



Ministerial Advisory Council of Senior Victorians

Submission to the Parliamentary Inquiry into Powers of Attorney

August 2009

Introduction

The Ministerial Advisory Council of Senior Victorians (MACSV) appreciates the opportunity to provide input to the Parliamentary Inquiry into Powers of Attorney.

The MACSV was established in 2001 to provide information and advice to the Minister for Senior Victorians on matters affecting the needs, interests and wellbeing of senior Victorians and on specific matters of concern to the Minister. Membership consists of older people from a range of backgrounds and experiences who live in metropolitan, regional and rural areas in Victoria.

Powers of attorney have been of interest to the MACSV for some years. The availability of a process to pass to reliable and trustworthy persons the power to make decisions on behalf of another is most important to senior Victorians. This process must be easy to understand and reasonably accessible to all, including senior Victorians.

Due to concern that seniors were not well aware of the different powers of attorney and the importance and relevance of these documents, the previous MACSV organised a number of community information forums in metropolitan, regional and rural locations, in collaboration with the Office of the Public Advocate (OPA) during 2004 - 2006.

Despite the ongoing efforts by OPA and others to raise the profile of enduring powers of attorney, we are concerned that people have not made enduring powers of attorney and guardianship when it is in their interests to do so and while they clearly have the capacity to do so.

Our specific suggestions for reforms are aimed at streamlining and simplifying powers of attorney and encouraging more senior Victorians to actively take control of their financial, personal and health care needs whilst they have the capacity to do so.

Streamlining

One of the reasons many seniors do not make enduring powers of attorney or guardianship is that they are confused about the various powers and believe that if they have one, they have them all.

The MACSV understands that this inquiry is focused on the power of attorney documents governed by the *Instruments Act 1958* and the *Guardianship and Administration Act 1986*.

It is difficult to separate health care (covered by the Enduring power of guardianship) and medical treatment [covered by the Enduring power of attorney (medical treatment)]. If an individual has not made an Enduring power of attorney (medical treatment) governed by the *Medical Treatment Act 1988*, a guardian (appointed under the *Guardianship and Administration Act 1986*) can consent or

withhold consent to medical treatment.¹ We believe that all enduring powers need to be considered in relation to each other.

Not only are there different powers and documents, but the terms used for each party differ across the powers. Use of different terminology for each power can be confusing. Currently there are two terms used for those making enduring powers – “donor” and “appointer”.

The MACSV suggests that the term “appointer” should apply to all powers. The concept of “appointing” an attorney or guardian makes sense. The term “donor” can be confusing as it has other meanings for seniors, eg donating to charities, donating organs, etc.

Currently there are three terms for those appointed to act – attorney, guardian and agent. To simplify matters and to avoid confusion, we suggest that the term “attorney” should apply to all powers.

The term “lifestyle” is currently used in association with the Enduring power of guardianship. Seniors are more likely to associate this term with retirement villages and recreational activities, rather than decisions about day to day matters such as diet and dress and whether they move to residential aged care.

Instead of the term “lifestyle” matters, we suggest using the term “personal” matters.

The MACSV considers that a single enduring power of attorney should replace the current Enduring power of attorney (financial) and Enduring power of guardianship.

The MACSV suggests that the Queensland *Powers of Attorney Act 1998* which covers both enduring powers should be considered as a basis for any future legislation in Victoria, bringing together the various enduring powers into one act. Under this Act, individuals have the option of whether to appoint an attorney for financial matters and/or personal/health matters or both.

We are aware that the Queensland legislation also covers the enduring powers applying to medical treatment.

The MACSV suggests that the need for separate enduring powers for health care and medical treatment should be considered as part of this inquiry.

Capacity

Witnesses are required to certify that at the time of signing, “the donor appeared to have the capacity necessary to make the enduring power” [Enduring power of attorney (financial)] or, “the appointer appeared to understand the effect of this instrument” (Enduring power of guardianship). Determining capacity involves a subjective judgement by the witnesses.

Witnesses are able to consult with a member of the medical profession to assist their decision making about capacity. However if a specialised medical assessment is required, the question would be who is to pay the costs. Some people may not be able to afford this. We do not want to suggest anything that will mean additional costs for seniors.

The *Take Control* kit published by OPA and Victoria Legal Aid includes information for witnesses to assist with determining whether the individual has legal capacity at the time of signing.

The MACSV suggests that the information included in the kit could be used as the basis for a checklist to be incorporated into the forms to be completed by the witnesses.

