INSTITUTE OF LEGAL EXECUTIVES®

The Institute of Legal Executives (Victoria)

~ Incorporated in 1966 ~

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[redacted]

31 March 2016

The Hon. Justice Michael Adams
Chairperson
New South Wales Law Reform Commission
nsw_lrc@agd.nsw.gov.au

Dear The Hon. Justice Michael Adams,

Re: Preliminary submission on the review into the *Guardianship Act 1987* (NSW), and related legislation including the *Powers of Attorney Act 2003* (NSW).

This Institute had the privilege of being invited to make a submission to the Victorian Parliament Law Reform Committee Inquiry into Powers of Attorney[1], which considered a number of matters referred to in the Terms of Reference relevant to the above review[2]; and quite often contributes to Victorian Law Reform Commission (VLRC) reviews[3]. More recently we made a submission to the NSW Attorney-General in relation to the *Powers of Attorney Act 2003* and the *Oaths Act 1900*, in view of the fact that our Fellows (Legal Executives™) are authorised to witness Statutory Declarations and take Affidavits[4], and thereby are authorised witnesses to all forms of Powers of Attorney[5], in Victoria.[6]

Notwithstanding that the majority of Institute members are presently located in Victoria, we do have some representation in the other States; and given the implementation of the *Legal Profession Uniform Law* in Victoria and New South Wales, we respectfully make a submission to this review, which is also made on behalf of the Institute of Legal Executives (Australia) Limited[7].

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[1] Final Report, August 2010
[2] particularly items 1 (albeit examining the relationship between Victorian Acts), 4, 5.1, 5.2, 5.3, 5.5
[3] for example, the review into Succession Laws, Report August 2013; and the review into The Forfeiture Rule, Report September 2014
[4] *Evidence (Miscellaneous Provisions) Act 1958* (Vic), see sections 107A and 123C
[5] *Powers of Attorney Act 2014* (Vic), see sections 35, 46, 48, 97; see also the *Medical Treatment Act 1988* (Vic) as to authorised witnesses for the purpose of an Enduring Power of Attorney (Medical Treatment)
[6] In relation to Powers of Attorney and prescribed witnesses, the New South Wales Registrar General has since responded that "…I am advised that in order to give the required certification, the prescribed witness must consider the implications of granting the power, which involves an element of legal advice. Accordingly, prescribed witnesses hold a legal qualification or have undergone specific study for the purpose of the Act. For this reason, the class of prescribed witnesses is unlikely to be expanded to include Fellows of the Institute." However, we were also advised that the inclusion of Fellows in relation to the certification of copy Powers will be considered in the forthcoming review of the *Powers of Attorney Regulation 2011*.
[7] incorporated in 1994, with a similar Constitution, with the aim of protecting the status and integrity of the Institutes of Legal Executives and their members across Australia, and against the day when greater numbers of Victoria Institute members are located outside Victoria

We expect that you may be unfamiliar with our Institute, and are happy to forward any materials or information upon request. Alternatively, extensive information is available on our website, which is kindly hosted by the Law Institute of Victoria: www.legalexecutives.asn.au.

General

Recent reviews in Victoria, particularly the VLRC reviews into Guardianship[8] and Powers of Attorney[9], were concerned with a number of matters applicable to the instant review including:

(a) An ageing population, which results in a greater reliance upon substitute decision makers;

(b) Recognising that persons with disabilities, of whatever nature, should participate as far as possible in decision making which affects them, notwithstanding those disabilities;

(c) Checks and balances to ensure that any vulnerability of an appointor (donor) is not exploited by an appointee;

(d) Simplifying the (then) complex laws[10] to ensure they operated harmoniously.

We have not responded to all reference items, but only those where we feel we might be able to contribute.

The relationship between various Acts, and developments in other jurisdictions[11]

We referred to some of the following matters in our submission to the Victorian Powers of Attorney review, which preceded implementation of the current *Powers of Attorney Act 2014* (Vic).

We believe that:

1. One Act covering all types of voluntary appointment would be particularly useful. This could provide consistency in terminology, and issues of capacity, and potential savings as mentioned below.

2. One form of enduring appointment[12] covering Financial, Guardianship and Medical powers would be useful, with the option of deleting the inapplicable part/s. This could have the benefit of appointors considering all types of appointment at the outset, and then making an informed decision as to which appointments they wished to make at that time.

   A further consideration is one form combining Guardianship and Medical powers as, whilst those making a Financial Power of Attorney often do not wish to make a Guardianship or Medical Power of Attorney at that time, appointors often wish to consider guardianship and medical issues at the one time.

