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Australian Government
Department of Health and Ageing

Ms Cheryl Scarlett
A/g Committee Secretary
House of Representatives Standing Committee
on Legal and Constitutional Affairs
PO Box 6021
Parliament House
CANBERRA ACT 2600

Inquiry into older people and the law

Dear Ms Scarlett

Thank you for your invitation of 20 September 2006 to the Secretary to make a submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into older people and the law.

The Department of Health and Ageing welcomes the opportunity to provide a submission to the Standing Committee Inquiry. The Department supports a consistent approach to state and territory legislation and standards and practices, particularly regarding substitute decision-making laws that affect older people.

Thank you again for the opportunity to provide comment to this Inquiry.

Yours sincerely

Handwritten signature of Melinda Bromley in cursive script.

Melinda Bromley
Acting Assistant Secretary
Office for an Ageing Australia

16 February 2007

Australian Government Department of Health and Ageing submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into older people and the law.

The Changing Demographic Landscape

Population projections predict that within the next 50 years, the percentage of people over 50 will grow to become a dominant influence in our society. Over this same period, the population aged 65 years and over will increase from 13 percent at June 2002 to between 26 percent and 28 percent by 2051. The proportion of the population aged 85 years and older will increase from 1.5 percent at June 2002 to between 6 and 8 percent by 2051. This latter age group will experience the highest growth rates of all age groups.

The ageing of the Australian population will see an increase in the number of older people and their carers who will seek substitute decision-making instruments concerning lifestyle, medical, financial and legal matters.

The most common ways for older people and their carers to plan ahead for a loss of capacity include the making of advance directives, such as enduring power of attorney and/or an enduring guardian.

The need for such mechanisms is expected to increase as the prevalence of cognitive impairment conditions such as dementia rise over time.

Consistency of Legislation

Currently, there is a lack of consistency of legislation governing the operation of enduring powers of attorney across states and territories. Powers of attorney in one jurisdiction may not be recognised in another.

Nationally consistent legislation governing the execution and operation of these powers would lead to a clearer understanding of the extent of the power conferred by the instrument and the circumstances under which the power may be exercised, irrespective of the location of the parties involved. This would assist those who seek to exercise the role of substitute decision-maker and those whose task it is to deal with those so empowered.

Australian Government-subsidised Aged Care

An older person's legal, financial and civil rights remain in place when in receipt of Australian Government-subsidised aged care services. In addition, the Australian Government has specifically recognised that when older Australians are in residential aged care they are entitled to further protection under the *Aged Care Act 1997*.

The *Charter of Residents Rights and Responsibilities* under the Act explicitly states that residents of aged care homes have the right to be treated with dignity and respect, and to live without exploitation, abuse or neglect. It encourages residents to maintain their independence and to take responsibility for decisions that affect their lives. The law continues to protect the right of a capable person to self-determination.

Major new safeguards against abuse in residential aged care

The Australian Government has moved to significantly strengthen the complaints handling powers available under the *Aged Care Act 1997* and the *Aged Care Principles 1997*.

The new measures include:

- the establishment of a dedicated Aged Care Commissioner who will replace the existing Commissioner for Complaints;
- the requirement for Approved Providers to report incidents involving alleged sexual assault or serious physical assault of residents in residential aged care to the police and the Office of Aged Care Quality and Compliance;
- whistleblower protection as part of the compulsory reporting requirements as it is believed that people will be more likely to report incidents of alleged abuse where they do not fear reprisal from their employer or other staff when incidents are reported in good faith. Approved Providers will be required to have policies and procedures in place to ensure that the identity of whistleblowers is protected and that whistleblowers are not unfairly treated as a result of making a report;
- operators of aged care services directly subsidised by the Australian Government under the *Aged Care Act 1997* will be required to ensure that staff and certain volunteers have had a police check and are assessed as to their suitability to work in aged care;
- legislation to require current and prospective employees and certain volunteers working in Residential, Community Aged Care Package, Extended Aged Care at Home (EACH) and EACH Dementia settings to be screened for any criminal history that would make them unsuitable to work in an environment involving contact with vulnerable elderly Australians. Those with sexual or serious physical assault convictions will be excluded from working in aged care; and
- additional funding to the Aged Care Standards and Accreditation Agency to allow a substantial increase in the number of unannounced visits to aged care homes.

Although the new measures against abuse in residential aged care are specifically directed at sexual assault and serious physical assault and do not extend to financial or other forms of abuse, these issues have been raised in consultations. Accordingly, the Department supports a focus on these issues in this Inquiry for coordinated action across States and Territories.

National Aged Care Advocacy Program

The Australian Government also funds the National Aged Care Advocacy Program (NACAP) under the *Aged Care Act 1997*. Through the NACAP, aged care advocacy services are funded in each State and Territory.

Advocacy Services can offer information and advice to recipients of Australian Government subsidised aged care services about rights and responsibilities, support them to be involved in decisions affecting their lives, assist them to resolve problems or complaints in relation to aged care services and promote the rights of older people to the wider community.

Advocacy services play a vital role in supporting a culture where people can speak out. The relationships developed in working with approved providers on behalf of residents place advocacy services in the position of assisting to develop a culture of open communication in homes.

As part of the service, advocacy services can offer practical examples of safeguards which older people can incorporate into their financial arrangements, such as seeking advice from experts and building in a range of safeguards to prevent financial exploitation.