

Our Ref: JR/klc/017

Attn: Mr Johan Scheffer MLC  
Chair  
Parliament of Victoria  
Law Reform Committee  
Parliament House, Spring Street,  
East Melbourne VIC 3002

Dear Mr Scheffer,

**RE: Inquiry into Powers of Attorney**

Thank you for the opportunity to submit our views as an organisation on possible issues with the current legislation on 'Power of Attorney'. The following comments are made with consideration to both our organisational aims to provide a quality service and the terms of reference the committee is reviewing. My current role at Bairnsdale hospital is that as Nursing Unit Manager of the physical Rehabilitation ward.

- 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?

Part 2. Section 123 of *Instruments Act 1958* relating to eligible persons, needs to be narrowed and conclusive. A medical practitioner of certain minimum specified standard or Neuro psychologist would give a more valid insight into a subjective review of the donor's mental capacity. This would also make it vastly easier for the donor to revoke at a later date power invested in the attorney as stated in section 123 D.

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

The purpose of the instruments act at the present time is the protection of those that are vulnerable to exploitation. We, as a healthcare organisation are aware of our fiduciary duty to our clients. However we are finding extreme difficulty in not only when to activate a power of attorney, but when one is absent. A scenario that is repeated throughout the Department of human Services is:

Elderly person admitted to hospital, unable to care for themselves but medically well. Needs to access residential care for their wellbeing, refuses to even consider this option despite the concerns of the person's family. The next step from a legal perspective is to either activate an attorney or apply to the tribunal for a guardian to be appointed. This leaves us as an organisation the following dilemma. They are medically well so as such the *Medical Treatment Act 1986* is not applicable.

- 1) If that person remains in our care it is clearly against their will and clearly a misuse of the organisation's power from the first point of contact (time frames can extend for greater than two months for a tribunal hearing).
- 2) If we discharge the persons to the abode at which they are currently situated we have knowingly breached our fiducial responsibility by returning them to an unsafe discharge destination.

This is in direct contradiction to the purpose of the act .As a remedy we would suggest the following being drafted into any amendments that are made to the legislation.

- 1) That section 117(2) should be redrafted as it is contradictory and does not address the mischief of misuse of power by the attorney.
- 2) That third party outside the family unit who hold a fiduciary interest with the affected donor can appoint an interim attorney in the absence of a power of attorney being present. The list of such persons would be inclusive in the legislation. The time frame for appointment needs to be concise if intervention will off set the current problem of awaiting V-CAT assessment.

- Objective testing

Upon Signature and undertaking the document of attorney, the donor should undertake an objective set of testing. This would assist in both invoking and revoking the usage of the attorney. The test would be listed in sec 125(zl) and would have the later effect of narrowing the power invested in the attorney by limiting its application at a later date .It would also benchmark the person's current mental status discarding such subjective testing as the "reasonable person test". This procedure acknowledges that a person's mental status is not static and that any deficits may be transit in nature. Cognitive screening is a common practice tool used for a variety of conditions by healthcare professionals.

I would like to thank you once again for providing us with the forum for voicing our concerns. It is my hope that my observations will be considered. Please contact me in the future with any concerns or questions you may have. These are my own views and do not represent those of the organisations.

Yours sincerely James Roughley.