

# CORRECTED VERSION

## LAW REFORM COMMITTEE

### Inquiry into powers of attorney

Melbourne — 22 October 2009

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#### Witnesses

Mr R. Shepherd, Barrister, and  
Ms J. Stone, Manager; Legal and Government Relations, Victorian Bar.

**The CHAIR** — I welcome Robert Shepherd and Jacqueline Stone from the Victorian Bar. Thank you very much for coming in this afternoon. Thank you for the submission you sent to us. I think you will be aware that the evidence taken this afternoon is protected by parliamentary privilege. That does not extend beyond the hearing. We have just under 45 minutes, so we will leave it to you to see what you would like us to know at the beginning, and then we will have a discussion after that.

**Mr SHEPHERD** — Thank you very much. This submission is made on behalf of the Victorian Bar, of which I am a member. I have prepared a submission which the Bar Council of the Victorian Bar endorsed, and which is provided for assistance. The reference questions obviously have limited certain areas. Accordingly it was important, when I prepared the submission, to answer the questions which were posed.

The position of the Victorian Bar is that the different types of power of attorney documents should be streamlined. However, what we find at the moment is that they are quite well understood and they work quite well. I have made inquiries and there is anecdotal evidence and experience that would tend to support that. However, we do find that in some cases powers of attorney are abused, and accordingly we find that there is good reason for them to be reviewed both with a view to ensuring that fraudsters do not use them for their own purposes and also so that there is in effect a proper basis upon which they are used and the wishes of the principal are honoured. How this is done is the question.

There should be streamlining. Certainly we have to look at the existing position. We have the general power of attorney and we have the enduring power of attorney. What we also have is in effect a position where a person loses capacity and as a result that raises the question: how do we ascertain when capacity is lost and how do we ascertain when capacity exists in the first instance? Certainly with a general power of attorney we are looking at a position where capacity can perhaps be more readily ascertained because we are not looking at whether the person loses capacity generally. It is just a question whether the power of attorney was used correctly. With an enduring power of attorney, often we would lose the ability to ask the person, ‘Were you advised of what you were doing; did you understand the nature of the document?’, and those sorts of things. Clearly there has to be a difference between an enduring power of attorney and the formality requirements, but there should be streamlining in my view, and certainly that is the view of the Victorian Bar.

A choice may be given. Obviously we have the general power of attorney. That is one choice. The enduring power of attorney has a statutory form. That is well understood; statutory forms work well. Do we need a hybrid power of attorney, to get over this loss of capacity question? At the outset, we have a general power of attorney and an enduring power of attorney in the one document. If that is correctly created, then the question of whether a person loses capacity may not be so problematic, because if they do lose capacity, the power is there because it is enduring. If they still have capacity, the power is there because it is a general power of attorney.

How should we determine that a donor has capacity to create a legally enforceable document at the time he or she created a power of attorney? It seems that there are points of time which are discrete and which must be looked at differently. Obviously, the outset is one point in time. Should we restrict people and say, ‘You must go to a person, a lawyer or a doctor, and you must get a certificate’, or, ‘You must ensure that capacity is established at that time and it is recorded’? Or do we leave it in effect to the commercial world or — a common experience of people — for, say, a general power of attorney, they just execute it?

A second point in time is of course later. A person apparently has lost capacity. How do we ascertain that they have lost capacity? Certainly the determination must be made, in my view, when a person has lost capacity, by those persons who have expertise in the relevant area. Often we find that people suffer from various debilitating medical conditions that require a medical standard to be considered, and we leave it perhaps to the doctors to be saying, ‘This person suffers from a condition of dementia, and this person at this point in time does not have capacity and at this point in time I can say, based on other evidence, that they did not have capacity when they executed the document’. That is a hindsight consideration. We would leave it to the medical practitioners.

