

REVIEW OF THE *POWERS OF ATTORNEY ACT 2003* ISSUE PAPER

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Information contained
in this document was correct at
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Further information

The issues paper is available on the Lands website at www.lands.nsw.gov.au. Printed copies are available from the Department of Lands.

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Submissions close on 28 August 2009

1. Introduction

The *Powers of Attorney Act 2003* (the Act) was assented to on 23 October 2003 and commenced on 16 February 2004. The Act implemented the recommendations of a green paper regarding powers of attorney that was released in December 1999.

Section 57 of the Act requires a review to be undertaken which is to be commenced five years after the date of Act's assent. The review is to determine whether the Act's policy objectives remain valid and whether the Act's terms remain appropriate for securing those objectives. A report of the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of five years.

The Department of Lands (Lands) is responsible for the Act's administration, and has organised a working group with other bodies for the purpose of this review. These bodies are:

- the Attorney-General's Department
- the Law Society of NSW
- the Guardianship Tribunal
- the Public Trustee of NSW (now known as the NSW Trustee and Guardian)

This paper discusses the Act's objectives and the issues that have emerged in the Act's implementation. The Minister for Lands and the department encourage anyone who has an interest in the Act to put forward their views on its objectives, its success in achieving its aims and the need for any legislative change.

What is a power of attorney?

A power of attorney is a document whereby one person (called the principal) authorises another (called the attorney) to act on his or her behalf. It can be limited to authorise very specific actions (for example, signing certain documents) or it can be general, authorising the attorney to do anything the principal may legally do. It can be limited to a certain period of time (for example, where the principal is going overseas for a period), or operate until the principal has died.

In NSW, there are two types of powers of attorney: general powers of attorney and enduring powers of attorney. Both can be used to manage a person's financial affairs. The main difference between them is that a general power of attorney ceases to have any effect, and therefore cannot

be used, after the principal has lost mental capacity. An enduring power of attorney, on the other hand, will continue to be effective after the principal has lost mental capacity. Both general and enduring powers of attorney cease to have effect once the principal has died.

An enduring power of attorney can be made in the same way and on the same form as a general power of attorney. However, an enduring power of attorney must contain an additional statement to the effect that the power of attorney is to continue after the principal has lost mental capacity, and be accompanied with a certificate by an authorised witness stating that he or she has explained to the principal the effect of making the enduring power of attorney.

An enduring power of attorney can be a useful tool in planning for later life. It enables people to choose who they want to make financial decisions for them when they are no longer able to do so themselves, thereby giving people greater control over their future welfare.

2. Objectives of the Act

The Act removed the statutory provisions governing powers of attorney from Part 16 of the *Conveyancing Act 1919* and substantially re-enacted them, with changes. The changes were aimed at remedying problems which were known at that time.

The Act replaced the previous statutory short form of power of attorney with a more comprehensive form, called a 'prescribed power of attorney'. The new form contains more information and more choices to enable people to make a better-informed decision about what they want to authorise their attorney to do. The prescribed form can be used to create either an ordinary power of attorney or, by having a prescribed witness complete the required certificate, create an enduring power of attorney.

The Act introduced a requirement that an enduring power of attorney will not commence to operate until the attorney has accepted the appointment by signing the power of attorney document. Previously, only the principal was required to sign an enduring power of attorney. This caused confusion because an attorney sometimes did not know whether he or she had been appointed. This new requirement makes the attorney aware that he or she has been appointed and gives him or her opportunity to refuse to act, as some people may not want to accept what can be an onerous responsibility. The new requirement provides the attorney the opportunity to obtain instructions from the principal about the principal's preferences, and also provides a specimen of the attorney's signature for comparison by persons dealing with the attorney.

One of the distinguishing features of an enduring power of attorney is the certificate by a prescribed witness stating that the witness explained the effect of making the enduring power of attorney to the principal. The certificate changes a general power of attorney into an enduring one, allowing it to continue to be effective after the principal has lost mental capacity.

