lawyers are the cause of it.

**CHAIRMAN**—Thank you very much for your contribution. Mr Kerr is a much more eminent lawyer than I am! Mr Manthorpe, please.

**Mr Manthorpe**—I am a temporary resident. I pay income tax in this country but I have no vote. I am hoping to use your committee as an avenue to reach the Attorney-General to define the phrase 'absorbed citizenship'. This has been used in the last couple of years. It has been enacted. A judge has said that absorbed citizenship allows the person to stay in the country. The minister for immigration has said, 'No, this is wrong, as Australia has deported people who have been here for 99 per cent of their life.' I wondered if this committee could ask the Attorney-General to define 'absorbed citizenship' and to explain its status in law.

**CHAIRMAN**—That is not really within the terms of reference of this inquiry. I suggest you see your local member of parliament, and I am quite sure that your member of parliament, regardless of party, would be prepared to make a representation on your behalf even though you are not a voter.

**Mr Manthorpe**—I was wondering if this came under immigration or law. I was hoping that this could be an avenue to get the Attorney-General to define this particular phrase.

**CHAIRMAN**—I suppose you could argue that, because this committee is looking at discrimination against older people, it could be that in your circumstances the immigration law does discriminate against—

**Mr KERR**—And most of these absorbed citizens will be older now.

**CHAIRMAN**—We will undertake, with the committee's consent—

**Mrs HULL**—Absolutely.

**CHAIRMAN**—to write to the Attorney-General on your behalf to get a response to the matter that you raised. Ms Van Dort, please.

**Ms Van Dort**—I am a solicitor and I am here in a personal capacity. I am very concerned about an emerging issue of lack of legal services for and financial abuse of older Australians, particularly in relation to living in apartments, units and retirement villages. In 1967 there was no strata titles law. Today in Australia about 25 per cent of all residential housing is managed by a body corporate or a strata title manager. In particular, this includes about 500 retirement villages in Victoria. We know there is significant legislation throughout Australia for both bodies corporate or strata titles and retirement villages. However, accessing legal services and the emerging disturbing trend of financial abuse have brought me here today.

I have a number of clients whose manager has never called a body corporate meeting in five to 15 years and in six months has not accounted for \$400,000 worth of expenditure. The contracts for the sale of an apartment or a unit or a spot in a retirement village are given to solicitors after they have been signed and they are usually as thick as a telephone book. There are three or four legislative frameworks governing those contracts, and there are often nine separate agreements inside. In one particular retirement village, it took me about 20 hours to work out what was actually in the agreements. Can you imagine the cost of legal services prior to purchasing an apartment or a spot in a retirement village?

The agreements say that the agent of the owner can sign all documents on behalf of the owner in relation to changes to titles, entering into agreements and selling the unit or apartment and that the agent has an irrevocable enduring power of attorney, an irrevocable appointment as manager and an irrevocable proxy to vote on behalf of the owner at meetings. It basically means that people who are buying into apartments and retirement villages do not have property rights even though they have a title.

I have two retirement villages, representing approximately 100 individual lot owners that are at risk of losing their property, and there is no avenue for them to seek legal services. The reason there is a problem with legal services is that only the body corporate can take action against the manager and only the manager can sign the costs agreement with the lawyer. If I sign up the lot owners, and they are acting as tenants in common, I necessarily have to sign up all the lot owners and the retirement village manager will have ownership of one of the lots, so you cannot get 100 per cent. If you sign up the individual lot owners, you have a conflict of interest when you try to act as the body corporate. Just to provide initial legal advice, we have to say \$5,000 or \$10,000 and the costs of taking the action to the Supreme Court.

**CHAIRMAN**—You raise something that I find concerning. Could you give us a submission in writing on the problem and what you suggest are options for fixing it? Thank you very much.

**Ms Pearl**—I belong to the Older Women's Network in Melbourne. It is a national body but I belong to the Victorian branch. We have not actually discussed these matters because we only knew about this meeting a couple of days ago too. But we do think the issues are very important because we ourselves going to hold a public meeting on these issues in Seniors Week in October this year. We hope to get a speaker from the Office of the Public Advocate about wills, powers of attorney, medical powers of attorney et cetera. The Council on the Ageing have also had a recent public meeting about it.

I would like to support the Association of Independent Retirees' suggestion about legal services being available more generally. I recently had occasion to seek legal advice about a

small financial claim on me. I found out from the Citizens Advice Bureau that there was no such service in my suburb but there was another one close by. I found there that they had one supervisor and a few legal students—not many—but the number of people who turned up for free legal advice was amazing; it was packed. It was open for a very limited period of time. I do not know how these people manage. This was all types of law that they covered but they did not cover all types. But especially for pensioners, I think, it is important because they do not have the experience or knowledge of where to get legal advice, reasonably priced. I would also like to support the medical power of attorney submission by the Alfred hospital and the HAAG submission earlier on housing because I think the most important thing for older people is being able to stay in their own home if they can. For that, maintenance is very important too. That's all.

**CHAIRMAN**—Thank you very much. Mr Reed.

**Mr Reed**—I was unaware when I came here that I would have an opportunity to address the committee; consequently, I did not have any notes with me when I came. I can however speak, I think, with some relevance on the issue that is before the committee. Australia is a nation whose people are said to live under the rule of law and that is as it should be, but it is not entirely as it should be because there are groups of people who do not live under the rule of law. I am a member of such a group of people who suffer from that disability. I am a resident at a retirement village and I am also the chairman of the residents' committee at that village.

There are, as I see it, three serious impediments to the residents obtaining the consolation of legal remedy. One of them, of course, is that they may avail themselves of legal services but only at an expense which they cannot meet and which is beyond them. A second impediment to their obtaining legal remedy lies in the incredulity of authority. Nobody believes older people. You can imagine an authority saying: 'Oh, the oldies, of course, they're never satisfied; they want the world. They expect you to do everything for them. They make no effort for themselves.' People who are exploiting them use that argument to excuse what they do. A third impediment to the residents obtaining legal remedy lies in the fact that they have no confidence in their ability to persuade people to listen to them and so they are frequently inarticulate and frightened. I speak of a community which is almost 90 per cent elderly, lonely, defenceless ladies who are very easily bullied and intimidated and can be made to what they ought not to be made to do.

This retirement village where I live is managed by two private investors who have taken up what I believe they regard as a licence to print money. They also have a contract which the residents have signed. It is called a 'management and personal services contract' and it gives them powers that are not only unconscionable and unacceptable but also remarkable for the fact that they were ever able to produce such a contract and have people sign it.

**CHAIR**—If you wish to give us a submission elaborating on what you have told us I am sure the committee would be happy to receive it.

**Mr Reed**—Thank you.

**CHAIR**—The draft of your evidence today will be sent to each of you. Please check it and get it back to the secretariat as soon as possible. I would like to thank you all for your contribution.

**Proceedings suspended from 12.37 pm to 1.40 pm**

**PEARSON, Mr Mark, Executive General Manager, Enforcement and Compliance Division, Australian Competition and Consumer Commission**

**RIDGWAY, Mr Nigel, General Manager, Compliance Strategies Branch, Australian Competition and Consumer Commission**

**ACTING CHAIR (Mr Murphy)**—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee has received your submission and it has been authorised for publication. I now invite you to make a brief opening statement if you wish, and then we will proceed with questions.

**Mr Pearson**—Thank you. I have a couple of very brief comments I would like to make. As our submission discussed, we at the ACCC try to focus our enforcement activities on those areas that we consider are of widespread consumer detriment. As a national enforcement agency, we have relationships with the Office of Fair Trading, our local state counterparts. Our ambit is to consider the national focus as far as our trade practices enforcement activities go. We do use enforcement, obviously, to obtain compliance with the act. Our preferred option has always been and remains to try to get businesses to take preventive steps or to show them how to take preventive steps to ensure that contraventions do not occur. We have taken on a range of matters targeting disadvantaged and vulnerable consumers, including the elderly. We do not necessarily have a program specifically related to the elderly. We have a disadvantaged and vulnerable program and within that we consider aspects relating to the elderly—particular issues that may impact or affect the elderly.

There are a couple of things that have occurred in the last six to 12 months that we did not discuss in our submission—that is, we have had a fairly significant restructuring that has led to some changes in our consumer protection, particularly the liaison, compliance and policy aspects of it. Mr Ridgway is now in charge of that area and two of our colleagues are in the room with us now. We have put together a small unit to particularly look at some of the policy issues to do with our internal enforcement. As you may or may not know, we do not separate our enforcement competition from consumer protection. So in each of our offices we have enforcement officers who will do a range of matters. What we have tried to do is put together a small unit that will also help to target our consumer protection, particularly with aspects of the disadvantaged and vulnerable and those types of issues.

In terms of our disadvantaged and vulnerable program, we have gone back out to get submissions from groups that would like to be active in our consumer consultative committee. We have actively sought involvement of organisations that advocate the rights of the elderly. We have not made anything public yet, but we have had groups that advocate those rights that have made submissions and are very interested in becoming part of our consumer consultative committee.

We have also put a fair bit of effort into looking at our education programs, not just for the disadvantaged but overall. In particular, with regard to the elderly, we are looking at how we

provide information to the public. In the past, there has always been a bit of a suspicion that we have gone out too broadly and not targeted the right areas and the right people. So we are looking at Rotary, golf clubs, Probus and other organisations that we can target with good, simple education. In a lot of the areas we are interested in, or on which the Trade Practices Act has an impact—in particular, scams—we have problems in identifying the perpetrators. Many of the perpetrators are offshore, and we have trouble with jurisdictional issues, investigating and so forth. So the best thing is to try and educate consumers. In educating consumers, we understand that the best approach is not always to throw things willy-nilly into the public domain but to try and target that. I am not sure if Mr Ridgway has anything he would like to add. He is directly responsible for a lot of this work that we are undertaking.

**Mr Ridgway**—Without going into too much detail, I would like to note that the integration of policy, the educative side of the commission's work and the enforcement side involve a fairly structured process with our information centre, which receives about 95 per cent of our inquiries and complaints. Those in the centre carefully scan the information received and identify whether it comes from individuals, their carers and so forth who may be 'at risk'—that is the term we use for those who may be in a disadvantaged situation or vulnerable circumstances—and they escalate those issues directly to our enforcement teams around the country. So it is not just a policy sitting in a cupboard somewhere; it is an active and structured program that brings these issues to the attention of our enforcement teams.

I would also note that with our work on trying to get some helpful information and messages out to the community—elderly individuals and others—we work actively on the scam side of things with a range of other government and non-government agencies. We work with the Australasian Consumer Fraud Taskforce. We work with about 18 different members as well as a number of businesses and consumer groups such as Neighbourhood Watch—this year—and the Country Women's Association to make sure we are getting our message out to those who really need it about avoiding scams and not getting trapped by scams.

**CHAIRMAN**—I am advised that a number of older Australians have been disadvantaged by Ponzi schemes. Do you know anything about Ponzi schemes? Is the commission looking into that particular matter?

**Mr Pearson**—Do you mean schemes where people are encouraged to provide money? I am not quite sure what you mean

**CHAIRMAN**—Yes. There has been quite a lot of correspondence with the ACCC about this but if you are not involved in it do not feel that you have to answer.

**Mr Pearson**—We would be involved in it; it is just that we may have different terminology.

**CHAIRMAN**—Maybe you can come back to the committee on that, please. The ACCC obviously does a good job—we all know that—but do you feel that older people feel intimidated about approaching the ACCC because you are seen as being a slick, glossy and powerful corporate organisation which is always in the *Fin Review*? Do you feel that people in the suburbs feel inhibited about contacting you because they feel that they might not get a fair hearing?

**Mr Pearson**—I have no doubt that there are sometimes problems occurring with access to information by the elderly—not that they cannot access us but issues, as you say, to do with intimidation. I know this from practical experience. I have an 83-year-old mother. It is very difficult for her. She is well educated and she still lives on her own, but she has trouble accessing, and problems talking to, anybody in government at any level. She finds it difficult. We have what I consider to be a very well drilled info centre. Our staff are well aware of the issues that may arise with the elderly—and disadvantaged people in general—trying to access information. But having said that, I still find that the actual numbers of elderly people who—from what we can determine—complain to us is probably less than what you would expect, given their proportion of the population. That is probably the best thing that we could say. That would lead you to believe that there is some issue there. It is not so much not being able to access us as much as probably, as you say, the issue of intimidation or concern because they see us as a big government department, even though we are not all that big.

