



# Achieving greater consistency in laws for financial enduring powers of attorney

## (Plain language summary)

### Overview

All Australian Governments are committed to preventing the abuse of older people. This includes physical, financial, psychological and sexual abuse, and neglect.

This paper is part of a consultation process about:

- financial elder abuse
- making laws about financial enduring powers of attorney (EPOAs) more consistent across Australia.

### Enduring powers of attorney and safeguards

Powers of attorney are legal arrangements made under State or Territory law. They let a person (called the principal) appoint – or choose – another adult or group to make certain decisions for them. This can include Public Trustees and private trustee companies. The person or group the principal chooses is called their attorney.

An EPOA continues (endures) even if the principal can no longer make their own decisions in the future. In this way EPOAs are different to general powers of attorney.

EPOAs should protect principals, but if an EPOA is used or applied in the wrong way it can lead to abuse.

This paper is about financial EPOAs. This is because the evidence suggests that financial abuse with EPOAs is ‘most clearly associated with elder abuse’.

### Why we are consulting

We, alongside corresponding departments in States and Territories, are keen to hear from a wide range of people and groups who have experience with financial EPOAs.

On 22 September 2023, the Standing Council of Attorneys-General (SCAG) agreed to share this paper to get feedback from the public. It puts forward possible terms across a range of areas in financial EPOA laws.

Sharing this paper does not mean the Attorneys-General support the ideas in the paper. The submissions and feedback that we, and corresponding departments in States and Territories receive, will shape the principles and terms (provisions) that we create. These principles and terms (provisions) will then be presented to the SCAG for approval.

You can provide a submission in response to this consultation paper by post and mail it to this address:

Attorney-General's Department  
Attn: Protecting the Rights of Older Australians Section  
3-5 National Circuit  
Canberra ACT 2600

You can also visit the 'Citizen Space' on our website to find additional information about the proposal outlined in this paper: <https://consultations.ag.gov.au>

## Making EPOA laws more consistent

A number of inquiries have shown the benefits of having greater consistency in EPOA laws in Australia. They have also highlighted the issues with having differences in State and Territory laws. A key piece of work in this area is the Australian Law Reform Commission's report *Elder Abuse – A National Legal Response* (May 2017).

As this inquiry and other works have pointed out, the ongoing differences in EPOA laws across Australia 'fragments education, training and support opportunities for principals, attorneys and third parties'.

Greater consistency 'would increase clarity and awareness for all national stakeholders, including Australian families, communities, business, governments and the media, and enhance the overall effectiveness of these laws'.

Having more consistent EPOA laws can reduce financial elder abuse. Or can improve the responses and activities that aim to reduce financial elder abuse.

Getting greater consistency in these areas of law would also help with work on:

- national education resources
- service responses – for example, legal assistance services
- plans and projects, such as creating one national financial EPOA form.

## Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (the Royal Commission) has been looking at a range of issues related to EPOAs. Its final report and recommendations are expected to be released during the time this paper is released for feedback. The report and recommendations will be carefully considered and also inform this work.

# 1. General principles and decision-making capacity

Below are guidelines for assessing a person's decision-making capacity. These are set out in the model laws from the Queensland Public Advocate, Dr John Chesterman. We recommend these guidelines as a basis to support the proposals in this paper.

## General principles about how an attorney should act for a principal

When a person acts for a principal, they must:

- assume that the principal is able to make the decision
- support the principal to take part in decisions that affect them as much as possible
- avoid limiting the principal's ability to decide and act for themselves, as much as possible.

## Decision-making capacity

A person has capacity (is able) to make a decision if they can:

- understand the information about the decision, how it will affect them, and the general results of the decision
- remember that information for long enough to make the decision
- use or weigh that information up as part of the process of making the decision
- communicate the decision, such as with speech, gestures or other ways.

A person has decision-making capacity if they can do all this when given the appropriate support.

## 2. Executing an EPOA

### Proposal for feedback

Possible terms for the laws could include the following:

- An EPOA must be in the approved form or very similar form.
- The principal or another person they ask must sign and date an EPOA in front of an authorised witness.
- The authorised witness must sign and date an EPOA in front of the principal. And, if relevant, in front of the person who signed for the principal.

These requirements stress how important it is to make an EPOA and give the document authority. Letting the principal choose another person to sign, and in their presence, supports accessibility. For example, in situations where the principal physically cannot sign.

