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Law Reform Committee

Inquiry into Powers of Attorney - submission

I should like to take this opportunity to thank the Parliament of Victoria Law Reform Committee not only for the opportunity to make this submission but also for the consideration in allowing me an extension of time in which to submit this submission, brief as it may be.

It should be noted at the outset that many of the issues that arise in the area of substitute decision making ie the various instruments, inter-jurisdictional recognition of these same instruments, definitions of capacity, insufficient education on the part of both principal and attorney and abuse of the powers delegated in the instruments arise as a result of our federal form of government and are therefore difficult to address in a state/territory review. It should also be noted that notwithstanding the fact that a number of the jurisdictions are reviewing their substitute decision making regimes many of these reviews are piecemeal (ie not all the relevant legislation is being reviewed at the same time) and effective reforms are therefore difficult to achieve.

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?

   As noted supra there is much confusion over the various types of substitute decision making instruments, in fact it is a fair comment to say that many people in the community also confuse the financial instruments with testamentary dispositions (wills) and do not differentiate between one enduring document and another. It is not uncommon for many people think that because they have one enduring document that it will cover both health and finances and it is not, in their mind, necessary to have more than one "similar" document.

   It is therefore, essential that any substitute decision making instruments be as simple as possible, not only in their terminology but also in the areas that they cover. It is also essential that the witnessing requirements be uniform. Additionally it is important that the types of persons eligible to witness these documents be limited to certain cohorts such as lawyers, court officials etc and that they undertake a prescribed course in witnessing documents such as the enduring power of attorney wherein they are required 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."

2. 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?

   The current position of allowing such a broad range of witnesses, not necessarily with relevant qualifications, is one of the key problems associated with substitute decision making. Our population demographics are changing and we are faced with an increasingly larger cohort of older persons. There is

also, with age, an increased risk of acquiring some form of mental impairment. To ask an "unqualified" person to certify that at the time of signing an enduring instrument the donor of the power appeared to have the requisite mental capacity is placing too great a burden on an individual with no expertise in the area of assessing mental capacity.

Most law societies have in place guidelines for solicitors when witnessing powers of attorney. Whilst these guidelines are commendable, indeed, essential, they are not in general use and do not serve to assist lay witnesses. It should therefore, be mandatory, as mentioned in (1) that anyone who is eligible to witness these instruments undertake a prescribed course, which inter alia will provide them with suitable guidelines to determine whether or not there are triggers which should alert them to the fact that the "principal's" mental capacity may be in question. Should the person's capacity be in question then the witness should be in a position to refer the person to a qualified practitioner who would be able to assess the person's capacity for the purpose of the task at hand.

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

   If the activating factor is the loss of capacity (as opposed by any other activating factor stipulated by the principal) then it is essential that the principal be assessed by a professional (ie medical practitioner, geriatrician, clinical psychologist for example) skilled in the area of mental capacity assessment. It must, however, be remembered that capacity is decision specific and that when determining whether a person has, or has not, the requisite mental capacity then we must ensure that the person understands the nature and effect of the transaction at hand. The use of a simple questionnaire is not a desired form of assessment.

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

   When granting powers to an attorney it is essential that both the donor and donee understand the extent of the powers that can be granted. The donor should, therefore, be entitled to grant to the attorney any powers that they wish, so long as they would be able to lawfully do themselves. It would be too limiting to set out in legislation the various powers open to the donor to grant to the donee. It is though, essential that any instrument clearly set out the limitations that the donor wishes to impose upon the powers of the attorney.

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?

In respect to the execution of the documents, as mentioned supra the witnessing requirements should reflect a narrower cohort eligible to witness these documents.

Education of both the principal and the attorney as to their roles is imperative and such information should form part of the documentation. Principals should be advised prior to appointing an attorney to consider that at the very least an attorney should have the following attributes – financial acumen, integrity and availability. Principals should also be advised that it is not a requirement to appoint one's own children/spouses as their attorney!

Ideally there should be a form of checking mechanism available within the instrument ie a requirement that the attorney submit audited accounts annually, however, it is noted that such a requirement may impose onerous obligations upon an attorney when the estate is small and funds may not be readily available to pay for such a service.

The idea of registration of the instruments, while popular in many quarters, does not in itself provide a safeguard against financial abuse.

The answer lies in the education not only of the principal and the attorney but also of the financial, legal and medical professions.

In conclusion it would appear that until such time as there is uniformity between the states/territories in respect of substitute decision making, until such time as the process is simplified and both the public and the professions are educated in the issues surrounding substitute decision making then the process will remain flawed and open to abuse – irrespective of which jurisdiction the instruments are created.

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Sydney