WHOSE PENSION IS IT?:

SUBSTITUTE PAYEES FOR MENTALLY INCOMPETENT PENSIONERS

By Robin Creyke *

As at June 1990 over 2.7 million people[1] were in receipt of pensions and benefits from the Australian Government - value $17.2b[2]; of those pensioners and beneficiaries, in excess of 111,000 were severely mentally incompetent.[3] This paper is about the mechanisms used by the principal income support Departments, the Department of Social Security and the Department of Veterans' Affairs, to permit a third person (or substitute payee) to manage the pension funds of a mentally incompetent pensioner.

Existing mechanisms are the 'nominee system'[4] (a form of agency) available under the *Social Security Act* 1947 (Cth), and the trusteeship system[5] provided by the *Veterans' Entitlements Act* 1986 (Cth). Section

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1 There were 2,121,562 people in receipt of social security pensions and benefits as at June 1990 (figure supplied by Department of Social Security, 21 September 1990). In addition there were 624,365 service pensioners, disability pensioners and war widows receiving pensions and benefits from the Department of Veterans' Affairs *(Explanatory Notes 1990-91 to Budget Related Paper No. 6.43,* Community Services & Health Portfolio (Department of Veterans' Affairs).

2 The expenditure outcome for 1989/90 for social security pensions and beneficiaries totalled $13,846,367,000 ie $13.8b (figures supplied by the Department of Social Security, 21 September 1990, Expenditure Outcome 1989/90). The equivalent figure for those in receipt of pensions, benefits and allowances from the Department of Veterans' Affairs was $3,396,896,000 or $3.4b *(Explanatory Notes 1990-91 to Budget Related Paper No. 6.43)*, Community Services and Health Portfolio (Department of Veterans' Affairs).

3 Australian Bureau of Statistics *Disabled and Aged Persons Australia, 1988* Cat No 4118.0, Unpublished Table 1, *Handicapped Persons: Number of Persons by States and Territories by Pension Receipt by Type of Primary Disabling Condition by Severity of Total Handicap, Australia, 1988.*

4 In the USA, the equivalent scheme is known as the representative payee system (Social Security Act 42 USC s 301 *et seq)* in the UK it is known as the appointee system (Social Security (Claims and Payments) Regulations 1981 r 26). In the latter jurisdiction there is also an informal agency arrangement which permits someone else to sign for and collect social security benefits. *(The Law and Vulnerable Elderly People* Mitcham, Surrey, Age Concern England, 1986, 96).

5 There is a scheme available under the *Veterans' Entitlements Act* 1986 s 122 for appointing an agent of a pensioner but it only applies where the pensioner is competent, *Veterans' Entitlements Act* 1986 s 122(3), (3A)(c). It is used, for example, where the pensioner does

161 of the *Social Security Act* and sections 122 and 202 of the *Veterans' Entitlements Act* provide for the appointment of an individual or agency as payee (the 'nominee' as the person is known unofficially in the Department of Social Security), or trustee for receipt and disbursement of a person's pension, benefit or allowance. The pensioner or, if the pensioner is incapable, the Secretary of the Department of Social Security or the Repatriation Commission ('the Commission') may direct that all or part of a pension, benefit or allowance be paid to a nominated individual who is to use the money for the benefit of the pensioner. Since the Departmental schemes differ in significant respects they will be dealt with separately.

A. HOW MANY NOMINEES OR TRUSTEES?

It is impossible to obtain an accurate indication of the number of pensioners and beneficiaries for whom a substitute payee has been appointed. As the figures in the introduction indicate, in 1988 there were 111,100 people[6] in receipt of pensions and allowances who were classed as severely[7] mentally incompetent. The figure would not indicate the number for whom a substitute payee has been appointed since in many instances the arrangement for management of these funds would be informal.

In the Veterans Affairs jurisdiction, for the financial year 1987/88, there were, throughout Australia, 723 Commission trusts (see Department of Veterans' Affairs scheme, below) and 2,200 private third party trusts, a total of nearly 3,000 such arrangements.[8] As at 9 October 1990 the number of Commission trusts had dropped to 146 and there were 1,052 arrangements in the hands of Public trustees, a total of 1,198.[9] The number of private third party trusts is no longer available.[10] It is anticipated that by June 1991 almost no trusts will be being managed by the Commission.[11]

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not wish personally to draw the pension, is temporarily hospitalised or is going overseas (*General Orders Pensions* - the Departmental guidelines - para 5.1.2).

6 That figure is likely to be an underestimate of the number given people's sensitivity about reporting some kinds of mentally disabling conditions such as alcohol, AIDS and drug related conditions, schizophrenia and forms of intellectual disability. (Australian Bureau of Statistics *Disabled and Aged Persons Australia* 1988 Cat No 4118.0, 34).

7 Severity of handicap was determined for self care, mobility and verbal communication and a person with a severe handicap was either incapable of performing or needed personal help or supervision to perform any of the three kinds of tasks. (*Id* 39).

8 *Repatriation and Department of Veterans' Affairs Annual Reports 1987/88* Canberra, AGPS, 1988, 25. Comparable figures were not published in the 1988/89 annual report.

9 Figures supplied by the Department of Veterans' Affairs, 15 October 1990.

10 Information supplied by the Department of Veterans' Affairs, 15 October 1990.

11 Communication from the Department of Veterans' Affairs, 15 October 1990.

The Department of Social Security could not supply even rough figures on the total number of nominees. The reason given was that its database did not contain historical data and did not differentiate between capable and incapable pensioners who were using the scheme. However as at June 1990 there were 32,057 individual nominees.[12] Bureau of Statistics figures, however, indicate that in March 1988 there were 48,800 severely mentally incompetent pensioners who lived in health institutions.[13]

A combination of these figures suggest that roughly 82,000 nominee or trustee arrangements were in place on behalf of incapable pensioners in mid-1990[14], that is 74%, or nearly three quarters of the over 111,000 severely mentally incompetent pensioners are covered by the two schemes.

Not only are there large numbers of people using this form of substitute payee scheme, but the sums involved are sizeable. A war veteran, for example, who is entitled to a disability pension at the special rate (the former TPI rate) of $535.90 per fortnight,[15] receives $13,933.40 a year.[16] That sum is sufficiently large to be tempting to a person in sole control. The combination of the numbers of people, their vulnerability and the amounts involved underscores the need to ensure that there are adequate safeguards against misuse of the two schemes. The paper examines the Australian schemes and what protections they afford, looks at the equivalent English and USA schemes and concludes with some suggested improvements to the local arrangements.

B.(1) SOCIAL SECURITY NOMINEE SYSTEM[17]

Although the nominee system provides substitute financial management for individual pensioners, its principal use is to make bulk payments of pensions to institutions or groups of people. Kirkwood notes[18] that pensioners in 'benevolent homes'[19], in mental hospitals (some

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12 Figure supplied by Department of Social Security, 21 September 1990.

13 Australian Bureau of Statistics *Table 1. Handicapped Persons: Numbers of Persons by Type of Residence by Pension Receipt by Type of Primary Disabling Condition by Severity of Total Handicap Australia, 1988.*

14 The figures would include payees appointed on behalf of improvident pensioners. These are likely to be a small proportion of the total.

