The Law
Reform
Commission

Report No 47

COMMUNITY LAW REFORM FOR THE AUSTRALIAN CAPITAL TERRITORY: THIRD REPORT

Enduring Powers of Attorney

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Unless otherwise indicated this report reflects the law as at 1 September 1988

Note: References to the Lunacy Act 1898 (NSW:ACT) are references to the Lunacy Act 1898 of the State of New South Wales in its application to the Australian Capital Territory.

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The Law Reform Commission is established by section 5 of the Law Reform Commission Act 1973 to review, modernise and simplify the law. The first members were appointed in 1975. The offices of the Commission are at 99 Elizabeth Street, Sydney, NSW Australia (Tel (02) 231 1733; FAX (02) 223 1203).

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Terms of reference

COMMUNITY LAW REFORM PROGRAM FOR THE AUSTRALIAN CAPITAL TERRITORY

I, GARETH EVANS, Attorney-General of Australia, HAVING REGARD TO:

(a) the functions of the Law Reform Commission (the Commission) under the Law Reform Commission Act 1973 (the Act);

(b) the provision made in section 6 of the Act for the Commission to suggest to the Attorney-General matters to be referred to the Commission; and

(c) the desirability of involving the community of the Australian Capital Territory in the reform of the laws of that Territory,

HEREBY REFER to the Commission the following program, to be known as the Australian Capital Territory Community Law Reform Program:

1. The Commission is to call for suggestions from members of the public as to laws of the Territory that should be reviewed and for proposals for their reform;
2. The Commission is to consider such suggestions and report on them to the Attorney-General;
3. Where it appears to the Commission that a suggestion relates to a matter on which it is desirable for the Attorney-General to issue to the Commission a specific reference under the Act the Commission is to include in its report a recommendation to that effect;
4. Where it appears to the Commission that a suggestion discloses the desirability of an amendment or amendments to a law of the Territory and a conclusion to that effect is possible without an extensive investigation, the Commission is to report to the Attorney-General to that effect indicating the nature of the amendment or amendments it considers desirable.

DATED this 21st day of February 1984.

Gareth Evans
Attorney-General

Participants

The Commission

The Division of the Commission constituted under the Law Reform Commission Act 1973 for the purpose of this report comprised the following members of the Commission:

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The Honourable Xavier Connor AO, QC, LLB (Melb) (1985 to December 1987)

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The Commission wishes to acknowledge the particular contribution of Ms R Creyke, Lecturer in Law, Australian National University and a consultant to the Commission, who played a major role in providing advice and guidance in the preparation of the Discussion Paper and this Report. She also assisted the Commission in its consultation process, both in the Australian Capital Territory and in Victoria.

[1] The recommendations, statements of opinion and conclusions in this report are the responsibility of the members of the Law Reform Commission. They do not necessarily represent the views of the consultant or of the Australian National University.

Summary

1. This is the third report in the Community Law Reform program for the Australian Capital Territory and the fifth of the reports which have flowed from that program. It deals with a suggestion made to the Commission under the program that it should be possible in the Australian Capital Territory for a person to give a power of attorney that continues to operate after the person becomes legally incapable.

2. The report examines the present law in the Australian Capital Territory under which, as soon as the donor of a power of attorney becomes incapable, the power of attorney lapses. It concludes that the law ought to be amended to allow enduring powers of attorney to overcome this anomaly.

3. The report sets out a number of specific safeguards to protect the donors of enduring powers of attorney, particularly after they have become incapable, but at the same time the scheme recommended is simple and easy to operate.

4. Finally, the report gives consideration to the question whether enduring powers of attorney should be able confer 'guardianship-type powers', such as the power to make day-to-day decisions for the donor and the power to give consent to medical treatment for the donor, on the attorney. It recommends that enduring powers of attorney be able to confer these powers on donees, subject to specific safeguards. These powers, however, should only be able to be exercised by the donee while the donor is incapacitated.

1. Introduction

The community law reform program

1. This is the third of the Commission's reports under the Community Law Reform Program for the Australian Capital Territory Reference, and the fifth report to flow from the Program. It follows reports on

- domestic violence — prepared under a specific reference and implemented in 1986[1]
- occupiers' liability — prepared under a specific reference suggested under the Program[2]
- contributory negligence[3] and
- loss of consortium.[4]

The background to the program was set out in the first report.[5] One suggestion received by the Commission and noted in the first report was that the Commission should investigate the law relating to the management of infirm person's property. One way in which a person can arrange for his or her future infirmity or incapacity is to appoint an agent (or 'attorney') to act for him or her. The document used for such an appointment is called a power of attorney. That is the subject of this report.

Powers of attorney and incapacity

Powers of attorney

2. The problem with a power of attorney is that it lapses once the person who granted it becomes legally incapacitated.[6] There is a need for an enduring power of attorney which continues to operate after incapacity. This need has been brought to the Commission's attention by many people in the community who work with those who are incapacited.[7] This report examines ways in which enduring powers of attorney can be made available to those who wish to provide ahead of time for their future incapacity and recommends that legislation should be enacted which allows the creation of enduring powers of attorney with proper safeguards.

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[1] ALRC 30; see Domestic Violence Ordinance 1986 (ACT).
[2] ALRC 42.
[3] ALRC 28.
[4] ALRC 32.
[5] ALRC 28 ch 1.
[6] See para 3 below for definition of legal incapacity.
[7] Among them the Public Trustee (ACT), solicitors, social workers and bodies who represent the aged and infirm, such as the Australian Council for the Rehabilitation of the Disabled, the ACT Council on Intellectual Disability and the ACT Council for the Ageing.

Incapacity

3. A number of expressions — 'incapacitated', 'incapable', 'infirm' — are used in this report to describe the notion of legal incapacity. In law, a person cannot do things which have legal consequences if he or she cannot sufficiently understand those consequences. Thus, children are incapable in law of making wills or binding themselves to contracts. Adults, too, may lack legal capacity if they suffer such mental impairment that they are unable to understand the effect of, for example, a contract and its consequences. Thus 'incapacity' and similar expressions have a limited meaning and relate to mental incapacity. They are not concerned with physical incapacity, though in some circumstances it may be difficult to distinguish between mental and physical incapacity, for example, when a person is so physically impaired that he or she cannot express his or her wishes or intentions. In the context of powers of attorney, the primary concern of this report is the case of the person who has executed a power of attorney and who later becomes incapacitated. In addition, the report deals with the problem of initial incapacity, that is, where, at the time of executing a power of attorney, the person is unable to understand the nature and effect of the power.[8]

Guardianship and management of property

4. Reform of the law on powers of attorney must take account of the general problem of establishing suitable mechanisms for the management of an incapable person's property who has not taken steps ahead of time to deal with the problem. In addition, it may be necessary to appoint someone, not only to manage an incapable person's property, but also to help the person in making ordinary day to day decisions not connected with management of money or property. This latter type of management is called guardianship. The law in the Australian Capital Territory dealing with guardianship and management of property is found in the Lunacy Act 1898 (NSW:ACT). That law is in urgent need of replacement. The Commission has been given a reference on guardianship and management of property. Some of the matters discussed in this report will have to await the resolution of issues which will need to be dealt with in a report on guardianship and management of property.

The Commission's work in this project

5. In October 1987 the Commission published a discussion paper, ***Enduring Powers of Attorney***.[9] This paper was widely circulated within the Australian Capital Territory and to selected bodies and persons outside the Territory. A number of helpful submissions were received from, amongst others, the Chief Justice of the Supreme Court of the Australian Capital Territory, Mr Justice Miles, the Public Advocate of Victoria, Mr Ben Bodna, the Tasmanian Law Department, the Northern Territory Bar Association, the Canberra Branch of the Voluntary Euthanasia Society of New South Wales and Mr John Jasinski of

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[8] See para 15–20 below.

[9] ALRC DP 33.

the Legal Aid Office (ACT). Special mention should be made of the assistance to the Commission provided by the Public Trustee (ACT), Mr Jim Campbell, who made a number of useful suggestions and comments. The Commissioner in charge, Mr Nicholas Seddon, and the Commission's consultant, Ms Robin Creyke, attended a number of meetings and discussion groups concerning the management of the property and affairs of incapable persons. Ms Creyke had detailed and helpful discussions with Mr Jeff Goldhar, the Legal Officer for the Victorian Guardianship and Administration Board. The need for an enduring power of attorney was universally recognised in all the submissions the Commission received, and in all its consultations.

2. Enduring powers of attorney

Introduction

6. In this chapter and in chapter 3, the focus of attention is on mechanisms for managing an incapable person's property and money. Whether a power of attorney could or should be used for guardianship (that is, for making day to day decisions on behalf of an incapable person, not related to property or money) is discussed in chapter 4. There are two principal legal mechanisms for managing an incapable person's money and property, court-ordered management and a power of attorney. There are other mechanisms, such as the use of a trust and joint bank accounts and, in relation to limited classes of property and money, the nominee system under the Social Security Act 1947 (Cth) and the Veterans' Entitlements Act 1986 (Cth). These are not dealt with in this report.

