

GENERAL SUBMISSION TO THE VICTORIAN PARLIAMENTARY LAW REFORM COMMITTEE

INQUIRY INTO POWERS OF ATTORNEY (APRIL 2010)

Submission from D.Constantine & L.Richmond

The following submission is made in addition to the verbal submissions made in respect of the Inquiry into Powers of Attorney before the Legislative Council Committee on Tuesday, 30 March 2010.

The current legislation regarding Powers of Attorney in Victoria does not provide sufficient protection to members of the community who are particularly vulnerable. We believe that the elderly, with significant health issues such as Alzheimer's and dementia related disorders are at risk of financial abuse and sometimes neglect where Powers of Attorney (Donees) remain uninformed, the instruments remain unregistered and the use of the powers remain unregulated. The current arrangements expose the elderly, particularly those who have lost capacity to care for their own health and finances, to serious risks. Many elderly are reliant on family members to handle their finances when they are unable to make decisions and the means by which this is achieved is through setting up a Power of Attorney arrangement. Family members, however, often do not understand their obligations and often engage in conflicts or interests by gaining benefit from the manner in which finances are managed, such as transferring property to themselves.

We believe that the Parliament should give serious consideration, in particular, to increasing the protection of vulnerable people (Donors) who have appointed an Enduring Power of Attorney, and subsequently lost capacity. In these situations, the Donor of the power no longer has the ability to protect themselves, comprehend or complain about any conflicts or failures of the attorney appointed and it is, therefore, important that as a community we ensure that these people are protected as much as possible. The Parliament should differentiate between the general and enduring powers by increasing the level of oversight into situations where an Enduring Power of Attorney is being utilised. We are living in an increasingly aging population which means that there are going to be significantly more numbers of people with complex health issues and lacking in capacity to look after their own financial affairs. These people will be at increasing risk in a society where the vast majority will be assisted by relatives or friends under an Enduring Power of Attorney, an instrument which is not registered and subject to very little transparency or regulation.

Below are some brief points, which we believe the Parliament should consider from the perspective of protecting the elderly.

Registration

Powers of Attorney documents should be registered with a central body, which can be accessed on request, provided sufficient interest, or reason is demonstrated. This would be particularly useful for banks and hospitals. The registration could also indicate any relevant date at which the Donor was determined to have lost capacity so that it is clear where they are being managed completely under the Power of Attorney instrument.

Education

Where a person has lost capacity and appointed an Enduring Power of Attorney, the Donee should be required to undertake a short training seminar outlining the obligations of the Donee and provide access to resources to assist them in ensuring the best needs of the person are met. Some of the issues arising under the current system are caused by Donees' lack of awareness of the obligations and duties of a Donee, and how they should deal with complex situations.

Accountability & Transparency

Where a person has lost capacity and is under an EP Enduring Power of Attorney, the Donee should be required to submit a simple, signed document each financial year confirming that they have undertaken basic duties including tax returns, which could be referenced in a checklist (we would be happy to provide a sample should this be required). Although some would argue that this is too onerous, where a Donee is managing someone's finances who has lost capacity they should be equipped to do this.

With a General Power of Attorney it would not be efficient or necessary to require quite the same obligations.

Access to protection

There should also be more clear rules allowing for the revocation of Power of Attorney arrangements where Donees have neglected to manage financial matters and/or have engaged in conflicts of interests. A simplified process should be developed where concerned family members can complain and the elderly can be protected more efficiently. Family (or other interested parties with sufficient concern) should be able to call the Donees to account for their dealings with the Donor's property and they should be more easily able to ascertain whether the person's best interests are being protected. This could be in the form of enabling VCAT to more easily revoke an arrangement without the need for protracted contests and to permit another family member who demonstrates sufficient ability to be appointed as a Guardian and/or Administrator despite unwarranted protests from a Donee who has not fulfilled the obligations. VCAT should not feel so limited by the legislation that its only option is to always appoint an independent Administrator or a public guardian where neglect has occurred by an attorney.

Clarification of joint arrangements (as opposed to joint and several powers)

Some Donors appoint two or more people jointly as Enduring Powers of Attorney and this is becoming complicated in the modern world and can cause detriment to the Donor. Most people now access banking electronically or through the use of ATM cards. Where a person appoints joint (not several) Donees – it is impossible to deal with finances through the use of internet banking and an ATM card. The Donor is effectively denied the ability to utilise efficient means of payment and sometimes this can result in detriment to the person being cared for. Banks will not issue an ATM card to one of the joint Donees because they are joint. The banks will also not issue two ATM cards for the one person being dealt with under the joint Power of Attorney.

The legislation should permit joint Powers of Attorney to jointly agree and sign with the bank for the use of electronic Internet banking. Under this arrangement both would sign to agree to the

conditions, and both would have the ability to access electronic banking and make payments. Terms could be introduced to govern this. Currently, it appears that the only way the bank will accept payments and debits is through the use of cheque books, which have to be signed and co-signed on each occasion jointly by all Donees. This is not efficient where there is an urgent need for payment or a short time frame. Banks will not currently permit electronic banking or direct debit arrangements where joint powers are set up.

For example, Mrs Q needs specialised care from time to time due to her dementia, and is unable to attend to personal hygiene. A podiatrist will attend the Aged Care Home but will not attend to Mrs Q's toenails due to the fact that a payment of a bill was not made on time. The bill may not have been paid due to the difficulty in the joint Donees co-ordinating a meeting to jointly sign the cheque and then take to a bank during banking hours. The person who suffers in this scenario is the Donor herself, who is forced to live with unattended health issues until the next scheduled visit of the podiatrist once payment is made. This situation would not occur where electronic payment could be made at any time of the day or night, or a regular direct debit arrangement set up with relevant providers. Consideration needs to be given to ensuring that the Donor would not suffer detriment because the banks do not know how to deal with joint Donees in an electronic world, where signatures are quickly becoming more redundant. It is arguable that denying Mrs Q of this right is a form of discrimination due to the nature of her disability (this should be a matter that could be raised with the appropriate Government Department which deals with disability discrimination).

The law needs to ensure that Donors have the same rights and access as others in the community and the law should keep up with changes in behaviour and technology, such as Internet banking.

Further education and greater onus on Legal Practitioners

A Legal Practitioner who undertakes to execute a Power of Attorney on behalf of their client should be subject to a greater onus to ensure that the power being given by their client is given to an appropriate person and that the client is fully aware and competent to give the power in the first place. This may require further education to be made available to Legal Practitioners from the Law Institute of Victoria, whereby a CPD component must cover the issues surrounding Powers of Attorney. In addition, it would be beneficial if the medical profession became involved in some capacity, to educate and point out particular issues surrounding capacity of clients and how to help ensure a client is sufficiently competent to execute a Power of Attorney in favour of another person.