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Preamble

CLA believes that ageing of the population is making the issues raised by questions of powers of attorney and advanced directives much more relevant now than 50-odd years ago, when the now-current legislation was written.

It is CLA's belief that the process of drafting new legislation should involve wide community consultation. While we have provided some comments below, we believe the issues should be further considered, in detail and with plenty of time for debate, once the first draft of legislation is readied.

In particular, CLA urges the ACT Government to consult young people, such as law school and nursing students, and youth groups as well as representatives of the elderly before determining a final Bill to be presented the Legislative Assembly.

Comment on the Issues Paper: Substituted Decision Making (May 2004)

Issues 1 and 2:
The Powers of Attorney (PoA) Act should contain a statement of values. The values should encompass people in the ACT being able to rely on a range of inherent qualities in any PoA legislation. These include:
- ease of understanding
- fairness to donor and donee
- producing consistent, reliable outcomes
- respect for donor and donee
- accountability by all parties, including government officials, and
- a process reviewable by fellow citizens effectively and speedily.

Issues 3 and 4:
The PoA Act should contain general principles. These should acknowledge that donors, donees and public servants involved in giving effect to the Act should operate to the following principles:
- all parties act in good faith relative to each other
- any decision by any party is made as if it was that party to whom the decision applied
- each has their civil rights and responsibilities, and these are shared equally
- the best possible health is an individual and community right, subject to the rational individual and community choices relative to costs and circumstances
- each person is free to choose their own way and standard of living/dying, provided their choice does not interfere with anyone else's being
- a community reference panel can and should act as the community's arbiter and conscience in relation to the values and principles.

Issues 5, 6 and 7:
Appointed decision-makers should be able to make decisions on all matters, as if the donee was the person, unless the donor has specifically requested otherwise.
There should be a checklist, with boxes (for which the Queensland special personal and special health care matters provide a basis) on the donor form whereby donors can specifically exclude items at the time of signing, if they desire.

Issues 8-12:
A person's capacity to make an enduring power of attorney (EPA) or Advanced Directive (AD) should be confirmed in writing by three parties (use of the word 'confirmers' is preferred to 'witnesses') who have each known the person for a reasonable period, normally more than a year (but a shorter period in circumstances where a year is impractical, with a registration body able to endorse the shorter period).
The three should be: someone medically qualified, someone qualified by association (member of a religious group, or carer, or club/association), and a proximate neighbour or acknowledged close friend.
The EPA form should include space for the confirmers signatures, names and addresses/contact details. Confirmers may be expected to be contacted by a government registration body, perhaps under a random selection process.
The EPA should be registered with a government body, to which reference may be made if anyone is in doubt. A signed certificate of validity of EPA provided by the government body should suffice.
Regaining of capacity should be confirmed by three people in equivalent relationships to the donor as to the three who made the original confirmation, ideally by the same three.

Issues 13-20:
'Normal' restrictions should apply to the confirmers, eg of voting age and themselves not subject to any capacity restraint.
The requirement for three people as 'confirmers', in the various categories, should provide sufficient safeguards.
There should not be different requirements/rules for EPAs and advanced health or other directives – simplicity of understanding should be a driving force of the legislation.

Issues 21, 22:
There should be an option for appointing multiple donees.
The appointing instrument should spell out the rules – the legislation should provide a possible model, or models.

Issues 23, 24:
Corporate donees should be permitted.
Corporate donees should be those operating under Trustee legislation/rules tightly defined (that is, to exclude financial advisers for example).

Issues 25-26:
The donor should be able to specify the appointment of a substitute.

The substitute should be appointed for a limited term only (usually less than a year, unless the registration body gives endorsement of a longer period).
The primary donor should remain primarily responsible.