Management of property

Court-ordered management

7. Under the Lunacy Act 1898 (NSW:ACT) the Supreme Court may appoint a person to manage an incapable person's property and money. This procedure is expensive, costing approximately $1500 in the average case, and is little used. Probably no more than 20 applications for such orders have been made since 1927.[1] By contrast, the body which deals with equivalent applications in Victoria, the Guardianship and Administration Board, processes several applications a day. The Commission has heard of many cases in the Australian Capital Territory where the cost of a Supreme Court order has been regarded as prohibitive and alternative arrangements, sometimes of doubtful legal validity, have had to be made.

Powers of attorney

8. *Ordinary powers of attorney.* The second legal mechanism by which a person can manage another person's property and money is a power of attorney. A power of attorney is a document which is executed (signed) by a person wishing to appoint another to manage his or her property. The person granting the power is called, in the Australian Capital Territory, the donor. The person granted the power is called the donee or attorney. The power may be limited or quite general in what property it covers. It may be limited in other ways, for example, as to duration or as to the powers it gives the attorney.

[1] Source: Registrar of the Supreme Court (ACT).

9. *Difficulties.* The problem with a power of attorney is that, except in limited circumstances, the power lapses upon the incapacity of the donor.[2] A person who executes a power of attorney knowing that he or she may become incapacitated in the near future cannot be confident that the attorney will be able to act under the power after the donor becomes incapacitated. The power lapses precisely when it is most needed. The Commission has found that the public perception of powers of attorney is the opposite of the legal position: powers of attorney are used in the belief that they are valid after the donor becomes incapable, whereas in law they are not valid. The consequence is that any actions taken under an ineffective power of attorney may be challenged and may be of no effect.[3] It would not be safe for a bank, for example, to deal with an attorney once the donor of the power had become incapacitated. What is needed to meet this problem is an enduring power of attorney, that is, one which continues to be valid after the donor's incapacity. In order to examine how best to provide for enduring powers of attorney, it is first necessary to examine the present law in some detail.

Powers of attorney: the present law in the ACT

The common law

10. *Principal and agent.* The relationship between the donor and attorney under a power of attorney is that of principal and agent. The principal appoints the agent to act on his or her behalf, specifying what may and may not be done by the agent. A relationship of agency lapses on the death or bankruptcy of either party or when the agency is revoked by the principal.[4] It is generally thought by lawyers that an agency relationship also automatically terminates upon the principal becoming insane or incapable. Yet the legal authority for this proposition is very thin. Courts have either simply asserted that this is the case, without saying why, or disagreed among themselves about the question.[5]

11. *Uncertain law.* None of the case law addresses the situation of a principal who specifically grants the attorney power intending it to continue in operation after the principal becomes incapable. If the reason for the agency relationship coming to an end is that the incapacitated principal could not legally have acted

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[2] This is the accepted legal position, though the authority for this proposition is not very strong: see para 10 below.

[3] *Yonge v Toynbee* [1910] 1 KB 215; cf *Drew v Nunn* (1879) 4 QBD 661.

[4] There are other ways in which the relationship may come to an end which are not of immediate concern.

[5] eg, in *Drew v Nunn* (1879) 4 QBD 661, only one judge, Brett LJ, was prepared to say unequivocally that the insanity of the principal put an end to the authority of the agent. Bramwell LJ said that not every case of insanity would necessarily terminate the agency. Cotton LJ was more doubtful. Again, in *Yonge v Toynbee* [1910] 1 KB 215, it was simply assumed that the insanity of the principal automatically revoked the authority of the agent. But this case was principally concerned with the question whether the agent was personally liable for acts done after the principal became insane. It was held that the agent was so liable.

for himself or herself — that is, the agent's authority to act is dependent on the principal's capacity to act — it would seem that the agency relationship cannot survive the principal's insanity. If, on the other hand, the agent's authority is dependent upon the expressed intention of the principal, there is no reason why the agent should not act after the principal's insanity, if the power of attorney is so expressed. Although the law in this area has not been fully tested or developed in the courts, the proposition that a power of attorney executed by a competent principal lapses upon that person becoming incapable is commonly accepted by lawyers as correct. It would, therefore, not be safe to operate a power of attorney on the opposite assumption. It is for this reason that there is a need for an enduring power of attorney.

Statute: the Powers of Attorney Ordinanace

12. The Powers of Attorney Ordinance 1956 (ACT) provides for limited enduring powers of attorney in certain circumstances.

- *Limited duration.* The more important provision is s 7, under which it is possible to create a power of attorney which is irrevocable for not more than two years from the date of execution of the power even if the donor becomes mentally incapacitated. It is thus possible to grant a power of attorney of limited duration – two years. But any time limit is arbitrary and two years is too short in any event. If the donor becomes incapable while the power is still current and it then expires, the donor cannot renew the power unless he or she has a lucid interval. Another obvious pitfall is that the power may be given and retained by, say, a trustee company only to find that it has expired once it is needed.

- *Valuable consideration.* The other provision is even less useful. Section 6 provides that a power of attorney, if given for 'valuable consideration' and expressed to be irrevocable, will survive the mental incapacity of the donor. No time limit is imposed. What this section appears to say is that the attorney must pay money or some other 'consideration' to the donor in exchange for the granting of the power of attorney. Obviously this is something which would almost never be done. Why should, for example, a trustee company pay the donor for managing his or her affairs? The explanation for this section is to be found not in its literal wording but in its historical origins. It caters for a type of security. For example, one way for a creditor to obtain security from a debtor was for the debtor to give the creditor a power of attorney. The creditor provided consideration by making the loan. Accordingly, this section is of very limited application.[6]

[6] Nevertheless, the Public Trustee (ACT) has, in the absence of enduring powers of attorney legislation, managed to create a form of enduring power of attorney by using s 6.

Recommendation

13. When a person has the foresight to make arrangements for his or her impending incapacity, it is most unsatisfactory if the law frustrates that planning. There is a need for a cheap, simple, self-help procedure, subject to appropriate safeguards, whereby a person can prepare in advance for his or her possible incapacity. The need for enduring powers of attorney is particularly pressing in a 'greying' population. The proportion of the population over 65 is steadily increasing. It is currently almost 11% nationally. Although the Australian Capital Territory has a much smaller percentage of its population over 65 (5.3%) it has the fastest growing number of old people. By the year 2011 it is expected to have caught up to the national average. An enduring power of attorney has the following advantages:[7]

- it allows the principal to plan for the future
- it allows the principal to choose who is to manage his or her affairs
- it avoids the stigma of the principal having to be declared incapable.

An enduring power of attorney has the additional advantage of 'privatising' care for the aged and other incapacitated people. Some of the burden is thus taken from State instrumentalities. For these reasons, the Powers of Attorney Ordinance 1956 (ACT) should be amended to enable an individual to appoint an attorney to manage that individual's property and money in the event that he or she becomes incapacitated. The Commission found strong support for this recommendation in all its consultations in the Australian Capital Territory and in submissions. Indeed, a similar recommendation was made 15 years ago by the former Law Reform Commission of the Australian Capital Territory.[8]

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[7] See Porter & Robinson 1987, 96.

[8] ACTLRC para 31–6.

3. Implementation

Finding a balance: simplicity and safeguards

14. If the law is to allow a person to manage the affairs of another who is unable, through incapacity, to supervise that management, there is a clear danger of potential abuse.[1] The law allowing the creation and operation of enduring powers of attorney must include proper safeguards to prevent, so far as possible, any unscrupulous use of enduring powers of attorney by 'friends' and relatives. In addition, the law must deal with the case of the possible incapacity of the donor when the power of attorney was given. But the more complicated the scheme for enduring powers of attorney is, the less accessible enduring powers of attorney will be to ordinary people who may not have the benefit of legal advice. In the United Kingdom the scheme for enduring powers of attorney is so complicated that it is virtually impossible to use one without professional legal help.[2] By contrast, in Victoria enduring powers of attorney are very simple indeed.[3] The ideal is to have a scheme for enduring powers of attorney which is as simple as possible to use and which is, at the same time, safe.

Capacity of donor

Initial incapacity

15. If enduring powers of attorney are to be given by people who are expecting to become incapacitated, it is inevitable that, from time to time, they will be given by people who may already have reached that state. The common law deems a power of attorney to be wholly void if it was executed by an incapable principal.[4] Incapacity is, in law,[5] that state of mind when a person cannot sufficiently understand the nature of a legal act or its consequences. It is unclear, however, in the light of two recent cases, precisely what degree of lack of understanding constitutes legal incapacity for the purpose of executing a power of attorney.

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[1] Two recent newspaper reports have highlighted the incidence of elderly and mentally ill people who are being exploited and whose assets are being 'ripped off': see *Sydney Morning Herald* (5 March 1987); *Age* (18 July 1987). The Public Advocate (Vic) has told the Commission of abuses of enduring powers of attorneys in that State.

