

New Zealand Law Society

Submission on Statutes Amendment Bill

Introduction

- 1 These submissions of the New Zealand Law Society (“Law Society”) are directed to clause 119 of the Statutes Amendment Bill.

Executive summary

- 2 The Law Society does not oppose clause 119 of the Bill.
- 3 However, the Law Society considers that this provision will do little to reduce the inconvenience and expense arising from the necessity to engage two or more law firms in order to create reciprocal enduring powers of attorney. The deterrent effect of this will accordingly be largely unmitigated.
- 4 The Law Society regards this position as unsatisfactory and is committed to seeking amending legislation which will enable the public to create enduring powers of attorney without undue inconvenience and expense whilst preserving appropriate safeguards and ensuring that independent advice is received.

Background

- 5 Clause 119 of the Bill would amend s94A of the Protection of Personal and Property Rights Act 1988. That section was inserted by the Personal and Property Rights Amendment Act 2007 (“Amendment Act”) which came into effect on 26 September 2008.
- 6 Section 94A(4) of the amended Act requires a person who witnesses the donor’s signature to an enduring power of attorney to be independent of the attorney (or of each attorney if more than one).

7 Difficulties have arisen as to how this independence requirement should be interpreted. Lawyers are concerned that they could fail to meet the independence test if they have acted for an attorney in the past, or as a result of witnessing the attorney's signature to the donor's power of attorney.

The Law Society's Property Law Section in a bulletin to members dated 9 October 2008 stated:

“There may be argument about the meaning of ‘independent’. The safest course is to assume that if your firm has acted for a client even though only one person in the firm has done all the work, other members of the firm are not ‘independent’ of the client.

Therefore in the common situation where you have acted for a couple and they wish to appoint each other as attorneys, the Section believes that you can prepare the documents and you can witness both of their signatures as attorneys. However, because you have acted for both of them previously you are not ‘independent’ of either donor and therefore each of them as donors must obtain independent legal advice. The safest course is to send each of the donors to separate firms because once an independent lawyer has advised one of them as donor he or she loses independence of the other's attorney and should not advise the other as donor.”

8 Many, if not most, lawyers have adopted this advice. As a result, where spouses or partners create enduring powers of attorney in favour of each other, this involves advice from at least two law firms. This has resulted in significant additional trouble and expense for spouses and partners who wish to create mutual powers of attorney. In some cases, this has had the effect of deterring them from proceeding.

9 The Law Society's Property Law Section wrote to the Ministry of Social Development's Office for Senior Citizens on 24 March 2009 setting out the Law Society's concerns and suggestions as to how the difficulties could best be overcome. A copy of this letter is **attached**. Important points made in the letter include the following:

- a Lawyers are well placed to ensure that a donor receives independent advice before he or she signs an enduring power of attorney.
 - b Lawyers are trained to recognise actual and potential conflicts of interest and to deal with them appropriately.
 - c The *Lawyers Conduct and Client Care Rules* which bind all lawyers adequately address conflicts of interest in this area. In particular:
 - Rule 5.3 states that a lawyer must at all times exercise independent professional judgment on a client's behalf.
 - Rule 6.1 provides that a lawyer must not act for more than one client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to one or more of the clients. This rule also applies where the lawyers concerned are members of the same law practice.
 - d The rules are backed by a complaints and disciplinary regime administered by the Law Society. Complaints are referred to Standards Committees (comprising lawyers and lay persons) with a complainant being entitled to require the decision of a Standards Committee to be reviewed by the independent Government-appointed Legal Complaints Review Officer.
- 10 Against this background, after further dialogue between the Law Society and the Office for Senior Citizens, the Law Society suggested an amendment to s94A of the Act by inserting the following provision:

The witness to a donor's signature does not fail to be independent for the purposes of subsection (4) by reason only that the witness is a member or employee of a law practice or an officer or employee of a trustee corporation that acts or has acted for the attorney (which includes the law practice or trustee corporation acting or having acted for the attorney in his or her capacity as a donor under this section).

