

Seniors Rights Victoria

Submission to the Royal Commission into
Aged Care Quality and Safety

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1. About this submission

1.1 Executive summary

Seniors Rights Victoria (SRV) welcomes the opportunity to make a submission to the Royal Commission into Aged Care Quality and Safety. SRV is the key state-wide service in Victoria established specifically to work with older people experiencing elder abuse.

This submission details our experiences of how older people living in aged care have had their independence curtailed and decision-making powers limited through improper use of enduring powers of attorney (EPOA), guardianship and administration orders, and advance care directives. This has occurred due to:

- ignorance and misunderstanding of the proper use and extent of these powers, orders and directives by aged care facility staff
- deliberate misuse of powers with the intent to restrict the independence and decision-making opportunities of the older person, and/or
- misguided attempts to safeguard or protect the older person.

In many cases the misuse of EPOA documents is driven by the appointed attorney and facilitated by the aged care facility staff without proper consideration of the older person's preferences and rights. Misuse of guardianship and administration orders is often a result of aged care staff believing they are acting protectively from a perceived or misunderstood duty of care or in the older person's best interests, but without regard for the older person's capacity, wishes and/or will.

This submission speaks directly to the Commission's terms of reference regarding how to ensure that aged care services are person-centred and allow people to exercise choice, control and independence in relation to their care.

In order to improve understanding and to deter the misuse of enduring powers of attorney, guardianship and administration orders, and advance care directives, Seniors Rights Victoria recommends the following:

Recommendation 1: Aged care provider management and staff should undertake regular professional education on the legal operation and requirements of enduring powers of attorney, guardianship, medical treatment decision-makers and advance care directives.

Recommendation 2: Commonwealth and state governments should work together on the harmonisation of national decision-making laws and practices.

Recommendation 3: Commonwealth and state governments should create an online register of enduring power of attorney (and similar) documents, as recommended by the Australian Law Reform Commission.

Recommendation 4: All enduring power of attorney appointments that take effect upon loss of capacity should require a formal assessment of capacity, and documentation of this assessment should be linked directly to the power of attorney document.

Recommendation 5: That aged care service providers cannot require enduring powers of attorney or advance care directives when an older person becomes a resident of a facility.

Recommendation 6: The older person should be present (or their absence explained by an independent party) at tribunal decisions regarding guardianship and administration. The tribunal should be required to make contact with the older person to ascertain their wishes and awareness of proceedings.

Recommendation 7: That aged care service providers make a considered move toward care practices that prioritise the will, preferences and rights of a person, whether or not they require decision-making support.

Recommendation 8: The Commonwealth government should ensure that there are improved policies and procedures in place for aged care facilities to acknowledge and communicate advance care plans and advance care directives, and for these directives to be revisited regularly.

1.2 About Seniors Rights Victoria

Seniors Rights Victoria (SRV) works to prevent elder abuse and safeguard the rights, dignity and independence of older people. Elder abuse is any act which causes harm to an older person and is carried out by someone they know and trust such as a family member or friend. The abuse may be physical, social, financial, psychological or sexual and can include mistreatment and neglect.

SRV is a community legal centre operating a helpline and a lawyer–social worker advice and casework model to support older people who have experienced elder abuse. SRV provides information, advice, education and support to older Victorians, their friends and family members, and service providers, through:

- telephone information and referral
- specialist legal services,
- advocacy, including short-term individual support
- community and professional education.

SRV also has a role in policy and advocacy, capacity building, and working collaboratively with relevant sectors to better identify, address and prevent elder abuse.

Operating since 2008, SRV is funded by the Community Legal Service Program through Victoria Legal Aid and the Victorian Department of Health and Human Services. It is a program of the Council of the Ageing Vic (COTA) and governed by its board.

1.3 Human rights and ageism

Seniors Rights Victoria operates under the principles of empowerment of older people and recognition of their rights. SRV works with older people to increase their degree of self-determination, enabling them to represent their own interests and claim their rights.

SRV's position is that old age is a natural part of the life course; it is not a deficit or failure. People entering the aged care system should not be treated as anything less than integral members of society. All Australians are entitled to access health and aged care that enable them to age with dignity and respect. In this regard it is important to recognise that we all have rights and needs – as humans, not as consumers. Health, wellbeing and integrity cannot be purchased as part of a package or allocated

according to market whims and mechanisms – especially when involving vulnerable people in the role of customer. We need an aged care system that recognises the individual as a whole person fulfilling an important role in society – not simply as a consumer of resources.

More specifically, there are a number of human rights enshrined in the Universal Declaration of Human Rights that relate to this submission. Article 25 confirms the right of each person to a standard of living adequate for their health and wellbeing, including food, clothing, housing and medical care and necessary social services; and the right to security in the event of old age, which is noted as a circumstance that may affect a person’s livelihood. Articles 12 and 22 confirm the right to access, to liberty of movement and freedom of association, which need to be upheld by aged care service providers that have the ability to control who can come and go from their facilities and allow or prevent access to the resident from family and friends.

This submission outlines a limited number of issues regarding legal appointments and documents, which are particularly relevant in the work of SRV. However, the underlying driver that allows and encourages these behaviours (and many of the behaviours held up for scrutiny for the Royal Commission) is ageism.

