

Submission to the Standing Committee on Legal and Constitutional
Affairs

Inquiry into older people and the law

30 November 2006

Contact Julian Gardner

Public Advocate

Office of the Public Advocate
5/436 Lonsdale Street, Melbourne, Victoria

Phone 03 9603 9505

Email julian.gardner@justice.vic.gov.au

1. About the Office of the Public Advocate - Victoria

The Public Advocate in Victoria is appointed by the Governor in Council pursuant to the Guardianship and Administration Act 1986 (Vic). The Office of the Public Advocate (OPA) represents the interests of people with a disability, aiming to promote their rights and dignity and to strengthen their position in society. It is a statutory office, independent of government and government services, and can highlight situations in which people with disabilities are exploited, neglected or abused.

2. Functions relevant to the Inquiry

Among the functions of the Office of the Public Advocate are those that bring about a significant exposure to issues affecting older persons. These are as follows:

2.1 Guardianship

The Public Advocate is the guardian of last resort in Victoria. Appointments are made by the Victorian Civil and Administrative Tribunal. In 2005/06 577 new orders appointing the Public Advocate as guardian were made. The total number of guardianship cases handled during that financial year was 1145.

Those persons subject to guardianship are predominantly older people. In 2005/06 of the new orders 68.4% related to persons aged 61 and above. Persons aged 81 and above were 32.8% of all new orders. It is noted that the Inquiry concerns persons aged 65 and over. The estimated proportion of those subject to guardianship orders in Victoria in this age group is 60%.

An order for guardianship can only be made if there is evidence of a disability that leads to a decision-making incapacity. The most common form of disability amongst guardianship clients in Victoria is dementia. It represents 40% of cases.

2.2 Advice

The Office of the Public Advocate operates an advice service both by telephone and in person. In 2005/06 advice was given in 14,117 instances. In those cases in which data relating to age was requested and recorded 44% of enquiries related to persons 70 years and over with the largest single cohort (29%) concerning those aged 81 and over.

The subject matter of the calls was as follows:

Administration 22.5%
Guardianship 22.5%
Enduring Powers of Attorney 20%
Health Issues 12%
Welfare Issues 6%
Other 17%

2.3 Community Education

The speaking engagement programme in 2005/06 involved 227 presentations to a total audience of 11,900. One of the main topics dealt with in these sessions is that of enduring powers of attorney and guardianship. This assumes a priority for two reasons. The first is to promote autonomy by encouraging people to choose their own substitute decision-maker while they are competent. Secondly it forms part of a demand management strategy to encourage people to make their own arrangements rather than rely upon the resources of the state to provide guardianship and administration services.

Publications - a number of fact sheets, brochures and booklets are produced. These relate to matters primarily involving legal issues such as guardianship, administration, enduring powers of attorney, etc. They include a publication entitled "Take control - a guide to powers of attorney and guardianship". This is a substantial booklet published in conjunction with Victoria Legal Aid. In 2005/06 18,700 copies were distributed and a further 4300 copies were downloaded from our website.

Website - The Office of the Public Advocate has a website that is AAA rated for disability. It contains access to information about a range of legal matters affecting substitute decision-making. It includes all of the forms necessary to make enduring powers of attorney or guardianship. The address is www.publicadvocate.vic.gov.au.

Video - Production is near completion of a video promoting an understanding of, and therefore the use of, enduring powers of attorney. It has been funded by the Victoria Law Foundation and prepared in conjunction with ten community agencies dealing with older persons.

2.4 Investigations

The Office of the Public Advocate has significant statutory powers to conduct investigations into matters that are raised by way of application to the Victorian Civil and Administrative Tribunal. A large proportion of these investigations involve allegations of abuse (including predominantly financial abuse), exploitation and neglect. Persons who are subject to investigations by this Office are predominantly older people. In 2005/06 57.5% of these persons were aged 61 and over.

3. Demographic issues.

Australian Bureau of Statistics figures on the ageing of the Victorian population predicted that in the four years to 2006 the number of Victorians aged less than 60 years will grow by a total of 2.8%. In that same four years the number of Victorians aged 80 and over will grow by 19.1%.

In addition an Access Economics report for Alzheimer's Australia records that over the age of 60 the incidence of dementia doubles every 5 years of age from 2% at age 65 to 32% at age 85.

When the age data and dementia data are combined it is clear that there will in the immediate and medium term future be a large increase both in older people and in those who will encounter a decision-making incapacity.