## 3. Witnessing an EPOA

Witnesses provide an important and independent role when putting in place an EPOA. The proposal for feedback seeks to balance the following considerations:

- Letting a wide range of people witness EPOAs, in a less formal way, helps make this a more convenient and accessible process.
- If there are too many requirements for witnesses or they are too strict, people may not be able to put EPOAs in place quickly in urgent situations.
- Requiring witnesses to explain, give information, or form a view on certain issues when they witness the signing of an EPOA, is a way to make sure everyone understands their roles.
- Having an Independent witness can give confidence that a principal had decision-making capacity and that they did not seem to be forced to sign the EPOA.

### Who can be a witness

### Proposal for feedback

Possible terms for the laws could include the following:

- The principal's signature of an EPOA, or a signature by a person asked to sign by the principal.
- An authorised witness would be a person listed in the law of a State or Territory.
- Each jurisdiction would take a specific approach to who is an authorised witness. But possible terms for the laws could include that the following people cannot act as an authorised witness:
  - a person who is less than 18 years old
  - a person who is part of the EPOA, such as the attorney, or a close relative someone who is part of the EPOA
  - a person signing the EPOA for the principal.
- Jurisdictions could decide other people who cannot be authorised witnesses.

## Responsibilities for witnesses

These proposals involve witnesses:

- confirming that they watched the principal and attorney or guardian sign the EPOA
- taking on duties that would safeguard principals and attorneys.

### Proposal for feedback

Possible terms for the laws could include that the authorised witness must certify that:

- they are qualified to be an authorised witness
- the principal signed the form in front of the authorised witness (or the principal freely asked a person to sign for them, in front of the witness)
- the authorised witness confirmed the principal has the set information about how EPOAs work and their importance.

The set information about EPOAs for the principal would be a plain language document. It would cover matters such as:

- what an EPOA is and how important it is, including examples of the sorts of decisions an attorney can make under a financial EPOA
- the general responsibilities that an attorney has towards the principal
- how to cancel an EPOA
- how to assess if a principal can make their own decisions
- contact details for a principal to get more expert help.

## Introducing common set information

Creating set resources for principals will help make sure everyone executing an EPOA understands the decision they are making. This includes those who cannot afford or access a lawyer.

## Extra responsibilities for witnesses

This proposal requires that only certain qualified people have the right training to *explain* the effect of an EPOA to a principal. This includes Australian legal practitioners and others chosen by jurisdictions to carry out this role.

Explaining the effect of an EPOA is complex and can require special training. Other witnesses could perform their role without needing to explain the effect of an EPOA. This is to make sure a wide range of people can be asked to witness an EPOA. This promotes accessibility in the EPOA process.

### Proposal for feedback

Possible terms for the laws could include the following extra responsibilities for the authorised witness:

- The authorised witness must certify they explained the effect of the EPOA to the principal before it was signed. The witness is only required to do this if they are either:
  - an Australian lawyer
  - a person listed in law who can give advice about EPOAs for the purpose of these extra responsibilities.
- All authorised witnesses otherwise must certify:
  - the principal seemed to freely sign the EPOA in front of the witness
  - when the principal signed the EPOA, they seemed to the witness to have decision-making capacity, and to understand the effect of the EPOA.

## 4. When an attorney accepts an appointment

Attorneys have a special position of trust. Because of this, the proposal is that they should sign a statement of acceptance in front of an authorised witness. This proposal would give greater confidence to principals and others that the attorney understands and will comply with their duties in the EPOA. And that they understand and will follow the relevant laws.

### Proposal for feedback

Possible terms for the laws could include the following:

- All attorneys must sign and date a statement of acceptance.
- The statement of acceptance must include that they:
  - are eligible to act as an attorney
  - understand and agree to the responsibilities and duties of an attorney
  - agree to follow the relevant State or Territory laws relating to EPOAs. And any rules set out in the terms of the EPOA.
- The attorney must sign and date the statement in front of an authorised witness. This does not need to be the same authorised witness who witnessed the principal signing.
- An 'authorised witness' for this purpose is the same as explained above.

What an authorised witness must do

- The authorised witness must certify that:

- they confirmed the attorney has the set information about how EPOAs work and their importance
- the attorney seemed to understand their responsibilities and duties as part of the EPOA.
- The authorised witness must certify they explained the effect of the EPOA to the principal before it was signed. The witness is only required to do this if they are either:
  - an Australian lawyer
  - a person listed in law who can give advice about EPOAs for the purpose of these extra responsibilities.
- The set information would be a plain language document. It would cover attorney duties. This would include that attorneys need to think about the specific instructions of the principal, set out in the EPOA.

## 5. Revoking an EPOA

The ability for a principal to cancel (revoke) an EPOA is important to prevent abuse. For example, if the attorney is not following the principal's wishes.

