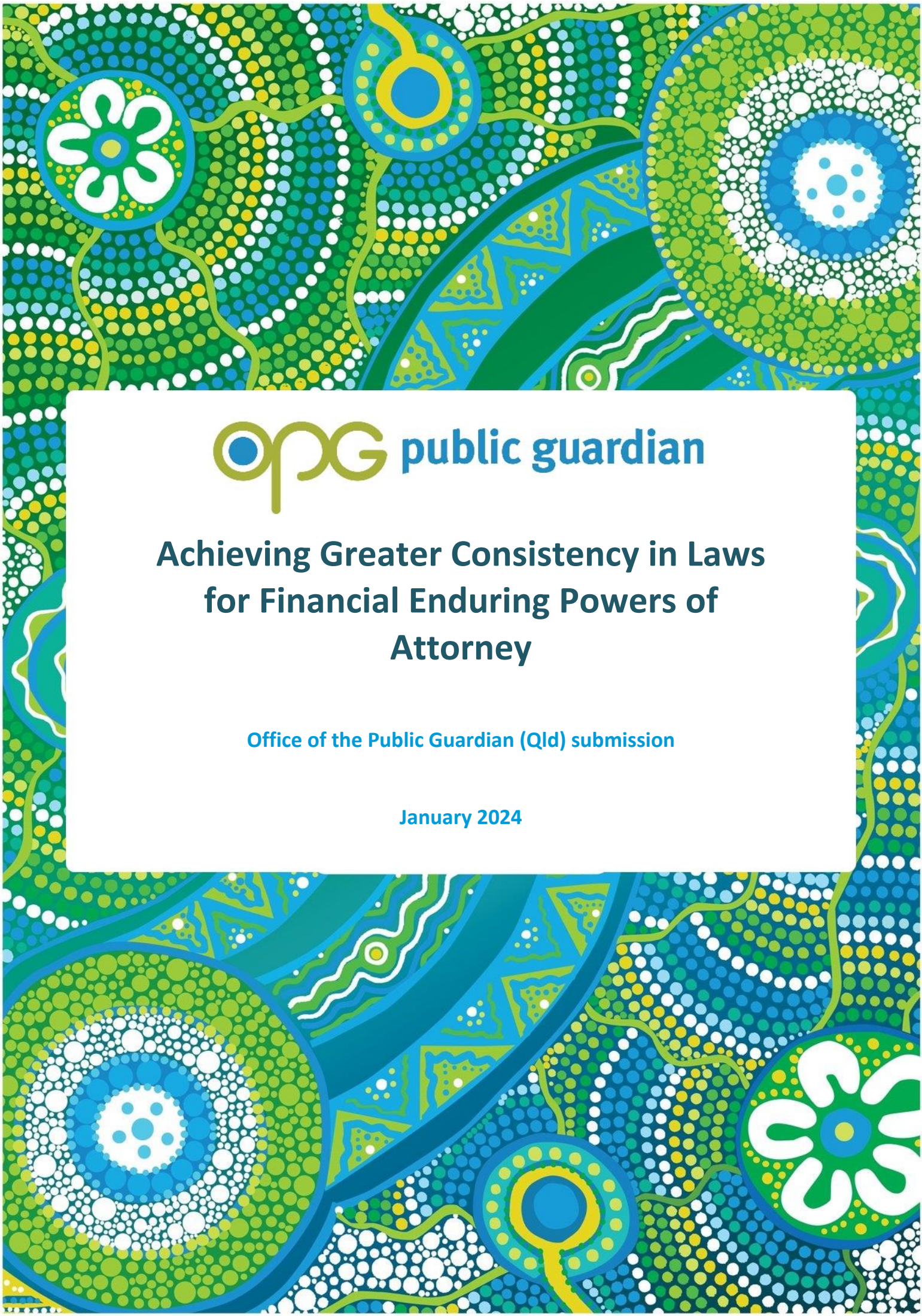

public guardian

Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney

Office of the Public Guardian (Qld) submission

January 2024

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About the Office of the Public Guardian

The Office of the Public Guardian (OPG) is an independent statutory office in Queensland which promotes and protects the rights and interests of adults with impaired decision-making capacity and children and young people in the child protection system or staying at a visitable site.

