Inquiry into powers of attorney

Submission to the Victorian Parliament Law Reform Committee

20 August 2009

Submission by Julian Gardner

This submission is made based upon my experience in the position of Victoria's Public Advocate from 2000 to 2007 and my ongoing involvement in this area including, for example, as a member of the Department of Human Services Advisory Committee on Advance Care Planning and as Chair of the National Reference Group of the Respecting Patient Choices Program.

Enduring powers of attorney (the financial enduring power and the enduring power of guardianship) should be streamlined and simplified because of the benefits to the community that result from the effective use of enduring powers.

The goal of any reforms should be to

- Increase the extent to which people execute enduring powers.
- Increase the extent to which enduring powers once executed are, when appropriate, used.
- Reduce the misuse or abuse of enduring powers.

1. The benefits of the effective use of enduring powers.

1.1 Promotion of individual autonomy.

The use of enduring powers promotes autonomy and respect for the inherent dignity of the individual. This occurs by enabling a competent adult to make decisions that can be implemented and respected after they cease to be competent (should this occur) and therefore become unable to exercise their autonomy.

1.2 Reduced cost to the community from the use of enduring powers.

This includes:
Avoiding the cost of (now borne by VCAT) of appointing administrators and/or guardians.
Avoiding the cost of providing public administration and/or guardianship services.
Reducing the cost to government and non-government agencies by avoiding uncertainty and disputes about the identity of substitute decision makers and about the decisions that are to be made. The agencies that benefit are diverse and include banks and financial institutions as well as hospitals and health services and those providing support and care.

1.3 Reduced health and emotional costs for families and friends.

The preparation of enduring powers provides an opportunity for the donor to discuss with the agent or enduring guardian their wishes about decisions that may have to be made.

Knowledge of a person's wishes and the opportunity to give effect to them can and does provide great comfort to those making substitute decisions. In palliative care it is accepted that family members can, as a result of a death that involved doubt or controversy about treatment decisions or in which the person's wishes were not respected, suffer serious ill effects to their health including those amounting to post traumatic stress disorder. Research in relation to the Respecting Patient Choices program at the Austin Hospital shows that where a person's wishes were known and respected there are significant benefits to the health and well-being of family and friends.

2. The benefits of the greater use of enduring powers will grow given demographic and morbidity trends.

It is clear that older persons will increase both in number and as a proportion of the population. This will result in:

Increased incidence of disability. The incidence of dementia increases exponentially with age: it doubles every five years after the age of 65. The number of patients in Australia with dementia is expected to more than triple from 220,000 in 2007 to 730,000 in 2050. [1]

Increased dependence even when there is no disability. One Australian study analysed the reason that older people seek help with their finances. The following table relates to persons over 65. It shows the primary reason was a lack of confidence rather than a disability. [2]

Reported reason for seeking help with finances	Percentage (of surveyed people over 65)
Lacks confidence doing it themselves	28.3
Dementia or confusion	11.7
Disability or poor health	27.2
Old and frail	20.6
English not first language	5.8
Literary difficulties	2.2
Other	4.2

The study also showed that as a person got older increasingly they indicated that "old and frail" was the main reason that they required assistance with their finances.

3. Obstacles to the execution of enduring powers

The can be a range of factors that limit the use of enduring powers. These may include:

[1] National Health and Hospitals Reform Commission, A healthier future for all Australians, Interim Report December 2008 at 186 .
[2] Cheryl Tilse, Deborah Setterlund, Jill Wilson and Linda Rosenman, Ageing and Society 25, 2005, 215-227.

3.1 Knowledge barriers. For example, there may simply be a lack of knowledge of the availability, effect and value of enduring powers or there may be mistaken beliefs about the costs involved.

3.2 Psychological barriers may include the fear of legal documents or denial – a refusal to confront morbidity and mortality.

3.3 A lack of an available person to appoint
Not only must the person appointed as agent or guardian be trusted and competent but also they must be available and willing. As Public Advocate I frequently encountered persons without anyone who met all of these requirements. For older persons their children are often the appointee. However, in many cases children are not appropriate as they may live elsewhere or are themselves in poor health or they are affected by substance abuse or are estranged. As Public Advocate I received occasional requests to accept an appointment as enduring attorney for making decisions regarding medical treatment in circumstances when the donor claimed to have no other person to appoint.

3.4 Complexity
There are three enduring powers. Some people are deterred by this. Others mistakenly believe that they have covered all that is required by signing one power. The terminology and other provisions is varied and contributes to a lack of understanding. For example, there are variations in the titles of the appointee, in the attestation provisions, the date of effect, etc.

4. Obstacles to the effective use of enduring powers

4.1 The existence of the power may not be known. This potential problem raises the vexed question of whether or not there should be a requirement to register an enduring power before it is operative. The advantages include the provision of greater certainty for persons or bodies asked to act on the authority of a substitute decision maker. Organisations such as banks, financial institutions, hospitals, etc would be able to ascertain whether there is a power and whether it is a current one. The disadvantage is primarily the cost which, if it were to borne by the use, would deter some people from executing an enduring power.