The definition of 'prescribed witness' (persons who can explain an enduring power of attorney to a principal and witness their signature) was expanded from solicitors, barristers and registrars (formerly clerks) of a local court to include licensed conveyancers, public trustee employees and employees of trustee companies who have completed a course of study approved by the Minister.

An important innovation introduced by the Act is to recognise enduring powers of attorney made in other states and territories of Australia, even if they do not meet

the NSW formal requirements, for example, not being in the prescribed form. This removed the inconvenience for people who, for example, have moved interstate but still have property in NSW. It is particularly helpful if the principal has already lost mental capacity (for example through dementia) when the attorney attempts to use the power of attorney in NSW.

The Act introduced provisions that clarified what an attorney can or cannot do in several common situations which have sometimes caused confusion in practice.

A prescribed power of attorney does not authorise an attorney to give a gift of all or any of the principal's property to any other person unless the power of attorney expressly authorises the giving of the gift. In this regard, the Act provides that if a prescribed power of attorney includes a certain expression, set out in Schedule 3, this will authorise an attorney to give the kinds of gifts specified in the Schedule for that expression. The types of gifts authorised in this Schedule are gifts to a relative or close friend of the principal on a birthday or marriage. Or the gift may be a donation of a kind that the principal would make if he or she had capacity to do so. In addition, the gift's value must be reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances and the size of the principal's estate. Of course, a principal may want to allow the attorney to give gifts to whomever the attorney chooses. If so, the prescribed form can be amended to reflect the principal's wishes.

Similar provisions apply to an attorney signing any document or doing anything that would result in the attorney gaining a benefit at the expense of the principal or conferring a benefit on third parties. If the prescribed expression is used, it allows an attorney to confer on the attorney or third party a benefit only for expenses for housing, food, education, transportation and medical care or medication. These provisions allow, for example, a person who is an attorney for their spouse to use the spouse's money to pay for housing, food etc. for the attorney and their children.

The prescribed power of attorney form set out in the Act contains the prescribed expressions within the printed form, so that if left unamended, the attorney will only be able to do the things referred to in Schedule 3 of the Act. This helps clarify for both the principal and the attorney what the attorney is authorised to do. If the principal wants to give the attorney more extensive powers, the principal can include the further powers in the prescribed form.

The Act also expanded the jurisdiction of the Supreme Court and Guardianship Tribunal with regard to the review of powers of attorney. Prior to the Act's operation, only the Supreme Court had jurisdiction. The Guardianship Tribunal has been given a range of powers in relation to enduring powers of attorney, including the ability to review, revoke, alter or confirm the enduring power of attorney, as well as to adjudicate on whether the principal lacks mental capacity. The Supreme Court has the same powers in relation to enduring powers of attorney, so an applicant will have a choice of forum. Proceedings before the tribunal are cheaper, quicker and less formal than the Supreme Court.

If the tribunal considers that a particular matter would be more appropriately dealt with by the Supreme Court, the tribunal may refer the matter to the court and vice versa (only the Supreme Court has jurisdiction to deal with any other power of attorney given by the principal who is incommunicate for the time being). Appeals from the Guardianship Tribunal's decisions will be to either the Supreme Court or the Administrative Decisions Tribunal.

The Act also cleared up the uncertainty about what happens where two or more attorneys are appointed and one dies. Where the attorneys are appointed to act jointly (that is, both must act together) then the death of one will terminate the power of attorney.

However, if the attorneys are appointed severally (that is either one can act alone) or jointly and severally, then the death of one will not terminate the power of attorney.

Finally, a provision modelled on Section 48 of the *Protected Estates Act 1983* was incorporated in the Act that provides protection from ademption for gifts under a will. Where property, which has been left to a beneficiary in a will, is sold by an attorney under an enduring power of attorney, the beneficiary will retain the same interest in the surplus proceeds of sale as they would have had in the property sold. A similar protection is given to the interest of a spouse of an intestate deceased principal in a shared home that was sold or otherwise disposed of by an attorney under an enduring power of attorney.

