



**Submission to the
Review of South Australia's Advance Directives
July 2007**

Summary

The Council on the Ageing [COTA] provides the following comments in summary of views relevant to the options listed for consideration by the Advance Directives Review Committee:

- A single application form covering all directives would be useful, particularly if that form guides people in considering their wishes and drafting instructions on financial matters, living arrangements, health matters and medical treatment when unconscious but likely to recover, and medical treatment at the end of life
- Any form should allow for appointment of different agents for the different types of instructions
- The application should lead to a process that puts the instructions in front of medical staff and requires them to act in accordance with those instructions

COTA is not in a position to comment on the relative benefits of single or diverse legal heads of power for the various types of instruction.

Consideration should be given to the establishment of a framework for accountability for the exercise of financial powers. While monitoring and reporting is fraught, it is possible to establish mechanisms that guide the exercise of these powers and act as a deterrent to fraud. Such mechanisms can be made transparent at the point of drafting of advance directives.

Introduction

The preparation and use of Advance Directives is important for all, not just older people. However, older people have particular needs and increased likelihood of use.

South Australia has an ageing population. In 2005, 15.2% of people were aged over 65 years. This is an increase from 14.5% in 2000. By 2050 one third of the State's population will be aged over 65. The fastest ageing group are the very old – the number of people aged over 85 is expected to increase by more than 50% in the next decade.

The incidence of dementia is rising rapidly. At present there are over 220 000 Australians with dementia. It is estimated there will be over 50 000 new cases in 2007¹ with this increasing to 70 000 new cases annually by the end of the decade. Estimates for South Australia are 21 800 people with dementia by the end of the decade.

Older people, and particularly the very old and people with medical conditions like dementia that will permanently reduce their capacities to act on their own behalf, need to have safe, affordable, usable and effective legal powers available that allow them to appoint others to make decisions about lifestyle, housing, finance and investment management, medical treatment and medical intervention at the end of life.

COTA receives regular queries from older people and their families about the creation and exercise of powers of attorney and advance directives. Queries include the current complexity of drafting directives, the perceived lack of accountability and safety in appointing an agent, and difficulties experienced as a result of inconsistencies between jurisdictions. COTA also receives contacts by families about wishes relating to end of life treatment in hospitals [anticipatory directions] not being followed. The cost of creating advance directives is a disincentive to people planning for their futures.

Families need to know that the directives made by their older relatives will be respected, acted on, and not abused.

People exercising powers of attorney have a right to clear information about their responsibilities, and the responsibility to act within the powers donated to them.

The press of 8 January 2007 reported increased demand on the services of the Public Advocate as a result of family members misusing or abusing the resources of older relatives². Evidence is that, in Australia, financial abuse is the most common form of abuse of older people. The absence of ongoing accountability for use of enduring powers of attorney contributes to fraud, theft

¹ Dementia in the Asia Pacific: The epidemic is here. Report by Access Economics Pty Ltd for Asia Pacific Members of Alzheimer's Disease International, September 2006

² The Advertiser 8/1/07 page 2 Families Ripping off aged to buy drinks and drugs

and abuse of older people. Furthermore, COTA receives contacts from agents who are reluctant to act on behalf of a donor in relation to financial decisions and would prefer to operate within a system of accountability. This reluctance to act is often to the detriment of the older person.

COTA has voiced, in a number of State and national forums, the need for forms of monitoring and auditing to be introduced for enduring powers of attorney for financial decisions. COTA's collaboration with the Aged Rights Advocacy Service [ARAS], and the work of the members of the Alliance for the Prevention of Elder Abuse [APEA], provide further evidence of the value of establishing a framework of accountability for the exercise of financial powers.

COTA's experience and understanding suggests that the following matters be considered by the Review Committee in reforming the advance directives system in South Australia:

1. Single application

Information and applications for all forms of advance directive [medical, enduring power of guardianship, and enduring power of attorney] need to be accessible at the same time and place. A single application form covering all directives would be useful. The suggested separation so that people draft instructions on financial matters, living arrangements, medical treatment when unconscious but likely to recover, and medical treatment at the end of life, will lead people to consider and document their wishes for each area of agency.

2. Cross jurisdictional consistency

National consistency in the operation and requirements of advance directives and enduring powers of attorney is urgently needed. COTA frequently receives inquiries from agents who do not live in same jurisdiction as their donor, and from the families of people who have moved to another State/Territory and now find that past directives no longer apply.

3. Access to instructions at time of need

Family members and others called upon to act in a caring role should be able to readily access information about advance directives at the time at which they are called on to make decisions about the person in their care. Clearly it is preferable that a person has talked with their family [or other relevant people] about their having made advance directives. However, this will not always occur, and people forget details over time. A simple system that allows the information contained in advance directives to be accessed by family members and agents at the time of need is required.

Increased awareness of the nature and use of directives could be expected to increase the likelihood of family members being aware of their older relatives' intentions.

4. Registration of advance directives

Research has shown that both oral and written directives about care and medical treatment are acceptable to older people and their families. However, where advance directives include instructions about the removal of life sustaining medical intervention or treatment, people have a clear preference for written, signed and witnessed directives. Registration of advance directives is probably required if people are to be able to readily access information at the time of need.