Ageism, and the way people are treated differently as they age, results in older people being marginalised and afforded less power and social status. This results in older people receiving lower levels of care than they are entitled to and deserve, and having less opportunity for redress when their rights are infringed. When older people are viewed as less deserving and less valuable members of society they are construed as a burden and less consideration is given to their needs and rights. In turn, this leads to the acceptance of behaviours and assumptions that would be seen as objectionable if applied to a younger person.

While this submission is focused on the misuse and mistreatment of enduring powers of attorney, guardianship and administration, and advance care directives, it also seeks to highlight the need for the provision of aged care services in Australia to be considered through the lenses of human rights and ageism, rather than a consumer-based model.

1.4 Abuse and mistreatment in aged care

Abuse and mistreatment such as staff misconduct occurring within Commonwealth-funded residential and community aged care settings does not fall under the remit of Seniors Rights Victoria (SRV). Calls regarding these situations are referred to the Aged Care Complaints Line and Elder Rights Advocacy, as appropriate. However, in supporting older people who are experiencing elder abuse perpetrated by an individual, SRV has become aware of many situations where the staff of aged care service providers have been complicit with the perpetrator in mistreatment of the older person, primarily regarding the misuse of enduring powers of attorney documents (EPOAs), but also through the contested use of guardianship and administration orders.

As detailed in this submission and described in de-identified case studies, multiple SRV clients living in aged care facilities have had their independence curtailed and decision-making powers limited through improper use of EPOAs or unnecessary applications for guardianship and administration. This has occurred due to ignorance and misunderstanding of the proper use and extent of these powers and orders; deliberate misuse of powers with intent to restrict the independence and decision-making opportunities of the older person; and misguided attempts to safeguard or protect the older person.

Often this misuse is directed by the person appointed as attorney through the EPOA, with the aged care facility staff following the attorney's directions, though there are also instances where aged care staff have sought guardianship in the belief that they are acting in the older person's best interests.

This submission speaks directly to the Commission's terms of reference regarding person-centred care:

e. how to ensure that aged care services are person-centred, including through allowing people to exercise greater choice, control and independence in relation to their care, and improving engagement with families and carers on care-related matters.

This submission will detail specific examples, and highlight the ways this misuse limits the older person's ability to exercise choice, control and independence of care. It will also include recommendations for changes to ensure older people are able to exercise their right to make decisions, and be properly supported to do so.

Please note that all case studies in this document are real clients of SRV (or other organisations as specified) who have given permission for their experiences to be used as case studies. Names and some information has been changed to ensure clients cannot be identified.

2. Misuse of enduring powers of attorney

Seniors Rights Victoria (SRV) is aware of multiple incidents in residential aged care of wilful or ignorant misuse of enduring power of attorney (EPOA) documents.

EPOAs support a person's decision-making and are often used by older people to appoint a trusted family member or friend to manage the older person's affairs in the event they are physically or mentally unable or unwilling to do it themselves. The attorney can be appointed effective immediately, at a specified date in the future, or in the event of the older person losing capacity, and the attorney can be responsible for all financial, medical and personal decisions or their responsibilities can be restricted to just some matters in any of these areas. Laws and practices regarding decision-making differ in each of the eight states and territories. Unless stated otherwise this submission references the situation in Victoria but the issues raised have broader relevance across Australia.

Prior to March 2018 in Victoria, a person could make an enduring power of attorney to appoint someone as a decision maker regarding financial, medical and personal matters. In March 2018 the implementation of the *Medical Treatment Planning and Decisions Act 2016* meant that decisions makers for medical treatments are now appointed separately, while financial and personal matters (such as where a person lives) are covered by an enduring power of attorney. Enduring power of attorney appointments (medical) made prior to this legislative change are still valid.

Through client work SRV has identified that there is significant misunderstanding of the proper use and extent of EPOAs, both by appointed attorneys and by aged care facilities. The existence of an EPOA document is often used to justify removing all decision-making ability from the older person, regardless of their capacity, and regardless of any limitations specified in the document. This was never the intention of the documents. There are also instances where guardianship of an older person has been sought despite the older person still being capable of decision-making (this is discussed in more detail on page 12).

2.1 Misusing powers of attorney (financial) for non-financial decisions

Seniors Rights Victoria has acted on behalf of a number of residents in aged care facilities who have had constraints imposed on them by the person they have appointed attorney for financial matters only. This misuse and over-extension of responsibilities has been facilitated by the aged care provider, which has carried out the instructions of the attorney without regard for the proper use of the document.

Clients have reported having their liberty curtailed by their attorney who in fact only had the power to make decisions relating to financial matters who has instructed aged care staff that without the attorney's prior consent the older person is not to:

- leave the aged care facility
- have a telephone
- have any (or particular) visitors.

Case study: Improper use of power of attorney (financial) to restrict movement and access to friends

Mona, a woman in her 80s with mild dementia, was moved to a Commonwealth-funded residential aged care provider against her will by her daughter, June. Mona had previously given June her financial power of attorney. June was not Mona's personal or medical attorney, and there was no appointed guardian. On June's instructions, and against Mona's will, the provider prohibited Mona from leaving its premises and from communicating with her friends and her long-term companion, or allowing them to visit.

