

# Power of Attorney

*This information is based on the law as at February 2011. It is intended as a guide only and is not intended to replace the need for legal advice about specific situations.*

## **What is a power of attorney?**

A power of attorney is a document giving one person (the attorney) the power to act on behalf of another person (the donor). If you (the donor) give someone your power of attorney it means that your attorney can then make decisions for you as if they were you. A power of attorney can be general or can only apply in particular situations.

## **Why should I have a power of attorney?**

There are certain situations when you may want someone to act as an attorney for you. You may not want to think about some of these possibilities but it is important to be prepared. Examples of situations where you may want to give someone a power of attorney may be if you:

- are overseas or interstate
- are in hospital
- cannot look after your affairs because you are in a nursing home or because you have limited physical mobility
- cannot mentally look after your affairs because of illness or age

Note that giving a power of attorney does not affect your own power to do anything that you are legally entitled to do.

## **Who can act as my attorney?**

Anyone who is of sound mind and is over 18 years of age can act as your attorney. It is best to choose someone you can trust to act responsibly. You may appoint more than one person as your attorney or you can appoint certain people to act in particular situations, for example, one person to look after any medical treatment you need and a different person to look after your financial affairs. If you are appointing more than one attorney, it is important to make sure that your attorneys will be able to work together.

Your attorney must agree to the appointment and sign the acceptance of appointment before the power of attorney is valid.

## **What can my attorney do?**

The power of attorney document sets out the situations when your attorney can act on your behalf. Your attorney can only do whatever you say they can do in the power of attorney document. You can include in this document limits on what your attorney can do in certain situations.

It is important that the power of attorney document is worded carefully so that it does not give your attorney more or less power than you intended. A solicitor or the Public Trustee can help you.

## **What powers should I give my attorney?**

There are two different types of power of attorney: a **general** power of attorney and an **enduring** power of attorney.

### General power of attorney

A general power of attorney is only valid while you have legal capacity, that is, the ability to be aware of and understand your affairs.

A general power of attorney allows your attorney to make any decision for you in relation to business, property or financial matters but does not allow them to make personal decisions. For example, your attorney can collect rent on your behalf but they cannot decide where you should live or consent to medical treatment for you.

### Enduring power of attorney

An enduring power of attorney continues to be valid even if you lose legal capacity, that is, if you are no longer aware of and able to understand your affairs; for example, if you go into a coma or you receive a brain injury.

An enduring power of attorney is similar to a general power of attorney but includes powers in relation to your personal decisions.

You can also state what powers your attorney will have if you become unable to manage your affairs. You can give your attorney the power, for example, to take care of all your property and financial affairs and make personal decisions for you such as where you will live.

## **Powers of attorney and medical treatment**

If you wish your attorney to either:

- a) consent to certain medical treatment for you, or
- b) withhold or withdraw certain medical treatment for you

complete the relevant section of the enduring power of attorney form. You can also authorise your attorney to consent to the donation to another person of any part of your body, blood or tissue. If you then become incapable of making decisions in relation to your own medical treatment, your attorney will be authorised to make these decisions for you.

## **Can I limit the power I give to my attorney?**

Yes. You do not have to give your attorney any powers that you do not want to and you can include limits on what your attorney can do on your behalf.

A general power of attorney can be limited to particular circumstances. For example, your attorney may only act for you while you are overseas or in relation to a specific thing, such as selling your house.

An enduring power of attorney document can include limits on the authority of your attorney even during a time when you are unable to manage your affairs. For example, you can specify what medical treatment the attorney is allowed to consent to or what property they cannot sell.

### **How long will a power of attorney last?**

- The *Powers of Attorney Act 2006* explicitly provides for the ending of a Power of Attorney
- A power of attorney can state the date when it will end, for example, when you return from overseas
- A specific power of attorney ends if the act is done, for example, if a power of attorney was given “to sell my flat in Canberra” it would end when the flat was sold
- A power of attorney will end on your death. The executor named in your will then takes responsibility for your estate.
- If you marry or enter a civil partnership with someone other than your attorney after you have made an enduring power of attorney, the enduring power of attorney may be revoked.
- If your marriage or civil partnership ends the enduring power of attorney is revoked if the attorney was your former spouse or partner.
- If you change your mind you can also end (revoke) a power of attorney in writing, so long as you let your attorney know.
- Someone can apply on your behalf to revoke an enduring power of attorney by order of the ACT Civil and Administrative Tribunal (ACAT) or the Supreme Court.

If you revoke your power of attorney, and your attorney does things on your behalf *before* they have notice that the power of attorney has ended, then those things are probably valid.

If you revoke your power of attorney and your attorney does things on your behalf *after* they have notice that the power of attorney has ended, then they may be required to compensate you, pay a fine or may even be imprisoned, depending upon the circumstances.

### **If I have an enduring power of attorney, am I still in control of my own affairs?**

Yes. However, if you give someone an enduring power of attorney and you become unable to manage your own affairs, then your attorney will manage your affairs according to the powers you have given them.

In the case where you are no longer able to manage your own affairs, the *Powers of Attorney Act 2006* provides enhanced safeguards in regards to your affairs. For example the ACAT has the capacity to make an order to remove an enduring power of attorney if it believes it is in your interests to do so. Similarly, an application to the ACAT can be made if a health decision is made by your attorney that is not in your interests.

