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Standing Committee on Legal and Constitutional Affairs
House of Representatives
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Alzheimer's Australia would like to thank the Committee for the opportunity to appear at its Canberra hearing on 17 August 2007.

As requested at that hearing, I would like to offer the Committee the following supplementary information. Some of the material has been already provided by mail or email to Mark Rodrigues on 29 August.

Dementia

Further information about causes, diagnosis and management, as well as dementia risk reduction, was provided last week.

Assessing capacity

A copy of the book by Peteris Darzins was provided last week. Further comments on capacity are attached at A.

Financial abuse and mandatory reporting

Our March 2006 briefing note on elder abuse (including financial abuse) was provided last week. Our views on financial abuse, in particular, are:

- Mandatory reporting is problematic as it impinges on the rights of older people. Our preference is for an empowerment approach;
- Financial abuse will be minimised if:
 - older people are encouraged to undertake legal and financial planning before capacity is lost
 - information, advice and training are readily available to attorneys before an EPA is signed
 - banking staff, other workers and the general community are more aware of the issues around financial abuse and any duty of care; and
 - access to specialist advice/mediation services is improved for older people;

The experience of the EAPU in Queensland provides an example of the benefits of investing resources in this area. See <http://eapu.com.au/> Alzheimer's Australia supports the broad approach taken in the EAPU report on the *Financial Abuse of Older People and Mandatory Reporting Position Statement*. (See <http://eapu.com.au/?TM=4&SM=27>)

Advance planning

The SA report, *Putting the Powers in Place: Planning for the Future*, is available on our web site at

<http://www.alzheimers.org.au/content.cfm?infopageid=4079>

Attachment B contains further comment on the

- Queensland legislation in respect of advance planning;
- Issue of the legal enforceability of advance directives; and
- Process for achieving a national approach.

I would like to reiterate that Alzheimer's Australia believes that it is particularly important for the Inquiry to recognise and build on current and valuable State/Territory initiatives such as the SA Review on Advance Directives.

There are no sections in this supplementary information which are confidential and we agree to the information being published in its entirety, if the Committee wishes.

Glenn Rees
National Executive Director
3 September 2007

Attachment A

HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS INQUIRY INTO OLDER PEOPLE AND THE LAW FOLLOW UP ON CAPACITY

Margaret Brown, Adjunct Research Fellow, Hawke Research Institute,
University of South Australia, in consultation with
Dr Peteris Darzins
Assoc Professor of Geriatric Medicine
Monash Ageing Research Centre

1. Capable people can make decisions about how they live (including the health care they receive, the conditions they live in, and how they use their financial resources). People who have lost capacity cannot make decisions about how they live.
2. It is important to protect the freedom of capable people to exercise their right to make decisions about how they live, even if they appear to be making poor or unusual choices.
3. It is important to protect people who have lost the capacity to make decisions to prevent them from coming to harm (including personal injury, financial injury or inadvertent harm to others) as a result of incapably made decisions.
4. To be able to protect the rights to make decisions of those who have decision-making capacity, and to protect those who have lost decision-making capacity, assessments that can validly distinguish between these conditions are required.
5. Many conditions can impair decision-making capacity. Dementia is a key problem, and as the numbers of older people increase this is likely to become an ever bigger problem. However, the issue of capacity can affect adults of all ages should they have the misfortune to have psychiatric illness, developmental disability, head trauma, substance abuse or any of a large number of other conditions that affect their thinking.
6. Currently assessing capacity is done poorly throughout Australia and requires **urgent attention**.
7. Capacity assessment is a legal problem not a medical problem. The legal process differs from the medical process. Many health care practitioners and, surprisingly, also legal practitioners are unaware of this.

8. Doctors and other health care professionals need special training and education to improve their skills and understanding of the process of assessing capacity and their attitudes toward this task. There is no Medicare item for the assessment of capacity. Currently many practitioners see this as an unrewarding and onerous task.
9. Legal practitioners also need further training to improve their skills and understanding of the process of assessing capacity and their attitudes toward this task, so that they could do it properly themselves or, should they retain the services of health care providers to assist with this task, so that they may appropriately instruct them.
10. The process of assessment is not always conducted and documented as having occurred in a logical step-by-step way. Indeed there are good reasons to suspect that many capacity assessments are not performed using a valid process.
11. In many instances the **current process may not be morally (or even legally) defensible**; even when the correct conclusion is reached the method used may not be correct.
12. Use of a proper, standardized, explicit step-by-step capacity assessment process could assure the quality of assessments. This would increase the confidence of society that assessments were indeed valid and that people are having their rights to autonomy or to beneficent protection safeguarded. Proper assessment would decrease the occurrence of improperly conducted assessments that are error-prone, and may reduce wasteful litigation.
13. A standardized, explicit, valid capacity assessment process already exists. This is the "Six Step Capacity Assessment Process" which is published by the Alzheimer's Association of South Australia. The necessary forms to guide and document the process exist. Training in use of this process is available.

Attachment B

HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS INQUIRY INTO OLDER PEOPLE AND THE LAW FOLLOW UP

Alan Oakey, family carer, Alzheimer's Australia, and lawyer

I have been asked to provide follow ups on the following matters:

- comment on the Queensland legislation in respect of advance planning;
- whether advance medical directions should be legally enforceable; and
- comment on the process for achieving a national approach.

Note: I have not had the time to research the issues in depth and I have not been able to "double check" for accuracy. Crucially I have not been able to compare the legislation of other States and Territories for precedents that might be usefully used to address any "inadequacies" in the Queensland legislation. In particular, I would have liked to have been able to undertake a detailed comparison of the provisions of the Queensland Powers of Attorney Act 1998 with the new ACT Powers of Attorney Act 2006 (enacted at the end of 2007, and which has only just come into force earlier this year). These caveats should be borne in mind in considering my comments.

