THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: JJC:SRC:1296652

14 September 2009

By email: legal.services@lands.nsw.gov.au

The Powers of Attorney Act Review
Legal Services Branch
Department of Lands
G P O Box 15
SYDNEY NSW 2001

Review of the Powers of Attorney Act 2003 – Issues Paper

Thank you for the opportunity to contribute to the Review of the *Powers of Attorney Act 2003* and granting the Law Society of New South Wales an extension of time in which to respond to the issues paper.

The attached submission reflects the considered views of the Law Society's Elder Law & Succession Committee, Property Law Committee, Accredited Specialists in Wills & Estates and a number of individual legal practitioners, and I commend it to the Review.

If you wish to discuss any of the matters raised in the submission, please contact Ms Sherida Currie, Senior Legal Policy & Research Officer, Practice Department by telephone to (02) 9926 0252 or by email to sherida.currie@lawsociety.com.au

Yours sincerely

Joseph Catanzariti
President

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REVIEW OF THE *POWERS OF ATTORNEY ACT 2003*

RESPONSE TO ISSUES PAPER

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REVIEW OF THE *POWERS OF ATTORNEY ACT 2003 – RESPONSE TO ISSUES PAPER*

Introduction

This Submission is made by the Law Society of New South Wales and reflects the views of the Society's Elder Law & Succession and Property Law Committees, Accredited Specialists in Wills & Estates and other expert legal practitioners.

Question 1.1
Should the NSW power of attorney form include additional information on the obligations and responsibilities of acting as an attorney?

Yes. Providing the information and education outlined in part 3(a) of the issues paper would certainly assist consumers. It is suggested that consideration be given to developing a tool kit of separate information booklets to assist principals, attorneys and legal practitioners. In this regard, see the recent United Kingdom developments at http://www.publicguardian.gov.uk/forms/Making-an-LPA.htm

Question 1.2
Should all powers of attorney require registration at the Department of Lands?

In the context of preventing financial abuse, the proposal to require registration of all powers of attorney is not supported. If it became mandatory for all powers of attorney to be registered this would raise significant difficulties including, but not limited, to:

- the additional cost of putting a power of attorney in place (not only registration fees simpliciter, but associated costs such as law stationer fees and the professional costs of solicitors arising from mandatory registration),
- the loss of privacy associated with placing particulars on a public register,
- the potential for the registered copy of the power of attorney to provide a "template" for the forgery of the signature of the principal (and in the case of an enduring power of attorney a template for the signature of the attorney).

It was considered that these factors on balance outweighed the benefits of registration in certain circumstances, for example:

- registration of powers in relation to land not under the Torrens system is useful because it assists in establishing chain of title by providing secondary evidence of lost or otherwise unavailable documents,
- registration in other contexts may have utility in giving searchable notice to the general public (for example, the registration of certain notifications under Part 2 Division 1 of the *Trustee Act*),
- in limited circumstances, enduring powers of attorney should be registered but special circumstances should exist to justify cost, loss of privacy etc.

Although not raised in the issues paper, it was considered that notification of commencement given to persons nominated in the power may be a more effective way of letting relevant people know that a power is in operation.

Question 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?

This proposal is supported, although it should not be mandatory. It could be a matter for election by the principal, and thus included as an option in the prescribed form.

Question 1.4
Should the Act provide for criminal sanctions against attorneys who knowingly mistreat or neglect a principal who has lost capacity?

This proposal is not supported. The issue raised arguably blurs the distinction between a 'power to do' something as an attorney and a 'duty to do' something. Given the nature, in particular, of some powers under an enduring power of attorney, issues could arise if criminal sanctions existed which could detrimentally impact on the willingness of people to accept the responsibility of being an attorney for someone. Existing law suitably addresses the circumstances where someone knowingly mistreats or neglects another person. It is not necessary to capture this under the *Powers of Attorney Act*.

However, it is suggested that information provided for attorneys should refer to the specific criminal sanctions that presently exist. This may have some deterrent effect.

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

No but, with reference to the comments at question 1.2, consideration should be given to requiring revocations to be registered in circumstances where the power of attorney is registered.

More importantly, it is suggested that there would be great benefit in providing principals and attorneys with more information about revoking grants of powers of attorney and the form such revocations can take. Revocation should be perfected as quickly as possible. Ideally, revocation should be in writing to be valid, but there will be instances where effective revocation does not take place in writing, for example, physically withdrawing a power of attorney coupled with words of intention that the power is revoked. It would also be of assistance to incorporate a form of revocation into the prescribed form.

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

Although experience indicates that the principal usually intends the new power of attorney to replace the previous one, the proposed legislative amendment is not supported. Rather, there should be a presumption that a later power of attorney revokes an earlier power of attorney unless expressly stated to operate in addition to a previous power of attorney. This may arise out of the need for an additional power given to a different attorney for a nominated purpose or for a limited period to cover the first nominated attorney's inability to act. The prescribed form could be amended by allowing the donor the choice of whether or not to revoke a former power of attorney, clearly specifying revocation of an earlier power of attorney as the default option.

