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SUBMISSION TO THE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

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INQUIRY INTO OLDER PEOPLE AND THE LAW

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Dr. J Myers

**Introduction**:

In order for the committee to report on the adequacy of current legislative regimes in addressing the legal needs of older Australians in the following specific areas

- Fraud
- Financial Abuse
- General and enduring power of attorney provisions
- Family agreement
- Barriers to older Australians accessing legal services, and
- Discrimination

Singularity of purpose, to enhance the life of the older person is in their best interest, and definitions of roles and terms must be agreed upon.

**Definitions**:
The term "older" is defined in terms of the Australian Institute of Health and Welfare to be 65 years and over.
**"best interest"** is defined as personal viewpoint and must be understood from the person's point of view. Acting in a persons best interest means according to their wishes, i.e. firmly held view or opinion expressed at any time, or as indicated by any means, oral, written, motion, or any other means at that point in time (see Medical Treatment Act, Vic Gov, 1988).
"**Capacity"** is the capacity of a person to indicate their own view in any manner they are able to, and to indicate their objection to any other proposition put to them.
**"well-being":** emotional, psychological, intellectual and physical well-being is relative and depends on a person's ability to feel well in themselves and that they are able to cope with or without supports and can express their choices as individuals whose wishes are respected and heard.
**"Abuse"** is an action or decision taken or made against a person's wishes to which they in any way object. See also Essential components of Abuse and types of abuse below..
**"Primary carer"** is a person or persons whom a person entrusts to take care of their whole being including decision-making.
**A "carer" or "personal care attendant"** is someone who does a certain action that does not encompass decision making, and may be related to only part of a person, eg eating, the carer being responsible for food preparation, or cleaning, or showering, or some aspect of care of the person, but not decision making or of the whole person or "self"..
**"Case manager"** is a misplaced and much abused term that ought to be legislated out of existence and replaced by "service provider liaison officer" which describes the "case manager role" one which does not include decision making for the person.

**"Advocate"** is someone whom the person trusts and appoints to carry out the person's wishes.
**"Enduring power of Attorney"** is the statutory appointment of someone whom the person trusts to carry out the person's wishes, which confers continuing authority if the person is no longer able to direct the advocate. Appointment even of "an Enduring Power" does not entitle the attorney to act while the person retains competence.
A **"guardian"** is someone who is appointed (or natural in the case of minors), who has statutory authority to make lifestyle and medical decisions that affect their charge. Guardians may be appointed in advance of any particular situation by the person in which case the guardian can only act if the person lacks the capacity to do be able to do so. Third party appointments can only be made if the person lacks capacity to make decisions for themselves related to lifestyle and medical issues.
A **medical doctor** is entrusted to make medical decisions together with the person, based on informed consent.
**Determining capacity**. An essential function of a medical practitioner or specialist in Aged Care, or Consultant Physician, is to be able to determine "capacity". see appendix 1. Determining Capacity using the FMSM measure "Functional Mental State Measure".
The aim of community health care and care in general is to support the wishes of a person, with respect to lifestyle, medical and legal access and to community.
**Essential components of Abuse**. There are three components to abuse, but only the latter two b) and c) are essential to the definition:

a) acting on behalf of another. This may occur with their consent, obtained by consent or is implicit as in the case of a parent and child or minor or by legal imposition as in the case of appointed guardianship
b) acting or deciding to do something or not doing something which is known is against the person's wishes
c) to which the person objects (or will object). Objection may be verbal, or be through a sign or action or in writing.

**Types of Abuse**:
Abuse may occur through acts or omissions in different areas and different ways:

Physical: is where harm to a person is caused through physical means.
Financial: occurs by depriving a person of assets and financial means. It includes misappropriation, purposeful mismanagement and restricting access to their own supply or reserve of funds to be used for their own needs and purpose.
Sexual: occurs through non-consensual sexual acts or ongoing behaviour of a sexual nature or intent directed at another person who indicates he/she regards such behaviour as offensive.
Psychological/Emotional: occurs by the use of intimidating language (including sexual inferences) or behaviour and includes influencing others or manipulating environments/circumstances in ways that adversely affect another person's sense of well-being.
Social: occurs through restricting access to persons or to places and activities that the person requests or is known to want to have an ongoing association with.
Neglect: occurs when care or services and or necessities are purposely limited to disadvantage a person, by those whose responsibility it is to manage or provide these to fulfil a person's need(s).