4. The importance of protecting rights.

The objective of the Office in making a submission to the Inquiry is to examine ways in which legislative regimes (or the lack thereof) have an impact on the quality of life of people as they get older.

One of the central tensions for law-makers is to respect and give effect to the balance between the right to autonomy and the right to protection. Since as early as the thirteenth century the King, and now the state, has accepted that it has a duty and a corresponding power to protect those citizens who are not competent. This is expressed through the *parens patriae* jurisdiction which exists today in the Supreme Courts (and in the Family Court in relation to children). Under our laws children are deemed to be incompetent and for that reason special protective laws are made to shelter them from abuse and neglect. In addition laws prevent them from, for example, entering into contracts and thereby incurring liabilities for which they could not reasonably be expected to have the capacity to comprehend. The *parens patriae* jurisdiction has also been seen as protecting adults who lack competence or capacity to make reasonable decisions for themselves.

In Australia we have chosen to give effect to this protective responsibility in respect of adults through guardianship and administration legislation. Our system is seen internationally as a best practice model of providing protection.

The guardianship and administration legislation comes into operation when an adult lacks competence and is therefore of particular relevance to older people given the incidence of decision-making incapacity that arises from dementia, and, in some cases, frailty.

The protective intervention under guardianship and administration laws does at times attract criticism. Typically these criticisms come, understandably, from those persons who are responsible for the abuse or neglect that gave rise to the order or from the individual themselves when their lack of capacity makes them unable to perceive the risks and the need for protection.

Guardianship and administration legislation provides vital protective measures to ensure that a person's rights are protected and promoted. The legislation not only enforces the right to protection but also gives effect, as far as possible, to an individual's right to autonomy, to be treated with dignity and to have their interests made paramount over the interests of others when making decisions about their welfare.

Recommendation – That the committee reaffirm the importance of guardianship and administration laws in protecting the rights of older people who have a decision-making incapacity and who have experienced or are at risk of experiencing exploitation, abuse or neglect.

A difficult question arises in relation to people who are very vulnerable but who are, nevertheless competent. For example, this Office encountered a woman in residential care whose financial affairs were being managed by her son. She expressed great concern about the way in which he was doing this and, in particular, the fact that he was doing so for his own benefit and to the detriment of her interests. However, she stated that she wanted no action taken given that he was her only relative, that he did continue to visit her from time to time and that if she alienated him she would feel completely abandoned and alone.

This example is, in the experience of this Office, not uncommon. It is not, however, a problem to which we can suggest a legislative solution.

5. Fraud

The experience of this Office in relation to fraud is limited. The submissions that we make and which may be considered to be relevant to this aspect of the Terms of Reference are dealt with within the context of financial abuse.

6. Financial Abuse

6.1 Financial abuse generally

The issue of financial abuse must be seen within the broader context of elder abuse. It is difficult to quantify the level of elder abuse but estimates suggest that some 20,000 people in Victoria alone – and therefore by extrapolation some 80,000 in Australia – are affected each year.

Elder abuse can be defined as any act that results in harm to an older person, which occurs in a relationship where there is an implication of trust.

To adequately prevent and respond to the abuse of older persons a comprehensive and coordinated approach is required which involves the following elements:

- Education and support for older Victorians, carers, primary care professionals and the wider community
- A whole of government and community response
- Protocols for agencies and interagency collaboration

- Lead agencies within each region to offer support to other agencies through advice and assistance as well as a statewide agency resourcing these and existing agencies to undertake this role.
- The use of multidisciplinary teams in responding to situations of abuse
- An evaluation of the effectiveness of these strategies.

Abuse can take many forms including psychological, physical, sexual, neglect and social. However, it is universally accepted that the most common form of abuse is that of financial abuse.

Most commonly, financial abuse – in general terms – involves family members in either:

- a) Preserving an inheritance by not spending money on an older person's welfare needs; or
- b) Bringing forward an inheritance by using an older person's assets for their own benefit.

Examples of financial abuse include:

- Taking, misusing or using, withholding knowledge about or permission in regard to money or property
- Forging or forcing an older person's signature
- Abusing joint signatory authority on a blank form
- Misusing ATMs and credit cards
- Cashing an older person's cheque without permission or authorisation
- Misappropriating funds from a pension
- Getting an older person to sign a will, deed, contract or power of attorney through deception, coercion or undue influence
- Persuading an older person to change a will or insurance policy to alter who benefits from the will or policy
- Using an authorised power of attorney not in the interests of the older person
- Negligently mishandling assets including misuse by a care giver
- Promising long-term or lifetime care in exchange for money and property and not providing such care
- Over-charging or not delivering care giving services
- Denying access to money or property
- Getting an older person to go guarantor without sufficient knowledge to make an informed decision¹.

