

**INQUIRY INTO POWERS OF ATTORNEY
by the
HUME RIVERINA COMMUNITY LEGAL SERVICE**

Dear Ms Riseley,

Thank you for the opportunity to contribute to the Victorian Law Reform Commission's inquiry into powers of attorney.

About the Hume Riverina Community Legal Service

The Hume Riverina Community Legal Service is funded by the Commonwealth Attorney-General's Department to provide free and confidential legal advice, information, casework and referrals for a range of individuals and groups in the community, especially those on low incomes or otherwise disadvantaged in their access to justice. We assist people who reside or work in North East Victoria and the Riverina of New South Wales.

We provide free legal advice face to face at our outreach locations and also by telephone. We currently visit Mt Beauty, Myrtleford, Corryong, Tallangatta, Mungabareena Aboriginal Corporation, Corowa, Howlong, Deniliquin, Finley, Lavington, Culcairn, Albury & Wangaratta.

We provide community legal education seminars, a duty lawyer for Intervention Orders at the Wodonga Magistrates Court, and a clinic which provides assistance in completion of family court forms and preparation for the court hearing for those self representing in the Family or Federal Magistrates Court. We also provide a legal aid family lawyer for mediation and litigation for NSW & Victorian legally aided clients.

In our practice during the last financial year, we have assisted 82 clients with questions in relation to powers of attorney. During this same period we have also presented 16 seminars on Wills and Powers of Attorney which are very popular throughout our region.

Our Comments

Our clients, especially at our seminars, are usually elderly, isolated and on a low income. As we are a cross border service, we give these seminars to both NSW and Victorian residents.

(a) Powers of Attorney (Medical)

We find that the Victorian system is more confusing for our clients due to the Power of Attorney (Medical) in addition to Power of Attorney (Financial) and Enduring Guardianship. The number of separate forms and each with different witnessing requirements makes it difficult for our clients not only to understand but also to draft with the assistance of the Take Control Booklet by VLA and Office of Public Advocate. We believe however that standardised forms and witnessing requirements would make it easier for people to create and understand their powers of attorney.

Recommendations:

- The paperwork associated with creating powers of attorney should be standardised.
- Incorporate the power of attorney (medical) into the Enduring Guardianship to decrease the number of documents required.
- The forms should follow a consistent format and should have the same witnessing requirements.

(b) Alternative and Composite Powers of Attorney

We agree with the Federation of CLC's submission as follows:

Currently, under s 120 of the Instruments Act 1958, donors of enduring powers of attorney may only appoint one alternative power of attorney. We agree with the Law Institute of Victoria (LIV) that it should be possible to appoint more than one alternative attorney, for the reasons stated in the LIV's letter to the Attorney-General dated 3 July 2008.

The current Instruments Act 1958 also prevents a donor from creating 'composite' powers of attorney, whereby a number of attorneys are appointed on the condition that two or more act jointly. We agree with the LIV that composite powers of attorney should be reinstated, as this arrangement provides a safeguard against abuse of powers of attorney.

Recommendations:

- A donor should be able to appoint more than one alternative power of attorney.
- The Instruments Act 1958 should be amended to enable the creation of 'composite' powers of attorney, whereby a number of attorneys are appointed on the condition that two or more act jointly.

(c) Cross-Jurisdictional Recognition

There is still widespread confusion regarding the effect of a power of attorney created interstate, or the effect of a Victorian power of attorney in other jurisdictions. This is of particular concern to our residents here on the border.

Recommendations:

- The Victorian Government should do everything in its power to promote cross-jurisdictional recognition of powers of attorney, including the enactment of uniform legislation across jurisdictions.

(d) The Test for Capacity

We agree that the area of capacity is a complex one but that some detailed guidelines, as that issued by the NSW Law Society, would benefit potential donors, attorneys, witnesses and their legal advisers.

Recommendations:

- The Victorian Government should develop clearer, more detailed guidelines regarding capacity, for the benefit of potential donors, attorneys, witnesses and their legal advisers.
- An additional safeguard could be that before an attorney can begin to exercise powers under an enduring power of attorney, he or she should be required to seek an independent written assessment of the donor's capacity by their treating doctor. The assessment should state whether or not the donor has lost capacity and whether or not this condition is likely to be permanent. A copy of the written assessment should be provided to the Office of the Public Advocate.

(f) Ease of access to powers of attorney

We find that our clients do not have the financial capacity to pay a private solicitor to draft this important document. We have instituted a subsidised scheme in our region in association with the Albury & District Law Society and North East Law Association so that a power of attorney can be drafted for one of our clients by a participating law firm for \$50. However, most clients struggle to afford this amount especially if they also require all the powers and a will for \$50 each. While we as a Community Legal Centre can give advice, we do not draft these documents for clients. The Take Control Booklet is excellent but due to the complexity of the requirements, as mentioned above, it is too difficult for most of our clients to understand.

Recommendations:

- The Government should consider a scheme or subsidy to ensure that parties always have access to legal assistance when creating a power of attorney.

(g) Community Education

We support the submission of the Federation of Community Legal Centres as follows:

We believe that better general knowledge about powers of attorney, both for donors and attorneys, would provide a valuable safeguard against their misuse. At present, many people are unwittingly complicit in the misuse of powers of

attorney because they do not understand them. We have also had clients tell us of an attorney preventing other people from visiting an elderly relative, on the strength of an enduring power of attorney (financial). This kind of behaviour would be less prevalent if members of the broader community (such as nursing home operators) better understood the distinction between the various instruments and the powers they confer.

Recommendations:

- The Victorian Government should conduct a public education campaign to raise community awareness regarding the various instruments and their effects.
- The LIV should be encouraged to provide low cost professional education regarding powers of attorney, in conjunction with private legal education providers such as the Leo Cussen Institute.
- The Victorian Government should devise a special education campaign targeted at banks, nursing homes, Centrelink and other organisations that deal regularly with older people and people with limited capacity, to ensure that their employees have a good working knowledge of powers of attorney.

Thank you again for inviting these comments.

If you would like to discuss any aspect of our submission, please contact me on the number below.

Karen Bowley
Principal Lawyer
Hume Riverina Community Legal Service
(02) 6057 5003 (direct)