OPG promotes and protects the rights and interests of adults with impaired decision-making capacity for a matter through the following functions:

- The guardianship function undertakes structured (supported and substitute) decision-making in relation to personal matters, supporting adults to participate in decisions about their life and acknowledging their right to live as a valued member of society.
- The investigations function investigates allegations that an adult with impaired decision-making capacity is being neglected, exploited or abused or has inappropriate or inadequate decision making arrangements in place.
- The community visiting function independently monitors visitable sites (authorised mental health services, the Forensic Disability Service, places where specified NDIS participants reside, residential services with level 3 accreditation (boarding houses/hostels), and other places prescribed by regulation), to inquire into the appropriateness of the site and facilitate the identification and escalation of complaints for resolution by or on behalf of adults with impaired decision-making capacity staying at those sites.

When providing services and performing functions in relation to people with impaired decision-making capacity, OPG will support the person to express their views and wishes and participate and make decisions where possible.

OPG also provides individual advocacy services to children and young people through the following functions:

- child advocacy, which offers person-centred advocacy for children and young people in the child protection system, and elevates the voice and participation of children and young people in decisions that affect them, and
- community visiting, which monitors and advocates for the rights of children and young people in the child protection system including foster, kinship and residential care, and all children and young people staying at other visitable locations (youth detention centres, police watch houses, authorised mental health services and other residential facilities).

OPG provides an entirely independent voice for children and young people to raise concerns and express their views and wishes. When performing these functions, OPG will seek and take into account the views and wishes of the child to the greatest practicable extent.

The *Public Guardian Act 2014* and *Guardianship and Administration Act 2000* provide for OPG's legislative functions, obligations and powers. The *Powers of Attorney Act 1998* regulates the authority for adults to appoint substitute decision makers under an advance health directive or an enduring power of attorney.

Position of the Public Guardian

The Public Guardian welcomes the opportunity to provide a submission to the Australian Attorney-General's Department on the *Consultation Paper: Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney* (the Consultation Paper). The views of the Public Guardian contained in this submission do not represent the views of the Queensland Government.

OPG supports national harmonisation and consistency in financial enduring power of attorneys (EPOAs), including the legal framework, format of EPOAs and related requirements. It is critical that the harmonisation of financial EPOAs reflect best practice and a high standard of safeguards. Our office does not support the dilution of any existing safeguards that exist in Queensland's current EPOA framework.

The investigations undertaken by our office have shown that the misuse of valid EPOAs is more prevalent than the creation of fraudulent EPOAs, so while both the creation and use of financial EPOAs is important, particular attention must be given to creating safeguards to minimise the misuse of EPOAs.

This submission comments on the topics outlined in the Consultation Paper where they relate to the experiences of OPG and the people we serve. A summary of the Public Guardian's recommendations appears below.

The Public Guardian recommends:

1. Consideration be given to explicitly stating in the meaning of decision-making capacity that a person is not considered to have decision-making capacity in situations of undue influence or where the person is not able to make decisions freely or voluntarily.
2. The list of people in the model provision who cannot act as an authorised witness should be expanded to include any person whose interests or relationship with the attorney may conflict with the interests of the principal.
3. Information resources about financial EPOAs should be available in a range of formats and languages to ensure the information is accessible to the community.
4. The same principles and threshold of decision-making capacity apply to both the creation and revocation of financial EPOAs.
5. The model provisions relating to the automatic revocation of an EPOA be expanded to include when an attorney becomes bankrupt or insolvent, a paid carer or health provider for the principal or the service provider for a residential service where the principal is a resident.
6. The model provision should require that a person cannot act as an attorney if they have been a paid health provider, care worker or accommodation provider for the principal in the last 3 years.
7. The model provisions about the eligibility of a person to act as attorney be aligned with the model provisions about when an EPOA is automatically revoked in relation to a particular attorney.
8. Greater clarity be provided around the term 'dishonesty' in the model provision regarding five-year ineligibility periods.
9. Consideration be given to the inclusion of a model provision for an authorised witness to confirm with the principal that an attorney has disclosed that they are eligible to act as attorney.

