



Inquiry into Powers of Attorney

Submission to the Victorian Parliament Law Reform Committee

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ACCRONYMS

<i>Charter of Human Rights and Responsibilities Act 2006 (Vic)</i>	the Charter
Elder Abuse Prevention Project	EAPP
Enduring Power of Attorney (and, unless specified, does not include EPOAs granted under the <i>Medical Treatment Act</i>)	EPOA
Enduring Power of Guardianship	EPOG
Federation of Community Legal Centres Victoria	FCLC
<i>Guardianship and Administration Act 1986 (Vic)</i>	GAA
<i>Instruments Act 1958 (Vic)</i>	Instruments Act
International Covenant on Cultural, Social and Economic Rights	ICESCR
<i>Medical Treatment Act 1988 (Vic)</i>	MTA
Office of the Public Advocate	OPA
Power of Attorney	POA
<i>Sentencing Act 1991 (Vic)</i>	Sentencing Act
Seniors Rights Victoria	SRV
Convention on the Rights of Persons with Disabilities	CRPD
Victorian Civil and Administrative Tribunal	VCAT
<i>Victorian Civil and Administrative Tribunal Act 1998 (Vic)</i>	VCAT Act
Victorian Parliament Law Reform Committee – check what they use	LRC
World Health Organisation	WHO

PART 1 ABOUT THIS SUBMISSION

1. Executive Summary

- 1.1 SRV welcomes the opportunity to contribute to the Victorian Parliament Law Reform Committee's Inquiry into Powers of Attorney.
- 1.2 SRV considers that the omission of medical powers of attorney under the MTA from the terms of reference for the inquiry has diminished its purpose to streamline and simplify powers of attorney documents in Victoria.
- 1.3 SRV works with a focus on preventing elder abuse amongst older Victorians. It undertakes this work using a human rights approach. As such this submission frames the discussion on reforming power of attorney legislation within a human rights context. A human rights framework empowers individuals, especially those who are marginalised or disadvantaged, such as those at risk of or experiencing elder abuse. This issue is of particular relevance in the context of Australia's ageing population as the prevalence of elder abuse is expected to increase.
- 1.4 Another impact of Australia's ageing population is that as the number of dementia sufferers and those requiring assistance with legal, lifestyle, financial and medical decision making is expected to significantly increase over the coming years more people will rely on POAs to assist with decision making. With the current state of POA legislation in Victoria this will arguably contribute to increases in elder abuse prevalence.
- 1.6 The core recommendation of this submission is that the Victorian Parliament should amend the current legislation so as to create a consolidated framework which governs powers of attorney and powers of guardianship. In addition, and to address the issue of elder abuse in the community, safeguards should be introduced through both legislative and non-legislative measures to ensure the rights of older Victorians are adequately protected.
- 1.7 In conjunction with the above recommendations SRV advocates for greater clarity regarding the assessment of legal capacity with respect to POAs. SRV recommends the introduction of a capacity assessment to be undertaken by legal professionals guided by the approach taken by the *Powers of Attorney Act 1998* (Qld), the work of the Law Society of NSW and the six step capacity assessment process as outline by Darzins.

2. Structure of this submission

- 2.1 This submission is structured around the terms of reference of the LRC Inquiry into Powers of Attorney.
- 2.2 This submission outlines the problems associated with the current framework governing powers of attorney and powers of guardianship in Victoria and the ways in which the rights of older Victorians may be better protected and safeguarded. A case study approach has been utilised to best illustrate the need for greater protections for older Victorians against elder abuse arising out of the misuse of power of attorney documents.
- 2.3 Part 2 of this submission establishes the context of elder abuse, highlighting the prevalence of elder abuse in the community and the response, to date, of the Victorian and Commonwealth governments to this issue. The discussion is undertaken in the context of a human rights

framework which recognises the importance of empowering individuals, especially those who are marginalised and disadvantaged within the community.

- 2.4 Part 3 of this submission examines the definitions and requirements under the various legislative instruments which govern POAs and the confusion this approach creates. The submission specifically considers the types of powers that can be granted and the inconsistency in the legislation which leads to misuse and abuse using a case study approach to highlight many of the issues with the current system.
- 2.5 Part 4 explores the issue of capacity, with regard to both capacity to create legal instruments and the execution of enduring instruments, both of which are clouded by much confusion and ambiguity. SRV recommends the implementation of a range of measures to better deal with the issues of capacity, loss of capacity and incapacity with regard to the extensive work already undertaken in this area and utilised in other jurisdictions.
- 2.6 Part 5 examines the issue of abuse of POAs and enduring instruments and the measures Victoria should take to better protect older Victorians against elder abuse. Further recommendations are made which SRV believes will assist in reducing the prevalence of elder abuse in Victoria including the introduction of a number of measures to safeguard older people, a state-wide education campaign and additional powers to assist VCAT in reducing the prevalence of elder abuse.

3. Summary of Recommendations

- 3.1 SRV submits that the LRC should recommend:

Recommendation 1

The implementation, insofar as possible in Victoria, of legislative and policy reforms to enable the States and Territories to work toward uniform legislation governing powers of attorney and guardianship as recommended in the 2007 Older People and the Law Report and the 2006 Inquiry into Harmonisation of Legal Systems within Australia and between Australia and New Zealand.

Recommendation 2

The current legislative framework governing POAs and enduring instruments be consolidated into once piece of legislation using consistent terminology to minimise confusion and to streamline processes.

Recommendation 3

The new act governing POAs and enduring instruments contains definitions of these instruments as well as the terms 'capacity' and 'legal incapacity'.

Recommendation 4

That forms for all instruments are harmonised into one whereby the donor may then select which instrument they are intending to create and the conditions under which it is created.

Recommendation 5

That the legislation be amended to set specific guidelines on who a donor can appoint as an attorney, namely:

- an attorney may be a relation or a close friend (who is at least 18 years of age);
- an attorney must be capable of considering the consequences of their decision, and have the ability to understand and to reason;
- an attorney may be a solicitor, accountant, statutory trustee company or the Public Trustee; and
- the attorney must sign an acceptance of the power in accordance with statutory provisions as per the *Power of Attorney Act 1998* (Qld),

and that the legislation be amended to incorporate additional specific guidelines as to who is not eligible to be an attorney, namely:

- a person with a criminal conviction of a type that involves fraud or dishonesty; or
- a person previously removed as an attorney by VCAT or another Tribunal in Australia for misusing their power.

Recommendation 6

The legislation regulating powers of attorney should clearly stipulate the restrictions on the exercise of powers by an attorney, including that the attorney:

- must comply with the principles, roles and duties set out in the legislation;
- must communicate all decisions and actions to the donor;
- must act honestly and with a degree of care that would be reasonable given the attorney's experience and expertise;
- must act in accordance with the terms of the power of attorney;
- must act in accordance with the directions and wishes of the donor (when the donor has capacity); and

- may apply to the tribunal (or Supreme Court) for advice or directions about the exercise of a power or the interpretation of its terms;

The attorney must sign an acceptance of the power recognising their responsibilities under the instrument.

Recommendation 7

The new act should specify the number of penalty units to be imposed on an attorney or guardian who fails to comply with their responsibilities, roles and duties as set out in the act.

Recommendation 8

To ensure consistency across all instruments all POAs may have attorneys appointed jointly and/or severally.

Recommendation 9

All instruments must be witnessed by members of the legal profession or clerk of the court having undertaken an assessment of donor capacity in accordance with the legal assessment as set out in the act. This should incorporate a legislative provision certifying that the donor executed the POA "freely and voluntarily" in the presence of the witness and "appeared" to the witness to "have the capacity necessary" to make the POA.

Recommendation 10

Assessment as to donor capacity must be made by a legal practitioner at the point of creation of the instrument. A capacity assessment form is to be attached to all POAs prior to lodgement with the registration body indicating whether capacity was at issue and if so the measures undertaken to determine capacity.

The assessment as to capacity must be made in consideration of a medical assessment regarding the cognitive abilities of the donor in conjunction with a schedule to the act (as per Schedule 2 *Powers of Attorney Act 1998* (Qld)).

For instruments activated upon loss of donor capacity the required evidence is to be outlined in the instrument itself and must consist of a medical assessment as to the cognitive abilities of the donor at the time the donee wishes to activate the instrument. A new capacity assessment form must then be lodged with the registration body prior to activation of the instrument.

Recommendation 11

That a national register (initially only state based if not feasible at this stage) of POA instruments be established, and that the registration of an instrument be a condition precedent to the activation of the instrument.

Recommendation 12

That the new act clearly sets out the duties and responsibilities of attorneys and guardians and that detailed guidelines be developed outlining the record keeping responsibilities of attorneys and guardians.

Attorneys and guardians acting under enduring instruments be required to submit annually a statutory declaration (in the prescribed form) stating that they are complying with their duties and responsibilities under the act.

That records and accounts required to be kept by attorneys and guardians be inspected and audited at reasonable intervals by the POA registration body.

Recommendation 13

A state-wide education campaign, targeted at the health care profession (with a specific focus on aged care facilities), financial institutions, the legal profession and the public generally that simply explains the legal requirements and responsibilities of both donors and donees of POAs and enduring instruments including the importance of donor participation in decision making.

Recommendation 14

That the new act specifically states that all decisions and orders made by VCAT be undertaken in consideration of and respect for the rights of the donor in accordance with the provisions of the Charter.

Recommendation 15

That the circumstances in which VCAT can revoke enduring instruments be made consistent, and that VCAT's power to revoke instruments is extended to situations where the attorney has acted in an incompetent and negligent manner.

Recommendation 16

That the relevant legislation specify issues to be considered in the making of a determination as to the "best interests" of the donor to allow for clarity and certainty as to circumstances when it is appropriate to apply for the revocation of an enduring instrument. Issues to be considered should include:

- the wishes of the donor, so far as they can be ascertained;
- implications of revocation for the donor;
- the wishes of any interested persons/parties; and
- any other matters prescribed by the regulations.

Recommendation 17

That relevant legislation specify what constitutes an "interested person" for the purposes of making an application to VCAT to create clarity and certainty in respect of who has standing to make an application to VCAT.

Recommendation 18

That the new act incorporates an extension of section 125V of the Instruments Act to extend VCAT's powers to make declarations, orders, directions or recommendations with regard to POAs which have been revoked. Alternatively, VCAT guidelines or practice notes should be published which clarify the extent of VCAT's powers and the use of such powers in relation to POAs that have been revoked.

Recommendation 19

The new act, or the Instruments Act, be amended to enable VCAT to award compensation or restitution against an attorney who has misappropriated funds without requiring separate proceedings to be brought in a court.