After being contacted by Mona, Seniors Rights Victoria met with the provider management and raised the Charter of Residents' Rights and Responsibilities made pursuant to the Aged Care Act 1997 (Cth). The provider agreed to allow Mona visitors, however, it continued to restrict her movement and would not let her come and go from the provider as she liked, defending their position by raising arguments of 'duty of care'.

SRV then appeared on behalf of Mona at the Victorian Civil and Administrative Tribunal (VCAT) and an independent guardian was appointed. Making decisions that were more clearly in line with Mona's wishes, the guardian ensured that Mona was able to return to living independently at home.

There are three issues of concern here: that an attorney appointed for financial matters is making decisions outside of the realm of their jurisdiction; that the aged care provider is following these decisions without question; and that the decisions are not in keeping with the older person's wishes, when these wishes are formed from reasonable judgement.

An attorney appointed for financial matters should not be making decisions regarding the older person's personal matters. While some attorneys may genuinely believe they are being helpful by making non-financial decisions for the older person (for example, they may be motivated to relieve the older person of tasks or protect them from conflict with another family member), all too often this kind of decision-making is indicative of the attorney's intention to commit financial abuse. A lack of understanding of power of attorney documents by aged care staff only facilitates the abuse by the attorney.

Case study: Improper use of power of attorney (financial) to restrict movement and access to friends, and to facilitate financial abuse

Diagnosed with mild dementia, Christos was eligible for a community aged care package to assist him at home. Christos lived on a large property with his long-term companion, Peter, who assisted him with his daily chores and banking. Christos also had a son, George, who lived approximately two hours away. Christos was not very close to George and they saw each other only a few times a year.

While Peter was travelling overseas, Christos had a stroke and was admitted to hospital. While in hospital, George visited him with a person authorised to witness the signing of statutory declarations and got Christos to sign an enduring power of attorney (financial), appointing George as his attorney. Christos stated to SRV that he did not know what he was signing and he felt really confused and disoriented at the time.

George then arranged for Christos to be relocated to a residential aged care provider near George. The provider was far away from Christos's home and friends. George wrote to the provider and instructed the manager of the provider that Christos was not to speak with anyone or to leave the provider at all. George purported to use his power under the enduring power of attorney (financial) to do this. There was no guardianship document or order in place, and he did not have an attorney appointed for personal decisions. The aged care provider agreed to these arrangements.

George refused to give Christos any of his own personal belongings or bank cards and he wrote to Peter giving him notice to vacate George's property as he wanted to sell it. At no time did George consult Christos about these decisions.

Throughout, Christos's health was improving and he wished to return home. He contacted SRV who took the matter to VCAT. George's power of attorney (financial) was revoked and an independent guardian and administrator appointed. The guardian decided that Christos was able to live independently with community supports, and enabled him to return home to Peter.

While the attorney should not be overstepping their powers and making decisions unrelated to financial matters, more of interest to this submission is that the aged care provider should not be supporting this misuse by carrying out the attorney's instructions which are unsupported by the power of attorney document. An EPOA is intended to support the older person's decision-making in a specified area, not curtail it to their own detriment. In addition, people who still have decision-making capacity should be making their own decisions regardless of whether a power of attorney exists.

A person appointed attorney should only be acting in accordance with the known will, preferences and rights of the person who appointed them and only if they are needed to make the decision. Except in situations of complete incapacity the older person should continue to be consulted (as appropriate) about decisions made on their behalf, so that they can make their own decisions where possible, and otherwise to make their opinion (which may change over time) known. The decisions of an appointed attorney should only relate to the specific powers they have been granted, and the aged care service provider who is being asked to enforce these decisions is responsible for ensuring their actions are proper, and addressing the situation directly if the attorney is overstepping.

The aged care provider should check the paperwork supporting the attorney's actions and be alert to possible misuse. Even in the event that the appointed attorney does have responsibility for personal (not just financial) matters, the aged care provider should make enquiries to understand why the attorney believes these restrictions are necessary, before they enforce them.

Unfortunately, the existence of an EPOA is too often used as an excuse to withdraw all decision-making control from the older person, wrongly enabling the aged care service provider to confer only with the attorney on all matters, and not including – let alone deferring to – the older person. This ageist and paternalistic approach often has severe personal, social and psychological repercussions, particularly when it compounds the loss of agency that can come from moving into aged care, and from any age-related health concerns that may have instigated this move.

The above case studies demonstrate an ageist response from the aged care provider where the older person's wishes and needs are ignored in the presence of any document 'suggesting' they lack decision-making power (as EPOAs can be activated upon loss of capacity they are often erroneously seen as indicating a complete lack of decision-making ability rather than a delegation of responsibility). Both Mona and Christos made their preference to return home known to their respective aged care providers, who took no action to support their desires. Happily, in both cases an independent guardian was appointed who could support their wishes to live independently at home.

The following case study demonstrates the unquestioned ageist assumption that an older person is better off ceding all decision-making control.

Case study: Improper use of power of attorney (financial) to restrict autonomy, right to private life, and opportunity for independent decision-making

Arthur, a man in his 70s, lives in a residential facility in Victoria. Julia is his only child and also has his financial power of attorney. Arthur is experiencing some memory loss but is still lucid and is able to manage his financial and legal affairs. Without consulting Arthur, Julia made a decision to begin using the power of attorney Arthur made in her favour some years before. Julia instructed the provider to redirect all mail to her. The provider began redirecting Arthur's mail to Julia without his knowledge or consent.