These forms of abuse apply to all persons. The words, “a person” or “another person” can be replaced by “an elderly person”, or any other specified person, male or female, for instance, if one chooses to specify any particular person or person group.

Thus, on the basis of the above, **Elder Abuse may be defined as: Action taken/made or not taken/made on an elder’s behalf against the wishes of the elder person to which they do or will object.**

**Other definitions of abuse** focus on point a) wishing to stress that abuse occurs within a relationship where there is an implication of trust. However, this is a definition of abuse of trust or of position, but is not an abuse of the person per se, thus misses the fundamental aspect of abuse, which is against the person’s wishes to which the person does object or will object. Accordingly the focus of this definition is on family relationships in particular although trust is not guaranteed within family relationships. This definition is preferred by Guardianship Boards because it exonerates the appointed guardian because there is no relationship and therefore there can be no abuse.

When the capacity of an individual to make decisions is completely lost and when the outcome does not make a difference only then may a guardian be appointed to act on the person’s behalf. This precludes any relationship.

If the person still has capacity and is able to indicate who they would prefer to be their own guardian, this must be respected. In this case, of a patient selected guardian, trust is an important component of that choice, which differs from the situation of a third party appointed guardian unknown to the person. However, even in this situation because of the trust we confer on the guardian to act in the person’s best interest any abuse of the person is also an abrogation of trust and visa versa, any abrogation of trust is an abuse.

It needs to be pointed out that families are the fundamental unit on which societies depend for moral and ethical tutelage and they form the fundament of care and nurturing practices in society. Not unexpectedly then, where there is care within families abuse can also occur.

There is also an inherent relationship which holds societies together that exists between all people that is based on belief in the common good that exists between people, often expressed in the words, “In G-d we trust”. It is therefore expected that civility will reign so that accord to each individual is respectful of each person’s individual rights. Thus abuse, if defined as having to be within a relationship can occur, even when there is no recognition of a personal relationship per se, let alone when there is one, as for society to work it must conform to laws that defined interactions in society that in effect constitute relationships.

**Elder Abuse**.
Elder abuse occurs through acts or omissions by persons acting on the elder’s behalf against the wishes of the elder person to which the elder person objects or will object.

By inserting the words "elder person" and "by a person acting on the elder person's behalf against the wishes of the elder person' into the definitions noted above, these general types of abuse may be applied to Elder abuse: eg.

Physical abuse of an Elder is harm caused to an elder person through physical means by a person acting on the elder person's behalf.

Financial abuse of an elderly person: occurs by depriving an elderly person of assets and financial means by a person acting on the elder person's behalf against the wishes of the elder person. It includes misappropriation, purposeful mismanagement and restricting access to their own supply or reserve of funds to be used for their own needs and purpose.
Sexual Abuse of an elderly person: occurs through non-consensual sexual acts or ongoing behaviour of a sexual nature or intent directed at an elderly person who indicates he/she regards such behaviour as offensive by a person acting on the elder person's behalf against the wishes of the elder person.
Psychological/Emotional Abuse of a elderly person: occurs by the use of intimidating language (including sexual inferences) or behaviour and includes influencing others or manipulating environments/circumstances in ways that adversely affect an elderly person's sense of wellbeing, by a person acting on the elder person's behalf against the wishes of the elder person.
Social Abuse of an elderly peson: occurs through restricting access to persons or to places and activities that the elderly person requests or is known to want to have an ongoing association with, by a person acting on the elder person's behalf against the wishes of the elder person.
Neglect of an elderly person: is a form of abuse that occurs when care or services and or necessities are purposely limited to disadvantage an elderly person, by a person acting on the elder person's behalf against the wishes of the elder person, or by a person whose responsibility it is to manage or provide these according to wishes of the elderly person.

By substituting any person or group for elder person in all of the above definitions of types of abuse, one can readily adapt the general definition to a specific person or group, in this case the Elderly.

Elderly are regarded as being over 65 years of age PAGE 5, and accounted for 13% of Victorians in 2001.

