

**ENDURING POWERS OF ATTORNEY IN VICTORIA  
- A SUBMISSION FOR LEGISLATIVE AMENDMENT**

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**PREPARED BY THE PUBLIC ADVOCATE  
MAY 2001**

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## **Preface**

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This document has been prepared by the Public Advocate and argues a case for law reform in relation to enduring powers of attorney (financial/legal) in Victoria.

While the document represents the views of the Public Advocate it reflects, in part, feedback received from a range of individuals and organisations on an earlier draft. Those consulted are identified in the Appendix.

## 1. Introduction.

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One of the primary functions of the Public Advocate is to assist in ensuring that people with disabilities are protected from abuse, exploitation and neglect. This is consistent with the values of a civil society in which those who are perceived as vulnerable are protected by the law. Such legal protections are, in part, effected by the mechanisms of guardianship and administration, pursuant to the *Guardianship and Administration Act* 1986, and by Powers of Attorney.

A General Power of Attorney confers authority on another to make decisions, this power ceasing to exist when the donor of the power loses capacity. In contrast, an Enduring Power of Attorney (EPA) continues to have effect after a person loses capacity in relation to his or her affairs, hence its enduring quality. In this document, the focus is on an EPA for financial/legal decisions.

An EPA is therefore an important instrument in that it allows all members of the community, before they have a disability that affects their decision-making capacity, to exercise a measure of control over their lives. It contributes significantly to enhancing individual self-determination and autonomy in alternative decision-making.

However, this is not to deny that abuse exists in relation to arrangements surrounding EPAs. It is for this reason that the Public Advocate is proposing amendments to the legal framework in order to assist in the creation of a more robust instrument and enhance the ways in which its use can be monitored. It is essential that the legal mechanisms which are purposely designed to protect vulnerable and disadvantaged people from abuse and exploitation are as effective as possible.

The submissions for reform relate to three primary areas:

- improving the standards for execution of the instrument;
- refining jurisdictional issues and powers in relation to the monitoring and use of EPAs; and
- enhancing the legal system's capacity to appropriately respond to situations of abuse and exploitation.

From a general perspective, the proposals are consistent with the Victorian State Government's policy of empowering both communities and individuals, and also reflect the Government's stated interest in the needs of people who may be disadvantaged and those with disabilities.

The proposals are also consistent with the key directions for the Justice Portfolio. Not only will they assist in enhancing community safety, in a broad sense, but importantly, they will contribute to the creation and promotion of a just society, where appropriate protections exist for those groups and individuals who are currently, or may become, vulnerable.

## **2. The current legal and practice framework for EPAs**

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While it is recognised that EPAs exist for decisions relating to medical treatment under the *Medical Treatment Act 1988* and for lifestyle decisions, in the form of an Enduring Power of Guardianship pursuant to the *Guardianship and Administration Act 1986*, this submission focuses specifically on EPAs created under section 114 of the *Instruments Act 1958*. An EPA executed under this section must be attested by two witnesses of whom neither is the Attorney (section 115) and usually relates to the management of an individual's financial and legal affairs.

Section 118 of the *Instruments Act 1958* provides the Victorian Civil and Administrative Tribunal – Guardianship List (“the Tribunal”) with the power to revoke an EPA where the Tribunal is satisfied that it is “not in the best interests of the donor of an enduring power for the power to continue.” In this context, an application can be made to the Tribunal by the Public Advocate or any person who, in the opinion of the Tribunal, has a special interest in the affairs of the donor. The majority of such applications to the Tribunal are investigated prior to the hearing by staff in the office of the Public Advocate (OPA).

The Supreme Court has inherent jurisdiction in relation to EPAs, for example to determine issues on the execution of an EPA such as capacity.

In terms of the practice related to EPAs, it is often the legal profession that advises donors and donees on, and assists with, the execution of the instrument. EPA information kits are also available, at post offices for example, to provide individuals with direction in preparing documents. The medical profession may assess for capacity and may also have a significant role in advising clients and their families on arrangements surrounding EPAs.

