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Law Reform Committee

The Honourable Johan Scheffer MLC
Chair
Inquiry into Powers of Attorney
Law Reform Committee
Parliament of Victoria
Parliament House
Spring Street
East Melbourne VIC 3002

Also by email: vplrc@parliament.vic.gov.au

Dear Mr Scheffer,

Re: Inquiry into Powers of Attorney

Thank you for inviting us to make a submission to the Victorian Parliamentary Law Reform Committee's Inquiry into Powers of Attorney. We are pleased to offer the following comments on the questions you have asked.

Should the different types of power of attorney documents, and in particular the formality requirements, the terminology and coverage of these documents, be streamlined? If so, how?

As you are aware, in Victoria powers of attorney are currently provided for in a number of Acts of Parliament. Financial powers of attorney, including general and enduring powers of attorney, are found in the Instruments Act (Vic) 1958 ("the Instruments Act"). Guardianship, or lifestyle and healthcare powers of attorney are found in the Guardianship and Administration Act (Vic) 1986 ("the Guardianship and Administration Act"). Medical powers of attorney are provided for the in the Medical Treatment Act (Vic) 1988 ("the Medical Treatment Act"). The Acts use different terms and set different requirements for what are quite similar and complementary powers. We believe that having consistent requirements for all of the various powers of attorney, contained in a single plain English piece of legislation, would make the law in this area easier to access and understand.

We believe that a distinction can be made between general powers of attorney granted under the Instruments Act on the one hand, which terminate if the donor loses capacity. On the other hand, enduring financial powers of attorney granted under section 115 of the Instruments Act, and enduring guardianship granted under section 35A of the Guardianship and Administration Act, which continue if the donor

loses capacity, are similar and complement each other. One provides for a person to make financial decisions on the donor's behalf, and the other provides for a person to make lifestyle and healthcare decisions for them. Given their similarities, it would seem appropriate to deal with enduring financial powers of attorney and guardianship together in a single, streamlined form containing discrete sections for each.

We note in this regard that the Committee's Terms of Reference specifically exclude consideration of powers of attorney for medical treatment under the Medical Treatment Act. This is unfortunate as they are complementary and overlap the other types of powers of attorney and, ideally, they should be dealt with together.

The terminology and definitions used for the different types of powers of attorney are not consistent. For example the Instruments Act talks about a 'donor' while the Guardianship and Administration Act refers to an 'appointor'. We believe that consistent terms should be used where possible, for example using terms such as 'donor' for all types of powers of attorney. However, it may be desirable to keep some separate terms like 'attorney' and 'guardian' that distinguish different roles.

We believe the formality requirements for granting, executing and witnessing all the forms of powers of attorney should be consistent. The certification requirements contained in the Instruments Act, which provide for a check of the donor's capacity at the time of granting, should be retained and applied consistently to all powers of attorney. These are necessary to protect donors, particularly those in vulnerable circumstances.

How should we determine that a donor has capacity to create a legally enforceable document at the time he or she creates a power of attorney? How should we determine when a person loses capacity in the context of when an enduring power of attorney is activated?

As mentioned above, the certification requirements contained in the Instruments Act provide a check for capacity in relation to creating powers of attorney. The formula for determining capacity should be articulated clearly in legislation in order to assist donors and certifying witnesses. This formula could include the requirement that a donor obtain a pro forma doctor's certificate, ideally from the donor's treating doctor, certifying capacity. In terms of determining when a person loses capacity, a pro forma certificate from the donor's treating doctor could also be used to determine whether the person has lost capacity, and the power of attorney activated.

What safeguards should there be to ensure that power of attorney documents are not abused – both in relation to the execution and the exercise of powers under these documents?

As discussed, the current certification requirements provide some form of safeguard against abuse at the time of execution of a power of attorney. The existing requirements that attorneys make a statement of acceptance undertaking to exercise

their power in the donor's best interest[1] attempt to provide a further safeguard against an attorney or guardian exercising their power improperly.

However, we believe that many cases of abuse of powers of attorney occur in the community and that it is a serious problem. In the last 5 years, the Murray Mallee Community Legal Service has advised over seventy five people in relation to powers of attorney. A significant number of clients sought advice in relation to an attorney having abused the power given to them. In every case, it was a close family member who had been appointed as a financial attorney and then abused their authority by not exercising the power in the interests of the donor family member.

In one case, a mother had appointed her daughter and son-in-law as her attorneys. They had obtained a mortgage against the mother's home to support their business without the mother's knowledge. The business failed with the daughter and son-in-law having many creditors.

Similarly in another matter, a mother had appointed her daughter as her attorney and the daughter obtained a loan secured against her mother's home. The mother was concerned that her other children were now going to miss out on a share of their mother's estate as the loan would not be repaid during the mother's lifetime.

The Victorian Civil and Administrative Tribunal (VCAT) provides the ideal forum for dealing with breaches of fiduciary obligations by attorneys. Making better and clearer remedies available to VCAT, for example giving it the specific power to make appropriate orders to recover money or property misappropriated by an attorney. Consideration could be given to empowering VCAT to refer matters to the DPP. This would enable it to assist donors where a breach has occurred.

Summary

Power of attorney arrangements are used by many members of our community, often by those who are in a vulnerable position, and it is important that the law in this area be clear and consistent. It is also important that it contain sufficient safeguards and remedies to protect vulnerable donors. We hope that the comments we have made are of assistance to the Committee in considering these issues.

Please contact Amanda Morrison, Law Reform and Policy Lawyer at amorrison@malleefamilycare.com.au or on (03) 5023 5966 in relation to this matter.

Yours sincerely,
Murray Mallee Community Legal Service
per:

[1] section 125B Instruments Act, section 35A(2)(b) and Schedule 4 of the Guardianship and Administration Act.