Australian Government
Attorney-General's Department

CONSULTATION PAPER

Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney | September 2023

Overview

All Australian Governments are committed to promoting the dignity, security and autonomy of older Australians. This includes preventing the abuse of older people in all its forms – physical, financial, psychological and sexual abuse, and neglect – and taking positive steps to promote the rights of older persons in Australia.

The key framework guiding the work of Australian Governments is the *National Plan to Respond to the Abuse of Older Australians 2019-2023 (National Plan).* A specific commitment within the National Plan is for governments to consider options for achieving greater national consistency in financial powers of attorney laws.[1]

On 22 September 2023, the Standing Council of Attorneys-General agreed that this paper should be released for public consultation. This does not represent an endorsement of the proposals in the paper by Attorneys-General. The feedback received will be considered to inform future steps towards achieving greater national consistency in financial enduring powers of attorney (EPOA) laws.

The importance of EPOAs and safeguards within EPOA laws

Powers of attorney are formal legal arrangements, made under State and Territory legislation. They allow a person (the principal) to appoint another adult person or persons (in some cases extending to legal persons, such as Public Trustees and private trustee companies),[2] to make certain decisions on their behalf. EPOAs, unlike general powers of attorney, are instruments designed to continue in force should the principal lose decision-making capacity in the future.

EPOAs are instruments intended to promote the interests of the principal, by allowing them to nominate *who* will make future decisions on their behalf, and to inform and guide *what* those decisions should be. Preparing an EPOA requires a principal to carefully consider, and if needed to seek expert advice, about their expected future needs, wishes and preferences, and how to best articulate these in an EPOA.

As studies have identified, while EPOAs are intended to provide a protective benefit to principals, if misused or misapplied, they 'may facilitate abuse by the very person appointed by the older person to protect them'.[3] The fact that EPOAs can enable financial elder abuse highlights the importance of there being effective legal and practical safeguards in place to inform and protect principals, both at the time EPOAs are made and during the period they are in force.

This paper focusses on financial EPOAs, rather than general powers of attorney or medical and personal/lifestyle enduring documents, as evidence suggests the abuse of financial EPOAs is 'most clearly associated with elder abuse'.[4] Financial EPOAs have been identified as a priority area for achieving greater national consistency by the Standing Council of Attorneys-General.

1 Council of Attorneys General, *National Plan to Respond to the Abuse of Older Australians [Elder Abuse] 2019-2023* (National Plan, 2019) 10.
2 Terry Ryan, 'Developments in Enduring Powers of Attorney Law in Australia' in Lusina Ho and Rebecca Lee (Eds), Special Needs Financial Planning A Comparative Perspective (Cambridge University Press, June 2019) 179, 182.
3 Australian Law Reform Commission, 'Elder Abuse – A National Legal Response' (Final Report 131, May 2017) [5.2].
4 Australian Guardianship and Administration Council, 'Enduring powers of attorney (financial)' (Options Paper, December 2018) 7.

The benefits of greater consistency in EPOA laws

A number of inquiries have highlighted the benefits of achieving greater consistency in EPOA laws in Australia, and the challenges and inefficiencies presented by differences in State and Territory legislation. A foundational work in this area is the Australian Law Reform Commission's report *Elder Abuse – A National Legal Response* (May 2017).

As the ALRC inquiry and other works have identified, the ongoing differences in EPOA laws across Australia 'fragments education, training and support opportunities for principals, attorneys and third parties'.[5] Achieving 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.'[6]

A summary of the identified benefits and opportunities which greater consistency in financial EPOA laws would deliver is provided below.

Expected key benefits of achieving greater consistency in financial EPOA laws	
Reduction in financial elder abuse	• Achieving greater consistency in EPOA laws, including stronger and more consistent safeguards, is expected to reduce financial elder abuse arising through EPOAs by: o ensuring attorneys understand the significance of their role and duties, and potential consequences of duty breaches o ensuring principals understand the effect of making an EPOA, and are supported to make EPOAs which reflect their wishes and preferences o preventing persons who are not appropriate from being appointed as an attorney, while balancing this risk with a principal's personal choice
Improved familiarity and understanding about EPOAs across Australia	• Greater familiarity about EPOAs and financial elder abuse issues within the community, including about the purpose and benefits of EPOAs as instruments for advance financial planning • Greater community and intergenerational understanding about EPOAs would assist: o relatives and friends of persons with, or considering making, an EPOA, to have informed discussions about EPOAs and life planning tools generally o prospective attorneys and witnesses to be more informed about EPOA matters, such as the expectations of an attorney and the decisions they make, undue influence risks and detecting decision-making capacity issues[7] • This in turn could help promote behavioural change in relation to how parties under an EPOA view and undertake their responsibilities, duties and obligations.

5 Australian Guardianship and Administration Council, 'Enduring powers of attorney (financial)' (Options Paper, December 2018) Figure 2: Theory of Change, 12.

6 Outcomes of a National Roundtable convened by the Law Council of Australia, National Roundtable: Enduring Power of Attorney (EPOA) Law Reforms- Law Council of Australia.

7 Australian Guardianship and Administration Council, 'Enduring powers of attorney (financial)' (Options Paper, December 2018) Figure 2: Theory of Change, 12.

Greater consistency in the practices of institutions relying on EPOAs	• Entities which recognise EPOAs (such as financial institutions, utility companies, aged care providers and government agencies) could more easily implement practices to inform their staff, clients or customers about transactions involving EPOAs[8]. Greater familiarity with EPOA transactions could increase the frequency of staff detecting and appropriately responding to suspected cases of EPOA misuse (both intentional or unintentional misuse)
Enabling national education, resources, and greater alignment of services	• New opportunities to establish national education initiatives, services and resources about EPOAs and elder abuse • Legal services providers would be assisted by reduced complexity and differences in EPOA laws between jurisdictions, and in mutual recognition arrangements
Greater consistency in the oversight of EPOAs and the implementation of safeguards to prevent their misuse	• Opportunities for greater consistency in the work of government and law enforcement agencies to prevent, detect and respond to possible elder abuse,[9] and for State and Territory Public Advocate, Trustee and Guardianship bodies to develop joint approaches.

What is financial elder abuse and how is it generally perpetrated

Financial elder abuse can be described as the improper use, or deliberate exploitation, of an older person's money, property or other resources.[10] It can consist of several actions which take place over a period of time, rather than a single event, and can occur alongside other forms of abuse and neglect.[11]

The *National Elder Abuse Prevalence Study* (2021) (the Prevalence Study), through a broad survey of community dwelling older people, found an overall prevalence rate of financial abuse of 2.1%. It found adult children were most likely to commit financial abuse, and sons were almost twice as likely as daughters to commit financial abuse.[12] The most common form of financial abuse was being pressured into giving or loaning money, possessions or property. This was followed by behaviour amounting to theft (taking money or possessions without permission) and failing to provide financial contributions or assistance to an older person (rent, food, aged care or home service fees), as previously agreed.

While half (51.6%) of the participants in the Prevalence Study had an EPOA in place, lower proportions of people from lower socio-economic and culturally and linguistically diverse backgrounds had made an EPOA. The Study found that, while having an EPOA is associated with lower levels of abuse (especially financial, physical and psychological abuse),[13] it is likely that the lower reports of abuse among people who have either wills or EPOAs 'is tied to their [generally higher] socio-economic status, rather than related to the advance planning behaviours themselves'.[14]

8 Australian Guardianship and Administration Council, 'Enduring powers of attorney (financial)' (Options Paper, December 2018) Figure 2: Theory of Change, 12.
9 Australian Guardianship and Administration Council, 'Enduring powers of attorney (financial)' (Options Paper, December 2018) Figure 2: Theory of Change, 12.
10 G. J. Lowndes et al, 'Financial Abuse of Elders: A Review of the Evidence (Protecting Elders' Assets Study)' (Report, June 2009) 5.
11 Australian Banking Association, Preventing and responding to financial abuse (including elder financial abuse) (Industry Guideline, March 2021) 2.
12 Lixia Qu et al, 'National Elder Abuse Prevalence Study', (Final Report, July 2021) 2.
13 Lixia Qu et al, 'National Elder Abuse Prevalence Study', (Final Report, July 2021) 4.
14 Lixia Qu et al, 'National Elder Abuse Prevalence Study', (Final Report, July 2021) 108.