### 3. Looking back – EPAs and law reform in Victoria

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In April 1990, the then Law Reform Commission of Victoria prepared a discussion paper on EPAs<sup>1</sup>. Following a period of consultation, the Commission produced its report on Enduring Powers of Management.<sup>2</sup> The choice of the word “management” rather than “attorney” was seen as a positive initiative, more clearly indicating the nature of the enduring power in contemporary language. In its report the Commission identified a range of major issues for consideration in the current legal arrangements at page 2:

- competence
- undue pressure
- revocation
- cancellation
- protection of managers & third parties
- flexibility
- the manager’s obligations
- reciprocity.

Many of these issues were identified in recognition that “the risk of a person becoming incompetent to handle his or her affairs is not negligible” (p.2). Many of these issues also remain relevant today as reflected in this submission.

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<sup>1</sup> Law Reform Commission of Victoria, *Discussion Paper No. 18 – Enduring Powers of Attorney*, Melbourne, April 1990

<sup>2</sup> Law Reform Commission of Victoria, *Report No. 35 – Enduring Powers of Management*, Melbourne, August 1990

#### 4. Scoping the need for EPAs and the potential for abuse

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Given the increasing prevalence of age-related disabilities associated with the longevity of the general community, it is likely that there will be an increasing need for substitute decision-making instruments such as the EPA. One significant barrier to the meeting of this need is the limited knowledge in the community of the mechanisms for substitute decision-making which are available. Relevant information on such mechanisms may also be difficult to access. This, in turn, may limit the choices for an individual and ultimately affect the potential for abuse in relation to his or her circumstances.

The Office for Older Australians, which is part of the Commonwealth Department of Health and Aged Care, has provided the following statistics on the ageing of the Australian population and the proportion of the population that will experience some form of dementia.<sup>3</sup> In 1997, 12% of the total population was aged 65 years and over. This percentage is projected to increase to 18% in 2021 and to 26% in 2051. Currently, at the age of 65 years, 5% of the population has some form of dementia. This increases to 20% of the population, or 1 in 5 people, at the age of 80 years. In essence therefore, while recognising that the figures are projections and that medical advances may have a significant impact in the area, they indicate that there is likely to be a much greater number of people with dementia-related illnesses in the coming years.

It is acknowledged that the information available on matters of abuse and exploitation in relation to EPAs is fragmented and not easily accessible. However, some material is both available and instructive. The Australian Institute of Criminology is clearly interested in this field of research. In its Trends and Issues Paper, titled *Substitute Decision Making and Older People*<sup>4</sup>, the authors argue that while abuse does not appear to be widespread, it is likely to occur as a consequence of:

- limited understanding of the EPA by the donor;
- the trust placed by the donor in families, friends and professionals to act in his or her best interests; and
- the processes involved in using an enduring power of attorney.

The authors conclude that “*when issues of limited knowledge, trust and questionable processes interact with a sense of relief at having relinquished control over decision making come together, the potential for abuse is amplified. A further concern is that these aspects are often combined with older people’s vulnerability linked to both frailty and conditions of dependency often associated with residential care.*”<sup>5</sup>

Interestingly, this document makes reference to an FBI Law Enforcement Bulletin produced in 1994 which claimed that “powers of attorney may be the single most abused legal document in the American judicial system”.

In a recently released discussion paper of the New Zealand Law Commission, titled *Misuse of Enduring Powers of Attorney*, it is acknowledged that it is difficult to assess

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<sup>3</sup> Telephone communication from a staff member in the Office for Older Australians on 13 February 2001.

<sup>4</sup> D. Setterlund, C. Tilse & J. Wilson, “Substitute Decision Making and Older People”, *Trends and Issues Paper* No 139, December 1999, Australian Institute of Criminology, Canberra

<sup>5</sup> *Ibid*, pp4-5

the extent of abuse as no one knows the number of EPAs which have been executed and also because it is likely that there is hidden misuse. However the report does state that what is known is that:

- the enduring power of attorney system, with its lack of safeguards, provides opportunity for misuse;
- overseas experience and that of New Zealand points to the frequency of the economic exploitation of the aged;
- social and welfare workers are convinced of the occurrence of misuse and can provide anecdotes as to its occurrence;
- an examination of 130 case studies of elder abuse compiled by Age Concern Auckland in a two year period, showed 40 cases attributable to misuse of an enduring power of attorney.<sup>6</sup>