15 As at June 1989.

16 The pension is indexed twice a year. The figures given are those in force in September 1990.

17 Formerly the 'warrantee system'. Both titles are informal.

18 J Kirkwood, *Social Security Law and Policy*, Sydney, Law Book, 1986, 184-6.

19 A 'benevolent home' means 'a home conducted for benevolent purposes which is wholly or partly maintained by contributions from the Consolidated Revenue Funds of the Commonwealth or from the consolidated revenue of a State or of the Northern Territory and is approved by the Secretary for the purposes of this definition; ...' (*Social Security Act* 1947 s 3).

of which are classed as benevolent homes) and aborigines in some rural communities, are regularly paid by group cheques. So also are people in institutions, hospitals and nursing homes not classed as 'benevolent homes'. The superintendent of the institution, hospital or nursing home or the mission or station manager acts as nominee.

In addition, as Kirkwood commented, '[t]his provision is often used in the case of alcoholics to authorise payment to be made to somebody else in the claimant's interest' and in the case of 'persons newly discharged from gaol or released from custody'.[20] In many of those cases the scheme is adopted to prevent improvident behaviour or for paternalistic reasons; the beneficiaries are not incapable in the strict legal sense. These are examples of use of the device for reasons other than mental or physical infirmity. The nominee may be an individual or a state official such as the Public Trustee.[21]

(I) SETTING UP THE SYSTEM

There are two methods of arranging for payments to a nominee: written request by the pensioner, or order made by the Secretary of the Department of Social Security.[22] The second method is the one generally employed where the pensioner is incapable. The dual process is consistent with the use of the system for both competent and incompetent pensioners.

From a theoretical perspective there are considerable doubts about the validity of the nominee scheme, at least as it is operated on behalf of incapable pensioners. It is based on an ordinary agency arrangement. A fundamental weakness in such arrangements is that they lapse on the incapacity of the principal/pensioner. It might be argued that the specific statutory provisions have overridden the common law rules. However, if that was the intention it would be expected that any such change was express.[23]

Since the *Social Security Act* 1947 does not refer to incapable pensioners, much less that the scheme is designed to address problems of pensioner legal incapacity, it is arguable that the Act was never seen as

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[20] J Kirkwood *Social Security Law and Policy*, Sydney, Law Book, 1986, 183.

[21] Individual nominees may be appointed to protect dependants of the pensioner against the pensioner's improvidence. Thus, for example, a spouse may be appointed nominee where the pensioner is not adequately supporting the spouse or dependants. (See Social Security *Benefits Manual* paras 12.304, 12.311)

[22] *Social Security Act* 1947 s 161 (1), (2). See also Social Security *Pensions Manual* paras 20.112, 20.200, 31.500, 31.501, 31.511, 31.600, 31.601 and *Benefits Manual* paras 12.300, 12.301, 12.305, 12.801, 12.803.

[23] For example, the extension of ordinary powers of attorney, a form of agency, to operate as enduring power and hence outlast the principal's incompetence, is universally contained in special legislation or specific amendments to powers of attorney Acts.

overcoming this deficiency in common law agency rules. That conclusion is reinforced when it is appreciated that the principal purpose of the nominee system is to provide a mechanism for payments by group cheque for institutions. In addition, the paucity of safeguards in the legislation and the administrative guidelines (see below) also suggests that the legislation was not seen as addressing the capacity issue. If these arguments are accepted, insofar as the scheme relies on agency principles, it is operating on a dubious legal foundation.

(II) EXISTING SAFEGUARDS FOR NOMINEE SCHEME

There are some protective provisions in the Act and in the Department's *Manuals*. These are, as will be argued, inadequate. The abuses of the scheme against which protection is needed arise out of coercion of the pensioner to consent to the scheme, failure to check whether the pensioner is incapable, the conflict of interest inherent in institutions having authority over residents' money, and misuse of funds by nominees.

(a) Inalienability of pension. The *Social Security Act* 1947 states that, subject to specific legislative provision[24], pensions are to be absolutely inalienable.[25] That means the pension remains the property of the pensioner and cannot be garnisheed, attached, assigned or become a priority payment to a creditor in, for example, bankruptcy proceedings. There is an exception for tax.[26] These provisions may protect the pensioner or the nominee from having the pension diverted as a consequence of particular legal proceedings; they do not address the dangers of appointments made under duress or misuse by the nominee of the pensioner's funds.

(b) Voluntariness of appointment and duties of nominees. The *Pensions Manual* states, unless it would cause 'considerable delay' that '[both] the pensioner and the person receiving his or her pension should be interviewed prior to the transfer arrangements to ensure they are both aware of each other's responsibilities'.[27] That procedure, if adopted, would enable the Department to check the medical assessment of incapacity, the trustworthiness of the proposed nominee and whether

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[24] Eg *Veterans' Entitlements Act* 1986 s 125(2).

[25] *Social Security Act* 1947 s 249. See also *Pension Manual* paras 31.550, 31.551, 31.602; *Benefits Manual* paras 12.307, 12.400, 12.401. The effect of these provisions is best expressed in the *Benefits Manual* para 12.307 which states: 'It should be noted that a benefit is absolutely inalienable, whether by way of, or in consequence of, sale, assignment, charge, execution, bankruptcy or otherwise. Sub-section 184(1). For example, benefit cannot be assigned (through a court or otherwise) for the purpose of repaying debts owed by a beneficiary.'

[26] *Income Tax Assessment Act* 1936 s 218. See *Social Security Act* 1947 s 249(2).

[27] *Pensions Manual* para 31.602.

there appears to have been any pressure to make the appointment as well as advise the nominee of the duties of the role.

The expression 'each other's responsibilities' suggests that these are ascertainable. They are not defined in the Act (except for the inalienability provision) or the Manuals. As a matter of law they would include the fiduciary obligations of the nominee to keep the pensioner's monies in a separate account and maintain records of all expenditure on behalf of the pensioner. It is assumed that the expression refers to statements in the *Pensions Manual*[28], that the monies belong to the pensioner and must be used for the pensioner's benefit[29], that the nominee must notify the department of any changes in the pensioner's circumstances[30], and that either party can request that the arrangement be terminated at any time.[31] It appears that the nominee must also be an adult unless the nominee is the pensioner's spouse.[32]

In practice, such interviews, whether conducted by counter staff (for individual applicants) or by departmental field officers (in the case of applications by residents of institution) are conducted in less than 50% of cases.[33] No-one with medical expertise is present. The *Pensions Manual* indicates that where an institution is already using the group cheque arrangement no interview is required.[34] That is consistent with the fact that the arrangement is for the benefit of the institution, not the individual pensioner. Since an interview is conducted in less than half the cases it cannot be said to be an effective safeguard. Moreover even where an interview does take place, screening potential nominees for suitability is

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[28] See also Part B of Form SS269, the form used to establish a nominee arrangement:

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'(d) I will notify the Department of Social Security if the pensioner, beneficiary or allowee has a change in circumstances which Social Security needs to know about.

(e) I will notify the Department if it is necessary to change or cancel this arrangement'.

[29] *Pensions Manual* para 31.602.

[30] *Id* para 31.603. The nature of the changes which are being referred to is not specified. Presumably it could mean, if the pensioner recovers his or her competence. As it stands, the circumstances which may disentitle the nominee to continue in the role are unascertainable.

[31] *Id* para 31.604.

[32] The declaration in Part B of Form SS269 requires a statement by the nominee that he or she is over 18. See also *Benefits Manual* para 12.302.

[33] Information supplied by Melbourne Office, Department of Social Security, February, 1986.