**CHAIRMAN**—Do you endeavour to have mature-aged staff dealing with mature-aged people or do you get new graduates to do so, which in itself can be somewhat intimidating for an older person?

**Mr Pearson**—It varies. Those in our call centres tend to be, in general, fairly young: a lot of university students or—

**CHAIRMAN**—Your call centre is not based in Bangalore, is it?

**Mr Pearson**—No, it is actually based in Canberra. As to our mix of staff, like a lot of agencies in the public service now, I think something like 50 per cent of our staff are under 30 years of age.

**CHAIRMAN**—Would you be disposed to looking at the possibility of having more mature people to deal with the problems of older people? We had evidence this morning that with respect to fraud it might be good if state police services brought back retired police on contract to talk to older people, because they do seem to have a bit of a problem—or a reluctance—to talk to someone who has not been schooled in the university of life.

**Mr Ridgway**—Perhaps we should add that we have a very active engagement with members of our consumer consultative committee. There is a range of consumer organisations—including the consumers federation, which itself has a range of members—from which information comes into us from the community, including concerns and inquiries. Often, in the first instance, those people will come to these consumer organisations, which have staff with a range of ages. So it is not entirely graduates or younger people within our information centre who are contacted. Also, when issues of substance are received by our staff at the information centre, they are generally escalated to our enforcement teams around the country and there is quite a range of age and maturity in those enforcement teams.

**CHAIRMAN**—Whenever we have a public hearing someone seems to come along and complain about retirement village contracts and older people being treated in unacceptable ways by various operators—some unscrupulous, some not. Has your organisation looked at retirement village contracts to see whether something can be done to improve the situation?

**Mr Ridgway**—The area of retirement village regulation is generally one that falls to the states and territories. We have from time to time had occasion to look at the regulatory framework, to identify our role where—particularly for issues such as unconscionable, misleading or deceptive conduct—we may be able to assist or complement that regulatory regime. So from time to time we do look at the range of issues that come to us or that we hear about in that sector. And we work actively with our state and territory counterparts—the offices of fair trading—to ensure that any issues that arise are in some way being responded to.

**CHAIRMAN**—The evidence we are getting is that those issues are not being satisfactorily dealt with. Obviously the criticism is not directed at you but it seems to be a matter of grave concern to a lot of people. I would commend the evidence of Ms van Dort, who was one of our three-minute contributors earlier. She is a lawyer and she highlighted some of the problems. Do you think there ought to be different eligibility criteria for older people getting access to legal aid? One of the things the Attorney wanted us to look at was access to legal services. The evidence coming forward seems to be that even those who once would have had lawyers, like independent retirees, their lawyers get old and they have to find new ones, and there is often a concern, a cost and all that sort of thing. Do you think that there ought to be some element of generosity to people who are older to make sure that they are not shut out of the legal system?

**Mr Pearson**—That is probably much more appropriately a policy question. I have personal views about that but the ACCC does not get involved much at that level. While we, again, may have some personal views about issues to do with access—

**CHAIRMAN**—What is your personal view?

**Mr Pearson**—My personal view is that there is always an issue with access for elderly people, not only in terms of funding, but also in terms of the support mechanisms around them. One of the things that came out of one of the submissions from the Australian Institute of Criminology, where they were talking about it, is that it is not so much their age as their social status. Again, it is very anecdotal but I have nine brothers and sisters, so my mother gets a lot of attention. Without that attention I wonder sometimes exactly what would happen, because there are times when we help her out. When dad was still alive we had to go and help him with veterans' affairs and such issues. So you often wonder how people who are on their own live. That is a broader social issue than just the issue of access to the lawyers, but I think there is probably a broader policy social issue in there.

**CHAIRMAN**—You are saying that your mother has you and your eight siblings to look after her, but there would be many other people who would not have that level of expert advice.

**Mr Pearson**—Not even an expert, but just somebody to support them and help them. Again, that is a much broader policy issue than anything that the ACCC has, and it is from a very personal point of view. Without going back and having my chairman lecture me for talking about policy, I do think there are issues in there, and it is probably an issue that, given our ageing population, is going to be something that we are going to have to face more, both in government and in bureaucracy.

**Mr MURPHY**—Just pursuing Mr Slipper’s line of questioning, do you think the Trade Practices Act in any way needs strengthening to assist the elderly? Do you think there is anything that can be done specifically for the elderly?

**Mr Pearson**—That is a very good question. We just put in our submission to the Productivity Commission’s review into consumer protection. They are particularly focusing on the disadvantaged and vulnerable, of which most people regard the elderly as a part of. Offhand I think the law itself is fine. There are probably always issues that you can look at in terms of the law and how you could strengthen it a little, but overall I would have to argue that the framework of the law is fine. It is probably more those social issues that the senator was talking about in terms of how the elderly are able to access lawyers, whether they have the confidence and those sorts of things, rather than the law itself. Our agency has about 100 investigators, so about 200 or 250 people are involved in the enforcement compliance side of our business. It is very difficult to consider how such an agency could alter things, in terms of either our structure or the structure of the act, to allow specific groups in the populace to access us better. I am not sure that changes to the law or access would do anything without that sort of social framework behind it and without the issues we have talked about regarding the elderly person’s ability, and their social support systems’ ability, to get through to us. Do you have any comment on that, Nigel?

**Mr Ridgway**—No, only that, drawing from my own experience a little too, it is as much about those who support and care for those in vulnerable circumstances knowing about their rights, the issues and access to organisations such as the ACCC as it is about the elderly themselves. Often those who are caring for and supporting those individuals may simply not be aware of some of the mechanisms available to seek some redress or of the rights that individuals should enjoy.

**Mr Pearson**—One of the objectives of the restructuring is to try and get through to all our enforcement teams the need, if we have a program, to be able to focus on and be aware of those issues as well. For example, I cannot name the company, but we had a call not long ago where I spoke with a lady whose daughter had been acquiring a lot of ‘prizes’ or spending money with an organisation that she did not really need to. We also had a ministerial from a minister who had been approached by a person who was looking after someone who was unable to look after themselves anymore and had found out that they had spent thousands of dollars acquiring merchandise from a company on the promise that eventually they would win a prize.

Those sorts of things are as much about going back to the company and saying, ‘This is not the right way to treat people,’ as they are about going to our enforcement people and saying, ‘You have to recognise this.’ It is not necessarily unconscionable right off the top, but there are definite things there—if it were my mother, I would not be happy. That is part of what we are trying to focus on: looking at both sides, looking at the businesses, being very active in pushing and saying, ‘This is really not appropriate,’ and also making our enforcement teams aware that we want to try and look at those things and take action.

**Mrs HULL**—It was interesting to read the submission. I for one was concerned when I read it. How would people know that the Australian Competition and Consumer Commission are there for the general public and that they have a role or responsibility in protection of the disadvantaged and vulnerable? The question that arises is: how do your publicity or promotional

campaigns reveal that you are there for more than seeing Professor Fels, previously, or Mr Samuel prosecute the big guys, when there are thousands of little guys every single day on the streets being really badly impacted upon who probably would not consider that the ACCC is a body that has a role in their protection?

**Mr Pearson**—That is a very good question. I think I will let Nigel answer that because he has been working on this issue.

**Mr Ridgway**—That is a very good question. Without focusing only on the elderly, the ACCC has for some time now been building its educative and information delivery. On the one hand, we are now getting out via radio networks as well as getting information through to a range of community points of information—which might sound bureaucratic—like local libraries, local government office space and so on as well as community organisations and legal centres. We mentioned before that in this area we are looking to work more closely with retirement villages and with some of the organisations where elderly people are more likely to be a focus.

We are also working with organisations such as Kidsafe, Neighbourhood Watch and so forth, which have a really good reach into the community beyond the usual points of information that we would have ourselves. That obviously takes some time. In the last two years we have had a particular focus to refresh where we are getting that information into the community. When my consumer team and others are saying, ‘We really want to have this particular task force or program delivering better information,’ the first question we ask is: how are we going to get it out there, in the face of those who need to know about it? That is very much our focus at the moment.

It is not just the ACCC, of course. We are working with our fair-trading counterparts and there is no point duplicating that information. So when we identify that there is a need for particular information, whether it is about product safety or consumer protection issues, we will identify what is already out in the community and to what extent the local fair-trading agency is getting relevant information out. Often we also work with local media. Without going into too much detail, we have quite a number of strategies directed to getting that information out, to complement the work of the larger end of town, which is often the focus of the *Financial Review* and other like papers.

**Mrs HULL**—It is interesting because the fair-trading commission is the first port of call in our states. If I had a problem with a constituent, I would not even think to go to the ACCC. I would think maybe of going to the New South Wales Office of Fair Trading. I am wondering whether too much emphasis is being placed on multimillion industry rather than on everyday fraud and whether or not there should be more emphasis from the ACCC to make people very aware of what you are about, rather than relying on fair trading.

**Mr Pearson**—It is extremely difficult for us as a national organisation, when you look at the number of individuals in each office across the country—for example, we have 32 people in Melbourne office, in Adelaide there are 14 and in Perth 18. That is one of the reasons we are extremely supportive of the OFTs. They are probably best situated for answering and dealing with individual consumers and complaints. We work with the OFTs. We have the FTOAC, the Fair Trading Operations Advisory Committee. The ACCC has just finished chairing the Office of Fair Trading, after chairing it for the last two years. At an officer level they work very hard to

identify the more local, regional, individual and then the broader national issues, or those that could more appropriately be picked up by the ACCC. With scams and frauds, we have been trying very hard through SCAMwatch and the fraud task force, those types of initiatives. Our deputy chair has been very involved in that.

There are other aspects, too. They do not necessarily help the individual on a day-to-day basis. Working with our international counterparts, one of the problems we have with the scams—people giving money to the so-called Nigerian scam—is that a lot of them are not run from Australia. The last one we had a look at is run from Las Vegas. Some are run from Canada, so we work very closely with the Canadian authorities. In fact their chair is going to be out here in another six weeks. We work with the American fair-trading authorities, and the UK, to see whether there is some way we can rapidly track transactions to get to the perpetrators.

We now have a memorandum of understanding with AUSTRAC. We can now track money, so we can follow that through. Again, if you stand back, they are the sorts of broader, maybe national issues. We hope that if we are successful at those initiatives it will assist the individual on the ground. There is no doubt that sometimes the individual with one problem, the one person calling, would more appropriately go through the Office of Fair Trading. I would have to say that the Office of Fair Trading works very hard as well. We have good relationships with most of the offices around the country. The local officers meet regularly with them to talk about these issues. It is that relationship that has to be really strong, and sometimes it has its hiccups, like many do.

**Mrs HULL**—There is a question about the mandatory reporting of financial abuse of elderly people. What are your thoughts on mandatory reporting of financial abuse, of elderly people and then just generally?

**Mr Pearson**—I have not thought about that at all. It is not an issue that has come up. I am not sure. As a policy issue it does not fit with our—

**Mrs HULL**—But if you had mandatory reporting of financial abuse of the elderly, wouldn't that assist you in uncovering the crime and being able to take more action on perpetrators?

**Mr Pearson**—If I could think a little about that. On the face of it mandatory reporting can be very attractive, but there are also issues about where you draw the line.

**CHAIR**—Perhaps you could give us the results of your reflections in written form.

**Mr Pearson**—Yes, because I have not really thought that through. It has taken me a bit by surprise.

**Mr KERR**—I want to firstly congratulate you on the work you do on scams. I think it has started to get through. It constantly surprises me that we still have people who accept the very generous solicitations they receive by email, but, nonetheless, it is there and I would like you to continue with that work. The two issues that have come home most to us in evidence that are within your jurisdiction, which do not seem to be addressed in a substantial way in your submission, are the issues of the retirement villages, which the chair has mentioned, and reverse mortgages. In both instances there appear to be both legal and administrative issues which really affect a very large number of older Australians—probably more than are being taken down by

scams. I just wondered whether we could get a little bit more detail about how you might be useful in these areas. Given the limited resources that you have, it strikes me that, if there were any choosing of priorities, those would be the two areas with high-profile attack that would potentially send a large message to those that abuse the system and be squarely in the jurisdiction you have within the act.

