



17 August 2009

Law Reform Committee
Parliament of Victoria
Parliament House
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Dear Committee Members

Submission on behalf of St Vincent's Hospital (Melbourne) Limited for Inquiry into Powers of Attorney ("POA")

St. Vincent's Hospital
(Melbourne) Limited
Incorporating:
Caritas Christi Hospice
St. George's Health Service
Prague House

ABN 22 052 110 755

Thank you for the opportunity to provide submissions to the Law Reform Committee on behalf of St Vincent's on the following:

1. *"Should the different types of Powers of Attorney documents, and in particular the formality requirements, the terminology and coverage of these documents, be streamlined? If so how?"*
2. *How should we determine that a donor has capacity to create a legally enforceable document at the time he or she creates a Powers of Attorney?"*

St Vincent's understands that this submission will form part of the public record.

The issues at St Vincent's

1. St Vincent's legal staff are fielding an increasing number of queries from clinicians concerning POA's Guardianship and Administration matters, and their application to the factual situation that a patient presents with. This in turn is adding an increased drain on St Vincent's legal resources.
2. Clinical staff are clearly confused by the various types of POAs. The four types are too complex to be understood by non-lawyers, especially in an urgent situation.
3. It is usually not clear if a POA has been revoked orally. Given the serious nature and extent of the powers a POA bestows on a donee by a donor, this seems unsatisfactory. In our experience revocation is not generally discussed by either patients or clinicians.



St Vincent's

Continuing the Mission of
the Sisters of Charity

4. St Vincent's legal office recently prepared a "Powers of Attorney, Guardians & Administrators Policy" for its staff to use as an educational tool, and to provide legal guidance on the use and powers associated therewith. Most Victorian hospitals do not have the resources to commit to such a substantial task as this proved to be. This policy proved to be one of the most difficult policies to research and draft and could only be done by our legal office. The law is complex and spread out over different acts, and the interplay between POAs, Guardianship and Administration issues and/or orders, is extensive. St Vincent's made a serious commitment to drafting this policy in terms of the application of its legal resources. This was because St Vincent's recognises the fact that POAs are an increasing issue in the community due to the ageing population, and the rise of illnesses that lead to a lack of capacity.
5. It can be the case that the St Vincent's legal team has to check the powers associated with the different types of POAs before we can advise clinicians. This fact alone suggests that they are overly complex. Not all hospitals have legal advisers available to do this.
6. The various POAs are too confusing. Donees do not understand their duties and or obligations often. Genuine mistakes are made and much confusion arises between POA-Guardianship and Guardianship orders.
7. The hierarchy of power between POAs and VCAT orders made concerning Guardianship and Administration orders are commonly not understood. What takes precedence when, and what powers are revoked when, is at times bewildering – even for lawyers.
8. Clinicians are uneasy about capacity issues. St Vincent's intends to compile a suggested checklist that can be used by medical staff that incorporates both medical and legal requirements for capacity (a member of our legal office and a senior clinician will work on this). The fact that the test for capacity for a POA is different to the test for testamentary capacity for a will, adds to confusion. It is difficult to understand why a lesser test is required for POA's when they can easily lead to abuse, especially financial.
9. Clinicians already have to grapple with the increasing complexities of medical and scientific developments and a large number of statutes (as well as the common law) when they practise medicine on a daily basis. The complexity associated with POAs adds to the demands placed upon them.
10. Clinicians think of "Donors" as people who donate tissue or organs. Use of the same term for POA's is unhelpful.

11. The medical profession receives insufficient training to understand the laws concerned with the use of POAs.

The following is an extract from St Vincent's "Powers of Attorney, Guardians & Administrators Policy"

"A Medical Treatment Agent can agree to, or refuse, medical treatment for a Donor, including a Donor's involvement in medical research. However they can only refuse medical treatment if the treatment would cause the Donor unreasonable distress or the Medical Treatment Agent reasonably believes that the Donor would consider the treatment is unwarranted. The Medical Treatment Agent cannot refuse medical treatment to alleviate pain or suffering when a person is dying, that is, they cannot refuse palliative care. See A Step by Step Guide for Registered Medical Practitioners to the Victorian Law on the Refusal of (Medical) Treatment Certificates.

*Medical treatment means the carrying out of -
an operation;*

*the administration of a drug or other like substance; or
any other medical procedure – but does not include palliative care.¹*

The Medical Treatment Agent must act in the Donor's best interests and wherever possible, make the same decision that the Donor would have made and further avoid situations where there is a conflict of interest.

In addition, a Medical Treatment Agent cannot consent to the following medical procedures (known as Special Procedures) without first applying to the VCAT for a decision for

those likely to lead to infertility;

the termination of a pregnancy; and

the removal of tissue for transplant.