[2] Under the Enduring Powers of Attorney Act 1985 (UK) it is necessary for the attorney, once he or she suspects that the donor is becoming or has become incapacitated, to send notices to relatives and to the donor before applying to a court to have the power registered.

[3] Instruments Act 1958 (Vic) s 114–8, Sch 13.

[4] *McLaughlin v Daily Telegraph Newspaper Co Ltd (No 2)* (1904) 1 CLR 243; *Gibbons v Wright* (1954) 91 CLR 423.

[5] See above para 3.

Alternative tests of initial incapacity

16. *Understanding the 'nature and effect of the power'.* In 1988 an English court held that it is not necessary that the donor of an enduring power of attorney have a complete understanding of everything that the attorney is empowered to do.

> [A]n understanding of the nature and effect of the power was sufficient for its validity.[6]

On this test it is not necessary that the donor, at the time of execution of the enduring power of attorney, should have had the legal capacity to do all the things which the attorney was authorised to do. It is sufficient if the donor understood that

- the attorney would be able to assume complete authority over the donor's affairs, subject to any limitation in the power itself
- the attorney would be able to do anything with the donor's property which the latter could have done
- the attorney's authority would continue after the donor became incapacitated
- the power would become effectively irrevocable once the donor had become incapacitated.[7]

The court stressed that it was wrong to import into the test of *initial* incapacity for determining the validity of the enduring power of attorney the test used to determine whether an ordinary power of attorney lapses because of the subsequent incapacity of the donor. The latter test, though not fully worked out in the cases, is that the power lapses once the donor is no longer legally capable of performing the acts authorised by the power. The whole purpose of an enduring power of attorney, the court pointed out, is to overcome this common law rule and it would frustrate the purpose of enduring powers of attorney legislation if the common law test for subsequent incapacity were to be introduced into the test for initial incapacity. Accordingly, an enduring power of attorney could be valid if the donor was, at the time of executing the power, in a state of mind where he or she was no longer able to manage his or her affairs but was able to understand that, by executing an enduring power of attorney, he or she was handing over management to another.

17. *Understanding everything the attorney can do.* On the other hand, *obiter* remarks from the Supreme Court of New South Wales suggest that the capacity required to execute an ordinary power of attorney (not an enduring power of attorney) is that the donor should understand, not only that he or she was authorising someone to look after his or her affairs, but also

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[6] *Re K* [1988] 1 All ER 358, 361 (Hoffmann J).
[7] id, 363.

> what sort of things the attorney could do without further reference [to the donor].[8]

This test is more stringent than that put forward in the English case. It appears to incorporate into the test of initial incapacity the criteria for testing the lapsing of a power. It is an unrealistic test, since it is impossible to know, at the time when a power of attorney is executed, what acts an attorney will perform under the power. It is out of line with other Australian authority which requires only a general understanding of the 'broad operation, the "general purport" of the instrument'.[9] It is not a necessary safeguard for enduring powers of attorney.

18. *The NSW scheme.* In New South Wales there is a somewhat complicated statutory scheme[10] to deal with the problem of initial incapacity. It effectively limits the attorney's authority to those acts which the donor was, at the time of executing the power of attorney, capable of understanding. This scheme, therefore, could render a power of attorney valid in some respects but invalid in others. But to determine to what extent the power is valid a careful examination would need to be conducted of precisely how impaired the donor's understanding was at the time of execution — a matter which, some time later, may be difficult or even impossible to establish. Although the New South Wales scheme recognises that there are degrees of incapacity, the Commission sees it as practically unworkable. It is too productive of difficulties to have a power of attorney which grants a number of powers on its face, some of which are valid but some of which are not, because the incapacity of the donor was only partial. Instead, the global approach of the common law is preferable and should be reflected in legislation. The Commission's Discussion Paper suggested that one aspect of the New South Wales scheme should be adopted, namely, that the court should be given the power to declare valid an enduring power of attorney which is of doubtful validity because of possible initial incapacity, if it would be in the best interests of the donor so to do.[11] The Commission has come to the conclusion that it would not be advisable to give a court the power to declare valid what might, in fact, have been void. It would amount to a power to appoint a manager and would pre-empt review of guardianship and management of property legislation in the Australian Capital Territory.

19. *Substituted execution?* The Commission's Discussion Paper also suggested that a court should have the capacity to execute an enduring power of attorney on behalf of an incapacitated person.[12] This was suggested as an alternative to the formal appointment of a guardian or manager of the incapable person's property. However, it would duplicate this formal procedure. Upon consideration, the Commission has concluded that little useful purpose would be served by having two procedures and, accordingly, does not recommend that there should be substituted execution of enduring powers of attorney. In addi-

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[8] *Ranclaud v Cabban* (1988) NSW Conv R (CCH) 55-385, 57-548 (Young J).

[9] *Gibbons v Wright* (1954) 91 CLR 423, 438 (Dixon CJ, Kitto J, Taylor J).

[10] Conveyancing Act 1919 (NSW) s 163E.

[11] See Conveyancing Act 1919 (NSW) s 163E(5); ALRC DP 33 para 12.

[12] ALRC DP 33 para 13.

tion, this is not the place to change the law of guardianship and management of property. Giving a court the power of substituted execution would, in effect, be conferring the power to appoint a guardian.

Recommendation

20. Because of the doubts raised by the recent incapacity cases,[13] the Powers of Attorney Ordinance 1956 (ACT) should be amended to set out clearly what level of understanding is necessary and sufficient for a donor validly to execute an enduring power of attorney. It should be enough that the donor of the power is able to understand 'the nature and effect of the power',[14] the test expounded by the English courts.[15] The same kind of doubts arise in connection with the execution of ordinary powers of attorney. For the purpose of initial incapacity, it would be undesirable to differentiate, in any legislative reform, between ordinary powers of attorney and powers of attorney that are intended to continue after incapacity. Accordingly, the legislation recommended by the Commission applies, in this instance, both to ordinary powers of attorney and enduring powers of attorney.

Preventing abuse in the creation of enduring powers of attorney

Possible abuses

21. The kinds of abuses that can occur in the creation of an enduring power of attorney and for which safeguards are needed range from outright forgery, to improper pressure being brought to bear on the donor by an unscrupulous relative or 'friend', to negligence. The recommendations in the following paragraphs are designed to deal with each of these kinds of abuses and difficulties.

Express intention that power endure

22. In all schemes for enduring powers of attorney the first requirement is that the donor expressly declare in the power of attorney that the power should survive the onset of incapacity. This is an essential requirement because it makes clear the unique aspect of an enduring power of attorney and alerts the donor to the potential for unsupervised management which is being authorised. It should be reflected in the scheme for the Australian Capital Territory.

Form of enduring powers of attorney

23. *Plain English with warnings.* There should be safeguards against carelessness and a lack of understanding, on the part of either the donor or the attorney, of the effect of an enduring power of attorney. It would probably not be unusual for one person to grant an enduring power of attorney to another, both not having really thought about the consequences. For example, the attorney may willingly accept the grant of the power without realising that he or

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[13] See above para 16–7.

[14] See App A: draft Powers of Attorney Amendment Ordinance 1989 (ACT), proposed s 3A.

[15] See above para 16.

she is thereby assuming a number of specific responsibilities arising out of the agency relationship. Later, he or she may want to be free of those responsibilities. This situation should, so far as possible, be avoided. One way of achieving this is for the form of the instrument by which the enduring power of attorney is created to give a clear indication of the nature of the power of attorney and the consequences it holds for both the donor and the attorney. Accordingly, the form of that instrument should be prescribed by the Powers of Attorney Ordinance 1956 (ACT). There is a need to provide for different types of attorneyship, depending on whether the donor wants the attorney only to manage assets, or to manage assets as well as provide for his or her (the attorney's) material needs, or to make guardianship decisions.[16] The prescribed form should nevertheless be as simple and straightforward as possible. There should also be a plain English statement, again prescribed in the Ordinance, which accompanies the enduring power of attorney and provides essential information to the parties.

24. *Multiple copies.* It is often necessary to make many copies of a power of attorney so that different institutions and persons can deal with the attorney. A sensible safeguard would be to endorse on the original enduring power of attorney a record of the names of the persons to whom and the institutions to which copies have been given. Provision for this can be made in the prescribed form. If the enduring power of attorney terminates, it should then be a relatively simple matter to recall all copies.

Execution of enduring powers of attorney

25. *Witnessed execution by the donor.* Various possibilities for the execution, that is, the signing and witnessing, of an enduring power of attorney were canvassed in the Commission's Discussion Paper.[17] The procedure for execution should aim to ensure that

- the parties involved realise that the granting of an enduring power of attorney is a serious matter
- the donor is, so far as possible, shielded from improper pressure and
- so far as possible, forgery is prevented.