### Proposal for feedback

Possible terms for the laws could include the following:

- A principal can revoke or cancel a power of attorney at any time. To do this they must be able to make decisions (have capacity) about revoking a power of attorney.
- When revoking an EPOA, it must be:
  - in an approved or very similar form
  - signed and dated by the principal or by a person the principal asks to sign for them in front of them
  - signed in front of an authorised witness
  - signed and dated by the authorised witness in front of the principal. Or in front of the person who signed for the principal.
- Different jurisdictions would decide who can be an authorised witness (as outlined above in relation to executing an EPOA).
- The principal must take reasonable steps to give all attorneys notice in writing that they are revoking the EPOA. This includes giving notice to any alternate attorneys.

The witness must certify that:

- They are qualified to act as an authorised witness.
- The principal, or the person the principal asked to sign for them, seemed to freely sign to revoke the EPOA. This means that the principal or other person did not appear to be forced or pressured to revoke the EPOA.
- They confirmed that the principal has the set information about revoking an EPOA.

The proposed requirement for the principal to give notice in writing to attorneys would reduce the risks of attorneys still using a revoked EPOA.

Sometimes a principal may need to urgently revoke an EPOA. For example, to stop an attorney wrongly managing money or property, or acting against the principal's wishes. Getting a witness may cause a delay to revoking the EPOA. By including that the principal must take 'reasonable steps' to give notice, the proposal also aims to allow for this situation.



## 6. Automatically revoking an EPOA

This proposal sets out the rules for when and how an EPOA could be automatically revoked. It also provides certainty to principals and attorneys by confirming the situations when they do not have to manually revoke an EPOA.

### Proposal for feedback

Possible terms for the laws could include the following:

- An EPOA is revoked when the principal dies.
- An EPOA is revoked for a particular attorney if:
  - they die
  - they no longer have decision-making capacity to act as an attorney
  - they resign
  - the principal and attorney are married or are in a registered relationship, and the marriage or relationship between the principal and attorney ends (unless a different instruction is in the EPOA).
- An EPOA is revoked when it no longer has any effect based on its own terms.
- An EPOA for financial matters is revoked when the principal executes a new EPOA for financial matters, unless they specify otherwise.
  - This is to limit multiple EPOAs being in place, unless the principal wants this to happen. It also gives greater certainty about whether an EPOA is current or if it must be read alongside an earlier EPOA. For example, for family members, attorneys, businesses and others relying on EPOAs.

## 7. Who can be an attorney

Attorneys are trusted with significant decision-making responsibility under an EPOA. Rules about who can and cannot be an attorney aim to prevent attorneys being appointed where there is a greater risk of:

- abuse
- an attorney not having the right skills
- undue influence on the principal.

### Proposal for feedback

Possible terms for the laws could include that these people cannot act as an attorney:

- A person who is less than 18 years old.
- A person who lacks decision-making capacity for the role.
- A witness to the power of attorney.
- A person who is a paid health provider, care worker or accommodation provider for the principal. (Family and friends giving an older person care, accommodation and health services would be able to act as an enduring attorney.)

## Proposal for feedback

### *Five-year ineligibility periods*

Possible terms for the laws could include that the following people also cannot act as an attorney:

- A person who has been convicted of an offence to do with dishonesty in the 5 years before the EPOA is put in place.
- A person who is bankrupt or personally insolvent. Or who has been bankrupt or personally insolvent in the 5 years before the EPOA is put in place.
- A person who has been convicted of an offence involving violence within the principal's family or domestic context in the 5 years before the EPOA is put in place.
- A person who has had a family or domestic violence intervention order or protection against them in the 5 years before the EPOA is put in place. And the principal is the person that order was made to protect. This includes interim or final orders. The 5-year period should be counted starting from the end of the intervention or protection order. Or from the end of any renewal or extension of that order.

### *'Disclose and approve' approach during the five-year ineligibility period*

- The 'disclose and approve' approach could be adopted during the five-year ineligibility period (referred to above) to:
  - support the personal choice of the principal
  - retain access to EPOAs.
- This approach would involve a person in the categories above – a person who has been convicted of an offence involving dishonesty, been bankrupt or personally insolvent – to be appointed as an attorney during the five-year ineligibility period.
- The 'disclose and approve' approach would happen if:
  - they have disclosed the conviction or bankruptcy to the principal
  - the disclosure has been recorded in the EPOA
  - the principal has approved the appointment with the knowledge of the disclosure.