Most relationships do not involve abuse. However, once we realise the extent to which people as they become older rely upon others we can also realise the increasing level of risk from those small proportion of relationships that are abusive. A valuable study was undertaken in Queensland in 2002.²

¹ Hafemeister, T. (2003) in *Elder Mistreatment: abuse, neglect and exploitation in an ageing America* (ed. Bonnie, R) National Academies Press, Washington. As cited in a discussion paper dated 3 November 2005 from the Office of Senior Victorians.

² Cheryl Tilse, Deborah Setterlund, Jill Wilson and Linda Rosenman, *Ageing and Society* 25, 2005, 215-227.

Tilse and others conducted a national telephone survey of 3466 adults that explored the prevalence and nature of non-professional asset management. As the table below shows the presence of dementia is only one of many reasons why assistance is sought.

Reported main reason financial assistance was required.

Reported reason	Percentage
Lacks confidence doing it themselves	28.3
Dementia or confusion	11.7
Disability or poor health	27.2
Old and frail	20.6
English not first language	5.8
Literary difficulties	2.2
Other	4.2

The above figures are for people aged 65 and over. Separating out those in the 80 or over group dementia became more significant but the most dramatic change was in an increase from 10% to 32% of those who simply indicated that “old and frail” was the main reason that they required assistance with their finances.

Also of interest was the form in which the assistance with the management of assets occurred.

Tasks people received assistance with:

Task	Percentage
Paperwork	72.4
Paying bills	54.6
Accessing money or banking	41.9
Pensions and superannuation	36.9
Property management	30.8
Accessing financial advice	16.0
Investments	11.1

Clearly from this table a significant proportion of older persons were receiving assistance from someone else in their interactions that involved banking and financial services.

Given other evidence that indicates the reluctance of older people to use ATMs or internet banking, it is possible to argue that the move to electronic banking and the decrease in the number of branches has had the effect of increasing the extent to which older people need assistance with their transactions.

In part this is reflected in the following table from the same Queensland study.³

Forms of assistance for an older person	Percentage
Formal	
Enduring power of attorney	15.4
Administration order	1.4
Semi-formal	
Bank arrangement	18.7
Informal	
Use ATM PIN number	9.8
Electronic payment eg. by phone, internet	10.5
Fill-in cheque or make withdrawal	17.0
Paid with own money	49.7

As already indicated, abuse in the context under discussion involves the abuser occupying a position of trust. It is not surprising therefore to find that close relatives make up some 80% of suspected financial abuse cases. Gender seems to make little difference so that if it is the children who are abusive they may either be the son or daughter. In many cases the abuser has the view that they have some entitlement to the assets on the ground that they will – or at least in their mind they should – ultimately inherit them and therefore they are simply advancing the time at which that inheritance is received. Alternatively they may be seeking to protect their inheritance and, as a consequence, expenses that should be incurred for the benefit the older person are not incurred. In other cases the abuser may believe that they have an entitlement for the burden of care that they carry or that they themselves have been abused in the past and are simply settling old scores.

The consequences of financial abuse for the older person can be particularly significant. Too often the prospects of recovery are limited. However, it is not just the financial loss, as significant as it may be, that has serious consequences. The older person may well have built their life plan around the sense of security that comes from having assets in their retirement and will, as a consequence, feel exceedingly insecure. With this may come a sense of betrayal and depression.

Protection comes from the criminal law in extreme circumstances but it is of minimal use given both the problems of detection and the reluctance of family members to issue complaints of a criminal nature.

Secondly there are provisions in each state and territory for executing an enduring power of attorney. The advantage of an enduring power of attorney is that an individual can appoint someone whom they trust. However, they do not provide a guarantee against abuse.

³ Ibid at 222.

The third form of protection is the making of an order for administration or, as it is called in some states, financial management. Such an order can only be made when an individual has a disability that leads to a decision-making incapacity.