Queensland legislation in respect of advance planning

- By "advance planning" I understand is meant "advanced health directives" under Queensland legislation.
- I have earlier expressed the view that a good starting point was the Queensland Powers of Attorney Act 1998. This Act not only deals with enduring powers of attorney, but also "advance health directives" (see Chapter 3, Part 1, section 28).
- Under section 35(1) an adult by advance health directive may, amongst other things (a) give directions about health matters (defined in sections 4 and 5 of schedule 2, basically ordinary health care but including withholding or withdrawing life-sustaining measures) and special health care matters (defined in sections 6 and 7 of schedule 2, and includes eg sterilization, removal of tissue whilst still alive for donation) for their future health care; (b) give information about his/her directions. Without limiting the generality of section 35(1), section 35(2) expressly refers to certain matters in respect of which such directions may be made, eg requiring in certain specified circumstances, when life sustaining measures may be withheld or

withdrawn.

Section 36(1) deals with the operation of advance health directives, stating amongst other things that they operate when the principal has impaired capacity and are effective as if the principal gave the direction and had the capacity to give the direction. Section 36(2) has some limitations on directions relating to withholding or withdrawing life-sustaining measures.

Section 40 extends recognition in Queensland to documents similar to advance health directives made in other States (a similar provision exists for interstate enduring powers of attorney – see section 34).

Chapter 4 (sections 62-63) of the Act deals with statutory health attorneys.

- It is important to note that under the Queensland Act a principal may only give an attorney power over health matters in an advance health directive, not over special health matters (see eg sections 35(1)(c) and 36(3). The position appears to be the same in the ACT.
- I have seen an advance health directive under the Queensland Powers of Attorney Act 1998 and it is very comprehensive – more comprehensive than can be covered in these notes. If it is at all possible, a copy of a Queensland advance health directive should be included in any material sent to the Standing Committee, as it is a good indication of the wide scope of the Queensland advance health directive provisions.
- In the ACT, there is an act entitled the Medical Treatment (Health Directions) Act 2006, but this would appear to cover only the issue of medical treatment generally being withheld or withdrawn or specific medical treatment being withheld or withdrawn (sections 5 and 7). Note that this Act expressly does not apply to palliative care (see section 6(2)).

Whether advance medical directions should be legally enforceable

- One downside to the Queensland legislation is that it contains nothing about the situation where eg new treatments become available. It is possible then that a patient may wish to review their advance health directives, or have a facility for their attorney to do so, to take account of changes in eg medical treatment.
- A further downside to the Queensland legislation is that there appears to be nothing to prevent medical practitioners overriding a directive on what the medical practitioner considers the person's medical best interest, or if the medical practitioner believes that the directive should be overruled on the basis of medical best practice.

- The patient, or their attorney, should have opportunities, even up to the last, to review the directive to reflect eg medical advances. Similarly the medical practitioner should not have the power to override the directive or veto the attorney. There should be room for a balance, eg by allowing the medical practitioner an opportunity to explain medical advances relevant to the situation, but leaving the final decision to the person or their attorney (where the person is incapacitated).
- Some of these issues have been addressed in Part 3 of the ACT Medical Treatment (Health Directions) Act 2006, sections 11 to 17. Section 11 provides that persons who have made health directives and who still have capacity must be informed of alternatives etc. and section 16 affords protection to medical practitioners making decisions to withhold or withdraw medical treatment in accordance with the Act. Under the ACT Powers of Attorney Act 2006 enduring powers of attorney can be made in respect of health care matters (but not special health care matters – see sections 13(2) and 35(b)), however it is not entirely clear (at least to the writer) what the obligations are between the medical practitioner and the attorney where an attorney holds an EPA extending to health care and the principal is incapacitated (section 1.11 of Schedule 1 of the Powers of Attorney Act 2006 – Health Care - does not appear to cover this). For example, can a medical practitioner veto a health care decision made by an attorney for an incapacitated person? These matters would need clarification.

Process for achieving a national approach

- It should be remembered that in essence the matters discussed above generally fall within the legislative competence of the States and Territories, not the Commonwealth.
- With reference to Recommendation 1 in AA's submission, although no final view is expressed (the Standing Committee will no doubt have legions of constitutional lawyers to advise it on such matters) there may be an issue whether the Australian Law Reform Commission, which is a Commonwealth body, has the power to take on this reference. If there are Constitutional issues, one possibility would be for the ALRC to make recommendations on these issues for use in areas of Commonwealth competence, with a further recommendation that the ALRC recommendations also be adopted by the States and the Territories. This was the approach adopted by the ALRC in its Evidence reference; the ALRC prepared an Evidence Act for use in Federal Courts, with a recommendation that the provisions of the Commonwealth Evidence Act be adopted in the States and Territories (thus far the ACT, NSW and Tasmania have enacted mirror Evidence Acts).

- Alternatively, the Standing Committee of Attorneys-General could agree that all States and Territories enact standard legislation. This could be done by one State or Territory being tasked with drafting the relevant legislation, and once its terms are agreed, all States and Territories enact legislation in similar terms. Another way is simply for States and Territories “copying” the legislation of one State (for example, the Limitation Act of NSW was essentially “borrowed” by the NT in its Limitation Act, and the ACT’s Limitation Act relied in its turn heavily on the NT Limitation Act. However this way of achieving standardized legislation is time-consuming, and success is not guaranteed (particularly if each State or Territory considers that it has all the answers and its legislation is or will be better than that of other jurisdictions).