The experience is that most people are going in the first instance to lawyers, not their doctors, about powers of attorney, but it does happen. People come along with their parents or trusted friends and they say to the doctor something like, ‘What do you think about mum?’. If the doctor says, ‘Well, I don’t think she’s got capacity’, there is a problem. If the doctor says, ‘She’s fine, but this condition is going to have an effect in the future’, so power of attorney. The experience is that lawyers, not doctors, are usually involved in the first instance. It seems to be the other way around when capacity is lost.

I was considering perhaps a prima facie evidentiary provision in the Act. If one goes to a doctor because one has concern about a family member who one thinks is being subjected to some sort of influence, and one wants to establish that that person does not have capacity at a point in time and the medical practitioner agrees and certifies, thereafter it becomes clearer from an evidentiary point of view to mark that point in time, although it is a prima facie evidentiary provision for a certification that can be used in the future. Again we go back to that difficulty of ascertaining points in time at which people had capacity or did not, as the case may be.

It is an issue of the point in time and medical practitioners or lawyers. There is scope, obviously, for other persons to be involved in this process, not just lawyers and doctors but other people who know the person concerned, because very often they are the witnesses who are good witnesses about whether they have capacity.

What powers does a donor grant to an attorney when making a power of attorney? The ability of a donee to choose the powers should obviously be subject to what is in the document. I will say a bit later, in response to some of the questions I anticipate, that that is what it is all about. We are not just making it so general. It can be general or it can be limited without being enduring. It can be for just one purpose. In my view, we should not necessarily restrain people, but the document should be the point of reference.

General or limited? The traditional conception of a power of attorney is in respect of financial matters. In my view, a donee should be able to confer powers upon an attorney in respect of only financial matters in these documents. The terms of reference exclude other documents which go beyond this consideration, of course. We find the limitations in section 107(2) of the Act:

A general power of attorney given by a person shall not operate to delegate to the attorney under the power the execution or exercise of all or any trusts, powers and discretions vested in him as trustee, either alone or jointly with any other person or persons.

In my view that should be preserved, because we are looking at financial matters but we do not want to delegate into trustee powers. Query that, because we are looking at empowering people so that they can get on with their lives in a commercial sense.

What safeguards should there be to ensure that a power of attorney document is not abused both in relation to the execution and the exercise of powers under the document? It is submitted that the retention of formality requirements and recordkeeping should be the mainstay of protection against abuse of the power in powers of attorney documents. That is the way that one may approach safeguarding the principal.

Where a person loses capacity, those protections should be greater. I hark back to the earlier point I made that general powers of attorney and enduring powers of attorney are different. When a person loses that capacity, therein lies the problem of getting the evidence that we need to ascertain capacity except from external sources.

Consideration may be given to the creation of specific criminal offences to assist in this process, such as procuring a power of attorney by threat or deception and related complicity offences. Provisions requiring disgorging of benefits may also be considered. We do find that criminal offences have been created in the Queensland legislation, the Powers of Attorney Act 1998. Section 66 of that Act states:

An attorney must exercise power honestly and with reasonable diligence to protect the principal's interests.

Maximum penalty — 200 penalty units.

In other words, safeguarding. It may be considered appropriate not only to regulate the civil aspects but to promote the protection by having criminal penalties which attach to certain conduct.

Then what we are looking at here in one sense is abuse of the worst kind. People are losing capacity. People are importuning them. People are taking advantage of them. These are matters which have always been regulated by the criminal law and treated seriously.

Members of the community need to feel that they are able to bring their concerns to the attention of relevant authorities. In this regard consideration of whistleblower and privacy laws may be made with a view to protecting those who make complaints about what they perceive to be, to use the colloquial term, elder abuse. Of course, to whom can they go? If there is a criminal offence to be investigated we have the coercive powers of investigation which are given to both state and federal police. In my view this can be seen again to promote the safeguarding of the principles.

Obviously, the authority to which complaints may be made needs to be identified. Reintroduction of registration of powers of attorney may be considered and a provision introduced that the instrument is not effective until registered. In answer to one of the questions that I anticipate, I will address the issue of registration and the location of place where registration should be effected.

