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Chair
Law Reform Committee
Parliament of Victoria
Spring St.,
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Dear Mr. Scheffer,

Inquiry into Powers of Attorney

We thank you for your invitation to make a submission in relation to this Inquiry.

Our service is a community legal service that provides free legal advice to the ratepayers of the City of Port Phillip, and in particular to the residents of South Melbourne and Port Melbourne. Those suburbs have a disproportionately high percentage of people who are over 60 years of age (several years ago this proportion was as high as 25%, although we believe it is lower now). We were established in 1988, and since that time we have provided simple wills and powers of attorney to our clients if requested. We often receive such requests. Also, several of our staff and Committee of Management members hold powers of attorney on behalf of incapacitated relatives, so we also have experience as attorneys.

- *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 ?*

If we could start with the general observation that it is our experience that the operative parts of the current enduring power of attorney form (3 pages) are quite cumbersome. In fact, if the attorney declarations are included, the form can be as long as 5 pages. The size would not be of such concern if it was caused by the fact that those pages included more information than the former 1 page form, but that is not the case (although there are more formality requirements in the longer form caused by the changes made in 2003).

We also make the general observation that in our experience very few people read the printed parts of forms, and our clients generally rely entirely on the person preparing the document (with respect to both preparing the document and understanding what the document does). Thus in practice we do not think the 2003 changes have resulted in any great improvements with respect to donor protection (although we exclude from this

comment the changes that now require an "official" witness), but they have caused those who prepare the longer forms considerable administrative inconvenience. In particular the current size of the document makes certifying copies of an original a very wearisome task (particularly if one does not have an appropriate stamp available).

We would thus ideally like to see a form that covered no more than 2 pages (thus one sheet of double-sided print). Those of us familiar with the pre-2003 version (and with the power of attorney (medical treatment)) form often wax nostalgic for the former 1 page version that seemed to elegantly do almost everything that the current form does. We also note that as attorneys we have found that those we present the documents to for inspection had a much easier time under the old system (and many still do, as there are still many old forms in use).

We also make the observation that while we think we understand why the form used for the enduring power of attorney was removed from the Act in 2003, it creates a practical problem. Services such as ours, and presumably the same occurs in many law offices, take a new approved form and put it into their precedents. We then faithfully use that precedent, rather than go back to the Department of Justice website, each time we prepare a new power of attorney. Unless we are informed that the form has changed by those changing it, we may not become aware of the change. There is thus a real danger that we will use an outdated form, which of course may well invalidate any power of attorney made using the form (depending on the extent of the changes). We think that the danger of such a thing happening would be considerably reduced if the form was returned to the Act (as we are much more aware of changes made to the Act). We note that there is nothing on the form at present, even in the instruction and information pages, that appears to need to be able to be changed on a regular basis.

We also make the observation that at present it is quite difficult to be certain exactly what the current approved form is, as it is not actually on the Department of Justice website, and the referral to the form on that website is not as clear as it might be (as it does not say outright that the form on the website of the Office of the Public Advocate is the approved form). Also, it is not particularly clear whether the instruction and information pages preceding the form are part of the form.

If the Committee is perhaps thinking of moving to more of a Queensland model, we make the observation based on our experience that it is not unusual for a person to want to have different people as holders of an enduring financial power and of a power of attorney (medical treatment). We recently had a classic case of a mother giving her son her enduring power of attorney and her daughter her power of attorney (medical treatment) on the grounds that daughters were more hard-headed in respect of making decisions about their mothers. She wanted hard-headed decisions about her medical treatment, but not about how her money was used to support her.

We also make the observation that at present the interaction between powers of guardianship and powers of attorney (medical treatment) is extremely confusing. If one was considering combining powers (as in the Queensland model), we think that the

strongest case would be for combining powers of guardianship and powers of attorney (medical treatment) in the hope that the confusion about what each covered would be resolved in the combination process. In saying this we are aware that the latter are beyond the scope of the Inquiry.

- *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 ?*

This is a very vexed question that we will not venture to attempt to answer (although we do touch on this issue tangentially in addressing the last question). We will take the liberty of observing that the issue of capacity is only very rarely an issue for us – in the vast majority of cases where we prepare powers of attorney capacity is not an issue. We would therefore be concerned if a test of capacity was developed that requires those prospective donors whose capacity is not in any doubt to jump through unnecessary hoops.

We will also take the liberty of observing that, subject to the reservations we make in addressing the last question, section 118 of the *Instruments Act 1958* seems to us to address the right sort of issues in relation to capacity.

