



Royal College of Nursing, Australia (RCNA)
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Ms Kerryn Risely
Executive Officer
Victorian Parliament Law Reform Committee
Parliament of Victoria
Spring St
East Melbourne VIC 3002

Email: vplrc@parliament.vic.gov.au

Dear Ms Risely

Re: Inquiry into Powers of Attorney

Thank you for inviting Royal College of Nursing, Australia (RCNA) to provide a submission to the Victorian Parliament Law Reform Committee's Inquiry into Powers of Attorney.

RCNA is the peak national professional organisation for Australian nurses. RCNA represents nursing across all areas of practice throughout Australia. A not-for-profit organisation, RCNA provides a voice for nursing by speaking out on health issues that affect nurses and the community. With representation on government committees and health advisory bodies, RCNA is recognised as a key centre of influence in the health policy arena in Australia. When health policy decisions are made, RCNA presents a professional nursing perspective, independent of political allegiance.

RCNA is pleased to provide the committee with the attached submission informed by RCNA member feedback on the powers of attorney legislation currently in effect in Victoria.

Please do not hesitate to contact me if you have any further questions regarding this submission.

Sincerely

Debra Y Cerasa FRCNA
Chief Executive Officer

Australia's peak professional nursing organisation





Royal College of Nursing, Australia (RCNA) Submission to the Victorian Parliament Law Reform Committee on the Inquiry into Powers of Attorney

1. Introduction

RCNA has sought to provide feedback to the Victorian Law Reform Committee by canvassing the views of our membership in response to the questions raised for the purpose of this Inquiry. RCNA found two strong themes emerged in member responses received. Firstly, an emphasis that there is a need to consider powers of attorney for medical treatment in the law reform process, and secondly, the need to provide for a legislated mechanism to deal with appeals and complaints in relation to abuse of powers of attorney. RCNA acknowledges that the Inquiry seeks feedback from nurses on the application of these laws in practice, and in response, this submission captures and presents the views of our members providing feedback from a professional nursing perspective.

2. Overarching comments and recommendations

2.1 While consideration of powers of attorney for medical treatment is stated as outside the scope of the Committee's inquiry, RCNA has been advised that to be comprehensive any law reform efforts to streamline and simplify powers of attorney legislation in Victoria should consider medical treatment legislation. RCNA understands that legislation in other states encompasses all forms of powers of attorney including medical treatment and advanced directives, preceded by a statement of principles. Therefore, RCNA members agree that a similar inclusion should be considered for the relevant Victorian laws so that one Act would allow an individual to achieve surrogate decision making for all forms of power of attorney. The Act could be further refined to cover power for financial and/or legal decisions and power for lifestyle and/or medical decisions. Donors could express the extent of and any limitations in the power to be granted to the attorney.

Recommendation: That the Law Reform Committee consider the development of one Act under which all matters relating to Powers of Attorney legislation, including medical treatment, are addressed.

2.2 RCNA has received a strong response from members regarding the need for the legislation to provide for mechanisms, especially on appeals and complaints issues, in order to adequately address concerns arising from abuse or potential abuse.

Recommendation: That a mechanism be provided for within the legislation to deal with appeals and complaints arising from abuse of powers of attorney.

3. Responses to inquiry questions

Q: *Each of the current types of powers of attorney in Victoria is called something different, is made in a different way and gives different powers to the attorney. For example, someone*

who wants to plan for future financial, health and lifestyle decisions might have to make several different documents. Should powers of attorney be streamlined? If so, how?

RCNA members provided the following advice and feedback in response to this question.

One Act that would allow an individual to delegate decision making powers for financial, lifestyle, and health care needs would effectively streamline and simplify the process of designating an attorney and exercising a power of attorney in Victoria.

The current Victorian legislation is complex and difficult for members of the community to access and understand. Legislation in other states provides a beneficial resource for considering ways in which to streamline and simplify the legislation currently in effect in Victoria. The Queensland Power of Attorney Act 1998 encompasses Power of Attorney, Enduring Power of Attorney and Advanced Directions, while the Tasmanian Power of Attorney Act 2000 provides for a register of powers of attorney documents. The Act could contain a provision such as that set out in Section 18 of the Tasmanian Power of Attorney Act 2000, which allows for the designation of specific powers of attorney by the donor to the attorney. The combination of these features from Queensland and Tasmania would provide the ideal model of legislation on powers of attorney.

***Q:** A power of attorney is only valid if the donor has 'capacity' at the time the document is created. This means the donor must understand the document he or she is creating and the effects it will have. How should we determine that a donor has capacity at the time he or she creates a power of attorney? What evidence should we require to show that a donor has capacity? For example, should a doctor need to sign a statement that a donor has capacity?*

***Q:** Some powers of attorney come into effect only when a donor loses capacity (that is, the ability to make decisions themselves). How should we determine when a donor loses capacity? What evidence should we require to show that a donor has lost capacity? For example, should a doctor need to sign a statement that a donor no longer has capacity?*

RCNA members provided the following advice and feedback in response to the above questions.