   Forms should be 'in or to the effect of', allowing for some adaptation, and thereby enabling easy readability by appointors and appointees alike. If firms are unable to adapt the form to a certain extent, i.e. include numbering or show deletions of inapplicable sections, we submit that this would make comprehension far more difficult (it has already been suggested in Victoria, by one commentator, that the current financial/personal powers form ought not to be changed, other than to a very minor extent, lest it later be held to be ineffective).

3. Witnessing requirements for Financial, Guardianship, and Medical Powers of Attorney should be similar; albeit that we believe the addition of Medical Practitioners as authorised witnesses to Financial/Personal Powers of Attorney in Victoria is of great benefit, and would like to see this apply to all Powers. In this regard, it would be of benefit if the State Medical Association were invited to make comment.

[8] Final Report 24, January 2012
[9] above
[10] although they may be said to still be somewhat 'complex' in that a proposed further review of the *Guardianship and Administration Act 1986* (Vic) has not yet taken place, and Medical Powers are dealt with under separate legislation
[11] reference items 1 and 2
[12] as opposed to a General Power of Attorney

In relation to footnote 6 above, and whilst acknowledging that there are currently few Legal Executives™ located in New South Wales, we would be interested in being informed of 'specific study for the purpose of the Act', as our Fellows may wish to undergo such study; also bearing in mind that an expanded list of authorised witnesses may assist in the reduction of the overall cost to the appointor.

4. Streamlining of the rules governing the number of permitted Attorneys and Medical Agents, and alternate Attorneys and Agents, would be particularly useful; as would the use of one consistent term to describe these persons to aid in clients' understanding.

5. There should be the ability to have multiple alternative appointees for the single primary appointee[13].

6. There should be a section in the Power itself notifying the appointee(s) of their duties, and the potential consequences of failure to observe the same.[14]

7. Records should be required to be kept by the appointee(s) of *all* transactions/gifts made on behalf of the appointor, also noting that the requirements should not be overly restrictive[15].

8. Accessibility and mobility of intending appointors (and also appointees), need to be considered in light of legal fees.

   Whilst greater protections are now in place in Victoria, which can be said to relate back not only to the *Powers of Attorney Act 2014* but also to the former review of the *Instruments Act 1958* in regard to Financial Powers, anticipated legal fees can also have a bearing on whether or not a person makes a voluntary Power when they ought. This does not only relate to obtaining instructions and preparation of the Power/s, but also in regard to satisfying witnessing requirements, much of this taking place via the Legal Practitioner's office which prepared the Power/s, but which could need to take place at the appointor's home at some distance[16]. We estimate that attending to execution alone of a Power/s would take approximately 40 minutes[17].

   Whilst many Legal Practitioners may discount the cost of preparing a Power/s when carried out in conjunction with other work, the Legal Practitioner is still entitled to receive a reasonable remuneration for his or her time and expertise, and that of his or her staff member who will generally serve as the second witness. The reality is, we believe, that many legal firms provide pro bono services, including discounting the cost of certain legal work, whilst not being recognised for this contribution.

   We believe the current witnessing requirements in Victoria are excellent, but also raise the fact that legal fees can be an issue, with potential savings possibly available in the preparation of a Power/s itself if care is taken to make this 'user friendly' rather than unnecessarily complicated.

   Note: The cost to the appointor could also increase if prudence dictates that a Medical Certificate ought to be obtained beforehand to ensure the appointor's capacity cannot later be challenged, although we do not believe this should be a mandatory requirement due to the cost to the consumer, and the possibility that the consumer would weigh up the total cost and decide against a Power/s which they ought prudently to put in place. We suggest that the Legal Practitioner (or other authorised primary witness) is in the best position to decide whether they can fulfil their duties appropriately with or without a Medical Certificate.

[13] i.e. spouse as primary Attorney with children as alternative Attorneys, versus section 31 of the *Powers of Attorney Act 2014*

[14] if this is not done, then the appointee may need to seek independent legal advice at a cost, which the appointee may not wish to incur; alternatively, the appointee may be unaware of all of their responsibilities

[15] see our comments in respect to 'UNCRPD reviews of instruments and financial management orders' below

[16] and see also section 5, which can entail increased attendance times

[17] see for example the requirements in the Acts, and also the excellent guidance notes prepared by the Legal Practitioners' Liability Committee

The UN Convention on the Rights of Persons with Disabilities[18]

The general principles espoused by the Convention have been incorporated in the *Powers of Attorney Act 2014*[19]. We believe inclusion of such principles provides excellent guidance to appointors and appointees alike, and would suggest inclusion in all such legislation.

