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Inquiry Into Older Persons and the Law

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The Secretary
House of Representatives Standing Committee on Legal and Constitutional Affairs
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I the undersigned, Abraham Simon Sher, do hereby make the undermentioned submissions, to the House of Representatives Standing Committee on Legal and Constitutional Affairs, in regard to the specific areas of -

- Fraud;
- Financial abuse;
- General and enduring 'power of attorney' provisions;
- Family agreements;
- Barriers to older Australians accessing legal services; and
- Discrimination.

1.I was born on the 9 May 1918 at Cape Town, South Africa and am an Australian citizen.

2. Prior to my arrival in Australia for permanent residence on the 28 March 1998, was in practice as an Attorney (solicitor) Notary Public and Conveyancer.- My practice was mainly in the field of commercial law, trusts, including estate planning. As a Notary Public, my notary's protocol, presently lodged with the Registrar of the Cape of Good Hope High Court, include well over 2 000 documents, attested before me. These consist of such documents as, Ante-nuptial Contracts, Servitudes (real and personal) Prospecting Contracts and Mineral Rights (many of which had to be attested before a Notary Public to be valid) Water Rights and Trusts.

3. During 1999 I attended the University of Western Australia as a full time student, where I passed 4 subjects required for my admission as a Barrister and Solicitor, namely, Constitutional Law, Trusts, Property and Equity. In September 2000, I was duly admitted as a Barrister and Solicitor, but I have not practiced in Australia.

4. I note that one of the above items, is 'Discrimination'. I recently made some submissions recently to the Parliamentary Committee considering the Age Dicrimination Draft Bill and refer the above Standing Committee thereto. One of my submissions was that the Justice of the Peace Act and Regulations, precluded

persons from voluntarily doing such work, if they were over 75 years of age, even if they were mentally and physically and in all other ways, suitably qualified.

5. In Australia today, it is generally accepted that persons live to a much later age than at any time previously. Furthermore, mention has been made of the fact that even the '*baby boomers* ' are approaching the age of retirement. Provision has been made for superannuation on retirement and it appears to be generally accepted, that retirees will no longer be part of the work force (paid or unpaid) and should just sit back and enjoy long well- earned, enjoyable holiday. This seems to me to be just a waste of a community's wealth of experience, not only in their specialist fields, but in the example they set to others in their daily intercourse with others.

6.1 My contention is that there are already a large number of older persons, even octogenarians, retired business and professionals who are physically and mentally fit and capable of voluntarily helping their contemporaries in the areas mentioned above and that many of them would welcome the opportunity of helping others in a voluntary 'official' capacity. The capacity could be similar to that of a Justice of the Peace, where such a person operates on some days of the week, from a public office, such as that of a local authority, but never from home.

6.2 The question may arise as to what happens for example, if after receiving assistance and on making say, an investment which my fail and the helper is blamed for a loss occurring. In a case of this kind, the advice given *must* be limited to advising the person concerned about seeking the correct professional assistance, that is, explaining the importance of seeking the appropriate professional advice and not to 'gamble' with a life's savings.

6.3 While there are pamphlets available at libraries dealing with the investment of funds by older persons, this is a very important brochur and should be revised in the light of the purposes of this parliamentary inquiry.

6.4 On the number of occasions when one sees from the media, so many older persons who have been defrauded of their life's savings and all their property, the remark heard is, 'Greedy old people I suppose, looking for high interest on their investments, without using their common sense. They all know that the higher the interest paid, the greater the risk' ! But the fact is that some of those normally prudent persons, may be 'out of sorts' on that day, on account of stress through loneliness, or the beginning of mental decay, which can strike anyone. If they are members of a family, one would expect them to consult with close family, when contemplating any kind of investment. The reason why they do not do so in such cases, should be investigated

6.5 In respect of the above submissions, I mention my own experience about a year ago, when I was invited to attend a meeting of a professional and businessman's club by a member of its executive, and a guest speaker on

behalf of his Investment firm, and in the course of his address, advised those present, never to seek the advice of an accountant when contemplating making an investment of their funds. He stressed that his firm, having obtained a license from the government as an investment company, had all the experience and integrity necessary for this purpose. When I mentioned my concern at this statement to a member on the executive, he displayed no concern at all.

