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To <vplrc@parliament.vic.gov.au>
cc
bcc
Subject Inquiry into Powers of Attorney

History: This message has been replied to.

Attached is a short paper by was of submission.

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Powers of attorney paper 20.7.9.rtf

SUBMISSION ON POWERS OF ATTORNEY IN VICTORIA

1. Powers of attorney need not be complicated or expensive.

2. One factor which does contribute to cost is length, the other is complexity – whether of construction or execution.

3. Until the prescribed forms were introduced, the form of general power of attorney in common use in Victoria was a very long pre-printed form setting out an exhaustive list of powers. Unwanted paragraphs could be deleted prior to execution.

4. It continues to be the case that powers of attorney may be prepared in which specific, and usually limited, powers are granted to the attorney. Preparation of limited powers requires drafting skills and knowledge of the law, and devolves upon legal practitioners.

5. As a footnote to the preceding paragraph, it is essential to prepare powers of attorney which are to be used in foreign jurisdictions (i.e. outside Australia and New Zealand) at length, setting out all of the powers being granted. This is true equally of civil law jurisdictions (Europe, South and Central America, Russia, Japan) and also of common law jurisdictions (USA, Canada, South Africa, India, Malaysia, Indonesia). These foreign countries also have execution requirements of a high standard, which must normally be satisfied by a notary public.

6. Powers of attorney are so common and so useful that they are published in kits. But this only works for standard forms, and as long as execution is both straightforward and depends on witnesses who are readily available.

7. With the exception of the prescribed form of General Power of Attorney under the *Instruments Act* 1958 ('the Act'), which is short and relatively simple to execute, al of the other prescribed forms have acquired, in recent years, considerable complexity and length.

8. The prescribed forms of Enduring Power of Attorney – Financial and the Appointment of Enduring Guardian challenge the comprehension of both the ordinary citizen and those who must witness their execution. If clients do not attend the soicitor's office to sign these documents, execution is invariably

muffed by even the most highly qualified people. See my comments below about the need for legal advice.

9. The Enduring Power of Attorney (Medical Treatment), while shorter than the preceding forms, in my view inadequately addresses the wishes of the donor, and gives little guidance to the attorney as to either the circumstances in which the donor desires the power to come into operation or the conditions which govern its application.

10. The use of the terms 'appointor' and 'donor' are poorly understood and give little assistance to a recipient in interpreting the document. Likewise, one frequently hears of a person's 'power of attorney' – referring to the attorney.

11. One change which might help would be rather to call each document an 'appointment', or 'nomination' of attorney. If further interpretative help were desired, 'representative' or 'nominee' could be used instead of 'attorney'. This would escape the connotation of 'lawyer' contained in 'attorney' both historically and in the American setting, where it survives as the general term for 'lawyer'. When admitted in New South Wales, I was admitted as 'an attorney, solicitor and proctor'. Thus the confusion may spread even more widely.

12. The form of enduring power (financial) offers little assistance except alternatives. A cover sheet containing simple information about possible options might assist. It could be published in several languages.

13. The form of appointment of enduring guardian contains an overload of information, in a rather impenetrable form. Simplification is need, and once again, a tear-sheet with the needed details could be the front cover.

14. The enduring power (medical treatment) should really be along the lines of the appointment of an enduring guardian. The form should have its statutory origin in the same place as the other powers. Again, a front cover with explanations would help.

15. Without decrying the involvement of others, the role of solicitors in the preparation and execution of these documents cannot be underestimated. These

documents are of such importance to so many of the public and are so common, that their proper completion is vital. The cost need not be high.

16. As to cost, with the exception of powers which are drafted by a lawyer from scratch, and which do not conform with one or other of the prescribed forms, with a view to achieving conformity and excluding the possibility of overcharging, new items could be added to the *Practitioner Remuneration Order* for General Powers, Enduring (financial) powers, appointments of enduring guardians and medical enduring powers. Sub-divisions could be allocated to the situation where the legal practitioner also attends to witnessing the power (with or without other witnesses). To include them in the PRO, though it might be unpopular with some lawyers, would remove argument as to cost.

17. A brief to a group of cost experts, together with one or more practitioners, should be able properly to assess the appropriate remuneration for each of the prescribed forms. A small discount could be allowed where two or more of the forms are, or could have been, completed at the same time.

18. Abuse of power by attorneys is both commonplace and difficult to address. The proposal that I have made above for the addition of cover sheets for powers (or appointments) might also add a page addressed to intending nominees. The document might both draw their attention to their obligations, and also to the potential penalties for inappropriate actions.

19. In my experience, even the most blatant fraud by an attorney stimulates no activity by the police force towards enforcement. Usually of comparatively small amounts, such fraud never gets past first base with the Fraud Squad, who are uninterested and unhelpful, or anyone else while they pursue bigger white-collar game.

20. Likewise, the sums involved are usually insufficient to justify civil litigation to recover the missing money or property.

21. It is of no comfort to a defrauded family member that a right of recovery exists, or that a crime has been committed, if they have no funds to pursue it and no influence over the police to have it investigated.

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22. It is difficult, nevertheless, to see what steps might be taken to circumvent this gaping hole in enforcement practices. VCAT is already saddled with huge lists and a vast array of litigants, both in person and represented. Enlargement of the Guardianship List to render guardians and nominees under all forms of powers of attorney amenable to its jurisdiction might work. Particularly so if there were a power to refer appropriate cases to the Victoria Police for investigation and a report back – although I should be surprised if this did not meet vigorous opposition from police representatives.

23. To add to the jurisdiction of VCAT would necessitate the appointment of more Tribunal Members, and larger funding. New forms might be necessary. Perhaps this could be offset, in part, by imposing a filing fee on all applications in the new list.

24. There is a large number of issues involved in this area, and this short paper only addresses a few. I would be happy to provide more detail if required.

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