These observations would seem to be supported by recent Australian research, specifically the report of the Australian Institute of Criminology on “Preventing Crime Against Older Australians”<sup>7</sup>. This asserts that, while older people are less at risk of criminal victimisation than other age groups in the community, there is a real vulnerability which stems from abuse of older people by family members and professional carers. One aspect of this abuse is labelled “economic crime” which is seen as particularly significant and may occur as a consequence of financial mismanagement, fraud and the use of, and circumstances surrounding, EPAs:

*“ The impact of economic crime can have a devastating effect on older people. Not only can a comfortable lifestyle collapse, but they may not have the time or the opportunity for financial recovery. A blow to financial security is often a permanent and life threatening setback, characterised by fear, lack of trust, and is often the onset of acute and chronic anxiety.”*<sup>8</sup>

In Western Australia, the Public Advocate has recently reported on research completed into the financial abuse of vulnerable older people.<sup>9</sup> It has analysed applications to the State Guardianship and Administration Board over a three year period where these applications contained allegations of financial abuse in relation to an older person. Ten percent of all applications contained such allegations (141 in number). Of these, 31 involved allegations of abuse of an EPA.

Similarly, in the New South Wales Guardianship Tribunal *Annual Report 1999-2000*, information is included on a survey conducted to gather details on the number of hearings in which issues of abuse were raised or identified. Financial abuse was the most common form of abuse identified in the survey.

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<sup>6</sup> Law Commission, Preliminary Paper 40 – Misuse of Enduring Powers of Attorney, May 2000, Wellington, New Zealand, p. 6

<sup>7</sup> M. James & A. Graycar, “Preventing Crime Against Older Australians”, *Research and Public Policy Series*, No. 32, July 2000, Australian Institute of Criminology, Canberra.

<sup>8</sup> *Ibid*, p. 78

<sup>9</sup> Office of the Public Advocate, *Annual Report 1999-2000*, Western Australia, p. 24.

While it is acknowledged that, inevitably and of course, not all allegations of financial abuse will be substantiated, such studies provide some indication of the extent of abuse which may exist.

Closer to home, the Alzheimer's Association of Victoria, in conjunction with LaTrobe University, released a discussion paper during 2000 on *Overcoming Abuse of Older People with Dementia and their Carers*. This paper identifies the risk of financial abuse that can exist for its client group. It states:

*“People with dementia were recognised as being vulnerable to financial abuse through compromised decision-making skills combined with the lack of an advocate”* (p. 36)

And further:

*“Having control of the finances of a person with dementia was seen as a tool for exercising control over the older person: ‘Sometimes you see someone who’s controlling the finances of the person with dementia and they have control of them.’”* (p. 37).

Interestingly, the March 2001 Newsletter of the Victorian Legal Practitioners Liability Committee covered powers of attorney and offered the following information, once again emphasising the issue of possible abuse:

*“ Powers of attorney have been at the centre of almost \$1m in negligence claims against practitioners in recent years....As powers of attorney are open to abuse, the best risk management strategy when preparing or examining one is to maintain a healthy scepticism.”*<sup>10</sup>

While it is beyond the scope of this submission to further document anecdotal evidence to demonstrate the “economic crime” which may occur with vulnerable people, a case study contained in a state departmental document<sup>11</sup> is instructive:

*“ Mrs D, aged 83, had been steadily declining with dementia. While still mentally competent, Mrs D had signed an Enduring Power of Attorney (EPA) appointing her daughter. The daughter arranged for Mrs D to move in with her. Later she sold Mrs D’s home, arranged for Mrs D to move into a cheap supported residential service, bought an interstate property with the \$180,000 proceeds of the house sale and left Victoria. The matter was brought to the Guardianship Board. The Board revoked the EPA as not being in Mrs D’s interests and appointed the State Trustees instead. However, the Police Fraud Squad believed the money could only be retrieved by civil action as no crime had occurred.”*

During the past year July 1999 - June 2000, staff of the Victorian office of the Public Advocate (OPA) responded to some 900 telephone enquiries (as part of its Telephone Advice Service) relating to EPAs<sup>12</sup>. This is around 15% of the total calls received. OPA staff also investigated 735 applications before the Tribunal, at least two thirds of which related to the revocation of an EPA which, it was alleged, was not being used in

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<sup>10</sup> Legal Practitioners Liability Committee, *In Check Newsletter*, No. 14, March 2001