4.2 A lack of knowledge or understanding of the effect and operation of powers. The fact that there is more than one existing type of power can and does give rise to inappropriate usage.

This can be dramatically illustrated by a case brought to my attention in relation to a major metropolitan hospital. The case involved an elderly man who was not able to express his wishes about medical treatment. The clinicians were of the opinion that treatment was desirable and necessary. Without that treatment he would die. However, they were proposing not to provide that treatment because the patient's son who held an enduring power of attorney was refusing to consent to the treatment. A social worker expressed concern. Upon investigation by the Office of the Public Advocate it was found that the document was only a financial enduring power of attorney. In other words the clinicians had

failed to check the document or if they had checked they had failed to understand it. This lack of knowledge of the differences in powers would have resulted in the person's death.

4.3 The abuse of powers. There are many instances of abuse, especially of financial powers. It is doubtful that it is possible for legislation alone to eradicate abuse. However, some steps could be taken.

In the Instruments Act is it not clear that an attorney must act in the best interests of the principal. It is important to enshrine the principle of 'best interests' and to emphasise that the starting point for determining best interests is ascertaining the wishes of the principal, to the extent that this is possible.

A further approach to the abuse of financial powers could be to make it more explicit that the abuse of a power for the benefit of the attorney is a criminal offence. In some cases attorneys benefit themselves in part because they believe that they are entitled or will become entitled to certain assets. This lack of clarity in their minds about the duty to act solely in the principal's best interest could be countered by providing for a criminal offence and by a warning about criminal liability in the documentation.

5. Refusal of medical treatment

Enduring guardians can be given all of the powers in relation to medical treatment that can be given to an agent appointed under an enduring power of attorney for medical treatment except two specific powers. An enduring guardian cannot refuse medical treatment and cannot sign a refusal of treatment certificate.

I appreciate that a medical enduring power, being a document under the *Medical Treatment Act* 1988 is outside the scope of this inquiry. However, it would be possible within the scope of the inquiry to recommend that a person appointed as an enduring guardian under the *Guardianship and Administration Act* could be given the power to refuse medical treatment and to sign a refusal of treatment certificate.

At present medical practitioners, families and carers in highly emotional circumstances in which the making decisions can be urgent can be confronted with the distinction between refusing treatment (refusal by a substitute decision maker can only be made by an agent under a medical enduring power of attorney or a guardian appointed by VCAT) and withholding consent or failing to consent to treatment (which can occur with an enduring guardian or any other person responsible).

The abstruse nature of this distinction quite understandably brings the law into disrespect and can cause unnecessary delays in treatment decisions, increase health costs and give rise to emotional hardship.

This problem could be overcome and the use of enduring powers streamlined could be done by giving power to refuse medical treatment or sign a refusal of treatment certificate to either an enduring guardian or, if enduring powers under the *Instruments Act* and

Guardianship and Administration Act are to be combined, by giving that power to the new enduring attorney.

Recommendations

1. There should be one enduring power document.

It should be possible for a person to sign a single document and in doing so select the nature and extent of the powers that they wish to confer in relation to financial, medical treatment and lifestyle matters.
This would ensure:

- A reduction in the confusion between documents. It would, however, require those being asked to rely on a power to examine the document to see what powers were included.
- A single set of terminology for the principal or donor of the power, the attorney, etc
- That a person did not mistakenly believe that they had made all necessary provisions by signing only one of the existing documents.

2. There should be a uniform test for capacity to sign the document.

Although capacity should be assessed on a decision-specific basis, there is insufficient reason to distinguish between the degree of capacity required to confer powers in relation to financial matters, medical treatment or lifestyle matters. There is, therefore, no basis on which to require more than one formality requirement regarding capacity to execute an enduring power.

3. There should be one requirement for attestation.

Witnesses should attest not only to the signing but also to the fact that the principal appeared to understand the nature and effect of the enduring power. In most cases a person's capacity or lack of capacity is clear. In those other cases the dilemma is between increasing the use of enduring powers and avoiding abuse. To prescribe a formal capacity test (for example by a medical practitioner) would impose an unreasonable burden and deter use. However, a witness could be required to ask questions and evaluate the answers of the principal in relation to matters such as the nature of the document, its effect, and the power to change it.

4. It should be possible for the power to be exercised earlier than the time of incapacity if agreed to by the donor.

This is not the current situation with medical enduring powers but recognises the evidence that for many people frailty rather than incapacity is the reason for wanting to have a power exercised. While this could be achieved by executing an existing general power of attorney to require this would be burdensome and ineffective.

5. The attorney should be required to act in the principal's best interests and should specifically be required whenever exercising a power to make such inquiries as are reasonable in the circumstances to ascertain the principal's wishes.

6. A criminal offence should be created in relation to the fraudulent actions of an attorney that results in their own or a related person's benefit.

7. A person appointed under the single document who is given power to make decisions about medical treatment should specifically be empowered to refuse treatment and to sign a refusal of treatment certificate.

8. The General Power of Attorney should be renamed. The term "general" is meaningless. A descriptor such as "temporary" or "limited" would better convey the limitations to a general power.