However, there is one area that has possibly been neglected. One member of our Committee of Management has a relative who has almost no short term memory as a result of particular disease process – it is not the result of dementia. Thus although she has the capacity to enter into an enduring power of attorney in the section 118 sense, if she did make such a power within a couple of hours she will have forgotten that she had done so. Arguably this issue should not affect the issue of capacity (as arguably it is no different in principle than forgetting after 5 years that one has made a power of attorney), but we would ask the Committee to consider whether it might not be of some use for the law to state that (if the Committee is of that opinion).

- *How should we determine when a person loses capacity in the context of when an enduring power of attorney is activated ?*

We should say at the outset that we have no experience of enduring powers of attorney that are activated when a donor loses capacity. We are aware that the official NSW form includes an option in this regard, but we have great difficulty in seeing how such a provision works in practice. Presumably when an attorney is challenged as to whether a power is active it is a complete answer for the attorney to say "I consider that the donor needs assistance in managing her/his affairs". But if that is the case we cannot see the point of having the delayed provision. And if the subjective element is removed then it is likely that the power will be almost unusable, as it will require the attorney to establish every time that the power is used that the donor has lost capacity – that will only be practicable for high frequency transactions with the same person.

However, having said all that, we note that those holding ordinary powers of attorney seem to be able to use those powers without having to establish that the donor of the power still has capacity. (Of course in the case of irrevocable ordinary powers of attorney, section 109(1)(d) provides that incapacity is irrelevant.)

- *What powers does a donor grant to an attorney when making a power of attorney ?*

As time goes on the answer to this question seems to get murkier and murkier. When one looks at the NSW legislation one begins to wonder whether certain powers that are specifically mentioned apply in Victoria. In particular we are now not sure whether an attorney can apply the donor's funds to cover the attorney's expenses in using the power, and whether an attorney has an absolute power with respect to making gifts.

One other issue that the Committee might like to consider that we have come across is whether an attorney is able, or should be able, to access the donor's medical records.

- *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 ?*

While we have no real answer to this question, we would like to point out a problem with the existing law. The current version of what we think is the approved form requires each witness to certify that "at the time of signing, the donor appeared to each of us to have the capacity necessary to make the enduring power of attorney". This has several problems. First, section 118 of the *Instruments Act 1958* specifies what understanding a donor must have to be able to make an enduring power of attorney. The signature clause for the witnesses on the form does not include even a basic summary of section 118 – in fact it makes no reference to this section at all. The information sheet for witnesses does include some of the things required by section 118, but in quite a different way. It also includes a definition of capacity that comes from goodness knows where – certainly it does not come from the Act (although in itself it is quite a reasonable definition) . There is also no link between the signature clause and the information page. However, these are not the things we are primarily concerned with. Our chief concerns are as follows –

1) Section 118 requires that the donor understands the nature and effect of the enduring power of attorney. In our experience there are quite a few lawyers who would struggle to meet this requirement – in fact there are a number of technical issues relating to powers of attorney that we suspect would result in split decisions of the High Court.

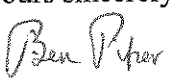
   Given that the vast majority of prospective donors will not have the required knowledge when they come to sign a power of attorney, it then becomes clear that a witness cannot make the required certification unless the witness has explained

the nature and effect of the power to the prospective donor and satisfied herself/himself that the prospective donor has understood the explanation. We query how a witness can do this unless the witness has a good understanding of how powers of attorney work (or is present while another witness or person with that understanding gives an explanation to a prospective donor). And we query how simply being an "official" witness confers this knowledge on a person. We would thus suggest that if the prospect of requiring enduring powers of attorney to be witnessed before a person trained to understand the operation of powers of attorney, which is where our line of questions is leading, is unpalatable, then it may be necessary to 'soften' the requirements of section 118 (perhaps by saying that it is sufficient with respect to understanding the nature and effect of the power itself to have a basic knowledge of how the power operates).

2) We also have a concern about the way section 118 is written. It makes the validity of every enduring power of attorney susceptible to a fairly easy challenge, particularly where neither witness is a lawyer. The lawyer of a person challenging the validity of a power of attorney need simply put the witnesses on the witness stand and proceed to probe their knowledge of the operation of powers of attorney. If either witness falters, then fairly good grounds exist for the argument that the donor was not able to make the power under section 118. This applies even more so if both witnesses falter.

We would be happy to provide any further assistance that the Committee might require.

Yours sincerely



Ben Piper
President
On behalf of the Committee of Management
SouthPort Community Legal Service Inc.