Accordingly, an enduring power of attorney should have to be executed in the presence of two independent witnesses, that is, two witnesses who are not related to the attorney or donor. The attorney should not act as witness. The legislation should define who may not be a witness by reference to family ties. To ensure, so far as possible, that the donor understands what an enduring power of attorney is, the donor's signature should serve both to execute the enduring power of attorney and to acknowledge that he or she has read and understood a plain English statement about the power. The form of that acknowledgement, which should be a part of the instrument creating the power of attorney and prescribed in the Ordinance, should be:

[16] As to which, see ch 4.
[17] ALRC DP 33 para 19.

> I understand fully that by signing this document I authorise my attorney to act on my behalf while I am unable to act on my own behalf.

26. ***Acceptance by attorney.*** Normally, an ordinary power of attorney has the attorney's signature on it. However, this is usually only to provide a specimen signature so that those dealing with the attorney can verify his or her signature from the document. It should be a requirement that an enduring power of attorney be signed by the attorney, not just for this purpose but also to convey to the attorney that he or she is accepting serious responsibilities — particularly, the responsibility to keep records and accounts.[18] The most significant of the responsibilities of an attorney should be set out in plain English in notes forming part of the instrument creating the enduring power of attorney. The enduring power of attorney should incorporate the following acknowledgement, which the attorney should also have to sign:

> I have read this power of attorney and the notes attached to it. I understand that, by signing this document, I take on the responsibilities outlined in those notes.

Commencement

27. An enduring power of attorney should either be immediately effective or start to operate when the donor requires. As is usual with ordinary powers of attorney, if nothing is said in the enduring power of attorney, it should operate immediately. The enduring power of attorney document should allow the donor to postpone immediate operation by specific provision. One possibility is that the donor will only want the enduring power to operate while he or she is incapacitated, or after he or she becomes incapacitated, and may say so in the instrument creating the power. This can give rise to the very difficult problem of having to decide when the onset of incapacity has occurred. This is often impossible to determine, particularly if the donor is sometimes perfectly lucid and at other times disoriented. It is a problem that may be unavoidable in some cases. It is something which should be drawn to the attention of the parties in plain English as part of the enduring power of attorney. The problem can be avoided by the donor either allowing the enduring power of attorney to operate immediately or by specifying a particular date in the enduring power of attorney.

Preventing improper use of enduring powers of attorney

Possible abuses

28. Once an enduring power of attorney has been executed, there need to be safeguards to prevent, so far as possible, fraudulent use of the enduring power of attorney and improper or careless management of the donor's assets or sloppy record-keeping. These can be achieved by imposing certain minimum standards

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[18] See para 31 below.

on the attorney and by setting up mechanisms for advice, supervision and, if necessary, control of the attorney.

Registration?

29. *A suggested requirement.* The Commission's Discussion Paper suggested that registration of an enduring power of attorney as a necessary step for its validity would not serve any useful purpose.[19] The Public Trustee (ACT), however, suggested a scheme under which enduring powers of attorney could be registered at the Public Trustee's office. Registration would be a necessary step to activate the enduring power of attorney. In other words, an enduring power of attorney could not be used by the attorney until it had been registered. Registration could be effected either by the donor or the attorney. The Public Trustee would, it was suggested, have the capacity to scrutinise the enduring power of attorney and, in appropriate cases, refuse registration. It was suggested that such a scheme would provide an additional safeguard against fraud or other abuse because granting of an enduring power of attorney would no longer be a purely private transaction. The document would have to have on it the Public Trustee's stamp. Any person who tried to cheat or defraud the donor of the enduring power of attorney would have to worry about the fact that the Public Trustee was, as it were, watching over his or her shoulder.

30. *Recommendation.* The Commission has given close consideration to this suggestion but has decided not to adopt it. The principal reason is that it would confront the parties to an enduring power of attorney with a bureaucratic procedure which would quite likely have the effect of deterring the use of an enduring power of attorney. There would inevitably be delays in having an enduring power of attorney registered. In some cases a donor would have to execute two powers of attorney, one which could be used immediately and an enduring power of attorney for the long term. Further, it would create a considerable amount of work for the Public Trustee's office. In fact, the Public Trustee would not have the resources to scrutinise and supervise every enduring power of attorney presented for registration. Consideration would only be given to a particular power of attorney if a problem was drawn to the Public Trustee's attention. The Public Trustee's supervisory and advisory role recommended below[20] is a more significant safeguard for the donors of enduring powers of attorney. That role would not be facilitated by a registration procedure; instead, because resources would have to be devoted to it, registration might actually impair the Trustee's ability to provide that supervision and advice.

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[19] ALRC DP 33 para 21.

[20] See below para 37.

Trustee or fiduciary duties for the attorney

31. *General fiduciary duties.* As was pointed out above, the basis of the relationship of donor and attorney is that of principal and agent.[21] That relationship gives rise to a number of obligations called fiduciary duties. Included in these are, in particular

- the duty not to engage in transactions in which the attorney is in a conflict of interest and duty
- the duty to keep the donor's property and money separate from the attorney's
- the duty to keep proper accounts.

These obligations are less extensive than those imposed on a trustee, although, in particular cases, the law may treat the relationship as one of trust.[22] Further, they may be modified by the power of attorney. These fiduciary obligations, to the extent that they are not expressly excluded by the terms of the particular power, should apply to enduring powers of attorney in the same way as they apply to ordinary powers of attorney. Because an enduring power of attorney, unlike an ordinary power, allows the attorney to act without the supervision of the donor, it would be sensible to spell out the attorney's principal obligations in the legislation. At the same time this provision should not be a code which excludes any possible residual common law or equity obligations. Further, the court should have the power to exonerate or excuse an attorney who has innocently mismanaged property. It will also be important to draw particular attention, in the prescribed form of the instrument creating an enduring power of attorney, to the attorney's obligations, including the need to keep proper accounts and the need to keep the donor's property and money separate from the attorney's. The latter rule should not apply to property held jointly by the donor and the attorney, or to money in joint accounts. The form should also draw special attention to the liability of the attorney who, without reasonable excuse, breaches these obligations to compensate the donor for any loss that arises from the breach. Other remedies, such as a court ordered cancellation of a transaction, are also available in certain circumstances.

32. *A higher standard: trusteeship?* The Commission gave consideration to the question whether, at least so far as the exercise of the attorney's powers while the donor was incapable is concerned, the higher duty of trusteeship should be imposed on the attorney. This is the position in Tasmania under recently enacted legislation.[23] The issue was raised in the Commission's Discussion Paper[24] but was not favoured, principally because the elaborateness of

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[21] See above para 10.

[22] eg, where the donor appoints a trustee company which, under its articles of incorporation or the trustee company legislation, can only act in the capacity of trustee.

[23] Powers of Attorney Act 1934 (Tas) s 11C(1) as amended by the Powers of Attorney Amendment Act 1987.

[24] ALRC DP 33 para 22.

trustee obligations would make them unsuitable, as a general rule, for the ordinary situation in which enduring powers of attorney can be expected to be used. Responses to the Discussion Paper were mixed. One submission suggested that an attorney should be deemed to be a trustee but need not be bound by some of the more stringent standards which are imposed by trustee legislation.[25] The Commission has concluded that the approach outlined in paragraph 31 is more appropriate. The difficulty of communicating to lay persons the nature of trusteeship obligations which are modified by omitting some of the legislative requirements is too great. Instead, the principal obligations should be spelt out and explained.

Standard of decision making by the attorney

33. *'Substituted judgment' or 'best interests'?* Given that, save in exceptional cases, the attorney under an enduring power of attorney is not to be deemed a trustee, the question arises whether a particular standard of decision making should be imposed on the attorney while the donor is incapacitated. Such a standard must appropriately cater for the case where an attorney is, say, the caring wife of the donor and who must be able to use the donor's assets for her own maintenance and needs. It must also prevent attorneys from acting improperly or carelessly with the donor's assets. Cases have arisen in Victoria, to the knowledge of the Public Advocate, in which an attorney either misuses funds or property for his or her own purpose or withholds money from the donor so that the attorney receives more under the donor's will when the latter eventually dies.[26] Workable, clearly understandable standards of decision making will go some way towards arriving at the appropriate balance. Two possible standards present themselves. The Commission's Discussion Paper suggested that the attorney should have to exercise 'substituted judgment' when making decisions about the donor's property or money.[27] This means that, so far as possible, the attorney should make decisions as the donor would have done; for example, the attorney could use the donor's money for the attorney's own purposes, such as buying clothes or going on a holiday, if the donor would, in the normal course of events, have paid for those things, or the attorney could continue to make monthly donations to a charity if this was the regular habit of the donor, even if the charity was one which most 'sensible' people would not support. The alternative test would require the attorney to act 'in the best interests' of the donor.[28]

34. *'Best interests' test.* The 'best interests' test requires some elaboration. It may mean one of two things. Traditionally, its legal meaning has been that the attorney must act as a reasonable person would, so that the donor's assets are preserved to the greatest extent possible consistent with the proper mainte-

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[25] Public Trustee (ACT) *Submission*, 19 January 1988.