5. Cost

If it is to be used, registration must be affordable to people on limited incomes.

6. Accountability of agents and prevention of abuse

The donation of power to act on one's own behalf is intended to cover the event that one loses the capacity to be accountable for their decisions. However, current legislative regimes provide that power to another person in the absence of structures of accountability. It is appropriate that, where a person is granted enduring powers of attorney, some form of reporting should occur. This is clearly administratively fraught. Nevertheless, the principle of accountability should be implemented. It may be possible for people exercising such powers to report against such indicators as real property held and annual bank balances, with major variations being monitored.

The requirement for such reporting in itself will have a deterrent effect.

Other means that have been proposed to increase accountability and to respond to suspected abuse of powers include legislation that enables the establishment of an investigation and/or the appointment of a third party guardian in settings beyond that currently defined as incapacity. This is a contentious matter and much thought would be required to enable its implementation.

7. Prevention of financial abuse

Evidence is that lack familiarity with financial matters increases the chance of financial abuse. Efforts to increase financial literacy for both older carers and their family members, alongside increased duty of care by financial service providers may, therefore be effective in reducing fraud of older people in relation to enduring powers of attorney.

8. Who should be an agent?

To define who can or cannot be an agent, other than that they be a person of legal capacity, is fraught. The development of structures of accountability in which an agent is required to exercise their power may be more productive.

9. Retracting donated powers

People are encouraged to make decisions about making advance directives well ahead of anticipated need in order to avoid the difficulties in gaining such powers following incapacitation. However, once an agent is appointed, it is not easy to retract that power should circumstances change. Even the simple act of retrieving the documentation can limit a person's capacity to effectively remove the power of another to act on their behalf.

The difficulties in changing matters relating to advance directives and the lack of accountability discourage many older people from preparing such directives while they are still able to do so.

10. Proactive role of Justices of the Peace in preventing abuse in the making of advance directives

At an extremely well attended forum in South Australia during Elder Abuse Prevention Week in 2006 there was discussion between carers, service providers, advocates and government agencies about the role of Justices of the Peace when witnessing signatures. This was identified as a point at which proactive approaches could be taken to determine the actual wishes of older people relative to any pressure they may feel from family members and others about making advance directives.

11. Consent to medical treatment and palliative care

Older people increasingly consider what health care and medical treatment decisions they would want made on their behalf if they are unable to make such decisions for themselves. This is a matter in which education and information pertinent to legal requirements could be usefully increased for older people and their families.

People make it clear to the COTA that they have views about the treatment they wish in both the event of medical circumstances from which they are likely to recover [possibly with reduced function and capacity] and for end of life treatment and care decisions.

Processes for drafting and lodging advance directives should lead people through decisions and documentation of their wishes in both sets of circumstances.

12. Practices that support adherence to medical directives by staff in acute care settings

Where people make such directives, even in a written form, they are frequently not honoured. Practices and protocols that support medical staff to observe and act on written directives in the emergency and treatment settings are required to support the legal aspects of such directives. Application and lodgement of advance directives relating to medical treatment in emergencies and at the end of life could usefully lead into a process that puts the instructions in front of medical staff and requires them to act in accordance with those instructions

13. Cultural and Indigenous older people

COTA urges close consultation with older people from cultural and indigenous communities. Older people from diverse backgrounds have expressed to COTA concerns that family or carers in their communities sometimes have rights attributed to them beyond those assumed for carers in other contexts. COTA is keen that a system for advance directives reflects first and foremost the viewpoint of the older person themselves.

14. Diverse relationships

COTA draws to the review committee's attention the diversity of older people in our community and urges that a framework for advance directives recognise a diversity of carer relationships other than western, heterosexual and nuclear family structures. Such a framework would ensure that the wishes of a person are acted on, irrespective of their age, given that the directives are made while people the have capacity to draft instructions.

Other comments

Issues relating to the creation of advance directives are relevant to other areas of older people's lives. For example, proactive roles by Justices of the Peace at the point at which declarations and other documents are signed could have a preventative and deterrent effect in relation to the transfer of assets by older people to family members and others, and when an older person is being asked to act as a guarantor for another person's borrowings.

About Council on the Ageing [COTA] SA

COTA SA is recognised as a strong and effective organisation which provides significant leadership on ageing issues at state and national levels. COTA also delivers a range of programs and services.

COTA is South Australia's peak seniors' organisation with an individual membership of around 20 000 and over 250 seniors' organisations members with a combined membership of more than 60,000. In addition COTA SA has 80 associate members who are aged care providers, local government bodies, health units and other service and educational institutions. COTA's membership networks and programs are state-wide.

COTA SA was incorporated in 1957. Since then COTA has established a wide range of aged sector organisations. Currently its key roles are:

- Policy and advocacy - centrally engaged in every major aged related State Government policy over the last 20 years
- Programs and services - COTA manages a range of services and programs delivered within South Australia and in other states
- Representation - seniors' interests are represented by COTA in a wide range of State and Commonwealth government forums, non-government bodies, consumer advisory groups, research bodies.

COTA has contributed significantly to the support and development of the non-government ageing sector across South Australia and nationally.

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