



Alzheimer's
Australia Vic
Living with dementia

Submission No. POA/32
Received 21/08/2009
Law Reform Committee

Ms. Kerry Riseley
Executive Officer
Victorian Parliament Law Reform Committee
Parliament House
Spring Street
EAST MELBOURNE VIC 3302

20th August 2009

Dear Ms Riseley

Alzheimer's Australia Vic would like to thank the Committee for this very important opportunity to contribute to the Inquiry on the law reforms aimed at streamlining and simplifying current powers of attorney documents.

Representing the interests of people affected by dementia and their families here in Victoria, and from our advocacy, counselling and education services, it has been identified that there are concerns regarding the different types of powers of attorney with inconsistencies in language, witnessing and authority.

We are grateful to Margaret Brown, Adjunct Research Fellow Hawke Research Institute University of South Australia, for her assistance in the preparation of this submission. As Deputy Chair of the SA Advance Directive Review Committee, Margaret has also indicated that she is willing to present evidence to the Inquiry later in the year.

Please note that we will be releasing further research and data relating to the prevalence of dementia on September 1st and will provide you with this information at that time.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Lynette Moore', written over a white background.

Lynette Moore
Executive Director

Alzheimer's Australia Vic
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Professor David de Kretser AC
Governor of Victoria

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Summary of Recommendations from Alzheimer's Australia Vic to the Victorian Parliament Law Reform Committee Inquiry into Powers of Attorney

A submission from Alzheimer's Australia made to the House of Representatives Legal and Constitutional Affairs Committee "Inquiry into Older People and the Law" in 2006 is also relevant in the Victorian context and identified the particular concerns relating to people with dementia. **Alzheimer's Australia Vic recommends that the Victorian Parliament Law Reform Committee consider the Report and its recommendations**

Recommendations:

1. There is one consistent set of principles underpinning Powers of Attorney from a national/state/territory perspective.
2. There is one legislative framework in Victoria underpinning Power of Attorney documents.
3. All Power of Attorney documents are consolidated into one format with standardized language/terminology.
4. The designation of who can witness Powers of Attorney is more consistent and requires a strict professional accountability with relatives excluded as witnesses.
5. Government Agencies e.g. Centrelink, accept the Power of Attorney as legal authority to meet their requirements of "authorising a person or organisation to enquire or act on your behalf".
6. The Victorian Parliament Law Reform Committee consider the approach of the NSW Attorney General Discussion Paper "**Are the rights of people whose capacity is in question being adequately promoted and protected?**" and the effect of the "**Capacity Toolkit**" developed as a result of the Discussion Paper.
7. The Victorian Parliament Law Reform Committee implement the recommendations noted by McCawley AL, Wilson J, Rosenman L, Setterlund D. Access to Assets: Older People with Impaired Capacity and Financial Abuse. *The Journal of Adult Protection Vol 8 No 1 2006* as outlined below:
 - Proactive measures for preventing both intentional and inadvertent abuse are urgently required
 - More education, monitoring and support should be provided so that those appointed with powers of attorney are aware of their responsibilities
 - Community discussion about the meaning of 'family money', ownership of the assets and financial abuse to raise awareness is necessary
 - People who strip older people of their assets intentionally are held accountable

- Registration of Enduring Powers of Attorney and/or monitoring through accountability procedures
 - The development of clear and consistent protocols for aged care professionals about notification and intervention when financial abuse occurs
 - Clarification of the protective measure for whistle blowers
 - Engaging financial institutions to report suspected financial abuse.
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In Summary:

- The increasing prevalence of dementia indicates the importance of clarity around Enduring Power of Attorney legislation and processes.
 - A national, coordinated approach is essential. If standard legislation is not nationally possible, there should be consistency between the States/Territories, or at very least no gaps or contradictions.
 - Considerable research and consultation has occurred around this subject. Alzheimer's Australia Vic urges the Victorian Parliament Law Reform Committee Inquiry to draw on the existing research base. The South Australian Advance Directive Review that is soon to be released is expected to be of considerable importance.
 - A practical approach of establishing an enduring power of attorney is of particular importance. Care needs to be taken that individual differences that influence 'capacity' are taken into account. Blunt, simplistic, one-size-fits all processes should be questioned.
 - Alzheimer's Australia Vic draws attention of the Victorian Parliament Law Reform Committee Inquiry to the NSW Attorney General Discussion paper.
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**Victorian Parliament Law Reform Committee
Inquiry into Powers of Attorney
Submission from Alzheimer's Australia Vic
21st August 2009**

1. Introduction:

Alzheimer's Australia Vic is pleased to have the opportunity to submit to this Inquiry.

Alzheimer's Australia Vic represents the interests of people affected by dementia in Victoria and provides leadership in dementia policy, risk reduction and services.