<sup>11</sup> Victorian Department of Health and Community Services, *With Respect to Age. A Guide for Health Services and Community Agencies Dealing with Elder Abuse*, May 1995, Melbourne, p. 42

<sup>12</sup> Note that this is a conservative estimate.

a person's best interests. Some examples of the risk areas associated with EPAs of which OPA is aware through its work include donor capacity in the execution of an EPA, transfer of funds by an attorney for the attorney's personal use to acquire assets or, in some instances, for gambling, emotional and financial distress caused by the execution of multiple EPAs, 'early' distribution of an older or disabled person's estate by an attorney through the use of an EPA and lack of understanding by the donor and donee of the role and responsibilities attached to the power. It should be noted that these risk areas are commonly observed by OPA staff.

A relevant case study included in OPA's 1996-1997 Annual Report<sup>13</sup> follows:

Joyce is an 87 year old widow who lives alone in her own home. She was first assessed in 1992 and found to have 'severe cognitive defects'. Her nephew Frank became concerned that bills were accumulating, repairs were needed to her home, and that some family members had said that Joyce should be 'put in a home' and her house sold. Frank applied to the Guardianship and Administration Board to have a guardian and administrator appointed for Joyce. The application subsequently became the subject of an OPA investigation.

Whilst the OPA investigator was visiting Joyce, her son Roger appeared. He advised that Joyce had recently appointed him as Enduring Power of Attorney and that any queries regarding her situation should be directed to her solicitor. When asked by the investigator, Joyce was unable to explain what an EPA was. Roger acknowledged that he had sought the EPA from his mother on learning that an application had been lodged with the Board.

The investigator's report recommended that the EPA be revoked on the grounds that the circumstances surrounding the execution of the instrument may not have been in Joyce's best interests. The Board ordered that the EPA be revoked and appointed Roger as administrator and the Public Advocate as accommodation guardian.

OPA has been, and continues to be a strong advocate of the benefits of the EPA in its capacity to enhance both the autonomy and independence of a person with a disability or indeed any member of the community. Fundamentally, it enables an individual to plan for his or her future. A well thought out and properly executed EPA can ultimately prevent the appointment of an administrator, if capacity is lost, and in this way is a much less restrictive option for any person. It is within this context that the following suggested legislative amendments are made.

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<sup>13</sup> Note that at the time of this case study, the former Guardianship and Administration Board was in existence.

## 5. Proposed Amendments

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The suggested amendments are organised under three headings as identified at the commencement of this document:

- improving the standards for execution of the instrument;
- refining jurisdictional issues and powers in relation to the monitoring and use of EPAs; and
- enhancing the legal system's capacity to appropriately respond to situations of abuse and exploitation.

### *Improving the standards for execution of the instrument (amendments to the Instruments Act 1958)*

- **The prescribed form**

Section 104 of the *Instruments Act 1958* currently requires an EPA to be “in or to the effect of the form set out in Schedule 13” to the Act. This wording has led to a view amongst some practitioners that no amendment can be made to the form without imperilling its validity. An amendment to these words which states that “an EPA must be in or substantially in the statutory form” would clarify this issue.

- **The prescribed form to include space for the expression of wishes or directions**

This would assist in providing some clarity in relation to the expectations of the donor. Such wishes could include the use or sale of the donor's personal property, provision for dependents, the person/s to be consulted on major financial and legal decisions and the like. Wishes and directions would be morally persuasive rather than legally binding. The amendment recognises the existence of a similar capacity in the form contained in Schedule 4 to the *Guardianship and Administration Act 1986* for an Enduring Power of Guardianship.

- **The prescribed form to include a statement that all previous EPAs are revoked**

This simple insertion would assist in enhancing certainty in the execution of an EPA and clarify its intent.

- **The prescribed form to include a statement of acceptance by the donee and a specimen signature**

By completing a statement of acceptance within the prescribed form, the donee will be aware of the existence of the EPA. Such a statement provides a specimen signature and gives weight to the significance of the document. The donee may, therefore, more readily appreciate his or her role and responsibilities in relation to the donor. This may also assist in minimising fraud.

- **The prescribed form to include notes on the meaning of “joint” and “joint and several”**

These notes would assist the donor in understanding, and making decisions about, how the power being donated is to be executed.