[34] *Pensions Manual* para 31.602. It provides, *inter alia,* 'In the case of institutions, it will not be necessary to interview the payee if he or she has previously been interviewed and notified'.

apparently not a high priority given that requests for setting up a nominee arrangement are rarely refused.[35]

There are other apparent safeguards. The application form sets out the principal rights and obligations of pensioner and agent: the applicant must be competent at the time of the application, must declare that he or she made the request voluntarily and is aware of the right to cancel the arrangement; the nominee, whether an individual or institution, must formally accept the appointment, must certify that the payments will be used for the pensioner's benefit and 'will on request account for the use of each payment'.[36]

The last-mentioned obligation was not included in the previous form[37] and is valuable. The reminder of the right of revocation is also useful, but only for competent pensioners. In general, despite the statements on the application form and the notices sent to individual nominees outlining their obligations, since these may not be understood or attended to and there are no sanctions for breach, these safeguards are more cosmetic than real.

(c) Ceiling on deductions for board and lodging. A mixture of provisions is designed to avoid the whole pension being expended on board and lodging. Pensioner contribution to nursing homes[38] is set at 87.5% of the maximum pension. Excess of $1.00 or more is paid to the pensioner or his or her nominee.[39] As from 1991 a similar restriction is to apply to hostels which come within the *Aged or Disabled Persons Homes Act* 1954. No person is to be left without at least $20.89 per week after deduction of board and lodgings.[40]

In the case of institutions other than Commonwealth funded nursing homes and hostels no such ceiling applies. Although the *Manuals* provide that 'it is desirable that the person should have some portion of the pension at his disposal'[41] and '[w]here an institution requires an inmate to hand over all his or her pension as a condition of admission, care should

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35 J Kirkwood *Social Security Law and Policy* Sydney, Law Book, 1986, 183. This conclusion was confirmed by Departmental officers in a conversation with the author on 21 September 1990.

36 Form SS269, Part B, (h).

37 Form SA33.

38 By June 1991 practically all nursing homes will be prohibited from charging more than this percentage of the pension (including rental allowance but excluding the pharmaceutical benefits allowance introduced in the 1990 Budget). A practical difficulty for the Department is that there is, at present, no facility for splitting pension payments. The Department is hoping to address this problem in the near future. (Information supplied by Department of Social Security, 21 September 1990).

39 *Pensions Manual* para 20.131.

40 *Aged or Disabled Persons Homes Act* 1954 (Cth) ss 10B-10G.

41 *Pensions Manual* para 31.512.

be taken that the pensioner's consent was given voluntarily' (emphasis supplied)[42], no indication is given as to how this care should be taken and bland statements of that kind are unlikely to be effective deterrents.

(d) Penalties and reviews. Although the Department will investigate any abuses which come to its notice[43], in cases where the pensioner is incompetent and the other party most likely to know of abuse is the perpetrator, notification is unlikely. When the nominee is a family member, the pensioner, if aware of what is happening, may be unwilling to shame the family by publicising the wrongdoing.[44]

The penalty provisions in the Act do not appear to be directed to abuses of these kinds. For example, the *Pensions Manual* para 33.000 states 'Where a person in receipt of a pension, benefit or allowance fails to furnish a statement ...' (emphasis supplied) the person can be prosecuted. The provision refers to a failure on the part of the pensioner rather than his or her agent. Similarly the section on conducting the interview with alleged offenders requires that the investigator ask, for the purpose of identification, are you 'the person who completed, signed and lodged the pension claim form?'.[45] That again precludes the nominee.

Misrepresentation is defined in wider terms. It is an offence for anyone 'knowingly or recklessly [to] make or present to an officer a statement or document which is false in any particular'.[46] That provision would be capable of covering a forged SS269 form or an untrue statement by a nominee that a person was incapable.

In general, however, the irrelevance of most penalties to breaches by nominees of the penalty provisions, coupled with the passive role adopted by the Department, mean its investigatory and penal powers are unlikely to be effective sanctions against abuse.

The most valuable safeguard, regular monitoring of the operation of the system, is not being implemented. As part of its attempts to improve its service and administration, the Department, since 1987, has placed more emphasis on the use of mobile review teams, and has instituted new review arrangements for sickness beneficiaries and invalid pensioners.[47] However, the selection of review areas is based 'on groups and areas

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42 *Id* para 20.201. See also para 31.512.

43 *Id* paras 20.201, 31.513. The *Pensions Manual* states that the Department will review the arrangement 'immediately any allegations of misuse of the payment are received', and unusual and problem cases must be referred to State headquarters.

44 Such a case was brought to the writer's notice at a meeting of the ACT council on the Ageing, August, 1987.

45 *Pensions Manual* para 33.402.

46 *Social Security Act* 1947 s 239(1)(d).

47 Department of Social Security *Annual Report 1987-1988* Canberra, AGPS, 1988, 103. These arrangements were included in the 1987/88 Budget and the 1988 May Statement.

where there is a higher than average risk of incorrect payment'.[48] These are identified from inconsistencies in data held by the Department or from local knowledge of regional staff and information supplied by the public.[49] There is no evidence to suggest that the review of nominee arrangements has been included.

A senior social worker in the Melbourne office of the Department said abuses only came to light in the rare cases where a third party reported them.[50] However, it is apparent, from largely anecdotal evidence[51], that such abuses do occur. Social workers have uncovered cases where individual nominees have kept payments for their own use or have allowed the incompetent person minimal amounts and retained the balance.[52] Problems arise more frequently with respect to group cheque payments. Although the Department must approve the financial accountability of institutions to which such payments are made[53], there have been claims that certain men's hostels in Melbourne and Sydney and special accommodation houses in Victoria[54] have adopted the practice of using all the pension or other payments towards accommodation expenses and have refused to allow the pensioner any monies for living expenses.[55] The result is that the pensioner becomes a virtual prisoner of the institution.

Despite these cases, since overpayments are uncommon, institutions are unlikely to advertise their practices and the veil of secrecy by family members is not likely to be lifted, except in cases of disputes between family members, abuses will rarely be revealed. Departmental social workers may come across examples but not in such numbers as to warrant deployment of the Department's limited mobile or other review teams. The new review programs, therefore, are unlikely to make any impact on preventing improper practices in this area.

(III) DEFICIENCIES IN NOMINEE SCHEME

It is apparent that there are deficiencies in the current scheme. Apart from its doubtful legality when used on behalf of incapable pensioners there are other matters of concern. Probably the major problem is that

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48 *Id*, 104.

49 *Id.*

50 Information from a senior social worker, Melbourne Office, Department of Social Security, February 1986.

51 For example, the Director of Social Work, Melbourne Office, Department of Social Security, commented in an interview with the author in February 1986 that the people most at risk of abuse under the system are former patients of mental hospitals and people with intellectual disability who have no family to support them.

52 Information supplied by social worker from Brisbane Office, Department of Social Security, February, 1986.

53 Information supplied by Central Office, Department of Social Security, April, 1986.

54 Information from Melbourne Office, Department of Social Security, February, 1986.

55 J Kirkwood *Social Security Law and Policy* Sydney, Law Book, 1986, 184.

the scheme fails to distinguish between nominees appointed to assist competent and incompetent pensioners. As a consequence the *de minimis* principle has been allowed to apply to the issue of safeguards. That is unsatisfactory.

A preferable approach is to provide for two schemes: an agency scheme with restricted departmental involvement for those pensioners who, for reasons other than incapacity to manage affairs, seek to have their pensions or benefits paid into an account in the name of another person; and another scheme (like the Department of Veterans' Affairs trustee scheme) for substitute third party payees for incapable pensioners. Such a division would be administratively more demanding, especially in relation to residents of institutions, but it is the only way that any effective protection can be accorded to incapable pensioners.