After being contacted by Arthur, who was concerned not to be receiving letters about his own property and finances, Seniors Rights Victoria raised the matter with the provider and the attorney, citing Arthur's right to privacy and the right not to have correspondence unlawfully or arbitrarily interfered with.

SRV also discussed with Julia that as her father's financial attorney she had responsibility to communicate with her father and act according to his preferences, and that it was particularly important to only act in accordance with his direction when he has capacity.

While re-directing a person's mail may seem like an innocuous (or even helpful) administrative task, it can also be indicative of an appointed attorney's intentions to isolate the older person from their friends and family and to have a free hand to make decisions about property and assets. In the interests of residents, staff at aged care facilities should be alert to these possibilities in any changes to decision-making.

In all of the aforementioned case studies the initial misuse of the enduring power of attorney has been by the appointed attorney, who has directed the aged care provider in their actions. While more needs to be done to prevent misuse by attorneys, in these instances the aged care provider should be acting in the role of safeguarding the older person from abuse, not enacting the abuse. In each situation the aged care provider staff should have been aware that an enduring power of attorney (financial) does not allow for the types of decisions to be made by the attorney, nor for the restrictions it was being used for. In addition, the aged care provider should have sought to understand, through discussion with the older person and the attorney, whether the actions of the attorney were in line with the wills, preferences and desires of the person now in their care.

2.2 Misunderstanding of the extent of purpose of enduring powers of attorney

While the issues described in 2.1 primarily relate to aged care service providers carrying out instructions made by the appointed attorney, a general level of misunderstanding by aged care staff around the proper use and extent of enduring powers of attorney hinder their proper use. As well as sometimes considering that the existence of an EPOA means that a person no longer has any decision-making capacity for any matters, aged care staff sometimes misunderstand the point of the document.

SRV staff have not uncommonly experienced difficulty meeting clients who reside in aged care facilities as aged care managers have restricted access to residents. When SRV staff visit an older person in an aged care facility, aged care staff sometimes ask whether the person's attorney is aware of the visit, and may contact the attorney to inform them of the visit. This creates issues around maintaining the older person's privacy, particularly as the older person may be seeking advice regarding the role and behaviour of the attorney. In these situations, the aged care service is effectively restricting the older person's right to seek legal or financial advice and assistance by their actions.

In the following case study provided by Elder Rights Advocacy, an organisation that supports people in aged care, the manager of an aged care service provider would not allow a resident to move as he had not appointed an attorney.

Aged care facility misunderstanding purpose of enduring power of attorney

Marco was living in an aged care facility in Victoria. He contacted Elder Rights Advocacy (ERA) because he wanted to move to live at a different facility but the manger would not allow it. Marco had already spoken to the new facility whose manager arranged to come and see Marco. However, when she arrived she was turned away by the manager of Marco's current facility. When an ERA advocate contacted the manager she was told that there were no concerns with Marco's decision-making capacity but the manager was under the impression that an active EPOA must exist for such a move to occur. Despite there being no legal requirement to do so, Marco's daughters were implementing a POA process, however this was not complete at the time. The facility manager then accepted that a POA was not necessary in this instance, as Marco had capacity to make his own decisions.

Professional education for staff who work at aged care facilities should cover the legal purpose and intent of powers of attorney, guardianship and medical treatment decision-making, as well as the potential misuse of these documents for abuse. Aged care provider management and staff would then be properly equipped to recognise misguided or abusive behaviour by appointed attorneys, and react appropriately to support the older person. Aged care providers should also implement policies that require staff to consult with residents regarding decision-making and any actions that are taken with reference to enduring power of attorney documents.

Recommendation 1: Aged care provider management and staff should undertake regular professional education on the legal operation and requirements of enduring powers of attorney, guardianship, medical treatment decision-makers and advance care directives.

2.3 Activation of enduring powers of attorney

The misunderstandings around how EPOAs operate can extend to aged care service provider staff considering that an EPOA is active as soon as it is signed (regardless of what is recorded on the document). This confusion is increased by the fact that laws and practice regarding EPOAs differ amongst all the states and territories. In some states and territories, the default commencement date is when the appointment is made, while in others there are no default provisions. In Victoria, the form allows for the principal to elect whether the power starts immediately; from a specified date or event; or 'only when I become a person with impaired decision-making capacity.'

This last phrase can be problematic as there is often no clear point when a person ceases to have capacity for decision-making. In particular, the fluctuations of aged-related cognitive decline or dementia can result in a person being able to make decisions regarding their day-to-day life but not be able to make more complicated financial or legal decisions.

While there are capacity assessments that can be done by lawyers, neuropsychologists, GPs and others, documented evidence of such is not required to activate an EPOA in Victoria, nor do third parties (such as aged care service providers) need to see documentation of diminished capacity in order to accept the attorney as the decision-maker. The guidelines for enduring power of attorneys in Victoria state:

A person who is assessing whether a person has decision-making capacity, must take reasonable steps to conduct the assessment at a time and in an environment in which the person's decision-making capacity can be assessed most accurately.

In practice, the assessment of capacity can be a vexed issue and there are numerous occasions where a person has been deemed to lack capacity, only to be re-assessed and found to still have capacity. As there is no requirement for assessment or documentation of reduced decision-making capacity for an enduring power of attorney to take effect, this leaves the practice open to abuse.