6.6 There is obviously a need to dispel any belief in the mind of the public, that the mere issue of an investment license, or the standing of any person, or an investment company or bank, or building society, as the case may be, holding such a license, implies government approval beyond the mere issue of the license itself, in which the rights and obligations of the licensee are detailed.

7.General Powers of Attorney

7.1 By General Power of Attorney, the Grantor grants to the Grantee full and plenary power. In some instances, it may include the power of substitution. This gives the Grantee power to substitute a person of his choice, as the Grantee. There may be good reason for including such additional power, for example the Grantee's physical absence from *situ.* In such case, it would be expected that the Grantee would be kept informed of any action taken by the person substituted, and would approve the action taken. There is provision in law for such powers. However, the appointment of the Grantee under a General Power of Attorney, may also include the words, .' *.....appoints John Smith as his lawful attorney and agent, for and on behalf of the Grantor, with power irrevocably and in rem suam, to .....etc'.* This would preclude the Grantor from revoking the granting of the Power of Attorney. These words, *irrevocably and in his own cause*, are sometimes inserted, when the Power of Attorney has to do with security provided by the Grantor to the Grantee, against property, or an Insurance Policy of the Grantor, who has been advanced money by the Grantee. Otherwise Grantors should be aware of the fact they can at any time revoke the granting of the power of attorney,

7.2 These are items which, together with the statutory provisions regarding powers of attorney, should be included in the Brochure for older persons mentioned above, made available to libraries and other places where they are likely to be, or to visit.

8. Enduring Power of Attorney

8.1 It seems that Australia itself has no statutory provisions with regard to Enduring powers of attorney, but follows English law in this respect. But the States may have some laws dealing with this matter. England has the Enduring Powers of Attorney Act, 1979, whereby the granting of such powers must be in the prescribed form and must be registered with the Court. In this instance, the Grantee would have no power to delegate, except for the carrying out of menial work, for example. These powers are not irrevocable, for so long as the Grantor is of sound mind.

8.2 The powers granted may be special or general, but In fact, the very reason for the granting of these powers, is so that they can prevail in the case of mental incapacity by the donor, whether mentally, or by death. Naturally, as in the case of the granting of any power of attorney, but especially in regard to enduring

powers, it is essential that the Grantor must be of sound mind at the time of execution thereof and has full capacity to do so.

8.4 In the English Act, once the enduring power has been registered, it cannot be altered by the Donor and can only be revoked with the assistance of the Court. The English act provides for prescribed forms, such as,

Part A about using these forms
Part B completed by the Donor
Part C completed by the 'attorney'
Application for Registration
General form of application to the Court
There are also other forms e.g. For searches, appeals and for and summonsing of witnesses.

8.4 In all the aforegoing it is of paramount importance to ensure (as is the case in the making of wills) that the person executing an enduring power, knows and understands what he is doing and fully appreciates the intent and purpose thereof.

9. The Position Under South African Jurisdiction.

9.1 Because of its history first as a colony under the law of Holland, South Africa was governed by Roman Dutch law. Even after it first fell under English law in 1795 and thereafter again in 1806, Roman Dutch Law continued to be the municipal law, up to the present time. This is so even though in Holland itself, Roman Dutch law was replaced by the Code Napoleon, from the beginning of the 19th century. Generally, because the Judiciary had the English Law experience and the necessities of modern law dealing especially with Contract and Corporations law, for example, the law of the country was strongly influenced by English law and even the law of other countries. The law of Trusts of South Africa is a good example, where the Roman Dutch law had no law of Trusts, until about 1894, where Judicial decision in the case of *in re* Estate McDonald, held that following English tradition and through usage, Trusts created in South Africa, were valid.

9.2 Today South Africas has a highly sophisticated law of Trusts, brought about by usage, Judicial decisions and subsequently, statute. It nevertheless, with regard to inter vivos and testamentary trusts, and in regard to Agency, which includes the execution of powers of attorney, and following what is now called South African law, is still intertwined with Roman Dutch law, which itself is derived from Roman Law.

9.3 South African Law does not (at least since I left South Africa at the beginning of 1998 until when I was in full time practice) know Enduring Powers of Attorney. If a person in South Africa becomes incapacitated, so much so that he is incapable of managing his own affairs, application would be made to the Supreme Court for an Order placing his person and property under Curatorship. In the application to Court, the request would be made for the appointment of a suitable person as a Curator to the person and property of the person under curatorship. The personal aspect would be dealt with under the Mental Disorders Act.

