

Moreland Community Legal Centre Inc.

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Moreland Community Legal Centre Inc.

Submission to the Inquiry into Powers of Attorney

Introduction

The Moreland Community Legal Centre Inc. (MCLC) is a not for profit community organisation that provides free legal and financial counselling advice for people who live work or study within the City of Moreland municipality. The MCLC envisages a Victorian community that values and provides justice and equality for people from all spheres of life. The MCLC welcomes the inquiry into the current powers of attorney legislation by the Victorian government.

The City of Moreland has a large percentage of people aged between 60-69 and 70-84 (7.6% & 10.7% respectively).¹ It is trite yet necessary to point out that Australia's population is becoming older. This is reflected in recent trends which indicate that the reduced fertility rate suggests an increase in the proportion of older people and the reduced death rate suggests an increase in life expectancy. It is within this context that older people are confronted with the need to make substitute decision making arrangements for future incapacity.

Areas of Concern

(i) Potential for Abuse & the Limitation of Informed Choice

The MCLC is particularly concerned with the potential of abuse of older people enmeshed in substitute decision making arrangements. Various studies have found that older people have limited knowledge of the various power of attorney provisions, the legal aspects of certain

¹ Australian Bureau of Statistics. *Census of Population and Housing*, 2006.

situations and a somewhat superficial awareness of legal rights.² Specifically, they are unaware of the differing forms of powers of attorney which exist and the extent to which action is available under each categorisation.³ Structural factors such as gender, low socio-economic status, ethnicity, disability, rural location and nursing home residence have been identified as being conducive to such misapprehension.⁴ Concomitantly, this misapprehension often results in older people being vulnerable to exploitation. The potential for mistreatment is exacerbated when for instance; an older person suffers from a disability such as dementia.

In the case of an Enduring Power of Attorney (EPA), older people are of the misconception that their family members will always act in their best interests.⁵ Nonetheless, this is not always the case. In fact, it is more often than not family members which engage in such exploitation, making detection of abuse all the more difficult.⁶ Hence, it is somewhat of a paradox that the very substitute decision making arrangements that are devised to allow for the financial protection of older people, may in fact provide the necessary preconditions for financial abuse, which may consequently give rise to various forms of anxiety, illness or depression.

If older people are to make the most of the power of attorney mechanisms, it is only appropriate that we arrange services which aim to enhance the knowledge older people have of their legal rights in substitute decision making arrangements, in order for them to make more informed decisions about the options which are available.

² Brown, M. & Jarrad, S. 'Putting "The Powers" In Place: Barriers for People with Memory Loss in Planning for the Future.' *Journal of Law and Medicine*, vol. 15, no. 4, 2008, pp. 530-537; Setterlund, D; Tilse, C. & Wilson, J. 'Older People and Substitute Decision Making Legislation: Limits to Informed Choice.' *Australasian Journal on Ageing*, vol. 21, no. 3, 2002, pp. 128-133.

³ Setterlund, D; Tilse, C. & Wilson, J. 'Substitute Decision Making and Older People.' *Trends & Issues in Crime and Criminal Justice*, no.139, December 1999, p. 3.

⁴ Brown & Jarrad, p. 534.

⁵ Ibid, p.531.

⁶ Sappideen, C. & Field, S. 'Coming of Age.' *About the House*. Issue 30, March 2007. pp. 22-25.

(ii) Legal Capacity

Central to the concept of entering into a power of attorney arrangement, is the presumption that an adult 'donor' has legal capacity. Although section 125A of the *Instruments Act 1958* (Vic) sets out what the witnesses must certify in making an enduring power of attorney, the MCLC believes that there are inadequate guidelines to determine each of the conditions under s 125A. The burden of determining such conditions infers a requirement on the part of witnesses to evaluate the particular health and medical issues of the donor, which would be beyond their level of expertise.

Recommendations

In light of the abovementioned issues, the MCLC submits the following recommendations for the *Inquiry into Powers of Attorney*.

- i) Specifically, s 125 (2) & (3) of the Instruments Act 1958 (Vic) is problematic given that a relative or a legal practitioner acting as witness may not have the necessary expertise to determine the legal capacity of the donor in accordance with the requirements under s 125A.

Recommendation 1

Where there is the slightest doubt about the legal capacity of the donor, MCLC recommends that there be an independent assessment made by a doctor or psychiatrist.

- ii) Given that older people have a somewhat limited understanding of the various forms of substitute decision making arrangements that are available, it follows therefore that we make such services more readily accessible and more 'user-friendly' for older people.

Recommendation 2

The MCLC recommends that the Victorian government, in collaboration with the various professional bodies and non-government organisations (NGO's)

should take the necessary steps to promote the awareness and understanding of and increase the accessibility of the various forms of powers of attorney arrangements that are available for older people. Ensuring that disadvantaged groups i.e. people with disabilities, culturally and linguistically diverse communities (CALD) and indigenous groups are included in these initiatives. This may be achieved through television and radio advertising, and/or facilitating community legal centres in providing community education on the legal issues surrounding powers of attorney.

iii) In an effort to provide a safeguard against abuse in a situation in which a relative of the donor as the designated power of attorney is suspected of financial abuse, there ought to be a requirement on the part of attorneys to give notice of their intentions.⁷ Such a safeguard would provide an inbuilt 'verification' mechanism whereby potential actions are verified in an effort to minimise (to the extent possible) the financial abuse of older people.

Recommendation 3

The MCLC recommends that prior to commencing any action under the power of attorney authority, attorneys must give notice of their intentions to other family members (or other person(s)) that are specified or designated by the donor.

iv) Another safeguard through which abuse may be impeded is to place a requirement on the part of attorneys to prepare an annual statement/report outlining the various financial transactions that have taken place on behalf of the donor, similar to the requirement put in place in the Guardianship and Administration scheme.⁸ Given that currently there is no requirement on attorneys to report any actions undertaken on behalf of the donor, such a requirement would ensure that all actions are accounted for.

⁷ Sappideen & Field, p.25.

⁸ Ibid, p.24.

Recommendation 4

The MCLC recommends that attorneys present an annual statement/report on the financial transactions that have been undertaken on behalf of the donor.

v) The MCLC believes that the review of powers of attorney by the Committee should also address powers of the attorney for medical treatment given to agents under the *Medical Treatment Act*. We believe that comprehensive reviews of all substitute decision-making processes are required in order to ensure a consistent approach.

Recommendation 5

The MCLC recommends that the Minister for Health requests that the powers of attorney for medical treatment are considered in this inquiry.

Conclusion

Recent trends which suggest that Australians are becoming older would mean that a larger proportion of older people would make power of attorney arrangements in the event of future incapacity. Nonetheless, given the various forms of illnesses and disabilities that old age may tend to bring about, older people are seen to be increasingly vulnerable to the exploitation of their financial resources. The lack of any adequate safeguards preventing such abuse serves as an indication that the current powers of attorney regulations have created the necessary preconditions for the financial abuse of older people.

In an effort to eliminate abuse in power of attorney arrangements, the first step is to promote the awareness and accessibility of legal rights amongst the elder population. This would ensure that older people are familiar with the system and have some level of confidence in having relinquished their control over decision making.

Prepared by Mohsin Mughal (Bachelor of Legal Studies student at LaTrobe University) on behalf of Moreland Community Legal Centre Inc.