Legislation establishing laws in relation to guardianship and administration also provides for the investigation of allegations of financial abuse. In some states and territories the investigation is carried out by the tribunal whilst in others it is carried out by either the Office of the Public Advocate or its equivalent such as an Office of the Adult Guardian. In Victoria, for example, this Office has powers when conducting an investigation to require the provision of information. Such powers have the effect of requiring banks and financial services to produce information about the person who is thought to have a decision-making incapacity.

6.2 Financial abuse and the role of banks

Problems exist in the enforcement and use both of enduring powers of attorney and of tribunal orders because of varying approaches taken by banks and financial institutions.

For example, in WA the Public Advocate reported a letter from a bank that refused to allow the donee of an Enduring power of Attorney to operate a credit card. It stated that because of the Conditions of Use the only way that a third person could be authorised to operate the card was by the cardholder nominating an additional cardholder and an additional card being issued.

The WA Public Advocate reported inconsistency in banks in accepting EPAs for the purpose of entering into mortgages in the name of the donor.

On other occasions attorneys have been told to go away and get an authorisation from the donor. Such action implies no understanding of what this means if that donor is now incompetent, which is, of course, the very reason for having an EPA.

Practical problems exist with banks and financial services recognising what an order for administration or financial management is and what its implications are. In Queensland, for example, the Guardianship and Administration Tribunal reported that it regularly experiences institutions that do not recognise certified copies of Tribunal Orders or require to sight the original order. This is so even though the Act states that a certified order is evidence of that order.

The same tribunal reports problems with banks requiring certain names for accounts or having systems that do not allow an account to be named “X as administrator for Y” and, as a consequence forcing administrators to risk breaching the Act by not keeping their own funds separate.

Banks do not always recognise that the administrator has the same right to operate an account as the customer. They do not always recognise that the

appointment has the effect of taking away the right of a customer to operate an account unless the administrator specifically authorises it. It needs to be understood that in many cases an administrator will encourage the person with a disability to have some ongoing autonomy and independence by allowing them to operate an account with limited funds.

Similarly this Office has experienced problems with banks recognising our role as investigators when we request that an emergency stop be placed on an account to prevent an imminent incident of misuse.

There is an important potential role for banks and financial services in detecting financial abuse. The American Bar Association produced a paper in 2003 entitled “Can bank tellers tell? Legal issues relating to banks reporting financial abuse of the elderly.” In that paper it stated that “banks have the potential to be the ‘first line’ of defence against financial abuse, by identifying the abuse at its outset, before the elder’s assets have been dissipated.” The paper suggests that banks are in a position to observe behaviours such as:

- An unusual volume of banking activity
- Banking activity inconsistent with the customer’s usual habits
- Sudden increases in incurred debt when the older person appears unaware of transactions
- Withdrawal of funds by someone else handling a person’s affairs with no apparent benefit to that person
- Implausible reasons for banking activity given either by the older person or someone accompanying them.

Given that the Commonwealth has banking powers there are options for a legislative response to impose requirements on banks for mandatory reporting of suspected financial abuse.

Our preferred approach is for a co-operative solution that does not impose mandatory reporting requirements. First there is a need for awareness of the problem and the role of banks and financial institutions in dealing with it and, indeed, their duty of care to their customers and their duty to avoid carelessly becoming party to a fraud.

In the US where voluntary reporting exists co-operative projects typically include the following:

1. Securing the co-operation of the banking industry
2. Preparing materials to be used in training bank personnel to recognise signs of financial abuse.
3. Development by the banks of an internal protocol to deal with suspected abuse, such as requiring bank employees to report suspected abuse to the bank’s security director or branch manager for a determination whether the incident should be reported.
4. Implementation of training and the protocol for reporting.⁴

⁴ American Bar Association “Can bank tellers tell” 2003 p. 30 accessed at http://www.elderabusecenter.org/pdf/publication/bank_reporting_long_final_52703.pdf

Training can involve teaching staff how to recognise vulnerability in customers as well as how to report it. Understanding the common profile of vulnerable customers and of potential abusers can assist. Strategies can be given for detecting a lack of capacity in a customer. For example some useful questions that may at times be asked of a customer could include:

- How much money is in this account?
- Can you tell me when you last withdrew money from this account?
- How much money did you withdraw?
- What effect will this transaction have on this bank account?

Training is also needed on what protection mechanisms and review processes are in place. There is a need to understand enduring powers of attorney and administration orders made by tribunals. Where vulnerable clients are identified particular care is needed in relation to assisted/induced withdrawals and in the identification of persons making withdrawing over the counter or cashing cheques.