Providing for a statement of principles as an attached schedule to the power of attorney legislation would serve to define how the law determines who is presumed as being of legal capacity, without taking too prescriptive or restrictive an approach.

Loss of capacity and the need to seek this verification frequently occurs in hospitals and aged care, where health care professionals are often called upon to witness power of attorney or enduring power of attorney, or to provide a letter as to the donor's loss of capacity. When loss of capacity occurs or an enduring power of attorney is to come into effect a statement from the doctor or the donor's medical practitioner, health care team, and/or allied health provider to the effect that the donor no longer has capacity should be sought. Including a statement of principles as part of the power of attorney legislation, accompanied by a legislated requirement that the person authorised to exercise power of attorney and any third parties (e.g. health professionals) must refer to the principles, would assist in situations where the donor of the enduring power of attorney loses capacity.

Provision should be made for circumstances that acknowledge any limitation or revocation of power from the attorney should they lose the capacity for this role, subsequent to the donor's loss of capacity.¹ Furthermore, it should be specified if the donor wishes the powers to remain or change when they lose capacity. For example, it is conceivable that a donor may physically not be able to manage their financial affairs, and appoint a donor to carry out

¹ The Queensland Power of Attorney Act, 1986 (Qld) s 41-42 sets out clear guidelines for determining the attorney's capacity and would provide a good model for the streamlining of any similar legislation.

these transactions for them. However, the donor may not wish this person to have complete autonomy over their affairs should they lose capacity. A review board overseeing these powers would be valuable in ensuring legal capacity of the attorney continues.

Q: Sometimes it is not clear what powers an attorney has. What powers should an attorney have? What limits should there be on attorneys' powers? How should we educate attorneys about what they can and can't do?

RCNA members provided the following advice and feedback in response to this question.

Limitations on who can be appointed as an attorney, and limitations on who is authorised to witness associated documents to be signed creating a power of attorney would provide greater clarity and further security.

Adopting a requirement for one of the witnesses to be a qualified lawyer would help to address concerns regarding legal capacity. The South Australian legislation, *Consent to Medical Treatment and Palliative Care Act*, identifies a range of 'authorised witnesses,' and provides a model for quality assurance processes for consideration.

A statement signed by a lawyer to verify that the power of attorney documents have been explained to and understood by the potential attorney prior to signing would provide a mechanism through which attorneys and donors could be better informed of the powers and responsibilities of a power of attorney.

Q: There are reports that powers of attorney are sometimes abused. For example, there are some stories about donors being pressured to grant powers of attorney and attorneys misusing their powers. How big is this problem? How can we make sure that powers of attorney are not abused? For example, should these documents be registered?

RCNA members provided the following advice and feedback in response to this question.

In instances where a donor loses capacity ethical dilemmas may arise where there is a potential for abuse of powers of attorney to occur, in particular where verification of loss of capacity is sought from the health care team for reasons motivated by personal interests. For example, family members may seek verification that an ageing parent has lost capacity, to enable them to sell the family home.

Providing powers for the donor to appoint more than one attorney could help to prevent abuse of powers of attorney occurring. In addition to having a third party involved, such a provision would help to ensure that an attorney is available at all times, while also providing a further mechanism through which any abuse of privilege could be monitored. There is a need to establish an appeals/complaints mechanism where people could register their concerns about abuse or potential abuse of powers of attorney. Such a mechanism could take the form of a review board, whose role would be to oversee appeals and complaints and to randomly review cases of appointment. Matters could be referred to the Guardianship and Administration Board for validation of the exercise of power as an additional means of dealing with cases of abuse. In aged care situations, where a change from power of attorney to enduring power of attorney occurs, a hearing should be held where all interested parties can attend and put forward any concerns. Powers of Attorney documents could be registered in a manner similar to that set out in the Tasmanian Power of Attorney Act 2000.²

4. Conclusion

RCNA has identified two strong themes emerging from member responses to the above questions. Firstly, RCNA members are particularly concerned that powers of attorney for medical treatment should be considered to ensure a comprehensive review of the current

² See s4, s5, s11 and s18

legislation is undertaken in the law reform process. In particular, members referred to legislation in other states where all forms of power of attorney are contained within one Act, such as the Queensland Powers of Attorney Act 1998. Secondly, members agreed there is a need for a legislated mechanism to deal with complaints and appeals surrounding abuse of powers of attorney, while registration of documents to identify powers of attorney would also help to prevent instances of abuse occurring.

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