10. Consideration be given to removing the words "in good faith" from the model provision about the conduct of attorneys currently worded as "act honestly, in good faith and with reasonable care" to enable a more appropriate and practical assessment of an attorney's behaviour.
11. The model provisions about conflict transactions should also include undue influence as seen in section 87 of the Powers of Attorney Act 1998 (Qld).
12. Consideration should be given to the model provision including a requirement for attorneys to record the views, wishes and preferences expressed by the principal as part of the decision-making process.
13. The model provisions for financial EPOAs should stipulate that a financial EPOA can only commence at a time when the principal does not have decision-making capacity for financial decisions.
14. Transition arrangements associated with a harmonised financial EPOAs should be established and clearly communicated in all relevant forms, documents and resources.

General principles and decision-making capacity

OPG broadly supports the foundational principles and criteria for determining decision-making capacity as set out in the Consultation Paper. Should these become nationally consistent for the purpose of financial EPOAs, States and Territories will subsequently need to harmonise relevant state and territory laws and frameworks to ensure consistency.

Our office acknowledges that the meaning of decision-making capacity in the Consultation Paper reflects human rights and supported decision-making principles, however we respectfully suggest that consideration be given to expanding the definition to incorporate that a person 'can freely and voluntarily make decisions about the matter', i.e. is not otherwise subject to coercive control or undue influence.

Article 12 of the United Nations *Convention on the Rights of Persons with Disabilities* focusses on equal recognition before the law and stipulates that States "shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body."[1] (Emphasis added)

The definition of capacity in Queensland's *Guardianship and Administration Act 2000* reflects the United Nations Convention by the inclusion of undue influence. Under the Act, decision-making capacity is outlined as follows:

> **capacity**, for a person for a matter, means the person is capable of—
> (a) understanding the nature and effect of decisions about the matter; and
> (b) freely and voluntarily making decisions about the matter; and
> (c) communicating the decisions in some way."[2]

[1] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008).
[2] *Guardianship and Administration Act 2000* (Qld) Sch 4.

The second limb of the capacity definition in the *Guardianship and Administration Act 2000* can play an important role when OPG is investigating allegations that a person with impaired decision-making capacity has been, or is being neglected, exploited or abused, or has inappropriate or inadequate decision-making arrangements in place. Importantly, it can support our office to establish whether a vulnerable person is being appropriately supported in their decision-making. It can also help determine what safeguarding or protective actions might be required to support the person and ensure the rights and interests are protected.

Our office has long advocated for a national approach to financial EPOAs not to dilute any of the existing safeguards for people with impaired decision-making capacity in Queensland. Specifically addressing the issue of undue influence will help establish the highest-level safeguards for people who might be vulnerable to financial abuse. It will also ensure that people living in Queensland do not experience a dilution in the safeguards that have been in place for many years.

Recommendation 1

Consideration be given to explicitly stating in the meaning of decision-making capacity that a person is not considered to have decision-making capacity in situations of undue influence or where the person is not able to make decisions freely or voluntarily.

Execution of EPOAs

Our office supports the proposed elements of a national financial EPOA model, particularly the required use of an approved financial EPOA form. Approved forms and legal documents offer protection for the principal and require attorneys to sign the document and therefore make specific acknowledgements regarding their eligibility to act as attorney. Approved forms can also provide protections through requiring that attorneys to undertake specific actions, such as providing information to the principal and/or independent third parties.

For the reasons above, the requirement for EPOAs in Queensland to be created using an approved form has been particularly helpful to our office when conducting investigations into whether a person with impaired decision-making capacity has been, or is being neglected, exploited or abused, or has inappropriate or inadequate decision-making arrangements in place.