At present pressure on the pensioner to appoint a nominee is unlikely to be detected and there is no standard of capacity which might provide a check against unjustified appointments. The Secretary is given a virtually unfettered discretion to appoint nominees. Where the pension is the sole or principal source of income and the whole of the pension is used to pay board and lodging the effect is to remove pensioners' independence. The absence of any serious attempt to monitor the operation of the scheme to ensure that the monies are being spent for the benefit of the pensioner and the apparent inapplicability of the penalty provisions create the opportunity for the nominee to do with the money what he or she wishes.

The conflict of interest inherent in an institution becoming nominee is another problem. Nursing homes and other institutions do have a legitimate interest in being paid. That very interest disqualifies them from being disinterested in dealings with residents' monies.[56] It is not uncommon to hear stories of institutions which pool residents' excess funds and, at best, use them to pay for amenities in the institution (new curtains for the television room, bookshelves for the reading room), often without residents' consent and contrary to their wishes, or, at worst, purchase items for the sole benefit of institution staff.

The current system creates a right to have payments directed to a nominee who is to expend them for the benefit of the pensioner. However, any guarantee of that right can only be effected by some review mechanism. At present no effective one exists. The existing nominee system is passive and reactive. A more interventionist model which could be created by the introduction of effective review measures is essential.[57]

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[56] W Gaylin, I Glasser, S Marcus, D Rothman *Doing Good: The Limits of Benevolence* New York, Pantehon Books, 1978, 109.

[57] T Carney, 'Rewriting the Social Security Act: Just Another Act; or a Blueprint for Social Justice', a paper delivered at the seminar entitled 'Renovating the Social Security Act', Monash Centre, Melbourne, 30 July 1988, 8.

The large number of pensioners who use the scheme underscores the need to tighten its administration. The Department should be accountable for the public funds it distributes. The monies are intended for the pensioner, and his or her dependents, not other relatives, much less the proprietors, staff or other residents of institutions.

(2) DEPARTMENT OF VETERANS' AFFAIRS TRUSTEESHIP SCHEME

Section 202 of the *Veterans' Entitlements Act* 1986 authorises the appointment of a trustee to manage a veteran's pensions or allowances in cases where this 'is desirable' due to the veteran's 'age, infirmity, ill health or improvidence'.[58] The trusteeship provision is, therefore, the veteran's equivalent of the social security 'nominee' system, at least insofar as the latter scheme is being used for incompetent pensioners. The provision had its origin in the first regulations made under the *War Pensions Act* 1914.[59] Regulation 3 provided for a trustee for a pensioner 'of unsound mind'. Today the scheme permits trusteeships to be established not only for people who are incapable but also, under the 'improvidence' criterion, for those whom the Department considers to be irresponsible such as veterans suffering from alcoholism. Use of the trust avoids the possible invalidity problem associated with the nominee scheme.

The current test for intervention is unacceptable for two reasons: it is paternalistic (more stringent criteria than the Department's view that trusteeship 'is desirable' should be adopted); and it does not tie the disabling conditions to incapacity to manage affairs. Although that deficiency is corrected in *General Orders Pensions* (hereafter *General Orders)*[60] these have no legislative force and on an important issue of this kind the source of the rule should be statutory.

(I) WHO MAY BE TRUSTEE?

Section 202 states that either the Commission, an officer of the Department[61], or another party may be appointed trustee.[62] The Commission may act from the inception of the arrangement or as the successor to another trustee who dies or resigns.[63] The Commission will not assume trusteeship where an alternative arrangement is available.[64] State and Territory Public Trustees or other officials (such as the New

58 *Veteran's Entitlements Act* 1986 s 202(1).

59 War Pensions Regulations 1915, SR 41/1915.

60 *General Orders Pensions* paras 5.5.3, 5.6.1 to 5.6.3.

61 *Veterans' Entitlements Act* 1986 s 202A(1).

62 *Id* s 202(1).

63 *Id* s 202(4), (5).

64 *General Orders Pensions* paras 5.7.1, 5.7.6. Trusteeship by the Commission is a matter 'of last resort' (para 5.8.2).

South Wales Protective Commissioner) who are statutorily required to manage the affairs of people with forms of mental disorder, may also be trustee.[65] Where the Commission or a Departmental officer is trustee it may appoint a manager of the funds.[66]

It is apparent from *General Orders* that there is a preference for parties other than the Commission to act as trustee. The third party categories listed are relatives, solicitors and public trustee companies, matrons or employees of hostels or nursing homes and finally 'Government Authority Trusts', that is Public Trustees, the State Trust Corporation of Victoria, the protective Commissioner in New South Wales or guardianship and administration boards.[67] A factor to be taken into account in making the appointment is whether the person or body is already managing property of the pensioner.[68]

The inclusion of owners or employees of nursing homes or hostels is understandable given the known fact that many residents of such establishments are largely abandoned by relatives upon entry. However, both owners and employees, but particularly owners, are tainted by conflict of interest. It would be preferable for that category to be deleted since the Commission or other independent State authority is available to act.

The Commission is attempting to divest itself of its trusteeship obligations. That is in part because of the inefficiency entailed by the splitting of the management function. (Fragmentation occurs where the Commission is managing the pensioner's income while other bodies or individuals deal with the pensioner's other property.) It is also due to the Commission's lack of resources to perform the protective management role.[69] At present the Commission is directly responsible for only about 80 trustee arrangements.[70]

(II) EXISTING SAFEGUARDS

(a) Inalienability of pension. The *Veterans' Entitlements Act* 1986, like its counterpart social security legislation, provides that veterans' pensions are inalienable.[71] Deduction of tax owed is specifically provided for in the Act.[72] The criticism of inalienability as an effective safeguard in

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65 These arrangements are referred to in *General Orders Pensions* para 5.7.2 as (?) 'other Government Authority Trust (ie. State Guardianship Boards or Public Trustees)'.

66 *Veterans' Entitlements Act* 1986 s 202A (5).

67 *General Orders Pensions* para 5.7.2.

68 *Ibid.*

69 *Repatriation Commission Annual Report* 1987/88.

70 Information supplied by an officer of the Department on 10th September 1990.

71 *Veterans' Entitlements Act* 1986 s 125.

72 *Id* s 125(2), (3).

relation to the nominee scheme applies equally to the veterans' affairs scheme.

(b) Voluntariness of appointment and duties of trustees. Interviews of prospective third party trustees are carried out by Departmental social workers, or sometimes by a person in the prospective appointee's local community to whom the Department will delegate the function.[73] An explanation of the duties of trustees is given either during the interview or by letter. There is, however, no uniformity in the practice and not every person nominated as trustee will be interviewed.[74] The trustee's obligations are also outlined on the application form and details of the terms of the trust are provided on appointment.[75] The applicant for trusteeship must certify that he or she is aware of the trusteeship obligations when signing the application form and departmental officers deputed to act as trustees must also acquaint themselves with their legal duties and responsibilities.[76]

(c) Ceiling on deductions for board and lodging. The maximum deductibility provisions for nursing homes and hostels apply equally to veterans' pensions. The absence of such a limitation in relation to institutions not covered by existing legislation (for example, certain hostels and special accommodation houses) means that veterans resident in such places are, like beneficiaries of social security pensions and allowances, also at risk.

(d) Maintenance of identity of funds. Under the trusteeship arrangements, if the Commission pools trust funds it must keep individual accounts. The Act requires that the Commission maintain the identify of each person's monies so as to enable it to apply each veteran's funds for his or her benefit or for the benefit of the veteran's family or dependants.[77] That protects the veteran against use of pooled funds to benefit fellow residents of an institution rather than the individual.