Are the objectives of the Act still valid?
If they are, are the terms of the Act still appropriate to achieve those objectives or are changes needed?

3. Issues

Issue 1: Measures to reduce financial abuse using a power of attorney

The issue of most concern facing the Act's operation is the prevention of financial abuse by an attorney. The department has received a number of letters citing incidence of claimed financial abuse perpetrated by an attorney, including unauthorised withdrawals from the principal's bank accounts, unauthorised gifts to third parties from the principal's estate, and underspending on the principal's everyday living expenses.

The relationship that exists between an attorney and principal is known as a 'fiduciary relationship'. That is, 'relationships of trust and confidence or confidential relations' in which attorneys have certain obligations in the exercise of the powers that principals give to them.¹ Over the years, the courts have consistently placed very high obligations on attorneys to carry out their duties in a way that protects and promotes the interests of their principals. As part of this duty, the attorney must always act in the best interest of the principal. An attorney cannot therefore gain a benefit that would be in conflict with his or her duty to act in the best interest of the principal.

There are two objectives underlying this common law rule – firstly, to prevent the attorney 'from being swayed by considerations of personal interest' and secondly, to prevent the attorney from misusing his or her position for a personal advantage.

Attorneys who do not act in accordance with their fiduciary duties are breaching a legal rule and can be personally liable to reimburse the estate of the principal and cover any damages the principal may have suffered. It must not be forgotten that the consequence of an attorney taking or distributing the principal's assets is that the principal can be left with insufficient money to pay for his or her living expenses or medical care.

The Protective Commissioner, the Guardianship Tribunal and the Public Trustee have identified cases of attorneys who have taken benefits for themselves in circumstances where the principal had lost mental capacity and could not therefore monitor their attorneys' actions. In some cases, the acts were done without full regard for the principal,

¹ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, at pages 96-7 per Mason J (as he then was).

but in most cases the attorneys were simply misguided as to the nature and extent of their duties, or believed that their actions somehow benefited the principal.

On the other hand, a major appeal of a power of attorney is the low cost, flexible and, importantly, private arrangements that can be legally set in place to allow one person to assist in the financial affairs of another. Any reform that seeks to limit abuse by attorneys must be carefully scrutinised to ensure that it does not unduly impact on the benefits that a power of attorney can provide.

(a) Education

It is considered that the most effective way to limit the abuse of a principal by an attorney is through education. The benefits of educating a principal and attorney are most effective at the time the principal makes the power of attorney. For this reason, both the principal and attorney should be encouraged to see a solicitor together when making a power of attorney. A solicitor can properly advise how a power of attorney (or the appointment of an enduring guardian) can be used to help organise financial and personal affairs should the principal lose the ability to manage it themselves. A solicitor can also prepare the documents for the power of attorney and arrange the necessary signatures and certificates.

Education promoting powers of attorney would also have a more general benefit for the community. It could lead to people better planning their financial arrangements when they are nearing retirement.

Information regarding powers of attorney is widely available. Lands has produced a fact sheet available on its website.² Similarly, the Public Trustee of NSW³, the Guardianship Tribunal⁴ and the Law Society of NSW⁵ have similar publications available for the public.

A co-ordinated campaign of awareness by various government departments regarding powers of attorney could highlight the advantages to older people of the benefits of a power of attorney, and also educate the public as to what a power of attorney can and cannot do, make clear what rights and remedies principals have, and the duties of an attorney. Such a campaign would need to

2 http://www.lands.nsw.gov.au/_media/lands/pdf/fact_sheets/land_and_property_information/Power_ofAttorney_in_NSW.pdf

3 <http://www.pt.nsw.gov.au/>

4 www.gt.nsw.gov.au

5 www.lawsociety.com.au

be large in scope and would obviously need to be funded by the government to allow the public to be properly educated in most aspects of a power of attorney.