In response to recommendations from the Australian Law Reform Commission's inquiry into elder abuse in December 2018 the Australian Guardianship and Administration Council (AGAC) Elder Abuse National Projects released a scoping paper looking at options for the harmonisation of enduring power of attorney (financial) laws across Australian states and territories. It highlights how the varying laws and practices have resulted in an overabundance of information making it more difficult for people to understand the choices available to them. It also details the benefits that consistency in this area would bring, including improved certainty about document validity and capacity.

The paper also puts forward compelling arguments for the benefits of a national register of enduring power of attorney documents, which is something SRV has long supported. An online register would allow third parties (with safeguards regarding privacy) to check the validity of enduring power of attorney documents, the particular matters they relate to, whether they are active, and whether documents supporting capacity assessments have been sighted. It would also support clear notification of any restrictions listed on the individual documents and remove confusion about the existence or location of documents: there have been occasions where an SRV client who is experiencing abuse enabled through the improper use of an enduring power of attorney, has been unable to locate a copy of the document, prolonging a delay in addressing the problem; a national register would assist in this and similar problems.

Registration of enduring power of attorney documents may also act as a deterrent for those considering misusing the powers granted them as it would indicate a level of oversight and serve as a reminder of their responsibilities and consequences of their decisions.

Recommendation 2: Commonwealth and state governments should work together on the harmonisation of national decision-making laws and practices.

Recommendation 3: Commonwealth and state governments should create an online register of enduring power of attorney (and similar) documents, as recommended by the Australian Law Reform Commission.

Recommendation 4: All enduring power of attorney appointments that take effect upon loss of capacity should require a formal assessment of capacity, and documentation of this assessment should be linked directly to the power of attorney document.

2.4 Aged care facilities requiring enduring power of attorney documents from new residents

Lawyers and advocates have reported that increasingly aged care services are requiring older people to have enduring powers of attorney (financial) and medical treatment decision-maker documents in place before they enter residential aged care, even when the older person does not wish to appoint anyone to their financial or medical decisions, and has no immediate need to do so.

The reasoning behind this is presumably that the aged care provider wants to ensure that should the older person lose capacity due to illness or cognitive decline then it is clear who the aged care provider can turn to for decision-making.

There are multiple problems with this approach, the first of which is that is an encroachment upon an individual's rights – an older person living in the community does not have to appoint an attorney for future decision-making, so should not be forced to simply because they are moving into aged care. While many people may be happy to make these appointments at this time, moving into aged care does not automatically mean that a person has no capacity or interest in continuing to manage their own financial or legal affairs.

The second issue is the problematic misuse of EPOAs in aged care, as detailed above in section 2.1. All too often EPOA documents are considered a relinquishing of all decision-making responsibilities, rather than a delegation of particular decisions. It is therefore understandable that new residents might be reluctant to appoint an attorney.

Thirdly, people may not have a trusted person they are willing to appoint as an attorney. Insisting a person appoints an attorney at the moment of entering residential aged care can be upsetting and alarming to the new resident. It can also lead to a decision made in haste without proper understanding of the document and consequences by the older person and by the person appointed as the attorney. The tumultuous period of moving into residential aged care, particularly if it has occurred after a hospitalisation or other crisis, can be used to the advantage of an attorney intending on improperly accessing money and assets.

This issue was addressed in the Australian Law Reform Commission's Discussion Paper on Elder Abuse (Proposal 11-8):

Aged care legislation should provide that agreements entered into between an approved provider and a care recipient cannot require that the care recipient has appointed a decision maker for lifestyle, personal or financial matters.

SRV supports this proposal and believes no aged care provider should be able to require that a care recipient has appointed a decision maker.

Recommendation 5: That aged care service providers cannot require enduring powers of attorney or advance care directives when an older person becomes a resident of a facility.

3. Misuse of guardianship and administration orders

If an individual has not appointed an attorney and is no longer able to appoint one because of a disability (such as cognitive impairment) that renders them unable to make reasonable judgements, the Victorian Civil and Administrative Tribunal (VCAT) can appoint an administrator and/or a guardian. Guardianship and/or administration orders may also be used when there is significant disagreement about the situation of a person and a decision needs to be made (for example about where they will live or how they will be cared for), and where there are concerns about the POA who was appointed acting appropriately. Guardianship orders will specify the types of personal and lifestyle decisions the guardian can make. An administrator can also be appointed for legal and financial decisions.

3.1 Aged care service provider applying for guardianship or administration

SRV has had clients whose aged care provider has applied for the appointment of a guardian or administrator motivated by what they often term as their ‘duty of care’ toward the older person. The concept of ‘duty of care’ is not always interpreted in accordance with its legal definition, rather a layman’s interpretation. More importantly, this ‘duty of care’ is often used as a way of overriding the older person’s will and preferences, instead seeking to safeguard against possible risks.

Aged care staff and concerned family members may use a person’s insistence on continuing what they consider to be risky behaviour or making decisions they think of as not sensible as demonstrating a lack of capacity to make good decisions. This can then be used as a justification to use existing powers of attorney documents to curb the older person’s decision-making power, or to apply for guardianship and administration powers.

All too often, the older person is not made aware of the application and is not present at the hearing when the order is made, increasing the possibility of elder abuse.