(e) Departmental procedures. There are a number of procedures in *General Orders* which are designed to protect the veteran. The Commission's powers to act as trustee and to appoint, review and revoke trusteeships are delegated to limited classes of public servant.[78] Power

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73 Conversation with Program manager, Benefits Division, NSW Office, Department of Veterans' Affairs, 15 May 1989.

74 *Ibid.*

75 Form D2505.

76 *General Orders Pensions* para 5.8.2.

77 *Veterans' Entitlements Act* 1986, ss 201 (3B), 202(2)(b)(i), 202A(4).

78 *General Orders Pensions* para 5.5.2. In practice the delegation is made to Senior Determining Officers or Determining Officers (officers at the ASO 8 and ASO 7 levels in current Australian Public Service terms).

to appoint trustees in improvidence cases may be exercised by an even more restricted group.[79]

Where appointment is on the ground of mental incapacity, the relevant trusteeship application form states that the application 'must be supported by a medical certificate from a doctor'.[80] That is inconsistent with the *General Orders* which requires two medical certificates, one from a doctor and a second from another professional such as a social worker.[81] The latter requirement is useful since it recognises the value of non-medical assessment in determining functional competence.

(f) Reviews and revocation. *General Orders* provides that reviews are to be conducted of trusteeships assumed by the Commission[82] at least every 5 years.[83] Departmental practice is to review at more regular intervals when Departmental officers think circumstances have changed and review is warranted.[84] A program of regular reviews has, however, only recently been instituted and whether any abuses have been uncovered is not yet known. The arrangement also needs to be extended to trusteeships by private individuals.

An application to revoke a trust may be made at any time. Unlike the application procedure[85] there is no indicative list of those who may apply for revocation. Presumably the veterans who may request that the scheme be set up may also request that the arrangement be terminated. The pensioner, the trustee and employees or owners of nursing homes and hostels should also be listed. It appears that the trustee and the pensioner are envisaged as likely applicants from a reference to them as a possible 'complainant' about the management of the trust.[86] At present failure to specify categories of applicants means, presumably, that the class is unrestricted.

Revocation must be determined formally by the Commission or its delegate[87] but no indication of the procedure to be followed is given in *General Orders.* Continuation of the trusteeship is to be assessed against 'the criteria then in force'.[88] This Delphic statement may refer to

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79 *Id* para 5.6.5. The delegation is confined to Deputy Commissioners on the advice of a social worker.

80 Form D2605.

81 *General Orders Pensions* para 5.6.4.

82 *Id* para 5.11 - Reviews.

83 *Id* para 5.11.1.

84 Conversation with Program manager, Benefits Division, NSW Office, Department of Veterans' Affairs, 15 May 1989.

85 *General Orders Pensions* para 5.5.5 lists a relative, doctor, district nurse, legal representative or social worker as possible applicants for trusteeship.

86 *Id* para 5.11.3.

87 *Id* para 5.11.2.

88 *Id* para 5.11.1.

legislative criteria as supplemented by those in *General Orders*. The failure to be explicit is, to say the least, unhelpful.

The determination starts with an assumption that the person is competent. That is surprising given both its absence in relation to the initial application and the fact of the trusteeship. However, it may serve to redress the evidentiary problems faced by pensioners whose affairs have been managed for them during the currency of the trusteeship arrangement.

Another surprising statement is made in relation to reviews of trust mismanagement.[89] It appears to suggest that complaints should be settled using the procedures available under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). That Act only applies to 'decisions of an administrative character ... made ... under an enactment' and the clear implication is that it only applies to decisions of administrative officials.[90] That definition would not cover decisions made by a trustee under a trust even though the setting up of the arrangement was sanctioned by Commonwealth legislation. Such a decision lacks sufficient nexus with administration and its connection with Commonwealth statutory enactments is too remote particularly as it is made under another document (the trust instrument) interposed between the Act and the actor.[91] It is unlikely, therefore that the complainant could rely on that avenue for redress.

(g) Other protections. There are a number of other valuable protections provided under *General Orders*. In the first place there are quite stringent criteria for appointment. The pensioner will only have a trustee appointed where he or she 'lacks the legal and/or mental capacity to manage his or her own affairs'. That is further defined to mean that the pensioner is 'mentally incapable of giving another person instructions or because of age (as with minors) be prevented from doing so by law'.[92] The part underlined is nonsense. Minority results in legal incapacity for reasons of immaturity and inexperience not mental incompetence; it therefore provides no parallels for the grounds of legal incompetence in older people. That aside, the criteria of incapacity to manage affairs and inability to give instructions are both well recognised and frequently used. In a later paragraph in *General Orders* it is emphasised that the trusteeship must be 'absolutely necessary'[93] and that age, infirmity, ill health or improvidence (the grounds specified in the Act) are not of themselves sufficient to justify trusteeship. Each of those conditions must lead to

89 *Id* para 5.11.3.

90 *Administrative Decisions (Judicial Review Act* 1977 s 3.

91 Eg *Australian National University v Burns* (1982) 43 ALR 25; *Chittick and Anor v Ackland* (1984) 53 ALR 143; *Australian Broadcasting Tribunal v Bond* (1990) 64 ALJR 462.

92 *General Orders Pensions* para 5.5.3.

93 *Id* para 5.6.1.

inability to manage affairs[94] and as mentioned earlier (at 14) must also be attested to by a doctor and another professional.[95] It is apparent that the Department is prepared to adopt strict requirements as a pre-condition to use of its trusteeship scheme.

A sensitivity to the implications of substitute management is also apparent in the provisions about choice of trustee. Not only is the person's financial ability listed as a factor to be considered[96] but so also are geographic proximity to the pensioner, whether the relationship between the pensioner and the trustee is likely to be 'harmonious and enduring', the reliability and trustworthiness of the person, whether the person has sufficient time to undertake the often onerous responsibilities involved[97] and, so far as practicable, the wishes of the pensioner's family.[98] In addition it is specifically provided that departmental officers who are appointed as trustees must keep in regular contact with the pensioner's family and seek their views on the pensioner's welfare and financial needs.[99] Provisions such as these mirror the care given to such matters in the best and most recent guardianship legislation.[100] They are in marked contrast to their total neglect in social security legislation and *Manuals*.

(h) Benefits of trusteeship. Are veterans better protected under a trusteeship than an agency arrangement given the nature of the obligations of a trustee? Superficially the answer is 'Yes'. In practice the reality is probably less sanguine. Certainly trustees must comply with the investment provisions of trustee legislation[101] and must observe the basic obligations of a trustee, namely, that the trustee will not benefit from the trust and that the trust monies be expended solely on the beneficiary.

In practice, in many cases the investment protections may be illusory. A veteran who is wholly dependent upon a pension is unlikely to have any or substantial funds to invest. There are exceptions, such as when the initial grant of pension is backdated and a substantial amount of arrears is paid in a lump sum or where a veteran's health and nursing homes costs are paid by the Department and monies available from a pension accumulate. In these cases investments which comply with the strict provisions in trusteeship legislation would be better protected than if they were placed in less secure funds. However, since the trustee is not required by legislation to account and because of his or her condition the pensioner is incapable of monitoring the trustee's activities, there is no

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94 *Id* paras 5.6.2 - 5.6.3.

95 *Id* para 5.6.4.

96 *Id* para 5.7.2.

97 *Id* para 5.7.3.

98 *Id* para 5.7.3.

99 *Id* para 5.8.2(b).

100 Eg *Guardianship and Administration Board Act* 1986 (Vic).

101 Eg *Trustee Act* 1957 (ACT) which applies in conjunction with the *Trustee Act* 1925 (NSW) Pt II, Div 2.

certainty that the Act will be complied with. A trustee minded to use the sums for his or her own benefit rather than for the benefit of the veteran would be free to do so.