[26] Public Advocate (Vic) *Submission*, 3 February 1988.

[27] ALRC DP 33 para 22.

[28] Public Advocate (Vic), *Submission*, 3 February 1988; and see Powers of Attorney Act 1934 (Tas) s 11C(1)(b).

nance and comfort of the donor. This focuses on what, in some 'objective' sense, is in the best interests of the donor at a particular time. It is a paternalistic test. But a 'best interests' test need not be confined to purely objective matters. It could mean that the attorney must make decisions, so far as possible, which the donor would have made (the substituted judgment principle), whether or not those decisions are 'sensible' or 'reasonable'. This recognises the problems associated with the traditional approach to a person's 'best interests'. In part, these problems arise from the fact that

> [r]easonableness is a culturally relative term. It will have different meanings to different generations. The Board [the Guardianship and Administration Board (Vic)] recognizes that in determining what is reasonable it must carefully allow for eccentricity, cultural diversity and a plurality of ethical viewpoints. . . . The Board is not established to be a moral or behaviour custodian.[29]

This interpretation stresses that it cannot be in the best interests of an incapable person that his or her personality and wishes are ignored simply because of the incapacity. It recognises that an attorney or guardian should play a minimal role, should not act paternalistically but should recognise and respect, so far as is possible, the individuality of the incapable donor.

35. *Modified substituted judgment?* The principle underlying the reforms recommended in this report is the preservation of the autonomy of the individual. Accordingly, as with ordinary powers of attorney, the scheme for enduring powers of attorney should allow maximum scope for the donor to express his or her particular wishes as to how the attorney should act, both before and after the onset of incapacity. To the extent that it is expressed in the instrument creating the power, the judgment of the donor will therefore be the guiding principle for the attorney after the donor has become incapable. Consistently with this, the 'substituted judgment' principle should be the guiding principle where there is no express direction in the power of attorney itself. This will preserve, as far as possible, the emphasis on the donor's individuality and autonomy. Some modification of this principle is, however, possible and may in some cases be appropriate. It could be argued that, if there is a conflict between giving full force to the donor's (perhaps eccentric) wishes and preserving the donor's property, the latter should prevail because the former will result in the donor's destitution. On the other hand, it could be said that the donor's destitution is not, in principle, the attorney's business. One possible compromise is suggested by the Guardianship and Administration Board Act 1986 (Vic). It provides that, in appointing guardians or administrators, the powers, etc., under the Act are to be exercised so that

> (b) the best interests of a person with a disability are promoted; and
>
> (c) the wishes of a person with a disability are wherever possible given effect to.[30]

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[29] Lawson 1987, 12.

[30] Guardianship and Administration Board Act 1986 (Vic) s 4(2).

36. *Recommendation.* Ultimately, the question depends on a choice between the relative values of respect for personal autonomy and the need to ensure that the donor is not rendered destitute. This decision cannot be made in the abstract: the relative weight to be accorded to each of these considerations will vary with, among other things, the significance of the expenditure and its effect on the donor's financial position. An imposed solution, favouring one of these considerations only, could not suit every case. The Commission recommends that a modified 'substituted judgment principle' be enacted. It should impose a duty to act, in the ordinary case, as the donor would have acted if the donor were not incapacitated, but to take into account the need, ultimately, for the donor's wishes to be modified if to follow them would result in the donor becoming destitute. The form of the recommended provision is:

> (1) In exercising powers under an enduring power of attorney while the donor is incapacitated, the donee has a duty to exercise 'substituted judgment', that is, to act, so far as possible, as the donor would have acted if the donor were not incapacitated.
>
> (2) In doing so, the donee must take into account:
>
> (a) the need to preserve the donor's property and money to ensure that the donor does not become destitute; and
>
> (b) the desirability of maintaining, so far as possible, the style of life of the donor as it was before the incapacity.

This duty should also be specifically drawn to the attorney's attention in plain English in the notes to the prescribed form of enduring power of attorney in the Ordinance. Furthermore, because it can be expected that enduring powers of attorney will be given between married or de facto married persons, it will be helpful to include, in the prescribed form, a suggested provision allowing the attorney to use the donor's property and money for his or her (the attorney's) own benefit, perhaps subject to conditions or restrictions. This would generally be the case when a spouse or de facto spouse is appointed as an attorney.

Advice and supervision

37. *Role of the Public Trustee.* The imposition of these standards of decision making will not be enough to prevent or discourage, in some cases, unacceptable conduct by attorneys under enduring powers of attorney. More will be needed.

- *Advice.* Advice should be available to the attorney who is unsure of his or her obligations or who needs help with a particular decision.
- *Supervision.* A mechanism should be available to enable the attorney to be supervised or, if necessary, controlled if he or she is acting improperly or carelessly.

The Public Trustee is ideally placed to provide advice and supervision and it should be one of the Trustee's statutory functions to do so. The plain English statement in the prescribed form of enduring power of attorney should make it clear that the office of the Public Trustee is available for advice and that

the Public Trustee is empowered to check that enduring powers of attorney are being operated properly. If necessary, the Public Trustee Ordinance 1985 (ACT) should be amended to make this clear.

38. *Mode of supervision.* The Public Trustee should have the power to call for accounts from an attorney under an enduring power of attorney. The attorney is required to keep these accounts by the general law and under the proposed Ordinance.[31] There should be no express sanction for a failure to comply with such a request. However, the Public Trustee should have a general power to apply to the court for appropriate orders directed to an attorney under an enduring power of attorney, including orders to comply with such requests. The court should be able, on such an application

- to order the attorney to comply with his or her obligations under the power of attorney or under the Ordinance or the general law, including to order that the attorney do something he or she is bound to do under the power of attorney
- to order the attorney to produce accounts
- to determine the meaning or effect of an enduring power of attorney
- if it is necessary to protect the donor, to terminate the enduring power of attorney.

If the court exercises its power to terminate the enduring power of attorney, it should not have power to appoint a substitute attorney. An enduring power of attorney is, by definition, a form of management chosen by the donor. If there is a need for someone else to be appointed, this is properly dealt with under guardianship and management of property law.[32] However, because the procedure for applying for a court-appointed guardian or manager may take some time, it would be desirable for the court to be able to appoint the Public Trustee as interim manager or guardian.[33] For similar reasons, the court should also be able to do this if the donee resigns or dies. Although it is envisaged that the Public Trustee would be the applicant for such orders in most cases, standing to apply for such orders should be extended, with leave of the court, to any other person. There is no benefit in artificially restricting this power to the Public Trustee. Finally, both the Public Trustee and any other person with a legitimate interest should be able to pursue, on behalf of the donor, any relevant remedy for mismanagement of property or money.

39. *Which court?* The question now arises which court should have the jurisdiction to make these supervisory orders. At present, the Supreme Court has power to appoint a guardian or asset manager under the Lunacy Act 1898 (NSW:ACT). If the responsibility for dealing with these appointments and the

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[31] See above para 31.

[32] See para 4 above.

[33] The Commission considered whether a spouse, relative or some other appropriate person should be able to be so appointed. But this would circumvent the procedures laid down for the appointment of a manager or guardian. These procedures are designed to ensure that the court is satisfied that a guardian or manager is suitable.

related task of supervising enduring powers of attorney is conferred on two courts, conflicts of jurisdiction could arise.[34] In the Commission's Discussion Paper it was suggested that the appropriate court would be the Magistrates' Court, on the ground that it is cheaper and possibly more accessible than the Supreme Court.[35] The Magistrates' Court also deals with matters involving mentally incapacitated people, particularly under the Mental Health Ordinance 1983 (ACT). Questions of supervision of the attorney under an enduring power of attorney might already have come to the attention of the Magistrates' Court in a related matter. While, as one submission pointed out in response to the Discussion Paper, it is quite possible to obtain a quick hearing in the Supreme Court,[36] there is little doubt that the cost of Supreme Court proceedings generally exceed those in the Magistrate's Court. In matters of supervision of an attorney, costs should not be a deterrent. For this reason, the Magistrates' Court should be given the jurisdiction to supervise enduring powers of attorney. To eliminate the possible conflicts of jurisdiction identified above, and to cater for those cases where, as well as terminating the enduring power of attorney, a guardian should be appointed under the Lunacy Act 1898 (NSW:ACT), concurrent jurisdiction should be conferred on both the Magistrates' Court and the Supreme Court.[37]

Termination of enduring powers of attorney

Present law

40. The Powers of Attorney Ordinance 1956 (ACT) does not spell out the circumstances in which a power of attorney terminates. This is left to the common law. Although it is arguably desirable to deal with termination by statute, there is little point in doing this only in relation to enduring powers of attorney. Accordingly, the common law rules relating to termination should continue to apply to enduring powers of attorney, except the rule that a power of attorney lapses upon the incapacity of the donor.

