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ELDER RIGHTS ADVOCACY

15 September 2009

Executive Officer
Victorian Parliament Law Reform Committee
Parliament House
Spring Street
EAST MELBOURNE VIC 3002

Dear Sir or Madam

INQUIRY INTO POWERS OF ATTORNEY

Please find enclosed the submission from Elder Rights Advocacy in relation to the Inquiry into Powers of Attorney.

I wish to thank you for the additional time that we have been granted for lodging our submission.

If you would like any further information or if you have any queries, please do not hesitate to contact me by telephone on 0418 503 157 or by email at belinda.evans@era.asn.au.

Yours sincerely

Belinda Evans

Belinda Evans
Acting Chief Executive Officer

Empowering older Victorians

Inquiry into Powers of Attorney

To:
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Submission from:
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Background

Elder Rights Advocacy (ERA), is funded under the National Aged Care Advocacy Program (NACAP) to provide advocacy for aged care recipients funded by the Australian government, across Victoria. ERA has been providing advocacy in Victoria for twenty years, initially under the Residential Care Rights Inc service name. This remains our incorporated association name, while we trade as Elder Rights Advocacy.

In our advocacy work we assist approximately 2,500 people each year within Victoria with enquiries and concerns regarding care recipients' rights when receiving aged care services. These services include high and low level residential care, community care in the form of Community Aged Care Packages (CACP) and flexible care such as Extended Aged Care at Home (EACH) packages and EACH – Dementia packages.

As part of our advocacy education role we provide education sessions for residents of aged care facilities and their relatives, and for staff working in aged care (including CACP and EACH services). We provided 263 education sessions across Victoria during the 2008-09 year, with 2,470 residents and family participants and 1,813 staff attending.

Our role at ERA is to provide information, advocacy support and education to older people and their representatives, and assist them in having their concerns and complaints addressed by the aged care provider. The issues handled by our service are often quite complex. We provide callers with information about care recipients' rights and entitlements and providers' responsibilities under the *Aged Care Act 1997* and the *Aged*

Care Principles. We are often involved in negotiating outcomes with providers on behalf of care recipients and/or their representatives.

In our experience, there is confusion among both the general community and the aged care industry about the nature and extent of the powers that a donor may confer on an attorney under the enduring powers of attorney that currently exist. This is the focus of our comments.

Preliminary comments

We are disappointed that the Committee has not been asked to look at enduring powers of attorney made under the *Medical Treatment Act 1988* (the MT Act). Under that legislation a donor may appoint an agent under an enduring power of attorney (medical treatment) who has the power to consent to, and to refuse, medical treatment (as defined in the MT Act) for the donor.

We believe that an inquiry considering law reforms to streamline and simplify powers of attorney in Victoria is incomplete if it is not asked to consider all forms of powers of attorney that exist under current Victorian laws.

There is some overlap between the medical treatment powers held by an agent under the MT Act and the health care powers that may be held by a guardian pursuant to an enduring power of guardianship under the *Guardianship and Administration Act 1986* (the GA Act). However, the two Acts use different terminology such as "health care" in the GA Act and "medical treatment" in the MT Act. The term "medical treatment" is defined in both Acts but there are significant differences between the two definitions. These issues add to the complexity associated with substitute decision making in relation to health care and medical treatment.

Need to streamline and simplify powers of attorney

We believe there is a need to streamline and simplify the current Victorian laws regarding powers of attorney. Having four different types of powers of attorney governed by three different Acts creates considerable confusion for donors and attorneys and for those dealing with attorneys.

We support the concept of having a new single Act that deals with the different types of powers of attorney and there being only two forms used to make the different appointments. One form could relate to general powers of attorney (financial) and the other form could relate to enduring powers of attorney (financial), enduring powers of guardianship and enduring powers of attorney (medical treatment). This would enable one form to be used in relation to all three types of enduring powers that continue or come into effect once the donor has lost capacity.