**Mr Pearson**—Reverse mortgages is really an issue for ASIC. I have been to several of the SCOCA working group meetings and I know it is very high on their agenda in a lot of the states and with ASIC to look at reverse mortgages as an issue. It does not fit under us because it is financial services.

**Mr KERR**—Two things: wouldn't it come under misrepresentations or deceptive conduct if these things are being marketed as safe? I mean, these are not discrete universes that never overlap, are they?

**Mr Pearson**—No, there are some areas that do. In fact, we have a memorandum of understanding with ASIC for areas that overlap. In terms of the more hardcore financial services, it is really that consumer protection issues to do with financial services rest fair and square with ASIC.

**Mr KERR**—Legally?

**Mr Pearson**—Yes.

**Mr KERR**—What about your act?

**Mr Ridgway**—That part of it has been carved out—

**Mr KERR**—So you do not have any legal responsibility for prudential regulation at all? If there has been unfair, false or misleading conduct in the provision of the financial service, you cannot proceed? That does not seem right.

**Mr Pearson**—We had an issue on advertising—I can talk about this because the chairman made it public—with one of the petrol companies that was advertising credit cards. There were two aspects to that. One was completely to do with our section. The other was to do with ASIC. In fact, the credit card aspect of it was to do with ASIC. There are some issues that overlap, but the financial services have been carved out and put fair and squarely into ASIC's act.

**Mr KERR**—I can see that the authorisation of a financial product can be to do with ASIC, but surely any representations are made in trade and commerce and that is squarely under your act.

**Mr Pearson**—It has actually been taken out of our act. After the Wallace review, which was many years ago now—

**Mr KERR**—But you cannot proceed on those matters?

**Mr Ridgway**—That is correct. In relation to financial services, misrepresentations and false or misleading conduct sit under the jurisdiction of ASIC not the ACCC.

**Mr KERR**—To the extent that that is the case, I now apologise. It does seem to me that, if that is the case, we need to hear from ASIC, because plainly people are being the subject of what they regard as false and misleading representations. Are the remedies the same as under your act, do you know?

**Mr Pearson**—I think they are very closely the same. There are some differences. Right offhand, I cannot think of any. There are some differences in how they investigate, but they are fairly similar in terms of—

**Mr KERR**—What about unconscionable conduct in relation to the terms in which the financial product is marketed? Is that excluded from your act?

**Mr Pearson**—The competition issues still rest with us—for example, mergers. Part IV competition issues will still sit with the ACCC, but the consumer protection, part IVA, to do with unconscionable conduct and misleading representations will sit with ASIC.

**Mr KERR**—But is there an equivalent unconscionable conduct provision that was transferred?

**Mr Pearson**—I would have to take that on notice.

**Mr Ridgway**—Yes.

**Mr Pearson**—As far as I am aware, there is, yes. I cannot remember exactly how it is worded, but I think it is very similar to ours.

**Mr KERR**—In relation to retirement villages, two things are being asserted. One is that people are being presented with documents which sign away their rights on terms which are grossly unfair, at a time when they are vulnerable. That has been asserted to us. You did not mention this issue in your submission. Again, I think in your oral presentation you said that that would ordinarily be a matter for state law. But the matter would also fall squarely within your jurisdiction, would it not?

**Mr Ridgway**—As I indicated before, the regulatory framework in association with retirement villages, as I understand it, is a matter of state or territory jurisdiction. We of course have jurisdiction in relation to unconscionable conduct or misleading or deceptive conduct; that does not detract from that. To the extent that the issue is being brought to the committee indicating either misleading conduct or misrepresentations, they are issues that we can look at.

I sit here recollecting the last time we had a close look at the various issues associated with retirement villages and the regimes around the country. I recall that it was not a lot of years ago; I think it was about three years ago. We had a look at, not publicly, what sorts of issues were coming to us, what sorts of mechanisms were in place and what the states and territories were saying and doing about those issues. At that time it was not indicative that there was a particular gap that was not being addressed. But I hear today that there are issues coming and there is a sense of a gap. We can take a further look at this area in the light of our jurisdiction and determine whether there is work to be done.

**Mr Pearson**—Just looking at my notes here, there are very few individual complaints that have come through along those lines. This is a recent briefing staff did for me for this. But we will have look at that and see if there is any issue. Perhaps we will have another look through the *Hansard* and see what others have said about this as well.

**Mr KERR**—I suspect the reason you do not have many complaints coming through is the same—I cannot remember the lawyer the chair referred to—as that of a lawyer I had a brief discussion with. Her instinctive reaction is to go to the state regulatory authorities. If there is no effective redress there—and that is what I gather is the case in many of these instances—legal advice is almost impossible to obtain or too costly for people in these situations, or they feel it to be so, which is not always the case. As people get older their willingness to engage in litigation becomes diminished. They want to hang on to what they have got. Litigation becomes something which is intimidating and quite scary. Litigation risk is something that they are just not prepared to accept.

**Mr Pearson**—We will have a very active look at that.

**CHAIRMAN**—Thank you very much for appearing before the committee today. We will send you a draft of the transcript of your evidence. If you could check it and send it back, we would appreciate it. Thank you for your time.

[2.22 pm]

**LEE, Ms Jeni, Representative, Federation of Community Legal Centres Victoria Inc.**

**SMITH, Ms Sally, Representative, Federation of Community Legal Centres Victoria Inc.**

**CHAIRMAN**—I would like to welcome both representatives of the Federation of Community Legal Centres Victoria. Do you have any comments on the capacity in which you appear?

**Ms Lee**—I work as a principal solicitor at the Southport Community Legal Centre and I am a co-convenor with my colleague here of the Federation of Legal Centres Elder Law Task Group.

**Ms Smith**—I am a solicitor at the Loddon Campaspe Community Legal Centre and work on the older persons legal program.

**CHAIRMAN**—While the committee does not require you to give evidence under oath, I should advise you that these hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We have received your submission and have authorised it for publication. Would one of you like to make a brief opening statement of up to five minutes to draw together the threads of what you have put in your submission, or maybe you would like to tell us something else.

**Ms Lee**—I will take on that role. Firstly, thank you very much for allowing us to elaborate on our submission here today. We take the opportunity to position the Federation of Community Legal Centres as a key player in this area of elder law. Just to reiterate—it is in our submission—there are 50 community legal centres in the state of Victoria. Not only do we provide generalist legal services but specialist legal centres are established as well. We provide services not quite specifically to older people, but there are an increasing number of older people appearing at community legal centres.

I was interested in some of the questions of the previous speakers. 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. We provide services engaging the older people. We provide services around wills and powers of attorney. There are consumer issues that come to us and an increasing number of abuse issues that we see. We also deal with an increasing number of family law related matters, as increasing numbers of older people are now being asked to care for their grandchildren, and also, with the high percentage of divorce rates, that access to their children is an issue as well.

In relation to the abuse issue, we see both physical and financial abuse coming in our doors. We think it is important that we deal with the range of issues dealing with older people, but we find that they come more readily if there is a particular program offering a service. You were asking previously, ‘Will older people come?’ No, they do not readily make use of legal services. They like to reveal an issue to their family first, perhaps, and then perhaps to their physio, their local doctor or their podiatrist, and then they come through to the legal service. We have been

working with the state government on setting up the elder law centre and looking at the Elder Abuse Prevention Program.

**CHAIRMAN**—Would you concede that there is a difficulty in accessing legal services on the part of older Australians?

**Ms Lee**—The research shows that older people find that there are technological barriers for some people. The reason they do not access legal services is that (1) they do not identify that they have a legal issue and (2) they find that it is intimidating and they do not understand the language used by the legal service. We find that the technological barrier is not as relevant. The New South Wales research showed that the technological barriers were an impediment to people seeking legal services. We found that that was not so. They love the email. They love the internet. But, when they ring a legal service, they do not like: ‘Press button 4; press button 2.’

**CHAIRMAN**—They wouldn’t be Robinson Crusoe!

**Ms Lee**—No. And it depends what the issue is. If it is an issue of violence or elder abuse then it may be that they are referred to the legal centre because of their association with the local health centre.

**CHAIRMAN**—You have a specialist seniors community legal centre in Victoria, haven’t you?

**Ms Lee**—No, it has not been established at the moment. But I have a specialist elder persons program that we run at Southport, and Sally has a rural and regional specialist elder persons program.

**CHAIRMAN**—Do you have a cross-section of age ranges amongst your legal practitioners? The evidence seems to be that older people are more comfortable talking to people who are slightly more mature.

**Ms Lee**—When the older clients were assessed, they were very responsive to the volunteers that we have that are younger and the students, and they will work with them, but they would prefer to see an older solicitor. Sally’s program has a retired solicitor who has come back and is working on the program there and we have me plus other people. The other thing that we do which is really crucial if you are going to set up an older persons legal service is that we co-locate with aged-care services. This has drawbacks, of course—they come in to get their feet done and to see the dietician and then they think will see the lawyer as well. But it works really well—

**CHAIRMAN**—It would be a one-stop shop for all those services, I hope.

**Ms Lee**—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 problem but it will tell them about what advocacy services are available and give them other sorts of information.

**Ms Smith**—It is a safe place that they go to regularly. We work closely with the health professionals and aged-care workers, who are the front-line workers, so that they have the information to be able to identify the legal issues and then refer them to the community legal centre.

**Ms Lee**—So it is about building community partnerships with appropriate other agencies and providing your service there. We also provide home visitation—we will visit people at home if they are elderly and unable to come to any legal or health service. There is a problem with that, in that for older people who are isolated you may be the only person they see all day, so you are a very welcome visitor and they may want you to come and visit them rather than making an effort to come out, and that stretches resources a little.

**CHAIRMAN**—What proportion of your client base would be aged 65-plus and what sorts of issues would people aged 65-plus bring forward for advice on?

**Ms Lee**—Because we offer a service for older people, 100 per cent of one of our programs is for the over-65s. When they present and it is not because they want a will or a power of attorney, and they are older, it will be around contracts or because they are not quite sure about what is happening to their bank account or about other contracts they have, or it is about consumer affairs or family law issues. There are a whole range of those sorts of issues.

**CHAIRMAN**—You said 100 per cent in one program. If you looked across your 50 community legal centres in Victoria, what proportion of the people who seek advice would be 65-plus? I imagine it would be quite low—10 per cent or something like that.

**Ms Lee**—It varies with the centres and what they do. If you are looking at the centres that reported to me that they see the elder abuse it will be about two per cent. There is no easy remedy to deal with that so they then have to go for an intervention order. The abuse occurs by somebody they live with, so it is a carer that abuses them, or it is somebody they have to keep the relationship going with, so an intervention order is not a useful remedy. But if you looked to a service that will agree they offer wills then it goes up to about 20 per cent.

**Mr MURPHY**—You said earlier that one of the problems with access to the elderly was that they were having difficulty understanding the legal language. Is there anything you can do to simplify it?

**Ms Lee**—I think there is. We hope to work with and develop protocols with the Law Institute of Victoria and Victorian Legal Aid as to how older people are dealt with. Private practitioners bill, as you know, by minutes—15 minutes. A very good piece of advice is: ‘You have come for a will. We will do a power of attorney document. So there are four instruments that you have that will make life easier for you.’ I had a client last week who mistook that information from the solicitor as: ‘The solicitor wants to take over my affairs, sell my house and put me in a nursing home.’ My suggestion is that they need to be able to meet with somebody, to have time to think about that and to have somebody explain to them what it is about.

This is where it is important to have co-location or a relationship with a community centre where you can say to their caseworker, their podiatrist or even an advocate, ‘Explain what this means to them’; have community legal education programs. I think that is one of our strengths in

that we can run sessions. I run a program called ‘What every old girl needs to know’. It is educating the community about wills, powers of attorney and whole range of other issues that concern elderly people. If you have 20 people in a room, you can explain it to them. It is not about soliciting for a business; it is that they can go and see their private solicitor if they like.

The other interesting aspect about elder abuse is how they reveal that. In some of these sessions afterwards, they will say: ‘My daughter wants me to alter my will. I’ve had to sign the house over.’ As Sally says, the first thing you have to do is build up a relationship of trust, open dialogue around issues they are comfortable with and then they will start talking about what concerns them about what is happening with their finances, the bank and the person that is managing their finances for them. It is a very useful mechanism for doing that and we think that we are in the best position to run those educational forums for older people.