Banks should be able to develop instructions for staff on how to discuss with older customers the ways in which they can protect themselves so that their service is enhanced.

Recommendation: That the Commonwealth exercise its banking powers to enter into arrangements with banks and financial institutions to establish on a voluntary and cooperative basis effective processes for minimizing the incidence of financial abuse of older people.

Recommendation: That the arrangements with banks and financial institutions should include the preparation of materials to train personnel in recognising financial abuse; the development of internal protocols to deal with suspected abuse; and the implementation of the training and protocols.

6.3 Strengthening the operation of guardianship and administration orders

Recognition of orders

The legal processes under which protection is provided to vulnerable older people by the making of an order can be undermined by the inconsistency with which some Commonwealth instrumentalities agree to or refuse to recognise the order.

For example, Centrelink administers arrangements for authorising a person to receive payments on behalf of another person who is entitled to that payment. In some cases the person receiving the payment does not apply those monies solely to the benefit of the entitled individual. In other words they do not act in that person's best interests. To remedy this, an application can be made to a tribunal for an order to appoint an administrator. While generally Centrelink is co-operative, there is no guarantee that it will recognise that tribunal order.

The legal advice that has apparently been provided to Centrelink is that under the Australian Constitution, as Commonwealth laws override those of States, it is not required as a Commonwealth instrumentality to recognise orders made by a tribunal operating under state legislation.

Similar statements about the law guide the administrative practices of the Department of Veterans' Affairs.

Recommendation: that given the importance of guardianship and administration laws in protecting rights, and given the need to avoid undermining those laws by inconsistency in recognition, Commonwealth instrumentalities such as Centrelink and the Department of Veterans' Affairs be required to recognise orders made by a tribunal responsible for guardianship and administration.

Interstate recognition of orders

This Office has experienced several cases in which the represented person has travelled interstate. This may occur for example:

- On the basis of the represented person's own decision in circumstances which puts their welfare, health and physical safety at an unacceptable level of risk;
- When taken by a relative or friend to evade the order (for example, a woman in her eighties with advanced dementia and being cared for in a nursing home had considerable financial means. A man twenty five years her junior formed a friendship with her, proposed marriage and without approval took her from the nursing home – without her medication – and travelled interstate);
- When taken by a family member to further their dispute with other family members (for example, an eighty two year old male who was settled in a nursing home with familiar routines and friends was taken by the eldest child who was estranged from her siblings. She took the person interstate without consultation);
- When taken by someone who themselves is unwell and whose denial of the person's need for particular care or medical treatment puts that person at risk.

In most cases there is a need for prompt action to give effect to the decision about the person's welfare. Not uncommonly these situations arise outside normal office hours.

Generally the legislation in States and Territories provides adequately for the recognition of orders made in another jurisdiction. However it is not the case in NT, SA and in WA

Recommendation: That States and Territories be required to ensure that all necessary legislation and regulations are in place to give effect to the prompt and efficient recognition of orders made by a guardianship tribunal in another jurisdiction. They should also be required to ensure that the guardianship tribunal has in place efficient measures for such recognition to occur outside working hours.

Extra-territorial operation of orders

It is not uncommon for a person to own property in more than one jurisdiction. When an order appointing an administrator is made it is necessary to be clear whether or not that administrator is able to lawfully exercise powers and discharge duties outside the jurisdiction in which their appointment is made.

In the case of guardianship, when a represented person moves temporarily across a border it is clear that the guardian cannot require the police or other State authorities to take action that would assist the guardian without obtaining registration of that order in the relevant State or Territory. However, there is some uncertainty and, therefore, a need for greater clarity on whether a guardian themselves can lawfully make decisions.

Recommendation: That the Standing Committee of Attorneys General be asked to report on the extra-territorial operation of the guardianship and administration laws of each jurisdiction and make recommendations for action to ensure that the movement of persons across jurisdictional boundaries does not render the protective benefits less effective or impose unnecessary inefficiency or cost.

6.4. Implications of capacity assessment.

As already discussed, older persons experience an increased incidence of disability leading to a decision making incapacity. The consequences of an assessment that an individual lacks capacity are very serious in terms of the impact they have upon individual freedoms. Given this it is of concern that there is a lack of clarity in the definitions of capacity and a lack of consistency in the processes for assessment of capacity.