- **The prescribed form to specify the duties and responsibilities of the donee**

Duties and responsibilities of the donee could be stated within the prescribed form (and the legislation) and incorporated within a statement of acceptance to be completed by the donee. These duties could include the keeping of financial records, acting honestly, acting with reasonable diligence, avoiding a conflict of interest and acting in the donor’s best interests. Simple general statements are to be preferred. One of the advantages of stating the responsibilities in this way would be as an educative tool for the donee (and donor) to provide better knowledge of the role and responsibilities expected and thereby nominate possible areas of accountability. This should not, of course, affect the donor’s ability to specifically exclude a power to act in relation to particular matters or assets.

This reform could also be used as an opportunity to clarify areas of uncertainty in the law relating to the ability/duties of an attorney to claim possession of the will of a donor or have access to a copy of the donor’s will.

A statement could also be included within the prescribed form acknowledging that the Victorian Civil and Administrative Tribunal may revoke the EPA if it is not in the donor’s best interests for it to continue.

- **A test of competence to be included in the relevant legislation**

A test of competence puts all participants on notice and underscores the fact that a legal document is being created and executed. The test of competence should be that the donor understands:

- the nature and extent of his or her estate<sup>14</sup>;
- the extent of the powers available to the donee, namely that the donee has the same powers as the donor would have if they were competent;
- his/her right to revoke the power at any time whilst competent to do so;
- the autonomy of the attorney, in that he or she can operate without supervision, which suggests a reliance on the donee’s credibility and trustworthiness;
- that the Victorian Civil and Administrative Tribunal may revoke an EPA if it is not being used in the donor’s best interests;
- that the power will otherwise continue indefinitely, even after the donor is no longer competent to make reasonable decisions on his/her own behalf.

- **The witnessing of the document**

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<sup>14</sup> In examining this aspect, allowance should be made for circumstances in which a donor may not reasonably be expected to have this knowledge, for example, an older woman who has not been responsible for, or involved in, decision-making in relation to her estate during her lifetime.

Two witnesses should sign the instrument in the presence of the donor. One witness should be able to witness statutory declarations. The donee (or donor) or their relatives should not be able to witness the EPA. Such provisions will signify the importance of the document being executed.

- **Witnesses to attest that the donor has executed the document voluntarily**

The witnessing of the document in this manner should serve as a verification that there has been no duress in the execution of the instrument and that the witnesses have seen the donor sign the document.

- **Need for a ‘certificate of capacity’ or verification as to capacity**

Consideration should also be given to whether the instrument should include a prescribed ‘certificate of capacity’, signed by an appropriately qualified person and attached to the form. This would address the issue of competency of the donor, where this may be of concern. Alternatively, witnesses may also attest that, in their opinion, the donor understands the nature and effect of the power at the time of signing.

- **Revocation of earlier EPAs to occur as a consequence of a validly executed EPA**

The existence of multiple EPAs can cause significant confusion and may severely disadvantage the donor. The ability to sign multiple EPAs is not in the best interests of people with disabilities, mitigates certitude, and is inconsistent with contemporary legal principles as evidenced by the law pertaining to wills and medical enduring powers of attorney.

However, where an attorney has not been notified of the revocation, protection should be given to his or her actions.

- **Revocation of an EPA must occur as a consequence of the appointment of an administrator.**

The appointment of an Administrator by the Victorian Civil and Administrative Tribunal must automatically revoke any pre-existing EPA. A new EPA should be seen as invalidly executed whilst an administration order is in place. The powers of administration are, in many ways, parallel to those of a financial attorney, and it is not in the best interests of people with disabilities for the two to co-exist.

There may also be some merit in considering the circumstances in which an EPA could be suspended (and subsequently restored if necessary) rather than revoked in the context of the appointment of an administrator.

- **A donee cannot be a person who is bankrupt**

An EPA should be invalidated if the attorney becomes bankrupt. This is consistent with the requirements of administration.

- **A form which revokes an EPA to be included in the legislation**

The donor, while competent, should have access to an appropriate form to revoke an EPA as part of the legislation, together with provisions which set out how an EPA may be revoked, reflecting the common law. Two adults should witness a revocation in the same way as an EPA is executed. The use of this form should not be a compulsory legislative requirement for revoking an EPA.