Recommendation 20

That the new act or consolidated acts incorporate penalties for failing to comply with the obligations under the act. This should incorporate an amendment to section 125D of the Instruments Act creating an offence for attorneys not to keep accurate records, or to permit VCAT to impose a fine on persons who have been found to have abused the powers conferred

under a POA in addition to outlining mechanisms for the recovery of any monies misappropriated by the attorney

4. About SRV

- 4.1 Established in April 2008 and the only service of its kind in Victoria, SRV provides leadership across Victoria in responding to individual older people experiencing abuse, through a network of legal and other supports. It is jointly managed by COTA (as the lead auspice), PILCH, Eastern Community Legal Centre and Loddon Campaspe Community Legal Centre, under a joint venture agreement.
- 4.2 SRV developed expertise with regards to the experiences of older people and the law, with a focus on elder abuse. As a result SRV is well placed to comment on the current lack of human rights protections afforded to older people.
- 4.3 SRV seeks to eradicate the abuse of older people in all its forms, and to promote the rights of all older people in Victoria to achieve, or maintain, their independence in a world free of ageism and abuse. SRV has a role in systemic advocacy, law reform and the promotion of a rights based attitude towards older people and abuse.
- 4.4 The aims of SRV are to:
- Provide leadership in knowledge, policy and advocacy on issues of abuse and older people
 - Develop and implement education and awareness raising programs for older people and the general community
 - Develop and implement education programs for service providers and other professionals
 - Engage in collaborative partnerships and networks to improve responses to the needs of older people
 - Provide a key point of contact for older people, their families, professionals working with older people and the general community
 - Assist individuals to receive appropriate services and support to make informed decisions in relation to their situation
 - Provide free and accessible legal services that empower clients to meet their legal needs
 - Establish premises and infrastructure from which to provide information, support and legal services to the target community
- 4.5 In its first year of operation SRV received upwards of 1304 inquiries to its telephone advice line resulting in the provision of 439 advices and 95 referrals to the advocacy service. SRV lawyers provided 191 formal instances of information resulting in referrals to other agencies, legal services and service providers. Of the 95 referrals to the advocacy service 55 received short term counselling and support whilst the remaining 40 received substantial advice and information with many being referred on to other services for further assistance. An average of six community education sessions have been run each month since SRV began operations. In this same period 69 professional education sessions have been attended by 1814 individuals. Four pro bono outreach clinics have begun operation around metropolitan Melbourne. The

clinics see an average of 6 clients per week and are staffed on a voluntary basis by lawyers from five of Victoria's major law firms

PART 2 POAs AND ELDER ABUSE IN VICTORIA

5. Introduction

5.1 Understanding the reform of legislation governing powers of attorney and guardianship within a human rights context is a key consideration. The Victorian Government is obliged to consider the impact of the Charter on all Victorian legislation, and these instruments and the legislative provisions that currently provide for them are often used as a vehicle to perpetuate elder abuse. For older Victorians this abuse is most often borne out in the form of financial abuse through the misuse of enduring instruments.

5.2 The use of a human rights framework empowers individuals. This empowerment occurs as a result of increasing people's understanding of what their rights are and how they may be utilised to afford better outcomes. In the context of the current inquiry, undertaking reform of POA legislation utilising a human rights approach will empower those who rely on POA instruments most with their decision making, especially in later life.

6. Defining elder abuse

6.1 Elder abuse is defined by the World Health Organisation as:

A single or repeated act or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.¹

6.2 Elder abuse is any knowing, intentional, or negligent act by a caregiver or any other person that causes harm (including physical, psychological, financial or social) or a serious risk of harm to a vulnerable adult. This most commonly occurs where the older person and the person carrying out the action or behaviour are in a relationship which involves trust, dependency or proximity.

6.3 Elder abuse takes many forms. The range of potential harms includes:

- physical (such as slapping, pushing, burning, physical restraint or inappropriate use of medication);
- financial (misuse of funds, forcing or forging signatures, denying access to funds or property, misuse of a POA, overcharging, promise of long term care in return for money, and improper changes to legal documents such as wills or insurance policies);
- psychological (such as verbal intimidation, threats, shaming, loss of privacy, humiliation, loss of dignity, harassment, isolation, deprivation and withholding of affection);
- sexual (such as rape, indecent assault and sexual harassment); and
- neglect (such as leaving the older person with no means to care for his or herself and with poor hygiene and personal care which may result in bedsores etc. Neglect also includes a lack of social, cultural, intellectual or physical stimulation).

¹ World Health Organisation, *A Global Response to Elder Abuse and Neglect*, 2008.

- 6.4 While some forms of elder abuse are extreme and involve criminal acts, the problem is often subtle and hidden, occurring between older people, their families, neighbours and carers. For this reason, elder abuse has been referred to as "a hidden problem, under-recognised and under-reported due to a stigmatisation and a lack of community awareness."²
- 6.5 Elder abuse is typically carried out by someone close to an older person, with whom they have a relationship implying trust. This is typically a family member such as a spouse, adult children, grandchildren, siblings, other family members, friends or carers, and may be perpetrated as a result of ignorance, negligence or deliberate intent.³
- 6.6 In the context of the current inquiry of great concern for older Victorians is the potential for financial abuse to be perpetuated through the misuse of EPOAs by those in positions of trust and confidence.
- 6.7 Financial abuse is defined by the World Health Organisation as "the illegal or improper exploitation or use of funds or resources of the older person."⁴ Financial abuse is associated with "greed leading to opportunistic or well planned exploitation, family expectations around inheritance and cultural differences surrounding the use and management of older people's finances."⁵
- 7. Victoria's ageing population and the prevalence of elder abuse**
- 7.1 The proportion of Victoria's population aged over 65 is projected to nearly quadruple by 2056 making up approximately 25% of the population.⁶
- 7.2 The increase in Victoria's ageing population will arguably correspond with an increase in the prevalence of dementia. Dementia is closely associated with a loss of decision making capacity. This increase in cases of dementia will lead to increases in the number of older Victorians needing assistance with decision making, and the need for substitute decision-makers to act on their behalf.⁷
- 7.3 Ageing and dementia are both recognised by the National Mental Health Policy 2008 as risk factors for human rights abuses in that "older Australians who have dementia are more vulnerable in relation to their human rights as many become more reliant on a range of services as they age."⁸
- 7.4 Elder abuse is difficult to document due to its private and domestic nature. Although accurate statistics documenting the number of people experiencing elder abuse are not widely

² Report on the Elder Abuse Prevention Project (2005) *Strengthening Victoria's Response to Elder Abuse*.

³ Office of Senior Victorians, *Victorian Government Elder Abuse Prevention Strategic Implementation Plan*, August 2007, Department of Planning and Community Development.

⁴ World Health Organisation/International Network for the Prevention of Elder Abuse (2002) *The Toronto Declaration on the Global Prevention of Elder Abuse*, Geneva, cited in the Report on the Elder Abuse Prevention Project (2005) *Strengthening Victoria's Response to Elder Abuse*.

⁵ Deborah Setterlund, Cheryl Tilse and Jill Wilson "Older People's Knowledge and Experiences of Enduring Powers of Attorney: The Potential for Financial Abuse" (Queensland Law Society Incorporated, Brisbane, 2000)

⁶ Australian Bureau of Statistics (September 2008) *Population Projections, Australia, 3222.0, 2006-2101*.

⁷ Access Economics (April 2009) *Making Choices: Future dementia care: projections, problems and preferences*.

⁸ Recognising the Rights of Older Australians *Submission to the National Human Rights Consultation*, June 2009.

available, research indicates that elder abuse is most likely to occur between the ages of 75 and 85 years.⁹

7.5 Whilst no comprehensive statistics regarding the prevalence of elder abuse in Australia are currently available, statistics in New Zealand show that between 2001 and 2002, 745 cases of elder abuse were reported. Of those cases, the most common form of abuse was financial and psychological abuse.¹⁰

7.6 In 2005, the Victorian Elder Abuse Prevention Project estimated that the incidence of elder abuse in the community is between 3-5 per cent and that it is chronically under-reported.¹¹ The American National Elder Abuse Incidence Study in 1998 indicated that for every reported incidence of elder abuse, five times as many incidences occur.¹²

7.7 According to the Queensland Law Society and the Elder Abuse Prevention Unit Queensland,¹³ financial abuse is the fastest growing form of elder abuse. Recent data indicates that financial abuse forms 50 per cent of all abuse perpetrated against older people.¹⁴

8. A Human Rights Framework for the prevention of Elder Abuse

8.1 SRV seeks to eradicate the abuse of older Victorians in all its forms, including financial abuse, and to promote the human rights of all older Victorians. Elder abuse is a clear violation of the human rights of older people. It is SRV's view that reform of legislation governing general and enduring powers of attorney and guardianship would assist in protecting and promoting the human rights of older Victorians.

8.2 Victoria, through the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, has an obligation to promote and protect the human rights of all Victorians. Within the context of the POAs certain Charter rights are of greater relevance than others. These are:

- **Recognition and equality before the law** (section 8)

Australia already has legislative protections in place to guard against age discrimination. However, human rights protection is still a live issue for many older people. In the context of POAs this is particular relevance to issues of capacity (see Case Study Example 6).

⁹ Pamela Teaster, (2002) A Response to the Abuse of Vulnerable Adults: the 2000 Survey of State Adult Protective Services, National Centre on Elder Abuse, Washington DC

¹⁰ Rachel Kent, (2003) Misuse of Enduring Powers of Attorney, Victoria University of Wellington Law Review, 8.

¹¹ Deborah Setterlund, Cheryl Tilse and Jill Wilson "Older People's Knowledge and Experiences of Enduring Powers of Attorney: The Potential for Financial Abuse" (Queensland Law Society Incorporated, Brisbane, 2000), 12.

¹² National Centre on Elder Abuse at the American Public Human Services Association (1998) The National Elder Abuse Incidence Study.

¹³ Australian research, including figures from the Elder Abuse Prevention Unit Queensland, Annual Report 2009.

¹⁴ Office of Senior Victorians (2007) *Victorian Government Elder Abuse Prevention Strategic Implementation Plan 2006-09*, 3.

- **Right to Life** (section 9)

This right is of particular relevance to decisions made with regard to health and well-being. As these decisions are generally made under the MTA and Part 4A of the GAA they are not discussed here in further detail.

- **Protection from torture and cruel, inhuman or degrading treatment** (section 10)

Degrading treatment is treatment that humiliates or debases a person. This right is of specific relevance to older people in aged care facilities and nursing homes who are detained in locked wards without reasonable justification as well as those who are not adequately provided for by those with control over their day to day well-being (see Case Study Example 9).