Definitions of capacity are contained both in common law and in various terms in different pieces of legislation. Whether or not it is feasible to address this by adopting a single definition of legal capacity that could be used for decision-making in all circumstances warrants further exploration. Similarly, investigation is justified of whether concepts such as that adopted in the province of Ontario in Canada of having registered professionals conducting assessments would be feasible and desirable.

Recommendation: That States and Territories be encouraged to review the laws and practices relating to the assessment of decision-making capacity to ensure that the rights of older persons are protected and that unnecessary intrusions of personal liberty are avoided.

6.5 Promoting the use of enduring powers.

There is little available data on the extent to which older persons do take advantage of existing laws that enable the appointment of substitute decision-makers who have power to make decisions should the donor of the power become incapable. In Tasmania enduring powers of guardianship are required to be registered with the Guardianship Tribunal. In that State it is therefore possible to gain statistical evidence and it is understood to show a very significant increase in the use of this instrument. Even so it is likely that no

more than one in hundred people have an enduring power of guardianship in that State.

It is likely that legislative provisions will have an impact on the take up rate for enduring powers. For example, there are arguments for and against legislative provisions requiring the registration of such instruments. The current Inquiry has the opportunity to initiate an exploration of these issues with a view to making recommendations about any legislative provisions, including requirements for legislation that may encourage older persons to make more extensive use of provisions that are protective of their rights and interests.

Recommendation: That the Inquiry initiate an investigation and report into the ways of promoting the use of enduring powers including the advantages and disadvantages of requiring the registration of such instruments.

7. General and Enduring Power of Attorney Provisions.

It is noted that at a national meeting of Health Ministers on 7 April 2006 called to consider the national framework for action on dementia, Ministers endorsed the following priority for action:

Refer the issues of legislative barriers regarding guardianship, advanced care planning and advanced care directives, wills and Powers of Attorney to Australian Government and State and Territory Attorneys General departments.

Presumably, given the narrower terms of reference, the current Inquiry is not a response to this resolution. If it is not then the Inquiry should clarify what action is being taken to respond to this resolution.

We note that an Inquiry by a Commonwealth Parliamentary committee may encounter difficulties in that the laws relating to Powers of Attorney are dealt with under State legislation. It is yet another example of the difficulties to which federalism gives rise given the lack of uniformity and, in some cases, difficulties in giving effect to such instruments in all parts of Australia.

Depending upon the jurisdiction there may be several relevant powers. For example in Victoria there are:

- a) General Power of Attorney – This deals with legal and financial matters but only remains in effect whilst the donor is competent. It is, however, a potentially valuable instrument for many older persons who, while competent, have mobility difficulties in accessing banking or who find the complexities of dealing with financial matters tiresome and are happy to give them to someone else.
- b) Enduring Power of Attorney for financial matters – Relatively recent reforms in Victoria have made this instrument far more flexible and provide greater choice and protection to donors.
- c) Enduring Power of Attorney for medical treatment

- d) Enduring Power of Guardianship – This can cover all lifestyle type decisions, including medical treatment, but excluding financial and legal matters.

The complexity in Victoria is illustrated by the fact that there are three different enduring powers each created under different legislation. While both the Enduring Power of Attorney for medical treatment and the Enduring Power of Guardianship can appoint someone to make medical decisions only an appointment under the former can refuse treatment under the Medical Treatment Act. The three forms have different requirements for witnessing and have different provisions regarding the appointment of alternates or joint and several attorneys.

It is the view of this Office that the extent to which people are deterred from executing enduring powers is, in part, the complexity and the confusion that can arise from having three documents. It is the view of this Office that the three instruments should be combined into one instrument with the opportunity for the donor to choose which specific powers are being given.

It is not clear what the Inquiry can do about this other than to encourage States and Territories to simplify their instruments. However, the Inquiry can reinforce the need to promote the use of enduring powers.

Recommendation: That the use of Enduring Powers of Attorney should be encouraged as a means of:

- **promoting autonomy**
- **reducing the risk of abuse and exploitation**
- **reducing the potential demand for the provision of tax payer funded guardianship and administration services.**

The significance of the recommendation immediately above is emphasised by the figures appearing earlier in the submission on the ageing of the population and the increasing incidence of dementia and, therefore, of decision-making incapacity.

Given the difficulty within one jurisdiction such as Victoria in simplifying the provisions that relate to three different documents, it is difficult to envisage what recommendations could usefully be made or what action could usefully be taken by the Inquiry in bringing about greater national uniformity. However, any action that could lead to greater consistency in form, terminology, witnessing requirements, and provisions for registration would further the goal of increasing the use of Enduring Powers of Attorney.