**Mr MURPHY**—Do you think for elderly people there is a case for changing the requirements for access to legal aid?

**Ms Lee**—Yes, we do. Sally can expand on that.

**Ms Smith**—The legal aid guidelines in civil matters are very limited. The majority of matters that come to us from older people are in civil law. In most cases people are unable to get legal aid because it is not available in those types of matters. That is a very big issue.

**Mr MURPHY**—Would you recommend changes?

**Ms Smith**—Community legal centres would say that the civil law guidelines for legal aid are too tight across the board.

**Ms Lee**—So we would, yes, and we are hoping that is one of the things that will happen.

**Mrs HULL**—What is the most common issue that you deal with in relation to elder abuse?

**Ms Smith**—One of the most common things that we see is abuse of financial powers of attorney. We see a lot of older people who have given a son or daughter power of attorney and have lost capacity or perhaps are vulnerable and not managing so well, and another family member comes to us and reveals that there is potentially an abuse of a power of attorney. That is a huge issue. Community legal centres can take these matters a step further. Because that is something that we see a lot of, we have started a project with a regional bank to look at banking internal policy, procedure and staff training to address abuse of powers of attorney. That is something that we are looking at locally. Another thing that we see a lot of concerns older women whose husbands have died, say, five years earlier and a son or daughter has encouraged them to come and live with them, to sell their house and to transfer all the money to them so they can either extend the house or buy a bigger house so that they can all live happily together. The relationship breaks down. The older person has no means to move out to get other accommodation. We see a lot of people in that situation.

**Mrs HULL**—Various submissions suggest to me that oversight of the power of attorney needs to be strengthened to ensure that it is done in the best interests of the elder person. What is

your view? Do you think that there needs to be greater oversight of how powers of attorney are conducted?

**Ms Lee**—Yes, it would be the policy of the Federation of Community Legal Centres that that is exactly what happens. There is also a problem because powers of attorney differ from state to state, and with a mobile population they are different, so we would like to develop legislation or have some exchange so that they can be enforced if people move to a different state.

The other issue is how we intervene effectively in terms of monitoring and protecting people. Once people lose capacity we can apply to the Guardianship Board to have those powers revoked, but when they have capacity it is very difficult to intervene, unless you have some legislative power, because of the relationship that they have with the abuser. It is either a son or a daughter that they have given the power to in trust, and then this person abuses it. There is a very complex dynamic of family relationships.

If you look at some of the overseas policies, they have asked banks to intervene and they have an opt-in strategy so that you can have a clause in your power of attorney that, with anybody who uses that power, the bank can oversight that and intervene and then, like an ombudsman, call in that person to explain any unusual movements in the money. That is one way we can offer people some protection if they draw up a financial power of attorney.

**Ms Smith**—Community legal centres are also at the front line of dealing with abusive powers of attorney. A lot of people come to us and want to change their power of attorney because the attorney has been abusing their position. They can come to us and get advice about what their rights are, how to revoke their power of attorney, how to do that, how to make a new one. Having access to that basic information is really the first step towards them doing anything about it.

**Mr KERR**—I think a registration system for powers of attorney is essential, and I also think we should audit them. But similar abuses can occur without powers of attorney being involved. There is no mechanism to deal with the older person who is overborne by their child or some other party and taken to the bank to sign papers.

**Ms Lee**—That is right. And I think that we can look to the debate that surrounded the introduction of mandatory reporting around child abuse and the debate around the reporting requirements for domestic violence and see whether that is what we want to do. But because the scope of abuse against older people is so much broader, I think we need a new paradigm. I think we need to look at developing systems where we can intervene, perhaps without mandatory reporting. In America there are mediation processes where a person can choose to have an advocate who stands with them as they challenge what their son or daughter is doing, without it becoming a criminal offence. If there is a criminal component, that must be pursued. That whole debate around mandatory reporting has to be had, and we have not had it yet.

**Mr KERR**—Have you got some information on that American system? I would be quite interested. I oscillate in my own thinking. I have not got a final view. I am really pissed off, to put it in crude terms, about the infantilisation of old people—as if the state or any other party step in and treat people of competent mind as if they are children, override their wishes and the

like. I think that would be the most offensive thing that could happen to you. I oscillate between that and, on the other hand, a recognition that some people are at risk of abuse.

**Ms Lee**—They are and their rights are being ignored because we cannot empower them in any way to be able to enforce those rights because they are—

**Mrs HULL**—They are adults. The biggest problem that you have is that people assume, because you are an adult and you are of sound mind, that you are in control of your life and you know what people are doing. That is simply not the case. This happens so many times, which leads me to my question. Earlier this morning we heard some evidence which prompted me to ask whether or not the arm of the family law court should be extended to cover the issue of the family in relation to the elder person. We tend to use the family law court for family breakdown and protection of the children or in the best interests of the children, but the family law court is more than that. So is there a possibility that you could actually enact an arm of the family law court that would enable many of the issues confronting families with an elderly person to be resolved in a better way?

**Ms Lee**—I think that there needs to be a forum where that can happen. Whether that is the family law court or not I do not know, given that a lot of disputes that get there tend to be handled in an adversarial way. I think we need to step back from having that model. 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.

**Mrs HULL**—We have introduced the family relationship centres for children and breakdown situations which is about mediation, about families connecting with families and looking out for the best interests of the children in the long term. Maybe there is an opportunity for us to really consider a family relationship centre with respect to people who are older and who require some assistance.

**Ms Lee**—The lack of power that comes with ageing is really important.

**Mrs HULL**—It is so bad.

**Ms Lee**—It is not just family; we see an increasing number of neighbourhood disputes. They are not just about the neighbour with the funny fence, they are about corralling older people off. As they get older they are excluded from the community, and the capacity of those people to negotiate some of the living together arrangements is difficult. So tension builds up and we have a dispute. They end up at the community legal centre trying to put out an intervention order against the neighbour who lives in the flat or the room next door to them. It is not the way to go. The way to go is to have a forum where there is a mediator, that is not intimidating and is not seen as adversarial and that has, as an outcome, a resolution.

A gentleman presented to a forum that we had and his major concern and what he wanted us to look at was that we are increasingly institutionalising older people. He brought me cuttings and information about the result of institutionalisation being abuse. You only have to look to children

in orphanages and to what has happened in churches. This was the information that he gave me. Anywhere we look to institutionalisation, there is a pattern of abuse. I think we need to be careful that we do not go that way with older people, and that is the way we are tending to go.

The cost-effective number of people in an aged-care facility is 150 and then we end up having an abusive situation there and having to introduce legislation to try to provide people within the institution with protection from harm. I think we have the opportunity now to have that debate, to work out where we are going and what mechanisms we are going to put in place. I think we need to look at the previous debates that we have had about offering protective policy and legislative reform. Forums like this give us a wonderful opportunity to start that debate going in the community.

**ACTING CHAIR (Mr Murphy)**—Thank you for appearing before the committee today.

**Mrs HULL**—That was fabulous. Thank you.

[2.50 pm]

**SALTARELLI, Ms Lynda, Media Liaison Officer, Aged Care Crisis**

**SPARROW, Ms Linda, Community Affairs Coordinator, Aged Care Crisis**

**WOOLLACOTT, Mr Barrie, Legal Adviser, Aged Care Crisis**

**ACTING CHAIR**—Do you have any comments to make on the capacity in which you appear?

**Ms Saltarelli**—I am also the IT support officer.

**Mr Woollacott**—I am a solicitor in Melbourne with Slater and Gordon. Today I am representing the interests of the elderly with Aged Care Crisis.

**ACTING CHAIR**—Although the committee does not require you to give evidence under oath, I advise you that the hearings are legal proceedings of the parliament and warrant the same respect as the proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee has received your submission, and it has been authorised for publication. I invite you to make a brief opening statement, for perhaps five minutes, and then we will go to questions.

**Mr Woollacott**—Firstly, thank you on behalf of Aged Care Crisis for giving us an opportunity to appear before this inquiry. I am going to give an opening statement, particularly to introduce Aged Care Crisis and who we are. The Aged Care Crisis team is essentially an independent advocacy group which consists of concerned Australian citizens who have an interest in the aged-care sector. That interest is obviously driven by a desire to ensure that the fast-growing population of older Australians can access quality aged care where they are treated humanely, with respect and with dignity. The members are essentially drawn from the ranks of health professionals, volunteers within the sector and consumers of the aged-care services.

Aged Care Crisis operates a detailed website that offers a broad range of information and news about issues relating to the aged-care sector. Its purpose is essentially to support and inform older people, their family members and carers about the increasingly complex system of aged-care services, and the website not only provides a wealth of information and news about current matters but also has links and resources to assist those seeking help. It provides an opportunity for concerned individuals to tell their stories about their experiences of the aged-care system and provides a forum for those wanting to discuss topics and issues that are affecting them or their loved ones.

Aged Care Crisis has a deep concern over the increasing reliance on the private sector to provide aged-care facilities, and that concern primarily relates to the fact that the provision of aged-care services used to be the preserve of community groups and charitable organisations that were intent on looking after the health and welfare of our aged citizens. Those services were largely provided on a not-for-profit basis. As the demand for aged-care services and facilities has

increased exponentially, governments generally have been happy to support the proliferation of private for-profit ventures in order to satisfy that growing demand. Our concern at Aged Care Crisis is that the rights and entitlements of those vulnerable individuals who require those services should not be displaced, diluted or, indeed, seen as a secondary consideration to the primary demands and interests of the corporate sector and their shareholders.

Most of the feedback that we receive at Aged Care Crisis is concerned with staffing issues, accreditation and the complaints system. At a time when the care needs of residents are higher than they have ever been, with many requiring 24-hour nursing care, we find that facilities across the country have reduced staffing levels generally, cut the numbers of trained professionals and asked nurses to reclassify as personal care attendants. There is no registration system for aged-care workers and no minimum staffing requirements. It is important, we believe, that the Aged Care Act be the main legislative vehicle to ensure that our aged citizens have their rights protected and their safety and wellbeing preserved. We must rely on the governments of Australia to protect the vulnerable individuals against abuse, neglect and exploitation in circumstances where the vagaries of market forces have the potential to dictate what level of care and services will be provided to the aged in aged-care facilities. It is very important for us at Aged Care Crisis that we are focused on this very narrow group in the aged population. Nevertheless, it is very important group within the aged community and it is becoming increasingly a more populous group within that age demographic.

Our paper was essentially concerned with three main areas. Firstly, fraud and financial abuse—we have raised certain issues that we see as relevant there. Many of those arise directly from complaints that have been received at Aged Care Crisis. Some of them have been alluded to more by virtue of the fact that they are issues that have been raised in a number of different forums and they are of great concern to us, particularly as they might concern people in aged-care facilities; and the recommendations that we have made speak to those issues.

Similarly, barriers to older Australians accessing legal services is an area that we think is a very important one. Some of the issues that the previous group, the Federation of CLCs, raised we think are also very important issues that need to be looked at, and we have tried to canvass a number of those in our submission. The recommendations that we have made, again, speak to those. I might hand over to Lynda in relation to the third point in our submission.

**Ms Saltarelli**—Part of our submission relates to the Aged Care Act. We note that the current act defining aged care has now been in place for 10 years and, while there have been some amendments over the decade, we believe there should be a full review and reform of this act. We say this because our experience and that of our respondents is that it does not provide enough protection for those frail older people at the end of life. The Aged Care Crisis team here, almost on a daily basis, have situations where care does not meet acceptable community standards. As mentioned by Barrie and in our submission, there is increasingly a move to privatise aged-care services and there are an increasing number of facilities where the primary responsibility of providers is to increase the profits for shareholders. For example, it is reported that the Macquarie Bank owns 7,500 beds in aged-care facilities and retirement villages.

We can think of several areas in the act that need review and reform. In our submission, however, we have concentrated on care issues and in particular staffing issues. Aged-care facilities generally spend approximately 79 per cent of their incomings on staffing costs, so there

is always a desire to keep these as low as possible and therefore we have dangerously low staffing levels in some facilities. We have a steady flow of reports about quite dangerous staffing levels from both staff and the public. *Choice* magazine recently reported on how just one carer was on duty for 80 people. One of the most serious incidents reported to us was by a registered nurse from an agency: she and one carer were on the evening shift in a hostel spread over two floors, with cottages out the back, and there were over 100 people at that facility. There are a lot more examples of that.

