



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ELCS/PLC:RHsh1966062

26 August 2020

Dr David Plater
Deputy Director
South Australian Law Reform Institute

By email: david.plater@adelaide.edu.au

Dear Dr Plater,

South Australian Law Reform Institute inquiry into Powers of Attorney

The Law Society of NSW appreciates the opportunity to provide comments in relation to the South Australian Law Reform Institute (**SALRI**) inquiry into Powers of Attorney.

The Law Society's response is informed by its Elder Law, Capacity & Succession Committee and Property Law Committee.

We provide our responses to the discussion questions, as relevant, below:

The use of Powers of Attorney in South Australia and Guiding Law (Factsheet 2)

4. How does the POA Act compare to other Powers of Attorneys laws in Australia? What are its benefits/disadvantages?
The South Australian Act is relatively brief and not prescriptive, particularly in terms of the powers and responsibilities it confers on attorneys. This may create uncertainty about key issues, for example, the extent of an attorney's authority.
5. Should guiding principles be introduced in the POA Act?
The capacity principles set out in the *Powers of Attorney Act 2014* (Victoria) might be considered.
8. Should it be mandatory to use the standard POA forms?
Requiring that a POA be in, or to the effect of, a standard form may make it easier for financial institutions and registries to recognise a POA.
9. Are the formal requirements for creating POAs suitable?
The inclusion of a certificate by a qualified witness going to the identity, volition and capacity of the principal could be helpful.
10. How many witnesses should be required to witness a POA document?
The most important factor is that the POA is correctly witnessed by a person who is qualified to be a witness pursuant to the Act. We do not recommend requiring more than one witness, as this may increase costs in the matter, and make the process more

cumbersome and more prone to abuse, particularly if the witnessing is being conducted electronically.

11. Should witnesses have to explicitly attest to the principal's capacity?

Yes.

12. What qualifications (if any) should a witness hold?

In our view it is preferable that the witness be a legal practitioner, particularly in relation to enduring POAs. This provides an opportunity for the witness to explain the rights and obligations of attorneys and principals to each of those parties.

13. Who should be disqualified from being a witness?

The attorney.

The Principal's Legal Capacity (Factsheet 3)

1. How should capacity be defined?

Section 4 of the *Powers of Attorney Act 2014* (VIC) provides a helpful definition.

2. Should the test in the 1870 case of *Banks v Goodfellow* continue to be the relevant test for assessing capacity?

A statutory definition is preferred. In New South Wales the test for mental capacity in relation to making a will is *Banks v Goodfellow* QB 1870 but the case of *Gibbons v Wright* (1954) 91 CLR 423 at 437-8 is cited as the test in relation to making a POA.

3. Who should be making the capacity assessment for the creation and activation of a POA?

In the context of the creation of the POA, a witness who is qualified as such pursuant to the legislation (and our preference is that this should be a legal practitioner). In the context of activation of an enduring POA, this depends on the facts and circumstances.

5. Should there be principles to guide capacity assessment?

Yes, principles are very helpful. We recommend those set out in the *Powers of Attorney Act 2014* (VIC).

6. What evidence should be required to create or activate an enduring Power of Attorney?

In NSW, the evidence needed to activate the attorney's authority will depend on the event chosen by the principal to trigger the attorney's authority.

7. Is there sufficient guidance and support for those making the assessment?

In 2008 the NSW Government created the Capacity Toolkit¹ which contains information to help a wide range of people making assessments. In our experience, many people have found this helpful.

The tests are different depending on the purpose of the assessment. There is relevant caselaw for assessing capacity at the time of making the power and revoking the power.

The role of the attorney in South Australia (Factsheet 4)

3. What are the issues arising with multiple and alternative attorneys?

Appointing multiple attorneys can provide an additional check and balance but can also be cumbersome especially if the attorneys live some distance from each other or interstate.

¹ Available at www.justice.nsw.gov.au/diversityservices/Documents/capacity_toolkit0609.pdf.

The NSW legislation responds to issues associated with appointing alternative attorneys. These include what events trigger the vacation of the first-appointed attorney's office. A limitation of the NSW legislation is that it does not include the event that the attorney is overseas and cannot in practical terms carry out their duties.

We advise against prescribing who can or cannot be appointed as an attorney, as this should be a matter for legal advice in the circumstances.

4. What are the powers and duties of attorneys and are they understood by the public?
Our members report that the public generally does not fully understand what a power of attorney is, nor do they understand the powers and duties of an attorney.
5. How can attorneys' understanding of their role, powers and duties be increased?
It may be of some help to include information about the role, powers and duties of an attorney on the form for a power of attorney.

In addition, by making it mandatory for an attorney's signature of acceptance on a power of attorney to be witnessed by a legal practitioner, the legal practitioner would have the opportunity of informing the attorney about their role, powers and duties.

7. Should it be mandatory to appoint two attorneys - one of whom is a professional (allied health)?
No. It should be up to the appointor who may only want one attorney. In some circumstances it will be sensible and practicable to appoint an alternative attorney.
8. Should any of the following become statutory limitations of an attorney's power?
 - a. the principal and/or another nominated individual, receive copies of account statements on a regular basis;
 - b. prior to certain transactions, such as sale of property, the attorney consult with nominated persons;
 - c. that the principal's finances be audited annually, with a report sent to nominated persons;
 - d. that the principal undertake a capacity assessment, once deemed legally incapacitated; or
 - e. other?

These could be options available to a principal but making such limitations mandatory becomes a form of financial management.