Achieving greater national consistency and strengthening safeguards

The proposals for feedback in this paper seek to build upon areas of consensus across a range of EPOA law reform inquiries, and model laws recommended by expert stakeholders.[15] Taken together, these inquiries and model laws provide a diverse body of views about the EPOA laws which should be adopted nationally, and how different policy interests should be balanced. Given the range of reforms recommended in past works, at certain points this paper presents guiding principles, or options for feedback, to inform the most appropriate approach to drive consistency in EPOA laws.

The proposals in this paper seek feedback on a core set of potential provisions, addressing the creation and cessation of financial EPOAs, protections for principals, and obligations and protections for attorneys and witnesses. These are identified as priority areas for achieving greater national consistency and stronger common safeguards, as they are key provisions governing the use and application of EPOAs. Achieving greater consistency in these areas would also assist any future consideration of work towards developing national education resources, service responses and initiatives such as a single national financial EPOA form, as recommended by the ALRC.

This paper also recognises that retaining jurisdiction-specific approaches in certain areas of financial EPOA law is necessary and appropriate. Financial EPOAs are one element of the broader frameworks which jurisdictions have in place to protect against elder abuse risks, and to promote future decision-making by older persons and persons with disability. These broader frameworks include laws governing medical and personal/lifestyle EPOAs, arrangements for Guardianship Tribunals and Public Advocates (variously named), human rights and anti-discrimination legislation, and policing responses to elder abuse where it may constitute an offence. There are important benefits in the policy settings for financial EPOAs in each jurisdiction continuing to integrate with other local protective mechanisms. As such, this paper seeks to navigate a course towards achieving greater national consistency in a set of core areas, while retaining the benefits of jurisdiction-specific approaches in other areas.

The proposals for feedback in this Consultation Paper contain core policy propositions, which are drafted in plain language. It is acknowledged that a range of technical drafting, definitional and transitional issues would require further development and refinement in a formal drafting process.

Next steps

The Australian Government, and State and Territory Governments, recognise and appreciate the large body of work and consultation that has already occurred, through separate inquiries, in relation to reforming EPOA laws. In recognition of this, contributors are invited to highlight or refer to matters addressed in past published submissions, where this is indicative of their current views on an issue.

The submissions and feedback received in response to this consultation paper will shape the principles and provisions that are ultimately presented to the Standing Council of Attorneys-General for endorsement.

It is acknowledged that the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability has been considering a range of issues related to EPOAs, such as State and Territory guardianship laws and practices, principles for ascertaining a person's decision-making ability or decision-making capacity, and supported and substitute decision-making issues. The final report and recommendations of the Royal Commission, which are expected to be released during the time over which this paper is released for feedback, will be carefully considered and inform the principles and provisions that are ultimately recommended to the Standing Council of Attorneys-General.

15 For a non-exhaustive list of the publicly available inquiries and recommendations drawn upon, see generally Australian Law Reform Commission, 'Elder Abuse- A National Legal Response' (Final Report 131, May 2017), South Australian Law Reform Institute, 'Valuable Instrument or Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia', (Report 15, December 2020), Law Council of Australia, 'National Roundtable- Enduring Power of Attorney Law Reforms' (Communiqué, 6 August 2021) Attachment: Model Provisions, Australian Guardianship and Administration Council, 'You Decide Who Decides- Making an enduring power for financial decisions', (October 2019), Queensland Public Advocate, 'Model financial enduring powers of attorney law', (July, 2023).

Making a submission

You can provide a submission in response to this consultation paper by visiting: Attorney-General's Department - Citizen Space (ag.gov.au). Responses may also be submitted by post and may be mailed to:

Attorney-General's Department

Attn: Protecting the Rights of Older Australians Section

3-5 National Circuit

CANBERRA ACT 2600

You do not need to answer every question. You are welcome to only respond to those questions that are relevant to you or your organisation. Consultation closes on **Wednesday 29 November 2023**.

You can submit your response under your name or anonymously. We will publish responses at the end of the consultation period. We will not publish submissions if you do not consent, or if there is any potential legal or other issue with publishing the submission. Submissions may be subject to freedom of information requests, or requests from the Parliament. Personal information shared through the consultation process will be treated in accordance with the *Privacy Act 1988*. For more information on how the Attorney-General's Department collects, stores and uses personal information, please visit the Attorney-General's Department's Privacy Policy at www.ag.gov.au/about-us/accountability-and-reporting/privacy-policy.

Order of topics addressed in the paper

This paper addresses the following topics:

1. General principles and decision-making capacity

The following principles and criteria for determining decision-making capacity, set out in the model laws released by the Queensland Public Advocate, Dr John Chesterman,[16] are recommended as key foundational principles that underpin the proposed model provisions outlined in the paper:

General principles

Where a person is exercising a power, carrying out a function, or performing a duty for a principal, the person must do so in a way that:

a) recognises the presumption of capacity

b) supports the principal to participate as much as possible in the making of decisions that affect them; and

c) is least restrictive of the principal's ability to decide and act as is possible in the circumstances.[17]

Meaning of decision-making capacity

A person has capacity to make a decision if the person is able to:

a) understand the information relevant to the decision and the effect of the decision

b) retain that information to the extent necessary to make the decision

c) use or weigh that information as part of the process of making the decision; and

d) communicate the decision in some way, including by speech, gestures or other means.

A person has decision-making capacity for a matter if the person can satisfy the above criteria when provided with practicable and appropriate support.[18]

This Consultation Paper adopts the term 'decision-making capacity' but acknowledges that terminology can differ across jurisdictions.[19]

2. Execution of Enduring Powers of Attorney

Proposal for feedback

A model provision could comprise the following elements:

- An EPOA must be in the approved or prescribed form, or in a substantially similar form
- An EPOA must be signed and dated by the principal, or by another person at the principal's direction, in the presence of an authorised witness
- An EPOA must be signed and dated by the authorised witness in the presence of the principal (and, if applicable, in the presence of the person who signed at the principal's direction).

These proposed provisions have strong alignment with existing approaches in States and Territories. For example, the requirement for an EPOA to be signed, dated and witnessed is an established feature across EPOA laws – these requirements emphasise the importance of making an EPOA and provide authenticity and authority to the document.[20] Allowing another person to sign at the principal's direction and in their presence, as suggested, supports accessibility in circumstances where the principal is physically unable to sign and is consistent with the ability to sign deeds and wills by direction.

16 Queensland Public Advocate, 'Model financial enduring powers of attorney law', (July, 2023). The definition of decision-making capacity reflects the approach in the *Powers of Attorney Act 2014* (Vic) s 4(1).
17 Queensland Public Advocate, 'Model financial enduring powers of attorney law', (July, 2023), cl 1.
18 Queensland Public Advocate, 'Model financial enduring powers of attorney law', (July, 2023), cl 4.
19 For example, 'capacity' is adopted in the Powers of Attorney Act 1998 (QLD) and 'mental capacity' (and related terms) is used in the Powers of Attorney Act 2003 (NSW).
20 South Australian Law Reform Institute, '*Valuable Instrument or Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia*', (Report 15, December 2020) 100.

3. Witnessing arrangements in relation to principals

Witnesses provide an important independent assurance role during the execution of an EPOA. At present, jurisdictions adopt a wide range of approaches to EPOA witnessing, including the number of witnesses, qualification requirements and the obligations on witnesses. A summary of the different approaches is at **Appendix 1**.

Enhanced witnessing, as described in the ALRC discussion paper, involves witnesses 'not just confirming that they watched the principal and attorney/guardian sign the enduring document',[21] but the witness taking on positive duties which have a safeguarding benefit for principals and attorneys. Potential enhanced witnessing measures have been considered in detail in a variety of subsequent inquiries and recommended model laws. While these inquiries and model law proposals tend to recommend different approaches, the key policy considerations which arise are:

- enabling EPOAs to be witnessed by a wide range of people, with minimal formality, promotes convenience and accessibility
- if witnessing requirements are too onerous or restrictive, EPOAs may not be able to be executed quickly in urgent situations
- requiring witnesses to explain, provide information or form a view on certain issues during execution is a way to ensure principals and attorneys understand their roles
- independent witnessing can provide a degree of assurance that a principal had decision-making capacity to execute the EPOA, and did not appear to be coerced into signing.[22]

The proposals for feedback seek to balance these considerations.