9.4 It would be usual for a person such as an attorney (solicitor) to be appointed as

Curator, but the Court could appoint any other suitable person as such. The most important of the special conditions laid down by the Court for appointment as Curators, is the question of providing satisfactory security, to the value of the property under curatorship.

9.5 The security to be furnished, would in terms of the order of Court, would be to the satisfaction of the Master of the Supreme Court. I believe that today, only South Africa, Zimbabwe and perhaps other States bordering on South Africa, have institutions such as the Master of the Supreme Court.. This office evolved from the law or custom of Holland introduced originally into the Cape of Good Hope, South Africa whereby an Orphan Chamber was set up, for the protection of widows and orphans. In South Africa today, all estates, whether, of deceased persons, or of insolvents, or companies in liquidation, must be administered under aegis and administration of the Master of the Supreme Court, to whom inter alia, inventories, periodical financial statements must be submitted and who can also call for periodic reports.

9.6 It will therefor be understood why a jurisdiction such as South Africa does not need laws regarding enduring powers of attorney. The need to provide for what is to happen upon a person's mental or physical condition failing, or upon his death, because there is full provision for such eventuality. For example, if one believes that one's mental powers may be failing, one should immediately amend one's will, or make a new one.

9.7. I would not recomment that Australia change its system to the South African way of dealing with deceased estates and of persons or property under curatorship. However, I would strongly recommend that in the use of enduring powers of attorney by older persons, especially those who need the comfort of knowing that they, or their successors are provided for on death or disability, the same precautions are laid down, as is the case for making wills.

9.8 Based on my own experience over many years, I regard it as essential that if there is the slightest suspicion that a person may be mentally, or in any other way incapacitated that he is unable to manage his affairs, extreme care should be taken to ensure that at the time of signing an Enduring Power of Attorney, at least one witness should be a person such as a medical practitioner, who should certify that at the time of execution thereof, the Grantor knew and understood what he was signing and that he understood the intent and purpose thereof.

9.9 It is especially as a protection for 'Older Persons' that I have introduced herein the question of the use of a Notary Public. His office in authenticating highly important documents, including that of the legal right of a person to certify as to the validity of a copy of a resolution by a corporation to perform an act, portrays that office as being one of the highest integrity. A notary must always be appointed by the Supreme Court, is also under the discipline of a Law Council, and is therefor an ideal office to ensure that an Enduring Power of Attorney executed before him, is indeed duly and properly completed. See hereunder for Origin and office of Notary Public.

10. Discrimination

I believe that my submissions to the Parliamentary Committee investigating the Age Discrimination Draft Bill, is relevant to my present submissions and I refer the Standing Committee thereto..

11.Notary Public

11.1 The only other submission I wish to make to the committee, is to consider the use of the office and status of the Notary Public, as consisting of persons and officers of special integrity, by persons who sign general powers of attorney, especially Enduring Powers of Attorney. I believe that grants of such unlimited power, especially by some older persons, should be attested not only by two persons as witnesses, but also before a Notary Public. The Committee will recall that Notaries Public are admitted by the Supreme Court, and as lawyers also, would be officers of the Court.

11.2 Notaries Public should also be issued with guidance advice, I suggest by the law societies under which they fall, such as using medical practitioners as attesting witnesses, if there is any doubt as to the mental capacity of the grantor. They should furthermore be required to note on their attestation, any feature of importance, in demonstrating the the care with which the willingness of the grantor to grant the power is substantiated.

11 .Notaries : Their Origin and Office

It may be useful for the Standing Committee have before them a brief resume of the ancient notarial practice and I have thus appended the following note.

The notarial practice stems from Roman times and the following is an extract from 'The Notarial Practice of South Africa', First Edition 1908, by C.H. Van Zyl, 'Attorney-at-Law, Notary Public and Conveyancer: and author of 'The Judicial Practice of South Africa". It speaks for itself.