- **Prescribing when the power of an EPA becomes available to the donee**

Currently an EPA can be invoked immediately it is executed, although, in theory, this will often occur at the direction of the donor. It would be desirable for the relevant form to contain a clause to allow the donor to nominate when the power can be invoked. Possible choices could be specified as follows:

- immediately (as is the case at the moment);
- when the donor loses capacity (This could be determined by a report from a registered medical practitioner. Where a dispute existed, an interested person could seek a declaration from the Victorian Civil and Administrative Tribunal if capacity was contested. If adopted, this would necessitate an amendment to Part 9 of Schedule 1 to the *Victorian Civil and Administrative Tribunal Act 1998* to allow at least legal members of the Tribunal to make declarations);
- at a specified point in time or at a specified event; or
- for a specified period.

The current arrangement is problematic as the donor is usually unaware that the donee can exercise power pursuant to the EPA immediately. The suggested amendment would facilitate choice, empowerment and would maximise the donor's control.

The legislation could contain a default provision that, in the absence of a contrary intention appearing in the EPA, it becomes effective at the time of execution by the donor.

### ***Refining jurisdictional issues and powers in relation to the monitoring and use of EPAs***

- **Increased authority for the Public Advocate (and staff in the office of the Public Advocate by delegation) to investigate EPAs**

When investigating EPAs, such as is required following a referral from the Victorian Civil and Administrative Tribunal to assist in its decision-making, the wording of the *Guardianship and Administration Act 1986* means that information must be obtained through negotiation with, or by the persuasion or cooperation of the parties involved, as there is no compulsion at law to provide the information to OPA staff. In short, OPA staff can only “request”, rather than “require”, information to be provided (section 16(ha) of the *Guardianship and Administration Act 1986*).

The authority to investigate EPAs should relate to matters before the Tribunal, which are then referred to OPA, as well as to those that come directly to OPA.

- **Consolidating the jurisdiction of the Victorian Civil and Administrative Tribunal in relation to EPAs**

The Tribunal should be empowered to deal with matters relating to the coming into operation of an EPA (contested issues of capacity), and the execution and use of EPAs, in addition to making determinations under section 118 of the *Instruments Act 1958* for the revocation of an EPA. These jurisdictional powers should not interfere with the existing powers of the Supreme Court in these areas, the Tribunal and the Court having concurrent powers. Both jurisdictions would also have power to transfer proceedings to the other jurisdiction and power to stay a matter if, for example, proceedings were brought before both forums.

The Tribunal should also be empowered to act on its own initiative rather than needing an application before it to revoke an EPA (section 118 of the *Instruments Act 1958*). This would be useful in circumstances where, during the hearing of an application for administration, it emerges for the first time that an EPA is in existence and the Tribunal determines that it is not in the best interests of the donor for this to continue.

Regardless of the accessibility of the Supreme Court jurisdiction, for some people the availability of a parallel jurisdiction in the Tribunal may meet their needs. The Tribunal has expertise in dealing with the question of disability and incapacity and is well placed to address matters involving EPAs. More specific powers are outlined below.

- **Incompetent at the time of execution**

The Victorian Civil and Administrative Tribunal, should have the power to revoke an EPA on the grounds that the donor did not meet the criteria for the test for competency specified in legislation. (A declaration would state that the donor did not have the necessary degree of capacity at the time the power was made. This would necessitate amendments to Part 9 of Schedule 1 to the *Victorian Civil and Administrative Tribunal Act 1998* to give, say legal, members a power to make a declaration.)

At present the Supreme Court has a declaratory power with regard to the execution of enduring powers of attorney while the Tribunal is restricted to investigation in relation to the proper “best interests” use of the enduring power of attorney, pursuant to section 118 of the *Instruments Act*. The Supreme Court would retain its inherent jurisdiction.

The Public Advocate is of the view that consideration should also be given to the creation of an offence where the revocation of an existing EPA, or the creation of a new EPA, is procured from a person without capacity.

- **Clarification of what is intended by “best interests” in the legislation**

The Tribunal may revoke an EPA following a determination by the Tribunal that it is not in the best interests of the donor for the power to continue. These provisions

are currently contained in section 118 of the *Instruments Act 1958*. Some legislative clarification of what is not in the “best interests” of a donor should be specified. This may include:

- financial abuse;
- exploitation;
- a conflict of interest;
- incompetence or unwillingness of the attorney to act or invoke the EPA;
- or
- an injurious conflict between family members or other interested parties regarding the use of the EPA.