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

The clarification of section 46 is supported so as to allow principals the flexibility of expressing contrary intentions and alternative appointments. The prescribed form should be amended to allow various alternatives to be expressed. An alternative to the expression 'joint and several' should be found.

Should the Act allow for the provision of substituted attorney appointments?

Yes. Again, the prescribed form should be amended to allow for the provision of substituted attorney appointments.

Question 5.1
Should the prescribed form be redesigned, or is it adequate as it is?

The form should be redesigned.

Question 5.2
If the prescribed form is to be redesigned, what features or amendments should it have?

It is suggested that there should be further consultation about changing the form of power of attorney. The new form or forms should be drafted as widely as possible to flag possible alternatives. It is also suggested that the process of consultation should also incorporate analysis of the proposed form (and accompanying information as foreshadowed in the response to question 1.1) to ensure that it is capable of being readily understood by the intended users. This form of "roadtesting" was utilised to great success by the Attorney General's Department when preparing its Capacity Toolkit.

As already noted, amendments should be made to give effect to:

- Incorporating in that section of the prescribed form that deals with an enduring power of attorney the variable whereby an independent accountant can be appointed and or required to carry out regular audits of the attorney's actions.
- Incorporating a statement in the prescribed form as to revocation of all previous powers of attorney or any specific power of attorney.
- Incorporating a form of revocation into the prescribed form.
- Providing the various choices as to survivorship, substitution and functions of attorneys.
- Providing the option of giving notice to nominated persons on commencement.
- The word "General" should be removed from the prescribed form of power of attorney, particularly if only one form is ultimately prescribed.
- Further information can be added to the form regarding the appointment by the principal of an independent accountant etc, and the obligations of good faith of the attorney in acting as an attorney (possibly only to operate if the instrument is an enduring power of attorney).

- It is noted that the present legislation refers to powers of attorney in the prescribed form, but contemplates other powers of attorney. It is suggested that the legislation should specifically provide that forms of powers of attorney should not be permitted to operate as enduring powers of attorney unless they are in and to the effect of the prescribed form.

- The words "when my attorney thinks necessary" should be removed, as they provide an opportunity for powers to be abused.

- There would be benefit in redesigning the form, if a single form is adopted, to gather into a single, prominent location that material which would transform the power into an enduring power (rather than having clause 2 on page 1, one relevant note immediately below, another note further down page 1 and the section 19 certificates on page 3, as is currently the case with the Australian Law Stationers Form).

It would beneficial if, ultimately, there was a uniform prescribed form or forms of power of attorney between the various jurisdictions in Australia. The Law Society has received numerous complaints and expressions of concern from practitioners that certain recipients, such as nursing homes, are reluctant to recognise and operate on powers of attorney made in other jurisdictions.

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

This proposal is supported.

Section 7
Other issues that need to be examined

7.1 Remuneration of attorney

Section 12(2) of the Act and part 6 of the form authorize the conferring of benefits to meet the attorney's reasonable living and medical expenses, but there is no provision for charging professional fees. In terms of benefit there are many instances where an attorney will be appointed (including trustee company, accountant etc) for whom a charging arrangement is appropriate. Accordingly, there is support for the Act to be amended to give attorneys the right to charge a fee or obtain some form of remuneration.

7.2 Attorneys conferring a benefit on themselves

It is noted that, having regard to the *Spina* litigation, there is a difficulty in addressing the issue of attorneys conferring a benefit on themselves (in particular, the tension arising from the fiduciary nature of the principal/attorney relationship). This matter will need to be considered further, and it is recommended that consideration should be given to the comments of Austin J in *Spina v Conran Associates Pty Ld* and *Spina v M & V Endurance Pty Ltd* [2008] NSWSC 326 and those of Hammerschlag J in *Angelina Spina v Permanent Custodians Ltd* [2008] NSWSC 561 in relation to the wording of the legislation, particularly since the issue was abandoned in, and so remains unresolved by, the

appeal from the latter decision: *Spina v Permanent Custodians Limited* [2009] NSWCA 206.

7.3 Joint Conference with principal and attorney

Page 5 of the issues paper under the heading "Education" proposes that, for effective educative purposes, and with a view "to limit the abuse of a principal by an attorney ... both the principal and the attorney should be encouraged to see a solicitor together when making a power of attorney". The solicitor can then "arrange the necessary signatures and certificates".

Although this practice may be helpful in certain circumstances, it should not be universally encouraged as there is the potential for principals to be the subject of influence or pressure from certain proposed attorneys.

7.4 Attorney to account on death of principal

Where a principal dies, there is some support for the Act to be amended to allow an executor or major beneficiary of the principal's estate, in appropriate circumstances, to seek an accounting from an attorney.

7.5 Management of superannuation benefits

The issue of an attorney's management of superannuation benefits for his or her principal requires further consideration (see, for example ATO SMSFR 2009/D1). It is suggested that the interplay between the *Powers of Attorney Act* and the *Superannuation Industry (Supervision) Act* may require further discussion at a federal level to address some of the unintended consequences.

7.6 "Cascading" appointments of Attorneys in the prescribed form

A difficult question arises as to whether a principal should be able to have one power of attorney with a cascading sequence of appointments depending on particular events. This requires further intensive consultation in order to formulate an appropriate recommendation.