The following case studies all demonstrate instances where the older person has not been at the centre of the process and their decisions have not been supported.

Case study: Aged care facility seeking appointment of a guardian

Married couple Judy and Harry were both in their seventies and lived in a low-level care facility in country Victoria. Both had children from previous marriages and there had been conflict between members of their families. In the recent past Harry’s daughter Emily had misappropriated money from Judy and

Harry's joint account and subsequently Judy and Harry had a VCAT-appointed administrator to manage their financial and legal affairs.

Judy and Harry wanted to relocate to a facility in the Bendigo area where they had family and history, so they had begun making enquiries for a double room. The manager of their current aged care facility was concerned about the decision because he felt it wasn't a wise choice and based on what he considered his duty of care towards Harry and Judy, he made an application to VCAT for the appointment of a guardian.

Judy contacted SRV for advice and assistance in relation to the guardianship application and upcoming VCAT hearing. A GP had assessed Judy and Harry as being incapable of making reasonable decisions in relation to their lifestyle decisions. The GP also commented that Harry had a cognitive impairment because he had a stroke which has left Harry with limited verbal skills.

At the hearing the SRV lawyer argued that Judy and Harry had made a sound reasonable decision in wanting to move and that there was no need to appoint a guardian. Initially the tribunal member suggested the appointment of a family member with limited powers to make decisions regarding accommodation. The SRV lawyer argued this was not the least restrictive option and that given the circumstances the applicant had not established a need for the appointment. The SRV lawyer also argued that the assessment of Harry was flawed because the GP's comments about Harry's cognitive impairment was based only on his having lost the ability to communicate verbally, and not a true assessment of his cognitive state.

The tribunal decided that Judy and Harry were capable of making their decision and therefore did not appoint a guardian for either Harry or Judy. The member was also critical of the GP's assessment of Harry based on his lack of verbal skills. With the support of SRV's lawyer and advocate both Harry and Judy attended the hearing and expressed their wishes and the reason for them directly with the member.

Case study: Family members and aged care provider seeking guardianship

Bruce was in his mid-seventies and a patient of a rehabilitation hospital. During a family meeting to discuss discharge planning it became apparent that Bruce's three children did not all support Bruce's wish to return home and live independently. The provider was concerned about its duty of care and made an application to VCAT for the appointment of a guardian and administrator for Bruce.

Bruce had lived in his own home in the same community for the past 55 years and was well known within his own local community. Bruce had a fall and was admitted to hospital before being discharged to the rehabilitation provider. Bruce had three children: two daughters Sarah and Christine, and a son Jack who resided with Bruce. Sarah and Jack were supportive of their father remaining independent, however, Christine felt that Bruce would be 'better off in a nursing home'.

Bruce had a history of alcohol dependency, and had been diagnosed with diabetes and a visual impairment. The provider was concerned about the safety of Bruce's home and his nutrition. A neuropsychologist's report indicating that Bruce suffered from vascular dementia, was attached to the application. SRV obtained a copy of a recent ACAS assessment (which had not been provided to VCAT) and which had indicated that Bruce had no cognitive impairment. Therefore, there was a lack of consensus regarding Bruce's incapacity.

Bruce was becoming increasingly frustrated with the provider as he had been told he could not return home until the outcome of the VCAT application was determined. Bruce was told if he tried to leave the provider the police would be called.

With the assistance of SRV, Bruce attended the VCAT hearing. At the hearing the tribunal member adjourned the further hearing of the matter until the provider could coordinate a meeting with the family and SRV. At the meeting a discharge plan was discussed and Bruce was able to return home with support of two of his children and a community aged care package. The provider then withdrew its application.

Case study: Application for administration for misplaced safeguarding purposes

The aged care facility in which Rhonda resided sought an administrative order at VCAT. The application was made on the basis that the facility managers believed that Rhonda was being unduly influenced by a male resident of the facility who had a history of attempting to withdraw substantial funds from co-residents' bank accounts. The aged care facility did not express any concerns regarding Rhonda's capacity. Rhonda did not dispute the fact that she had been befriended by the male resident. However, she did not believe that undue influence had been exerted and, further, she had no intention of providing her bank account details to the other resident. SRV supported Rhonda to resist the administration order.

3.2 Putting the person first

Underlying many of the difficulties with powers of attorney and guardianship is the challenge in negotiating between a person's best interests as perceived by others, their will and preferences for any given situation, and the duty of care a service provider has for a resident. Unfortunately, in navigating these concepts, the person who should be placed at the centre is often disregarded. There can be a tendency for decisions to be justified by the loose use and interpretation of concepts such as 'duty of care' and 'best interests'.

The first difficulty lies in defining a person's 'best interests'. This concept is important because it is both a legal term and an understanding that individuals hold about how decisions should be made for another person.

Victoria is currently in the process of reforming its legislation regarding guardianship and administration, and in doing so will no longer use the phrase 'best interests' to consider the preferences of the person.

Currently the Victorian law (Section 28 (2) of the Guardianship and Administration Act (1986)) describes that an appointed guardian act within the best interests of a person when s/he:

- advocates for the represented person
- encourages the represented person to participate in the community as much as possible
- encourages and help the represented person to care for him/herself
- protects the represented person from neglect, abuse or exploitation
- considers the wishes of the represented person whenever s/he makes a decision for them.

