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**St Kilda Legal Service Submission  
to the Victorian Parliament Law Reform Committee's  
Inquiry into Powers of Attorney**

*About St Kilda Legal Service*

St Kilda Legal Service was amongst the first community legal centres to be established in Victoria. The Legal Service began as part of the St Kilda Community Group that was set up to provide welfare services to the local community. The Legal Service is a registered co-operative and a voluntary Board of Directors oversees the management of the Service.

The Legal Service provides free and accessible legal services to members of the community within the Cities of Port Phillip, Bayside, Stonnington and parts of Glen Eira. The Legal Service is committed to redressing inequalities within the legal system through casework, legal education, community development and law reform activities. The Legal Service conducts a Night Service three nights a week, staffed entirely by volunteer lawyers, and employs an administrator, a casework lawyer, a community legal education lawyer, a volunteer coordinator and a community drug outreach lawyer. The Legal Service also conducts a duty solicitor service at the Moorabbin Justice Centre one day per week for applicants in family violence intervention order matters.

**St Kilda Legal Service Submission**

- 1. 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?*

St Kilda Legal Service has received anecdotal reports that the power of attorney process is confusing for donors and attorneys. St Kilda Legal Service generally does not assist clients in drafting powers of attorney

documents. The *Take Control: A Kit for Making Powers of Attorney and Guardianship* booklet produced by the Office of the Public Advocate and Victoria Legal Aid and containing the relevant forms is provided to individuals wishing to make a power of attorney. It would be useful if the process were streamlined and the content of this booklet could be simplified. Also, it would be useful if this, or a similar booklet, were available in a broad range of community languages. However, as the Legal Service does not generally assist clients with the process of drafting powers of attorney documents, the above question is not addressed in any detail in this submission.

2. *How should we determine that a donor has capacity to create a legally enforceable document at the time he or she creates the power of attorney?*

The Legal Service generally does not witness power of attorney documents. The Legal Service also has a policy not to assist with medical powers of attorney. These policy and practices have developed in large part because of concerns that if Legal Service lawyers witness powers of attorney documents they are required under the *Instruments Act 1958* (Vic) to make assessments of donors' capacity<sup>1</sup>.

The first contact for many clients of the Legal Service is with the Night Service. The Night Service operates three nights a week and legal advice and assistance is provided by volunteer lawyers. Night Service volunteer lawyers have expressed their concern that it is not appropriate for them to make an assessment of a donor's capacity to make a power of attorney. These concerns are shared by the Legal Service Day staff. It is the view of the Legal Service that powers of attorney documents should be witnessed by the client's local doctor who is in the best position to assess the client's capacity<sup>2</sup>.

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

St Kilda Legal Service supports the recommendations of the SouthPort Community Legal Service<sup>3</sup> and the Federation of Community Legal Centres in this area. The SouthPort Community Legal Centre recommendation is to:

[r]equire the attorney to obtain a medical certificate, confirming that the donor has lost capacity, and provide the certificate to the Office of the Public Advocate before the enduring power of attorney can take effect. This

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<sup>1</sup> s. 125A *Instruments Act 1958* (Vic)

<sup>2</sup> The issue of whether the donor has capacity also arises where a donor seeks to revoke a power attorney.

<sup>3</sup> SouthPort Community Legal Service is located in relatively close proximity to St Kilda Legal Service. SouthPort Community Legal Service's catchment area includes a significant number of over 65s and SouthPort Community Legal Service will draft simple powers of attorney for clients.

certificate should be issued by the donor's treating doctor, unless the matter is urgent and the treating doctor is unavailable.<sup>4</sup>

The Federation of Community Legal Centres recommendation is very similar but in addition recommends that the written assessment should state whether or not the loss of capacity is "likely to be permanent":

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.<sup>5</sup>

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

This issue is not addressed in this submission.

5. *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?*

The Legal Service has concerns about the potential for powers of attorney documents to be abused. The Legal Service is concerned that the power of attorney process can be used to facilitate economic abuse of an older family member. Below is an example of a reported incident of alleged abuse of the power of attorney process.

#### **Case study**

The client attended the Legal Service seeking to have a power of attorney revoked. The client stated that while he was ill his son attended with a lawyer and arranged for the client to sign a will and power of attorney. The client stated that subsequently his son provided him with an inadequate weekly allowance. The client was also concerned that his personal financial documents had been taken from his home. The client held the view that his son was not managing his affairs in his best interests.

In the case study below the client also stated that she wished to end the enduring power of attorney.

<sup>4</sup> SouthPort Community Legal Services Submission to the Victorian Parliament Law Reform Committee Review of Powers of Attorney, p. 4

<sup>5</sup> The Federation of Community Legal Centres Submission to the Victorian Law Reform Committee Inquiry into Powers of Attorney, August 2009, p.3

**Case study**

The client stated that she believed her son who had power of attorney for medical and financial matters might not be acting in her best interests. The client wanted to know whether she could revoke the power of attorney and if it were possible to trace her investments.

St Kilda Legal Service notes that clients of the Legal Service have expressed a wish to have more than one alternate enduring power of attorney. In the case study below, involving a guardianship matter, the client was concerned that decisions in relation to her mother's affairs would be left entirely to her brother. This same issue can apply in enduring powers of attorney situations.

**Case study:**

The client's mother was in a nursing home. The client's brother was seeking sole guardianship for the client's mother. The client was concerned that she was excluded from the process.

The Legal Service endorses the recommendation of the Federation of Community Legal Centres that:

[t]he *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.<sup>6</sup>

The Legal Service makes the observation that in the case of composite attorneys there would need to be a provision in the event of a split decision. That is, do the attorneys go to VCAT or to mediation or should there always be an odd number of attorneys so that a majority decision is followed unless there is a three-way split.

St Kilda Legal Service also endorses the recommendations of the Federation of Community Legal Centres around the issue of safeguards against abuses of the powers of attorney process including:

- The Victorian Government should consider creating a register of powers of attorney, to be maintained by the Office of the Public Advocate (OPA).
- The Victorian Government should consider imposing regular reporting requirements on attorneys or, alternatively, granting the OPA powers and resources to audit this register.<sup>7</sup>

However, if a register is introduced it is the view of St Kilda Legal Service that there should be a commitment by the Victorian Government that there be no stamp duty or fees payable.

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<sup>6</sup> The Federation of Community Legal Centres Submission to the Victorian Law Reform Committee Inquiry into Powers of Attorney, August 2009, p.3

<sup>7</sup> Ibid p. 5