**Well-being**: emotional, psychological, intellectual and physical well-being is relative and depends on a person's ability to feel well in themselves and that they are able to cope with or without supports and can express their choices as individuals whose wishes are respected and heard.

**In a persons best interest**: this is subjective but at the same time absolute and means that the person's sense of wellbeing is respected as each person is different and has different needs as each perceives this.

**Care** means's agreeing to and respecting a person's best interests while at the same time being able to express another opinion or provide information for consideration.
Care is the understanding of need of a person and is done by informed consent between a qualified medical practitioner and the patient, or member of family or friend. Care is a two party arrangement where the wishes of the person being cared for are respected. Care is about understanding a person's wishes and the formulation or definition of them most importantly to ensure effect is given to them. Informed consent is an integral part of care because this indicates that to the carer the wishes of the person being cared for are considered as foremost and paramount..

**Services and support** is the provision of services and support that are provided by a third party to ensure that a person's wishes can be fulfilled as distinguished from care.

**Case manager**: is veritably a services provision manager, who is a third party in the care\carer arrangement and as such has no rights of call over a person to whom they are supplying and or managing services or co-ordinating these services. A case manager is obliged to manage services that support a person's wishes and sense of wellbeing and to do so with consideration and care. The term case manager has led to conflict of interests between service provision and patient or elder person's freedom of choice. If the title of case manager was altered to services provision manager or services liaison officer this would resolve the conflict of interest that arises when the title of case manager is used, for one no-one wants to be referred to as a case, and secondly a case manager does not have licence to manage another person. The qualifications of case managers are varied but none are qualified to make decisions for or on behalf of another person, nor does anyone else, because that is an abuse.

**Carer:** is a person who provides personal care ie provides help with basic living activities agreed to by the person receiving this care as requested or required and which is given with due care ie to not cause harm. A carer has no decision making capacity other than to provide the necessary services with due responsibility and care to not cause harm, and is a third party in the care\carer arrangement.

**Activities of daily living** include toiletting, showering, dressing, eating and may include outings.

**Impairment**: The loss of use of a body part.
**Disability**: The loss of function as a result of impairment.
**Capacity**: Retained ability in the presence of disability.

**Dependency.** Is the result of disability and indicates the need for aids and or services, ie third party provision of aids or services.

**Service provider** is a provider of services. Has no say over a person or their wishes and has no say in relation to anything that is the person's. Is obliged to provide services with care whether voluntary or paid. Case manager is a manager of service provision and ought to be designated as such, see above.

**Medical practitioner** is the patient's elected partner in medical and health care and well-being of the individual. As elected by the patient the medical practitioner is an advocate for the health if his/her patient.
**Health care professionals** provide services. They are specifically trained and are partners in a person's health care arrangement but unless they are given medical power of attorney to support a person's health are not responsible for the overall care of the person or patient. They may provide input into the overall care of the person or patient. A patient may entrust them with health care decisions relevant to their expertise.

**Case conference or team meeting. or family conference** involve either health professional and a doctor or family members and health professionals and the doctor. A conference is usually held to discuss the needs of the person. The doctor may hold a family meeting only with the family present or after a team meeting bring all parties together to determine the decisions to be made in the best interest of the patient or person. The patient or person may appoint someone as their medical power of attorney. The doctor and patient may elect to include anyone in the decision making process by agreement or according to need, but with informed consent.

In the case where the doctor is not sure or the patient is unable to make decisions or if their wishes are not known, close family or trusting friends may decide what is in the person's best interest. In certain cases where there is a difference of opinion guardianship may be sought for the sake of conflict resolution, not necessarily for a good or better decision. It would be prudent to include in the law that Guardians make access to medical and legal and social outlets possible to the satisfaction of he person, because guardians are known to restrict access against the will of the person. Similarly Case managers oppose the will of a person. Where a person is able to access their will there is n neo need for a guardian or any other third party, so that within the law limited guardianship, to, could be a concept that could apply if capacity in that domain is tested by a trained practitioner in capacity assessments.

**Trial of according to the persons wishes in their best interest**. This is giving precedence to the wishes of a person and supporting them in all need requirements according to their own wishes to be in their own environment, and to evaluate the practicality and person's wellbeing in this situation. This is the best option when there is doubt or when there has been an illness or where the service provision has been less than was needed or can be increased to deal with a changed situation.