The current view is that facilities need flexibility with staffing, but our view is that this flexibility is a dangerous policy and can lead to gross neglect of some residents. We urge that, either through law or through regulation, a safe, basic, minimum staff-resident ratio be set. We say that the vulnerabilities of people at the end of life are not all that different from infants at the beginning of life, and yet we are so cavalier in our approach. One could not imagine that we would leave birthing centres free of set staff ratios or open to the vagaries of market forces. We also support the need for a register of aged-care staff. Currently, police checks are being introduced but at this stage just about anybody can be an aged-care worker.

We are also concerned that the sanction system, we believe, is not working as well as it might. For example, in July last year we found that there were six homes, totalling 503 beds, which together failed 106 standards and yet no sanctions had been placed on these facilities. And we note that when sanctions are placed on homes it generally means that they can no longer take new residents until a new approval is given. It is our view that this is not a sufficient deterrent. We do not want to see facilities closed and people made homeless, but we do want to see rigorous measures in place to ensure the proper care of people.

We also think there is a need for clearer definition between the state role and the Commonwealth role in terms of aged care. In the recent Broughton Hall situation, where there was a salmonella outbreak, the state was in charge of health and food preparation and the Commonwealth was in charge of care and general monitoring.

The last part of our submission addresses the need for increased whistleblower protection for staff members who report abuse and neglect in aged-care facilities. A large part of our feedback is from staff members who notice things in their facilities, feel they cannot do the job that is required of them and see incidents of abuse but are too fearful to report them. We note that, as of 1 July, under the new reforms coming into aged care, managers and proprietors are required to report incidents of abuse, but we think that this will not work unless there is strong whistleblower protection so that staff can feel safe when they report incidents of abuse.

**ACTING CHAIR**—Have you got any concerns with Macquarie Bank getting involved in aged care?

**Ms Sparrow**—No. I just used that example. I have no knowledge whether the residents who hold the Macquarie Bank aged-care beds are being well looked after or not. I used that as an example to show the direction that aged care is going in—increasingly moving to the private sector.

**ACTING CHAIR**—Macquarie Bank seems to be buying everything these days.

**Mr Woollacott**—A particular concern that we have with the private sector, particularly big business, moving into the aged-care services industry is that, generally speaking, private organisations go into business to make money. Our concern is that the aged are appropriately looked after in areas which also touch very closely on the issues that this inquiry is looking into.

**ACTING CHAIR**—So do the single providers.

**Mr Woollacott**—Certainly. Any commercial entity—

**ACTING CHAIR**—For any business, the commercial imperative is to make a profit. Why are the staff levels dangerously low? Is it because this is not a glamorous occupation?

**Ms Sparrow**—No. We have just been talking about the need to cut costs in order to increase profits. The main place that you can cut costs is with staffing. It is a high-staffing, high-human industry sector. As I mentioned in my statement, 79 per cent of the costs in aged-care facilities are for staffing, so they are always trying to cut costs there. The care levels for people in nursing homes are huge. People can do nothing for themselves. We have reports of people being left for long periods of time by themselves, not getting the care that we would wish for ourselves or for our parents.

**ACTING CHAIR**—That is why you are so strongly opposed to the flexibility of staffing policy and you want that staff ratio enforced.

**Ms Saltarelli**—I think what you were alluding to was that it is not seen as a glamorous job and it is underpaid, or it is very lowly paid. I think it is on a scale of 20 per cent less than in the acute sector, so it is sort of looked upon as a not very attractive job option. We have been told of instances where some aged-care providers have actually acquired backpackers to fill in for work at nursing homes.

**ACTING CHAIR**—You gave some examples in your submissions of some of the worst cases of abuse. What would be the worst one?

**Ms Sparrow**—It is the low level of staffing which concerns us most. This is a sector that requires good people to give good care. You might have one nurse and one carer looking after 100 people—some high care, some low care—in a facility that has cottages, and they are crushing up medications, supervising their meals and getting them off to bed. This is in the name of flexibility, that we as a community cannot mandate that there should be certain minimum staffing levels. As I said, we would not dream of doing this to babies and children, and yet the level of care required by some people at the end of the life journey is equally high. Your heart breaks when you go into the facilities and see the level of care that is needed and you see these poor people run off their feet trying to deliver it. Aged Care Crisis certainly does not want to demean the work of carers in facilities, but we want them to be trained and we want more of them to be able to do their job well.

**ACTING CHAIR**—You mentioned in your submission that the Aged Care Complaints Resolution Scheme was inadequate. Can you give us a few examples of those complaints, why it is inadequate and what could be done to address those problems?

**Ms Saltarelli**—Because the system has just been changed we are waiting for the new system to kick in. But, generally speaking, there is reluctance by residents and families to use a complaints process. I was speaking to someone this week who had started a complaints process several months ago, but as she essentially felt she was being gagged she did not continue with the complaint. Under the old scheme, once you begin a complaint you are not allowed to talk to anyone about it. We hope that the new scheme is better but we have not actually had any experience with the new scheme yet. Residents and families often fear retribution, and once they lodge a complaint it is their loved ones who are there 24 hours a day; they cannot be there.

**ACTING CHAIR**—That is understandable.

**Ms Saltarelli**—That is exactly right. They also find that the processes are too complex and some of the residents die before there is any resolution. The process often appears to the complainant to be quite ineffective, even when a supposed resolution has occurred. To date, the systems have not yet been investigatory but have merely sought to resolve through mediation. So, again, we are waiting for the new system.

**Mr KERR**—You are saying they are not investigated.

**Ms Saltarelli**—They were not, no—they never used to investigate; it was a mediation process.

**Ms Sparrow**—I think the new system starts next month. The new Aged Care Commissioner has been appointed and the new system, we have been told, will be investigatory. The old system relied on mediation. One reason people ring up and email Aged Care Crisis is because they have been through this process and still feel very aggrieved. They find us on the internet and so they call us and let us hear all of their concerns in no uncertain terms.

**Mr Woollacott**—Another really critical thing about this, and it is brought out in a couple of the examples we provided in the submission, is that particularly for the frail elderly there is a real need for a quick response. The complaints system that existed was anything but that. If you were lucky enough to actually hang on and survive the torturous path, then something might be done if it could be mediated upon. One of our examples was about a person's elderly father who was in a facility. His condition deteriorated so rapidly through the delay and the poor attention—and there was some very real abuse through lack of appropriate care and attention—that the lady had to actually remove him from the facility simply to save his life. He ended up in a hospital where it was established that he was on a whole lot of medication that was inappropriate and in fact it was the medication that was killing him. He managed to recover quite significantly from where he was when he was brought into the hospital and away from the facility. Unfortunately he did not recover enough to survive.

**Mr KERR**—You say that the mechanism did not work because the process went to mediation. What if there is a complaint of some serious nature: physical abuse, an assault or sexual abuse and the like. You do not mediate sexual abuse, do you?

**Mr Woollacott**—Once criminal activity and criminal conduct has occurred, you normally report that to the relevant authorities, such as police.

**Mr KERR**—Let me give you an example and ask you what happens. This is an actual case that came to me the other day. A woman was found out of her bed naked. She was massively bruised and taken to the Royal Hobart Hospital, where the initial doctors who saw her condition called the police because their first instinct was that she had been sexually abused. She had no capacity to dress or undress herself, so her nakedness in itself was an issue. Subsequently, after a period of time at the Royal, she died. The tests showed that there was certainly no proof of sexual penetration—no semen or anything like that—but there was nothing to explain how she had ended on the floor in a bruised and beaten condition naked in the middle of the night. I have written to the minister to say that, whatever else, this seems to be something that requires investigation. Is there a mechanism that gets put into place? Certainly there is an issue about policing but there is also a management issue. ‘How could this happen?’ is a different question from ‘Can we find someone who is criminally responsible?’ You may never find a perpetrator, but that does not resolve the question about how this could happen.

**Mr Woollacott**—Obviously at a state level you have the option of a coronial inquiry in circumstances where there has been a death. But let us assume there had not been a death but that that person was greatly impacted but still could not provide much in the way of evidence because they had dementia or something like that. In that sort of situation, unless there is going to be a family member or an interested person who is going to take up the complaint, there is going to be no redress through that avenue, so you are left with relying on some system within the aged-care system, which there is not—

**Ms Saltarelli**—An underpaid staff member.

**Mr Woollacott**—Where that issue is going to be brought to the attention of the relevant authorities—

**Mr KERR**—I have written; it has been brought to the attention of the so-called authorities. At least the minister should deal with it. What are the powers and the capacity of the agency to deal with something like this? On its face, something must have happened. A woman who cannot undress herself cannot be found naked and bruised on the floor. The bruising may be self-inflicted, but that sounds improbable given, as I understand it, that her physical condition would not have facilitated her throwing herself around to a degree that might cause that kind of bruising. But the nakedness cannot be explained, so something happened. Who does investigate these things?

**Ms Sparrow**—One would assume that the minister would refer that to both the complaints commissioner and also to the accreditation agency to go in and do an audit of the place. I would expect there would be great difficulty in finding out what actually happened that night.

**Mr KERR**—I can understand why a criminal investigation is likely to be fruitless, but what about setting out some protocols? Presumably, if somebody enters a room it can only be another patient or—You have to have some mechanism for supervision. What is wrong with this kind of system?

**Ms Sparrow**—In spite of being in a communal setting, aged-care residents are in a very lonely place at night. There would be very few people who would speak up about that incident, I believe.

**Mr Woollacott**—Or would even see it, for that matter.

**Ms Sparrow**—Those rooms are there and people without capacity are in them. It is very difficult to find out what is really happening, and it ends up being one person's word against another person's word when investigations occur. As we have already mentioned, in the present system the complaints system is not even an investigatory one. So it is hard.

**Mrs HULL**—I have been through your submission and it is primarily about potential fraud within nursing homes or facilities. You have cited some very good examples of how fraud can take place in those areas. We have tended to talk mainly about the wellbeing of people in aged facilities. I want to ask a question about the capacity to manage mentally ill ageing people. There is a limited amount of accommodation that is available to those people who have suffered mental illness during their life and who then become an aged mentally ill person. There is a difference when the ACAT teams assess a mentally ill person because they are aged-care assessment teams rather than being skilled in mental health. You might have an ageing person who is exhibiting all types of behaviour that could be clearly dementia or Alzheimer's disease and there is this discrepancy between how ACAT will assess that person and how you can manage a mentally ill person. When does a mentally ill person who has dementia actually become assessable under an aged-care act for age issues? It is a big issue and we are having increasing episodes of mentally ill people not going into aged-care facilities.

**Ms Sparrow**—There is a shortage.

**Ms Saltarelli**—That is where it is also important to have trained staff to manage those types of residents. You have residents whose carers or staff have to deal with high and complex medical needs as well as mental health issues.

**Mrs HULL**—I see it as the discrimination part of our inquiry because nobody seems to mention mentally ill people who are aged.

**Ms Sparrow**—It is the same with some people with intellectual disability too who, in the past, did not normally live to deal with ageing issues. Similar issues also pertain to our homeless population. We are starting to address that with specific hostels, such as Winteringham and others, that really deal quite well with that sector of the population, but you are quite right to identify these fringe areas that we do not actually cater for all that well.

**Mrs HULL**—Does your organisation, Aged Care Crisis, look at these issues? Are you making recommendations on these issues? I have looked all through your submission to see whether there is some mention of people who have either suffered a mental health problem all of their life and are now aged or intellectually disabled people who are now aged. Nobody seems to mention them and yet they are having an extraordinary difficulty with discrimination in that they are not able to be accepted into hostel care nor are they able to be accepted into aged care if they have a long history of mental illness. I am wondering who looks after those people?

**Mr Woollacott**—Probably not the private for-profit organisations, that is for sure. They are going to be left to the other state based or charitable organisations to look after in whatever facility was appropriate, as Linda mentioned.