As noted at the beginning of this paper, attorneys have a variety of obligations and responsibilities, particularly those that arise from the fiduciary relationship. These obligations and responsibilities have been developed by the courts over the centuries on a case-by-case basis as disputes arose. Therefore, much of the law on the duties of an attorney can only be found by reading the decisions in those cases. There is very little information or publicity, other than in expert legal texts, to inform an attorney as to what can and cannot be done, what must be done and how the obligations are to be carried out. Anecdotal evidence from the Protective Commissioner and the Guardianship Tribunal shows that attorneys may be unaware of the most basic of their obligations or duties.

Education could be further implemented by amending the current prescribed form. The current form was developed as an easy to use form with enough information to allow a layperson to complete it without professional assistance, although, again, the parties are encouraged to see a solicitor. Attached to the current form is a sheet titled "Important Information for Principals and Attorneys". The information sheet has several points such as the effect of the power of attorney form; that an attorney should keep the attorney's own money and property separate from the principal's money and property; and explaining the duties of an attorney.

The prescribed form could be expanded to provide a summary of the attorney's obligations and responsibilities, which are to:

- keep records
- keep property separate
- present a management plan and get approval for certain unauthorised transactions
- avoid conflict transactions
- give gifts in accordance with the law
- maintain dependants
- execute documents correctly.

The form may go on further to provide guidance on how to keep records, and keep property separate, etc, so that the attorney can have a clear understanding of what is required. Other important information could be provided on the form itself, to clearly state that the attorney must:

- exercise their powers honestly and with reasonable diligence to protect the interests of the principal
- not conduct transactions which may involve a conflict between the attorney's interests and those of the principal
- be aware of the risk of compensation if the duties are not exercised properly
- cease to act as an attorney when told by the principal.

The form could set out details of when the power of attorney begins, when it ends and where an attorney can get advice.

Other suggestions are to clarify and simplify the clauses that deal with gifts and benefits. The language used in the prescribed form, such as 'confer', 'reasonable gifts' and 'benefits' could be replaced by words that are easier to understand. Also, notes and examples could accompany each clause to make it easier to understand the effect of each clause.

The downside of expanding the form is that it will become more complex. If the form attempts to address too many potential contingencies it will inevitably contain information that will not be relevant in all instances and may cause confusion.

(b) Compulsory registration of all enduring powers of attorney

A power of attorney must be registered if the attorney is going to sell, mortgage, lease or otherwise deal with principal's real estate. Registration is not required for all other uses of the power of attorney. Despite this, if the principal chooses to do so, any power of attorney can be registered. Powers of attorney are registered at Lands' Queens Square office⁶.

There are advantages in registering a power of attorney. Firstly, the power of attorney will be on record as a public document. This would allow anyone from the public to search the general register of deeds and view a copy of the power of attorney. The search can be done online or at a Lands office. A person dealing with the attorney can then read the scope of the powers given to an attorney under the instrument and (if it is an enduring power of attorney), can verify the attorney's signature. Secondly, a registered

power of attorney will be safe from loss or destruction, as it is a permanent record in the register. This may assist in preventing abuse as it will allow anyone to see if there are any limitations on the attorney.

The main disadvantages of this suggestion relate to cost and privacy. The current fee charged by Lands for registration of a power of attorney is \$91 and there may be additional costs incurred in getting the power of attorney to the Lands office for registration. This cost may seem unnecessary, particularly if the power of attorney is limited in some way; say for the period that the attorney is on holidays overseas. Also, a principal may want to keep his or her arrangements private and away from public record. In some cases, the principal may want to ensure that certain people are unaware that he or she has appointed an attorney to act on his or her behalf.

(c) Principal nominated monitoring of attorneys

In Australia, there is no central body able to monitor powers of attorney. The idea that a central government body be established to monitor powers of attorney would only succeed if it was implemented at a national level, to accommodate powers of attorney made interstate. Therefore, discussion of a national monitoring scheme of some description is beyond the scope of this paper.