**Provision of services for the Elderly** is a more accurate description and more considerate than Aged Care. This distinction ensures that care and decision-making is done by those whom the person/patient trusts in an informed consent situation, and is not hijacked by service providers or service provider managers, see Case managers, usurping a role beyond their brief under the guise of Aged Care or claims of Abuse. Service providers are not appointed to care, but rather to provide services with the responsibility to ensure these are provided with care, ie do not harm either the person or possessions of another.

SUBMISSION TO THE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS:

TERMS OF REFERENCE.

a) FRAUD.

At Section 4(2) of the Guardianship and Administration Act 1986, sets out the principles that are to be followed in its administration.
(2) It is the intention of Parliament that the provisions of this Act be interpreted and that every function, power, authority, discretion, jurisdiction and duty conferred of imposed by this Act is to be exercise or performed so that (and in this the Mental health Act must also be reviewed as legislation there under also pertains to this) namely;

2(a) the means which is the least restrictive of a person's freedom of decision and action as is possible in the circumstances is adopted, and,
2(b) the best interest of a person with a disability are promoted, and
2(c) the wishes of a person with a disability are wherever possible given effect to.

Further with respect to the Office of the Public advocate, and in the mental Health Act surely in cases if involuntary admission or community treatment order,

Any such appointment as may also be included under the Metal Health Act), as in the above mentioned case scenarios), The appointment or (order in the case of the Mental Health Act) of Public Advocate as Guardian under the Guardianship and Administration Act for a person with a decision making incapacity should be considered as a last resort.

i.e. the person must first be proven to have a disability or mental condition that precludes decision making

The Office of the Public Advocate exercises its advocacy role based on its interpretation of the Act. This needs to be defined so that there is no interpretation. The three main principles which guide its advocacy practice are: s16(1)(e) and s22(2)(a)
namely

i) that the wishes of the person must be considered
ii) that the best interest of the person must be pursued, and
iii) that the least restrictive option must be sought.

Which is similar to the intention of the Act (Guardianship and Administration) and also similar to the Mental Health Act.

It is considered that where decision making capacity is present, (and in the case of the Mental Health Act, there is no risk to the person or to others) the decision of the person is not negotiable, neither is their wish and in their best interest is what they wish for themselves, is to be upheld, and is not negotiable, unless they give consent to change this.

It is the failure to uphold a person's wish and the appointment of a guardian from the Office of the Public Advocate in situations where a person retains their decision-making

capacity that fraud and abuse occurs by government. Similarly under the Mental Health Act the imposition of an involuntary order, as inpatient or community treatment order) is abuse by government and fraudulent as the enacting of Laws certified by the trust of the electorate to carry out laws as stated and as passed by Parliament. Laws are not to become a ruse for fraudulent activity by officials of government. Such fraudulent action results in the loss of rights of people, emotional and financial disadvantage and which brings government and its officers in various departments, such as Guardianship and Administration, Office of the Public Advocate and Mental Health Department into disrepute, and is a mockery not only of the Parliamentary process but of elections and therefore of the citizens of the country who vote and who are encouraged to aspire to exercise their vote in the belief that Australian Government conforms to democratic standards in Government.

The Guardianship and Administration Act and the Mental Health Act need to be reworded so that interpretation does not occur on matters such as ability to make decisions, capacity, and best interest of a person, in order that the rights of an individual are respected and that the person's wishes are not negotiable, by government officials or anyone irrespective of their position in the health care system or administration of judicial departments of government nor by individuals, whether family members or of the public at large.

iv) Where people have a disability that affects their capacity for thinking and decision making the Office of the Public Advocate is required to promote their rights and dignity and assist them in a manner which, among other things, gives effect to their wishes wherever possible - it is hereby said that if there is no decision making capacity it is not relevant to say "gives effect to their wishes wherever possible, but rather to indicate that any action does not cause harm to the person in any way, and to choose the least restrictive option.

v) Where a person has full mental capacity their right to self-determination prevails within the restrictions that apply to all people.

Thus the sections above need to be rewritten to accommodate this, the rights of individuals.

2(a) the means that is the least restrictive of a person's freedom of decision and action, these being not negotiable must be ensured.