Alzheimer's Australia Vic operates within a national federated structure as part of Alzheimer's Australia. Our vision is for a society committed to the prevention of dementia, while valuing and supporting people living with dementia.

Members of the Alzheimer's Australia Vic Consumer Reference Group (current people with dementia and/or family carers) and consumers who use the services of Alzheimer's Australia Vic have been consulted, along with our staff experienced in dealing with people with dementia and their families. Expert comment has been sought from Margaret Brown, a supporter of Alzheimer's Australia and Deputy Chair of the SA Advance Directive Review Committee. Material has also been sourced and reference made to previous inquiries and reviews conducted around Australia.

A submission from Alzheimer's Australia made to the House of Representatives Legal and Constitutional Affairs Committee "Inquiry into Older People and the Law" in 2006 is also relevant in the Victorian context and identified the particular concerns relating to people with dementia. **Alzheimer's Australia Vic recommends that the Victorian Parliament Law Reform Committee consider the Report and its recommendations**

<http://www.aph.gov.au/house/committee/laca/olderpeople/index.htm>

2. Facts and Figures:

A recent report by Access Economics, "Making Choices – Future Dementia Care" commissioned by Alzheimer's Australia, April 2009, draws together information about dementia and the devastating impact it can have on the lives of individuals and their families and carers.

Australian demographic ageing will give rise to the rapid increase in the number and proportion of people living with dementia from 234,000 now to 465,460 in 2030 to over 730,000 in 2050. By 2030, dementia is the chronic disease projected to show the greatest increase in disease burden and by 2050, 2.8% of the population is projected to have dementia.

Dementia is now recognised as an Australian Government health priority and it needs to be recognised that we are in fact dealing with a growing challenge of a dementia epidemic.

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Approximately 90,200 Australians (40%) living with dementia reside in residential aged care facilities with another 52,000 (23%) living in the community and receiving formal care. In addition there are approximately 85,125 people (37%) with dementia living at home receiving no formal care and supported by family carers.

In addition to ageing, there is a potential for an increase in chronic illness, disability and intellectual impairment.

It is those people living with dementia who may be most at risk of abuse in relation to their decision making regarding financial, legal, lifestyle and health care and who needs to be protected within the legal and legislative system.

3. General Comment:

Alzheimer's Australia Vic is concerned about the limitations of the Inquiry's Terms of Reference particularly for people with dementia.

In order to 'streamline and simplify powers of attorney documents' so that Victorians can plan for their future financial, lifestyle and health care needs, all four Powers of Attorney including the Enduring Power of Attorney (medical) and the Refusal of Medical Treatment Certificate need to be reviewed, simplified and integrated. Currently the Refusal of Treatment Certificate is rarely used and is designed to work in the hospital setting to guide the medical profession, rather than empower people to take control at the end of their lives.

The current confusion with documents and people's reluctance to appoint a substitute decision maker and plan for the future will continue if the basic principles underpinning enduring powers and advance care planning are not clarified and adhered to. This confusion is a barrier for people especially the increasing number of elderly people who will lose their decision making capacity.

There have been a number of inquiries and reviews relating to enduring powers and advance health care directives around Australia. It is important that the Victorian Law Reform Committee takes into account the outcomes and recommendations of these inquiries and reviews, in particular the national approaches that are currently being developed. **National consistency is essential.**

a) Currently the **Health Minister's Working Group on Advance Care Planning** is establishing national standards for advance care planning. The guidelines will be available for comment in November 2009. It is essential that the Victorian Law Reform Committee work in conjunction with these guidelines.

b) The **Standing Committee of Attorney Generals (SCAG)** is also addressing the issues associated with enduring powers of attorney for financial matters nationally. The evidence submitted to this Committee, including a response from Alzheimer's Australia, stress the importance of mutual recognition across state boundaries.

c) In 2007, **The House of Representatives Standing Committee on Legal and Constitutional Affairs** reviewed the issues associated with *Older People and the Law*. We would like to draw the Committee's attention to Recommendations 24 and 25. (See *Older People and the Law Report* [September 2007])
<http://www.aph.gov.au/house/committee/LACA/olderpeople/report.htm>

d) In 2007-2008 the **South Australia Advance Directive Review** examined the policies and legislation relating to enduring powers and advance directives in the state. The two Reports are currently with the South Australia Attorney General and will be released for comment in the near future. We strongly recommend that the Victorian Parliamentary Law Reform Committee access these Reports which are based on extensive research and consultation. The Recommendations are relevant for this Inquiry.

e) The evidence submitted to the SA Review included submissions from the community, health and legal professionals and those working in aged care indicated that:

- The language and documents were confusing and a barrier to planning ahead. This included lack of understanding of the different powers of attorney. More people were familiar with enduring powers of attorney for financial matters but frequently misunderstood that this power did not include health care decisions.
- The majority of enduring powers of attorney for financial matters work well, but without improved protections there is the potential for abuse. This is a concern for the increasing number of older people.
- Improved protections included better witnessing arrangements and more explicit documents. Registration of the documents was considered to be expensive and would be problematic to implement, especially at a state level.
- People prefer to choose who and how many agents they appoint. Some people want to appoint joint decision-maker others would prefer to appoint only one person.
- The community indicated that people wanted empowerment especially if and when they lose decision making.