In lieu of a national body, an option would be to allow the principal to make it a condition that the attorney submit periodic accounts of the principal's estate to an independent accountant to ascertain whether there has been any abuse by the attorney. This option could form part of the prescribed form for an enduring power of attorney. An accountant or other approved financial officer may be nominated on the power of attorney to conduct yearly, half-yearly, or quarterly audits, depending on the principal's wishes. If the audit reveals that the attorney has been abusing his or her position or discovers unauthorised transactions by the attorney, the accountant may make application for the power of attorney to be reviewed under s35(1)(d) of the Act.

This option may dissuade an attorney from embarking on acts that he or she knows are outside of the powers given to him under the power of attorney, because at some point an audit will be conducted, and the fraudulent or unauthorised act may be discovered. This option would be beneficial in circumstances where the principal has lost capacity, or otherwise cannot monitor the activities of the attorney.

⁶ Department of Lands, 1 Prince Albert Road, Queens Square, Sydney NSW 2000

This option would complement the powers to which the court or Guardianship Tribunal has under s.36(4) of the Act, to make a variety of orders which could remove an existing attorney if abuse was occurring. Orders can also be made under this section, requiring an attorney to furnish accounts and other information to the tribunal or to a person nominated by the tribunal. Alternatively, an order could require that an attorney lodge with the tribunal a copy of all records and accounts kept by the attorney of dealings and transactions made by the attorney under the power, or that those records and accounts be audited by an auditor appointed by the tribunal and that a copy of the report of the auditor be furnished to the tribunal, or that the attorney submit a plan of financial management to the tribunal for approval.

Consequential proceedings in courts to remedy abuse or fraud may still be required to restore property to the principal. The Guardianship Tribunal's orders however could prevent further innocent mistakes or mismanagement by an attorney.

There are some points to consider if this option to allow the principal to nominate someone to monitor an attorney were to be adopted. The costs of the financial monitoring would have to be paid for by the principal. The costs of financial monitoring on the principal's estate may be a burden, especially if the estate is not large. It is assumed that the accountant inspecting the attorney's financial dealings could only give an accurate appraisal of the use of the principal's money if the entire inventory of the principal was known. As the principal has given consent to the independent review, this removes the concern that the review could be considered to be an invasion of the principal's privacy.

If the principal loses capacity at some point, the attorney would have to be relied upon to furnish the accountant with all the necessary documents to allow a full and proper audit. An attorney who abuses his position may not be inclined to co-operate fully with an accountant by giving those necessary documents. The Guardianship Tribunal's current powers allow for the attorney to be compelled to provide this information to a person nominated by the tribunal.

One issue to consider with this option is how to ensure the financial monitoring occurs. One option could be to serve a copy of the power of attorney on the nominated accountant to remind the attorney that the review is due.

Finally, it should be kept in mind that implementing reform such as this may increase the cost associated with a power

of attorney and make it more difficult to manage. This in turn may lead persons to adopt cheaper, alternate arrangements outside the protections afforded by the legislation for powers of attorney, and thereby increasing risks for both principals and fair minded attorneys.

(d) Criminal sanctions

A more serious measure is to introduce criminal sanctions to prevent the attorney from engaging in acts where their own interests are put ahead of that of the principal, and also to prevent the attorney from misusing his or her position for a personal advantage. In other words, criminal sanctions could be imposed to persuade attorneys to act in the best interest of the principal.

Although the Act provides for criminal sanctions in certain circumstances, (for example, where an attorney continues to act despite knowledge that their power is revoked), it does not provide for any criminal sanctions against attorneys not acting in the principal's best interest.

The Guardianship Tribunal or the Supreme Court may review a power and make orders relating to the care and administration of a principal's estate if they lack capacity, however they have no power to punish the attorney with a criminal conviction, if the attorney knowingly acted against the principal's best interest. Of course, the provisions of the Crimes Act would apply to any attorney who has physically and or psychologically abused the principal, but that issue is separate from the duties of an attorney to his or her principal.

The legislation that governs the relationship between principal and attorney in England, the *Mental Capacity Act 2005*, does impose a criminal sanction for the ill-treatment or neglect by the attorney of a principal who has lost capacity. If the attorney is found guilty of this offence, the maximum term of imprisonment is 12 months for a summary conviction, or five years for an indictment.