2(b) the best interest of a person with a disability is not diminished but is upheld as the goal and aim of guardianship to be achieved.

2(c) the wishes of a person with a disability are not negotiable and are to be upheld as the goal and aim of rehabilitation or treatment to be achieved.

Further with respect to the Office of the Public advocate, and in the mental Health Act surely in cases if involuntary admission or community treatment order, any such appointment as may also be included under the Metal Health Act), as in the above mentioned case scenarios), The appointment or (order in the case of the Mental Health

Act) of Public Advocate as Guardian under the Guardianship and Administration Act for a person with a decision making incapacity should be considered as a last resort.

i.e. the person must first be proven to have a disability or mental condition that precludes decision making

The Office of the Public Advocate exercises its advocacy role based on its interpretation of the Act. This needs to be defined so that there is no interpretation. The three main principles which guide its advocacy practice are: s16(1)(e) and s22(2)(a) namely

vi) that the wishes of the person must be upheld and granted.
vii) that the best interest of the person must be pursued, and
viii) that the least restrictive option must be sought.

Which is similar to the intention of the Act (Guardianship and Administration) and also similar to the Mental Health Act.

B) FINANCIAL ABUSE. Please see also, discrimination, below..

Financial abuse by Government occurs when the wishes of a person are considered but not adhered to and when the appointment of State Trustees or third parties are made as the administrators, against the wishes of a person.

The wishes of a person are paramount.

It is further asserted that financial abuse occurs when appointments under Guardianship and Administration Act (1986) of Government agencies or third parties or in the case of the Mental Health Act orders, are made which results in defensive action of the person that requires payment of costs. In these situation costs and damages where these occur ought to be compensated by government, if only as a check on the system against wrongful use and abuse, for which there are no checks in place to control this financial and the emotional abuse that often accompanies it, as the direct result of actions taken by Government abuse arising from poor wording of the Laws meant to protect the disabled (and mentally ill) from abuse within the system.
Damages ought to be considered payable in the case of abuse such as this which requires personal expenditure on defence that is upheld if not by the review boards or tribunals, then at least by pone individual, professional's report who is prepared to challenge the system and to include in panels or have separate panels people who do not have a vested stake in the system eg psychiatrist or members of the State Trustees or Office of the Public Advocate or Boards, <u>but rather to set up trusts comprising people who have been through the system and have been challenged by it and who have won their freedom back and financial independence and control.</u>

C) GENERAL AND ENDURING POWER OF ATTORNEY PROVISIONS.

This is to be recommended ie appointment made by individuals with statutory signatures to the agreement.

## D) FAMILY AGREEMENTS

These are to have the same status as enduring Power of Attorney as long as in both cases capacity has been determined. The most appropriate person to assess capacity is a qualified medical practitioner using a capacity assessment tool, such as FMSM. Only a medical doctor can be involved in certifying capacity as capacity is affected by infection or any acute illness or mood disturbance or effect of drugs that may be temporary or transitory, which requires clinical i.e. medical assessment, and which has to be excluded or known to be present when capacity assessment of the person or patient is carried out.

The medical doctor must be one whom the person(s) have themselves chosen to consult, or whom they prefer to consult, in accordance with their own wishes.

## E) BARRIERS TO OLDER AUSTRALIAN ACCESSING LEGAL SERVICE.

One factor is cost. Other factors are family, carers, case managers, or council worker who do not regard the rights of an individual, who do not regard th(irrespective of te fact that they are not trained to make the decision of competence see Myers. Intern Med J 2006, August issue, and imposition by Guardians and officers of the Office of the Public Advocate, or team members of the Mental Health community or inpatient network hampering or preventing or in fact ordering that no legal representatives visit or be contacted.