Confusion regarding powers conferred by the different powers of attorney

Enduring powers of attorney (financial)

In our work, the greatest source of confusion about powers of attorney relates to uncertainty about the powers that an attorney has under an enduring power of attorney (financial) made under the *Instruments Act 1958*.

We often deal with situations where a donor is a resident in an aged care facility and a family member is their attorney. The most frequent problem we encounter is that attorneys under these powers mistakenly believe that they have the power to make all decisions relating to the donor including where the donor lives, refusing access to the donor by other family members, and health care and medical treatment decisions for the donor.

Our understanding is that the powers conferred on an attorney by an enduring power of attorney (financial) are based on the old common law form of power of attorney and relate only to decisions regarding the donor's financial, property or business affairs. However, in our experience this is not well understood either by attorneys or by managers of aged care facilities, who often accept instructions from attorneys in relation to matters affecting the donor that are not within the scope of the power of attorney. We quite often deal with situations where an attorney (usually a family member) instructs the donor's aged care facility not to allow the donor to see certain family members with whom the attorney (but not the donor) is in conflict. In these situations we advise the aged care facility that the attorney does not have the power to restrict the donor's access to visitors.

For example:

> *An elderly woman was pressured by her son to appoint him as her attorney under an enduring power of attorney (financial) while she was unwell and in hospital. The attorney arranged for his mother to move to a residential care facility even though she wanted to return to her own home. The director of nursing (DON) at the facility mistakenly believed that the attorney had the authority to override the donor's wishes and place her in the facility. The attorney instructed the DON not to allow his mother to have any visitors or phone calls, saying that these could upset her while she was settling in. The DON initially acted on the attorney's instructions even though the donor said that she wanted to contact her friends, have them visit her and return to her home. The DON eventually contacted our office for advice. We advised her that the attorney did not have the power to decide that the donor was to live in the facility or to prohibit the donor from seeing her friends. The DON made an application to VCAT and a guardian was appointed. The guardian arranged for the donor to return to her home where she was able to look after herself with community care support.*

In another example:

> *An aged care facility was restricting a resident's son from visiting his mother. He contacted the facility and asked to speak to his mother and he was told by the DON that he could not speak with her or see her unless he had permission from his sister who held an enduring power of attorney (financial) from the resident. The son was estranged from his sister and other siblings and had had little contact with his mother for some time. The son contacted our office for advice. An advocate visited the resident and she indicated that she wanted to see her son. The advocate explained to the DON that the*

sister did not have the power to restrict her brother from visiting his mother. The DON said that she did not get involved in family disputes and stated again that the son would have to obtain permission to visit from his sister. The advocate suggested that the son contact the Office of the Public Advocate and VCAT for advice. Unfortunately, his mother passed away before he was able to obtain further advice.

These cases illustrate the need for greater community awareness and education about the powers conferred, and not conferred, on an attorney under an enduring power of attorney (financial).

Misunderstandings about the powers conferred by this type of enduring power of attorney appear to be exacerbated by the difficulty in ascertaining exactly what those powers are.

The *Instruments Act* does not specify what powers may be conferred on an attorney. Section 115(1) merely states that by an enduring power of attorney an adult may "authorise one or more persons (*attorneys*) to do anything on behalf of the donor that the donor can lawfully authorise an attorney to do." But there is no provision setting out exactly what a donor can lawfully authorise an attorney to do. Nor does the power of attorney form set out these powers, it simply says "I authorise my attorney(s) to do on my behalf anything that I may lawfully authorise an attorney to do."

On its web site the Department of Justice describes an enduring power of attorney by saying "This is where you appoint someone to make financial or legal decisions for you in the event of you losing, at some time in the future, the capacity to make those decisions for yourself." However, what is a "legal" decision? The web site does not provide a definition. This expression is extremely broad and it could be interpreted as relating to any decision involving the rights or responsibilities of the donor, including decisions about health care, medical treatment and lifestyle issues, and not just to decisions relating to the donor's property or business affairs.

It is therefore understandable that some donors or attorneys or those people dealing with attorneys may believe that this type of power of attorney confers on the attorney the right to make any type of decision for the donor including lifestyle, health care and medical treatment decisions.