However, the new legislation (still in draft form before the Parliament) will follow the example of the Medical Treatment Planning and Decisions Act 2016 (Vic.), which does not use the phrase 'best interests' but instead asks the decision maker to consider the *preferences and values* of the person about whom the decision will be made to make the decision they reasonably believe is the decision *the person would have made*.

The draft legislation uses the following decision-making principles:

- a) the person should give all practicable and appropriate effect to the represented person's will and preferences, if known;
- b) if the person is not able to determine the represented person's will and preferences, the person should give effect as far as practicable in the circumstances to what the person believes the represented person's will and preferences are likely to be, based on all the information available, including information obtained by consulting the represented person's relatives, close friends and carers;
- c) if the person is not able to determine the represented person's likely will and preferences, the person should act in a manner which promotes the represented person's personal and social wellbeing;
- d) the represented person's will and preferences should only be overridden if it is necessary to do so to prevent serious harm to the represented person.

Regardless of the legal definitions, the concept of 'best interests' is often loosely used to justify the decisions being made, irrespective of the individual's preferences or will. In everyday practice, decisions are often made by family members, appointed attorneys or aged care staff, that purport to be in the best interests of the person but are primarily aimed to mitigate risk and protect the person from harm (regardless of whether the above dot points are considered).

This is compounded by service providers operating under a restrictive interpretation of what is required for them to meet their duty of care toward residents. This obligation to take responsible care of a person and avoid injury can sometimes lead to restrictions placed on the older person that stop them from exercising their own will.

Aged care staff and family members who feel frustration with an older person striving to maintain their independence may use the concept of 'best interests' or 'duty of care' to curb their behaviour or limit their decision-making. For example, an older person who is adamant they wish to stay living at home, or to freely come and go from an aged care provider, is often considered by others to be undertaking risky behaviour, on account of their age, health, frailty or cognitive status. The older person would maintain it is in their own immediate best interests (happiness, health and wellbeing) to exercise choice and agency, while the staff may insist it is in their long-term best interests (longevity) to remain within the provider, and that the duty of care a provider has for a resident obliges them to restrict the older person's movements.

A recent case before the Supreme Court highlights this disconnect between a person's wishes and what can be seen by others as risky behaviour. The Supreme Court ruled that the Tasmanian guardianship and administration board had made a legal error in granting powers to the public guardian to stop an older man from living on his yacht after the hospital made an application for a guardian to be appointed when discharge proceedings declared the boat unable to meet safety considerations. In her ruling, Justice

Helen Wood said “there was a need for caution about a “boot straps” approach to guardianship orders in the case of a person declining to accept medical advice that is in their interests.”¹

An important aspect of truly person-centred care is to support a person’s wellbeing and self-esteem. In this context, the importance of personal agency cannot be underestimated, especially as many people at the point of moving to residential aged care may be experiencing an erosion of their independence. The older person has every right to take risks when they have the capacity to understand the likely outcomes of their behaviour and the possibility of negative consequences.

Case study: Disregard of personal will and decision-making

Ted, a man in his early seventies, contacted SRV from an aged care facility in a Victorian country town. He was distressed at being in the nursing home and about the fact that he had an independent guardian from the Office of Public Advocate appointed to make decisions in relation to accommodation, health care and access to services (State Trustees had previously been appointed as his administrators). Ted was adamant that he did not know how these appointments had occurred and that he was capable of looking after himself and making his own decisions. Ted was also adamant that he did not need to be in the nursing home in a locked ward and he wanted to live independently in his own unit.

SRV discovered that the history to his incarceration in a locked ward was as follows: a single man without family, Ted had been in receipt of an aged care package. He had a case manager who visited him in his unit, and a home carer who attended fortnightly for cleaning and shopping assistance. He had a history of excessive alcohol use but was able to live at home. Ted’s carer regularly took him shopping and also to a Salvation Army dining room for lunch. Because his carer never had any money, Ted would pay for his carer’s lunch until he decided this was unacceptable and he asked his case manager to change his carer.

Subsequently, under the pretence of organising a new carer, Ted’s case manager took him to a regional office and said he had to sign some papers, which he did not have a chance to read, nor were they explained to him. It turned out this was an application for Guardianship and Administration.

His case manager wanted Ted to participate in more social activities and also to get a pet, but Ted said he was a loner and happy doing his own thing. His case manager requested a set of keys to Ted’s unit, “in case you are sick and need help sometime.”

At this point, Ted was managing all his own finances, he had a little under \$1000 in the bank and a few hundred dollars cash. Ted did not have any outstanding debts. In order to save money heating the whole house, he bought a small heater and an electric blanket, and pulled his mattress into the lounge where he would watch TV and sleep. One evening Ted fell asleep with the TV on after having a few drinks. He awoke to find two people standing over him, one his case manager and another person he did not know (who was the appointed guardian.) They told him he didn’t look well and they were taking him to hospital. He was taken by ambulance an hour or so away from his unit and placed in the nursing home.

He was placed in a locked ward. After a couple of weeks, angry and confused as to why he was in the nursing home, Ted contacted SRV. An assessment from the geriatrician showed that Ted had no ongoing disability and was capable of his own self-care. With SRV’s support, Ted attended VCAT and the Guardianship was revoked. Ted was given six months to show he could manage his finances and would then return to VCAT to have the enduring power of attorney (financial) revoked.