Revocation of enduring power of attorney by attorney after incapacity

41. The attorney should be encouraged not to revoke the enduring power of attorney or resign as attorney after the donor's incapacity. If the donor has appointed a trusted friend or relative to be the attorney, it is not satisfactory if the attorney then resigns, if this occurs after the donor has become incapable of appointing anyone else. The attorney should be advised of this in plain English in the notes that form part of the prescribed form of enduring power of attorney. However, ultimately, an attorney cannot be forced to continue to act against his or her wishes. The most that can be asked of attorneys who wish

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[34] Chief Justice Miles, Supreme Court (ACT), *Submission*, 7 January, 1988.

[35] ALRC DP 33, para 23.

[36] Chief Justice Miles, Supreme Court (ACT), *Submission*, 7 January, 1988.

[37] The Commission notes that this recommendation is an interim one, pending a full review of guardianship law in the ACT.

to resign in these circumstances is that they inform the Public Trustee. There seems to be little point in attaching a sanction to this requirement.

Relationship between enduring powers of attorney and guardianship or management of property orders

Appointment of guardian after attorney appointed

42. The recommendations made so far envisage that, in the future, the court or tribunal which has power to appoint a guardian or manager of an incapacitated person's property will have an active role in the supervision and control of attorneys appointed under enduring powers of attorney. An enduring power of attorney is a form of surrogate management. If it is necessary for the court or tribunal to appoint a guardian or asset manager, and the incapacitated person has already granted an enduring power of attorney, the court or tribunal should take into account the fact that an attorney has been appointed when deciding about guardianship or management of property. The court or tribunal should be empowered to appoint the attorney as guardian or manager, alone or jointly with someone else. If the attorney is not appointed guardian or manager, the court or tribunal should make an order either that the enduring power of attorney is terminated or that the enduring power of attorney continues and the attorney is answerable to the appointed guardian or manager.[38] At present no recommendations can be made on these matters, which are more appropriately dealt with in a general review of guardianship and management of property.

Appointment of attorney after guardian or manager appointed

43. Under the present law, it appears that a principal cannot appoint an attorney after his or her affairs are subject to a management order,[39] unless the contrary is specifically provided for in legislation.[40] Allowing a person to create a power of attorney after a guardianship order has been made would recognise that people should be allowed to conduct their own affairs to the extent of their competence. In some cases, as mentioned earlier,[41] a power purportedly granted when the donor was incapable of understanding its effect would be a nullity. However, the problem with allowing a person who does have some residual capacity to create a power of attorney after a management order has been made is that the authority to manage is split once the power has been validly created. This could give rise to conflicting decisions concerning the donor's property or affairs. This is a problem which is more properly addressed

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[38] See, eg Powers of Attorney and Agency Act 1984 (SA) s 10.

[39] *Re Barnes* [1983] 1 VR 605.

[40] eg Protected Estates Act 1983 (NSW) s 76(4) allows a donor to give a power of attorney notwithstanding that the estate is subject to management.

[41] See above para 15.

in a general review of guardianship.[42] In the meantime, there should be no change to the common law which prevents the creation of an enduring power of attorney if a guardianship order has been made.

[42] See para 4 above.

4. Scope of enduring powers of attorney

Scope of chapter

44. Previous chapters have been concerned with enduring powers of attorney which confer authority on the attorney to manage the donor's property and money. This chapter considers whether an enduring power of attorney should also be able to confer on the attorney power to make the kinds of decisions that a guardian can make for the donor, including decisions about, and consent to, medical treatment.

Guardianship powers

What are guardianship powers?

45. A guardian may make decisions of a personal nature on behalf of an incapacitated person. These could include decisions about where to live, when to take a holiday, whether to have an operation and whether to initiate legal proceedings. The dividing line between management of property and guardianship is not always easy to draw.

> The line between financial and guardianship type decisions is often very fine. For instance, money decides the quality of nursing home care, cosmetic operations have to be paid for, and even little things like visiting hairdressers boil down to money.[1]

However, there are some decisions or acts of a personal nature which a guardian cannot carry out. Examples are the decision to marry, voting in an election and making a will.

Can a power of attorney confer guardianship powers?

46. *The present law.* Whether a power of attorney may be used for guardianship type decisions is not clear. There is almost no decided case law on the question. One legal text has concluded that,

> Contrary to popular notion, a power of attorney does not give to the attorney any power to make "personal life" decisions on behalf of the principal, that is, consent to medical procedures, or to exercise powers of a "parental" nature.[2]

47. *Public perceptions.* A legal argument over whether this proposition is correct would not serve any useful purpose. The fact remains that it is not safe to assume that a power of attorney, or an enduring power of attorney, can confer guardianship powers on the attorney. But the Commission's consultations

[1] Public Advocate (Vic) *Submission*, 3 February 1988.

[2] Porter & Robinson 1987, 86.

tend to suggest that the popular perception of the position is the opposite. It seems to be generally assumed by lay persons that an ordinary power of attorney, particularly if given by a close relative or spouse, authorises the attorney to make 'personal life' decisions. There appears to be some confusion, particularly among doctors, on the question whether attorneys can give valid consent to medical treatment. Some attorneys (at present, under ordinary powers of attorney) apparently consider that they are able to give consent to medical procedures. Doctors sometimes insist, in non-emergency cases, that a guardian be appointed by the Supreme Court if the patient is incapable of giving consent. In consultations with the medical profession, some doctors expressed doubt to the Commission about whether powers of attorney can authorise the attorney to give consent. Other doctors apparently believe that a consent given by an attorney under an ordinary power of attorney is valid. Because of the circumstances in which enduring powers of attorney are designed to operate — the incapacity of the donor — there would be even more confusion about the power of the attorney under an enduring power of attorney to exercise these kinds of powers during the donor's incapacity. The position should be made clear.

Recommendations: enduring powers of attorney and guardianship powers

Recommendation: guardianship powers

48. An enduring power of attorney is a convenient, simple and relatively cheap way of providing for one's future incapacity. These advantages apply as much to 'personal life' decisions as to management of property and money. There is a strong argument for combining management and guardianship roles in the same person when that person is a spouse or close relative. It would be curious if a person could appoint his wife to manage his property through an enduring power of attorney but could not appoint her to be his guardian. The consequence would be that an application would have to be made to a court for the formal appointment of a guardian. In all likelihood, the court would appoint the wife as guardian. There is, therefore, a cost-saving argument in favour of extending enduring powers of attorney to guardianship functions. More fundamentally, being able to use an enduring power of attorney for this purpose enhances the donor's dignity and autonomy. It is he or she who decides, not some external body. It could be argued that 'personal life' decisions can be so sensitive and intimate that it is too dangerous to allow an enduring power of attorney to be used. More strict controls can be exercised if there must first be a court or tribunal hearing and a guardian formally appointed. However, it is precisely because of the intimacy and sensitivity of these matters that the decision of the individual most concerned – the donor – should be respected and a close relative, spouse or friend is most likely to be aware of the donor's wishes and needs. Adequate controls on the exercise of these powers can be incorporated into the regime. The arguments in favour of extending enduring powers of attorney to allow them to confer guardianship powers outweigh the

argument against.[3] The Commission's Discussion Paper specifically suggested that an enduring power of attorney should at least be able to be used in suitable cases for consent to medical treatment.[4]. No submissions received by the Commission have argued against this. The Powers of Attorney Ordinance 1956 (ACT) should be amended to allow enduring powers of attorney to confer, with suitable safeguards, guardianship powers, including the power to give consent to medical treatment.

Preventing abuse

49. *Need for safeguards.* There is less danger of fraud and less opportunity for careless decision making in relation to guardianship powers than with the management of property and money. If a guardianship decision involves the expenditure of money, the safeguards already recommended in chapter 3 will apply. The principal matter for concern in relation to guardianship functions is simply that one person is empowered to make personal decisions for another. The conferring of such authority is something which should only be done after considered judgment by the donor. Then, after the power to make such decisions is conferred, there may be a need to supervise the attorney or provide advice to him or her.

50. *Form and execution of enduring power of attorney.* An enduring power of attorney which confers guardianship powers on the attorney should therefore have to do so expressly. The prescribed form of enduring power of attorney to be included in the Powers of Attorney Ordinance 1956 (ACT) should include a special section dealing with this matter and there should be special instructions, in plain English, in the form, together with examples, to bring to the donor's attention the significance of conferring these powers on the attorney. The donor should specially sign (in the presence of two witnesses) the section conferring guardianship powers. Thus, if the enduring power of attorney deals with both management of property and guardianship, the donor's signature should appear twice.