## F) DISCRIMINATION

This occurs when appointments by VCAT or involuntary orders are made in the Mental Health Department, by individuals who regard it their duty to impound others assist they will, and who appear to do so because those whom they impound represent achievers in society, who have property or assets that those in government wish to have or who wish to get their own back on their parents or others who choose to lead independent lives. The adage ”Go over 80 and you’ll get booked”, is a saying that I believe materialised before me because of the attitude of government, Guardianship and Administration, Guardians and members of the Office of the Public Advocate and Mental Health Review Board, and community packages and council workers and attitude of personal care attendant, not all but several who felt they could and did determine the outcome of a patient and whether services are provided or not, that affects lifestyle and choice of domicile for many elderly persons, and Community mental health teams APAT, who act beyond their brief for whatever reason, sociopathic or otherwise without checks under licence of laws enacted in Parliament by Government. “results in assets being sold at lower than market prices, and an enquiry into who going over the eighties” provides a windfall for government yo obtain involuntary taxes which is a second tax for government on peoples’ assets. The control that is obtained buys these and the distribution of profits there from ought to be a concern of government.

**Appendix 1**.

**Functional Mental State Measure (FMSM) (Myers, JB)**

A measure of mental capacity based on the person's own assessment of a) physical function using the Functional Independence Measure (FIM) b) administration needs, c) mood d) lifestyle decision making and e) cognitive function using the Folstein Mini-Mental State examination (Folstein MF, Folstein SE, Mchugh PE, 'Mini-Mental State'. a practical method for grading the cognitive state of patients for the clinician. J Psychiatr Res 1976;12:189-198) questionnaire, which serve as comparators, but to which additional functional tasks and cognitive responses have been added. An appraisal by the patient of their own performance is compared to the appraisal using the same rating scale by an observer (qualified), which can also be compared to a carer's assessment of the person or of more than one carer or interested party to understand motif or awareness of patient or person ns needs and function.

Using the (FIM) Functional Independence Measure, which is in standard use in rehabilitation units to measure function, monitoring of progress and outcomes of therapy to which two items are added
item S – cold food preparation
item T – hot food preparation
and past history and likelihood of falls
provides a rating scale of function of daily activities on 0-7 scale where 7 is independent and 0 is either not applicable or not testable or completely dependent, and where 6 is independence with an aid, while 5 and below indicate the need for assistance albeit set up or supervision, non-hands on in 5, minimal assistance in 4 (subject does 75% or more of effort or task accomplishment), moderate assistance in 3 (subject does 75% of effort or task accomplishment), dependence at the level of 50-75% in two (subject does 25-49% of effort or task accomplishment), and dependence of more than 75% in 1 (subject does less than 25% of effort or task accomplishment),.
Class 6 and 7 no helper is required. Class5 or below Helper required, class 3-5 are modified dependence, and Class 1 and 2 are complete dependence, being maximal or total assistance required.
A person is asked to rank their function eg with lower body dressing or grooming on a scale of 0-7 as above and this is compared with an observer finding.
A comment of the test is then recorded. The patient is asked the time at the start of the assessment and at the end is asked how long he/she thinks the assessment took. The Folstein Mini-mental State Examination is performed and again after the test the person is asked to describe what he/she thought of it. The two statements can then be compared.

A lifestyle questionnaire is then filed out about lifestyle preference, housing, accompanying person where they would like to live and who with them or with whom, the need for an administrator or administrative help, part time or full time and for what / which activities. Feelings about the need to have human contact, preference for a pet,

hobbies and activities and leisure interest, the provision of a will and or advance directive,
Ability to communicate using telephone, or internet access,
Ability to arrange or call for transport, or ability to drive
Ability to self medicate
Funeral arrangements if pertinent,
Screening questions of mood, whether feeling happy, neutral or sad
Do they have a sense of humour?
How long did the interview take and
to comment on this part of the assessment.

A family member can then be asked the same questions, preferably separately and perhaps corroborating results given by one family member with another's.

Concordance Between person and observer scores is then assessed by item and where there is discordance, tis can be verified by further direct assessment of the person's performance of that item by the examiner to determine whether the person or the observer is correct.

Evaluating the outcome or results allows a decision to be made regarding performance, self-evaluation and comparison of self-evaluation to observer evaluation in physical function, psychological function, intellectual function and emotional state and preferences in relation to lifestyle and administration, provision of Wills and Advance directives or the appointment of or nomination of Enduring Power of Attorney, in relation to preferred Financial and Medical aspects of care.

A two page, both one sided, questionnaire is all that is required plus the Mini-Mental State Examination which is recorded separately.

Copies of FMSM (Myers JB) forms can be supplied by FAX

Yours sincerely,

**Dr. John Myers.**