Where the trustee is the Commission, a departmental officer or a State official, public accountability is assured without recourse to trusteeship obligations. The requirement that individual accounts be kept[102], coupled with departmental accounting practices, would mean that monitoring does occur.

A deficiency in employing the trust is that there is no obligation on the trustee to expend the monies as the veteran would have wished. *General Orders* correctly states that, unlike the position in relation to agents, trustees are legally entitled to monies they receive on behalf of the pensioner and although they are under an obligation to expend it for the person's benefit[103] the trustee has a discretion as to what is encompassed by that notion and is not required to comply with the pensioner's directions. In other words the 'best interests' rather than the 'substituted judgment' principle is to apply[104] and that provides no guarantee that the individual's autonomy or wishes will be respected. Trusteeship also has the disadvantage that if a spouse is the trustee technically that person cannot use any of the pensioner's funds for his or her own purposes. That prohibition is unworkable where those monies are a principal or the sole source of the couple's income.

(III) CONCLUSION

Use of the trusteeship scheme by the Commission avoids the potential illegality, once the pensioner has become incapable, of agency-based schemes. It also recognises that a separate arrangement with appropriate safeguards is needed for incompetent pensioners. The application form (which contains clear statements of most of the principal obligations imposed on a trustee)[105] and *General Orders* lists the rights and duties involved. *General Orders* also includes reasonably stringent criteria to

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102 *General Orders Accounts* para 6.6.3 and Part 6.

103 Form D2505 states:

> 'If a Trustee is appointed, you are giving that person full control of your pension or allowance.
>
> The Trustee has the legal right to receive and retain your pension or allowance.
>
> The Trustee does not have to follow your directions on how the money is managed.'

That is a clear and explicit statement of the degree of control being granted. However, since the trusteeship scheme is only set up for pensioners who have become incapable the warning may be wasted!

104 *General Orders Pensions* para 5.3.2.

105 The requirement that the trustee may need to account for expenditure from the trust funds should be listed.

prevent unnecessary appointments, standards for choice of trustee and guidelines as to how the trustee must manage the funds. With some minor amendments such as the adoption of the substituted judgment rather than the best interests test, mandatory reviews at more regular intervals than 5 years, for all private as well as Commission trusteeships and attention to matters such as the limited operation of the inalienability provisions, the failure in the case of some kinds of institutions to have a ceiling on the amount of the pension that may be used for board and lodging and statutory authorisation of expenditure by a spouse/trustee for his or her own purposes, the scheme is workable. *General Orders* indicates a clear intention that the scheme should be operated so as to be sensitive to the individual rights and interests at stake and that is welcome.

C. SUGGESTED IMPROVEMENTS TO BOTH SCHEMES

It is apparent from the discussions above that existing safeguards, especially in the Department of Social Security scheme, are inadequate. What alternatives are there? Criticisms of the parallel schemes in the United Kingdom and the United States of America have been made[106] and solutions suggested in those jurisdictions will be explored.[107]

(1)(I) EXISTING AND PROPOSED SAFEGUARDS UNDER UNITED KINGDOM SCHEME

In the first place those to whom the scheme is to apply, persons who are unable to manage their affairs[108], are carefully defined. Social security staff are required to satisfy themselves that the requisite degree of incapacity is present. That is achieved either by interviewing the claimant or, if that is not possible, by obtaining medical evidence.[109] Such a procedure is a clear signal that people who are competent are not eligible to use the scheme.

In addition local officers of the Department of health and Social Security (DHSS) must assess the suitability to act of the proposed appointee. That is determined at an interview where the duties and

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106 Administrative Conference of the United States *Annual Report 1989* at 22 refers to a study being undertaken by Professor Margaret Farrell into the representative payee system for social security beneficiaries.

107 Eg US: John J Regan 'Protective Services for the Elderly: Commitment, Guardianship, and Alternatives' (1972) 13 *Wm and Mary L Rev* 569, 612-3; S J Brakel *et al, The Mentally Disabled and the Law* (3rd ed) Chicago, Illinois, American Bar Association, 1987; UK: *The Law and Vulnerable Elderly People* Mitcham, Surrey, Age Concern England, 1986, 104-113.

108 UK *DHSS Supplementary Benefits: Procedure Manual*, ss 9520-21.

109 *The Law and Vulnerable Elderly People* Mitcham, Surry, Age Concern England, 1986, 105.

responsibilities of the appointee are discussed.[110] There is a preference for appointing a close relative who has regular contact with the pensioner, failing which, an official in the local health body or the institution in which the person resides is the next choice.[111] Although these practices sound admirable whether they are always adhered to has been doubted.[112]

The relevant Departmental instructions require that a sufficient sum for the patient's personal needs be deducted weekly from the pension.[113] In other words there is a mandatory ceiling on deductions. There is no requirement that the appointee keep individual accounts.[114] That also applies in relation to bulk payments to institutions.[115]

There is a process for review even if it is not required at fixed intervals. Instructions are that DHSS staff must visit the appointee and the pensioner 'at intervals appropriate to the claimant's circumstances'.[116] However, though the timing of reviews is not fixed, a matter which has been criticised, by Age Concern[117] (a key non-government body concerned with issues to do with the aged), the principle is established that checks on the appointee and the pensioner should be made.

The conflict of interest problem is also an issue. The practice of appointing managers or proprietors of institutions to be appointees has been the subject of unfavourable comment by the Centre for Policy on Ageing.[118] It suggested that a social services appointee should be sought as an alternate payee since, if the proprietor acts, it 'makes it possible for hidden extras to be deducted from the personal allowance with no safeguards'.[119]

A number of recommendations were made by Age Concern to improve the operation of the English scheme. They echo those suggested later in this paper. The recommendations were that:

- appointments should be regularly reviewed;

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110 *Ibid.*

111 *Ibid.*

112 *Id* 109-110.

113 *DHSS Supplementary Benefits: Procedure Manual* s 9523.

114 *The Law and Vulnerable Elderly people* Mitcham, Surrey, Age Concern England 1986, 111.

115 *DHSS Supplementary Benefits: Procedure Manual* s 9551.

116 *Id* s 9538.

117 *The Law and Vulnerable Elderly people* Mitcham, Surrey, Age Concern England, 1986, 110-111.

118 *Home Life: A Code of Practice for Residential Care* London, Centre for Policy on Ageing and DHSS, 1984, section 2.6.5.

119 *The Law and Vulnerable Elderly People* Mitcham, Surrey, Age Concern England, 1986, para 3.2, 109.

- interviewing the pensioner prior to an appointment should be mandatory and doctors should be required to affirm in writing that appointeeship is necessary;

- there should be an obligation on institutions to keep accounts and these should be inspected;

- it was undesirable that institution staff should be appointed as agent;

- in all cases some portion of social security payments should be retained for the personal use of the pensioner and these sums should be expended on the pensioner or credited to his or her account;

- an independent panel of experts should be appointed to visit institutions, especially those acting as appointees.[120]

(II) CONCLUSION

The United Kingdom scheme suffers from and has recognised many of the same problems which have emerged in Australia. The best UK practices - a tighter definition of incapacity, confinement of the scheme to those who are incapable, greater emphasis on interview of both the pensioner and proposed appointee and the requirement that reviews be undertaken - have been recognised in Australia by the Department of Veterans' Affairs but not the Department of Social Security. The English scheme, however, still has deficiencies and the recommendations made by Age Concern are all matters which can and should be endorsed in the Australian context (see suggestions below).

