

Federation of
Community Legal Centres
VICTORIA

Ms Kerryn Riseley
Executive Officer
Victorian Parliament Law Reform Committee

By email: vpjrc@parliament.vic.gov.au

24 August 2009

Inquiry into Powers of Attorney

Dear Ms Riseley

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

About the Federation

The Federation of Community Legal Centres (Vic) is the peak body for over fifty community legal centres across Victoria.

Community legal centres (CLCs) are independent community organisations that provide free legal services to the public. CLCs provide free legal advice, information and representation to more than 100,000 Victorians each year. CLC activities integrate assistance for individual clients with community legal education, community development and law reform projects that are preventative and based on client need.

The work of CLCs commonly entails assisting people who are disadvantaged, vulnerable or marginalised. Our clients are predominantly low-income, and include many young, elderly and culturally and linguistically diverse (CALD) Victorians.

Several of our member centres regularly assist clients with powers of attorney, particularly the Mental Health Legal Service and Seniors Rights Victoria in Melbourne and Bendigo.

This submission has been drafted by members of the Federation's Older Persons' Law working group, in consultation with the broader membership. Member centres consulted include the Mental Health Legal Centre, Seniors Rights Victoria, Disability Discrimination Legal Service, Loddon Campaspe Community Legal Centre, Tenants Union of Victoria, La Trobe University Student Legal Service, St Kilda Legal Service, Gippsland Community Legal Service and Fitzroy Legal Service.

General remarks

As set out in the working group's letter to the Attorney-General dated 24 March 2009, we believe that the committee's inquiry should include enduring powers of attorney under the *Medical Treatment Act 1988*.

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Nevertheless, we welcome the review and thank the committee for inviting our comments.

Recommendations

(a) Simpler paperwork

In Victoria there are four types of power of attorney, the enduring power of attorney (financial), enduring power of attorney (medical), enduring power of guardianship and general power of attorney. These instruments are governed by separate Acts of Parliament, require the completion of separate forms and have different witnessing requirements. This causes confusion and inconvenience, particularly for people who wish to create numerous powers of attorney simultaneously.

The Federation does not object to the existence of four separate instruments. We think it is important to maintain a clear distinction between general powers and powers granted for specific purposes or specific periods of time. Overzealous 'streamlining' of formerly distinct powers may increase confusion about the effects of the various instruments.

We believe, however, that simpler, standardised forms and witnessing requirements would make it easier for people to create and understand powers of attorney.

Recommendation 1: The paperwork associated with creating powers of attorney should be simplified and standardised. There should be one form for creating a general power of attorney and another for creating an enduring power of attorney of any kind. The enduring power of attorney form should contain distinct sections for enduring powers of attorney (financial), enduring powers of attorney (medical) and enduring powers of guardianship. Apart from this difference, the forms should follow a consistent format and should have the same witnessing requirements.

(b) Alternative attorneys and composite attorneys

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 a lesser number act jointly. We agree with the LIV that composite powers of attorney should be reinstated, as this arrangement provides a safeguard against abuse while retaining a degree of flexibility.

Recommendation 2: Section 120 of the *Instruments Act 1958* should be amended to enable the donor of an enduring power of attorney to appoint more than one alternative power of attorney.

Recommendation 3: 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 a lesser number 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 another jurisdiction. We note the 2007 report of the House of Representatives Standing Committee on Legal and Constitutional Affairs ('the 2007 report'), which recommended uniform legislation across jurisdictions.¹

Recommendation 4: The Victorian Government should do everything in its power to promote cross-jurisdictional recognition of powers of attorney, preferably through the enactment of uniform legislation in each jurisdiction.

(d) Assessment of capacity

At present, there is no clear and consistent test for doctors or lawyers to apply when ascertaining a donor's capacity.

We recognise that the assessment of capacity is highly complex, embracing both legal and medical issues. We believe that some clarification of the process would assist donors, attorneys, witnesses and legal advisers.

There are conflicting views within the Federation's membership as to whether doctors or lawyers should have ultimate authority to determine questions of capacity. As such, we make no specific recommendations on this point, but refer to the submissions of our member centres, Seniors Rights Victoria and the Mental Health Legal Centre.

(e) Proof of Incapacity

The Federation is concerned that in some instances, attorneys exercise their powers under an enduring power of attorney despite the fact that the donor has capacity. This is particularly concerning with respect to mentally ill donors, who sometimes lose capacity for short periods and then regain it.