Proposal for feedback

A model provision could comprise the following elements in relation to the number and qualifications of authorised witnesses:

- The principal's signature of an EPOA (or a signature by a person directed to sign by the principal), must be witnessed by at least one authorised witness
- An authorised witness would be a person of a class prescribed in the law of a State or Territory
- While jurisdiction-specific approaches would be taken in relation to who is an authorised witness, a model provision could provide that the following people cannot act as an authorised witness:
    - a person who has not reached the age of 18
    - a party to the EPOA, or a close relative of a party to the EPOA
    - a person signing the EPOA at the direction of the principal
- Jurisdictions could prescribe other persons not able to be authorised witnesses.

Number of witnesses

The proposal for feedback would require an EPOA to be witnessed by *at least one* authorised witness, which would leave scope for jurisdiction-specific approaches to this issue. At present, four jurisdictions require at least one witness in the execution of an EPOA, and four require two witnesses (**Appendix 1** refers).

The approach to require at least one authorised witness has been adopted in previously published model provisions.[23] Other inquiries, such as the ALRC, have recommended there be a uniform requirement for two witnesses.[24]

Qualifications for authorised witnesses

Jurisdictions have different approaches to witness qualifications (**Appendix 1** refers). These sit on a spectrum ranging from no specific qualifications, to requiring authorised witnesses to be legal practitioners or a limited class of other professionals. In general, the greater the prescription of qualification requirements in a jurisdiction, the greater the extent of obligations placed upon those witnesses during EPOA execution.

21 Australian Law Reform Commission, Elder Abuse (Discussion Paper No 83, December 2016) [5.70].
22 Australian Law Reform Commission, '*Elder Abuse – A National Legal Response*' (Final Report 131, May 2017) [5.45].
23 The Queensland Office of the Public Advocate, '*Towards Harmonisation*' (December 2021).
24 Australian Law Reform Commission, '*Elder Abuse – A National Legal Response*' (Final Report 131, May 2017) [5.35].

A number of submissions to the ALRC inquiry highlighted the difficulties with unduly limiting the range of authorised witnesses, through specific qualification or professional requirements, could have for older persons. Limiting access to witnesses in regional and remote areas, and in urgent circumstances, were raised as particular concerns.

The proposed approach seeks feedback on whether retaining jurisdiction-specific approaches to qualifications for authorised witnesses is desirable, or whether this should be a priority area for achieving consistency.

Retaining jurisdiction-specific approaches is proposed as it would enable States and Territories to tailor their approaches to local conditions, and address risks that limiting qualification requirements for witnesses in different remote and regional areas may make those witnesses inaccessible or, even if accessible, unaffordable for principals. Specific approaches may also be desirable where jurisdictions combine personal, medical and lifestyle enduring documents with financial EPOAs, and so require a consistent approach to witnessing across these different types of instruments.

Restrictions on who can be a witness

Requirements for independent and adult witnesses are common across many jurisdictions, but are not in place in all cases (**Appendix 1** refers).

Excluding a party to the EPOA, a close relative of a party to the EPOA and a person signing the EPOA at the direction of the principal from acting as authorised witnesses, as proposed, mitigates the risk of undue influence or exploitation of the principal at the point of signing.

The proposal for feedback would allow jurisdictions to exclude additional persons from being authorised witnesses, according to local needs and broader considerations in their EPOA and guardianship frameworks.

Obligations on witnesses

Proposal for feedback

A model provision could provide that the authorised witness must certify that:

- they are qualified to act as an authorised witness in the jurisdiction in which they are witnessing
- the principal signed the form in the presence of the authorised witness (or the principal voluntarily directed a person to sign on their behalf, in the presence of the authorised witness)
- the authorised witness drew the attention of the principal to the prescribed information about the operation and importance of EPOAs.

The prescribed information for the authorised witness to draw to the attention of the principal would be a plain language document addressing matters such as:

- what an EPOA is and its significance as a formal legal document (with examples of the sorts of decisions an attorney can be permitted to make under a financial EPOA)
- the general obligations that an attorney owes the principal
- how to revoke an EPOA
- assessing whether a principal has decision-making capacity, incorporating guidance material such as has been published in Queensland: Queensland Capacity Assessment Guidelines (publications.qld.gov.au)
- contact details where a principal could seek further expert assistance.

The proposal incorporates a certification requirement for the authorised witness to an EPOA, which is a common but not uniform feature of witnessing arrangements across jurisdictions. Drawing on the approach in place in a range of States and Territories, the certification requirement would incorporate a statement that the witness is qualified to be an authorised witness in the jurisdiction in which they are witnessing, and a number of additional matters addressed below.

Introducing common prescribed information

A further proposed element is to require the authorised witness to certify that they have drawn to the attention of the principal prescribed information about the operation and importance of EPOAs. The prescribed information would, as far as possible, be common across jurisdictions and be prescribed either administratively, or under the law or regulations, in each State and Territory.

The prescribed information would be a plain-language guide about the rights and obligations of principals. A number of jurisdictions, such as Queensland and Victoria, now provide detailed information of this kind to assist principals and witnesses in their prescribed EPOA forms.

Establishing prescribed information resources for principals is intended to ensure that all persons executing an EPOA (including those who cannot afford or cannot access a lawyer, for example), are assisted and informed about the nature of the decision they are making. In practice, drawing the prescribed information to the attention of the principal could include reading that information aloud to the principal, which may be required in certain cases (such as if the principal could not read the prescribed information).

The proposed introduction of prescribed information also features in later parts of this paper, as a suggested mechanism to assist attorneys to better understand their rights and obligations, and to assist principals contemplating revoking an EPOA.

Enhanced witnessing obligations

Proposal for feedback

A model provision could provide the following further obligations for the authorised witness (in addition to drawing the attention of the principal to the prescribed information about the operation and importance of EPOAs and the other matters address above).

- Where the authorised witness is an Australian legal practitioner or a member of a class of witnesses prescribed by jurisdictions for this purpose,[25] the witness is to certify:
    - they *explained* the effect of the EPOA to the principal before it was signed
    - the principal appeared to freely and voluntarily sign the EPOA (in the presence of the authorised witness); and
    - at the time the principal signed the instrument, the principal appeared to the witness to have decision-making capacity in relation to the making of the EPOA (including that the principal appeared to understand the effect of the EPOA).[26]
- The authorised witness is otherwise required to certify:
    - the principal *appeared* to freely and voluntarily sign the EPOA (in the presence of the authorised witness); and
    - at the time the principal signed the instrument, the principal *appeared* to the witness to have decision-making capacity in relation to the making of the EPOA (including that the principal *appeared* to understand the effect of the EPOA).[27]

In moving towards a more nationally consistent approach in this and other areas of financial EPOA law, it is important that more protective frameworks (in this instance, NSW requirements) are accommodated, while also developing a model which is suitable to meet local requirements in other States and Territories.

The proposal provides that only certain qualified persons – Australian legal practitioners and others designated by jurisdictions – hold appropriate training and qualifications to *explain* the effect of an EPOA to a principal. Explaining the effect of an EPOA involves providing tailored advice to a principal on the specific contents of their EPOA, including legal requirements relevant to their personal circumstances. While a requirement to explain the effect of an EPOA is a higher standard than that recommended by the ALRC inquiry, it has been endorsed in certain recent model law proposals and reflects the requirements in place in NSW.

25 An Australian legal practitioner is an Australian lawyer who holds a current local practising certificate or a current interstate practising certificate.
26 Adapted from *Powers of Attorney Act 2003* (NSW) s19.
27 *Powers of Attorney Act 2014* (Vic) s36 and s4 (Meaning of decision making capacity).

The proposal would require that all authorised witnesses certify the remaining matters, being that the principal appeared to freely and voluntarily sign the EPOA and appeared to the witness to have decision-making capacity to make the EPOA. These additional requirements reflect, generally, the approach in Victorian legislation and would introduce enhanced safeguards to the approach in a number of jurisdictions.[28]

The proposal ensures that a wide range of persons can be called upon to witness an EPOA, and enables jurisdictions to prescribe those witnesses who are qualified to *explain* the effect of an EPOA. The witnesses designated by jurisdictions between the two categories (being witnesses required to explain and those not required to explain), may evolve over time. For example, jurisdictions may eventually move to prescribe a common set of witnesses for each category, and a corresponding common set of training or qualification requirements.