51. *Medical treatment: special limits.* Although the power to give consent to medical treatment is comprehended within guardianship powers, it is so significant a matter that separate provision ought to made for it in the prescribed form of enduring power of attorney. A separate section granting these powers should have to be signed by the donor. Again, a separate explanation, in plain English, should be included in the prescribed form. The donor should be able to specify any limits to the authority and the enduring power of attorney document should have a space set aside for this. In addition, the donor of the power may wish to authorise the attorney to consent to donation of blood, tissue or organs on his or her behalf. This should be specially set out in the enduring power of attorney. Apart from any specific limits dictated by the donor, there should be general limits, specified in the legislation, on the scope of an enduring power of attorney to give authority to consent to medical treatment.

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[3] This view drew support from the Public Trustee (ACT) *Submission*, 19 January 1988.

[4] ALRC DP 33 para 15.

The first and most obvious is that the consent should be one which can lawfully be given – for example, in the case of tissue donation, the requirements of the Transplantation and Anatomy Ordinance 1978 (ACT) should be complied with. The consent sections of this Ordinance will need to be modified to allow an attorney to consent to removal of body tissue. Secondly, non-therapeutic procedures, such as sterilisation and abortion, should be specifically excluded. Consent for these procedures, and for procedures outside the limits of the enduring power of attorney, should have to be given by a court or, in the case of psychiatric treatment, by a committee set up under the Mental Health Ordinance 1983 (ACT) Pt VII.

52. *Supervision.* As with management of assets, the attorney may need assistance or supervision in exercising guardianship powers. The Public Trustee should provide this assistance and supervision. No additional special safeguards are necessary other than the ultimate ability of the Public Trustee, or of any other interested person, to apply to a court to have the enduring power of attorney terminated.[5]

53. *Commencement.* Both guardianship and medical treatment enduring powers of attorney will only be needed if the donor has become incapacitated. The fact that these powers, when conferred by an enduring power of attorney, are only activated by the donor's incapacity should be clearly stated in the enduring power of attorney itself. It is here that the problem, discussed earlier,[6] of whether or not the donor is in fact incapacitated is unavoidable. It will be at its most acute in a case where the donor maintains that he or she is not incapacitated and the attorney maintains the contrary. In relation to guardianship decisions, the problem will not be so serious, but in relation to medical treatment it could be much more difficult. Ultimately, if the donor refuses medical treatment, the doctor will be unable to act unless an emergency arises. The Commission considers that in such a case that is the appropriate result.

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[5] See above para 38.

[6] Para 27 above.

Appendix A
Draft legislation

- Draft Powers of Attorney Amendment Ordinance 1989 (ACT)
- Explanatory Statement to Draft Powers of Attorney Amendment Ordinance 1989 (ACT)

AUSTRALIAN CAPITAL TERRITORY

Powers of Attorney Amendment Ordinance 1989

Short title

1. This Ordinance may be cited as the *Powers of Attorney Amendment Ordinance 1989.*

Principal Ordinance

2. The *Powers of Attorney Ordinance 1956* is in this Ordinance referred to as the Principal Ordinance.

Interpretation

3. Section 2 of the Principal Ordinance is amended:

(a) by inserting after the definition of "bankruptcy" in subsection (1) the following definition:

"'Court' means the Magistrates' Court or the Supreme Court of the Australian Capital Territory;";

(b) by inserting after the definition of "donor" in subsection (1) the following definition:

"'enduring power of attorney' means a power of attorney as mentioned in section 12;"; and

(c) by adding at the end of subsection (1) the following definitions:

"'Public Trustee' means the Public Trustee appointed under the *Public Trustee Ordinance 1985*;

'relative', in relation to a person, means:

(a) a person related by blood, adoption or marriage to the first-mentioned person; or

(b) a person who is of the opposite sex to the first mentioned person and lives with the first mentioned person as the husband or wife of the person on a *bona fide* domestic basis, although they are not legally married to each other;".

4. The Principal Ordinance is amended by inserting after section 3 the following section:

Capacity to execute power of attorney

"3A. A power of attorney, including an enduring power of attorney, is not invalid on the ground of the donor's incapacity when the power was created if, when the power was created, the donor was able to understand the nature and effect of the power.".

5. The Principal Ordinance is amended by adding at the end the following sections:

Enduring powers of attorney

"12. If:

(a) a power of attorney is created by an instrument in or substantially in the form in the Schedule;

(b) the execution of the instrument by the donor of the power is witnessed by 2 persons neither of whom is the donee or a relative of the donee or the donor; and

(c) the power of attorney is accepted in writing by the donee of the power;

the power of attorney is an enduring power of attorney and is not affected by the incapacity of the donor occurring after the execution of the instrument.

Guardianship and medical treatment powers may be included

"13. (1) The powers conferred on the donee by an enduring power of attorney may, if the power of attorney expressly so provides, include the powers of a guardian, in particular, the power:

(a) to make decisions and arrangements for the donor in relation to the donor's day to day affairs other than those relating to the management of the donor's property and money; and

(b) to give consent to:

(i) medical treatment, or specified medical treatment, for the donor, other than treatment that is not necessary for the well-being of the donor; or

(ii) the donation of a body part, blood or tissue of the donor to another person in accordance with the *Transplantation and Anatomy Ordinance 1978*.

"(2) The donee may only exercise those powers while the donor is incapacitated.

Obligations of donees

"14. (1) In exercising powers under an enduring power of attorney while the donor is incapacitated, the donee has a duty to exercise substituted judgment, that is, to act, so far as possible, as the donor would have acted if the donor were not incapacitated.

"(2) In doing so, the donee must take into account:

(a) the need to preserve the donor's property and money to ensure that the donor does not become destitute; and

(b) the desirability of maintaining, so far as possible, the style of life of the donor as it was before the incapacity.

"(3) Without affecting any other obligation imposed by law, while acting as an attorney:

(a) the donee must not, unless the enduring power of attorney authorises it, enter into a transaction if the interests and duty of the donor in relation to the transaction may conflict with the interests and duty of the donee in relation to the transaction;

(b) subject to sub-section (4), the donee must keep the donee's property and money separate from the donor's;

(c) the donee must keep proper accounts.

"(4) The obligation of a donee of an enduring power of attorney to keep the property and money of the donee separate from the property and money of the donor does not apply to property and money owned jointly by the donor and donee.

Public Trustee etc, may claim relief for breach of duty

"15. (1) If the donor of an enduring power of attorney is entitled to relief against the donee (including the payment of money by way of compensation) because of a breach of the donee's duty as donee occuring while the donor was incapacited, the Public Trustee or, with leave of the Court, some other person, may commence and maintain a proceeding in a court of competent jurisdiction, in the name and for the benefit of the donor, for that relief.

"(2) Subsection (1) does not affect a right of a person to commence and maintain a proceeding.

"(3) If the court gives judgment for the donor, the court may make such order as is just with respect to the payment of any money ordered to be paid.

"(4) The Court may excuse a donee's breach of obligation if:

(a) the breach was due to an honest mistake; and

(b) the donee ought fairly to be excused.

Public Trustee may ask for accounts

"16. The Public Trustee may, by writing given to the donee of an enduring power of attorney, require the donee to produce to the Public Trustee specified books and accounts, or other specified records, of transactions carried out by the donee for the donor.

Power of Court

"17. (1) The Court may, on application by the Public Trustee or, with leave of the Court, some other person, by order:

(a) give a direction, not inconsistent with this Ordinance or the power of attorney, that the donee of an enduring power of attorney do or refrain from doing a specified act;

(b) direct the donee ot an enduring power of attorney to produce accounts or other records of transactions carried out by the donee for the donor;

(c) terminate an enduring power of attorney; or

(d) make a declaration as to the interpretation or effect of an enduring power of attorney.

"(2) If the Court terminates an enduring power of attorney, or if the donee of such a power resigns or dies, the Court may appoint the Public Trustee to be the manager of the donor's property, or the guardian of the donor, for a specified time and with powers specified in the order.

"SCHEDULE

Section 12

"INSTRUMENT CREATING AN ENDURING POWER OF ATTORNEY

Creating the power of attorney: managing property and money

"1. I, AB appoint CD to be my attorney whom I authorise to do on my behalf anything that I can lawfully do by an attorney, subject to the following limits:

* cross out what does not apply

Set out here any limits to be placed on the attorney's powers. *This is an example.*

The attorney* may/may not* use my assets for his/her* personal use.

This document allows the attorney to make decisions for the person who signs it (the donor) *after the donor becomes*

"Enduring power of attorney

"2. This power of attorney is an enduring power of attorney which may be operated by my attorney while I am incapacitated.

unable to manage his or her affairs. This means that the attorney can make decisions which the donor cannot supervise or control. It means that the attorney may, for example, sell the donor's house.

I understand fully that by signing this document I authorise my attorney to act on my behalf while I am unable to act on my own behalf.

Set out here when you want your attorney to be able to act in managing property and money.
* cross out what does not apply

"When does this power of attorney start?

"3. The power to manage property and money comes into effect
*immediately
*from .....
*only while I am incapacitated.