Issues 27-32:
Revoking an EPA/AD should be possible by the donor under the same requirements as for making an EPA/AD.
In such circumstances, it should be a requirement on the donor to notify all parties who may need to know.
A donee should be able to revoke the EPA/AD responsibilities by giving notice to all parties who need to know (including joint donees, the registration authority, etc).
Where such action causes the EPA/AD to fall outside the rules, the registration authority should be empowered to act and charged with the responsibility of acting to bring the EPA/AD back within the rules, possibly by acting in the place of one or more donees.
Issue 33:
Yes.

Issue 34:
Yes.

Issues 35-36:
No. The same provisions should apply.

Issues 37-39:
There is no need for separate provision for ADs.
There should be no special protections – the donee(s) should stand in place of, and act as if, the donor.
If it is thought additional protection should be afforded people in donee situations, the protection should be written into other legislation (eg, Medical Treatment Act), where amended legislation will almost certainly be required in any case once the PoA legislation is passed.

Issued 40-41:
The act should provide for compulsory registration for all EPAs/ADs.
Compulsory registration should make instrument enforceable and with having due weight of the law in relation to any third party.

Issues 42-43:
Interstate EPAs/ADs should be required to be registered in the ACT to have full and immediate effect in the ACT (but annual reporting requirements should not apply).
(In passing, this may provide a business opportunity for a registration authority in the ACT to offer itself as a 'national registry'. CLA would be interested in discussing how this option might be explored).
The ACT registration authority should be empowered to act as a decision-making body where interstate EPAs/ADs not registered are required to be interpreted in an emergency (eg, an accidental injury to a visitor to the ACT).

Issue 44:
Yes, in keeping with the intent of the Queensland provisions.

Issue 45:
Yes, using the Queensland Act as the starting point, with the addition of, at least:
e. the donee must keep all relevant parties informed as to any major material change(s) in the status of the interests of the donor.
f. the donee must make an annual review in writing of the status of the interests of the donor, and lodge a copy of the review with the ACT registration authority.
g. The annual review must include notification of any 'conflict of interest' transactions, and their impact on the donor and the donee.

Penalties for minor breaches of these rules could be imposed by the ACT registration authority. The penalties should be spelt out in the Act, and should be:
First offence: up to $1000 (or the equivalent in 'penalty unit' terms) or 10% of the financial impact of the offence on the donor, whichever is greater.
Second: up to $10,000 or 50%.
Third: Up to $1m, or 100%.

Issue 46:
The ACT act should provide in a similar way to the Queensland Act.

Issue 48-49:
The current ACT Act provisions should be expanded.
As well, reference should be made under 'general obligations' (see Issue 45 above) to the penalties applying.

Issue 50:
The circumstances as outlined in the Issues Paper (11.17 to 11.20).

Issue 51:
In line with the Queensland legislation.

Issue 52:
Yes.

Issues 53-54:
The proposed ACT registration authority should have power to call for accounts and records. Penalties for non-provision should be of the order of amounts outlined Under Issue 45 above.
The Public Trustee should not be involved, or have any powers in this regard. The Public Trustee should stand at arms length, as it may be that the ACT registration authority has to call into question the actions of the Public Trustee.
It is suggested that the duties of the proposed ACT registration authority could be combined with those of the current Guardianship and Management of Property Tribunal.

This may well be an issue for public consultation.

Issues 55-56:
Yes – the ACT registration authority should be so empowered.
Anyone with a relevant interest should be able to apply.

Issue 57:
Yes – the ACT registration authority should be so empowered.

Issues 58-60:
Yes – the ACT registration authority should be so empowered.
Overlapping powers should be primarily handled by the 'lower' (less expensive) jurisdiction.
No – the ACT registration authority should have jurisdiction over any relevant matter.

Issues 61-63:
Yes.
The monitoring should be by random selection of a percentage of EPAs/ADs. It is suggested that about 5-7% of new EPAs/ADs be monitored in their first year of registration, and that 2-4% of EPAs/ADs be monitored in their subsequent years, with random selection in one year not preventing re-random selection in the next or following years.
Yes. The moitoring should cover all aspects.
Note: Registration fees and penalties should be set so as to pay for monitoring costs.