(2)(I) PROPOSED AND EXISTING SAFEGUARDS UNDER UNITED STATES SCHEME.

In the United States three main questions have been identified:

- should an agency, especially if the agency is wholly or partly funded by government, be appointed as payee for residents in its institutions;

- should there be due process protections before the appointment of a nominee or payee;

- can the payee be prevented from misusing a pensioner's funds.

The variety of solutions reflects the federal division of powers.

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120 *Id*, 111-113.

As to the first issue, in some States, it has been found that the mere appointment of State officials as payees violated due process;[121] in others[122] that use of a superintendent of an institution as payee could not be proscribed in all circumstances.[123] As to due process, the practice that is most commonly accepted is that a full hearing is not needed and adequate protections are provided by lesser safeguards. Thus in *Tidwell v Weinberger*[124] the court concluded that notice to the pensioner of the application, access to the materials used to make the determination and an opportunity for the patient to submit materials on his or her own behalf was all that was necessary to satisfy due process.[125]

On the third issue it has been held that the federal administration is under a duty to require periodic accounting by payees[126], has the power to sue for misuse of funds and to appoint a new payee and that the payee may be required to apply social security benefits to provide for the patient's care and maintenance while institutionalized.[127]

A further matter which this raises, not as yet settled in the United States, is whether the whole of the pensioner's payments can be used to defray care and maintenance expenses. That question has been raised in the context of a United States statutory provision which is equivalent to the inalienability provisions in the two Australian Acts. The United States Supreme Court construed the relevant provision as prohibiting the use of legal process to attach social security benefits.[128] That approach was endorsed by the District Court.[129] Subsequently the provision was amended[130] to state that the prohibition in the Act could be modified but

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121 Eg *McAuliffe v Carlson* 386 F Supp 1245 (D Conn 1975) (a Connecticut case). See also *Vecchione v Wohlgemuth* 558 F 2d 150 (3d Cir 1977) where the Court of Appeals for the Third Circuit struck down a Pennsylvania statute that permitted the appropriation of Social Security cheques without a hearing.

122 Eg *Tidwell v Weinberger* Nos 73-C-3104 & 74-C-183, 1 MDLR 192 (ND Ill, June 28 1976). See also *Commonwealth v Cabinet for Human Resources* 686 SW 2d 465 (Ky Ct App 1984).

123 M Bender *Social Security Practice Guide* (1985), 22.03[2], at 22-4 which comments, citing *Tidwell v Weinberger*, that while appointment of the director of a government institution as payee for a resident is not improper *per se*, such appointment often creates an inherent conflict of interest, because of the institution's dual rule of 'creditor [and] caretaker'.

124 *Tidwell v Weinberger* Nos 73-C-3104 & 74-C-183, 1 MDLR 192 (ND Ill June 28, 1976).

125 S J Brakel *et al, The Mentally* Disabled and the Law (3rd ed) Chicago, American Bar Association, 1987, 278.

126 *Jordan v Heckler* 744 F 2d 1397 (10 Cir 1984), 808 F 2d 733 (10 Cir 1987).

127 *State v Kosiorek* 5 Conn Cir 542, 259 A 2d 151, 154 (App Dev 1969).

128 *Philpott v Essex County Welfare Board* 409 US 413 (1973).

129 *Woodall v Bartolino* unreported, Civil No 85-1781 (MTB) (DNJ, Oct 24, 1985).

130 The *Social Security Act* was amended in 1983 by the addition of 42 USC 407(b). This states: 'No other provision of law, enacted before, on or after the date of the enactment of

only by express reference. The Australian provisions contain a similar exception.

In the United States, although the courts have settled that no government charges may be offset by attaching social security payments, they have found that while such payment must be voluntary, a payee has the responsibility, if at all possible, to make such payments. The ultimate sanction for any unreasonable failure to do so would be removal of the payee from the institution.[131]

(II) CONCLUSION.

The United States courts have produced equivocal responses to the conflict of interest problem. Some States have proscribed the appointment of heads of institutions as nominees but others, presumably recognising the practical need to have at least someone to act where no family member is available, have hesitated to prohibit institutional staff from being payee in every circumstance.

Protection of the pensioner at the time of the initial appointment has been effected by giving the pensioner notice of the application, access to the submissions and an opportunity to submit written responses. That seems a sensible outcome which balances administrative efficiency against protection of the individual. Finally the courts have held that for federal government agencies, at least, periodic accounting should be required and a court may enforce the obligation to spend the monies for the benefit of the pensioner.

Whether all of these approaches would be adopted in Australia is doubtful. In relation to the appointment process, the more highly developed practice in the United States undoubtedly owes much to the Fifth and Fourteenth Amendments to the United States Constitution which provide a constitutional guarantee of due process.

(3) FURTHER SAFEGUARDS FOR AUSTRALIAN SCHEMES.

As an initial step the Department of Social Security should amend its legislation either to substitute a trusteeship for the nominee system for its incapable pensioners or to make it clear in the legislation that Parliament's intention is to abrogate the common law rule that an agency relationship lapses upon the mental incompetency of the principal. In addition it should be provided that when the scheme applies to incapable pensioners it attracts the safeguards outlined below. A new name should

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this section, may be construed to limit, supercede (*sic*), or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section'.

131 *Woodall v Bartolino* unreported, Civil No. 85-1781 (MTB) (DNJ, Oct 24, 1985), slip op at 21.

be given to this scheme to differentiate it from the nominee scheme. The latter scheme would only apply to competent people.

What are the minimum safeguards which should be introduced? Some of those outlined below have already been implemented by the Department of Veterans' Affairs.

(I) INVESTIGATION OF APPLICATIONS

Departments should investigate all cases in which the reason for the application for appointment of an agent or trustee is the pensioner's incapacity or impending incapacity. The application form should contain appropriate questions which would alert officials to the reasons the appointment was being sought. The obligation would apply whether the pensioner was living in a private dwelling or in an institution. The aim would be twofold: to determine whether pressure for the appointment was being exerted for reasons other than the benefit of the pensioner; and to assess the suitability of the chosen appointee.

To those ends a departmental officer should interview the pensioner in the absence of the chosen nominee to confirm the voluntariness of the proposed appointment. The interview also would provide the opportunity to explain the obligations of nomineeship or trusteeship to the proposed appointee and to ensure that they were understood. In cases of urgency, the checking could be undertaken after an appointment had been made but within a specified period, say six weeks.

(II) CRITERIA FOR DETERMINING INCAPACITY.

The investigation referred to in (i) above should be made against a definition of incapacity in the legislation. The sole criterion for appointment should be some form of disability which produces a need for assistance in managing affairs.[132] That would be in line with legislation for other surrogate management devices such as guardianship and enduring powers of attorney which carefully define the forms of impairment and their effect on functioning which are preconditions to the use of these mechanisms.

At present the *Social Security Act* does not define incapacity for the purposes of the nominee system.[133] At first sight that is surprising in an

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[132] That is the current position in England. (*DHSS Supplementary Benefits: Procedure Manual* sections 9520-21 state that an appointment will be made for 'a claimant who is unable to manage his affairs. The incapacity may be permanent, eg because of senility or mental deficiency, or temporary, eg following a serious accident.')

[133] In the US the practice is similar. A pre-existing finding of the pensioner's legal incompetency is not essential. The federal legislation provides that if it 'appears ... that the interest of an applicant entitled to a payment [of social security benefits] would be served thereby' a representative payee may be appointed. (42 USC s 405(j) (1985 Supp).