The proposal enables principals to identify an available and appropriate authorised witness. This discretion is already available to principals in jurisdictions, and promotes the accessibility of EPOAs by ensuring access to a wide range of witnesses. Principals retain discretion to seek legal advice and other professional assistance as part of having their EPOA prepared and witnessed, and at other times following execution of the EPOA. The proposed prescribed information for witnesses could draw attention to the importance of a principal seeking professional advice, should they have any questions about the potential operation of their EPOA, particularly if they are having their EPOA witnessed by a person who is not legally qualified and required to formally *explain* the effect of the EPOA.

Given the important role undertaken by authorised witnesses in the execution of an EPOA, the desirable resources, assistance and guidance available to them is an important consideration and a matter on which feedback is sought (Topic 11 in the paper addresses in detail).

Consultation questions

1. Is it practical (for principals, attorneys and witnesses) for a model provision to:
    - require *at least one* authorised witness to an EPOA, and to retain jurisdiction-specific approaches to the number of witnesses required
    - retain jurisdiction-specific qualifications requirements for the required authorised witness?
    - Alternatively, if you consider it appropriate that there is a consistent approach across jurisdictions in relation to the prescribed class of persons who may act as authorised witnesses, what qualifications should that class of witness be required to hold?
2. Feedback is sought on whether your experience of the witnessing requirements for financial EPOAs, as they apply in your jurisdiction, appropriately balance factors such as accessibility, with providing appropriate protection and assistance to principals.
3. Feedback is sought on the proposed establishment of prescribed information resources, which witnesses would draw to the attention of a principal. What matters do you consider should be addressed in the proposed prescribed information?
4. Feedback is sought on the obligations proposed for authorised witnesses, and the model of having differing requirements for different types of authorised witnesses (such as Australian legal practitioners).

28 See *Powers of Attorney Act 1998*, section 44; and Witness Certificate in Queensland Enduring Power of Attorney (short form).

4. Acceptance of appointment by an attorney

Proposal for feedback

A model provision could comprise the following elements:

- All attorneys must sign and date a statement of acceptance
- The statement of acceptance must be to the fact that they:
    - are eligible to act as an attorney
    - understand, and undertake to act in accordance with, the responsibilities, duties and obligations of an attorney
    - undertake to act in accordance with the provisions of the relevant State or Territory Act relating to EPOAs, and any limitations set out in the terms of the instrument
- The attorney's acceptance must be signed and dated in the presence 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 has the same meaning as outlined above, in relation to principals.

Obligations on an authorised witness

- The authorised witness is required to certify that they:
    - drew the attention of the attorney to the prescribed information about the operation and importance of EPOAs, and
    - the attorney appeared to understand their responsibilities, duties and obligations under the instrument.
- Where the authorised witness is an Australian legal practitioner or a member of a class of witnesses prescribed by jurisdictions for this purpose,[29] the witness is also to certify (in addition to the matters above) that they *explained* the nature and effect of the EPOA to the attorney.
- The prescribed information would be a plain language document addressing attorney duties, including the need for attorneys to consider the specific instructions of the principal, set out in the instrument.

Key issues

Attorneys are appointed to a privileged position of trust. The significance of their role is reflected in the proposed requirement for them to sign a statement of acceptance in the presence of an authorised witness. As noted in the SALRI review:

'This course of action will impress upon attorneys the gravity and nature of their role and assist in addressing the current lack of education and confusion that many attorneys hold as to the nature and duties of their important role.'[30]

The ALRC's inquiry and a number of proposed model provisions endorse requiring written and witnessed attorney acceptance to address the risks of abuse arising from an attorney not understanding their role, or the limits of their authority. The approach also addresses the risks of deliberate abuse, by making it more difficult for an exploitative attorney to claim, if scrutinised, they were unaware of their duties and obligations.[31] It is acknowledged that a requirement for attorney acceptances to be witnessed may, in certain circumstances, present practical issues where an EPOA is sought to be created in urgent circumstances, as it adds a further stage in the execution process.

29 An Australian legal practitioner is an Australian lawyer who holds a current local practising certificate or a current interstate practising certificate.

30 South Australian Law Reform Institute, '*Valuable Instrument or Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia*', (Report 15, December 2020) 207.

31 South Australian Law Reform Institute, '*Valuable Instrument or Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia*', (Report 15, December 2020) 94.

The proposal for feedback would extend existing protections in many States and Territories, as written attorney acceptance is not consistently required, and only one jurisdiction already requires attorney acceptance to be witnessed (**Appendix 1** refers).[32] Where jurisdictions already require attorney acceptances to be signed, there are significant differences in the content of the prescribed forms or rules setting out what the attorney must attest to when accepting their appointment.

Witnessing arrangements – what the witness must certify

The proposal for feedback would give greater assurance to principals and others that the attorney understands, and undertakes to comply with, their duties in the EPOA and the relevant legislation. Under the proposal, authorised witnesses would be required to certify that:

- The witness drew the attention of the attorney to the prescribed information addressing attorney duties. The prescribed information would be a plain language document addressing attorney duties, including the need for attorneys to consider the specific instructions of the principal, set out in the instrument; and
- The attorney appeared to understand their responsibilities, duties and obligations under the instrument.

These requirements align with the standard for witnessing attorney acceptance suggested by the ALRC, being that '…the witnesses should certify that the attorney/guardian was signing voluntarily and understood the nature of the document'.[33]

The proposal also reflects that, where the authorised witness is an Australian legal practitioner or a member of a class of witnesses prescribed by jurisdictions for this purpose, the witness is also to certify that they *explained* the nature and effect of the EPOA to the attorney. As outlined in relation to witnessing the signature of a principal, *explaining* the effect of an EPOA involves providing tailored advice on the specific contents of the EPOA, including legal requirements relevant to the circumstances of the principal and the attorney. Because of the extent of this duty, only certain qualified persons – Australian legal practitioners and others designated by jurisdictions – would be required to undertake an explanatory role.

The proposal clarifies that the authorised witness certifying the attorney's acceptance, does not need to be the same authorised witness who witnessed the principal signing. This is reflected in suggested model provisions,[34] and makes clear that an attorney may sign an EPOA at a different time and place to the principal. Incorporating this element builds on the rationale noted by the ALRC that 'it is in fact beneficial for the principal and attorney to sign the document separately and potentially gives time for independent discussions as to the implications of signing the enduring document'.[35]

Consultation Questions

1. Feedback is sought on the benefits and feasibility of establishing a single national attorney acceptance form.
2. Would the proposed role(s) for the authorised witness provide an appropriate degree of assurance that the attorney understands the obligations of their appointment?
3. What matters do you consider should be addressed in the proposed prescribed information?
4. Does the proposed approach sufficiently account for situations where
   a. an EPOA needs to be put in place urgently and/or
   b. for attorneys to accept their appointment, where the attorney may be overseas or interstate?

32 *Powers of Attorney Act 2006* (ACT) s 23, *Powers of Attorney Act 2003* (NSW) s 20(3), *Powers of Attorney Act* 1998 (Qld) s44(8), *Powers of Attorney and Agency Act* (SA) s6(2), *Powers of Attorney Act 2000* (Tas) s302(c), *Powers of Attorney Act 2014* (Vic) s37(1), Guardianship & Administration Act 1990 (WA) s104(2)(b).

33 Australian Law Reform Commission, '*Elder Abuse – A National Legal Response*' (Final Report 131, May 2017) [5.48].

34 Law Council of Australia, 'National Roundtable – Enduring Power of Attorney Law Reforms' (Communiqué, 6 August 2021) Attachment: Model Provisions, 5-7 and South Australian Law Reform Institute, '*Valuable Instrument or Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia*', (Report 15, December 2020) 98.

35 Australian Law Reform Commission, '*Elder Abuse – A National Legal Response*' (Final Report 131, May 2017) [5.50].

5. Revocation of an EPOA

Proposal for feedback

A model provision could comprise the following elements:

- A principal may revoke a power of attorney at any time if the principal has decision-making capacity in relation to the making of a power of attorney
- A revocation must be in the approved or prescribed form, or in a substantially similar form
- A revocation must be signed and dated by the principal, or by another person at the principal's direction and in their presence
- A revocation must be executed in the presence of an authorised witness
- The definition and qualifications for an authorised witnessed would be jurisdiction-specific (as outlined above in relation to execution of an EPOA)
- A revocation must be signed and dated by the authorised witness in the presence of the principal (and, if applicable, in the presence of the person who signed at the principal's direction)
- The principal must take reasonable steps to give all attorneys, including any alternate attorneys, notice in writing of the revocation.