4. Differing formality requirements and terminology, and coverage of the power of attorney documents, governed by the *Instruments Act 1958* and the *Guardianship and Administration Act 1986*:

The Power of Attorney documents take effect under different pieces of legislation, each with different powers and different responsibilities.

Instruments Act 1958:

- General Power of Attorney
- Enduring Power of Attorney (Financial)

Guardianship and Administration Act 1986:

- Enduring Power of Guardianship

Consumers, family members and third parties such as health care facilities and financial institutions, find the number of different Powers of Attorney confusing and difficult to understand, each with different requirements and witnessing under the different legislation and some with overlapping powers. While most families manage the assets of their family member with diminished capacity well, others are confused and misguided and in some cases, enduring Powers of Attorney can be used as a form of elder abuse by taking away the decision making ability of the individual immediately they are signed and used unbeknown to the 'donor'. A particular issue reported by our consumers is that

some government agencies, such as Centrelink, do not recognise the POA and require separate authority documents to be completed when acting on behalf of another.

The summary table (p.8) of the powers of attorney and guardianship provided in the booklet *Take Control* by the Office of the Public Advocate, identifies the differing powers, responsibilities and witnessing and shows how easy it is for there to be confusion in choosing the right one. In particular the General POA and the Enduring POA (Financial) cause the most confusion and could be consolidated. In addition terminology and language across the various Powers of Attorney needs to be standardised.

Recommendation:

Alzheimer's Australia Vic recommends that

- There is one consistent set of principles underpinning Powers of Attorney from a national/state/territory perspective.
- There is one legislative framework in Victoria underpinning Power of Attorney documents.
- All Power of Attorney documents are consolidated into one format with standardized language/terminology.
- The designation of who can witness Powers of Attorney is more consistent and requires a strict professional accountability with relatives excluded as witnesses.
- Government Agencies e.g. Centrelink, accept the Power of Attorney as legal authority to meet their requirements of "authorising a person or organisation to enquire or act on your behalf".

5. Capacity to create a legally enforceable document and differing execution requirements and the different tests that apply:

Under the law, you must presume that every adult person has capacity. The concept of capacity is fundamental to a person being able to make a legally enforceable decision relating to decisions about empowering others to be a guardian or an attorney, medical treatment or entering a contract.

A person's overall capacity to make decisions can be enhanced by personal strengths, good service provision, information and support. Personal limitations, poor service, provision and lack of support can limit it.

In addition, the external environment will often influence or determine whether a person with impairment makes decisions in areas where they are capable. For example, legislation which only provides for a finding of global incapacity automatically limits the opportunities for a person to make their own decisions in areas where they might otherwise be found to be capable. Taken together, all these factors create major challenges for professionals and members of the community who are involved in capacity assessment.

A person can make decisions if they understand the nature and the consequences of their actions. The decision will depend on the circumstance in each case and the nature of the transactions. Currently there is no comprehensive approach to assessing capacity or addressing the support needs of a person whose capacity is in question.

There is a growing concern in Australia about the lack of appropriate tools for assessing capacity and who is responsible for the assessments. A survey of health professionals in

South Australia in 2003 found that 60% considered that a standard assessment tool for capacity would help their work considerably.

The Discussion Paper ***Shades of Grey*** written as a result of this survey had 30 responses from individuals and organizations in which 85% stated that the absence of a formalized assessment process affected their work and the current ad hoc assessments were restrictive and inadequate. These respondents wanted an independent assessment process that could provide more certainty, consistency, independence and reliability.

Currently capacity assessment is in the jurisdiction of mostly medical and legal professionals but the tools they use vary and, as noted, there is no consistency or reliability. Some jurisdictions overseas are addressing this problem, for example Ontario, Canada has created an independent system of capacity assessment with specialized training and accreditation.

The Discussion Paper by the NSW Attorney General; ***Are the rights of people whose capacity is in question being adequately promoted and protected?*** is applicable to the issues experienced nationally. Since its publication in 2006, a Capacity Toolkit was developed in 2008. Alzheimer's Australia Vic urges the Committee to consider this discussion paper and the toolkit in its current inquiry.