¹ Office of the Public Advocate/Victoria Legal Aid (2007), *Take Control – a kit for making powers of attorney and guardianship*, p 12

The Queensland Enduring power of attorney for both financial and personal/health matters includes a Statement of Understanding to be completed by the donor/appointer as part of the legal document.

The MACSV suggests that a similar statement should be included on the forms used in Victoria.

Currently the second witness must be a person who is authorised to witness the signing of statutory declarations. This person may be someone who does not have any real knowledge of the donor/appointer's capacity. A relative of the donor/appointer can witness an Enduring power of attorney (Financial). Each witness must state they believe the donor/appointer has the necessary understanding; sometimes a relative is very aware of how the donor/appointer has been coping in recent times.

Many individuals who may be asked to be the second witness, such as Justices of the Peace, do not have access to free interpreters. Some therefore ask family members to interpret. This can make the donor/appointer vulnerable and potentially subject to abuse.

The MACSV considers that funding should be available through the Department of Justice for interpreters to be utilised by witnesses who need to confirm that the donor/appointer understands the effects of the document/s.

We support the current provisions in Victoria which enable donors to nominate a start date for an Enduring power of attorney (financial). We are aware of some seniors who appreciate being able to formally hand over the management of their financial and/or personal affairs to a trusted third party prior to losing capacity to donate that power.

Attorney Powers

Take Control includes information for attorneys about their powers and responsibilities. The Enduring power of attorney (financial) and Enduring power of guardianship forms require prospective attorneys to confirm that they will responsibly exercise their powers in accordance with the legislation. Currently there is no requirement for the signature/s of attorney/s to be witnessed. However the prospective guardian's signature is witnessed.

The MACSV suggests that the attorney/s signatures should be witnessed by an individual authorised to witness the signing of statutory declarations. This may assist in emphasising the seriousness of the commitment being undertaken.

Community Education

The *Take Control* kit, including the associated DVD, provides a good basis for raising awareness about enduring powers. Depending on the findings of the Parliamentary Inquiry, these materials could be updated and used for future community based information sessions.

The MACSV considers that funding needs to be available to support OPA, the Law Institute of Victoria, Seniors Information Victoria and community legal services to provide regular community information and education about enduring powers. Many Victorian local councils have developed positive ageing strategies in association with the Municipal Association of Victoria/Council on the Ageing Victoria Positive Ageing in Local Communities Project. Community education could be organised through these local council networks.

Public awareness efforts have focused on raising awareness about the existence of enduring powers and the differences between each power.

The MACSV supports expansion of community education activities to include specific information for attorneys about their roles and responsibilities. The information for attorneys contained in *Take Control* would be a good basis for this education.

We are aware that matters that are seen to be associated with later life and death are avoided by some seniors from culturally and linguistically diverse (CALD) backgrounds. This includes enduring powers of attorney.

The MACSV suggests a major community education campaign about enduring powers of attorney targeting seniors. We suggest a multi-pronged approach, initially raising awareness and explaining the purpose and operation of enduring powers of attorney and guardianship.

Using ethnic radio and media, liaising with key ethno specific organisations and migrant resource centres and utilizing their connections with ethnic seniors groups in the community would assist with enabling individuals to understand the importance of and need for these legal documents, as well as the significance of what they are signing.

We know of at least one Justice of the Peace who, until last year, was not aware of the three enduring powers and was still using old general power of attorney forms when approached by community members for assistance.

The MACSV supports specific public education strategies that ensure that those who are authorised to witness the signing of statutory declarations have up to date information about enduring powers.

Abuse of Powers

The *Instruments Act 1958* does include provisions to safeguard the interests of the donor, however there is no supervision.

While there are no clear statistics about abuse of Enduring powers of attorney (financial) there appears to be much anecdotal evidence. Attorneys are required to keep records of their actions but there does not appear to be any supervision or regulation of their actions. In addition while the Victorian Civil and Administrative Tribunal (VCAT) can be approached concerning abuse by an attorney, the only recourse is to revoke the power and no compensation can be awarded.

The MACSV considers that it may be beneficial if some form of supervision was introduced, together with some compensation requirement for abuse in the exercise of the power. We suggest that there should be an easy way for "appeal" to VCAT by persons who are concerned that the powers are not being exercised in the interests of the donor, as is currently the case under the *Guardianship and Administration Act 1986*.

The MACSV considers that both enduring powers of attorney/guardianship and wills should be centrally registered. In cases of sudden loss of capacity (or death), people or organisations may not be certain about whether these documents exist, or if they have the current version. Currently there is no way to check whether an individual has revoked an earlier power of attorney (or will).

A central database could also assist when authorities such as banks, health care providers and legal practitioners need to confirm the existence/currency of these legal documents.



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