- **Freedom of Movement** (section 12)

In the context of older people, the right to access, liberty of movement and freedom of association is important because it ensures residents in aged care facilities and nursing homes are allowed access to family and friends. It further limits the ability of care providers to arbitrarily restrict older people to their place of residence without evidence supporting such a restriction (see Case Study Example 2).

- **Privacy and Reputation** (section 13)

The right to privacy includes the right not to have your family or home life unlawfully or arbitrarily interfered with (see Case Study Example 3).

- **Protection of Families** (section 17)

The right to protection of families protects a family's ability to live together and enjoy each other's company (see Case Study Example 12).

- **Property Rights** (section 20)

The right to property includes all real property including money. In the context of the current inquiry many attorneys presume that the donor's property is their own (see Case Study Example 9).

8.3 As the Charter recognises the importance of international jurisprudence with regard to the protection and promotion of human rights there are additional rights drawn from the international sphere of relevance to older Victorians in the context of POAs and EPOAs. These are:

- The right to health (ICESCR Article 12)
- The right to an adequate standard of living, including adequate food, clothing and housing (ICESCR Article 11)
- The right to be free from financial abuse (WHO)
- Presumption of legal capacity (CRPD Article 12)

- 8.4 POAs, especially in their enduring form, are a commonly used vehicle for the perpetration and perpetuation of elder abuse in Victoria. By undertaking an examination of POAs through a human rights framework the LRC will be better placed to make legislative amendments which reflect the importance of empowerment and respect of individual rights within a protective jurisdiction.

PART 3 DEFINITIONS AND REQUIREMENTS

9. Introduction

9.1 Under the terms of reference, the LRC is asked to consider the different requirements, terminology and coverage of all POA documents governed by the Instruments Act and the GAA.

9.2 This section analyses the differing requirements for a POA and EPOA under the Instruments Act and EPOG under the GAA and highlights the legislative uncertainty and confusion engendered by these requirements as well as the absence of definitions for many core concepts.

9.3 SRV recommends changes to the structure, wording and intent of the relevant parts of the Instruments Act to ensure greater certainty and understanding for Victorians executing or becoming an attorney under Parts XI and XIA of the Instruments Act.

9.4 Witnessing and capacity requirements are examined in part 4 of this submission.

10. National Harmonisation

10.1 In 2007 the House of Representatives Standing Committee on Legal and Constitutional Affairs published a report entitled *Older People and the Law*.¹⁵ Specific recommendations were made with regard to POAs including:

10.1.1 working towards uniform POA legislation;

10.1.2 developing a nationally consistent approach to the assessment of capacity;

10.1.3 developing:

- an information strategy to better inform principals of the implications of making a POA; and
- a scheme to enable all POAs to be prepared with the advice of a solicitor;

10.1.4 implementing a national register of EPOAs; and

10.1.5 implementing a campaign to raise awareness of the purpose and intentions of EPOAs in financial institutions.

10.2 In the Commonwealth House of Representatives 'Inquiry into Harmonisation of Legal Systems within Australia and between Australia and New Zealand', the Standing Committee on Legal

¹⁵ Report of the Commonwealth House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People And The Law*, September 2007

and Constitutional Affairs identified the lack of recognition of EPOAs across jurisdictions as an example of "senselessness resulting from regulatory inconsistency".¹⁶

- 10.3 The lack of portability of POAs is a confronting problem not only for parties to the instrument but also public agencies responsible for guardianship and administration arrangements as well as third parties such as banks, aged care facilities and hospitals.
- 10.4 According to the Victorian Public Advocate, evidence suggests that not only do people frequently move between states and territories, but a person may own property or conduct financial or legal transactions in more than one jurisdiction. These facts make it imperative that enduring instruments that the appointor appeared to understand the effect of this instrument be recognised and have effect in all states and territories.¹⁷
- 10.5 The Instrument Act provides for mutual recognition of documents however this is only in regard to EPOAs. There are no provisions for the mutual recognition of POAs or EPOGs.

Recommendation 1

The implementation, insofar as possible in Victoria, of legislative and policy reforms to enable the States and Territories to work toward uniform legislation governing powers of attorney and guardianship as recommended in the 2007 Older People and the Law Report and the 2006 Inquiry into Harmonisation of Legal Systems within Australia and between Australia and New Zealand.

11. Types of Powers of Attorney

- 11.1 There are four commonly used types of powers of attorney:
- 11.1.1 Under the Instruments Act
- General Power of Attorney
 - Enduring Power of Attorney (financial)
- 11.1.2 Under the GAA
- Enduring Power of Guardianship
- 11.1.3 Under the MTA
- Enduring Power of Attorney (medical treatment)
- 11.2 For ease of reference Annexure A provides a comparison of the legislative requirements for POA instruments in Victoria. This table does not include a comparison of requirements under the MTA as POAs under this act were explicitly excluded from this inquiry.

¹⁶ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into harmonisation of legal systems within Australia and between Australia and New Zealand*, December 2006, p. 101.

¹⁷ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into harmonisation of legal systems within Australia and between Australia and New Zealand*, December 2006.

- 11.3 In the context of elder abuse prevention enduring instruments are of utmost concern as these present the greatest potential for misuse and abuse by attorneys. However, SRV recognises that in the context of legislative reform and in the interests of clarity and ease of use, recommendations must be made with regard to each of the three instruments of relevance to this inquiry.
- 11.4 SRV submits that the placement of attorney powers across different pieces of Victorian legislation causes confusion on the part of the donor, attorney, and third parties, as to the powers created under each Act and the associated responsibilities. The following discussion sets out an analysis of the various requirements and responsibilities governing POAs and enduring instruments, highlighting the inconsistencies and need for reform.

Recommendation 2

The current legislative framework governing POAs and enduring instruments be consolidated into once piece of legislation using consistent terminology to minimise confusion and to streamline processes.

12 Defining a power of attorney instrument

- 12.1 POA is not specifically defined in the legislation, but is a legal instrument that appoints one or more persons to make decisions on another's behalf. It is often used for a specific purpose and for a fixed period of time.

Case Study Example 1

"I thought at the time that the POA was a good idea but did not realise the extent of the power I had handed over to my children. I was not aware of placing conditions in the document to protect me – but these are my children!" Stated by older women who had major surgery and gave EPOA to adult children for the time she was in hospital. Her bank balance dropped \$20,000.00 and they threatened to put her away (in a nursing home) if she did not stop causing trouble by asking about her money.¹⁸

- 12.2 Whilst providing a broad definition of EPOA, the Instruments Act leaves many crucial terms undefined. Significantly, the legislation fails to define the terms **legal incapacity** and **capacity**. As will be discussed in Part 4 of this submission, given that many instances of elder abuse relate to the issue of capacity, the lack of definition creates confusion and ambiguity. SRV submits that these terms must be clarified to bring certainty to the operation of POAs.
- 12.3 The GAA does not specifically define an EPOG. However, it is commonly understood to be a legal instrument appointing another to make personal and lifestyle decisions for the donor. It begins to operate when the donor is no longer able to make their own decisions.

¹⁸ Aged Rights Advocacy Service Inc, *Submission to the Standing Committee on Legal and Constitutional Affairs Inquiry into Older People and the Law*, 2006,

- 12.4 SRV submits that the lack of definitional clarity confuses the operation of POA instruments. This has the potential to lead to confusion amongst donors, attorneys, guardians and third parties, and may heighten the chance of abuse. The centralisation of POA regulation, including the incorporation of relevant definitions, would provide a greater safeguard against potential abuse.

Recommendation 3

The new act governing POAs and enduring instruments contains definitions of these instruments as well as the terms 'capacity' and 'legal incapacity'.

13. Execution and form of documents

- 13.1 A general POA is executed by, or at the direction and in the presence of, the donor of the power.¹⁹ Where a POA is executed by direction, two witnesses must be present to attest to the instrument. Similar requirements govern the execution of an EPOA, which must be signed by the donor, or where by direction, an eligible person.²⁰ The EPOA must be signed by two adult witnesses, one of whom is qualified to take statutory declarations.²¹ An enduring guardian may be appointed by an instrument in writing. The signed EPOG must be attested to by two witnesses.
- 13.2 There are no express requirements as to who can be directed to sign a general POA on behalf of the donor, as compared to the requirements governing EPOAs, which must be signed by an eligible person.²² In addition, there is uncertainty as to how the donor validly gives a direction to another person to execute a POA or EPOA on the donor's behalf.
- 13.3 The Instruments Act requires that a POA and an EPOA be executed using different forms.²³ The GAA requires another form again for the execution of an EPOG.²⁴ This creates issues regarding the accessibility of forms and causes confusion as to which form must be used in which circumstances.
- 13.4 SRV submits that this ambiguity requires clarification and stricter regulation in order to limit the opportunity for elder abuse. This includes greater supervision of the execution of the POA instrument through a requirement to obtain independent legal advice before executing the document. POAs are easily taken advantage of, and donors must be made fully aware of the effect of the transaction.
- 13.5 Witnessing requirements are discussed in part 4 in the context of capacity to create legal instruments.

¹⁹ *Instruments Act*, s 106(1).

²⁰ *Instruments Act*, s 124. A person is eligible to sign an EPOA for a donor identification that person is over 18 years of age, not a witness for the EPOA and not an attorney under the EPOA.

²¹ *Instruments Act*, s 124.

²² *Instruments Act*, s 124.

²³ Under Part XI, section 107(1) of the Instruments Act states that a POA must be executed in the form set out in Schedule 12 of the Instruments Act and under Part XIA, sections 123(1) and 125ZL of the Instruments Act state that an EPOA must be executed in the "approved form" set out by the Secretary of the Department of Justice.

²⁴ *Instruments Act*, Schedule 4, Form 1.

Recommendation 4

That forms for all instruments are harmonised into one whereby the donor may then select which instrument they are intending to create and the conditions under which it is created.

14. Who can be an attorney/enduring guardian?

14.1 There are few requirements in the Instruments Act as to who may be an attorney for a general POA. This is contrasted to the comparatively extensive requirements for an attorney to an EPOA.²⁵ For an EPOA, the attorney:

- must be at least 18 years of age;²⁶
- must not be insolvent;²⁷ and
- may be head of a religious order.²⁸

14.2 The GAA provides a stronger safeguard for determining who may be appointed as an enduring guardian for an EPOG. A person may not be appointed as an enduring guardian if they are either, 'in a professional or administrative capacity, directly or indirectly responsible for, or involved in, the care, treatment of or provides accommodation' to the donor.²⁹

14.3 SRV submits that the eligibility requirements for an attorney should be consistent for all POA instruments. SRV notes that the additional requirements for enduring instruments reflect the greater powers afforded to an attorney. However, these should nevertheless be made consistent across the legislation in order to provide greater protection against elder abuse. SRV recommends that the current legislation be amended to provide guidance on who may act as an attorney under all POA instruments to assist in the streamlining of legislative requirements.