11 The Law Society considers that this amendment would provide a workable solution to the difficulties which have arisen and at the same time ensure that donors of enduring powers of attorney receive independent advice.

Clause 119 of the Bill

12 Against the above background, the Law Society is disappointed with clause 119 of the Bill.

13 The proposed provision is limited to situations where mutual powers of attorney are given solely in favour of the two parties concerned. This will often not be the case. By way of example:

- a spouses or partners may wish to give enduring powers of attorney in favour of each other with a child (in the case of property) as co-attorney or with a child as successor attorney;
- b a spouse or partner may wish to give an enduring power of attorney in favour of his or her spouse or partner without a reciprocal power of attorney from the spouse or partner;
- c a parent may wish to give an enduring power of attorney in favour of a child or children;
- d a person may wish to give an enduring power of attorney in favour of a friend.

14 The proposed provision addresses a possible conflict only to the extent that it might arise by reason of lawyers in the same firm witnessing the donors' signatures in a reciprocal power of attorney situation. However, a conflict is much more likely to arise for other reasons and in particular by reason of a lawyer in the firm:

- a having previously acted for the attorney; and/or
- b witnessing the attorney's signature.

The provision needs to be broadened to address these sorts of situations.

- 15 The use of the expression “firm” in the proposed provision is of some concern, as there may be doubt that the expression would include a lawyer in sole practice. It would be preferable to use the expression “law practice”.
- 16 The Law Society considers that if the provision is enacted in its present form, a careful lawyer may well consider that he or she can safely rely on it, if at all, only in circumstances where mutual powers of attorney are created by partners for neither of whom the lawyers’ practice has previously acted.
- 17 This will do little to assist most people to avoid the inconvenience and expense of engaging two or more legal firms in the creation of enduring powers of attorney. The resulting deterrent effect will accordingly be largely undiminished.

The Law Society’s position

- 18 The Law Society does not oppose the proposed provision as it is at least a minor step in the right direction.
- 19 However, the proposed provision will do no more than touch the edge of the problem. It will not enable most people to avoid the inconvenience and expense of engaging two or more law firms in the process of creating enduring powers of attorney.
- 20 The Law Society remains committed to seeking an amendment to the legislation which will enable members of the public to create enduring powers of attorney without undue formality and expense whilst at the same time receiving appropriate advice, especially in situations where there may be an actual or potential conflict of interest.

John Marshall QC
President
11 February 2010



24 March 2009

Natalie Lavery
Director, Office for Senior Citizens
Office of Senior Citizens
c/- Ministry of Social Development

By email: natalie.lavery001@msd.govt.nz

Dear Ms Lavery

Enduring Powers of Attorney—Independence and Witnessing Requirements

We refer to your paper on this issue and to the meeting on 18 February 2009 between Ministry officials and representatives of the Property Law Section ('Section'). The Section greatly appreciates your meeting with us and also the opportunity of input in respect of this important matter of practice.

This matter was considered at a meeting of the Section's Executive Committee on 19 March 2009. We set out the Section's views.

1. The Section agrees that in practice the independent witnessing requirements of s94A of the Protection of Personal and Property Rights Act 1988, as they are being interpreted, are occasioning difficulty and significant additional expense to donors. Further, this difficulty and the additional expense are acting as a disincentive to people giving enduring powers of attorney.
2. The Section considers that paragraphs 12 and 13 of your paper are a fair commentary on the position. The Section agrees that some statutory amendment is desirable in order to clarify the position and make it more workable.
3. The Section considers that the *Lawyers Conduct and Client Care Rules* which bind all lawyers already adequately deal with conflicts in this area. In particular:
 - (a) Rule 5.3 states that a lawyer must at all times exercise independent professional judgment on a client's behalf.
 - (b) Rule 6.1 provides that a lawyer must not act for more than one client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to one or more of the clients. This rule also applies where the lawyers concerned are members of the same law practice.
4. These rules are backed by a complaints and disciplinary regime administered by the New Zealand Law Society. Complaints are referred to Standards Committees (comprising lawyers and laypersons) with a complainant being entitled to require the decision of a Standards Committee to be reviewed by the independent government appointed Legal Complaints Review Officer.