Witnessing arrangements in relation to principals

Number of required authorised witnesses

Our office supports the proposal in the Consultation Paper for a national model that requires at least one authorised witness. OPG questions whether a requirement to have multiple EPOA authorised witnesses is an effective safeguard, particularly considering it could also be a barrier to creating an EPOA. Based on the experience of our office undertaking investigations, having two EPOA witnesses can provide a false sense of legitimacy of the EPOA and does not always help prevent or detect undue influence and/or coercion. For example, our office has undertaken investigations where two authorised EPOA witnesses have endorsed and signed an EPOA and failed to identify that the principal was subject to undue influence by the proposed attorney. The witnesses' inability to detect undue influence was a result of their existing relationship with, and level of knowledge about, the proposed attorney.

OPG acknowledges however that there is potential for a requirement to have multiple authorised witnesses to help identify duress or coercion in some circumstances. This raises a question about whether the potential benefits of a requirement to have multiple EPOA authorised witnesses outweigh the additional burden it may place on some people when creating an EPOA and the potential barrier it may be to putting an EPOA in place.

In terms of fraudulent signing of EPOAs, it is reasonable to assume that a person who is prepared to forge one signature, will simply forge two signatures if the EPOA requires two signatures. Therefore, an increase in witnessing requirements may have limited or no effect on dishonest family members or other people who pose as helping or supporting the principal.

Retention of jurisdiction-specific qualification requirements for authorised witnesses

Our office supports the establishment of a model provision in relation to authorised witnesses, as identified in the Consultation Paper, along with the retention of jurisdiction-specific approaches. Our office also supports the proposed model provisions about the people who are not able to act as an authorised witness.
Based on OPG's experience in undertaking investigations, we propose that the list of people who are not able to act as an authorised witness be expanded to include any person whose interests or relationship with the attorney may conflict with the interests of the principal. For example, the lawyer of an attorney who has created an EPOA nominating the attorney (their client). While this example may already be considered an inappropriate legal practice, there may be benefit for such actions to also be disallowed in the model provision.

Recommendation 2

The list of people in the model provision who cannot act as an authorised witness should be expanded to include any person whose interests or relationship with the attorney may conflict with the interests of the principal.

Prescribed information resources

OPG acknowledges the need for information resources to be provided to EPOA principals and attorneys. Attorneys were the most common type of decision-maker to be investigated by our office in 2022-23. Many of the attorneys whose actions we investigated advised our office that they were unaware of their obligations as an attorney and were never provided with information about their obligations and responsibilities. The provision of education and information to principals and attorneys may help uphold the rights of principals and ensure attorneys act in accordance with their responsibilities.

We suggest that information resources be available in a range of formats, versions and languages to ensure the information to accessible to the community. This information should be available different languages, versions for people with a disability and culturally appropriate versions for First Nations peoples. Ideally this information should be available to parties at the critical times of creating, witnessing and enlivening financial EPOAs.

Recommendation 3

Information resources about financial EPOAs should be available in a range of formats and languages to ensure the information is accessible to the community.

Acceptance of appointment by an attorney

OPG supports the concept of a single national attorney acceptance form and considers the benefits of this initiative to outweigh any potential unintended consequences e.g. the additional step of completing an attorney acceptance form being a barrier to the creation of the EPOA. We support the proposed model provisions for an attorney acceptance form and the proposed obligations on an authorised witness.

Revocation of an EPOA

The Consultation Paper highlights a situation where a principal may wish to revoke an EPOA when they are considered by others (e.g. family members, witnesses) to not have the decision-making capacity to do so. OPG suggests that the same principles and threshold of decision-making capacity apply to both the creation and revocation of financial EPOAs. One of the general principles in Queensland's *Guardianship and Administration Act 2000* is that all adults are presumed to have decision-making capacity unless proven otherwise.[3] This includes the capacity to make the decision to revoke an EPOA.

