

Submission No. POA/57  
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Law Reform Committee

Executive Officer  
Victorian Parliament Law reform Committee  
Parliament House  
Spring Street  
East Melbourne

19/08/09

Dear Sir/Madam

Please find enclosed a response to the Victorian Parliament Law Reform Committee Review of the Power of Attorney.

I would like to thank the Committee for the opportunity to contribute to this timely review and look forward to the outcome of the review.



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**VICTORIAN PARLIAMENT LAW REFORM COMMITTEE  
REVIEW OF POWERS OF ATTORNEY**

This response is prepared and submitted by Jeni Lee principal solicitor for SouthPort Community Legal Service in August 2009

This response was prepared as a draft response to be submitted by the SouthPort Community Legal Service. After discussion with the Committee of Management, the decision was made for Jenifer Lee to submit a response under her own name. Some members of the Committee of Management have had very little experience with Powers of Attorney and therefore felt they were unable to comment outside their own experience thus they are submitting a response on behalf of the SouthPort Community Legal Centre.

I as author of this response would like to take this opportunity to express my thanks for the opportunity to contribute to the review currently being undertaken by the Victorian Parliament looking at possible reform of the powers of attorneys now in operation in Victoria.

As the principal solicitor at the SouthPort CLC, I have extensive experience in offers to draft simple wills and powers of attorney (POAs) for our clients. I am currently also Principal Solicitor with Seniors Rights Victoria and run community legal education programs dealing with Powers of Attorney. This submission therefore is based on the experience I have had over the past few years.

The inquiry is aimed at streamlining and simplifying powers of attorney documents to enable Victorians to plan for their future financial, lifestyle and healthcare needs. We understand that the terms of reference ask the Committee to consider several issues I therefore turn my mind to addressing the issues as outlined in the terms of reference.

**(1) Should powers of attorney be streamlined?**

The existing forms are governed by the *Instruments Act 1958* and the *Guardianship and Administration Act 1986*. It is noted that each of the current types of POAs in Victoria are titled differently, and require that a person planning for their future might have to make several different documents. The experience of solicitors working with elder Victorian has revealed that many POAs (financial) are subject to abuse by the Attorney. Once the fraud has been committed it is difficult, time consuming and costly when seeking a legal remedy.

- In Victoria there are three different documents created under three different Acts of Parliament with different forms, different options, different witnessing requirements, different wording of capacity and different acceptance requirements.
- This has the potential to cause confusion of purpose, in particular for older people who are anxious to continue to manage their affairs and plan for their future.

- Currently in Victoria people are unable to appoint more than one agent / guardian to make healthcare and lifestyle decisions.
- Reliance on the Attorney to exercise diligently their responsibilities with no form of structured or regular accountability

**(2) A power of attorney is only valid if the donor has ‘capacity’ at the time the document is created.**

Many older people who are required to obtain POAs by aged care agencies have their documents signed by members of the community not adequately trained to determine capacity. This means the donor is not fully tested to determine if they understand the document he or she is creating and the effects it will have

- The certification clause regarding donor’s capacity is different for each power.
- Requirement for better education and tools regarding capacity assessment to ensure that professionals are applying a standard assessment.
- The need for a statement of capacity at the time of signing the power.
- The classification of witnesses is extensive and includes categories that I would questions would not have the skills to determine capacity.

**(3) How should we determine when a donor loses capacity thereby triggering an enduring power of attorney to come into effect?**

We acknowledge that some powers of attorney come into effect only when a donor loses capacity but there appears to be no requirement to produce evidence to show that a donor has lost capacity. Our experience is that there should be a test that is noted and attached to the document and signed off by a designated person such as a lawyer or a doctor, which states; with accompanying evidence; a statement that a donor no longer has capacity.

- Assessment of cognitive impairment is little understood or applied in practice by legal and health care professionals
- Tests for capacity as a legal concept and a medical concept have different purposes and are often confused.
- No established and approved test as to loss of capacity.
- No statement of loss of capacity
- No understanding that capacity is decision specific.(person is unable to make specific or complex decision but can manage simple tasks)

**What powers should an attorney have and what limits should there be on attorneys’ powers?**

When the donor becomes frail and vulnerable, there is often a lack of consultation and communication by the attorney with the donor about decisions being made on behalf of the donor. Many attorneys act beyond scope of their powers or disregarding limitations and demonstrate a lack of understanding about the different powers e.g. a financial

attorney purporting to have authority to make decisions about where the donor should live. This lack of understanding extends to other parties such as financial institutions and aged care facilities that may accept a financial power of attorney as authority to make lifestyle decisions. There are often breaches of privacy by the financial attorney assuming the power extends to accessing the donor's medical records without the donor's consent.

### **The issue of abuse of powers of attorney?**

As a community, we are becoming aware of reports of abuse of powers of attorney. The instruments as they are structured offer little protection or contain requirements for accountability of financial attorneys. Administrators appointed by the Victorian Civil and Administrative Tribunal are required to submit annual audits which are, in some cases, onerous, but where there is an individual of high need and also where there is a large estate there should be requirements that demonstrate that the attorney is managing the finances in the donor's best interest.

- There is no legislative claw back provision when abuse has been identified.
- Many family members of others appointed attorneys who are alleged to have abused their power often claim that the donor has contributed to the welfare of the family in the past and claim that therefore they can access the funds to pay personal accounts such as school fees. If this is the case then the power should state this as the intention of the donor.

### **Recommendations**

Based on the reading of reports and current literature and the experience of many legal practitioners there appears to be agreement that there needs to be reform. I offer here several recommendations for reform.

1. Better and clearer remedies available to donor where attorneys have breached their duties. VCAT powers should be extended to make orders to recover money misappropriated by the attorney or create an order that can be lodged with a superior court.
2. Requirement that all donors get independent advice and that this advice has included facts, the donor's capacity to give limited rather than absolute authority to the attorney.
3. Mandatory registration of POAs and annual accountability requirements.
4. Registering authority Probate Office. Could lodge wills and POAs at the time of signing.
5. Reporting requirements – attorneys to make brief annual/periodical reports to the registering authority re their exercise of their responsibilities under the POA to VCAT.

6. Clear guidelines that recognise the importance of respecting the parties' wishes, and powers to intervene in/nullify POAs to cases where there is clear evidence of impropriety, abuse or fraud
7. A mechanism whereby hospitals and treating doctors can check the register to find out if there is a POA in place when someone comes in.
8. Improved access to the investigating possible elder abuse, VCAT to be more accessible and enhanced role of Office of the Public Advocate to investigate abuse.
9. Streamline various power of attorney forms to enable one form to contain all the requirements, responsibilities and limitations of the attorney.
10. Allow for the appointment of more than one decision maker in relation to healthcare and lifestyle decisions and more than one alternate decision maker in relation to all decisions.
11. Measures to improve consistency and portability of the instrument across State jurisdictions.
12. Education and tools regarding capacity assessment and when it is required.
13. Development of a national standard re capacity
14. A register of medical professionals authorised to make legally effective determinations of capacity.
15. Require 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. The donor's treating doctor should issue this certificate, unless the matter is urgent and the treating doctor is unavailable.
16. Roles and responsibilities of attorneys to be set out clearly in legislation.
17. Information on roles and responsibilities of attorney could be incorporated into power of attorney forms, for example as in Queensland.
18. Better education of prospective attorneys and the public regarding attorney's responsibilities and the donor's rights (including human rights).
19. Better protection for the donor regarding breaches of privacy and the collection of personal information about the donor by an attorney.

Submitted by 16 August 2009

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