Recommendation 5

That the legislation be amended to set specific guidelines on who a donor can appoint as an attorney, namely:

- an attorney may be a relation or a close friend (who is at least 18 years of age);
- an attorney must be capable of considering the consequences of their decision, and have the ability to understand and to reason;
- an attorney may be a solicitor, accountant, statutory trustee company or the

²⁵ *Instruments Act*, s 119 to 122.

²⁶ *Instruments Act*, s 119(4).

²⁷ *Instruments Act*, s 121.

²⁸ *Instruments Act*, s 122.

²⁹ *Guardianship and Administration Act*, s 35A(4).

Public Trustee; and

- the attorney must sign an acceptance of the power in accordance with statutory provisions as per the *Power of Attorney Act 1998* (Qld).

and that the legislation be amended to incorporate additional specific guidelines as to who is not eligible to be an attorney, namely:

- a person with a criminal conviction of a type that involves fraud or dishonesty; or
- a person previously removed as an attorney by VCAT or another Tribunal in Australia for misusing their power.

15. Powers and Restrictions under a POA instrument

15.1 The current legislative provisions relating to POAs do not specifically stipulate powers held by an attorney. Some States and Territories have vague requirements, for example:

[A]n attorney to do on behalf of the donor anything which a donor can lawfully do by an attorney.³⁰

15.2 Whilst the legislation does not stipulate specific powers, it does (at least for an EPOA) provide some restriction on the exercise of powers requiring the document to be in a prescribed form which requires the attorney to act lawfully. In relation to financial decisions, there are also some requirements that an attorney must keep adequate records, keep the donor's property separate from his or her own and avoid conflicts of interests.

15.3 Case study examples two and three (below) both demonstrate circumstances in which the lack of clarity around powers held by attorneys may result in circumstances in which elder abuse is perpetrated, often unintentionally.

Case Study Example 2

Maria was refused access to visit her friend who resided in an aged care facility, based on the directions of the friend's attorney. Based on the powers donated in the POA instrument the attorney did not have the power to refuse access and neither did the aged care facility.³¹

15.4 It is also worth noting, that the donor/attorney relationship imposes fiduciary duties on the attorney. Fiduciary duties, arising out the relationship of trust and confidence require the attorney to act in the best interest of the donor. These duties apply under the common law to protect a donor from the actions of an attorney or guardian that breach this relationship of trust and confidence. A discussion of these duties and the remedies for breach are discussed in part 5 of this submission.

³⁰ *Property Law Act 1974* (Qld) s. 170(1).

³¹ The following case studies are drawn from the experiences of SRV staff. Where the case example is derived from another source, this source has been referenced accordingly

- 15.5 At common law, an attorney's power is restricted to prevent him or her from doing anything which was required by statute to be done by the principal personally, or which demanded the exercise of the principal's own skill or discretion.³² Also, an attorney must use his or her power honestly and with reasonable diligence to protect the interest of the donor.
- 15.6 The enduring guardian may exercise the powers specified in the instrument if, and only to the extent that, the donor subsequently becomes unable to make "reasonable judgments".³³ The GAA fails to provide guidance as to when these powers are activated. If no powers are outlined in the instrument, a guardian is conferred with all the powers and duties a parent would have if the donor were a child.³⁴

Case Study Example 3

Arthur, a 75 year old man lives in a residential facility in Victoria. Julia is his only child and is also his financial power of attorney. Arthur is experiencing some memory loss but is still lucid. Julia made a decision to exercise the use of the power of attorney. Julia instructed the facility that all mail should be redirected to her. The facility commenced redirecting mail to Julia without the knowledge or consent of Arthur

- 15.7 SRV submits that greater clarification of restrictions on the exercise of powers by attorneys is required to guard against elder abuse. This may include further restriction on the powers which may be exercised under an enduring instrument, or a requirement that the powers be explicitly outlined in the instrument.
- 15.8 To assist attorneys and guardians SRV further recommends that the new act should provide a clear definition of the role(s) and duties of attorneys and guardians. Where the attorney or guardian fails to comply with their statutory responsibilities the new act should specify the number of penalty units to be imposed.

Recommendation 6

The legislation regulating powers of attorney should clearly stipulate the restrictions on the exercise of powers by an attorney, including that the attorney:

- must comply with the principles, roles and duties set out in the legislation;
- must communicate all decisions and actions to the donor;
- must act honestly and with a degree of care that would be reasonable given the attorney's experience and expertise;
- must act in accordance with the terms of the power of attorney;
- must act in accordance with the directions and wishes of the donor (when the donor has capacity); and

³² *Halsbury's Laws of England*, Fourth Edition (Reissue) Vol 1(2)

³³ *Guardianship and Administration Act* s 35(4).

- may apply to the tribunal (or Supreme Court) for advice or directions about the exercise of a power or the interpretation of its terms;

The attorney must sign an acceptance of the power recognising their responsibilities under the instrument.

Recommendation 7

The new act should specify the number of penalty units to be imposed on an attorney or guardian who fails to comply with their responsibilities, roles and duties as set out in the act.

- 15.9 To minimise the risk of abuse of enduring instruments SRV recommends that attorneys may be appointed jointly and severally under all POA instruments.

Recommendation 8

To ensure consistency across all instruments all POAs may have attorneys appointed jointly and/or severally.

³⁴ *Guardianship and Administration Act* s 35B(2) and s 24(1).

PART 4 DONOR CAPACITY

16. Introduction

- 16.1 The LRC has been asked to address two issues with regard to capacity. The first being the capacity to create legal instruments and the second the issue of legal capacity relating to the execution of enduring instruments. Each of these is addressed below.
- 16.2 Whilst legislation governing POAs considers the issue of capacity the term is not adequately defined anywhere in the relevant legislation. This critical omission has led to much anxiety and confusion on the part of both donors and donees with regard to the time at which a general power is no longer binding and when an enduring power may be activated.
- 16.3 Capacity is decision specific³⁵ and may fluctuate as the health of the donor diminishes and subsequently improves.
- 16.4 Further to this “[a] finding that a person lacks legal capacity results in the restriction or removal of fundamental human rights. For this reason, the definition of legal capacity, how it is assessed and who carries out the assessment are all very important issues.”³⁶

17 Capacity to create

- 17.1 The purpose of the GAA is to "enable persons with a disability to have a guardian or administrator appointed when they need a guardian or administrator".³⁷ Under this Act, the definition of "disability" is "intellectual impairment, mental disorder, brain injury, physical disability or dementia". However, the GAA contains no requirement for evidence of the appointor's capacity to create an EPOG. Appointor capacity is only raised in Schedule 4 of the GAA where the witness to the document is required to sign 'that the appointor appeared to understand the effect of this instrument'.³⁸
- 17.2 To meet the criteria of capacity to create an EPOA, the Instruments Act stipulates the donor may make an EPOA only if he or she understands the nature and effect of the EPOA.³⁹ Understanding the nature and effects is further defined as understanding any specific conditions, limitations or instructions being conferred on the attorney, when the powers are exercisable, revocation requirements, and implications of legal incapacity.⁴⁰
- 17.3 The report of the Law Commission of New Zealand on the misuse of EPOAs released in April 2001⁴¹ made a number of recommendations including requiring a solicitor's certificate be obtained to attest to the donor's capacity upon execution of the instrument in all cases where:

- the attorney is a person other than the donor's spouse or defacto partner;

³⁵ *Gibbons v Wright* [1953-1954] 91 CLR 423, 438

³⁶ The Law Reform Commission – Ireland, *Consultation Paper on Law and the Elderly*, LRC CP23 – 2003, 11

³⁷ *Guardianship and Administration Act* s 1

³⁸ *Guardianship and Administration Act* Sch 4

³⁹ *Instruments Act* s 118(1).

⁴⁰ *Instruments Act* s 118(2).

- the donor is 68 years or over; or
- the donor is a patient at or a resident in any hospital, home or other institution⁴².

17.4 Although the use of a medical diagnosis was also considered, it was thought a solicitor (retained independently of the attorney) could provide the donor with legal advice on what is known under Victorian legislation as the 'nature and effect' of the EPOA.

17.5 The solicitor would then be required to certify he or she has advised the donor on these matters. The report suggested that these actions are an extension of those already carried out by a solicitor when preparing a client's will.⁴³

18 Capacity Assessment

18.1 To ensure consistency SRV recommends that a capacity assessment be undertaken at the time a POA is created. As capacity is both a legal concept and one that is decision specific it is imperative that any determination with regard to the capacity of the donor is undertaken by a legal professional.⁴⁴

18.2 Where the capacity of the donor is in question the legal professional is to be guided by the type(s) of decision(s) that arise under the instrument. To assist the legal professional with this assessment SRV recommends the approach of the Queensland *Powers of Attorney Act*⁴⁵ in conjunction with a medical assessment of the donor's cognitive abilities.

18.3 Further guidance may also be found in practical guidelines such as those developed by the Law Society of NSW which lists a series of warning signs which may provide assistance in any determination of capacity.⁴⁶ The work undertaken in this area by Darzins et al⁴⁷ may also assist the legal professional as to the steps to be taken and issues that may arise when making an assessment as to capacity.

18.4 Subsequent to the capacity assessment the legal professional must complete and attach the capacity assessment form to the instrument prior to lodgement with the registration body (see part 24 below). The capacity assessment form should indicate whether capacity was an issue and if so the measure undertaken to determine capacity.

⁴¹ Law Commission (NZ), *Misuse of Enduring Powers of Attorney*, Report 71, (April 2001).

⁴² Law Commission (NZ), *Misuse of Enduring Powers of Attorney*, Report 71, (April 2001), 45.

⁴³ Law Commission (NZ), *Misuse of Enduring Powers of Attorney*, Report 71, (April 2001), 25.

⁴⁴ See generally Peteris Darzins, D William Molloy and David Strang, *Who Can Decide? The six step capacity assessment process*, 2000, Memory Press Australia, Adelaide

⁴⁵ See Schedule 2 Types of Matters, *Powers of Attorney Act 1998* (Qld) which provides guidance in respect of financial, personal and legal decisions and activities.

⁴⁶ Law Society of New South Wales, *When a Client's Capacity is in Doubt*, March 2009, [4]

<<http://www.lawsociety.com.au/idc/groups/public/documents/internetcontent/023880.pdf>> accessed 10 August 2009.