The acknowledgements in the *Guardianship and Administration Act 2000* also apply to a person's decision to revoke an EPOA. These acknowledgements include:

- A person's right to make decisions is fundamental to their inherent dignity
- A person's right to make decisions with which others may not agree
- A person's capacity to make decisions may differ according to the type of decision being made and the support available from the person's support network
- A person's right to make decisions should be interfered with to the least possible extent
- A person with impaired decision-making capacity has a right to adequate and appropriate support for decision-making.[4]

Recommendation 4

The same principles and threshold of decision-making capacity apply to both the creation and revocation of financial EPOAs

Automatic revocation of an EPOA

The model provisions in relation to the automatic revocation of an EPOA should be expanded to stipulate that an EPOA is taken to be revoked in relation to a particular attorney when the attorney becomes bankrupt or insolvent, a paid carer or health provider for the principal or the service provider for a residential service where the principal is a resident.[5] These additional safeguards are already part of Queensland's legislative framework and should be part of the model provisions for national EPOAs to prevent a dilution in safeguards for Queenslanders.

Recommendation 5

The model provisions relating to the automatic revocation of an EPOA be expanded to include when an attorney becomes bankrupt or insolvent, a paid carer or health provider for the principal or the service provider for a residential service where the principal is a resident.

[3] *Guardianship and Administration Act 2000* (Qld) s11B(3).
[4] *Guardianship and Administration Act 2000* (Qld) s5.
[5] *Powers of Attorney Act 1998* (Qld) ss 57(2), 59 and 59AA.

Attorney eligibility

Some of the people OPG interacts with during the conduct of investigations argue that the concept of a 'paid carer' does not include a person who lives in the same residence as the principal, such as a family member, who is not a registered NDIS provider, but receives NDIS funds to provide home care services. We suggest that the model provision and/or the information resources for financial EPOAs provide clarity around this situation. This could be achieved through modifying the proposed definition of a 'care worker'.

Queensland's *Powers of Attorney Act 1998* provides that anyone who has been a paid carer of the principal anytime within the last three years is ineligible to be the principal's attorney. Our office would like to see a similar requirement in the model provisions to ensure the existing safeguards for Queensland residents are not weakened. The model provision that outlines that a paid health provider, care worker or accommodation provider cannot act as attorney for a principal could be expanded to require that these people cannot act as attorney until at least 3 years after the cessation of their role as a paid health provider, care worker or accommodation provider.

OPG respectfully suggests that the model provisions about the eligibility of a person to act as attorney be aligned with the model provisions regarding when an EPOA is automatically revoked in relation to a particular attorney. For example, if a person is ineligible to act as attorney if they are a care worker for the principal, then the provisions around automatic revocation should also reflect that the EPOA in relation to that attorney should automatically be revoked if the attorney becomes a care worker for the principal.

To support our work conducting investigations, our office would welcome greater clarity around the term 'dishonesty' in the model provision regarding five-year ineligibility periods. We also invite consideration of a potential model provision for an authorised witness to confirm with the principal that an attorney has disclosed that they are eligible to act as attorney. This may provide greater transparency and another safeguard for EPAO principals.

Recommendation 6

The model provision should require that a person cannot act as an attorney if they have been a paid health provider, care worker or accommodation provider for the principal in the last 3 years.

Recommendation 7

The model provisions about the eligibility of a person to act as attorney be aligned with the model provisions about when an EPOA is automatically revoked in relation to a particular attorney.

Recommendation 8

Greater clarity be provided around the term 'dishonesty' in the model provision regarding five-year ineligibility periods.

Recommendation 9

Consideration be given to the inclusion of a model provision for an authorised witness to confirm with the principal that an attorney has disclosed that they are eligible to act as attorney.

Attorney duties

OPG supports the establishment of a minimum baseline for the proper conduct of attorneys appointed by a financial EPOA. In relation to the proposed model provisions, our office encourages the removal of "in good faith" from the statement "act honestly, in good faith and with reasonable care".[6] Our experience conducting investigations shows that the concept of "good faith" can be difficult to navigate and assess, and has similarities to the concept of 'intent' in criminal law in that it cannot be proven but inferred by circumstances. A statement such as "Act honestly and with reasonable care" may allow for a more appropriate and practical assessment of attorney behaviour and allows for a scale of appropriateness based on the understanding and circumstances of an attorney.