5. The complaints process is reinforced by a disciplinary regime under which lawyers may be disciplined, including suspension and striking off for misconduct. 'Misconduct' includes the wilful or reckless contravention of any provision in any practice rules.
6. On top of this, lawyers are trained to recognise actual and potential conflicts and to deal with these appropriately. This is part and parcel of the everyday practice of a lawyer.
7. Accordingly, the Section believes that lawyers are well placed to ensure that a donor receives independent advice on the merits of giving an Enduring Power of Attorney in favour of any particular attorney or attorneys.
8. Against this background, in the Section's view, the simplest and most appropriate way of resolving the present difficulty is to add a further subsection in s94A stating that a lawyer acting or having acted for a proposed attorney does not of itself result in another lawyer in the same law practice failing to be independent of the attorney.
9. An amendment of this kind would mean that lawyers would need in each case to consider whether any conflict of interest exists, but if it did not then enduring powers could be completed within the same law practice.
10. A provision of this kind could be worded along the following lines:

For the purposes of s94A(4) a lawyer or legal executive who witnesses a donor's signature does not fail to be independent of the attorney by reason only that another lawyer or legal executive in the same law practice as the first lawyer or legal executive, acts or has acted for the attorney.

11. We mention that the above provision would apply to all enduring powers of attorney and would not be restricted to those created between spouses or partners. For the reasons set out above, the Section considers this is appropriate. The *Lawyers Conduct and Client Care Rules*, coupled with the lawyers complaints and disciplinary regime and lawyers' training will provide adequate safeguards to the public.

Not infrequently, it is appropriate for spouses or partners to appoint an additional or substituted attorney, and it is not desirable that undue impediments be placed in the way of this. Of course, where someone other than the spouse or partner is appointed an additional or substituted attorney, the lawyers involved will need to satisfy themselves that there is no actual or potential conflict.

12. If however, as a matter of policy it is considered that reform should be limited to spousal or partner situations, then the Section suggests a provision along the following lines:

For the purposes of s94A(4) where a person creates an enduring power of attorney in favour of his or her spouse, civil union partner or de facto partner, a lawyer or legal executive who witnesses the donor's signature does not fail to be independent of the attorney by reason only that another lawyer or legal

executive in the same law practice as the first lawyer or legal executive acts or has acted for the attorney.

13. We consider the following matters are relevant to the above provisions:
- (a) The expression 'de facto partner' would have the meaning given to it in the Interpretation Act.
 - (b) If it is considered desirable to define what is meant by a 'law practice', the definition could follow that of 'practice' in rule 1.1 of the *Lawyers Conduct and Client Care Rules*.
 - (c) Legal executives have been included in the draft provisions as legal executives who meet the requirements of s94A(9) are permitted witnesses.

14. Consideration was given to the provision suggested by your office namely:

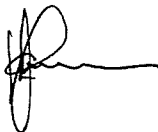
If two persons (A and B) who are married, in a civil union, or in a de facto relationship are appointing each other as attorneys, another lawyer or legal executive in the same firm, or another officer or employee authorised by the same trustee corporation, as the person who witnesses A's signature as donor, may witness B's signature as donor.

The Section's concern with this provision is that it would suggest it is in order for lawyers in the same practice to witness the signature of both donors, notwithstanding that there may be a significant actual or potential conflict of interest involved between the parties. The Section considers that this could present a misleading picture.

15. Finally, on the basis that the Act is amended along the lines set out in paragraphs 10 or 12 above, the Section would ensure that lawyers are reminded of their independence and conflict obligations in relation to the giving of enduring powers of attorney. Indeed, the prescribed form referred to in s94A(7) could be amended to refer to this.

We would be happy to discuss any aspect of this matter with you and indeed to meet with you again if this would assist in any way.

Yours sincerely



Chris Moore
Chair