⁴⁷ Peteris Darzins, D William Molloy and David Strang, *Who Can Decide? The six step capacity assessment process*, 2000, Memory Press Australia, Adelaide

19. Witnesses to the execution of instruments

- 19.1 Both the Instruments Act and GAA fail to effectively protect a donor or appointor from an opportunistic attorney or guardian abusing the power granted to them. The Instruments Act attempts to minimise abuse by providing for the requirement of two witnesses to attest the donor's capacity at the time of execution;⁴⁸ however, this section is also open to exploitation as the majority of people authorised to witness POAs arguably do not understand the concept of legal capacity. The GAA contains more stringent conditions on who can witness⁴⁹ the creation of an EPOG but does not require a formal assessment of the appointor's capacity prior to execution.⁵⁰
- 19.2 A general POA is not required to be witnessed when the donor executes the instrument personally; if another person executes the instrument by direction and in the presence of the donor⁵¹ two witnesses are required. Neither of the witnesses are required to make any declaration as to the donor's capacity.
- 19.3 Limited consideration appears to have been given to the inclusion of s125 of the Instruments Act, in which some attempt has been made to protect the donor's interests by allowing only one witness to be a relative of either the donor or attorney, and requiring the other witness to be a person authorised by law to witness the signing of a statutory declaration.⁵² There is currently no restriction on the relative or friend of the attorney and the person authorised by law to witness statutory declarations from being the same person.

Case Study Example 4

Arthur had been diagnosed with mild dementia in 2007 and was eligible for a community aged care package to assist him at home. Arthur lived on a farm with his long term companion, who assisted him with his daily chores and banking. Arthur also had a son, George, who lived approximately 2 hours away. Arthur was not very close to George and they only saw each other a few times a year. In 2008 Arthur had a stroke. His companion was away at the time of the stroke. After the stroke, Arthur was admitted to hospital for 3 weeks. While in hospital, George visited him with a person authorized to witness the signing of statutory declarations and got Arthur to sign an enduring power of attorney (financial), appointing George as his attorney. Arthur claims that he did not know what he was signing and he felt really confused and disoriented at the time. After being in hospital for 3 weeks, George arranged for Arthur to be relocated to a residential aged care facility near him. The facility was about 2 hours away from his farm and friends. George wrote to the facility and instructed the manager of the facility that Arthur was not to speak with anyone or to leave the facility at all. George purported to use his power under the enduring power of attorney (financial) to do this. There was no enduring power of guardianship in place. George refused to give Arthur his personal belongings or bank cards and wrote to George's companion giving

⁴⁸ *Instruments Act*, s 125A(1)(b).

⁴⁹ *Guardianship and Administration Act*, s 35A(2)(c).

⁵⁰ Schedule 4 of the *Guardianship and Administration Act* requires the witness(s) to 'turn their minds' to the issue of capacity.

⁵¹ *Instruments Act*, s 106(2).

⁵² *Instruments Act*, s 125(1), (2), (3).

her notice to vacate George's property as he wanted to sell the property. At no time did George consult Arthur about these decisions. Arthur wanted to return home and his health was improving daily.

- 19.4 The GAA provides the most stringent of requirements for witnesses to the execution of an EPOG, being the exclusion of any party to the instrument or any relative of a party to the instrument, whilst still requiring one of the witnesses to be authorised by law to witness a statutory declaration.
- 19.5 The requirement under s 125A of the Instruments Act of a certificate⁵³ to evidence the donor's capacity is similarly open to abuse. This section requires both witnesses to sign certificates that the donor signed the EPOA freely and voluntarily in the presence of the witness, and at the time of signing, the donor appeared to the witness to have the capacity necessary to make the EPOA.
- 19.6 Anecdotal evidence suggests that as there are a range of potential witnesses for POAs under the current regime people will 'shop around' until they find someone who will witness the POA. Limiting the range of professionals able to witness POAs is another protective measure against potential abuse.

Recommendation 9

All instruments must be witnessed members of the legal profession or clerk of the court⁵⁴ having undertaken an assessment of donor capacity in accordance with the legal assessment as set out in the act. This should incorporate a legislative provision certifying that the donor executed the POA "freely and voluntarily" in the presence of the witness and "appeared" to the witness to "have the capacity necessary" to make the POA.

20. Enduring powers and capacity

- 20.1 Any assessment as to donor capacity must recognise that regardless of any perceived disability the person has,

[t]here is a presumption at common law that a person who enters into a contract has full capacity to do so, and a person alleging that they are protected from the normal consequences of their actions must bear the burden of proving incapacity.⁵⁵

- 20.2 However, as the law governing enduring instruments sits within a protective jurisdiction there is often a tendency to presume lack of capacity or incapacity. A negative consequence of presumptions of this kind is that the rights of the donor may be unduly limited. This is of particular concern where the donor still possesses legal capacity but medical evidence has been obtained to the contrary.

⁵³ *Instruments Act*, s. 125A

⁵⁴ As per *Powers of Attorney Act 2003* (NSW) s 19(2)(a)

⁵⁵ *Borthwick v Carruthers* (1787) 99 ER 1300

Case Study 6

Joan appointed a trustee company in 1998 to act as her attorney by way of an enduring power of attorney (financial). The trustee company was authorised to do on Joan's behalf anything Joan could authorise an attorney to do. The trustee company acted as Joan's attorney for approximately 10 years and only on Joan's instructions. Last year, Joan's daughter Gail was concerned about Joan's capacity to manage her finances. Gail contacted the trustee company directly regarding this matter without consulting her mother first. The trustee company then contacted Joan's GP and asked the doctor to provide a letter outlining whether Joan had capacity to manage her finances. Joan's GP wrote a letter stating that Joan no longer had capacity. The GP did this without first consulting Joan or seeking an authority from Joan to release the medical information to the trustee company. The following month, Joan discovered the trustee company was not consulting her about her financial affairs and she was being charged more for the services the trustee company was providing. Joan contacted the trustee company and was advised of what had occurred. Joan subsequently confronted her doctor and her doctor produced another letter stating that Joan had regained her capacity to manage her finances. Joan provided the trustee company with that letter, demanded a refund of the additional fees charged, and revoked the enduring power of attorney.

- 20.3 Further, it is important to recognise that we cannot be paternalistic about the issue of capacity recognising that individuals must still be afforded the opportunity to make 'bad' decisions.⁵⁶

Case Study Example 5

Mrs S lives with her son and daughter-in-law. She felt she could not trust her son to put her interests first as she believes his wife may negatively influence him against her. She is very independent, has a strong desire to 'hold on as long as I can' to her decision-making capacities and believes that 'what will be will be'. She is convinced that she will be able to decide when she is no longer capable of managing her own affairs and, at that point, will get an Enduring Power of Attorney and pass the responsibility on to her son. She does not appear to consider the possibility that this perceived window of opportunity might not appear.⁵⁷

- 20.4 If a donor satisfies the requirement of capacity upon execution of an enduring instrument under which powers are to be conferred on the attorney upon the loss of donor capacity, the issue then arises as to who and how a determination is made as to loss of donor capacity thereby activating the instrument.
- 20.5 Under the Instruments Act, a donor has the option to nominate when the EPOA may be exercised. Failure to make a nomination results in the EPOA being exercisable upon execution, allowing the attorney to act, within their powers, even if the donor still has capacity.⁵⁸

⁵⁶ *Re C (TH) and the Protected Estates Act* [1999] NSWSC 456 [17]

⁵⁷ Deborah Setterlund, Cheryl Tilse and Jill Wilson, 'Substitute Decision Making and Older People', 1999, 139 *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice* 1, 3

⁵⁸ *Instruments Act* s. 117 (1) and (2)

- 20.6 The GAA simply provides that a guardian's powers are exercised "if, and only to the extent that, the appointer subsequently becomes unable by reason of disability to make reasonable judgments in respect of any of those matters".⁵⁹
- 20.7 As SRV recommends an assessment as to capacity is undertaken at the time all instruments are created, measures to assess subsequent loss of capacity must be outlined in the instrument itself. A new capacity assessment form must then be lodged with the registration body as evidence of loss of donor capacity prior to activation of the previously registered instrument.

Recommendation 10

Assessment as to donor capacity must be made by a legal practitioner at the point of creation of the instrument. A capacity assessment form is to be attached to all POAs prior to lodgement with the registration body indicating whether capacity was at issue and if so the measures undertaken to determine capacity.

The assessment as to capacity must be made in consideration of a medical assessment regarding the cognitive abilities of the donor in conjunction with a schedule to the act (as per Schedule 2 *Powers of Attorney Act 1998* (Qld)).

For instruments activated upon loss of donor capacity the required evidence is to be outlined in the instrument itself and must consist of a medical assessment as to the cognitive abilities of the donor at the time the donee wishes to activate the instrument. A new capacity assessment form must then be lodged with the registration body prior to activation of the instrument.

21. Revocation of POA

- 21.1 For a general POA, the issue of capacity is important, as it determines when a POA is revoked. While this submission focuses more on enduring instruments, SRV nevertheless advocates for a standard assessment of 'capacity' to combat situations where there is a challenge as to whether a general POA has been revoked. SRV notes that the Instruments Act currently does not contain an assessment of 'capacity' as it relates to a general POA.
- 21.2 In relation to enduring instruments, if the donor has capacity, the donor can revoke the enduring power. SRV notes there are currently inconsistencies in the requirements for revocation to be effective. The GAA contains requirements for a revocation instrument to be effective.⁶⁰ While the Instruments Act currently does not contain any such requirements. Section 125I of the Instruments Act states that the donor can revoke the EPOA in writing in the approved form. However the section also notes that this is not the only way an EPOA can be revoked.⁶¹

⁵⁹ *Guardianship and Administration Act*, s 35B.

⁶⁰ See s. 35C(3) of the *Guardianship and Administration Act* relating to the form of the revocation instrument and the need for 2 witnesses to attest to the instrument (including conditions relating to the type of persons who can witness).

⁶¹ *Instruments Act*, s. 125I

- 21.3 If the donor of an enduring instrument lacks capacity, then the process to effectively revoke an enduring power is to apply to VCAT.⁶² However for VCAT to revoke an EPOA, it must be satisfied that the donor lacks capacity.⁶³
- 21.4 It is fair to say that there is confusion in the community as to how to revoke an enduring instrument. For example:
- How do concerned persons know whether a donor still has capacity or whether it is appropriate to apply to VCAT for revocation?
 - Does VCAT need to be satisfied in the case of an EPOG that the appointor has lost capacity (as in the case with a donor of an EPOA)? SRV notes that there is inconsistency between the two Acts in this regard.⁶⁴
 - How and from whom can concerned persons obtain a declaration of the donor's incapacity to VCAT's satisfaction and thus allow VCAT to revoke an EPOA under s 125X of the Instruments Act?
- 21.5 It is important that members of the public be provided with a clear and certain process for the revocation of enduring instruments. As the issue of 'capacity' represents the distinct point where procedures for revoking enduring instruments vary (i.e. if the donor has capacity, then he or she can revoke the enduring instrument, but otherwise an application to VCAT is required), SRV advocates a standard, recognised and consistent approach to the determination of a donor's capacity.