Abuse of Powers of Attorney - Current Legal and Practical Remedies (Factsheet 5)

1. What is the level of abuse of POAs?
The Australian Institute of Family Studies ("AIFS") report 'Elder abuse: understanding issues, frameworks and responses' indicated financial abuse is the most common form of elder abuse – in that study, 38% of calls to the helpline were on that topic.² However, to our knowledge there is little readily available up to date data on POA-related abuse. Agencies such as the NSW Ageing and Disability Commissioner may be in a position to provide some information. Anecdotally, we note an increase over the past 12 months in cases of misuse of a POA.
2. How are POAs abused?
They are used to obtain access to the principal's assets/finances.

² Australian Institute of Family Studies, 'Elder abuse: understanding issues, frameworks and responses' (2016) 7.

3. Who are the victims?
Elderly, vulnerable principals with mental incapacity, who are likely to be living in aged care accommodation or dependant on a family member.
4. Who are the perpetrators?
In most cases a family member/carer or friend who has been nominated as the principal.
5. How can abuses of POAs be better detected, reported and investigated?
 - a. Should a referral system as outlined in the *ACD Act* be applied in the context of POAs?

We recommend, particularly in relation to enduring POAs:

- clearer information and warnings for principals and attorneys in the form;
- requiring that at least one witness be a legal practitioner;
- improving public awareness about POAs;
- a requirement that attorneys undergo specific training before commencing their role;
- improving the understanding of financial institution staff about of POAs; and
- clear reporting pathways.

Any process or procedure which would enhance/facilitate reporting and investigation is to be welcomed.

6. What mechanisms can be implemented to provide oversight of an attorney's conduct, to identify and address abuse?
Options include greater oversight at the time of the appointment of the attorney, greater care in selection of attorney, and greater understanding by the principal of the powers that the attorney will have and whether they should be limited.
7. What measures should be implemented to prevent abuses?
In addition to the measures outlines above in response to questions 5 and 6, consideration could be given to ensuring a robust tribunal review system and to statutory reversal of the onus of proof for undue influence (as is the case in Queensland).
8. How can data collection processes be improved to obtain accurate figures of abuse?
The development of a single, online portal where abuses can be reported by financial institutions may assist.
9. What measures can be adopted to better protect vulnerable populations, specifically CALD individuals and Indigenous and Torres Strait Islander individuals?
It could be made clear on the form that an accredited interpreter should be engaged to explain the significance of the POA at the time of execution.
10. Are the current legal remedies adequate?
Studies such as that undertaken by the Australian Law Reform Commission³ and the AIFS it would suggest that the current legal remedies do not act as a sufficient deterrent.

Register of Powers of Attorney in South Australia (Factsheet 6)

1. Should South Australia introduce a compulsory register of POAs?
No.

³ Australian Law Reform Commission, *Elder Abuse—A National Legal Response* (ALRC Report 131) (2017).

2. Should registration be national or state-based?

The Council of Attorneys General has indicated it is considering the development of a national online register of powers of attorney.

3. What are the benefits and risks of introducing a register?

If a national register is developed, the benefits of a state-based register are likely to be minimal, as such a register may become redundant or less reliable.

Other risks include privacy concerns and concerns around access to the register (including in relation to fraud), maintaining the register, cost and security of the register, whether it records the status of a power of attorney, as well as its mere existence, and ensuring suitable waivers of liability.

4. Should registration be compulsory upon initial creation or when the principal loses decision-making capacity?

In NSW registration is only compulsory when a POA is used for land dealings, regardless of the principal's capacity. Therefore, at the time of creation, registration may be unnecessary.

Compulsory registration would require registration upon creation of the document.

Compulsory registration when the principal loses decision-making capacity would potentially create a register of persons who have lost decision-making capacity. Such a register may be discriminatory.

5. Should there be a notification scheme as in England / Wales where designated persons are notified once the attorney attempts to first exercise their powers?

Issues to consider include:

- What would be the purpose of a notification scheme? If the purpose were limited to detecting unlawful transactions, a single notification would be ineffective in cases where the second - or a subsequent - transaction was unlawful.
- What would the designated person be expected to do with the information?
- Who would be responsible for notifying the designated person?
- Is there evidence in the UK that the notification process has assisted in reducing the risk of elder abuse?

6. What information should be included in the register?

Further debate is required on this point. In NSW, a copy of the document is available upon payment of a fee to Land Registry Services, in the context of powers of attorney associated with property transactions. However, a copy of the document exposes signatures and addresses, which may not always be appropriate or desirable.

The information on the register will be guided by the intended purpose of the register.

7. Who should have access to the register?

Further debate is required on this point.

Access should be available to the principal, the attorney, the solicitor acting for the principal, the solicitor acting for the attorney, banks and other governmental bodies and perhaps commercial online search providers (e.g. Infotrack).

8. Where should the register be located?

We suggest the development of a cloud-based register comparable to other national registers, e.g.: Personal Property Securities Register, MyGov, Australian Taxation Office, Australian Securities and Investments Commission.

9. Will the costs of registration deter principals from creating POAs?

The cost of registration will be affected by the cost of maintaining the register, which in turn depend on how the register manages registration and access processes, security of documents etc. In our view, from a principal's perspective the cost of registration is unlikely to be a significant deterrent to creating a POA.

10. Should registration be online and/ or in person?

Online – not only because of COVID-19 but in line with our answer to 8 above.

11. Should the registration body take on the role of ensuring POAs are correctly executed?

No, the solicitor certifying the principal's understanding of the document should take responsibility for proper execution.

12. Will the register help to detect fraud?

Not necessarily. A national register may assist in confirming the existence of a POA and whether it has been correctly executed, but not whether it is being abused. It will not assist in determining whether the POA is activated, or whether an attorney has exceeded their powers under the POA.

Thank you for the opportunity to comment. Any questions in relation to this submission should be directed to Sue Hunt, Principal Policy Lawyer on (02) 9926 0218 or by email: sue.hunt@lawsociety.com.au.

Yours sincerely,



Richard Harvey
President