Our office also respectfully suggests that consideration be given to expanding the model provisions about conflict transactions to capture situations of undue influence. This is an important safeguard that exists in Queensland's *Powers of Attorney Act 1998*:

> 87 Presumption of undue influence
> The Fact that a transaction is between a principal and 1 or more of the following —
> (a) An attorney under an enduring power of attorney or advance health directive;
> (b) A relation, business associate or close friend of the attorney;
> Gives rise to a presumption in the principal's favour that the principal was induced to enter the transaction by the attorney's undue influence.[7]

The Consultation Paper suggests that the model provision should require that an attorney must seek the views, wishes and preferences of the principal, and take them into account when acting as attorney. Based on the investigations work of our office, we suggest the additional requirement that attorneys document and/or record this process and the specific views, wishes and preferences expressed by the principal. This would provide an additional safeguard for the principal's rights and interests as well as an important source of evidence if the actions of the attorney are investigated by a relevant authority, including the police or our office.

Information resources about financial EPOAs should also ideally encourage principals to articulate their views and wishes at the time of making the EPOA.

Recommendation 10

Consideration be given to removing the words "in good faith" from the model provision about the conduct of attorneys currently worded as "act honestly, in good faith and with reasonable care" to enable a more appropriate and practical assessment of an attorney's behaviour.

Recommendation 11

The model provisions about conflict transactions should also include undue influence as seen in section 87 of the Powers of Attorney Act 1998 (Qld).

[6] Attorney-General's Department (Australian Government), *Consultation Paper: Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney* (2023), p23.
[7] *Powers of Attorney Act 1998* (Qld) s 87.

Recommendation 12

Consideration should be given to the model provision including a requirement for attorneys to record the views, wishes and preferences expressed by the principal as part of the decision-making process.

Other issues

General powers of attorney

OPG proposes that the model provisions for financial EPOAs stipulate that a financial EPOA can only commence at a time when the principal does not have decision-making capacity for financial decisions. We also propose that any national harmonised forms and information resources include a reminder that if a person who has decision-making capacity for financial matters would like another person to manage their finances, they should create a general power of attorney rather than an EPOA. Reminding people that a financial EPOA should only be created for use when the principal does not have decision-making capacity for financial decisions may help to safeguard against the misuse of financial EPOAs when the principal has capacity to make their own financial decisions.

Recommendation 13

The model provisions for financial EPOAs should stipulate that a financial EPOA can only commence at a time when the principal does not have decision-making capacity for financial decisions.

Transition provisions

All forms, documents and resources associated with nationally harmonised financial EPOAs should include clear information about long-term transition and grandfathering arrangements that cover financial EPOAs that are already active as well as financial EPOAs that have been created but have not yet been activated. Further, a comprehensive communication strategy will be needed to ensure members of the community and relevant professions are aware of the changes and any transitional arrangements.

Recommendation 14

Transition arrangements associated with a harmonised financial EPOAs should be established and clearly communicated in all relevant forms, documents and resources.

Previous submissions

The Consultation Paper invites the provision of previous submissions relating to the reform of EPOA laws. Our office has made two previous submissions which are provided alongside this submission for the information of the Attorney-General's Department. These submissions relate to:

- Enhancing protections relating to the use of Enduring Power of Attorney instruments Consultation Regulation Impact Statement (March 2020)
- The National Register of Enduring Powers of Attorney Public Consultation Paper (July 2021).

Conclusion

The Public Guardian thanks the Attorney-General's Department for the opportunity to provide feedback on the Consultation Paper and for providing an extension of time to make this submission. Our office looks forward to the opportunity to provide further comment as efforts are progressed to achieve greater consistency of financial EPOA laws in Australia.