⁶² *Instruments Act*, s. 125X and *Guardianship and Administration Act*, s. 35D

⁶³ *Instruments Act*, s. 125X(2)

⁶⁴ That is, the Instruments Act states in s. 125X(2) states that VCAT must be satisfied that the donor lacks capacity in order to revoke an EPOA yet there is no similar requirement in the GAA relating to the appointor's capacity.

PART 5 MEASURES TO PROMOTE THE APPROPRIATE USE OF POAs

22 Introduction

- 22.1 In addition to the introduction of a standard test for capacity SRV recognises that further measures must be adopted to limit the potential for the misuse and abuse of POAs. As such this part examines a range of measures which SRV argues would limit the potential for abuse of POAs and enduring instruments.
- 22.2 In addition to protective measures which may be contained within the new act SRV advocates for a state-wide education campaign directed at a range of professions including, but not limited to, the legal and medical spheres.
- 22.3 Finally, and in recognition of the fact that abuses do occur, reform of the jurisdiction of VCAT is recommended to assist in further protecting those most at risk of attorney misuse and abuse of POAs and enduring instruments.

23. Potential for abuse

- 23.1 SRV considers that one of the most significant areas for reform lies with the issue of the supervision and accountability of the activities of an attorney. It is a widely held view that the legislation currently regulating power of attorneys in Victoria does not contain adequate safeguards against abuse and there is little provision for scrutiny or monitoring of the exercise of the powers.
- 23.2 The potential for abuse of EPOAs derives primarily from three factors:
- that the donor is suffering from a lack of capacity, and thus will have minimal ability to effectively monitor the activities of his or her attorney;
 - that highly trusted family members and relatives are most commonly appointed as attorneys; and
 - that there is generally a limited understanding of the powers and duties of the attorney among both the donors and the attorneys themselves.
- 23.3 A common form of abuse occurs in circumstances where the attorney breaches his or her fiduciary relationship with the donor. A POA relationship is characterised by a high level of trust and confidence which in turn imposes a high level of responsibility or duty of care on the attorney.

Case Study Example 7

A son acting as attorney in both welfare and property capacity refused to place his mother with advanced dementia, who was over 80 years old, into residential care. This was after a health assessment by a psycho-geriatrician required that she needed 24 hour supervision. Despite efforts by health professionals to encourage the son to place his mother, he continued to

refuse. The issue was that the son thought he was entitled to his mother's home as of right, and he knew it would need to be sold to pay for her rest home fees.⁶⁵

- 23.4 Breach of the fiduciary relationship generally occurs where the attorney takes a benefit for him or herself from the exercise of power not expressly authorised by the instrument creating it.⁶⁶ The fiduciary relationship may also be breached where the attorney uses the donor's assets to provide a benefit to a third party, or to give gifts to third parties on behalf of the donor where such acts are not authorised by the power.

Case Study Example 8

An older man was pressured by his daughter to sign over an enduring power of attorney to her, and over a short period of time she emptied his bank account. Although legally competent to make his own decisions he felt unable to refuse his daughters demands.⁶⁷

- 23.5 Cases of attorneys wrongly taking benefits for themselves or others are not restricted to attorneys acting without regard for the principal's interests, but include situations where the attorneys were simply misguided as to the nature and extent of their duties or believed that their actions somehow benefited the donor.
- 23.6 SRV recognises that, short of a comprehensive and national system for the administration of POAs, there is no way to guarantee that a person who administers the affairs of an incapacitated person, including an attorney appointed under an EPOA, will not abuse the powers given to that person. SRV does consider however that there are a number of measures that can be taken to prevent abuse by increasing the monitoring of powers exercised under EPOAs.

24. A registration system for POA instruments

- 24.1 POA instruments are private documents and there is often no knowledge of the existence of an instrument beyond the donor, attorney and possibly family and friends. A consequence of the private nature of such instruments is that upon presentation of the instrument to a third party such as a bank or aged care facility, the third party has no way of confirming that the instrument is valid and has not been subsequently revoked.
- 24.2 In practice, an attorney could potentially purport to rely on the original document to exercise powers which have since been revoked. In the absence of the revocation document, a certified copy of a POA document could still be purported to be evidence of a valid POA, albeit a clear abuse of power.
- 24.3 SRV submits that issues of this nature can only be overcome by the introduction of a national, (at least initially a State level) registration system for POA instruments. A central database of all POA instruments and their status (active/revoked/expired) would allow third parties to

⁶⁵ Auckland Age Concern, *Elder Abuse and Enduring Power of Attorney*, Age Concern, April 2004, 7

⁶⁶ Butterworths, *Halsbury's Laws of Australia*, (at 21 August 2009) 185 Equity, 'Chapter 4 Fiduciaries' [185-780]

⁶⁷ Auckland Age Concern, *Elder Abuse and Enduring Power of Attorney*, Age Concern, April 2004, 12

quickly confirm the validity of an instrument and the powers of an attorney in respect of a donor.

Case Study Example 9

A son was operating his father's financial affairs using an enduring power of attorney (**EPOA**) but also managing his pension under a nominee arrangement. To collect more money he failed to notify Centrelink that his father lived with him and that he was renting the father's house for considerable profit (retained by the son). Centrelink discovered the situation and raised a \$12,000 overpayment against the father. As the son knew he would not be responsible for any debt under Centrelink legislation, he dropped the father off at his sister's house, emaciated and with only with the clothes he was wearing. Before the administrator could get involved in the retrieval of the rent money and protecting the remaining assets the son had sold the father's house and moved interstate. Both the nominee form and EPOA were signed by the father well after he was deemed not to have capacity by the family doctor.

- 24.4 Case Study Example 9 (above) raises further issues regarding the potential for the perpetuation of elder financial abuse. Although not within the parameters of this inquiry SRV believes this is an appropriate to forum to recognise the misuse of Centrelink nominee arrangements.
- 24.5 The purpose of Centrelink nominee arrangements is to allow another person to make enquiries or act on the donors behalf in relation to any dealings they have with Centrelink. Of particular concern to SRV are the arrangements which may be made regarding the nomination of a person to receive Centrelink payments. The Centrelink nominee form makes no reference to any other type of substitute decision making instrument which may be in place nor is there a requirement for the donor to sign the form if they are deemed to be under a disability.⁶⁸
- 24.6 Further, Centrelink is not currently required to take into consideration attorney and guardianship arrangements made under State law,⁶⁹ with the exception of orders made by State Courts or Tribunals.⁷⁰ Arguably all power of attorney arrangements, be they court ordered or otherwise, 'should be sufficient to direct Centrelink in determining nominee arrangements'.⁷¹
- 24.7 The Victorian Government expressed its support for 'Commonwealth instrumentalities to recognise powers of attorney, and guardianship and administration orders'⁷² in its submission to the Commonwealth Older People and the Law inquiry based on the arguments raised in *Henderson's Case*⁷³ where the High Court of Australia recognised that the Commonwealth

⁶⁸ Centrelink, *Authorising a person or organisation to enquire or act on your behalf*, SS313.0903, available <[http://www.centrelink.gov.au/internet/internet.nsf/filestores/ss313_0903/\\$file/ss313_0903en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/ss313_0903/$file/ss313_0903en.pdf)> accessed 21 August 2009

⁶⁹ Report of the Commonwealth House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People And The Law*, September 2007 [3.122], [3.128]

⁷⁰ Report of the Commonwealth House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People And The Law*, September 2007 [3.131]

⁷¹ Report of the Commonwealth House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People And The Law*, September 2007 [3.133]

⁷² Report of the Commonwealth House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People And The Law*, September 2007 [3.130]

⁷³ Residential Tenancies Tribunal of New South Wales and Henderson and anor; Ex parte the Defence Housing Authority (1997) 190 CLR 410, 421

Executive is not immune from State laws of general application – such as laws regulating powers of attorney.

- 24.8 The implementation of a registration system for all POA instruments would assist Centrelink in accessing the requisite information when making decisions regarding nominee arrangements thereby limiting opportunities for financial elder abuse.

Recommendation 11

That a national register (initially only state based if not feasible at this stage) of POA instruments be established, and that the registration of an instrument be a condition precedent to activation of the instrument.

25. Record keeping and auditing requirements

- 25.1 The case studies and elder abuse statistics highlight that abuse of POAs is not uncommon. Whilst the record keeping requirements under the Instruments Act aim to ensure attorneys deal honestly and appropriately with the property of donors, this can only be properly achieved through regular and ongoing monitoring by an independent state body or similar.
- 25.2 SRV recommends that the legislative regime be amended so as to provide for the proactive and regular monitoring of the exercise of powers conferred on attorneys. The current regime relies on a third party taking action upon becoming aware of circumstances that give rise to an application to VCAT. The Instruments Act provides a mechanism of retrospective monitoring only and does nothing to actively prevent abuse of POAs. The monitoring of POAs should not rely on the action of a third party, but should provide regular and ongoing monitoring in the form of account audits or the requirement for attorneys to submit yearly accounts.
- 25.3 In order to overcome the issues associated with the current regime and the limited jurisdiction of VCAT to monitor the exercise of powers conferred under POAs, SRV considers that it would be appropriate for the legislation to be amended so as to provide for accounts and records of attorneys to be routinely inspected and audited to ensure that the powers conferred have not been abused. Whilst SRV recognises that any additional accounting safeguards implemented should not be so onerous that they will unduly inhibit the use of POAs, regular monitoring of attorneys' accounts in their exercise of POAs can be justified on the basis that it would provide an invaluable safeguard against elder abuse.⁷⁴

Case Study Example 10

Joel and Nathan's parents had appointed them jointly and severally as powers of attorney a number of years ago. Subsequently Nathan began pressuring their parents into signing blank cheques and bank withdrawal slips without providing any explanation. When Joel requested to see records of the transactions to ensure Nathan was acting in their parents best interest, Nathan refused. Joel rang SRV for advice as he was unsure of what he could do to protect his parents' interests

⁷⁴ *Instruments Act* s 125D already requires attorneys to 'preserve accurate records and accounts'.

Recommendation 12

That the new act clearly sets out the duties and responsibilities of attorneys and guardians and that detailed guidelines be developed outlining the record keeping responsibilities of attorneys and guardians.