It is the Office's experience that not only do people move between states and territories but that a person may own property or conduct financial or legal transactions in more than one jurisdiction. These facts make it imperative that an Enduring Power of Attorney be recognised and have effect in all states and territories. Attached as Appendix 1 is a table setting out the current situation in terms of interstate recognition with respect to Enduring Powers of Attorney for financial treatment and Enduring Powers of Attorney for Guardianship. This table has been prepared by this Office for the purposes of the Australian Guardianship and Administration Committee.

It should be noted that the table does not deal with Enduring Powers of Attorney for Medical Treatment. Given the difficulties in achieving interstate recognition of other powers, it is considered unlikely that progress will be made in relation to Enduring Powers of Attorney for Medical Treatment. This is because in some jurisdictions no such powers exist whilst in others it is considered that any legislative amendments are so controversial that there is little political will to deal with them. This seems to be the consequence of a general reluctance to raise issues about medical treatment decisions given that such amendments are seen as likely to give rise to an unwelcome debate about the topic of euthanasia.

Recommendation: That it is important to ensure that there is inter jurisdictional recognition between States and Territories for those Enduring Powers of Attorney for financial matters, Enduring Powers of Attorney for medical treatment and Enduring Powers of Guardianship that are made in another jurisdiction.

Recommendation: That the States and Territories through the Standing Committee of Attorneys General be asked as a matter of priority to ensure that statutory provision is made in those jurisdictions in which such provisions do not already exist to provide for the inter jurisdictional recognition of enduring powers.

Enduring Powers of Attorney for medical treatment.

This Office has substantial experience in making medical treatment decisions including those that occur at the end of a person's life. It is acutely conscious of the value of an individual having appointed a trusted decision-maker and, as importantly, having made known their wishes about medical treatment. This Office is a member of the national reference group of the Respecting Patient Choices project. The Public Advocate also chairs the ethico legal committee of that project. The project operates out of the Austin Hospital in Melbourne but, with Commonwealth funding, has expanded to a hospital in every State and Territory. The experience of this project has been to emphasise the value of offering to individuals the opportunity to discuss their wishes and, if appropriate, to appoint an Enduring Power of Attorney.

One of the major difficulties is that in certain circumstances – particularly where treatment is urgent – the existence of an Enduring Power of Attorney will not be known to those responsible for treatment.

Persons signing Enduring Powers can be encouraged to ensure that their GP and their local hospital are aware of the existence of a power and therefore of a substitute decision-maker who has knowledge of the person's wishes. These provisions are not, however, always effective.

This Office believes that an opportunity exists to use technology in the form of cards that contain digitally stored data.

Recommendation: That the Commonwealth government should ensure that if proposals for a Medicare smart card do proceed, provision is made for the voluntary inclusion on the card of information about the existence of an

Enduring Power of Attorney for medical treatment and other information, including advance directives where applicable, about a person's wishes regarding medical treatment. Failing that, proposals be developed for effective methods by which relevant health care provisions are made known in a timely fashion of the existence of a person's enduring power.

8. Family Agreements

This office has limited exposure to family agreements given that its focus is not on financial matters. However, we have had experience of informal arrangements that have resulted in the exploitation of the older person.

For example, in one case a daughter agreed to build a unit in her back garden in which her mother could live and agreed to care for her mother in that unit. The unit was built using the mother's money which were the proceeds of the sale of her house. After two years the daughter and mother had a falling out and the daughter arranged for the mother to be moved into a nursing home. The arrangement was an oral one and provided no protection for the mother nor any way of recouping her former assets to support her care in the nursing home.

Recommendation: That guidelines be established recommending the use of family agreements and providing suggestions for model provisions of such agreements.

9. Barriers to older persons accessing legal services.

It is noted that considerable work on this issue has already been done. In particular reference is made to the report of the NSW Law and Justice Foundation entitled "The legal needs of older people in NSW", Ellison, Schetzer, Mullins, Perry and Wong, 2004.

The report indicates seven significant areas in which it has been found that older people need information on the law.

Of the seven areas identified four relate to work that is undertaken by this Office and its equivalence in other States and Territories.

Given that the terms of reference of the Inquiry are limited to "legislative regimes" it is not possible to offer recommendations on measures that could be taken legislatively to address barriers to older Australians accessing legal services.