Note that, for example, an injurious conflict will not of itself mean that an EPA is not being used in the best interests of the donor and careful consideration will be required of the facts presented in any case.

- **The Tribunal to establish disability and incapacity prior to revocation of an EPA**

As previously stated, section 118 of the *Instruments Act 1958* provides that the Tribunal may revoke an EPA if it is not in the best interests of the donor for the power to continue. Prior to such revocation, the legislation does not require that the Tribunal establish the donor’s current capacity/incapacity. It is submitted that before making a finding on the question of “best interests”, the Tribunal should first establish the person’s current disability and incapacity, in a similar manner to that prescribed in section 22 of the *Guardianship and Administration Act 1986* before the making of a guardianship order. This will ensure that revocation is not occurring in circumstances where a competent donor has simply given a power that others find unacceptable for some reason.

- **The issue of registration**

It is the understanding of OPA that the following table indicates the status of the registration of EPAs in jurisdictions around Australia:

<b>State /Territory</b>	<b>Status of Registration</b>
Australian Capital Territory	No central system of registration exists. Registration of an EPA with the Land Titles Office is required where there is a property transaction.
Northern Territory	Voluntary registration system exists but EPA must be registered before being used with the Land Titles Office .
New South Wales	Voluntary registration system exists with the Register Generals/ Land Titles Office. For a transfer of real estate, registration is compulsory.
South Australia	No central registration system in place, although registration with the Land Titles Office is required when dealing in property.
Queensland	No central system of registration in place. Registration is required with the Land Titles Office when there is a transaction in property.
Western Australia	No central registration system in place,

	although registration of land dealings involving an EPA is required with the Land Titles Office.
Tasmania	System of voluntary registration exists with the Recorder of Titles, a statutory office. EPA must be registered before being used for any transaction.
Victoria	No system of registration in place. Note that the Victorian Lawyers RPA Practice Rules under the <i>Legal Practice Act 1996</i> require law firms to maintain a register of EPAs where a member of the firm is the donee.

While a small number of voluntary registration schemes exist and registration is required in most States for property transactions, no State has confronted the issue of a compulsory registration system for EPAs when executed. Despite this, the Public Advocate recommends that an inexpensive and accessible registration system be established for EPAs and that such registration should be compulsory upon execution of the instrument, rather than at the time of use, and available electronically as well as by more traditional means. Registration upon execution will assist in identifying any problems in the form or content of the instrument, which could then be remedied prior to any loss of capacity.

This recommendation is not to suggest that the issue of registration is a simple one as indeed the following benefits and disadvantages of registration indicate:

#### *Disadvantages*

- the costs of establishing and maintaining a register, and in searching a register;
- increased lack of flexibility in relation to revocation;
- potential delays in registration procedure;
- the possibility that registration may deter potential donors and donees;
- militates the essentially private nature of the arrangement by making it more bureaucratic.

#### *Advantages*

- enhances accountability and facilitates greater capacity for monitoring and scrutiny of an Attorney's activities;
- allows the community to search the register;
- emphasises the seriousness of the instrument;
- would assist in mutual recognition of interstate EPAs, if such an arrangement were to be introduced;

- creates certainties for third parties in their dealings with EPAs.

On balance, the requirement for registration is seen as a highly desirable initiative in the context of the potential abuses highlighted throughout this submission. It is an initiative in the broad public interest with a particular focus on those who are vulnerable. Issues of who would maintain the register, what it would contain and how material would be stored remain to be answered, as well as the critical issue of funding. Given the lead time which would inevitably be required to finalise and establish a registration system, it is suggested that the amendments proposed in this submission be undertaken in two stages as follows:

- Stage 1 – all reforms other than those relating to the establishment of a registration system;
- Stage 2 – reforms related to the establishment of a registration system.

If a register of EPAs is established this should also have the capacity to take account of relevant administration orders.

