



**QUESTION ON NOTICE TO THE PUBLIC ADVOCATE - SELECT COMMITTEE
INTO ELDER ABUSE - MISUSE OF AN ENDURING POWERS OF ATTORNEY**

Question: What is the Public Advocate's considered view as to whether there should be a penalty for people misusing Enduring Powers of Attorney?

Answer:

The Public Advocate agrees there should be a penalty for people misusing an Enduring Power of Attorney (EPA) and comment is provided about what penalties would apply in relation to a person who uses an EPA in the knowledge that it has been superseded.

Part 9 of the *Guardianship and Administration Act 1990* (WA) (the Act) prescribes the requirements of a person appointed by the EPA (the donee) to act on behalf of the person who made the EPA (the donor). The relevant provision is:

107. Obligations of donee

- (1) *The donee of an enduring power of attorney —*
- (a) *shall exercise his powers as attorney with reasonable diligence to protect the interests of the donor and, if he fails to do so, he is liable to the donor for any loss occasioned by the failure;*
 - (b) *shall keep and preserve accurate records and accounts of all dealings and transactions made under the power;*
 - (c) *subject to section 109(2), may not renounce a power during any period of legal incapacity of the donor; and*
 - (d) *shall, if the donee becomes bankrupt, report that bankruptcy to the State Administrative Tribunal.*

Penalty applicable to paragraph (b): \$2 000.

When legislated, recommendations 63 and 64 of the Statutory Review of the *Guardianship and Administration Act 1990* will also strengthen the provisions about the obligations of donees.

Recommendation 63 will amend the Act to provide that a donee of an EPA must act according to his opinion in the donor's best interests of the represented person.

Recommendation 64 will amend the Act to increase the penalty for a donee who fails to act properly under section 107 from the current \$2,000 to \$5,000.

The Act does not prescribe penalties for people other than a donee who misuse an EPA however offences by donees and any other person who misuses an EPA may be covered by the *Criminal Code* (WA), particularly sections 169, 170, 371 and 378. These provisions relate to making false statements, providing false information to officials, stealing (including fraud) and penalties for stealing.

In regard to a person using an EPA where they know the power is no longer in force, the Act is currently silent on the revocation of an EPA. However the *Property Law Act 1969*, which is relevant in regard to a power of attorney states at Part 8, s85(1) that:

Subject to any stipulation to the contrary contained in the instrument creating a power of attorney, the power, so far as concerns any act or thing done or suffered thereunder in good faith, operates and continues in force until notice of the death of the donor of the power or until notice of other revocation thereof has been received by the donee of the power.

Generally speaking, where a person has notice of the valid revocation of the EPA, the person would no longer have authority with regard to the estate of the person. It can be inferred that anyone having received a revocation should cease their use of the power.

Recommendations 2 and 3 of the Statutory Review of the *Guardianship and Administration Act 1990* will also strengthen the provisions about the revocation of an EPA.

Recommendation 2 will amend the Act to require revocation using a prescribed form, which will require an authorised witness. It will also state that the revocation will take effect once the donee is notified.

Recommendation 3 will make the donor responsible for advising Landgate of a revocation, and also require the State Administrative Tribunal (the Tribunal) to send any order revoking an EPA to the Registrar of Landgate to enable the EPA to be removed from their records.

This will strengthen the protection of a person's estate and key asset being their property.

While the penalties under the Act are currently limited to the 'obligations' as above the Tribunal takes a broader approach when considering applications for interventions into EPAs. In RGP and MCTB [2011] WASAT 52 the limited administrators were provided functions to investigate the management of the estate by the donee, and the donee was ordered to provide the administrators with information they sought. The administrators then have capacity to consider whether further action is warranted to seek redress.

In KS [2008] WASAT 29 and KS(2) [2008] WASAT 167 the Tribunal considered an application regarding an EPA where the donor of the power had died but was deemed to retain mental capacity prior to their death. In both areas the Tribunal determined it has authority to consider applications with regards to the EPA. In relation to elder abuse, the capacity to intervene even where a person has capacity is highly relevant. It provides an avenue for people to seek intervention where a person may be unable to act due to their vulnerability, but others can identify there are concerns about the operation of the power.