The witness must certify that:

- They are qualified to act as an authorised witness
- The principal (or a person directed by the principal to sign on their behalf) appeared to freely and voluntarily sign the revocation (that is, the principal or other person did not appear to be acting under any form of duress or coercion to revoke the EPOA)
- The witness drew the attention of the principal to the prescribed information about the revocation of an EPOA.

The ability for a principal to revoke an EPOA is an important mechanism to prevent abuse of the instrument, and to promote the principal's choice and control over their affairs more generally. A principal may wish to revoke an EPOA in a range of circumstances, including if they become concerned about the intentions or actions of an appointed attorney.

Risks of financial abuse and practical difficulties for principals may also arise in cases where an EPOA is potentially being revoked. In particular:

- A principal may wish to revoke an EPOA when they are considered (by family members, witnesses or others), not to have decision-making capacity to do so. This is particularly complex where a principal's decision-making capacity is variable and fluctuates due to factors like medication, stress, illness or grief.[36]
- A principal may be pressured into revoking an EPOA, in order to appoint a new attorney(s). For example, an abusive family member may pressure a principal to appoint them in place of another attorney.
- An attorney may either inadvertently or deliberately continue to rely upon a revoked EPOA, including by representing the EPOA as current to businesses and other institutions. This could occur, for example, if an attorney is not advised about a revocation.

36 Australian Guardianship and Administration Council, '*You Decide Who Decides – Making an enduring power for financial decisions*', (October 2019) 4.

In addition to revocation of an EPOA by a principal, some jurisdictions also have provisions within relevant legislation that allow a tribunal to make orders in respect of EPOAs. For example, in Tasmania, the Tasmanian Civil and Administrative Tribunal on its own motion or on application by a relevant person may hold a hearing to review an EPOA or an application to revoke an EPOA. On review, the Tribunal may declare that the principal did not have the decision-making capacity to make or revoke the EPOA and declare that the EPOA or its revocation is invalid if it is satisfied that the principal was induced to make or revoke the EPOA by dishonesty or undue influence. The Tribunal may also make other orders as it sees fit, such as appointing an administrator for the person's estate. The Queensland Civil and Administrative Tribunal has similar powers including the power to remove an attorney, make a declaration as to the validity or invalidity of an EPOA or a revocation of an EPOA, and to revoke an EPOA.[37] This is an important safeguard and provides an avenue for the EPOA to be reviewed in circumstances where the principal may have lost decision-making capacity.

Proposal for feedback

The proposal for feedback adds formality (through a prescribed form and authorised witnessing, in particular) to the current revocation requirements in a number of jurisdictions (**Appendix 1** refers), and incorporates elements recommended by a number of sources.[38]

Key elements of the proposal for feedback are as follows:

- The proposed requirement that a revocation be executed in the presence of an authorised witness will assist to ensure the apparent decision-making capacity of a principal to make a revocation decision and mitigate the risk of a coerced revocation.
- The proposed requirement for an authorised witness to draw the attention of the principal to prescribed information about the revocation of an EPOA will assist to ensure principals are aware of the significance and practical effect of revoking the EPOA. The prescribed information could address practical matters, such as the importance of a principal (or others on their behalf) notifying all attorneys (including alternate attorneys), banks, utility providers and government entities about the change in EPOA arrangements.
- The requirement to provide written notice to attorneys of a revocation would reduce the risks of attorneys relying on a revoked EPOA. The qualification that a principal must take *reasonable steps* to give this notice accounts for practical difficulties for a principal giving notice in urgent circumstances.

It is acknowledged that urgent revocation may be required to avoid an attorney improperly transacting money or property, or transacting contrary to the principal's wishes, and that witnessing may risk causing a delay to revocation.

Consultation Questions

1. A risk identified above is that a principal may wish to revoke an EPOA when they are considered (by family members, witnesses or others), not to have decision-making capacity to do so. What qualifications or training requirements (if any) do you recommend are necessary to ensure a witness is able to make a considered determination as to the principal's decision-making capacity in the case of a revocation?
2. Do the proposed requirements for revocation of an EPOA balance the relevant considerations in relation to:
    a. The extent of obligation placed upon the authorised witness, regardless of the qualifications or positions they hold
    b. Ensuring a principal is supported to understand the effect of revoking an EPOA
    c. Flexibility to accommodate circumstances where urgent revocation is required?
3. Are there other suggested elements which would be beneficial to incorporate in a model provision?
4. What do you consider the prescribed information about the revocation of an EPOA should include?

37 See Powers of Attorney Act 1998 (Qld) ss 109A, 113-117.

38 Law Council of Australia, 'National Roundtable – Enduring Power of Attorney Law Reforms' (Communiqué, 6 August 2021) Attachment: Model Provisions, 5-7 and The Queensland Office of the Public Advocate, '*Towards Harmonisation*' (December 2021).

6. Automatic revocation of an EPOA

Proposal for feedback

A model provision could comprise the following elements:

- An EPOA is taken to be revoked on the death of the principal
- An EPOA is taken to be revoked in relation to a particular attorney:
  - on the death of the attorney
  - if the attorney ceases to have decision-making capacity to act as an attorney
  - if the attorney resigns
  - at such time as the EPOA ceases to have effect according to its terms
  - if the principal and attorney are married or are in a registered relationship — on the dissolution or annulment of the marriage, or the end of the registered relationship, unless a contrary intention is expressed in the EPOA.
- An EPOA for financial matters is revoked at such time as a new EPOA for financial matters made by the principal is executed, unless a principal specifies otherwise.

EPOA legislation commonly prescribes circumstances where an instrument is automatically revoked, unless otherwise specified by a principal or where such revocation requires the approval of a court or tribunal. Prescribed grounds upon which an EPOA is taken to be revoked provide certainty to principals and attorneys, and confirms the default circumstances in which a manual revocation process is not required.

At present, jurisdictions prescribe different grounds for automatic revocation (**Appendix 1** refers). In general terms the provisions address situations where:

- there is an expectation that an attorney can no longer undertake the role for which they were appointed (due to a loss of decision-making capacity)
- an attorney no longer wishes to hold the appointment or is deceased
- where, unless a contrary intention is recorded in the EPOA, it is anticipated that the person the principal trusts to make decisions on their behalf has changed. For example, at the end of a marriage or registered relationship with the attorney.

Different approaches are taken between jurisdictions, and between various model laws and inquiry recommendations, about whether certain events relevant to the conduct of attorney (such as attorney bankruptcy or conviction of an offence), should be grounds for automatic revocation, or should instead limit the eligibility of that person being appointed as an attorney in the first instance.

The proposal for feedback seeks greater alignment in the grounds for automatic revocation across jurisdictions, and designates several related considerations as attorney eligibility criteria. The proposed approach to having a more limited range of automatic revocation grounds recognises the significant impact which automatic revocation would have on a principal, particularly the risks for a principal who has since lost decision-making capacity to execute a new EPOA, having an EPOA automatically revoked.

The proposed approach is also alive to the importance that events triggering automatic revocation are clearly identifiable, so principals, attorneys, businesses and institutions seeking to rely on an EPOA have as much certainty as possible about whether the EPOA remains in force.

Revocation by a later EPOA

A particular feature of the proposal for feedback is the provision that an EPOA for financial matters is revoked upon the execution of a later EPOA for financial matters made by the principal, unless a principal specifies otherwise.[39] This establishes a default arrangement that, unless a later issued financial EPOA specifically retains an earlier EPOA (or this intention is expressed in the earlier EPOA itself), the earlier EPOA ceases.

This is intended to limit multiple EPOAs being in place (unless that result is specifically sought by the principal), which provides greater certainty to family members, attorneys, businesses and institutions relying on EPOAs, about whether an EPOA is current or if it must be read alongside an earlier EPOA. The proposal is limited to financial EPOAs, as a principal may have other types of EPOAs (such as medical and personal/lifestyle enduring documents), which address matters separate from a financial EPOA.