**Mrs HULL**—What about advocacy?

**Ms Sparrow**—One would assume that the mental health advocacy organisations are on the chase with this particular issue. I should mention that we are a volunteer group that have set up a website and have taken it upon ourselves to advocate as much as we can. We would be the first to admit that we are not right over the whole spectrum of the issues. I appreciate your concern; I agree with you on that.

**Mrs HULL**—I thought it was interesting enough to raise it. If you could change the way in which older people were prone to suffer financial abuse—you have indicated that you would not allow aged-care staff, or staff of facilities or whatever, to be able to benefit from a resident—how would you see that as working? How would you implement such a thought?

**Mr Woollacott**—One point was raised before about registration of things like enduring powers of attorney and those sorts of things. That is one way of perhaps starting that process. I think the difficulty—particularly as we see it in the aged-care facility area that we are focused on—is obviously that there are some residents who have an intellectual capacity to look after their own financial affairs and there are others who perhaps fall into that area where they do not have that capacity. So, in that sense, they may have dementia or other things. In terms of actually controlling it, as far as we could go with it, we felt it was appropriate that there be some sort of body or tribunal. You mentioned in a previous section about the Family Court. It struck me that perhaps it was more appropriate for there to be some tribunal, such as a civil administration tribunal, that would perhaps take on that role. It needs to be an area where it does not require lawyers and advocates and all those sorts of people. It needs to be something that can be driven by individuals and/or concerned family members. It seems to me that it should be some sort of body that can actually do more than mediate disputes—a body that can actually make decisions and overturn situations where there had been an unfair advantage obtained by one person involving the financial affairs of an elderly person.

**Mrs HULL**—We heard a lot about abuse of a power of attorney and of guardianship. We have not spoken much about guardianship here today. We had several examples in our previous hearings of people coming forward who have had significant difficulties with guardianship tribunals, particularly in New South Wales. I wonder whether you have any anecdotal evidence or thoughts on the possible abuse of guardianship, particularly with respect to the way in which the tribunal operates?

**Ms Sparrow**—The system in Victoria is reasonably fair. That is not to say that there aren't family members feeling peeved and feeling that they should have guardianship over their frail, aged relative. But you can go back to VCAT as much as you want and put your case. Everybody has the right to take their case back to the tribunal and have their issues heard. I believe that, in general, the system that operates in Victoria is reasonably fair. But because the issues about your parents are so much inside you, because it is such a deep bond, when things go wrong and a guardianship order is given to a professional guardian, to the Office of the Public Advocate instead of you as a daughter or a son, then people do feel very aggrieved and very pained. It is always difficult to assess what is right and what is wrong in these situations. But I reiterate that people can always go back to the tribunal and usually they will get a different member to hear their case.

**CHAIRMAN**—They would often feel as though they were failing in their duty to their parents, wouldn't they?

**Ms Sparrow**—Yes. I guess the worst situations we hear of, where I think it could be a little bit iffy, is if, for example, my mother is in an aged-care facility, a nursing home, and I am up there all the time making demands and worrying them and I have become a nuisance to them, so the people that run the home put in an order and request that my mother has somebody else as a guardian. We have people in that situation coming to us and saying: 'This is unfair. It is just because I have wanted the best for my mum. They are not listening to me and now I have lost any powers to control this situation and I am being excluded.' So that situation does happen on occasions. But, equally, I think we have to be mindful that we need to protect people too. While we have been sitting here we have just heard of sons and daughters who are not doing the right thing by their parents. It is a bit tricky.

**CHAIRMAN**—Thank you, very much, for coming. We appreciate your time.

*Evidence was then taken in camera but later resumed in public—*

[4.14 pm]

**CRAIG, Mr Alistair, Senior Corporate Lawyer, State Trustees Ltd**

**FITZGERALD, Mr Anthony George, Managing Director, State Trustees Ltd**

**CHAIRMAN**—Welcome. Although we do not require you to give evidence under oath, these hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We have received your submission and we have authorised it for publication. Would one of you like to make a brief opening statement of up to, say, five minutes to elaborate on some of the matters in your submission?

**Mr Fitzgerald**—Yes, Chairman. Our submission concentrated on two areas. The first was preparation and planning around estate planning and some of the tools that are available to older people for preparing for their advancing years. The second concentrated on the other end of the spectrum, where abuse has occurred, and on some of the mechanisms or tools that are available or should be available to help deal with issues when it gets to that stage. It was also on other financially adverse events. In ‘Planning and preparation’ we concentrated on community awareness and on increasing education in the community around the tools that are available to individuals. We particularly focused on streams that would benefit older people. We referred to literacy programs and so on that were conducted previously, to their importance and to more widespread publicity around those to make sure that older people can get access to those for their own benefit.

On some of the tools that are available, we spoke about alternative decision-making arrangements that are available under both voluntary schemes, being enduring powers of attorney, and then about some of the guardianship appointments that can be made as well. We also 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. We thought that if we could avoid involving lawyers, where possible, that would be a better way of approaching the issues.

Where voluntary solutions or tools are used, we say there should be some overview or regulation of those similar to what there is where there is a guardianship appointment. That could act as a deterrent at the other end. If somebody knows that they have got to submit a set of financial accounts as an attorney, that may well be a way of acting as a deterrent to fraud or abuse occurring against an older person. We concentrated on those in our submission.

**CHAIRMAN**—Thank you very much. What is your view of mandatory reporting of suspected financial abuse of older people by financial institutions?

**Mr Fitzgerald**—It is certainly something that has been talked about in Victoria before. It is an extreme step. Nonetheless I think it is something that should be considered as an alternative. I know it does exist in other parts of the world and has been implemented successfully there. It is something that I think we should have a look at as a way of acting as a deterrent as well.

**CHAIRMAN**—The lack of common rules for powers of attorney and enduring powers of attorney, particularly the failure of powers of attorney made in one state to always be exercisable in another, is something that has been raised before us. We understand there is some work on harmonising the rules. How quickly is this going to happen, in your view? Also, do you have a view on the Tasmanian arrangement whereby there is a register of powers of attorney?

**Mr Fitzgerald**—I will deal with the first thing. We would be strongly supportive of having uniform rules around powers of attorney across all the jurisdictions. I think we would support that very strongly. How soon could that happen? I could not offer a judgement on that. There are six states and territories involved, all with different legislation, albeit with similar intentions. But there are some nuances in each of the state and territory laws that obviously make them different.

Certainly the Victorian legislation was changed in the last couple of years and strengthened immeasurably around the attestation process at the start. When it is first executed, there is some strengthening where witnesses have to be independent of the process and from a prescribed list of approved witnesses. That strengthened it up immeasurably and made sure that both parties in the document understand it fully in terms of responsibilities and so on. We are strongly supportive of that process.

In terms of the registry that exists in Tasmania, in our submissions to the Victorian government we have suggested that a register would be an appropriate way of formalising some of the documentation and formalising the recognition of powers of attorney. It happens in a lesser way at the moment with some of the land title transfers that require powers of attorney to be registered but only in respect of the transfer of land, not to the broader aspects of financial arrangements.

**Mrs HULL**—Conveyancing has to be registered?

**Mr Fitzgerald**—Yes.

**CHAIRMAN**—We have had arguments about how capacity should be assessed. Do you have a view?

**Mr Fitzgerald**—Certainly capacity is an important issue across document execution. We live with that every day, because every day we have an estate-planning team that writes wills. One of the things that a will writer has to attest to is the capacity of the individual who is making the will to make sure that they can demonstrate testamentary capacity. We think it is an important piece. With the powers of attorney I referred to earlier on, the legislation was changed to make sure that there was a witness there who could demonstrate that both parties to the agreement had an understanding of what they were getting into. At the same time, it would be useful to have some capacity tests around that. Our will writers have a process that they go through to make sure that (1) the person has appropriate capacity and (2) they are not executing the document under duress, which sometimes happens.

**Mr MURPHY**—Would you like to see a national register of powers of attorney?

**Mr Fitzgerald**—Our lobbying to date has been from the Victorian perspective, because that is where we felt we had the most influence. If you are going to have cross-jurisdictional impact, yes, it would need to be a national register.

**CHAIRMAN**—Even though different rules apply to powers of attorney in different states?

**Mr Fitzgerald**—Yes. You could have an independent register, I think, that reflected where the powers-of-attorney document was originally registered. I am not enough of a legal expert to know how that would work legally, but certainly you could have an independent register. If it were registered initially in Victoria then it would be covered by Victorian government legislation.

**Mr MURPHY**—What about family agreements? Should they be registered also?

**Mr Fitzgerald**—That is a good question. We have not seen a lot of family agreements. Normally, if we have a mediation, particularly where we are administering a deceased estate, that is where we tend to find them more than anywhere else. The trust deed is probably executed and then is sanctioned by the Supreme Court. I would think that is slightly different to a register of family arrangements about the person's affairs while they are alive. Once they are dead, of course we have legislation and so on that can deal with that.

**Mr Craig**—I think you would encounter definitional difficulties in actually defining what is and what is not a family agreement.

**Mr MURPHY**—Correct.

**Mrs HULL**—What weight would you give a family agreement if you were asked to determine whether the person could manage their own affairs or needed some assistance? Do you ask whether there is a family agreement, and how do you determine whether there should be somebody managing the affairs? How does that happen? How do you manage the affairs of 8,500 Victorians?

**Mr Fitzgerald**—There are two parts to the State Trustees business. One is where we act as a financial and legal guardian for a represented person. That is where we are formally appointed by VCAT to be that person's financial and legal guardian. That is where an application has been made to VCAT for a formal guardian to be appointed, and that can only happen where there is a legally recognised mental or intellectual disability and we are appointed as the person's financial and legal guardian. Our understanding of the tribunal's preference is that, where a family member is available to undertake that guardianship, that is the first preference, and we would support that. We would only get involved where there is no immediate family member who has the skill set capable of performing those roles or there has been a family dispute and they want somebody independent of the process to come in and undertake those responsibilities.

With a voluntary situation, which is where you would be appointed as attorney under a power of attorney, traditionally we find that the family member normally wants to be the first choice as attorney and we will act as substitute attorney in the case where something happens to that family member. Normally that is a discussion that happens between the person who works for us and prepares the documents and the person who is the testate or, in this case, who is signing the

will, signing the powers of attorney. If they want to appoint a family member, we would respect those wishes—unless we assess that the person does not have capacity or they are under duress.

**Mrs HULL**—So how do you do that? How do you assess whether the person is under duress, being coerced or being taken advantage of?

**Mr Fitzgerald**—There are some questions that we would ask the person who is executing the documents that would help us determine whether or not they have got capacity. You would not interview them with another person in the room; so you would have that person in the room by themselves where you could have a one-on-one scenario, and, if they wanted to disclose anything to you, that could be done without the duress of a family member sitting beside them. We do that quite often. Al, do you want to add to that?

**Mr Craig**—And clearly there are some circumstances where the family member will convey that they want to be present for, for example, translating reasons, and obviously that is also something we would avoid. We would obtain an independent translator in order to speak directly to the client where instructions are being made to draft a will or to prepare an enduring power of attorney.

**Mrs HULL**—You indicate in your submission that you manage people living with a disability, including dementia, a mental disorder, intellectual impairment et cetera.

**Mr Fitzgerald**—Yes.

**Mrs HULL**—So you actively manage their affairs?

**Mr Fitzgerald**—Yes.

**Mrs HULL**—How do you actively manage the affairs of ageing mentally ill people and ageing intellectually disabled people with respect to finding the appropriate care model for them—say, in a nursing home, which might not accept mentally ill people? How do you manage that?

**Mr Fitzgerald**—I need to explain to the committee that we are only the person's financial and legal guardian. We do not act as their lifestyle guardian, which is where that issue would be addressed.

**Mrs HULL**—Yes; it is quite confusing, in my view.

**Mr Fitzgerald**—Yes. We are established as an entity of the Victorian parliament to manage people's financial and legal affairs, not their lifestyle issues. We obviously would have a view on whether or not they could afford to live in a particular place, but it is normally a family member or their personal guardian who has responsibility for finding the type of accommodation appropriate to their needs. We are not set up to assess an individual's requirements in terms of where they live and what level of care they need. There is another area of government that looks after that. Where a personal guardian is appointed or where a family member is appointed as their personal guardian, we would expect that that person would make the decision about the quality of care that individual needed.