Attorneys and guardians acting under enduring instruments be required to submit annually a statutory declaration (in the prescribed form) stating that they are complying with their duties and responsibilities under the act.

That records and accounts required to be kept by attorneys and guardians be inspected and audited at reasonable intervals by the POA registration body.

26. Education

26.1 SRV also recommends the implementation of additional obligations on attorneys and guardians to safeguard against abuse of EPOAs and EPOGs as follows:

- attorneys encourage the donor to participate in decisions (financial and other) as much as possible and consult a doctor or other interested parties for advice regarding decisions;⁷⁵ and
- where a donor is assessed as no longer having legal capacity the attorney should give notice of their intention to activate the enduring instrument to family members and to any other persons designated by the EPOA to receive notice.⁷⁶

26.2 Once new legislation or legislative provisions have been enacted, education programs should be introduced to encourage people to have powers of attorney and to educate both the donors and attorneys of their rights and obligations. SRV, in its role as a legal service assisting elderly people is aware of the confusion regarding the extent of attorney's powers. Attorneys often act outside their power under an EPOA (financial) by purporting to make lifestyle decision for a donor, such as where the donor should live. Whilst these instances are often not *abuse*, these examples evidence a lack of understanding of the scope of an attorney's power and their duties. Similarly, it is not unusual for organisations and aged care facilities to accept an EPOA (financial) as conferring on the attorney the power to make decisions about the donor's lifestyle and accommodation.

Case Study Example 11

Lisa and Michael's mother signed an EPOA a number of years ago. Lisa is the attorney under the power. Michael has recently begun pressuring her into using her powers under the EPOA to withdraw money from their mother's bank account, ostensibly for their mother's care. Lisa

⁷⁵ See Rachel Kent, "Misuse of enduring powers of attorney" (2003) 34 VUWLR 504. This was a recommendation of the NZ Law Commission.

rang SRV for advice as she was aware that her powers under the EPOA did not come into effect until her mother lost capacity, however she does not understand when this occurs or exactly what this means.

- 26.3 It is imperative that attorneys and persons acting on the basis of a power conferred under a POA instrument, such as a bank or aged care facility, understand the scope of the instrument and what it permits the attorney to do.

Recommendation 13

A state-wide education campaign, targeted at the health care profession (with a specific focus on aged care facilities), financial institutions, the legal profession and the public generally that simply explains the legal requirements and responsibilities of both donors and donees of POAs and enduring instruments including the importance of donor participation in decision making.

27. Jurisdiction of VCAT

- 27.1 The Instruments Act gives VCAT jurisdiction to hear applications in respect of POAs brought by the donor, attorney, Public Advocate or any other person whom the Tribunal is satisfied has a special interest in the affairs of the donor. VCAT has jurisdiction to revoke the appointment of an attorney where it is considered in the best interests of the donor to do so.

- 27.2 In addition, VCAT also has the power to make a declaration of invalidity in respect of an EPOA where:

- the donor lacked capacity at the time the EPOA was made;
- the EPOA does not comply with the requirements of the Instruments Act; or
- the EPOA is invalid for another reason, such as, it was made by dishonesty or as a result of undue influence.

- 27.3 VCAT also has the power to vary the effect of the EPOA, suspend the powers made under it and make any other order it considers necessary in relation to the EPOA.

- 27.4 The Instruments Act places a clear duty on attorneys to keep accounts in relation to the affairs of a donor of an EPOA. Section 125D of the Instruments Act provides:

An attorney under an enduring power of attorney must keep and preserve accurate records and accounts of all dealings and transactions made under the power.

- 27.5 The number of cases brought before VCAT in which issues of record keeping or abuse of powers are raised is highly disproportionate to the anecdotal and statistical evidence of the number of cases of abuse. By way of analogy, in 2003, the Alberta Law Reform Institute

⁷⁶ See Alberta Law Reform Institute, "Enduring Powers of Attorney: Safeguards Against Abuse", Final Report No. 88, February 2003.

(USA)⁷⁷ issued a report on safeguarding against abuse by attorneys in which it noted that the expense, difficulty and burden of bringing an application before the Courts was a significant barrier to the effectiveness of "accounting safeguards" built into the Alberta *Powers of Attorney Act*.

- 27.6 Whilst SRV acknowledges that VCAT's jurisdiction in relation to EPOAs aims to ensure that attorneys are accountable for the transactions and dealings they conduct in relation to a donor's affairs and that irregularities are highlighted by proper record keeping, the current regime in Victoria does not achieve this.

Case Study Example 12

Serge and Viola had been married for 15 years and more recently had been living together in a home that had been left to Viola by her first husband. Serge became quite unwell and was admitted to hospital. His daughter from a previous marriage flew down to visit and once Serge was released from hospital took him back to Queensland with her. John, Viola's son from her previous marriage, rang SRV as Serge's daughter had been in contact with Viola regarding accessing her father's finances. Serge had signed both a general and financial power of attorney and his daughter was now demanding that Viola sell the house so that she could access Serge's share of the profits from the sale. John is very concerned both for his mother and Serge as Serge's daughter has not been a part of Serge's life for many years and John has had sole responsibility for looking after Serge and his mother's finances. He believes that Serge has been pressured into signing the powers of attorney.

- 27.7 The VCAT mechanism relies on a third party to bring an application before VCAT in relation to the exercise of powers by attorney in order for any external monitoring of the power to occur. The current regime does not take into account that, in the vast majority of cases, family members act as attorneys and where donors have few support systems in place or lacks capacity to recognise when an EPOA is being abused. There are inadequate protections against elder abuse due to the limited circumstances in which an attorney may be held to account for their exercise of power.

Recommendation 14

That the new act specifically states that all decisions and orders made by VCAT be undertaken in consideration of and respect for the rights of the donor in accordance with the provisions of the Charter.

28. Power to Revoke

- 28.1 If a donor or appointor loses capacity, VCAT's role is crucial to the revocation of enduring instruments. However, there is a lack of clarity around VCAT's discretion to revoke an enduring instrument where a concerned person suspects abuse of the instrument.
- 28.2 Currently the Instruments Act and the GAA are vague in expressing when VCAT can revoke enduring instruments. Both Acts state that VCAT can do so when:

⁷⁷ Alberta Law Reform Institute, "Enduring Powers of Attorney: Safeguards Against Abuse", Final Report No. 88, February 2003.

- "it is in the *best interests* of the donor to do so";⁷⁸ and
- the enduring guardian has "not acted in the *best interests* of the appointor"⁷⁹

28.3 Further, neither the GAA nor the Instruments Act provides any guidance as to what constitutes the 'best interests' of the donor or appointer. SRV is concerned at this omission as there is no consistency in the manner in which this subjective concept is interpreted and applied.

28.4 SRV also notes there is an inconsistency between the two Acts. The GAA contain provisions for VCAT to revoke an EPOG where the guardian has acted "in an incompetent or negligent manner" while the Instruments Act does not. SRV recommends that VCAT should be given the power to revoke an EPOA on similar grounds to those provided to it in relation to an EPOG.

Recommendation 15

That the circumstances in which VCAT can revoke enduring instruments be made consistent, and that VCAT's power to revoke instruments is extended to situations where the attorney has acted in an incompetent and negligent manner.

28.5 As noted above (paragraph 28.3) the GAA does not currently specify what constitutes 'best interests' of the donor in making an assessment regarding revocation of an enduring instrument. This is concerning as 'best interests' is a subjective concept. Without guidance determinations as to 'best interests' are made entirely at the discretion of the decision maker.

28.6 However SRV notes that the GAA does provide definitions of 'best interests' in relation to other sections of the act.⁸⁰ Accordingly SRV advocates for a similar definition to be provided in relation to revocation of POAs which would include consideration of:

- the wishes of the donor, so far as they can be ascertained;
- implications of revocation for the donor;
- the wishes of interested persons/parties;
- any other matters prescribed by the regulations.

28.7 The provision of issues to be considered in the making of a determination as to the "best interests" of the donor will assist interested persons applying to VCAT for revocation of an enduring instrument in determining whether they have a strong case for doing so, and also how to prepare for such a hearing at VCAT.

⁷⁸ *Instruments Act* s. 125X(1) (emphasis added).

⁷⁹ *Guardianship and Administration Act* s. 35D (emphasis added). VCAT can also revoke when the enduring guardian has acted in an "incompetent or negligent" manner.

⁸⁰ *Guardianship and Administration Act* ss 38 and 42U

Recommendation 16

That the relevant legislation specify issues to be considered in the making of a determination as to the "best interests" of the donor to allow for clarity and certainty as to circumstances when it is appropriate to apply for the revocation of an enduring instrument. Issues to be considered should include:

- the wishes of the donor, so far as they can be ascertained;
- implications of revocation for the donor;
- the wishes of any interested persons/parties; and
- any other matters prescribed by the regulations.

28.8 Further, SRV recommends that the Act specify the grounds for which an enduring instrument can be revoked. Grounds for revocation could include:

- failure to consult the donor;
- where appropriate, a failure of an attorney or guardian to consult concerned family members or interested parties for advice regarding decisions;
- a failure to notify family members (or any persons nominated in the enduring instruments) of the intention of the attorney or guardian to take over the financial affairs of the donor once the donor is declared to lack capacity;
- a failure to properly document or record transactions carried out on the donor's behalf. (Note: these grounds need to mirror any positive obligations imposed on donors.)
- a failure to act in the best interest of the donor

28.9 Finally, SRV recommends that the new act specify what constitutes an "interested person" for the purposes of making an application to VCAT to revoke an enduring instrument. This will assist concerned family members or other concerned persons in understanding the procedures (and ascertaining if they have legal standing) for seeking the revocation of an enduring instrument once the donor has lost capacity.

Recommendation 17

That relevant legislation specify what constitutes an "interested person" for the purposes of making an application to VCAT to create clarity and certainty in respect of who has standing to make an application to VCAT.