We believe that the powers that may be conferred on an attorney by an enduring power of attorney (financial) should be clearly specified in the legislation and on the relevant form.

Enduring power of guardianship

The problems that we are aware of in relation to enduring powers of guardianship arise from uncertainty about the powers that may be exercised by the guardian, particularly in relation to health care, medical treatment and the administration of prescribed medication.

Under an enduring power of guardianship the appointor may authorise a guardian to consent to any "health care" that is in the appointor's best interests. If an enduring power of guardianship does not specify the matters in relation to which the guardian may exercise their powers, the guardian is empowered to exercise the powers of a guardian set out in section 24 of the GA Act which relates to the powers conferred on a plenary

guardian under a guardianship order. These powers include the power to consent to any "health care" that is in the best interests of the represented person (see s. 24(2)(d)).

It appears from the publication "Take Control", produced by Victoria Legal Aid and the Office of the Public Advocate, that an enduring power of guardianship that includes health care powers confers on the guardian the power to consent or withhold consent to "medical or dental treatment" but not to refuse medical or dental treatment. (See 10th edition, pages 4, 12 and 13.)

Problems arise from the fact that the definition of "medical or dental treatment" in section 3 of the GA Act expressly excludes from the definition certain procedures that are considered minor including:

> *"the administration of a pharmaceutical drug for the purpose and in accordance with the dosage level -*
> *(i) if the drug is one for which a prescription is required, recommended by a registered practitioner; or*
> *(ii) if the drug is one for which a prescription is not required and which is normally self-administered, recommended in the manufacturer's instructions or by a registered practitioner."*

This means that a guardian does not have the power to consent or withhold consent to the administration of a prescribed medication within recommended dosages. While it might have originally been thought that this was a relatively minor form of treatment for which consent was not necessary, in fact the exclusion can cause considerable problems.

In our work, this issue most frequently arises in the context of psychotropic medication being given to an appointor who is a resident of an aged care facility. The medication may be prescribed by a medical practitioner as a regular medication or to be used on an "as needed" basis where the frequency of administration is left to the judgment of staff. In some cases, guardians believe that the facility is using psychotropic medication too readily instead of using appropriate behaviour management strategies first and only using sedating medication as a last resort. The guardian may inform the facility that they do not consent to the medication being given so frequently, or at all, but the facility continues to administer the medication anyway. For example:

> *A resident of an aged care facility had previously appointed her daughter as her guardian under an enduring power of guardianship which included health care powers. Subsequently, a medical practitioner prescribed psychotropic medication for the resident due to her agitated behaviour. After commencing the medication the resident was very sedated and had four falls, two of which resulted in major injuries including a brain bleed and a broken arm. The guardian wanted the medication to be stopped or reduced as she believed that it was doing more harm than good to her mother. The facility said that it would continue giving the medication to the resident as no consent was required to administer the medication within the prescribed dosages. The guardian applied to VCAT seeking a guardianship order with medical treatment decision making powers which would give her the legal authority to consent or refuse consent to the medication. However, the resident died before a hearing could take place.*

In our view, the definition of "medical or dental treatment" in the GA Act should be amended to remove the exclusion regarding administering a prescribed drug within recommended dosages.

Given the powerful effect that many medications, particularly psychotropic ones, may have on an individual, we believe it is reasonable for an enduring guardian to have the power to consent or withhold consent to the administration of medication. As with any other form of "medical or dental treatment", if the guardian withholds consent and the medical practitioner believes that the medication is in the best interests of the appointor, he or she may give the guardian and the Office of the Public Advocate a statement under section 42M of the GA Act and may commence the medication subject to the guardian applying to VCAT within the required time frame for an order that administering the medication is not in the best interests of the appointor.

We also believe it is reasonable to expand the powers of an enduring guardian to include the power to refuse medical treatment. This would enable a guardian under an enduring power of guardianship to have the same medical treatment decision making powers that VCAT is able to confer on a guardian under a guardianship order.