This may be that registration is effective unless the court or VCAT orders otherwise. In this respect a provision may be inserted in the legislation enabling a person to lodge a caveat against registration on the basis that they do not consider the person has capacity to make a power of attorney. In the case of dispute, the onus would be on the caveator to establish why the caveat should not be removed. So a person applies for registration, somebody has a concern about that power of attorney and that immediately raises the question of whether the person has or did have capacity. That happens right at the outset, so this is early intervention.

Consideration may be given to making it an offence to accept an appointment as an attorney if one has been convicted of a prior offence of theft or obtaining property by deception from a relative. That may be difficult to ascertain perhaps just by looking at a record of prior convictions and the like.

That is an opening summary of the submission of the Victorian Bar, and I would be very pleased to answer questions.

**The CHAIR** — It is very detailed for a non-lawyer to try to prise his way into that: I have my challenges, I think. I understand the general scheme, though, that you map out of capacity initially in the hands of lawyers, roughly, and then as it progresses and capacity may be lost it reverts to the professional medical areas, and the components that you set out under that. You do draw on the Queensland legislation as a single, stand-alone legislative framework. Just in summary, is it your view that that could stand as a best-practice model for Victoria to follow, or are there things about the Queensland legislation that you think we need to be a bit cautious about?

**Mr SHEPHERD** — I do think it is best practice. When I considered it I thought through whether there are limitations, any matters which are peculiar to Queensland or anything of that nature. I certainly have come to the view that it is best practice.

**The CHAIR** — We have had witnesses talking about the UK legislation. I am not across it, but I am asking you whether you have looked at it.

**Mr SHEPHERD** — I have only looked at UK legislation when I have been looking at other cases. I did not look at it specifically because I know there are potential differences in some areas. I think, having looked at the Queensland legislation, the best practice may be derived within Australia, because we are looking at the laws which apply to Australia; English laws on succession and the like do vary.

**Mr CLARK** — I want to raise an issue relating to the range of powers that are conferred by enduring power of attorney, which I think refers to authorising the attorney to do all things that one can authorise an attorney to do, as with the general power. The question is, how far does that extend? And related to that, your submission at page 10 rightly refers to the approved form of an enduring power of attorney under section 125ZL of the Instruments (Enduring Powers of Attorney) Act 2003 which needs to be published in the *Government Gazette*. I have been trying to find such an approved form in the *Government Gazette* online this afternoon, without success. There is only the version published by the Office of the Public Advocate that I have seen. Have you actually seen an original approved form as published in the *Government Gazette*?

**Mr SHEPHERD** — I have not seen it in the *Government Gazette*. But there have been some forms which some of the trustee companies and other persons have published in their own forms. In fact, I have another one in my bag over here, if I can get it. In addition, we do have from the Office of the Public Advocate and Victoria Legal Aid documents such as this one: *Take Control — A Kit for Making Powers of Attorney and Guardianship*. When I looked at it I thought it was excellent; it is well understood, and it does have the forms.

**Mr CLARK** — One of the aspects that relates back to the opening part of my question is that it is headed, I think, 'Enduring power of attorney (financial)'. The question is: what is the authority for adding the word 'financial'? Clearly if the Secretary is included in the Secretary specified form, that answers that, but it still leaves open the related question of whether it is an accurate representation of what the powers are of an enduring power of attorney, and whether they are limited purely to financial; or whether one's capacity to

appoint an attorney at common law extends beyond purely financial matters. Do you have any views on that aspect as well?

**Mr SHEPHERD** — I certainly have. They are financial; that is what we are looking at here. We are not looking at lifestyle decisions in this type of document. We have other forms of documents which are not within the terms of reference where we can determine issues concerning medical questions, including whether or not the person should have treatment, which are not financial. In my view we are looking at the regulation of decisions about financial matters. Within that, when we regulate decisions about financial matters by saying, ‘This is what you can or cannot do with a power of attorney’, obviously a person’s conduct has to be considered, but it is only conduct relevant to the financial transaction, which is a commercial transaction. I suppose in one sense we are looking at money by using the word ‘financial’, but I think we are looking at the wider context of commercial as well — it has to be imported into it.