Consultation Questions

1. Feedback is sought on whether the range of proposed automatic revocation events are sufficiently clear and identifiable, so as not to create uncertainty about whether an EPOA is revoked.
2. Feedback is sought on the proposal that an EPOA for financial matters would be revoked at such time as a new EPOA for financial matters made by the principal is executed, unless a principal specifies otherwise. An alternative approach is that the earlier EPOA is taken to be revoked to the extent of inconsistency with the later financial EPOA.
3. Certain model laws and inquiry recommendations suggest additional grounds for automatic revocation, where they occur after the execution of an EPOA. Feedback is sought on whether the following events (or other additional events), if occurring after the execution of an EPOA, should be grounds for automatic revocation:
    a. an attorney is convicted or found guilty of an offence involving dishonesty
    b. an attorney is convicted of an offence involving violence occurring within the principal's family or domestic context
    c. an attorney is a person against whom an interim or final family violence intervention or protection order has been made, where the order is relevant to the principal's family or domestic context
    d. an attorney becomes bankrupt or personally insolvent.

39 The proposal for feedback is similar to the approach proposed in Queensland Public Advocate, 'Model financial enduring powers of attorney law', (July, 2023), cl 26.

7. Attorney eligibility

Attorneys are entrusted with significant decision-making responsibility when appointed under an EPOA, which supports the need for prescribing a baseline of common eligibility requirements. While only a limited range of eligibility criteria are proposed to be embedded in legislation, it is acknowledged that an attorney should be a trusted, reliable and capable individual who will exercise their powers diligently and with a high degree of integrity.[40] Other recommended attorney attributes identified by the AGAC include:

- willingness to listen to, respect and act on a principal's wishes and preferences, rather than their own
- the skill and time required to perform the role
- the ability to manage property and money well
- the confidence to speak up on the principal's behalf (for example, the confidence to talk to lawyers and government agencies)
- that the person understands and respects the principal's culture and connections to their community
- willingness to take on the role with all its responsibilities.[41]

Restrictions on who can and cannot be appointed as an attorney seek to prevent attorneys being appointed where there is a heighted risk of abuse, an appointee not having the requisite skills, or there is a risk of undue influence on the principal. At present, jurisdictions adopt different approaches in relation to the categories of person they restrict from being an attorney (**Appendix 1** refers).

Proposal for feedback

A model provision could provide that the following people cannot act as an attorney:

- A person who is less than 18 years
- 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 providing an older person with care, accommodation and health services would be able to act as an enduring attorney.
    - 'Health provider' could mean a person who provides health care in the practice of a profession or in the ordinary course of business
    - 'Care worker' could mean a person who provides services for the care of the person and receives remuneration for those services from any source, but could exclude a person who is an informal carer or a person who receives a carer payment or other benefit from the Commonwealth for providing home care to the person; or a person who is a health care provider.
    - 'Accommodation provider' could mean a person who is, in a professional or administrative capacity, directly or indirectly responsible for or involved in the provision of accommodation for the person.

Restrictions based on age, decision-making capacity, witness to a power of attorney

The proposed restrictions based on age and decision-making capacity seek to ensure that the attorney is able to understand and give effect to the wishes and interests of the principal, in line with the terms of the EPOA and the associated duties of the role. The proposed restriction on appointing a witness to an EPOA as an attorney would ensure the separation of the witness and attorney functions.

40 South Australian Law Reform Institute, '*Valuable Instrument or Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia*', (Report 15, December 2020) 178 [5.1.11].

41 Australian Guardianship and Administration Council, '*You Decide Who Decides Making an enduring power for financial reasons*', (Guide, October 2019) 16.

Restrictions based on paid carers, health providers and accommodation providers

The proposal would restrict paid health providers, care workers and accommodation providers from being appointed as an attorney. Some but not all jurisdictions have these restrictions in place, to address the identified risk of undue influence these persons may have upon a principal. [42] In addition, there could be the risk that these categories of providers may have self-benefitting motives (which could lead to abuse of the principal) for being appointed as an attorney.

As supported by the ALRC, the provision would be framed to ensure that 'family and friends providing an older person with care, accommodation and health services should be able to act as an enduring attorney.'[43]

Restrictions based on offences, intervention or protection orders and bankruptcy or insolvency

The issue of whether a person who has been convicted of offences, been the subject of intervention or protection orders, or is or has been bankrupt or personally insolvent, should be eligible for appointment as an attorney is complex, and is addressed in different ways by jurisdictions. These issues are also considered and resolved in different ways in various law reform inquiries and in recommended model laws.

The key policy considerations balanced in the different approaches are:

- promoting the personal choice of the principal to appoint an attorney of their own choosing
- whether there is unacceptable risk to a principal in enabling them to appoint a person convicted of certain offences, subject to certain orders or who has been bankrupt or insolvent
- practical difficulties related to how a principal could ascertain a potential attorney's criminal history, if any, if this information is not voluntarily disclosed
- restrictions on who may be appointed as an attorney based on convictions could disproportionately impact communities where there is overrepresentation in the criminal justice system. Unduly restricting the availability of EPOAs could in turn increase the likelihood of less secure informal arrangements arising, such as undocumented verbal agreements between family members, and have impacts on levels of demand in the guardianship and administration systems in States and Territories.

In seeking to balance such considerations, the ALRC took the position that:

'The typically close personal relationship between the proposed attorney and the principal may mean that the principal is unable to objectively assess the risk of future financial abuse. Nevertheless, the ALRC considers that a blanket prohibition may be too restrictive. The ALRC considers that state and territory tribunals should have the power to assess and determine the suitability of individuals, with convictions for fraud and dishonesty, to act as enduring attorney in each individual case.'[44]

The NSW Law Reform Commission in their inquiry report noted concerns with requiring a tribunal to make the assessment, finding:

'…this would overly restrict the autonomy of someone with decision-making ability and would place an unnecessary resource burden on the Tribunal…We can envisage situations where a person's history of bankruptcy or dishonesty will not be relevant to their decision-making functions. We are therefore of the view that people should be able to make an informed choice about who to appoint.'[45]

At present, jurisdictions generally do not limit attorney eligibility on the basis of convictions or intervention or protection orders, which preferences the choice and decision making of principals. Restrictions on grounds of bankruptcy are a more common feature and have been established given an attorney under financial stress may be at higher risk of improperly using the principal's finances for their own benefit (**Appendix 1** refers).

42 *Powers of Attorney Act 1998* (QLD) s 29 meaning of 'eligible attorney', *Powers of Attorney Act 2014* (VIC) s28.
43 Australian Law Reform Commission, '*Elder Abuse – A National Legal Response*' (Final Report 131, May 2017) [5.65].
44 Australian Law Reform Commission, '*Elder Abuse – A National Legal Response*' (Final Report 131, May 2017) [5.68].
45 NSW Law Reform Commission, 'Review of the Guardianship Act 1987', Report 145, 8.30.

Proposal for feedback

A model provision could provide that the following people cannot act as an attorney:

Five-year ineligibility periods

- A person who has been convicted of an offence involving dishonesty in the five years prior to the execution of the EPOA
- A person who is bankrupt or personally insolvent, or who has been bankrupt or personally insolvent in the last five years prior to the execution of the EPOA.[46]
- A person who has been convicted of an offence involving violence occurring within the principal's family or domestic context in the last five years prior to the execution of the EPOA
- A person against whom an interim or final family or domestic violence intervention order or protection has been made in the five years prior to execution of the EPOA, where the principal is a person for whose protection the intervention order or protection order was issued. The prohibition period should commence from the expiry of the intervention order or protection order, or the expiry of any renewal/extension of that order.

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

- A 'disclose and approve' approach could be adopted during the five-year ineligibility period referred to above, to support the personal choice of the principal and to retain access to EPOAs. This would involve a person in the categories above (that is, a person who has been convicted of an offence involving dishonesty, or been bankrupt or personally insolvent), to be appointed as an attorney during the five-year ineligibility period if they have disclosed the conviction, or bankruptcy to the principal, the disclosure has been recorded in the EPOA and the principal has approved the appointment with the knowledge of the disclosure.[47]

The time-limited exclusions in the proposal build upon the approach in the outcomes of a National Roundtable on EPOA law reform, convened by the Law Council of Australia (August 2021), and the approach in the Queensland Public Advocate's model laws.[48] There is also some precedent for time-bound eligibility requirements in certain jurisdictions.[49]

The proposal also incorporates and adapts the 'disclose and approve' approach in Victorian legislation,[50] and which has been recommended in various ways in recent law reform reviews.[51] The approach incorporates discretion for a principal to appoint an attorney, where the relevant dishonesty offence conviction, or bankruptcy has been disclosed and recorded in the EPOA during the five-year ineligibility period. This approach prioritises the choice and control of a principal.