In contrast, no jurisdiction in Australia imposes a sanction of imprisonment for the neglect or ill-treatment of a principal who lacks capacity. In order for this option to operate effectively, one would assume that the laws governing power of attorneys would need to be harmonised amongst all the Australian jurisdictions so as to overcome various jurisdictional barriers. For example, if an attorney residing in Queensland was not performing their duty under a power of attorney registered in NSW in respect of a principal residing in Victoria, would that attorney be criminally liable in NSW?

A stumbling block with this option is the complex jurisdictional issues that surround such a proposal. It would be necessary to somehow harmonise or align the law regarding powers of attorney among all the states in Australia for this option to work. This option is allowed to operate in England because the jurisdictional issues do not arise as this law applies on a national basis. In contrast, the powers of attorney regime in Australia is governed by each state individually, and separate from each other. Despite this, it is not the purpose of this paper to tackle the jurisdictional issues, but rather to understand whether the public believes that an attorney who does not act in the best interest of a principal in certain situations is serious enough to warrant criminal sanctions.

Questions

Should there be a campaign of awareness regarding powers of attorney?

- 1.1** Should the NSW power of attorney form include additional information on the obligations and responsibilities of acting as an attorney?
- 1.2** Should all powers of attorney require registration at the Department of Lands?
- 1.3** Should the principal be able to subject the attorney to financial monitoring by an accountant by nominating this to occur in the power?
- 1.4** Should the Act provide for criminal sanctions against attorneys who knowingly mistreat or neglect a principal who has lost capacity?

Issue 2: Revocation

The ability for a principal to revoke a power of attorney is an important one. Revocation by the principal is as easy as telling the attorney that the power of attorney is revoked. Preferably a principal will serve a written notice on the attorney to inform him or her of the revocation and advise third parties known to have dealt with the attorney. Once an attorney becomes aware that the power of attorney is revoked, he or she cannot continue to act as attorney, and if they do, penalties can be imposed of up to five years imprisonment.

A revocation does not have to be registered to be effective, irrespective of whether the power of attorney was registered or not. However, by registering the revocation, it allows third parties to inspect the register to see that the power of attorney is revoked.

Registration of the revocation may remove the temptation of an attorney to continue to act under the revoked power. If the principal removes an attorney from office by only serving the attorney with notice of revocation, and not registering it, and also does not advise third parties, the attorney may be enticed to continue to act with the knowledge that no one else knows of the revocation. Should the principal tell his family and friends that he has revoked the power of attorney, this may dissuade the attorney from continuing to act. However, third parties dealing with the attorney, including banks and other institutions, would not know of the existence of the revocation. In these instances, the principal is relying on the law to ensure that the attorney is doing the right thing by not continuing to act when he has no authority to do so.

Also, if a person dealing with the attorney wishes to check whether or not the power of attorney remains valid, unless the revocation is registered, it is very difficult to establish that the attorney's authority to act has been revoked.

Requiring all revocations to be registered, irrespective of whether or not the power of attorney is itself registered, means that there will be a central register that can be checked by anyone dealing with the attorney to verify that the power of attorney remains valid.

The disadvantage of requiring registration of a revocation is obviously the cost, as explained previously in Issue 1b. This is particularly so if the attorney is a trustworthy family member. The current method of simply informing the attorney that the power of attorney is revoked seems to serve this purpose quite well.

If the attorney does the right thing and ceases to act as an attorney when told to do so by the principal,

what would be achieved by registering the revocation? Registering a revocation would only be beneficial as a preventative measure against abuse in those limited circumstances where an attorney chooses to abuse his or her position by continuing to act. The anecdotal evidence suggests that the majority of attorneys are acting within the scope of the power of attorney. Requiring that all revocations be registered would impose an unnecessary burden on the principal.