¹ Lisa Martin, *The Guardian*, “Elderly amputee wins court battle after being prevented from living on yacht”, 23 April 2019, accessed at <https://www.theguardian.com/australia-news/2019/apr/23/elderly-amputee-wins-court-battle-after-being-forbidden-from-living-on-yacht>

At the hearing it was stated by the case manager that Ted had been drinking heavily and was not eating well. The case manager and guardian were concerned for his welfare and they considered placement in the nursing home was in Ted's best interests.

A SRV advocate worked with Ted and referred him to a community housing organisation who was able to find a housing commission unit in another country town. Some 12 weeks after attending VCAT and having guardianship revoked Ted left the nursing home and was again living independently.

When placed in the nursing home, without his knowledge, Ted was medicated with diazepam at night and tobacco patches to stop him smoking. Ted told us he did not want to stop smoking and had not told the doctors that he did. He was also insulted because he was charged for medication he did not need and for the tobacco patches on his monthly nursing home account. After his guardianship was withdrawn, the medication was reviewed and the nursing home reduced the amount of tablets they were administering to Ted.

In order to ensure the older person's preferences are taken into consideration, SRV recommends that for a tribunal to make an order for guardianship or administration, the older person should be present (unless information explaining the person's absence is provided by an independent party such as a GP). Failing this the tribunal should contact the older person by phone to ascertain their wishes.

Recommendation 6: The older person should be present (or their absence explained by an independent party) at tribunal decisions regarding guardianship and administration. The tribunal should be required to make contact with the older person to ascertain their wishes and awareness of proceedings.

Recommendation 7: That aged care service providers make a considered move toward care practices that prioritise the will, preferences and rights of a person, whether or not they require decision-making support.

4. Advance care planning

Advance care planning involves documenting a person's preferences and values regarding their health and personal care. It is intended to ensure that even when a person is unable to participate in decision-making that their values and wishes are respected and followed. Advance care planning and the supporting legislation were developed from a human rights perspective that recognise a person's right to dignity and choice.

In Victoria, an advance care directive (ACD) is the only legally recognised document where a person can record their medical preferences. However, should a person lose decision-making capacity, any written record of their values or wishes regarding medical treatment must be considered by their medical treatment decision maker. A person can record general statements in their ACD about their values and preferences to guide future medical treatment decisions, or record instructions consenting to or refusing specific types of treatment.

Importantly, ACDs allow people to maintain control over decisions that affect them and puts the person at the centre of the care. Many people decide to have an ACD in order to maintain autonomy and to give themselves and family members peace of mind regarding end of life care and decisions.

4.1 Issues with advance care directives

There are some concerns with the use of ACD in aged care facilities, primarily that aged care staff are not referring to and respecting the instructions in the document. Elder Rights Advocacy, an organisation that supports people in aged care, provided the following case study demonstrating an aged care provider not acting in accordance to a resident's ACD.

Case study: Advance care directive not being followed

Diane, a 94-year-old woman living in an aged care facility had an advance care directive (ACD), which included the instruction 'DNR' (do not resuscitate). Aged care provider staff were aware of the ACD and it was revisited and discussed annually, by her daughter Melissa, and the facility management.

When Diane experienced cardiac arrest the on-duty nurse at the facility commenced CPR, and called an ambulance who also advised on resuscitation. Diane was resuscitated and hospitalised where she died 8 days later, in what her daughter described as an "awful" death.

This case clearly demonstrates a lack of communication within the aged care facility as the on-duty nurse was not aware of the ACD and its important DNR instructions. Considering the constantly changing staffing in many aged care providers, communicating information relating to each resident is crucially important.

Recommendation 8: The Commonwealth government should ensure that there are improved policies and procedures in place for aged care facilities to acknowledge and communicate advance care plans and advance care directives, and for these directives to be revisited regularly.

5. Recommendations

In consideration of the previous issues and guided by a human rights approach, SRV makes the following recommendations to ensure the older person's rights are respected regarding decision-making and there are sufficient safeguards to abuse through the misuse of enduring power of attorney documents.

Recommendation 1: Aged care provider management and staff should undertake regular professional education on the legal operation and requirements of enduring powers of attorney, guardianship, medical treatment decision-makers and advance care directives.

Recommendation 2: Commonwealth and state governments should work together on the harmonisation of national decision-making laws and practices.

Recommendation 3: Commonwealth and state governments should create an online register of enduring power of attorney (and similar) documents, as recommended by the Australian Law Reform Commission.

Recommendation 4: All enduring power of attorney appointments that take effect upon loss of capacity should require a formal assessment of capacity, and documentation of this assessment should be linked directly to the power of attorney document.

Recommendation 5: That aged care service providers cannot require enduring powers of attorney or advance care directives when an older person becomes a resident of a facility.

Recommendation 6: The older person should be present (or their absence explained by an independent party) at tribunal decisions regarding guardianship and administration. The tribunal should be required to make contact with the older person to ascertain their wishes and awareness of proceedings.

Recommendation 7: That aged care service providers make a considered move toward care practices that prioritise the will, preferences and rights of a person, whether or not they require decision-making support.

Recommendation 8: The Commonwealth government should ensure that there are improved policies and procedures in place for aged care facilities to acknowledge and communicate advance care plans and advance care directives, and for these directives to be revisited regularly.