In the context of family and domestic violence convictions, and intervention or protection orders relevant to the principal, a 'disclose and approve approach' is not considered appropriate as it may be exploited through coercive controlling behaviours. Coercive control is a dynamic whereby a perpetrator exerts power and control over a victim-survivor using patterns of abusive behaviour over time that create fear and deny liberty and autonomy. A perpetrator's use of family and domestic violence is almost always underpinned by coercive control. There is significant risk that a principal's experience of this dynamic would influence their decision to appoint the perpetrator as their attorney, which would undermine the apparent choice and control related benefits of a 'disclose and approve' approach in this context.

It is acknowledged that an EPOA may be executed many years before its intended or actual commencement, and that a five-year exclusion period prior to execution may have little protective benefit in such cases, where the EPOA is not in force. The proposed ongoing disclosure obligation (below), which would operate from

46 See Law Council of Australia, 'National Roundtable – Enduring Power of Attorney Law Reforms' (Communiqué, 6 August 2021) 4, where this provision is reflected.
47 *Power of Attorney Act 2014* (VIC) s28(1)(C)(ii).
48 Law Council of Australia, 'National Roundtable – Enduring Power of Attorney Law Reforms' (Communiqué, 6 August 2021) 2-3; Queensland Public Advocate, 'Model financial enduring powers of attorney law', (July, 2023), cl 9.
49 For example, *Powers of Attorney Act 1998* (QLD) s29(1)(a)(ii) in relation to paid carers.
50 *Power of Attorney Act 2014* (VIC) s28.
51 NSW Law Reform Commission, Review of the Guardianship Act 1987 (Report No.145, May 2018) [8.28]; South Australian Law Reform Institute, '*Valuable Instrument or Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia*', (Report 15, December 2020) 189 [Recommendation 49]. It is acknowledged that these excepts are not specifically contemplating family violence risks.

execution of the EPOA, would ensure a principal is advised of a relevant conviction, order or bankruptcy, giving the principal the opportunity to revoke the instrument. Feedback is sought on whether it would be appropriate to adopt alternative approaches to addressing the issue of delayed commencement of EPOAs.

Ongoing disclosure obligation

Proposal for feedback

A model provision could provide that an attorney is required to report to the principal, or to the relevant State or Territory authority if the principal has lost decision-making capacity, any change in circumstance following the execution of the EPOA which relates to the initial eligibility criteria.

The proposal would create a continuous disclosure obligation for attorneys, to ensure the principal (or an authority in their place), is made aware of subsequent events which are potentially relevant to the attorney's suitability. A mechanism of this kind was endorsed by the ALRC and certain submissions to that inquiry.[52]

This proposal addresses circumstances where, for example, an attorney is appointed several years in advance of their powers under the EPOA commencing, and seeks to ensure that any change of circumstance during that period are known to the principal (or the appropriate State or Territory authority with responsibility for oversight of the EPOA).

Ongoing disclosure to the principal is important in a range of circumstances, including where the change of circumstances gives rise to an *automatic* revocation of the EPOA (so the principal or relevant authority is aware of the need to make a new appointment), as well as ensuring the principal has updated information to inform any amendments they may wish to make to the EPOA.

Consultation Questions

1. Does the proposed range of attorney duties to be made more nationally consistent give appropriate coverage of safeguards, or should additional duties be incorporated?
2. Feedback is sought on whether the proposed five-year ineligibility period, is appropriate in each of the following cases. A prospective attorney:
    a. has been convicted of an offence involving dishonesty
    b. has been convicted of an offence involving violence occurring within the principal's family or domestic context
    c. has been the subject of an interim or final family or domestic violence intervention order, where it relates to the principal's domestic or family context
    d. is a person who is bankrupt or personally insolvent, or who has been bankrupt or personally insolvent in the last five years prior to the execution of the EPOA.
3. Feedback is sought on whether the proposed disclose and approve approach is appropriate in each of the following cases:
    a. a person who has been convicted of an offence involving dishonesty
    b. a person who is bankrupt or personally insolvent, or who has been bankrupt or personally insolvent in the last five years prior to the execution of the EPOA.
4. Are there circumstances where it would be appropriate for a 'disclose and approach' to apply without a period of time?
5. Are there other types of offences, intervention or protection orders or criteria, which should make a person:
    a. entirely ineligible for appointment under a financial EPOA, or
    b. ineligible for a five year or other period?

52 Australian Law Reform Commission, '*Elder Abuse – A National Legal Response*' (Final Report 131, May 2017) [5.69].

8. Attorney duties

Proposal for feedback

A model provision could provide that an attorney acting under an EPOA must:

- act in accordance with the provisions of the relevant EPOA Act
- act in accordance with the requirements specified in the EPOA
- keep accurate records and accounts of all dealings and transactions made under the EPOA
- unless otherwise directed in the EPOA, take reasonable steps to notify any other attorneys appointed under the EPOA about any action taken under the EPOA
- act honestly, in good faith and with reasonable care
- must keep the attorney's property (both money and financial assets) separate from the principal's property (unless owned jointly by the principal and attorney).

Conflict transactions

- A model provision could provide that an attorney acting under an EPOA
    - must not enter into a transaction where there is or may be a conflict between the following interests:
        - the duty of the attorney to the principal, and
        - the interests of the attorney, or a relative, business associate or close friend of the attorney
- An attorney under an EPOA may enter into a transaction that results, or may result, in a conflict of interest, if:
    - The EPOA specifies that the transaction may, even though it will or may otherwise result in a conflict of interest, be entered into by the attorney
    - A court or tribunal may authorise such a transaction (even retrospectively), even though such a transaction will or may otherwise result in a conflict transaction.
- A transaction is not a conflict transaction merely because an attorney:
    - is related to the principal
    - may be a beneficiary of the principal's estate on the principal's death
    - deals with, or acquires an interest, in property held jointly with the principal (whether as joint tenants or tenants in common); or
    - obtains a loan or gives a guarantee or indemnity in relation to property held jointly with the principal
    - makes a gift or donation where it is:
        - of the nature the principal made when the principal had decision-making capacity; or
        - of the nature the principal might reasonably be expected to make; and
        - the value of the gift or donation is not more than what is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances
    - undertakes any other transactions permitted under State and Territory laws.

Key issues

Embedding consistent attorney duties in State and Territory legislation will establish a baseline for proper financial attorney conduct, and is intended to facilitate greater understanding about the requirements of an attorney's role. An underlying complexity is that, given the prevalence of family members being appointed as attorneys under financial EPOAs, perceptions of attorney duties and misconduct can differ between family contexts.

As has been documented:

'Financial elder abuse by family members often is not recognised as abuse by those involved or in the wider societal context…Even where family abuse is apparent, victims are likely to excuse and explain the behaviour as a result of personal or financial circumstances rather than as a criminal offence. Beliefs about reciprocity, obligations to help ones' children when in difficulty and expectations regarding future inheritance all combine to perpetuate an acceptance of financial abuse by future beneficiaries, as disappointing but not as criminal behaviour'. [53]

Clear attorney duties, embedded in legislation, will assist all parties associated with an EPOA to identify inappropriate conduct which can be a precursor to, or itself constitute, financial elder abuse.

The proposed common attorney duties reflect a range of existing statutory duties in jurisdictions, and overlap with several attorney duties which arise at common law through the fiduciary nature of the attorney-principal relationship (**Appendix 1** refers).

The proposed core duties seek to balance providing certainty for attorneys and principals about the requirements placed upon an attorney, while also leaving appropriate discretion for principals to stipulate other matters in an EPOA itself. A related consideration is avoiding potential adverse impacts in the number of persons who accept the role of attorney, through an overly complex legislative framework of attorney duties. Although balancing considerations is required, the paramount consideration is ensuring the framework of attorney duties mitigates the risks of financial and other abuse of older persons.