### **How do I prepare a power of attorney?**

The documents are available free from the Public Trustee’s Office and the Office of the Public Advocate. They can also be purchased from law stationers and post offices. There are special rules about who can witness a power of attorney so you need to read this carefully. If you are making an enduring power of attorney document, your attorney/s must also sign.

The Public Trustee or a solicitor can also give you advice about the power of attorney document and help you make one.

### **What are the obligations (duties) of someone acting as my attorney?**

Anyone acting as your attorney has certain legal obligations they must fulfil.

These include:

- they must only act in accordance with the powers you give them in the power of attorney document
- they must not benefit from acting on your behalf unless you have given them permission to do so, for example, they cannot sell your property to a relative unless you give them that power
- they must keep their property separate from yours and they must keep proper records about your finances
- they cannot act on your behalf after notice of your death
- they cannot act after notice that the power of attorney has ended

In addition, if you become unable to manage your affairs, your attorney must:

- act as far as possible as you would act
- prevent you from becoming destitute
- maintain you, as far as possible, in the lifestyle you previously enjoyed
- Also, in the case of an enduring power of attorney, the *Powers of Attorney Act 2006*, provides for general rights and principles, attorneys are obliged to follow. These include:
  - Access to family members and maintenance of these relationships/family involvement in decision about your life, property, health and finance, if you wish
  - An inherent right to respect, human worth and dignity as an individual
  - The right to be a valued member of society, including the right to be supported in social roles valued by society
  - The right to participation in community life
  - The right to the need and wish to have a reasonable quality of life
  - Participation in decision making to the greatest extent practicable
  - The right to confidentiality
  - To have your wishes taken account of in relation to health care matters

### **Do I need to register my power of attorney?**

It is only necessary to register a power of attorney (at the Land Titles Office) if your attorney is going to be dealing with any of your property, for example, buying or selling your house, or entering into a lease on your behalf that is longer than 3 years.

If the original power of attorney was registered and you want to end the power of attorney, you must register the fact that the power has ended (been revoked). It is also a good idea to register the fact that an unregistered power of attorney has been revoked. There is a cost to do this.

## **How do Powers of Attorney fit with Health Directions?**

In the ACT you are able to make formal directions if you wish to refuse, or require the withdrawal of, medical treatment: *Medical Treatment (Health Directions) Act 2006*. This Act also deals with the issue of medical donation.

Different rules apply to directions and powers of attorney under the *Medical Treatment (Health Directions) Act* than the rules which apply to general and enduring powers of attorney.

For example, under the *Medical Treatment (Health Directions) Act* you can make an oral or other direction in relation to the refusal or withdrawal of medical treatment which must be witnessed by a doctor and a nurse or another doctor, who must both be present at the same time. You may revoke such a direction by clearly expressing this to a doctor, nurse or other person. Where a valid health direction has been made, it must be followed by health care professionals – for this reason is it important to ensure that you have carefully and fully considered all the implications of putting such a direction in place.

If you have an enduring power of attorney, your attorney can consent on your behalf to the donation of your body parts, blood or tissue, or else can be authorised not to consent to any or certain specified donations.

In relation to the issue of refusing medical treatment, your attorney will have to make decisions which he/she believes you would make if you had the capacity to do so, after giving serious consideration to your health and well-being. Your attorney will need to consult with a qualified health professional before acting on the authority so that he/she fully understands, for example, the nature of your condition and any alternative forms of treatment that might be available.

If you make a direction under the *Medical Treatment (Health Directions) Act* after you have signed a power of attorney, the health direction will override any parts of the power of attorney that deal with medical treatment. Similarly if you give a power of attorney under the *Powers of Attorney Act* after you complete one under the *Medical Treatment (Health Directions) Act*, the latter one will override the former.

For this reason, if you are looking at putting both a Power of Attorney and a health direction under the *Medical Treatment (Health Directions) Act* in place, it is important to ensure that these documents work together in the way you intend them to.

## Where do I go for information and advice?

### Legal Aid Office (ACT)

general enquiries	6243 3411
appointments for advice	6243 3471
legal advice line (weekdays 9am to 4pm)	1300 654 314

### Welfare Rights & Legal Centre

legal advice line	6247 2177
(weekdays 9.30am to 1pm and Monday 2pm to 4pm)	1800 445 665
admin	6257 2931
night time "drop-in" service – Tuesday 6pm to 8pm	

### Public Trustee's Office

6207 9800

[www.publictrustee.act.gov.au](http://www.publictrustee.act.gov.au)

### Office of the Public Advocate

enquiries service (weekdays 8.45am to 4.45pm) 6207 0707

[www.publicadvocate.act.gov.au](http://www.publicadvocate.act.gov.au)

### About the Women's Legal Centre

The Women's Legal Centre (ACT & Region) Inc. is a community legal centre for women in Canberra and the surrounding area. The Centre is run by women and aims to improve women's access to justice. The Centre offers free, confidential telephone advice Monday to Friday from 9.30am to 12.00 noon, and face to face appointments, when appropriate.

The numbers for legal advice (weekdays 9.30am to 12 noon) are:

Local	6257 4499
Outside Canberra	1800 634 669

The Women's Legal Centre is funded by the Indigenous Justice and Legal Assistance Division, Commonwealth Attorney-General's Department.