The model/s of decision making that should be employed for persons who cannot make decisions for themselves[20]

1. The protection of the consumer/appointor is of course the paramount consideration, and robust penalties for (particularly: deliberate, negligent or reckless) breach of their responsibilities by appointees will in the majority of cases serve as a deterrent.[21]

2. Restrictions as to those who may serve as appointees can also go a long way to ensure that only those who are suitable to the appointor's needs, and who will serve them prudently and well, be appointed in the first place.[22]

   However, it is suggested that 'technical' breaches, effected in the utmost good faith by an appointee, ought not to bear a heavy penalty, if incurring a penalty at all[23].

   It should also be borne in mind that the appointor's 'peace of mind' in having a Power in place relies upon an appointee being willing to take on the appointment – if appointee requirements are overly prescriptive then it is quite possible that appointees may not be willing to serve, particularly if the appointor has no close family members and a more remote appointee is required. This would appear to defeat the intention of legislation, i.e. to enable citizens to put a desired appointment in place to ensure that their instructions and wishes are effected in the future, particularly in the event that they lose capacity.

Supported decision making models[24]

1. Victoria has now incorporated Supportive Attorney Appointments in the *Powers of Attorney Act 2014*. Whilst this is a new concept in Victoria, the legislation is extremely comprehensive and we believe now allows a greater freedom to those who wish to make their own decisions but require support in doing so.

2. One potential issue we raise is the prohibition on an appointee receiving any remuneration for acting in their role as supportive attorney[25]. Clearly a partner or close relative appointee will not usually consider their time and trouble in acting. However, a more remote potential appointee may well weigh up their own personal and financial obligations, and conclude that they simply cannot afford to commit to the time (and any related expense/s) necessary to fulfil their obligations under the Appointment.

Disability v decision making capacity[26]

1. 'Disability' in our view is a different matter to 'capacity', as a person may well be 'disabled' in some way but still have capacity for the purposes of granting a Power.

[18] reference item 4
[19] section 21
[20] reference item 5.1
[21] We are not addressing here any potential abuse at the time of making the Power, as the requirement for at least one prescribed witness, and the rules pertaining to eligibility of witnesses in Victorian legislation, we believe minimises this possibility as far as possible. We also do not address abuse which may occur vis-à-vis persons who are intent upon abusing their position, and will unfortunately do so no matter what restrictions or penalties are put in place.
[22] Notwithstanding a potential 'administrative' difficulty where an appointor wishes to give the Power to a particular person, but that person's full history is not known to the appointor, and for personal reasons the appointee does not wish to reveal the details which are mandated in the legislation.
[23] In respect to unintended breaches, 'guidance' would appear to be much more appropriate than 'penalty'.
[24] reference item 5.3
[25] section 90(2), in contrast to section 70 (if included in the Enduring Power itself or authorised by law)
[26] reference item 5.5

2. We believe that one consistent test for establishing capacity should be applied across all types of Powers or Appointments, bearing in mind that there should be no increased onus placed upon non-Medical Practitioner witnesses acting in good faith other than those 'good practice' requirements which currently exist.

   The only other alternative would be to obtain a Medical Certificate prior to an appointor being able to effectively execute a Power. Whilst this will still be obtained when a Legal Practitioner is in doubt, making such a practice mandatory will increase the cost burden to consumers as noted above.

3. In relation to determining incapacity, as this can be a matter of some dispute between the appointor and his or her appointee, giving rise to issues of authority, a Medical Certificate could determine the matter. However, this suggestion is not necessarily satisfactory, as an appointor could simply refuse to be evaluated. A possibility is to include an option, in a Power which only comes into effect upon the appointor's incapacity, giving authorisation to the appointor's Medical Practitioner (and associated privacy release) to provide a Certificate as to incapacity (or otherwise) to the appointee.

Lawful restrictive practices[27]

We believe consideration should be given to addressing the circumstances in which the use of restrictive practices will be lawful in relation to people with a decision making incapacity, in light of those circumstances where this may be necessary for the (better) protection of the appointor.

UNCRPD reviews of instruments and financial management orders[28]

Ongoing accountability may increase the level of compliance; however, the cost of any such review, the extent of a review[29], and who bears the cost, need to be taken into account. Where the 'asset pool' in question is small, the cost may well outweigh the benefit, and could even cause a detriment.

Yours faithfully,

(Miss) Roz Curnow
Chief Executive Officer
On behalf of the Councils of the Institutes

[27] reference item 5.6
[28] reference item 5.7
[29] e.g. formalised accounting versus copy accounts and explanations