29. Power to award compensation

- 29.1 VCAT has the power to, on application or on its own initiative, revoke an EPOA if it is satisfied that it is in the best interests of the donor to do so. Circumstances where it would be considered appropriate to revoke an EPOA include abuse of power by an attorney.
- 29.2 Section 125V of the Instruments Act grants powers to VCAT to scrutinise the actions of an attorney under a financial power of attorney. Similarly, under section 125Z, VCAT has the power to make any order(s) it considers necessary in relation to an EPOA.
- 29.3 These provisions expressly refer only to POAs in the present tense. It is therefore unclear whether VCAT's powers extend to situations where the power has already been revoked. This ambiguity has significant implications in elder abuse cases, where it can be vital that there is an ability to take action against attorneys after the POA is revoked. Given the significant barriers to reporting abuse in relation to POAs and bringing applications before VCAT, it is imperative that the donor, family, friends or other interested parties have the ability to seek orders from VCAT in respect of a POA which has been revoked, rather than having to initiate separate legal proceedings in a court.
- 29.4 Further, neither the Instruments Act nor the VCAT Act afford VCAT the power to award compensation against an attorney who has abused his or her powers, or has misappropriated or disposed of the donor's property or funds. Consequently, older individuals are required to institute separate proceedings or, alternatively, rely on criminal proceedings, to pursue such compensation. The inability of VCAT to award compensation can be contrasted with the power afforded to the courts by section 86 of the Sentencing Act. Pursuant to section 86, where the court finds a person guilty, or convicts a person of an offence, it may make an order that the offender pay compensation for any loss, destruction or damage to property, not exceeding the value of the property. VCAT does not however, have any power to make orders for the claw-back of the donor's funds where they have been misappropriated as a result of misuse of power conferred upon an attorney.

Case Study Example 13

Patricia appointed her two daughters in 2003 to be her joint attorneys by way of an EPOA (financial). In 2008, Patricia's daughters sold her house for \$340,000 and claimed that Patricia had given them \$150,000 each. There was no formal agreement that Patricia agreed to gift \$150,000 to each of her daughters. The daughters claim that Patricia had capacity at the time the alleged gift was made. The daughters now claim that Patricia has dementia and due to her disability can no longer recollect having agreed to gift the money. Patricia claims she never agreed to give her daughters the money and now wants it back. The daughters did not seek advice at the time as to whether they could accept the alleged gift, and simply transferred the money into their respective accounts.

Recommendation 18

That the new act incorporates an extension of section 125V of the Instruments Act to extend VCAT's powers to make declarations, orders, directions or recommendations with regard to POAs which have been revoked. Alternatively, VCAT guidelines or practice notes should be

published which clarify the extent of VCAT's powers and the use of such powers in relation to POAs that have been revoked.

Recommendation 19

The new act, or the Instruments Act, be amended to enable VCAT to award compensation or restitution against an attorney who has misappropriated funds without requiring separate proceedings to be brought in a court.

29.5 In other jurisdictions, penalties are imposed on attorneys for breach of their duty to the donor. The nature of the penalty which is imposed depends on the seriousness of the offence. These include:

- an attorney may have to compensate the donor for loss or damage to the donor's property due to the attorney's negligence, incompetence or fraud;⁸¹
- the attorney may be excused if the breach was due to an honest mistake and the breach ought fairly to be excused;⁸²
- the authority of the attorney may be revoked;⁸³ and
- penalties may be imposed for failure to keep adequate records, and the attorney may be obliged to meet the cost of an audit of income and expenditure.⁸⁴

29.6 For example, section 9 of the *Powers of Attorney and Agency Act 1984* (SA) provides that an attorney commits an offence if he or she fails to keep and preserve accurate records and accounts of all dealings and transactions made in pursuance of the power, and is liable to a penalty not exceeding \$1000. Similarly, section 107 of the *Guardianship and Administration Act 1990* (WA) provides that an attorney under an EPOA shall keep and preserve accurate records and accounts of all dealings and transactions made under the power. If this does not occur, the attorney is liable to a penalty of \$2000.

29.7 The current Victorian regime does not provide for any penalties or sanctions to be imposed on an attorney in the event of a misuse of power. Whilst SRV does not seek the development of a system which would be inhibited by onerous obligations and penalties, SRV does consider that it is necessary that consequences, for example by way of fine, attach to an attorney where it has been established there has been a misuse of power.

⁸¹ *Powers of Attorney Act 1956* (ACT) s. 15(1)-(3); *Property Law Act 1974* (Qld) s. 175H; *Powers of Attorney and Agency Act 1984* (SA) s. 7; *Powers of Attorney Act 1934* (Tas) s. 11C(1); *Guardianship and Administration Act 1990* (WA) s. 107(1)(a)

⁸² *Powers of Attorney Act 1956* (ACT) s. 15(4); *Property Law Act 1974* (Qld) s. 175I.

⁸³ *Powers of Attorney Act 1956* (ACT) s. 17(1)(c); *Conveyancing Act 1919* (NSW) ss. 163G(2)(a), (3)(b), (e); *Powers of Attorney Act 1980* (NT) ss. 15(2)(c), 17; *Property Law Act 1974* (Qld) ss. 175C, 175G(1)(c); *Powers of Attorney and Agency Act 1984* (SA) s. 11; *Powers of Attorney Act 1934* (Tas) s. 11E(1)(c); *Guardianship and Administration Act 1990* (WA) s. 109(1)(c).

⁸⁴ *Property Law Act 1974* (Qld) s. 175D; *Powers of Attorney and Agency Act 1984* (SA) s. 8; *Guardianship and Administration Act 1990* (WA) s. 107(1).

Case Study Example 14

Brian was persuaded into signing an EPOA (financial) and an EPOG, appointing his niece Kate to be his attorney and guardian respectively. Brian had mild cognitive decline at the time and was quite vulnerable. Kate decided to exercise her power not long after and approached a GP, unbeknown to Brian, in order to obtain a medical report stating that Brian could not manage his financial affairs. Kate then advised Brian that he had to move into her granny flat which was out the back of her house. Kate took Brian's bankcards and all identification. Kate then allowed her son to reside in Brian's house free of charge. Kate withdrew a few hundred dollars from Brian's account every fortnight and did not keep receipts of payments she made. Kate also withdrew \$80,000 from Brian's bank account to loan to her son. Kate claims Brian agreed to loan the money to Kate's son. Brian has no recollection of the agreement. The case was referred to VCAT. VCAT found that Kate was not acting in Brian's best interests, had not kept accurate records of all transactions, and Kate's interests were in conflict with the interests of Brian. The EPOA (financial) and EPOG were revoked. However, VCAT did not have the power to make an order to recover the money taken from Brian's account. No other action was taken against Kate by VCAT.

Recommendation 20

That the new act or consolidated acts incorporate penalties for failing to comply with the obligations under the act. This should incorporate an amendment to section 125D of the Instruments Act creating an offence for attorneys not to keep accurate records, or to permit VCAT to impose a fine on persons who have been found to have abused the powers conferred under a POA in addition to outlining mechanisms for the recovery of any monies misappropriated by the attorney.

PART 6 CONCLUSION

30. Part 2 of this submission introduced the concept of elder abuse and its prevalence in Victoria. The discussion was framed within a human rights context which recognises the empowerment delivered through the use of human rights to marginalised and disadvantaged individuals, such as they adversely affected by elder abuse. It went on to highlight the importance of legislative reform with regard to powers of attorney and guardianship as a mechanism for assisting in the reduction of elder abuse. This is particularly pertinent as Victoria's population is ageing and accordingly the prevalence of elder abuse is expected to increase.

31. Part 3 of this submission provided an analysis of the differing requirements for POAs and enduring instruments as currently provided for in the Instruments Act and the GAA. A case study approach was used to highlight the uncertainty and confusion engendered by the current requirements and the lack of definitions for many core terms. A number of recommendations were made which SRV believes will assist in making the legislative framework governing substituted decision making processes more accessible to those most in need of assistance.

32. Part 4 examines the issue of capacity, both with regard to the creation of legal instruments and the execution of enduring instruments. This submission recognises that capacity is a complex issue and one that is integral to the correct execution of both general POAs and enduring instruments. Recommendations are made with regard to the implementation of a test as to legal capacity recognising the extensive work already undertaken in this area by Darzins et al, aspects of which are currently utilised in other jurisdictions, such as Queensland.

33. Finally part 5 explores further measures to limit the potential for the misuse and abuse of POAs and enduring instruments. Additional recommendations are made which SRV believes will reduce the prevalence of elder abuse in Victoria including a state-wide education campaign directed toward both professionals and individuals. Additional recommendations are made with regard to the jurisdiction of VCAT in recognition of the fact that abuses do occur.

Annexure A

Comparison of formal requirements for POA documents under Victorian Legislation

Power	General POA (Instruments Act)	EPOA (financial) (Instruments Act)	Enduring Guardian (Guardianship and Administration Act)
Form	Must be executed in the form set out in Schedule 12 of the Instruments Act.	Must be executed in the "approved form" set out by the Secretary of the Department of Justice.	Appointment of an enduring guardian is made in the form of, or to the effect of, Form 1 in Schedule 4 of the Guardianship and Administration Act.
Execution	A general POA is executed by the donor or by another at the direction and presence of, the donor.	An EPOA is executed by the donor or by an "eligible person", at the direction and in the presence of, the donor.	A person who is of or over the age of 18 years may, by document in writing, appoint a person to be his or her enduring guardian or alternative enduring guardian.
Witnesses	Where a donor directs another to sign on their behalf, a general POA must be executed with "two other persons" present as witnesses.	An EPOA must be witnessed by two adult witnesses, in the presence of the donor and each other. Only one may be a relative. One must be authorised by law to witness the signing of a statutory declaration, such as a lawyer.	Execution of the document of appointment must be attested by two witnesses. The witnesses must not be: - a party to the document; - a relative to a party to the document; and - the person appointed as the enduring guardian or alternative enduring guardian. One witness must be authorised by law to witness the signing of a statutory declaration.

Power	General POA (Instruments Act)	EPOA (financial) (Instruments Act)	Enduring Guardian (Guardianship and Administration Act)
Attorneys & Enduring Guardian	A general POA can be provided by the donor to one or more attorneys acting jointly or acting jointly and severally.	An EPOA can be provided by the donor to one or more attorneys acting jointly or acting jointly and severally.	An EPOG may only appoint one guardian, but may also appoint an alternative decision maker.
Third persons	Attorney and third parties are provided protection under a POA. A donor is bound by the action of an attorney and/or third parties after the revocation of the POA where the attorney did not have notice of that revocation.	Attorney and third parties are provided protection under an EPOA. A donor is bound by the action of an attorney and/or third party after the revocation of the EPOA where the attorney acted in good faith and did not have notice of the power's invalidity.	
Revocation	A general POA is automatically revoked when the donor loses capacity. The POA can be revoked in writing at any time by the donor.	An EPOA can be revoked: - expressly when the donor has capacity; - on application to VCAT if satisfied it is in the best interest of the donor to do so.	An enduring power of guardianship can be revoked: - in writing by the appointor; - by VCAT if the appointor lacks capacity.
Recognition in other jurisdictions	N/A	An EPOA made in another State or Territory is recognised in Victoria.	Guardianship orders made under a corresponding law of a participating State in respect of a person who resides in the participating State and proposes to enter Victoria or has property situated in Victoria.