**Mr CLARK** — Can you give us — not necessarily now but possibly on notice — the legal authority in terms of the common law scope of a power of attorney?

**Mr SHEPHERD** — All right, we can certainly do that. It might be convenient to do it on notice, because my response might be not as comprehensive as it should be to be helpful.

**Mr CLARK** — Okay, that would be good. Thank you.

**The CHAIR** — Robert, you say in your submission that the enduring power of attorney document should be in statutory form and not as it is currently, just generated by the Secretary of the Department of Justice. Could you talk about why you think that?

**Mr SHEPHERD** — Tied in with the issue of people understanding what their duties are, what their powers are and the like, I think, is for them to also understand the form of the document. If it is in statutory form, they can go to the statute, they can look at their powers, they can look at their duties and they can look at the form, and so can other people who have a concern about the power of attorney. I recently saw one that was headed ‘General power of attorney’ and then underneath it ‘Enduring powers’. The people who looked at that thought, ‘This is an enduring power of attorney’. They could not go to the statute and just make a quick comparison.

**Mr FOLEY** — Assuming that it is the Bar’s basic view that the registration of the powers of attorney will guard against abuse, does the Bar have a view as to issues of cost and privacy and the location and administration of such a centralised system of registration of attorneys?

**Mr SHEPHERD** — I have thought about this particular question. At present may it be expressed as my view, which I am sure the Bar would agree with. It seems to me that a register for powers of attorney should be located at the Victorian Civil and Administrative Tribunal. The Guardianship List at VCAT deals with powers of attorney-type issues. Persons making inquiries with VCAT on this List may be encouraged to do a search of the register at that time.

In my view the Probate Office is too small, entry is via security checks and the traffic flow into the area is already very high. The Office of the Public Advocate may not be seen by persons with queries about powers of attorney to be an entry point of reference at which they could make searches. I may be wrong about that, but the Land Titles office is eminently suitable. How could the costs of registration be addressed? In my view a search fee and links to existing systems should be promoted to reduce costs, essentially addressing them through a search fee and to the extent possible ensuring that all other systems can communicate to ensure that there is a flow of information.

**Mr FOLEY** — On the issue of privacy, what level of detail should be available to different parties? Does the Bar have a view on that?

**Mr SHEPHERD** — Again, expressing my own opinion, and looking again at the Queensland legislation, it does deal with privacy issues and, in my view, the obvious need to deal with the tension between the need to protect privacy and the need to ensure that there is not abuse, and the need to ensure that in investigating abuse there is a flow of information that is not unduly restricted by privacy concerns.

**Mr FOLEY** — Fair enough. So privacy up to a point should take second rung to practical problem-solving?

**Mr SHEPHERD** — Yes, and perhaps one could find this in other circumstances, analogous circumstances. When we look at the privacy laws and laws of confidentiality that apply between doctor and patient, when urgent things have to be done, when people are at risk, more information has to flow more quickly and there has to be relaxation of some of the privacy restrictions.

**Mr BROOKS** — So is it suggested that access to that register be provided to any member of the public or only to financial institutions and medical services?

**Mr SHEPHERD** — Perhaps there could be levels: if someone is a member of the public, they can make an inquiry which goes to a certain level. If other circumstances exist, other authorities — again we might look at the police forces — if a complaint is made to Victoria Police, they can go in and they can make another inquiry at a higher level. Maybe this can interface with their own LEAP systems and other like authorities, such as the Office of the Public Advocate, with greater ability to have access to otherwise protected, private information.

