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Inquiry into Powers of Attorney

Submission to the Victorian Parliament Law Reform Committee

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Introduction

The Association of Independent Retirees (A.I.R.) Limited is:-

- The peak body representing the views of fully and partly self-funded retirees
- A not-for-profit, non party-political, community service based organization funded primarily from members' subscriptions.

A.I.R. covers every State and Territory, and has 13 Branches in Victoria.

Our members are all of an age where there is an increased likelihood that they will need to rely on Powers of Attorney and consequently are critically interested in this Inquiry.

Powers of Attorney and Guardianship become critical when a person loses the ability to make decisions on their own behalf. It is therefore important that a mechanism exists to ensure that a person's affairs will be managed in the manner that they would desire and by a person in whom they have full confidence.

This submission is made by the Victorian Division of the Association.

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Executive Summary

This submission identifies A.I.R.'s concerns and provides brief suggestions as to how they should be addressed. Our recommendations are:-

Recommendation 1:- Expansion of Inquiry.

The major concern of our members is in regard to Enduring Medical Powers of Attorney and we strongly recommend that the terms of reference be expanded to cover this area.

Recommendation 2:- Nationally Consistent Legislation.

Important legislation such as this should have Australia wide application as many traumas resulting in loss of legal capacity occur whilst people are interstate on holidays.

Recommendation 3:- Consolidation of Legislation and Documentation.

New consolidated legislation and documentation should be introduced to simplify procedures and encourage greater use of these important instruments.

Recommendation 4:- Registration of Documents and Capacity of Donor.

Enduring Powers of Attorney should be registered and safeguards introduced to ensure that legal capacity is subject to independent certification.

Recommendation 1:- Expand Inquiry to include Enduring Medical Powers of Attorney.

A major concern of many people, especially the elderly, is losing the legal capacity to make their own decisions regarding medical treatment. They are then at risk of being subjected to procedures which under normal circumstances they would not authorize.

As a consequence, Enduring Medical Powers of Attorney are of critical importance to a diverse demographic section of the population.

The ability to appoint a trusted representative to make these decisions on their behalf is a great source of comfort to our members.

While financial matters are also of concern we believe that they are much less of an issue to our members.

The close relationship between Medical Powers of Attorney and Guardianship Powers of Attorney make it important that both are addressed in a consistent manner.

Recommendation 2:- Nationally consistent legislation.

Financial Powers of Attorney are generally recognised nationally but, Enduring Medical and Guardianship Powers of Attorney are not as widely accepted due to the differing State legislation. This has long been a concern to our members as interstate travel is a major pastime in retirement.

Trauma resulting in loss of legal capacity can result from car accidents and some of the pastimes we enjoy while on holidays. The need to rely on a Power of Attorney in a timely and consistent manner can therefore be of critical importance.

Documentation should be instantly recognizable and enforceable no matter where the need arises.

To ensure that the Enduring Medical Power of Attorney is recognised Australia wide, many solicitors advise members to have separate documents prepared for each jurisdiction that they will visit. This is obviously an added financial burden which members may be reluctant to incur.

It is recommended that the Inquiry examine the possibility of the States handing jurisdiction in these matters to the Federal Government. Alternately the States should adopt consistent legislation which is enforceable nationally.

Recommendation 3:- Consolidation of legislation and documentation.

The differences in legislation mentioned in our second recommendation are in no part due to the varying number of Acts which apply in the different States.

Even without these inter-jurisdiction differences the number of applicable Acts within Victoria is considered to be extremely confusing. It is recommended that new consolidated legislation covering Financial, Medical and Guardianship Powers of Attorney be introduced.

Because the different timeframes in which the various Acts were drafted there is a wide variation in the terminology used, and in design of applicable documents. This can lead to confusion and a modern multipurpose form should be introduced.

There is a close relationship between Enduring Financial, Medical and Guardianship Powers of Attorney and provision should be made to allow for consolidation of these powers in a single document if required by the donor.

Recommendation 4:- Registration of Documents and Capacity of Donor.

Enduring Powers of Attorney are important documents and as such registration is desirable. The validity of a document should not however rely upon registration.

Registration would also assist with establishing the validity of the documents when they need to be acted upon outside Victoria.

A donor's capacity at the time of execution should determine the validity of the instrument and any change in that capacity prior to registration should be of no consequence.

Capacity at time of execution should not be too onerous to establish. Certification by a Medical Practitioner and another professional person such as those approved for Passport verification is recommended.

Ensuring that loss of capacity is properly proven is of vital importance but provision must be made to allow for critical medical decisions to be made promptly.

A person's capacity to make decisions can change dramatically at any stage of life but unfortunately many of us are unprepared for such an occurrence.

Limited powers should highlight the fact that they cease to operate if the donor loses legal capacity. A positive acknowledgement of this fact on the document would encourage the donor to consider the consequences of a loss of capacity. This may help ensure that proper Enduring Powers of Attorney are also executed as a precautionary measure.