## The 'Disclose and approve' approach during the 5-year ineligibility period

The 'disclose and approve' approach means a principal can use their judgement to choose an attorney even if the attorney:

- has been convicted of an offence to do with dishonesty in the 5 years before the EPOA is put in place
- is a person who is bankrupt or personally insolvent. Or who has been bankrupt or personally insolvent in the 5 years before the EPOA is put in place.

The dishonesty offence conviction or bankruptcy would need to be disclosed and recorded in the EPOA during the 5-year period. The principal would know this when they choose the attorney. This approach puts the choice and control of a principal first.

If the case of family and domestic violence convictions, and intervention or protection orders related to the principal, a 'disclose and approve' approach is not considered appropriate. This is because it may be exploited through coercive controlling behaviours.

**Proposal for feedback**

Possible terms for the laws could include that an attorney must report to the principal any changes after the EPOA is put in place that relate to the eligibility rules. Or they must report this to the relevant State or Territory authority if the principal has lost decision-making capacity.

The proposal would create an ongoing disclosure responsibility for attorneys. This will make sure the principal, or an authority in their place, knows about any events that might affect if the attorney is suitable. For example, an attorney must tell the principal if they are convicted of certain offences. The principal can then decide if they want to end the EPOA arrangement.

## 8. Attorney duties

Setting consistent attorney duties in State and Territory laws will create a common and national standard for financial attorneys. This aims to support better understanding about an attorney's role. The proposed core duties aim to give certainty for attorneys and principals about what an attorney is required to do. While also leaving enough room for principals to specify other matters in an EPOA.

Principals often choose family members to be their attorneys under financial EPOAs. Because of this, there are often different ideas between different families about attorney duties and misconduct. Although we need to consider different situations, the main goal for a framework of attorney duties is to reduce the risk of financial and other abuse of older people.

The proposal for feedback includes that an attorney must not enter a 'conflict transaction'. This means where there is or may be a conflict between the duty of the attorney to the principal, and the interests of the attorney. Or the interests of a relative, business associate or close friend of the attorney. An example of a conflict transaction would be if an attorney for a financial matter rents the principal's house to the attorney or a relative of the attorney.

An EPOA, or a court or tribunal can authorise a conflict transaction.

### Proposal for feedback

Possible terms for the laws could include that an attorney acting under an EPOA must:

- follow the terms of the relevant EPOA Act
- follow the requirements in the EPOA
- keep accurate records and accounts of all actions taken under the EPOA
- unless the EPOA states otherwise, take reasonable steps to let any other attorneys under the EPOA know about any action taken under the EPOA
- act honestly, in good faith and with reasonable care
- keep their property (both money and financial assets) separate from the principal's property. Unless owned jointly by the principal and attorney.

#### *Conflicts of interest and financial decisions*

Possible terms for the laws could include that an attorney acting under an EPOA:

- must not enter into a transaction where there is, or may be, a conflict between:
  - the duty of the attorney to the principal
  - the interests of the attorney, a relative, business associate or close friend of the attorney.
- Under an EPOA, an attorney can enter into a transaction that results, or may result, in a conflict of interest if:
  - the EPOA specifies
  - a court or tribunal authorises it (even relating to a past event).
- A transaction is not a conflict transaction just because an attorney:
  - is related to the principal
  - may be a beneficiary of the principal's estate when the principal dies
  - deals with, or acquires an interest, in property owned jointly with the principal (whether as joint tenants or tenants in common)
  - gets a loan or gives a guarantee or indemnity in relation to property held jointly with the principal
  - carries out any other transactions allowed under State and Territory laws.

- A transaction is also not a conflict transaction just because an attorney makes a gift or donation that is:
  - like a gift or donation the principal made when they had decision-making capacity; or
  - like a gift or donation the principal might reasonably be expected to make; and
  - the value of the gift or donation is not more than what is reasonable based on the situation and the principal's financial situation.

## Finding out and acting on the views, wishes and preferences of a principal

### Proposal for feedback

When an attorney exercises a power or performs a duty under an EPOA they must follow these general principles. An attorney must:

- assume that the principal has capacity – they are able to make the decision
- support the principal to take part in decisions that affect them, as much as possible
- avoid limiting the principal's ability to decide and act for themselves, as much as possible.

Possible terms for the laws could include that an attorney must, as much as possible:

- find out the views, wishes and preferences of the principal
- take into account any views, wishes and preferences the principal states or shows. Or what these would likely be, if the principal had decision-making capacity and could communicate them.