This issue also ties in with the issues raised in Issue 1b. If all powers of attorney should be compulsory registered, then this option of requiring all revocations to be registered would be more effective. The form of revocation could be tied into the form itself, saving costs and also providing certainty to the public that the power of attorney has been revoked.

Question

2.1 Should it be compulsory for all revocations to be registered?

Issue 3: Multiple powers of attorney in operation

In some cases a principal may make more than one power of attorney appointing different attorneys. The Guardianship Tribunal has encountered a number of instances where a person makes a series of enduring powers of attorney without specifically revoking earlier enduring powers of attorney made by them. The tribunal advises that there is some case law suggesting that making a later power of attorney impliedly revokes an earlier power of attorney. There is, however, other case law which suggests that implied revocation would depend on the intention of the principal at the time of making the later enduring power of attorney.

The principal's intention to have more than one valid power needs to be absolutely clear from the face of the document. The prescribed form would need to be altered to include a statement to the effect that the principal intends to either revoke or confirm a previous power to reflect their intention. This would be comparable to the standard clause in wills which has the same effect.

A further difficulty can also arise if the principal loses capacity, yet makes a second power of attorney. The danger is that third parties may mistakenly deal with the second attorney, without knowledge of the invalidity of the power of attorney. This issue is generally dealt with by the Guardianship Tribunal under s36 of the Act: effectively making the later power invalid by determining that the principal did not have capacity.

Alternately, an amendment to the Act, to the effect that a later power of attorney revokes an earlier power of attorney would put beyond doubt the issues encountered by the tribunal in regards to multiple powers of attorney. If it is later shown that the later power of attorney was made without capacity, the earlier power would revive.

Question

3.1 Should the Act be amended to provide that a later power of attorney revokes an earlier power of attorney?

Issue 4: Joint attorneys to continue to act where there is a vacancy in the office

Section 46 of the Act states that the power of attorney is terminated if the office of one or more attorneys appointed jointly becomes vacant. For example, if a principal appoints his two sons as the attorneys to act jointly, and later one of the sons no longer wants to act as an attorney, or otherwise vacates the office of attorney, then the whole power comes to an end. The principal would then have to make a new power of attorney, if he still wants someone to act on his behalf.

Section 46 further states that if two or more attorneys are appointed jointly and severally, then the termination of office of one of the attorneys does not invalidate the power of attorney. Therefore, when a person is making a power of attorney and wishes to appoint more than one person as an attorney, advice should be sought on the advantages and disadvantages of either appointing the attorneys jointly, or jointly and severally. Which option should be taken depends on a variety of factors, most important being the family dynamics and the skill sets of proposed attorneys.

Due to the nature of family dynamics, sometimes a principal prefers that the attorneys be his or her children, so that they all have equal responsibility in looking after his or her financial affairs. The principal would therefore choose to appoint the attorneys jointly (and not severally). This would also allow each attorney to 'keep an eye on each other' when conducting affairs on behalf of the principal.

Despite the good intentions of the above arrangement, there are some obvious problems. Firstly, if one of the siblings moves interstate or overseas, this then forces the other attorney(s) to send over documentation to be signed. This may cause undue delay and additional costs to complete urgent tasks on behalf of the principal. If the attorney based interstate or overseas realises that it is impractical for him or her to continue to act, and wishes to vacate office, this would bring the whole of the power of attorney to an end. The principal would then be required to prepare a new power of attorney, provided he or she still has capacity.

Lands' registration staff have noticed an increase in power of attorneys that appoint attorneys to act jointly, with a statement to the effect that if one of the attorneys terminates office, then the other remaining attorney is to continue to act as the sole attorney of the principal. The principal is effectively providing a fall-back position to enable for the power to continue with the remaining attorney(s). This may also appear to be an attempt to override Section 46 of the Act.

The position needs to be made clear to avoid the uncertainty that could arise if appropriate wording was not used to reflect the intentions of the principal. Circumstances could arise that mean that the surviving joint attorney may continue to act in the false belief that the power of attorney is still valid, whereas in fact, it is legally terminated. Additionally, if the principal has lost capacity, he or she cannot make another power to overcome the termination of the power under these circumstances.