If you choose the third option, it may be very difficult to know if and when you have become legally incapacitated. So it is advisable to write in a definite date or allow the power to operate immediately

Signature of donor

Signature of witness
not related to donor or attorney

Signature of witness
not related to donor or attorney

You can authorise your attorney to make personal decisions on your behalf *but only while you are unable to manage your affairs.* These could be decisions about where to live, what kind of food to eat and whether to go on a holiday.

If you allow this, you must understand that your attorney will have almost complete control over your life while you are incapacitated.

Set out here any limits to be placed on the attorney's powers.

"Power to make personal decisions and arrangements

"4. I authorise my attorney to make decisions and arrangements of a personal nature for me while I am incapacitated.

"5. This power is subject to the following limits:

Signature of donor

Signature of witness
not related to donor or attorney

Signature of witness
not related to donor or attorney

You can authorise the attorney to consent to medical treatment on your behalf *but only while you are unable to manage your affairs.*

"Power to consent to medical treatment

"6. I authorise my attorney to give consent to medical treatment for me if I become incapacitated.

You can limit this power by writing in the limits you want here, eg, you can say that the attorney cannot give consent to a blood transfusion.

"7. This power is subject to the following limits:

You can expand this power by writing in what you want here, eg, you can say that the attorney can give consent to a blood donation, or donations of body parts, in accordance with the law.

"8. I specifically authorise my attorney to consent to the following on my behalf while I am incapacitated:

Signature of donor

Signature of witness
not related to donor or attorney

Signature of witness
not related to donor or attorney

"Acceptance by donee

"9. I have read this power of attorney and the notes attached to it. I understand that, by signing this document, I take on the responsibilities outlined in those notes.

The attorney must sign here.

Signature of attorney

"Who has copies of this document?

You should keep a list of those who have a copy of this power of attorney. Write their names here.

"Copies of this enduring power of attorney have been given to:

"NOTES TO THE ATTORNEY

"What do you have to do?

Keep money separate

"1. You must keep your money and property separate from the donor's money and property, unless you are joint owners, or operate joint bank or similar accounts.

Keep accounts

"2. You must keep proper accounts and records of how you handle the donor's money and property.

"The Public Trustee, or anyone interested in the donor's welfare, can ask you to produce these accounts and records.

Avoid conflicts of interest

"3. You should not enter into transactions for the donor which may involve a conflict of interest. For example, if it is necessary to sell some of the donor's property, it may be a breach of your obligation to sell it to a relative of yours.

Act for the donor

"4. What you do on the donor's behalf while the donor is incapacitated must be, as near as possible, what the donor would have done.

Pay compensation

"5. You may have to compensate the donor in some circumstances if you do not carry out these duties properly. It is also possible that a transaction will be cancelled if it was not carried out properly by you.

Advice is available

"6. The Public Trustee will give you advice, if you need it. The address of the Public Trustee is . . .

How do I stop being the attorney?

"7. If the donor becomes incapacitated and you want to stop being the attorney, you should see a solicitor or the Public Trustee.".

Explanatory Statement to Draft Powers of Attorney Amendment Ordinance 1989

OUTLINE

1. The purpose of the proposed amendment to the *Powers of Attorney Ordinance 1956* is to provide for powers of attorney to continue in force notwithstanding any incapacity, including mental incapacity, of the donor occurring after the creation of the power.

NOTES ON SECTIONS

Section 1 — Short title

2. This clause provides for the short title of the Ordinance.

Section 2 — Principal Ordinance

2. This section identifies the Principal Ordinance as the *Powers of Attorney Ordinance 1956.*

Section 3 — Interpretation

3. This section amends the definition section in the Principal Ordinance to include new definitions:

Court — the Magistrates' Court or the Supreme Court of the Australian Capital Territory

enduring power of attorney — one created under new section 12

Public Trustee — this is self-explanatory

relatives — people related by blood, adoption or marriage, including de facto spouses.

Section 4

Insertion of new section 3A — Capacity to execute power of attorney

4. *New section 3A* provides a test to determine whether a power of attorney is void for incapacity. The test is: was the donor able to understand the nature and effect of the power at the time the power was created?

Section 5

New section 12 — Enduring powers of attorney

5. *New section 12* provides that a power of attorney that is created in or substantially in the form in the Schedule, and in accordance with these amendments, is not affected by the incapacity of the donor occurring after the execution of the instrument creating the power. The instrument must have been witnessed by two persons, neither of whom are relatives of either the donee or donor, and must be accepted in writing by the donee.

New section 13 — Guardianship and medical treatment powers may be included

6. *New subsection 13(1)* authorises enduring powers of attorney to give the donee powers in addition to the ordinary powers to manage property and money. The additional powers are guardianship-type powers, in particular, powers

- to make decisions and arrangements concerning the day to day affairs of the donor
- to consent to medical treatment of the donor, including the donation of a body part or tissue in accordance with the law.

These additional powers must be expressly given.

7. *New subsection 13(2)* restricts the exercise of those powers to periods during which the donor is incapacitated.

New section 14 –Obligations of donees

8. *New subsection 14(1)* provides that the donee has a duty to act, so far as possible, as the donor would have acted if the donor were not incapacitated.

9. *New subsection 14(2)* requires the donee, in exercising his or her powers while the donor is incapacitated, to take into account

- the need to preserve the donor's assets and property to ensure that the donor does not become destitute and
- the desirability of maintaining, so far as possible, the donor's day to day life as it was before the donor's incapacity.

New subsection 14(3) spells out the principal obligations of the donee relating to management of property and assets. Other duties may be imposed by the rules of common law and equity. These are specifically preserved. The principal obligations are:

- to keep proper accounts and records of the donor's affairs
- to keep the property of the donor separate from the property of the donee
- to avoid conflicts of interest.

The most important of these are referred to in the form of enduring power of attorney in the Schedule.

10. *New subsection 14(4)* makes it clear that the obligation imposed on donees to keep their property and money separate from that of the donor does not apply to property and money owned jointly by donor and donee. This provision will be useful in what will be the common case of an enduring power of attorney given between spouses.

New section 15 — Public Trustee etc, may claim relief for breach of duty

11. *New subsection 15(1)* authorises the Public Trustee or, with leave of the court, any other person, to take legal proceedings, in the name and for the benefit of the donor of an enduring power of attorney, for a breach of the donee's duty as donee.

12. *New subsections 15(2) and (3)* provide that the right to take proceedings conferred by this section is additional to any other right to take proceedings, and authorise the court, in giving judgment for the plaintiff in such proceedings, to make any proper order to ensure that any money ordered to be paid is in fact paid for the benefit of the donor.

13. *Subsection 15(4)* provides that the Court is empowered to excuse a donee's breach if it is due to an honest mistake and ought fairly to be excused.

New section 16 — Public Trustee may ask for accounts

14. *New section 16* permits the Public Trustee to require, by notice in writing, a donee to produce to the Public Trustee specified books and accounts or other evidence of transactions carried out by the donee on behalf of the donor.

New section 17 — Power of Court

15. *New subsection 17(1)* describes the kinds of orders that the Court may, on application by the Public Trustee or, with leave of the Court, some other person, make:

- orders directing the donee to do or not to do some specified act, consistent with the terms of the power of attorney and the Ordinance
- orders directing the donee to produce accounts or other evidence of transactions carried out on the donor's behalf
- orders terminating the power of attorney
- a declaration as to the meaning or effect of an enduring power of attorney.

16. *New subsection 17(2)* provides that, if the Court terminates the donee's appointment, or if the donee dies or resigns, the Court may appoint the Public Trustee to act as the interim manager of the donor's property or as interim guardian of the donor, for the time and with the power specified in the order.

Schedule

17. The *Schedule* contains a form of instrument creating an enduring power of attorney with explanatory notes. The explanatory notes include instructions and advice for the donor and donee in relation to the execution of the instrument, the effect of the instrument and the duties of the donee.

Appendix B
Written submissions

ACT Administration, Central Office	24 December 87
Minister for Corporate Affairs, South Australia	7 January 88
Ms P Sibree MP, Member for Kew (Victoria)	18 January 88
Office of the Public Trustee for the ACT	19 January 88
ACT Health Authority	1 February 88
Office of the Public Advocate, Victoria	3 February 88
ACT Administration, Central Office (Programs Branch)	11 February 88
Office of the Public Advocate, Victoria	31 May 88

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ALRC, see Australia, Law Reform Commission.

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———, Report No 30, *Domestic Violence*, Australian Government Publishing Service, Canberra, 1986 (ALRC 30).

———, Report No 32, *Community Law Reform for the Australian Capital Territory: Second Report*, Australian Government Publishing Service, Canberra, 1986 (ALRC 32).

———, Report No 42, *Occupiers' Liability*, Australian Government Publishing Service, Canberra, 1988 (ALRC 42).

———, Discussion Paper No 33, *Community Law Reform for the Australian Capital Territory: Enduring Powers of Attorney*, Australian Law Reform Commission, Sydney, 1987 (ALRC DP 33).

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