- **Other mechanisms for monitoring the use of EPAs**

Consideration should also be given to other safeguards which would assist in monitoring the use of EPAs. Some examples follow:

- a duty being imposed on the donee to keep accounts (with legislation specifying what this requirement involves);
- a prohibition on distributing real estate without approval of the Victorian Civil and Administrative Tribunal;
- random auditing of the use of EPAs, at the direction of the Victorian Civil and Administrative Tribunal, or otherwise; and
- periodic auditing of the use of EPAs by an appropriate organisation, such as State Trustees, or examination by the Victorian Civil and Administrative Tribunal in a similar vein to that currently required of an administrator.

This suggestion is supported by comments in a recent journal article, the author of which is Terry Carney:

*“One area which Australian jurisdictions largely ignore is regulation and oversight over persons appointed under continuing powers of attorney. Generally these become investigated only if fraud allegations are made or management orders sought. In some North American states or provinces a public body has the responsibility to monitor these powers both when they are created and when they are activated. Even England and Wales require registration of enduring powers of attorney with the Public Trustee.”*<sup>15</sup>

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<sup>15</sup> T. Carney, “Abuse of Enduring Powers of Attorney – Lessons from the Australian Tribunal Experiment?” *New Zealand Universities Law Review*, vol 18, December 1999, p. 492

***Enhancing the system's capacity to appropriately respond to situations of abuse and exploitation***

- **Capacity to refer situations of EPA abuse to the Department of Public Prosecutions**

The Victorian Civil and Administrative Tribunal should be empowered to refer any finding of abuse of power or exploitation by an Attorney in his/her performance of duties to the Department of Public Prosecutions where these are criminal in nature. This amendment will facilitate the prosecution of Attorneys who commit criminal acts in the course of their duties and in breach of their fiduciary relationship with the donor.

- **Civil responses/remedies to situations of abuse**

Currently, where abuses are alleged in relation to the use of an EPA, and an administrator is subsequently appointed, that administrator will determine whether any civil action is taken to recover funds removed inappropriately from an estate. In addition, consideration should be given to whether the powers of the Victorian Civil and Administrative Tribunal should be expanded to, for example, facilitate restitution of an estate or set aside transactions and the like.

- **Protection from liability where EPA exercised in good faith**

Protection from liability should be afforded to the donee and any third party if an otherwise invalid power is used in good faith, and in the reasonable belief that it is valid. This recommendation is consistent with section 110 of the *Instruments Act* which relates to a general power of attorney, and would assist in alleviating related concerns of potential Attorneys. This means that a third party who relies on a power which is invalid would be protected, provided that the third party did not know, or have reason to believe, that the EPA was invalid.

- **Protection to beneficiaries under a will where attorney has not acted in good faith (or has sold an asset depriving a beneficiary from their entitlement)**

Section 53 of the *Guardianship and Administration Act* 1986 should be extended to protect potential beneficiaries under a will from the actions of attorneys, in the same way as that which exists in relation to the actions of an administrator who sells an asset. In this latter instance, the proceeds from the sale of the property pass to a beneficiary under a will as if the property had not been sold during the lifetime of the represented person.

As an attorney is not necessarily privy to the contents of the will of the donor, the attorney may unintentionally sell an asset and deprive the potential beneficiary from his or her entitlement. An unscrupulous attorney may deprive a beneficiary of an entitlement by deliberately liquidating an asset. An extension of section 53 of the *Guardianship and Administration Act* 1986 to cover the actions of attorneys is therefore desirable.

## **6. Conclusion**

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The Public Advocate makes these submissions for legislative amendment as they will, by assisting in the creation of a more robust EPA instrument, and by strengthening the legal and investigatory processes surrounding EPAs, enable individuals to plan effectively for the future. They will further assist in reducing “economic crimes” perpetrated against people with disabilities who are vulnerable, and will contribute to the creation of a safer and more secure society. Finally, they reflect a preference for enhancing the autonomy of individuals with disabilities rather than relying on more protective mechanisms where such vulnerability exists.

Any legislative change in this area, should be supported by appropriate community education activities.

## **Appendix – Parties consulted on submission**

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Law Institute of Victoria – President & Sub Committees

Mental Health Legal Centre - Coordinator

Villamanta Legal Service - Coordinator

State Trustees – General Manager, Client Management Services

Victoria Legal Aid – Managing Director

Intellectual Disability Review Panel - President

Supreme Court of Victoria – Chief Justice

Victorian Civil and Administrative Tribunal – Deputy President, Guardianship List

Legal Ombudsman

(Note that not all individuals/organisations responded to the draft document)