'No profession among the ancients seemed to have been of as much importance as the notarial. It is true that in the early period of their history the Romans at one looked upon it with contempt, and said it was an office fit only for slaves. But this must have been through jealousy; for where slaves acted as notaries it was in most cases when their masters either could not write at all, or wrote with difficulty. Many slaves used to practice writing, in order to write for their masters and thus be of more use to them. The Emperors Arcadius and Honorius forbade slaves to become notaries, and conferred the office only on free persons. But let us trace the office of a notary a little further back, as it began at a much earlier period than the Roman. Many writers class notaries under the various terms of 'scribae', 'logographi' exceptores' actuarii' 'notarii' 'librarii' 'tabelliones' 'tabularii', and other more modern names, especially when designating tnose appointed as notaries or prothonotaries to Kings, Popes, Bishops, Abbots, Chapters, Ecclesiastical and particular Courts, and Princes; but most of these more modern ones have fallen

into disuse. The term used by our law is derived from Roman law and is either 'notarii' or 'tabelliones'. Let us consider some of these ancient terms.

The Scribes in the early Hebrew times, at any rate prior to the captivity, were engaged not only as writers of the Law but in administrative capacities as well. Some of them were high functionaries. We find many employed in the reigns of the Kings of Judah, where they are often mentioned as high officers of the crown ; for instance, Seraiah was scribe, or secretary, to King David (ii.Samuel, 8. 17 ; Elihoreph and Ahiah were scribes to King Solomon (i, Kings, 4. 3). II. As there were few people in those days who could write well, the employment of a scribe, or writer, was of considerable importance. The scribes of the people, who are frequently mentioned in the Gospels, were copyists of the sacred writings. It is known that the system of writing sometimes in the Hebrew period was in the form of notes or abbreviations, marks, secret signs, or in cipher, and hence we may call this the early or the first period of the stenographic art.

From the Hebrew let us come to the Greeks. It is said that Xenephon was originally written in abbreviated form, and in a kind of shorthand which might be called stenography. When the philosophers in the Greek schools dictated the lessons to their pupils, and sometimes so hurriedly that the pupils could not write the words in full, they invented the art of abbreviation of words. In this respect the Romans copied the Greeks; and as the characters of the system of abbreviations differs, and in order to avoid confusion, t;he; Emperor Justinian forbade his '*corpus Juris Civilis'* being written, *per Sigilla,* i.e. In the abbreviated form (cod. 1. 17..2. Sec. 22).

Under the Roman Republic we shall find mentioned also the '*scriba'*. There the '*scribae'* were chiefly employed in drawing up legal documents in the Roman Courts and used symbols of abbreviation. (Cod. 4. 21. 17 : Novellae 73 c. 5 and Dig. 29. 1. 40.) Under the Empire the '*scribae'* were called 'tabelliones.' This was from the fact that , in the absence or scarcity of writing materials, they made notes on the tablets. So that in the course of time from taking or making notes ('*nota*,' a mark or sign) they came to be called '*notarii*', notaries. Hence the term notary is etymologically derived from the Latin word '*nota*,' and means originally any one who by notes or signs takes down the words or speech of another person. It was the stenographic system of the ancient days now called shorthand. In this sense all the ancient writers use this term. Later in Rome, in the 4th century, we find the alternative terms '*notariin*' or '*tabelliones*'. The term '*tabellio*', or '*tabellionius*', means a keeper of the archives or regiter, a public notary (Just. Inst. 7. 9. 1). Holland has adopted the Roman terms and in a Placaat to which we shall refer later on, on the subject of notaries, the terms 'notarii' or 'tabulari' are used to mean the same persons; and so also at a later period Groenewegen, an eminent Dutch jurist, in his work 'De Legibus Abrogatis' (C. 10. 31. 15) says 'Hodie.....'.

In modern usage, notaries are public functionaries, duly authorized to act as such, to attest contracts or writings of any kind and to make and authenticate public acts, especially when for use in foreign countries. In practice their business is now very much limited in England as well as in Holland and in South Africa. What documents must still be executed notarially in the latte country we will mention further on. At present we will first define what is meant by a notarys 'minute', his 'grosse', and his 'protocol'."

Note: Briefly, these terms mean, the original notes or writing of the document, the minute, the first clear issued copy thereof, and the book in which the minute or original, was pasted or glued. Copies of documents from the protocol, could be made and certified as such.

Dated at Perth, Western Australia on this 29 November 2006.

A S SHER