VCAT may consent to the carrying out of any Special Procedures on a patient if VCAT is satisfied that the patient cannot give consent, nor is likely to give their consent within a reasonable time and the Special Procedure is in the patient's best interests.² VCAT may require medical evidence to assist it in making these decisions. If a registered medical practitioner carries out or supervises the carrying out of a Special Procedure, without first obtaining consent AND there is no emergency, then VCAT may impose a substantial fine and/or period of imprisonment.³ However if a registered medical practitioner holds on reasonable grounds, an opinion that the Special Procedure is required for a patient as a matter of urgency to:

- *save the patient's life; or*
- *to prevent serious damage to the patient's health; or*

¹ "Palliative Care" includes the provision of reasonable medical procedures for the relief of pain, suffering and discomfort and the reasonable provision of food and water. See section 3 Medical Treatment Act 1988 (Vic)

² Sections 3, 42B, 42E and 42G Guardianship & Administration Act 1986 (Vic)

³ Sections 42A and 42G Guardianship & Administration Act 1986 (Vic)

- *in the case of a medical research procedure, to prevent the patient from suffering or continuing to suffer significant pain or distress;*

then a registered medical practitioner may carry out or supervise the carrying of the Special Procedure without consent from VCAT provided it is done in good faith.⁴

A registered medical practitioner can apply to VCAT in relation to any matter, question or dispute relating to the best interests of a patient. Similarly, so can any Guardian or Medical Treatment Agent (it is foreseeable that an Attorney may as well). This means that if the registered medical practitioner is not comfortable with the instructions given to him or her by the patient's Guardian or Medical Treatment Agent (that is they refuse to consent to medical treatment), the registered medical practitioner can obtain a ruling from VCAT on what treatment is in the best interests of the patient.⁵ If this occurs, Legal should be informed as certain procedures must be followed.

NOTE:

- *A Medical Treatment Agent's decision takes precedence over those of an Enduring Guardian appointed by the Donor who has healthcare powers.*
- *When the Donor dies, the Enduring Power of Attorney (Medical Treatment) ends.*

If a patient is incompetent and has not appointed a Medical Treatment Agent to make their medical decisions for them, then an application can be made to VCAT for an order that a Guardian be appointed for that person to make their medical decisions. VCAT may order the type of medical treatment allowed..." "

The foregoing highlights the complexity concerning POAs-Medical Treatment. No clinician is going to be able to retain this knowledge without reference to the said St Vincent's policy. The real problem here however, is that clinicians may not even be aware that there are any limits placed on a POA-Medical and therefore do not check the policy to have regard to the limitations.

Some Examples of Case Scenarios at St Vincent's

1. A patient executed an Enduring POA in 2001 donating her powers to her sons. Advice was sought on whether it would cover medical powers. The patient's lawyer submitted that it did. St Vincent's legal office had to provide advice. There was no means to be certain that the Enduring POA had not been revoked and what the true intention of the donor/patient was. The fact that the patient's lawyer had to give advice

⁴ Sections 42A Guardianship & Administration Act 1986 (Vic)

⁵ Sections 42K and 42L Guardianship & Administration Act 1986 (Vic)

and St Vincent's Legal Counsel, is both costly and unsatisfactory from the donee's point of view.

2. From time to time a patient presents at St Vincent's without capacity and without a POA but who needs access to their insurance (for example sickness/disability insurance cover when unable to work) or a letter to be sent to Centrelink for transitional care detailing their medical issues. (The next of kin or a friend makes the request.) The patient's needs are clear but there is no POA-Financial. St Vincent's is then in a dilemma as it cannot disclose the medical information that is required without the POA or a VCAT order (Administration). This 'gap' St Vincent's has to deal with until such time an application to VCAT has been lodged and heard.
3. The Social Work Department finds that there is often confusion on when the powers of a POA are triggered. Family members of a donor become confused by the distinction between the legal test and medical test concerning capacity. Sometimes family members ignore staff advice that a patient lacks capacity and bring in the donor/patient's lawyer to do what they want even when capacity concerns are explained and or documented.
4. On average it is estimated that our Social Work Department has some level of concern in relation to POAs on a weekly basis.

Recommendations for Change

1. One document only be used to cover all types of POA. The document might be a tick-a-box document. With a large number of variables listed that the donor can tick on what they want. It will need to be written in clear simple language.
2. All POA must be certified by either a legal practitioner or medical practitioner to say that the donor had capacity at the time of execution.
3. A central register must be implemented where all POA documents are registered. Unless a POA is registered it will be invalid.
4. Medical and Legal Practitioners will need access online to the register 24/7. Privacy issues will need to be addressed.
5. POAs cannot be revoked orally.

6. POAs can only be revoked by a revocation that is filed on the register. Once a revocation is executed, the revocation will be detailed on the register.
7. The hierarchy between POA, Guardians and Administrators needs to be made clearer and easier to understand.
8. For a donee to implement the powers of a POA, they will have to produce with it a medical certificate evidencing the donor no longer has medical capacity. The certificates should state whether it's permanent or for a limited period, and therefore has an expiry date. (How you deal with POA-General in this regard will have to be determined as capacity won't be an issue.)
9. Medical staff must be better educated on the powers and prohibitions relating to POA.

Other matters


I have been in contact with Ms Kelly Purser, a former legal practitioner of Queensland and NSW who is currently undertaking a PhD at the University of New England, NSW on competency assessment and the legal and medical interface, including, the workings of POAs inter-alia Australia wide. She recently co-authored an article "Competency and capacity: the Legal and Medical Interface." (2009) 16 JLM 789.

Ms Purser is very interested in St Vincent's intention to draft a suggested checklist that can be used by medical staff that incorporates both medical and legal requirements for capacity – a vexed area of practical application.

I trust the foregoing is of some assistance to you and would be grateful for a copy of any reports and or recommendations made by the Committee in relation to POAs in due course.

Yours faithfully


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Legal Counsel


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General Counsel