**Mrs HULL**—Various submissions have indicated that guardians, the Guardianship Tribunal or your office are very difficult when it comes to paying bills—that they drag the chain paying rate notices and bills and that it is very hard for the family members when someone else is holding the purse strings. And they often have no access to the Guardianship Tribunal or you as public trustees, so to speak, in order to resolve these issues. Some of the submissions have been quite incredible. They say these groups will not respond to their approaches. They try to get some information on why these accounts are not being paid, and there is no response. What are the particular rules, conditions, guidelines or criteria associated with you as the trustee to ensure that you are adequately, or in a timely manner, paying accounts and bills and managing those finances? Because there are heaps of submissions to this inquiry that indicate that that is a major problem.

**Mr Fitzgerald**—With each individual case we collect all income and pay all the bills, and we make our best endeavours to get them paid on time. In the majority of cases, I think we do a very good job in making sure that all the bills are paid. Occasionally some might slip through the cracks, but if that is brought to our attention by a family member it is acted on straightaway. We are also happy to talk to family members. We have traditionally tried to get an appropriate family member nominated in the order who can act as a family representative. We can have a proper and open disclosure, under privacy, with that family member so that, if there are any decisions that a family needs to be involved in or there is any information the family would want, they have got a contact person that we can deal with who is nominated on the tribunal order. We have mechanisms for family members to raise issues with us that are separate from the consultant that is appointed. We have client relations officers so, if our client's family have got a complaint, they can raise it, and we take prompt action when that happens. So there are mechanisms in place for dealing with inquiries from family members that I think would cover most of the scenarios that you have outlined. We endeavour at all times to make sure that everything is kept up to date, from both an income point of view and a bill payment point of view.

**Mrs HULL**—Do you get paid for doing that?

**Mr Fitzgerald**—Yes, we do.

**Mrs HULL**—Do you get paid from the person's wealth?

**Mr Fitzgerald**—What happens is: the tribunal, when they issue the order appointing us as guardian, sets out a schedule of fees in the order, which we follow. Where the individual has insufficient assets or income to meet those fees, there is a community service obligation contract that we have with the Department of Human Services, where the loss that we would incur on that particular client is topped up by the state government under that contract. So, if the client does not have sufficient worth to be able to afford the fees that are sanctioned by the tribunal, the state government picks up the tab, effectively.

**Mrs HULL**—Is there any difference in the service level that is provided?

**Mr Fitzgerald**—Absolutely none. Irrespective of who pays the bill, we provide the same level of service to all of our clients, which is based on the premise of trying to act in the client's best interest at all times. That is a commitment we have given irrespective of who pays the bill. The same level of service is provided to any of those clients.

**CHAIRMAN**—Thank you, gentlemen, for appearing before us.

[4.33 pm]

**JETER, Ms Lillian, Executive Director, Elder Abuse Prevention Association**

**CHAIRMAN**—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Would you like to make a brief opening statement of, say, a couple of minutes before we ask some questions? What have you given us here?

**Ms Jeter**—I looked at the categories that were in your terms of reference and I tried to pick some materials that would cover most of them. As Mr Fitzgerald recently attested, there are some recent laws in the United States dealing with the mandatory reporting of banking and financial institutions. There are four separate statutes from four separate states—California, Massachusetts, Maine and Hawaii. I also looked at the discrimination issue and put in the human rights, not only from the United Nations, of which Australia is a charter member, but also the residential care—

**CHAIRMAN**—Perhaps the committee can resolve to receive these documents as an exhibit.

**Mr MURPHY**—I so move.

**CHAIRMAN**—There being no objection, that is so ordered. Thank you, you can go back to your opening statement.

**Ms Jeter**—As I said, I put in not only the United Nations charter of older persons, to which Australia is a signatory, but also the charter of rights that hangs in every single residential care facility under the Aged Care Act. I have put in some information on our association, as you can see, at the rear and also some general information.

**CHAIRMAN**—Your organisation is not particularly well known, at least to me, being from Queensland. How do you advertise it and tell people what services you provide?

**Ms Jeter**—We are a national organisation. We were incorporated in December 2002. We are not government supported, we get no government funding, so I do not have a \$400,000 marketing budget so that we can get the word out like some of the bigger organisations.

**CHAIRMAN**—How are you funded?

**Ms Jeter**—We are funded through private sponsorship, through donations, bequests, memberships and our seminar training—we are doing our third national seminar in August.

**CHAIRMAN**—Are you of the view that the legal profession has adequate skills to serve older Australians in the area of elder law?

**Ms Jeter**—No, I am not in agreement with that. First of all let me say that I am now a dual citizen, so what I talk about today is also my future. I became a citizen of Australia on 20 December 2006. I am not one of these buzz in or breeze in and then fly back out people.

**CHAIRMAN**—I was not suggesting—

**Ms Jeter**—No, I know you were not, but I want to make that perfectly clear, and that we are also talking about my future because I am not getting any younger either. I have had 23 years in elder abuse, coming from a policing commander career of 25 years. I am now in my 23rd year of just elder abuse, spanning two continents and research from around the world. I came here in January 2000 and the association was incorporated in December 2002 under the premise that we did not think there were adequate systems in place from the community perspective not only at the level governed by the state and territory governments but also at the federal level in your residential care facilities. That was how we gave birth, so to speak, to the association. We are all volunteers; none of us get salaries through the association. My board of directors are volunteers, along with me.

**CHAIRMAN**—How do you evaluate your work and the impact of your initiatives?

**Ms Jeter**—We evaluate it because of our going on *Lateline* on 20 February 2006 and as a result, five months later, the federal government with Senator Santoro put together a \$100 million package. I was one of the signatories to the submission that went to him in June 2006. He made the announcement in July 2006 for that package, which has already become law in parliament, went through Senate inquiries and will become effective on 1 July. That was my submission; it was my recommendations that were put together in that four-page submission.

**CHAIRMAN**—What are the main challenges faced by your organisation in meeting its objectives? You mentioned you were funded from the private sector. Are you adequately funded?

**Ms Jeter**—No, we are not. We have to fight for every dollar that we get. And we are not sexy either—I do not think there is anything sexy at all about elder abuse. We are fighting for the same charity dollars as children's charities and the not-for-profits, but we are not the future and we are not something that can be put in front of the cameras and look innocent and helpless. I am not putting down children's charities, but it is not a pretty picture to see older people being neglected, abused, exploited or mistreated in residential care facilities or in the community as a whole.

**CHAIRMAN**—Mr Murphy is about to go. Do you have any questions you want to ask?

**Mr MURPHY**—I was only going to ask: what is the worst case of abuse you have ever experienced?

**Ms Jeter**—After 23 years, one of the worst cases was the one at the Mt Eliza facility back in October to December 2005. There were four victims involved, and they were all allegedly sexually assaulted by the same temporary male carer. It is still a criminal case, so I say 'allegedly' and 'innocent until proven guilty'. It was a criminal incident involving his sexual assaults, multiple times on all four victims. These victims were females in their 90s, all bedridden with late stages of dementia. He is, or was, or allegedly is a sexual predator in that he

took the control, domination and accessibility of being the temporary carer in that facility. But it was also a systemic failure in that five separate witnesses from that facility—Div 1s, Div 2s, and PCAs—made 12 separate incident reports to the director of nursing that got torn up and not reported.

**CHAIR**—Where was that facility?

**Ms Jeter**—Mt Eliza, the George Vowell Centre.

**Mr KERR**—I am just working my way through all the documentation you have provided us with. It is remarkably substantial, so excuse me if I am not quite over the work that you do.

**Ms Jeter**—That is all right.

**Mr KERR**—In the submissions we have received there seems to be a general focus on financial abuse of older people. Areas that have come across most repeatedly have been in relation to the potential misuse of enduring powers of attorney and pressure to agree to dispositions of wealth to family members often, or to a close associate. There have also been issues regarding the residential villages and, finally, there have been issues regarding reverse mortgages. Do you have anything that you think would be interesting for us to be aware of regarding that, before we go to physical abuse? Just by way of background, we have heard a lot about these subjects, but from your experience in those three areas, is there anything that we should be particularly aware of?

**Ms Jeter**—I think the first thing you should be aware of is that that is the most easily investigated type in this plethora of elder abuse that we are talking about, and when people say that that is the most commonly committed type of incident, I disagree with them. It is the most easily explored and easily investigated type, and because of that we have more cases that can come to fruition.

But, having said that, I think one of the biggest challenges is that we have legal solicitors out there every single day doing legal transactions. There are no checks and balances whatsoever throughout Australia on their moral and ethical stature in signing over or creating wills, powers of attorney, enduring powers of attorney or titles to property. There are a lot of solicitors and no way to gauge how many have the legal licensing and do it legally. I call it the three-for-one deal. Today and today only, the adult son comes in with his mother who still has capacity, so she can still sign, but the undue influence, duress and manipulation from that adult son to the mother is taken before a new attorney of record—not the family attorney, because they would have too much history on the mother in her lifetime. They pick one out of the phone book because they know they want the moneys by doing those three things. It is done in a very quick and short period of time without any consultation or taking the mother into a private area to make sure she knows the ramifications of her signing those documents and giving that power over to the adult son or daughter, trusted other or a neighbour in some cases. To me, that is very crucial: we do not have worked into our protective statutes checks and balances on the very solicitors who make these legal transactions on a daily basis that change forever the lives of people who walk into those arrangements already in an undue influence type of situation.

**Mr KERR**—That would deal with the powers of attorney issue, but you could equally have a situation where a person draws up a new will. Such a will does not need to be witnessed by a legal practitioner; it can be witnessed by any two independent nonbeneficiaries.

**Ms Jeter**—That presents another problem. I have been told by solicitors that, when they want a witness, they call the secretary in to witness the enduring power of attorney or whatever. What I am saying is that there are a lot of loopholes. By no means am I saying that it is a broadbrush on the legal fraternity, but it does happen and we need to be aware that they are not looking at it morally and ethically but only for profit and because they have the legal licence. That is just one example.

**Mr KERR**—I accept that people make judgements about these things that are ultimately found to be the subject of judgements that you or I would not make. But I suppose a solicitor's ultimate responsibility is to satisfy themselves that a person is of testamentary capacity—that they are able to make adult and responsible decisions. Normally we do not ask our professionals to second-guess us in terms of our instructions or judgements. I understand why this can be an abuse and that people can prevail upon and sweet-talk their parents into decisions that you or I think would think they should not make. If you came into my office to sign such a document before me, I would have to satisfy myself that that was a willed and voluntary act by a person of testamentary capacity, a person who was freely exercising their own will on their own account.

**Ms Jeter**—I understand what you are saying.

**Mr KERR**—But how do I go behind that?

**Ms Jeter**—A lot of times you do not. You have to realise the interaction in the relationship of the two who are sitting in front of you. We have very ethical and moral legal alliances with a number of legal firms who would take that older person to one side, in private—even if it takes three separate solicitors to speak to them—and then make a determination as to whether to sign or allow the process to go forward. The problem is that they can still walk out the door and go to another firm or another sole solicitor who will sign it each and every time every minute of the day. Again, there should be checks and balances. These people are not neurogeriatricians, neuropsychologists or psychiatrists; they are solicitors. They have nothing to do with mental assessments. Those same law firms have told me that, if the person looks like they are cognisant and have the capacity, they have to go on that—but that those same people could be on the sidewalk talking to the air, and it would still be a legal document. That was out of the mouth of solicitors. I understand what you are saying but in this sort of relationship it is not simply sweet-talking. We are talking about adult sons, daughters and family members and trusted others and neighbours who have infiltrated themselves into that older, now dependent, person's life and have, through manipulation and coercion, completely taken over the older person's life.

**Mr KERR**—I understand that. One of the most hideous things that I remember happening is that the managers of an aged-care facility—which is now, fortunately, no longer in existence—would take their older, otherwise homeless clients to the bank to withdraw all their funds. If you have someone presenting themselves superficially as a performing a willed act, with their accountant and what have you, it is difficult to detect, as you would know. In most jurisdictions, powers of attorney are required to be signed and witnessed by a lawyer.