Recommendation 5: 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. 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. The Government might consider whether or not exceptions to this rule are appropriate in urgent or otherwise exceptional circumstances.

¹ Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older people and the law* (2007) ('the 2007 report'), 79.

(f) Education

In our experience, many people have little understanding of powers attorney and the differences between the various instruments. Many attorneys demonstrate a poor understanding of their obligations. Even within the legal profession, there is some confusion regarding the various instruments and their effects. This is unsurprising, given that powers of attorney generally do not feature in the law school curriculum.

Case study

A rural community legal centre was contacted by woman seeking information and assistance on behalf of her father. The woman's father had decided to grant her power of attorney, prior to his admission to the local hospital for major surgery.

Several days previously, the father and daughter had seen a private solicitor. The solicitor had helped them create a general power of attorney.

The daughter advised the CLC that they had requested a power of attorney that would take effect if the father lost capacity. In this case, the solicitor should have advised them to create an enduring power of attorney.

At present, many people are unwittingly complicit in the misuse of powers of attorney because they do not understand them. For example, we have heard anecdotal reports of an attorney preventing other people from visiting an elderly relative in a nursing home, 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 distinctions between the various instruments and the powers they confer.

We believe that a government-sponsored education campaign about powers of attorney would assist donors, attorneys and third parties, and provide a valuable safeguard against the misuse of powers of attorney. In this respect we endorse the recommendations contained in the 2007 report.²

Recommendation 6: The Victorian Government should conduct a public education campaign to raise community awareness regarding the various instruments and their effects.

Recommendation 7: 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.

Recommendation 8: 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.

² Ibid, 87.

(g) Access to legal advice

We support the recommendation in the 2007 report that governments should attempt to subsidise legal assistance for anyone wishing to create a power of attorney.³ Currently many CLCs provide general advice on powers of attorney, but due to resource constraints they are not always able to provide intensive assistance.

Recommendation 9: The Government should consider a scheme or subsidy to ensure that parties always have access to legal assistance when creating a power of attorney.

(h) Further safeguards: a registration scheme and regular auditing

The Federation recognises that powers of attorney are private agreements and that donors' privacy should be respected to the greatest possible extent. At the same time, we believe that some regulation and monitoring is necessary in order to combat abuse and protect the rights of vulnerable groups such as the elderly.

We believe that the Victorian Government should consider creating a register of powers of attorney, to be maintained by the Office of the Public Advocate (OPA).⁴

The duties of an attorney could be expanded to include regular reporting requirements. These reports could be recorded on the register. We acknowledge, however, that this may impose a significant burden on some people who already have many responsibilities in their capacity as attorneys.

Alternatively, the OPA could be empowered to conduct regular audits of registered powers of attorney. If the OPA is given auditing powers, there should be clear guidelines recognising the importance of privacy. The guidelines should state that the OPA may only intervene where there is *prima facie* evidence of undue influence, abuse or fraud.

Treating doctors and hospitals should be able to access the register in a medical emergency, to ascertain whether or not a patient has created any powers of attorney. In all other respects, the registered instruments should be treated with the utmost confidentiality.

Recommendation 10: The Victorian Government should consider creating a register of powers of attorney, to be maintained by the Office of the Public Advocate (OPA).

Recommendation 11: The Victorian Government should consider imposing regular reporting requirements on attorneys or, alternatively, granting the OPA powers and resources to audit the register.

Recommendation 12: If a registration system is introduced, and the OPA is given auditing responsibilities, there should be clear guidelines affirming that the OPA may only intervene where there is *prima facie* evidence of undue

³ Ibid 87.


⁴ We note that the 2007 report called for a national register, to be developed and implemented by the Standing Committee of Attorneys-General. We support the implementation of a national register, which would eliminate the need for a Victorian register. See the 2007 report, 99-100.

influence, abuse or fraud.

Recommendation 13: Treating doctors and hospitals should be allowed to access the register in a medical emergency, to ascertain whether or not their patients have put in place any 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.

Sincerely

A handwritten signature in black ink, appearing to read 'Lucie O'Brien', with a long horizontal flourish extending to the right.

Lucie O'Brien

Policy Officer

Direct line: (03) 9652 1512

Summary of recommendations

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