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Date 17 February 2017

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Australian Law Reform Committee  
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Dear Sirs,

**Re: Elder Abuse**



KENNETH D. STARKE  
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This firm employs a Fellow (or Fellows) of the Institute of Legal Executives (Victoria) - Legal Executive<sup>TM</sup> - being a person currently authorised pursuant to the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) to witness Statutory Declarations (section 107A) and take Affidavits (section 123C) in Victoria; which in turn means that that Fellow is an authorised witness in Victoria in respect to Enduring Powers of Attorney and Supportive Appointments pursuant to the *Powers of Attorney Act 2014* (Vic) and an authorised witness in respect to Enduring Powers of Attorney (Medical Treatment) pursuant to the *Medical Treatment Act 1988* (Vic).

It is of great value to the firm, and its clients, that Fellows of the Institute of Legal Executives (Victoria) are designated authorised witnesses in respect to the above. This is also of great assistance to clients in smaller or remote firms where another authorised witness, such as a Legal Practitioner, may not always be available to witness a prescribed document.

This firm believes that restricting authorised witnesses to those detailed in the Discussion Paper, namely Legal Practitioners, Medical Practitioners, Justices of the Peace, Registrars of the Local or Magistrates' Court, and Police Officers holding the rank of Sergeant or above, could have the effect of reducing access to prescribed witnesses by those wishing to execute a prescribed document; noting, as referred to in the Discussion Paper, that "(t)he key disadvantage of enhanced witnessing requirements (as suggested) is that they may dissuade individuals from entering into such arrangements". We believe this restriction may make it far more difficult for the public to execute their prescribed document in a timely manner:

- Clients often wish to execute their prescribed document at the firm which prepared that document for them, rather than possibly needing to travel

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elsewhere for execution – smaller or remote firms may not always have a Legal Practitioner available, and it would in any event be an advantage to have two authorised witnesses for the better protection of the client's interests;

- Legal firms which employ Fellows may be located in areas closer to the client than Police, a Medical Practitioner, a Justice of the Peace or a Court – travel for elderly or infirm clients may be an issue, and frequently a legal firm will arrange for the attendance on an elderly or infirm client in their home, whether a Legal Practitioner *or* an alternate authorised witness, with another staff member – this flexibility may not be available to the other proposed categories of witnesses;
- Fellows often have the day-to-day management of client matters under the Principal's supervision, and so are well placed in terms of knowing the client and being able to provide the required witness certification (or not, as may be necessary in the circumstances) – this can be a distinct advantage in terms of protecting the client's interests, as opposed to the client attending a prescribed witness who does not have the advantage of any prior 'getting to know you' processes;
- Police are often extremely busy with other matters, as would be a Court Registrar;
- Whilst the Discussion Paper refers to "increasing community awareness of the role of JPs and their availability to witness the signing of enduring documents"<sup>1</sup>, we believe that a Justice of the Peace often may not have an independent second witness readily available.

This firm agrees with the commentary included in the Discussion Paper<sup>2</sup>, that a "more stringent list of prescribed witnesses enhances the protection around enduring documents", for the reasons given, and that it is beneficial to include Medical Practitioners as authorised witnesses. *however*, whilst agreeing that the "second part of the proposed enhanced witnessing requirement is the increased role of witnesses", we do not believe that only the proposed five categories listed are able to properly (a) confirm they watched the principal client and/or attorney/guardian sign the enduring document, (b) certify they were satisfied that the principal client and/or attorney/guardian freely and voluntarily signed in their presence without duress, and (c) at the time the principal client signed the enduring document they appeared to have decision-making ability in relation to that enduring document<sup>3</sup>. Further, the additional requirement<sup>4</sup> that each witness certify the principal appeared to understand the nature of the document clearly does not require the provision of legal advice which non-Australian Legal Practitioners are prohibited from providing, as none of the other proposed categories of authorised witnesses are permitted to give legal advice.

We suggest that persons authorised in their respective jurisdictions to take Affidavits would also have the necessary knowledge and understanding required, and exercise appropriate caution and protocols, in witnessing enduring documents.

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<sup>1</sup> paragraph 5.74

<sup>2</sup> at paragraphs 5.67-5.75 (pages 100-102)

<sup>3</sup> paragraph 5.70

<sup>4</sup> in Proposal 5-4

Whilst the ALRC may not wish to consider including other specific categories of authorised witnesses, we **urge** the ALRC to give serious consideration to recommending the inclusion of persons authorised in their own jurisdictions to take Affidavits as authorised witnesses; in a similar manner to Commonwealth legislation such as the *High Court of Australia Rules* 2004, *Federal Circuit Court of Australia Act* 1999, and *Family Court Act* 1975 which provide that an Affidavit for use in a (respective) proceeding in those Courts may be sworn or affirmed in Australia (in this case within Victoria) before a person who is authorised to administer oaths or affirmations for the purposes of the Supreme Court of a State or Territory<sup>5</sup>.

Authorisation to take Affidavits is not granted lightly, and therefore those who have earned that privilege are expected to be fully cognisant of their duties in the course of the proper administration of justice.

Yours faithfully,  
**McNAB McNAB & STARKE**



Daria Dagher  
Associate Director

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<sup>5</sup> see the following via [www.austlii.edu.au](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s98ab.html): section 98AB(1)(f)(iv) *Family Law Act* 1975 [http://www.austlii.edu.au/au/legis/cth/consol\\_act/fla1975114/s98ab.html](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s98ab.html), section 59(1)(f)(v) *Federal Circuit Court of Australia Act* 1999 [http://www.austlii.edu.au/au/legis/cth/consol\\_act/fccoaa1999325/s59.html](http://www.austlii.edu.au/au/legis/cth/consol_act/fccoaa1999325/s59.html), and Rule 24.01.07 of the *High Court Rules* 2004 [http://www.austlii.edu.au/au/legis/cth/consol\\_reg/hcr2004170/s24.01.html](http://www.austlii.edu.au/au/legis/cth/consol_reg/hcr2004170/s24.01.html)