



19 August 2009

Ms Kerryn Riseley
Executive Officer
Victorian Parliament Law Reform Committee
Parliament House
Spring Street
East Melbourne, VIC 3002

Dear Ms Riseley,

Re: Submission to the Victorian Parliament Law Reform Committee's Inquiry into Powers of Attorney

The Australian Association of Gerontology congratulates the Victorian Parliament Law Reform Committee for this timely inquiry into Powers of Attorney; we respectfully submit the following comments relating to the Terms of Reference:

1/ While streamlining the different types of power of attorney (PoA) documents could possibly make them easier to use, e.g., into one document with a section (possibly in a table format) highlighting the key differences of the various powers of attorneys (e.g., medical, general, enduring), great care must be taken to ensure that such streamlining does not, in fact, create even more confusion. In States where this is already the case, some doctors and solicitors tell patients/clients that if they have given someone enduring power of attorney (EPoA), that person can make their health care decisions, without making certain that the authority that has been given is not just financial authority and actually covers health care.

2/ In addition, the language used should not be overly complex or legalistic; even the concept of 'donor' can be confusing for older people (and younger people) because it is often confused or associated with organ donation or gifting to the needy. Keeping it simple would assist with accessibility.

3/ While determining that a donor has capacity to create a legally enforceable document at the time he or she creates a power of attorney is sometimes seen as a difficult area to navigate, particularly for lawyers who may not have the required expertise to do so, having the person's general practitioner or geriatrician attest to their capacity (e.g., by including a simple "tick and sign" statement within the document) could provide certainty not only to the person who is giving EPoA to someone, but also to the financial or health-care provider who has to act on that authority at some time in the future. This would also help to reduce vexatious claims from family/others that the person was not competent when they completed the document.

4/ Determining when a person loses capacity – and thereby allowing activation of an EPoA - is also important, and where any doubt exists, a medical report should be used, particularly when previous patterns of reasoning are contrary to the current cognitive behaviour of the individual in question. This is important to ensure that short term memory loss is not confused with a significant decline in cognitive capacity. (Note: the Mini-Mental State Exam [MMSE] is NOT an appropriate tool to test cognitive capacity of older people. Firstly, it was only ever intended to be a screening tool, not a determinant of capacity; secondly, there is very good evidence/research to show that it often does not accurately assess capacity when used with older people, people with low education, or people from CALD or ATSI backgrounds. Unfortunately, many people in those categories have been denied their rights through the inappropriate use of that tool.)

expanding knowledge of ageing



5/ With respect to the powers that attorneys have, a concerted education system needs to be put in place to assist both the donor and the attorney to understand their rights and responsibilities, with the limits of those rights and responsibilities clearly defined and explained in simple language. Research conducted in Queensland found that the majority of complaints investigated by the Office of the Adult Guardian or the Guardianship Tribunal did not relate to intentional wrong-doing, but to ignorance of the requirements of the appointment (e.g., for financial PoA, to keep records, to keep property separate).

6/ The conditions under which a PoA becomes an 'enduring' provision in relation to financial matters should also be clearly explained and included in the education document (above). (We assume that, as in other states/territories, the authority in relation to health care does not take effect unless/until the person giving the power has lost capacity, so that it can only be "enduring".)

7/ Finally, there must be provision for an 'audit' of the way the power is being used – or of the capacity of the person appointed to continue to perform that role, if such is requested by any third party. However, checks and balances would need to be established to ensure that the audits were not abused, and to dissuade spurious requests (for example, by disenfranchised family members).

Thank you for the opportunity to comment on the Victorian Parliament Law Reform Committee's Inquiry into Powers of Attorney; we look forward to hearing about the Committee's outcomes in due course.

Yours sincerely,

Professor Laurie Buys
National President
Australian Association of Gerontology

expanding knowledge of ageing