**The CHAIR** — Returning to the powers and responsibilities of attorneys, a number of submissions have said to us that they are not clear, that they should be clearly set out in the legislation and that Queensland legislation does that. I am assuming you think that is a good thing, but could you perhaps throw some light on what you think the powers of attorneys and guardians should be, and also, do you think the Queensland legislation — while you said before it is a best practice model — provides sufficient clarity about those powers? I should say another witness today also cautioned us against the folly of being over prescriptive.

**Mr SHEPHERD** — Certainly. In summary, should there be legislative principles to guide attorneys requiring them to act in the best interests and/or in accordance with the donor's wishes? In my view, no, this is too general. The requirement should be to act in a certain way, which is honestly; and secondly, with reasonable diligence to protect the principal's interests. If we look at that as the requirement in the first instance, that should be enough, and then we look at whether we should be more prescriptive I think the answer is yes, we should, but there must be a point at which we stop.

How is this done? If we look at section 66 of the Queensland Act, we find that we have this general statement that, 'An attorney must exercise power honestly and with reasonable diligence to protect the principal's interests'. Interestingly, we find that it is an offence incurring 200 penalty units not to so do. Then we work through and look at specific examples which can provide in effect guides to attorneys as to what they can and cannot do.

I think one has to assume that a lot of people have little or no understanding of concepts which otherwise bind fiduciaries or trustees. They do not know what bona fide acting in good faith means. They have no concept of this. They need concrete examples, something they can look at to assist them. Examples may be given, such as exercising the power, subject to the terms of the document, as I earlier indicated, so they can say, 'That is the document; that is what I have to do'.

That you are not to use it if it is revoked we find in the legislation in Queensland as well. 'I had it for a while, but I cannot use it any more.' Avoiding a conflict in a transaction; even for lawyers we ask in what circumstances do we find a conflict of interest; set it out in the legislation as has been done in Queensland. They say, 'I'm surprised that I can't do this', but they know. Keeping their own property separate from the principal's property is one of the cardinal requirements for fiduciaries and trustees. They need to know.

Rather than keeping their own bank account, which many of them do, they take the money from the principal and they put it in their own bank account, but they keep a separate bank account. That makes it very easy to look at the transactions from that bank account, and they know that this is what they have to do, making it clear to them and to others that gifts can be made if they are reasonable, even to themselves.

I find — and anecdotal evidence seems to suggest — that the real complaints within families are often that the attorney is paying themselves or giving themselves gifts; those sorts of things. It is not contrary to the law in Queensland to do it, and we find in section 50(a) of our own Guardianship and Administration Act that even an administrator may make a gift of the represented person's property to themselves. But if they do so and it is in excess of \$100, they have to notify the Tribunal in writing about the gift. So we can tell them, 'You can even make a gift'. The powers and restrictions found in sections 66, 71, 73, 86 and 88 of the Queensland legislation are, in my view, enough by way of prescriptive indication, because if we start telling them all of what they have to do, then the people who are perhaps motivated by helpful intent will say, 'There are 22 things set out that you

are required to do. You did 21 of them. We are now going to have the attorney subjected to inquiries about no 22'. I think the approach is to have the general statement and then the important statements of what they can and cannot do, and we derive a lot of those from the law of trust regulating fiduciaries and trustees.

Closely tied to the question of whether there should be legislated principles to guide attorneys is the question of whether the powers should also be set out in the legislation, and I would be pleased to deal with that now if it is convenient.

**The CHAIR** — Yes.

**Mr SHEPHERD** — In my view the answer is, again, yes, it should be set out in legislation, providing that the general powers possessed by an attorney are first stated and then specific powers which may extend beyond common law agency powers or may limit those powers are then stated. So we have the general position, then extensions or limitations.