**Ms Jeter**—Yes.

**Mr KERR**—They do not in my own state of Tasmania. They can be signed and witnessed by an independent party. But wills do not have to be signed by a lawyer. There are so many opportunities if you wish to be manipulative of an older person, to close one door and, in a sense, have a regulatory regime that makes that particular mechanism watertight. It does seem to fix this problem very much. The real issue is whether there is any effective mechanism to enable us to be more useful when it comes to protecting the interests of older people, particularly when in many instances they will say that what they are doing is what they want to do.

**Ms Jeter**—Of course they are going to say that if the other person in the other part of the relationship is sitting right beside them. Even in a private situation, even through VCAT or the various civil tribunals, they still know they have to go back home with that person and they will be there one-on-one in an ostracised type of situation. Keep in mind that we see the worst of the worst. I realise that there is a happy world out there too and there are loving families and adult children who take care of and will do everything in the world for their ailing or debilitated parents. I am only telling you from my experience of 22 years what we see and, to me, it is only going to get worse with the ageing population.

We have got a new generation coming along. I am 52 and I was brought up to respect the dignity of my grandparents and my mother and father, but now we have got some ‘me’ generations coming up that do not want to wait on inheritances, and they will work around the law to get the moneys now. They do not want to wait until after the fact of death for the will and the estate. Unfortunately we do not have the protective statutes in place to curtail that activity from happening, in my opinion.

**Mrs HULL**—I am with you. I think that it is like having the sheep pen with the gate open and a hole in the fence. You decide to shut the gate and you are going to lose some of your sheep through the hole in the fence but you are not going to lose the whole flock out the gate. I do not understand how you can say that it is not going to resolve all the problems. It will simply not resolve all the problems but it will stem a significant amount and it will also bring attention to the fact that you have to be responsible when you are going to be undertaking a power of attorney on somebody’s life. Do you see the need for a national structure? We have implemented family relationship centres to try to take some of the flow from the family law court in the interests of children. Do you see a similar structure nationally that can enable families to positively resolve issues around the care and the needs of an elderly parent?

**Ms Jeter**—I think that dispute resolution or mediation is fine. I think the bigger need though is protective criminal statutes. In other words, we are not holding those manipulators and those coercers responsible under the law for their criminal acts—and in saying ‘criminal acts’, yes, I am talking about adult sons and daughters. You can sit there horrified, and a lot of people do and a lot of people are judgemental because of that. The people we are concerned about are in the first stages of dementia or they might have very crystal clear capacity but otherwise they are dependent because of physical needs or physical handicaps. They are fearful and they are intimidated. They feel guilty in some cases and they are embarrassed. This is their own son or daughter doing this to them. So along with what you are saying down the path, so to speak, my first call would be specific: to deal with elder abuse we need criminal statutes that are specialised and specific to our older Australians and those that are dependent.

**Mrs HULL**—I agree with you.

**Ms Jeter**—Right now we have criminal statutes that are for all adults. We have specialised children's statutes that are protective in nature, and rightfully so; we need the same complementary specific statutes for our older Australians who are in that particular category. I know there is a question of choice and people still having the capacity to make their decisions et cetera. I am not talking about the ones who are still bungee jumping, marathon running and living an independent healthy, wealthy life; I am talking about 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 do not know about other state laws, but in Victorian law it is equal to incapacitation. 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.

**Mrs HULL**—I agree with you.

**Mr KERR**—I hear all this and I understand it and I respect it. The worst abuses are obviously crimes and should be treated as crimes and knocked out. It is not just about sons and daughters who abuse their elderly parents. There are instances that I am aware of, for example, where caregivers have provided care for 20 years or 30 years for a parent expecting that on their parent's death they would inherit something of the estate and instead the parent gives it entirely to somebody else. There are things that you could regard as financial abuse perpetrated on carers as well.

**Ms Jeter**—Certainly.

**Mr KERR**—Carers are in a terrible position. I really am worried about—

**Ms Jeter**—I am not talking about those carers.

**Mr KERR**—No, but I am worried about the characterisation of the act of providing care for somebody as if it carries with it some derogatory component. In the very difficult situation where, for example, a parent has become senile and has made arrangements for a power of attorney, people make decisions about the use of their funds. They might not always be judgements that we agree with but I am not certain that we would always characterise them as criminal judgements.

**Ms Jeter**—I am not talking about the caregiving role. Carers do 24-hour days. My family has been through that same role with my grandmother when there was not even a name for Alzheimer's. We kept her at home because the nursing homes were not fit to put an animal in. I was also the administrator, both medical and financial, for my father for seven years. I know the other side of the coin. I respect and put up on a pedestal those carers who sacrifice, in some cases, most of their adult lives for their mother or their father. There are those who do that every single day without any benefit, any reward or any 'atta boy' whatsoever, but we cannot sit here and pull the wool over our eyes that there are not the other types of carers who see the opportunities and the accessibility of exploitation, of coming into that relationship at a time when their mother or father slip and fall or become dependent, regardless of whether it is caused

by disability, disease or physical ailment. Those are the ones I am talking about, not the ones who you speak proudly of. They are over here and, yes, we should reward them more.

**Mr KERR**—I suspect that there is a terrible continuum between shades of white and saintliness and reprehensible evil that should be punished. Many people are in the middle where there is give and take. People caring for an elderly parent for 15 years may say: ‘It is fair for us to benefit a little bit for this. Old Bill will never wake up again. He does not know what is going on.’ All I am saying is that there is a tricky middle ground where most people are. The law never intruded into these areas in the past.

**Ms Jeter**—I understand that, but we are also talking about criminal acts. I do not see it as a continuum at all. I see those who are doing the right thing and those who are not doing the right thing.

**Mr KERR**—Take, for example, a parent who has made provisions over the years, who has given their sons and daughters \$10,000 a year, who becomes senile. The sons and daughters, in the management of their parent’s affairs, in the exercise of their power of attorney, continue to give themselves \$10,000 or \$20,000 a year. Is that a criminal act? I do not find these issues as simple as some people put them. It is quite common for parents to say, ‘I want you to have something during my lifetime,’ and to make frequent payments to them for a whole range of reasons. Then there is power of attorney granted and the parent becomes senile. Under some laws you are not allowed to advance money for your own benefit, but certainly in my state of Tasmania you can provide power of attorney to your son or daughter in the confident expectation that they will continue to benefit themselves. It is not a breach of trust or a crime. I am not troubled by the idea of cracking down on people who abuse in fraudulent ways or deceitful ways, or who steal from, old folk. That is a terrible thing. But I think there must be a whole continuum, from people who give saintliness a good name by caring for elder people without any expectation of reward, to most people, who are in the middle in a give-and-take situation. They expect some kind of recompense—the additions to the house being paid for so that they can care properly for their parents, or the modifications to the car being paid for so that they can take their parents out.

**Ms Jeter**—I think a reasonable thing to do, which is based on what you are talking about—and I did the same thing with my father—is to do a tax deduction, a tax benefit, a gifting that took that amount of money off his total so that Uncle Sam, so to speak, would not get it. Those are reasonable deductions. But we are talking specifically. What I have found in these types of cases was not just clear-cut financial exploitation sitting by itself in that one family situation or that trusted situation. It always has other degrees of abuse that surround it, and that is when you know beyond a doubt that it is manipulative and coercive. You might have neglect, mistreatment, physical abuse or psychological abuse. So it is not just financial exploitation standing on its own.

**Mr KERR**—That is what I am trying to get to.

**Ms Jeter**—Exactly, and I agree with you totally.

**Mr KERR**—We are dealing with a bundle of cards that show that some kinds of conduct should be treated as crime.

**Ms Jeter**—Along with other factors.

**Mr KERR**—Yes.

**Ms Jeter**—Yes. As investigative police officers, we had to prove the case beyond a reasonable doubt. If we could not then it would not go into a criminal court. It was always commingled. Financial was always a part of it. I never had a case, except in residential care, where the moneys were not involved somewhere, where the greed was not involved somewhere.

**Mr KERR**—It strikes me that we have had very little evidence about the physical abuse of the elderly, and yet I suspect there is a greater degree of physical abuse of old folk than is generally thought.

**Ms Jeter**—Again it is a one-on-one situation, and the community is ostracised, behind closed doors. The manipulator has pushed away all the eyes and ears that can come in. They even get rid of some of the services and community care agencies. It happens behind closed doors. The person to pick up the phone is the victim, who is fearful and intimidated. There is also a dichotomy of love and hate, because the hand that feeds you is the same hand that hits you, pinches you or strikes you. As I said before, in all of those years I have never had victims pick up the phone and say: ‘Please help me. I’m being abused or struck by my trusted other family member.’ Always the reporting has come from the outside through agencies or those that give services to older persons. So, yes, if we had a verifiable means of reporting in all the states and territories, you would start to see the cases coming through. But right now in Australia there is no reporting mechanism.

**Mr KERR**—Did you get what you wanted with the changes to the federal law that you mentioned had come about through your intervention?

**Ms Jeter**—Did I get what I wanted or what I proposed? I do not think this was Lillian’s wish list.

**Mr KERR**—You put it that way.

**Ms Jeter**—From my perspective it was and I was asked specifically by—

**Mr KERR**—Did you get all the reporting things that you sought?

**Ms Jeter**—No, the senator left out 10 per cent—and I think it was the biggest and most important 10 per cent.

**Mr KERR**—Can you clarify that?

**Ms Jeter**—Yes, I certainly can; I do not mind doing that. Very succinctly, I wrote in all of the definitions and I provided criminal statutes for all of that which is happening—I am only talking about in residential care—behind residential care doors, from psychological abuse, to neglect, to mistreatment, to financial exploitation, to serious physical assault and sexual assault. The senator, in his final submission for the Aged Care Act, and everybody else that he consulted with only chose to compulsorily report on serious physical assault and sexual assault because they are

not prevalent but they are not isolated, plus they are also covered by criminal statute. So it was a win-win to take something that was already on the criminal statute that nobody would ever say we should not report on. But the problem is all of those other categories that I mentioned: they happen in some facilities each and every day. I am asking the three of you: is this what we want for our protection of older vulnerable Australians, to negate those categories that are being violated every single day against older Australians who are suffering?

**Mr KERR**—Could you help us by dropping us a note about what you think remains to be done by way of reporting obligations?

**Ms Jeter**—I will give you the submission that I submitted to him.

**CHAIRMAN**—If you could in particular draw to our attention what was not implemented.

**Mr KERR**—Yes, because that helps us.

**Ms Jeter**—No problem whatsoever, and it will be perfectly clear.

**Mr KERR**—The other issue is that there is a whole range of community organisations that go into households, such as Meals on Wheels and Red Cross. Do you think there should be some form of compulsory reporting of—

**Ms Jeter**—No doubt.

**Mr KERR**—Does that exist anywhere?

**Ms Jeter**—It exists in the United States.

**Mr KERR**—Right across?

**Ms Jeter**—Out of 50 states, 46 have what they call ‘mandatory reporting’ over there. That is too American so we call it ‘compulsory reporting’ over here. Those are the eyes and ears of what I was saying. The victim will not pick up the phone. It is through those services coming in—through their suspicions or their actually seeing the bruising or their seeing the dynamics within that home—that you identify if abuse or neglect or mistreatment or financial exploitation is actually going on. It is through the eyes and ears of those trained observers. Otherwise it will always be a hidden problem and there will be suffering throughout the communities throughout Australia. It also takes money and it also takes reporting mechanisms. Think of child protective services. I am not calling adults children by any means. I am referring to a similar system at the other end of the family spectrum to protect and to recognise and to report. But you have also got to investigate. What exactly do we have upon report? I am referring to having trained investigators—not police—going in. They can call the police if it is possible criminality. It gets that particular family situation—

**Mr KERR**—It can be just incompetence, can’t it?

**Ms Jeter**—It can be.

**Mr KERR**—Thank you. I would welcome anything that you can add about the US framework on mandatory reporting from service providers into homes. It seems to me to be an interesting difference. I do not think we have got it in Australia.

**Ms Jeter**—No. In 1986 we put it in for the first time. I was a part of 20, from all disciplines, who went to Washington DC.

**CHAIRMAN**—If you would give us a paper on that we would appreciate that.

**Ms Jeter**—I will.

**CHAIRMAN**—Thank you very much for your time; it is greatly appreciated. You are obviously very committed in this area.

Resolved (on motion by **Mr Kerr**):

This committee authorises publication of the transcript of the evidence given before it at public hearing this day.

**Committee adjourned at 5.09 pm**