To overcome this problem, it has been suggested that the Act be amended to allow a principal to appoint two or more attorneys jointly, and make it clear that if the principal so directs, the power of attorney will not be invalidated by the termination of office of one of the attorneys.

A corresponding amendment to the prescribed form would be required to reflect any change in the law, effectively creating substituted appointments following the termination of the first preference for joint appointments.

Question

4.1 Should Section 46 be amended to allow a surviving joint attorney continue to act as attorney?

For clarity should the Act allow for the provision of substituted attorney appointments?

Issue 5: Redesigning the prescribed form

Concerns have been expressed, especially from the legal profession, regarding the complexity of the prescribed form of power of attorney, and calls have been made for the prescribed form to be simplified.

The main concern is that the prescribed form is headed *General Power of Attorney* and although the prescribed form may be used for both a general power of attorney and an enduring power of attorney, the heading of the prescribed form may cause confusion. There is also the possibility that persons dealing with the attorney, such as a bank, may assume that the power of attorney is only a general power and not enduring, solely because the form is headed as a *General Power of Attorney*.

The current prescribed form consists of two pages for the general power of attorney. If an enduring power of attorney is to be created, the principal retains clause 2 of the form as per the instructions, and has the certificate under section 19 completed by a prescribed witness, which makes the whole power of attorney document three pages long.

The prescribed form was designed to be easy to use and less onerous than previous forms. The prescribed form is also considerably smaller than forms in other jurisdictions. For example, in Queensland, the general power of attorney form consists of three pages; however their enduring power of attorney (short form) consists of twenty pages.

One suggestion is to remove the heading and replace it with *Power of Attorney* and have some type of notification (such as ticking a box) that indicates whether the power of attorney is general or enduring. There would have to be a presumption to the effect that if no box choice was made, it is presumed to be a general power of attorney, unless the certificate was completed.

Another suggestion is to prescribe two separate forms; one for a general power of attorney and one for an enduring power of attorney, as is the case in Queensland. This suggestion will eliminate confusion and may assist principals and attorneys in recognising the differences between the two. Having two separate forms may also assist in third parties dealing with the attorney as the power will be clear as to whether it is general or enduring.

Questions

- 5.1 Should the prescribed form be redesigned, or is it adequate as it is?
- 5.2 If the prescribed form is to be redesigned, what features or amendments should it have?

Issue 6: Guardianship Tribunal

The Guardianship Tribunal in its dealings with powers of attorney has raised the issue of revocation by a principal who may or may not have capacity.

The Guardianship Tribunal has pointed out that the Act makes no reference to the capacity of the principal when a power of attorney is revoked. In some instances, the attorney disputes that the principal had capacity to revoke the enduring power of attorney and asserts that they remain validly appointed with the authority to continue to deal with the principal's affairs.

Further, the Act does not enable the Guardianship Tribunal to make orders about a person's capacity to revoke an enduring power of attorney. In some situations an enduring power of attorney is revoked but family members or others dispute that the principal had capacity to revoke it and to then make a subsequent power of attorney. Currently, attorneys or others who dispute the validity of a revocation must take proceedings in the Supreme Court to resolve this issue.

The Guardianship Tribunal suggests that to properly deal with the above issue, it should be given the ability under the Act to review a revocation. This ability would require amendment to the Act, along with other amendments to ensure that a valid revocation can only be made by the principal if he has capacity to make it.

Question

- 6.1 Should the Act be amended to allow the Guardianship Tribunal to review the validity of a revocation?

4. Conclusion

This issues paper has sought to identify the issues that have emerged over the life of the *Powers of Attorney Act 2003*. Your comments on the various issues raised in this paper, and any other issues not covered here, will assist in identifying amendments that may be necessary to ensure that the policy objectives of the Act remain valid and that the terms of the Act remain appropriate for securing those objections.

Are there any other issues you feel need to be examined in the review of the Act?

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