Recommendation:

Alzheimer's Australia Vic recommends that

- The Victorian Parliament Law Reform Committee consider the approach of the NSW Attorney General Discussion Paper "***Are the rights of people whose capacity is in question being adequately promoted and protected?***" and the effect of the "***Capacity Toolkit***" developed as a result of the Discussion Paper.

6. Powers granted and minimizing abuse in relation to the execution of and exercise of powers under powers of attorney documents:

Research conducted at the Australian Institute of Criminology indicates that older people are more likely to be the victims of financial abuse (for example, fraud, deception, and commercial exploitation) than physical crimes against the person. As people become less able to manage their affairs they may (and are encouraged to) choose to appoint an enduring power of attorney to assist them in decision making about their financial affairs. Adam Graycar (Director of the Australian Institute of Criminology) has stated that the Powers of Attorney was the most abused legal document in America. (ref Crime & Older Australians p 10) <http://www.aifs.gov.au/institute/afrc7/graycara.pdf>
Advocacy organizations in Australia reported similar cases of abuse in Australia.

Alzheimer's Australia Vic would like to draw the Committee's attention to the inconsistencies that currently prevail in the community. That is, stealing and exploiting another person's finances is called theft and is a criminal offence. However when misappropriation of finances occurs with an enduring power of attorney or a family member, it is currently referred to as financial abuse and frequently there are no consequences for the abuser. This inconsistency needs to be addressed as it affects mostly older people many of whom have impaired decision-making capacity.

In March 2006, Alzheimer's Australia prepared a Briefing Note on Elder Abuse and Dementia including several points related to financial abuse, e.g.:

'There is a need to review and analyze the legal issues around dementia to ensure individual rights and property are protected in the context of the Dementia as a National Health Priority including inter alia, guardianship, mental health, enduring powers of attorney, advance directives.'

<http://www.alzheimers.org.au/content.cfm?infopageid=3594>

Alzheimer's Australia Vic would like to stress that the misuse of enduring powers of attorney including financial mismanagement of assets is an increasing problem for people living with dementia and **requires urgent attention**.

Recommendations:

Alzheimer's Australia Vic recommends that the Victorian Parliament Law Reform Committee implement the recommendations noted by McCawley AL, Wilson J, Rosenman L, Setterlund D. Access to Assets: Older People with Impaired Capacity and Financial Abuse. *The Journal of Adult Protection Vol 8 No 1 2006* :

- Proactive measures for preventing both intentional and inadvertent abuse are urgently required
- More education, monitoring and support should be provided so that those appointed with powers of attorney are aware of their responsibilities
- Community discussion about the meaning of 'family money', ownership of the assets and financial abuse to raise awareness is necessary
- People who strip older people of their assets intentionally are held accountable
- Registration of EPAs and/or monitoring through accountability procedures
- The development of clear and consistent protocols for aged care professionals about notification and intervention when financial abuse occurs
- Clarification of the protective measure for whistle blowers
- Engaging financial institutions to report suspected financial abuse.

7. Summary:

- The increasing prevalence of dementia indicates the importance of clarity around Enduring Power of Attorney legislation and processes.
- A national, coordinated approach is essential. If standard legislation is not nationally possible, there should be consistency between the States/Territories, or at very least no gaps or contradictions.
- Considerable research and consultation has occurred around this subject. Alzheimer's Australia Vic urges the Victorian Parliament Law Reform Committee Inquiry to draw on the existing research base. The South Australian Advance Directive Review that is soon to be released is expected to be of considerable importance.
- A practical approach of establishing an enduring power of attorney is of particular importance. Care needs to be taken that individual differences that influence

'capacity' are taken into account. Blunt, simplistic, one-size-fits all processes should be questioned.

- Alzheimer's Australia Vic draws the attention of the Victorian Parliament Law Reform Committee Inquiry to the NSW Attorney General Discussion paper.

8. References:

Instrument Act 1958

Guardianship and Administration Act 1986

Making Choices – Future Dementia Care: Projections, problems and preferences. Report by Access Economics Pty Limited for Alzheimer's Australia April 2009

Submission to the House of Representatives Legal and Constitutional Affairs Committee. Alzheimer's Australia. November 2006

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Trends in Aged Care Services: some implications. Productivity Commission Research Paper. September 2008

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Decision Making, Personhood and Dementia. Ed D. O'Connor and B. Purves. Published 2009

Who Can Decide? The Six step capacity assessment process. Ed P. Darzins, D. Molloy, D Strang. Alzheimer's Australia SA 2000

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Crime and Older Australians - Understanding and Responding to Crime and Older People. A. Graycar and M. James. Australian Institute of Criminology July 2000

Health Ministers Working Group on Advance Care Planning

Standing Committee of Attorney Generals (SCAG)