**Mr CLARK** — At page 16 of your submission you very helpfully drew our attention among other things to section 125E(1) of the Powers of Attorney Act which relates to a decision of a guardian or enduring guardian prevailing in the event of conflict with a decision made by an attorney under an enduring power. That is relevant to a number of issues we canvassed with other witnesses earlier in the day. However, while it advances the situation it seems to me that it still leaves open issues about how you deal with situations where an enduring guardian wants to go in one direction and the holder of a power of attorney wants to go in another direction. The typical example I have given previously is where the enduring guardian believes the principal ought to be moved into a nursing home but the holder of the enduring power of attorney is unwilling to execute the sale of the family home in order to raise the funds for the principal to go into the nursing home. It is not a square-on conflict; it is just a clash of views as to the best thing to do for the principal. Do you have a view as to how, legislatively, practically or in terms of administration, those sorts of conflicts should be handled?

**Mr SHEPHERD** — In the first instance, as you have explained, we have the statutory regulation; then we have the practical problems. These sorts of practical problems could be addressed by having, in effect, overriding powers given to VCAT and/or a court. But notwithstanding that section a court may make such an order as it considers just in all the circumstances. If there is a conflict, then the matter can be brought before a court or VCAT and perhaps provisions can be made to assist that occurring urgently and a decision can be made — a summary application-type mechanism which is an override power of the court or VCAT.

**Mr CLARK** — Do you have a view as to whether VCAT or the court is more appropriate, or should it depend on the value or size of the issue in contention?

**Mr SHEPHERD** — VCAT is obviously the most cost-effective jurisdiction. In which court should the applications be made? From a cost-effective point of view, powers could be given to Magistrates to deal with these questions. Magistrates, we find, are well able to consider complex matters, but they are also experienced in problems which are commonplace within our community — family problems. They deal with family violence, domestic violence, restraining orders and the like. Perhaps we could make it VCAT and/or the Magistrates Court, perhaps with a section which would limit the power of the person or limit the ability of the court to order costs if a person decides to choose the Magistrates' Court rather than VCAT.

**The CHAIR** — We have 2 minutes left. We are just about out of time. I just want to ask you one more question. Your submission says that currently the test for witnesses who can sign the enduring powers of attorney documents is too high and that it should be reduced and brought to the level of a person who can sign a will. The submissions that we have got from other witnesses have argued the opposite way. They have said that actually we should raise the bar, we should strengthen it, so that the class of persons able to witness them would be to the level of those who witness affidavits. Have you got a concern with that?

**Mr SHEPHERD** — My view is based on the fact that with wills we are dealing with more than just financial matters, as we discussed before; we are dealing with trusts, we are dealing with things which are in excess of what we can deal with under a power of attorney. May I say, upon reconsideration of the point, that there may be some argument for there being an equation. I say that because I read a case, which is *Re HAA* [2007] Queensland Guardianship and Administration Tribunal 6 — that is the media-neutral citation — where the learned Members at paragraph 34 noted:

Expert medical opinion provided to (and which appears to have been accepted by) the court in *Adult Guardian (In Re Enduring Power of Attorney of Vera Hagger) v. Vera Hagger, Declan James Barry and Albert Craig Ray*, SC Qld no. 1083 of 2001 (unreported), was that an enduring power of attorney was both more unfamiliar and more complex (for most members of the community) than a will. Accordingly, a higher cognitive ability and therefore standard of capacity would be required for an enduring power of attorney.

When I read that I thought perhaps I should reconsider my initial view of the matter. At present I do not necessarily say that my view is one which might be taken with a grain of salt!

**The CHAIR** — Perhaps on that note we will wrap up for today. Thank you both very much for coming. As I said earlier, it has been a very interesting and comprehensive discussion and presentation. Thank you for your submission as well. You will be sent a transcript of the discussion we have had. You can make any minor corrections to that that you think are appropriate. I hope you would be willing to receive calls perhaps from Kerryn or Kerry to clarify any points that were raised today or that have come out of your submission.

**Mr SHEPHERD** — I certainly would be. May I say on behalf of the Victorian Bar that we appreciate the opportunity to raise some issues in this forum.

**The CHAIR** — Thank you.

**Committee adjourned.**