Act which has used incapacity as a benchmark for the purposes of the invalid pension[134] and the child disability allowance.[135] However it simply highlights the fact that it was not envisaged that a major use of the scheme would be for incapable pensioners. Even in departmental guidelines no uniform definition can be found. The *Manuals* state variously that the nominee system may be used where the pensioner 'is unable to sign his or her cheques'[136], is 'unable to handle his or her own affairs'[137], is 'incapable of giving an authority'[138], or where the pensioner 'because of a mental or physical incapacity or other reason, ... is considered to be incapable of handling his or her own affairs or money in a competent manner' (emphasis supplied).[139] The last-mentioned, which is found in the *Benefits Manual* para 12.3.05 is the most explicit and, if the words underlined were excluded could provide an adequate and appropriate test for incapacity.[140] It echoes the two-pronged definition[141] found in most guardianship statutes.[142] It is also broad enough to encompass cases of frailty or confusion which do not easily fall within common categories of mental incapacity.

Section 202(1) of the *Veterans' Entitlements Act* provides that the qualifications for appointment of a trustee are incapacity or improvidence. The recognised causes of incapacity are 'age, infirmity, ill health ... of a pensioner'.[143] That definition is inadequate since it does not link those conditions with incapacity to manage affairs. The Act provides instead that appointment is dependent on the Commission considering it 'desirable' that someone coming within one of the categories should have a trustee appointed, a paternalistic provision which gives to the decision-maker an unacceptable degree of discretion.

In the Department of Social Security the variety of tests in current use and the failure to specify with any precision what degree of incapacity is

134 *Social Security Act* 1947 ss 27-9.

135 *Id* s 101.

136 Eg Social Security *Pensions Manual* para 31.501.

137 *Id* para 31.511.

138 *Id* para 31.601.

139 Social Security *Benefits Manual* para 12.305.

140 The deletion of 'other affairs' is recommended since the only issue should be whether the pensioner can manage his or her pension.

141 The so-called 'binary analysis', namely, the person must have some form of mentally incapacitating condition which prevents him or her from managing personal and/or business affairs (Lawrence A Frolik 'Plenary Guardianship: An analysis, a Critique and a Proposal for Reform' (1981) 23 *Ariz LR* 599-616).

142 NSW: *Protected Estates Act*, 1983 ss 13-17, 19-20(1); Qld: *Mental Health Services Act* 1974-1989 ss 5, 55 Fifth Sch Cl 1; SA: *Mental Health Act*, 1977 Pt IV, Div III; Tas: *Mental Health Act* 1963 ss 3, 4, 83, 86, 88; *Public Trust Office Act* 1930 ss 3, 13; WA: *Mental Health Act* 1962 ss 5, 64; *Public Trustee Act* 1941 ss 2, 35, 36C; ACT: *Lunacy Act* 1898 (NSW) as it applies in the ACT) ss 3, 102, 103.

143 *Veterans' Entitlements Act* 1986 s 202(1).

required must be confusing for decision-makers. The tests are being used for the one purpose, to establish need for use of the nominee system. If the purpose of using departmental guidelines and manuals is to ensure consistency of decision-making[144], at present that is not being achieved. Similarly, the level of discretion in Department of Veterans' Affairs officers who determine use of the trustee system is equally unacceptable. A single definition of incapacity should be adopted, preferably the one referred to in the *Benefits Manual,* and it should appear in both Acts.

(III) EVIDENCE OF INCAPACITY

Substitute payee schemes are likely to be used most often by people in receipt of the invalid, age, service or disability pensions. Hence it would be usual for there to be medical evidence of the pensioner's incapacity on file. However that information would have been supplied when the pensioner applied for the pension and frequently by the time the person has become incompetent the information is out-of-date. Before an order for a substitute payee is made contemporary medical evidence should be supplied, and, in order to avoid the doctor's opinion being treated as conclusive, it should be accompanied by corroborative evidence from family or carers. That evidence should be available at the initial interview and should be measured against the test for incapacity (see (ii) above).

(IV) OTHER PROCEDURAL SAFEGUARDS.

A more difficult issue is whether there should be 'due process' safeguards before an initial appointment is made. It would be impracticable to require a hearing of the kind used for the appointment of guardians and property managers. In the United States, although there is no uniform practice in this regard, the trend, as mentioned above, is to require as a minimum a 'hearing' on the papers.

If the suggestions made earlier for an interview are adopted, that provides the opportunity for a form of oral hearing. Where the pensioner has made the application that would sufficiently meet the needs of due process. However, where the appointment is proposed by the Commission or the Secretary of the Department of Social Security because it is believed that the pensioner is incapable, procedural fairness requires that the person (and the primary carer or next-of-kin) be notified of the proposed appointment, receive copies of any medical certificates and the letter or report which initiated the process, other relevant material and the reasons for the Department's provisional decision. The pensioner, primary carer and next-of-kin should also be advised of his or her right to make written submissions to the Department. The official who conducts the interview should be required to complete a section on the application form or the order made following that interview which

144 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 640 per Brennan J.

states either that the pensioner is incapable and the primary carer or next-of-kin do not object or which affirms that the pensioner has been consulted, understands the implications of the appointment and has been informed of his or her right to object.

(V) OTHER SAFEGUARDS

A personal account of expenditure from pension monies should be kept for each resident in an institution[145], and individual nominees should be required to keep records of expenditure. In line with the practice for other surrogate management mechanisms[146] there should be annual mandatory reviews when records of accounts should be available for perusal by officials.

A ceiling on the amount of the pension which may be used for accommodation and other institution-provided services should be extended to all institutions. Thus it would be obligatory for pensioners to receive a minimum percentage of the payment to spend on their personal needs or keep in their accounts.[147]

Finally attention needs to be given to the conflict of interest problem. The requirements that individual accounts must be maintained, that these will be examined annually and that there should be a ceiling on the amount of the pension that may be deducted to pay for services, should prevent major abuses. In particular retention in the pensioner's account of a minimum percentage of the pension to be used solely by or for the pensioner's own purposes, avoids those restrictions on action which arise when a person has no money at his or disposal.

Given the administrative convenience of the group cheque arrangement it is unlikely that institutions would tolerate an alternative scheme, especially if that was only to apply in the case of incapable residents. The fact that even in the pro-individual-rights environment of the United States, there has been no blanket prohibition on the appointment of institution staff as alternate payees, suggests that such a move is even less likely to occur in Australia.

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145 A suggestion included in *The Law and Vulnerable Elderly People* Mitcham, Surrey, Age Concern England, 1986, 101. This practice is often, but not invariably followed, in institutions benefiting from the group cheque arrangement in Australia. For example, many boarding houses or hostels or 'special accommodation houses' in Victoria do not follow these procedures. (Information supplied by Central Office, Department of Social Security, April 1986).

146 For example, annual accounts must be presented to the New South Wales Protective Office by individual managers.

147 *The Law and Vulnerable Elderly People* Mitcham, Surrey, Age Concern, England, 1986, 111-12. Note that by June 1991 this position will have been reached for the majority of institutions housing elderly people or invalids.

(4) CONCLUSION

Adoption of the measures proposed would counter the arguments that the nominee system is of doubtful legality and go some way towards meeting complaints about the inadequacies of existing safeguards. Given that evidence of abuses of the schemes is, it appears, more extensive than Departments realised, given also the numbers of pensioners using the schemes, the size of the amounts involved and the obligation to ensure that government is accountable for public expenditure,there is an urgent need to tighten the safeguards in income support legislation. The thousands of pensioners who are incapable and whose financial affairs are being managed by someone else, be it an institution or a relative or carer, deserve that degree of protection.