How substitute and supported decision-making is, and should be, included in different EPOA and guardianship laws is a complex issue. The Royal Commission is considering this issue at a national level. The Royal Commission has highlighted the difference between substitute and supported decision-making:

- Substitute decision-making refers to processes and regimes that involve decisions being made on another person's behalf. This approach removes legal capacity from a person, as a substitute decision-maker can be appointed against a person's will, and decisions are based on the 'best interests' of the person concerned, rather than their will and preferences.
- Supported decision-making refers to processes and approaches that assist people to exercise their autonomy and legal capacity by supporting them to make decisions. This approach seeks to give effect to the will and preferences of the person requiring decision-making support (other than a decision about a significant financial transaction)'.

In law reform and practice, there has been a move away from substitute decision-making toward supported decision-making. This is happening in a number of Australian and international jurisdictions, sectors and organisations.

We expect the consultation for the current proposal will happen while governments and the community are considering the recommendations of the Royal Commission. These processes will further inform a possible national approach to this issue.

## 9. Recognising EPOAs in different states

There are often cases when a different jurisdiction needs to recognise an EPOA that was made in another jurisdiction. There are interstate recognition arrangements in place now. But stakeholders have raised that interstate recognition laws continue to create uncertainty. Or they create practical issues and costs for a range of people involved.

At the moment, 6 jurisdictions recognise powers under an interstate EPOA if those powers can be given under the law in both jurisdictions. Greater national consistency in core areas of EPOA laws could improve the current interstate recognition arrangements. This is because it would be clearer for all people involved to confirm whether an EPOA was valid in another jurisdiction. And how much it can be applied in the second jurisdiction. Greater national consistency would also make it easier for EPOAs to move across jurisdictions in border areas.

## 10. Access to justice issues

### Jurisdiction and compensation

Opportunities for addressing disputes or misconduct to do with financial EPOAs should be effective, informal, flexible and low cost. This is important particularly for older Australians where a family member may have caused the losses and there is an urgent need to get back any misused money or assets.

The possible benefits of this approach need to be considered alongside:

- different tribunal arrangements across jurisdictions
- the possible complexity of EPOA matters.

In some cases and jurisdictions, it may be more appropriate for a matter to be heard in the Supreme Court.

## Offences and civil penalties

There are different views among stakeholders about whether it is necessary and appropriate to have specific EPOA offences. The alternative would be to have more general offences that cover the relevant conduct. This is the approach taken in most jurisdictions. The Australian Law Reform Commission (ALRC) inquiry looked into this issue. It did not support creating new offences as it would risk duplicating existing offences. And it risks increasing complexity without any guarantee of more prosecution of these offences.

### Proposal for feedback

#### *Jurisdiction and compensation*

Possible terms for the laws could include that a court or tribunal may order an attorney for a financial EPOA to pay compensation:

- for a loss they caused because they did not follow the relevant State or Territory Act when acting as an attorney
- to account for any profits they got as a result of not following the relevant State or Territory Act.

The attorney would need to pay compensation or an account of profits to a principal. Or the principal's estate if the principal has died.

A court or tribunal may excuse the breach of an attorney who has acted honestly and reasonably and the court believes should be excused.

#### *Offences*

- Jurisdictions that currently have offences specific to an EPOA in their laws should keep them in their laws.
- There should be penalties for attorneys who misuse their powers. This should happen through specific EPOA related offences, broader general offences or civil penalty regimes.

Penalties should apply for:

- dishonest inducement to execute or revoke an EPOA
- dishonest use of an EPOA to:
  - get financial advantage for the attorney or another person
  - cause loss to the principal or another person
- misrepresentation in relation to an EPOA, which includes pretending to be an attorney.

## **11. Information, resources or training for witnesses and attorneys**

Stakeholders and law reform reviews have raised how important information and training is for witnesses. For example, to support their role of assessing a principal's decision-making capacity. Or to notice signs of a principal being coerced to make the EPOA.

Stakeholders and others have also raised that it's important for attorneys to have training, guidance and support. For example, so they understand their role and specific duties.

Setting up any form of required training for witnesses, attorneys or principals would be a major task. It would also be difficult to check who is doing the training or enforce it.

For range of duties and responsibilities for witnesses and attorneys proposed in this paper, we need feedback about information and resources or training needs. This includes adding to or creating voluntary resources, such as:

- online training modules
- guidance material for witnesses.

## **12. Other ideas for preventing and responding to financial elder abuse**

We invite feedback on other non-legislative work that the Commonwealth, States and Territories could prioritise to prevent and respond to financial elder abuse. This would complement work to achieve greater consistency in financial EPOA laws.