Duty to comply with the Act and the EPOA

The proposal for feedback is that a duty for an attorney to comply with the relevant State or Territory Act, and the EPOA itself, is made common across jurisdictions. At present, this is not an express requirement in all jurisdictions.

A requirement for an attorney to act in accordance with the Act under which the financial EPOA is made, and with the EPOA itself, should be foundational attorney duties. This requirement would establish a baseline expectation that attorneys are both familiar with, and act in accordance with, the law under which they are appointed, and that they adhere to the express wishes of the principal, set out in the EPOA.

It is acknowledged that, in practice, a person making an EPOA without legal advice may lack the confidence or feel unable to insert conditions about the way an attorney is to act. This may include fear of deterring acceptance of the appointment.[54] A recent review in South Australia observed that 'very few [enduring powers of attorney] have any conditions or limits on the power given to the attorney. Generally, the conditions panel in the EPA form is left blank, giving the attorney the widest possible powers'.[55] Examples of potential beneficial conditions a principal may make include directions to consult named parties about property transactions or to require an annual audit.[56]

Duties to keep records and to take reasonable steps to keep other attorneys informed

The proposal incorporates duties to keep records and, unless otherwise directed in the EPOA, to take reasonable steps to notify any other attorneys appointed under the EPOA about any action taken under the EPOA.

53 Deborah Setterlund et al, 'Financial Abuse within families: Views from family members and professionals' (Conference Paper, Australian Institute of Family Studies Conference, 12-14 February 2003) 4.

54 See South Australian Law Reform Institute (SALRI 2020 Report 15) '*Valuable Instrument or Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia*', (Report 15, December 2020) [5.1.1] where the challenges of being an attorney are outlined. See also Queensland Government, *Enduring power of attorney explanatory guide* (Guide, 30 November 2020) 21 where it is 'strongly' recommended that a person seek advice from a professional (such as a lawyer) when considering whether to accept an appointment as an attorney.

55 South Australian Law Reform Institute (SALRI 2020 Report 15) '*Valuable Instrument or Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia*', (Report 15, December 2020) [5.4.37].

56 South Australian Law Reform Institute, '*Valuable Instrument or Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia*', (Report 15, December 2020) [5.3.6].

A requirement that an attorney keep records is existing law in several jurisdictions (**Appendix 1** refers) and has been recommended in a number of inquiries and model provisions.[57] As observed by the ALRC 'good record keeping demonstrates the way in which an attorney has fulfilled their duties and can protect the representative in circumstances where accusations are made that the representative has failed in their duties'.[58] In South Australia, for example, current law goes further by making it an offence for an attorney (titled a donee) to fail to keep and preserve accurate records and accounts.

The proposal includes a requirement that, where a principal appoints multiple attorneys under an EPOA, each attorney is to take reasonable steps to keep other current attorneys informed of actions taken. This requirement is intended to increase accountability and transparency in the administration of an EPOA.[59] It is acknowledged that this requirement will operate in slightly different ways, where attorneys are jointly appointed (and so must act together and agree on decisions to administer the EPOA), compared to where attorneys are jointly and severally appointed (meaning that either attorney can make decisions by themselves, independently of each other) and where attorneys are appointed successively (for example, if Attorney 1 is appointed first, and Attorney 2 is appointed second if Attorney 1 is no longer able to act).[60] The nature of the appointment will impact on the extent to which each attorney is required, in practice, to keep other attorneys informed of actions taken.

To account for jurisdictions that enable multiple EPOAs to be in place simultaneously, the proposal confines the duty to informing other attorneys appointed under the same financial EPOA to act at the same time, that is, appointed jointly or severally.

Duties to act honestly, in good faith and with reasonable care

The proposal for feedback incorporates duties to act honestly, in good faith and with reasonable care. The language of the proposal aligns with and combines the language of a number of existing laws. For example, Queensland requires attorneys to 'exercise power honestly and with reasonable diligence', Victorian attorneys 'must act honestly, diligently and in good faith' and the Northern Territory requirement 'to act honestly, with care, skill and diligence'.

Duty to keep property separate

The proposal incorporates a duty for an attorney to keep their property (including money) separate from that of the principal, which is a common requirement in most jurisdictions, and in some cases strengthened by a corresponding offence. To account for situations where one member of a couple is the attorney for the other, jurisdictions may add qualifications, such as 'this does not apply to property owned jointly by the principal and attorney',[61] which is reflected in the proposal.

The rationale for this duty, and the associated duty to keep records, was outlined by the ALRC as follows:

'An explicit requirement to keep records and keep property separate is designed to protect the principal and the attorney. By keeping good records and not co-mingling property, the representative is upholding the distinction between their personal affairs and their fiduciary role as an enduring attorney of the principal…The explicit requirement to keep records and to keep property separate is also educative, as it reinforces the nature of the fiduciary role of the representative as the manager of the principal's affairs and the importance of doing so diligently and effectively.'[62]

57 For example, the proposed wording was recommended following the Law Council of Australia National Roundtable to discuss EPOA law reforms on 15 July 2021. See also The Office of the Queensland Public Advocate, '*Towards Harmonisation: Key model provisions of financial enduring powers of attorney legislation*' (Document, December 2021) 1 and NSW Law Reform Commission, Review of the Guardianship Act 1987 (Report No.145, May 2018) lii-liii [8.7] where this wording was also proposed.

58 Australian Law Reform Commission, 'Elder Abuse – A National Legal Response' (Final Report 131, May 2017) [5.77 to 5.80].

59 *Powers of Attorney Act 1998* (QLD) s79 obliges attorneys to consult 'to ensure a principal's interests are not prejudiced by a breakdown in communication between them'. This duty was also recommended in the South Australian Law Reform Institute, '*Valuable Instrument or Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia*', (Report 15, December 2020) and during the Law Council of Australia National Roundtable to discuss EPOA law reforms on 15 July 2021.

60 For example, the *Power of Attorney Act 2014* (VIC) s31 provides for the appointment of alternative attorneys.

61 *Powers of Attorney Act 2006* (ACT) s48(2), *Power of Attorney Act 2014* (VIC) pt 6, div 1.

62 Australian Law Reform Commission, '*Elder Abuse – A National Legal Response*' (Final Report 131, May 2017) [5.77- 5.79].

Duty not to enter conflict transactions

The proposal for feedback includes a duty not to enter a transaction 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), unless an EPOA, or a court or tribunal authorises this to occur.[63] This aligns with the approach recommended by the ALRC, that:

'starting with an express prohibition on conflict transactions means that, when making an enduring document, a principal must consider, having regard to their finances and their relationship with the attorney, whether conflicts are likely and in what areas. Having identified potential conflicts, the principal has the choice whether to authorise the attorney to act in those areas. This ensures that the principal retains choice and control.'[64]

Enabling either an EPOA, or a court or tribunal (including retrospectively), to authorise a conflict transaction is a feature in the law of most jurisdictions (**Appendix 1** refers). A number of jurisdictions also clarify in legislation specific transactions which are permitted (such as gift giving), and do not constitute conflicts. As has been observed, such 'exceptions to rules against conflict transactions… have developed in state law to enable principals to continue with altruistic behaviours such as sharing a residence, gift giving, donations and other transfers to third parties and even to representatives themselves.'[65] The proposal identifies several transactions of this kind which do not constitute conflicts, and therefore do not require express authorisation in an EPOA or by a court or tribunal.

Recognising the difficulties which principals, attorneys and others may face in identifying conflict transactions, the ALRC recommended that a model national enduring document 'should include appropriate guidance on what conflicts are and how they may be managed by the principal in designing their enduring documents.'[66]

Seeking and giving effect to the views, wishes and preferences of a principal

Proposal for feedback

As outlined at the outset of this paper, an attorney exercising a power or performing a duty under an EPOA, must do so in a way which is consistent with the following general principles:

- recognises the presumption of capacity
- supports the principal to participate as much as possible in the making of decisions that affect them, and
- is least restrictive of the principal's ability to decide and act as is possible in the circumstances.[67]

Noting the findings and recommendations of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability will require consideration, a model provision could provide that an attorney must, to the greatest extent practicable:

- seek the views, wishes and preferences of the principal
- take into account any views, wishes and preferences expressed or demonstrated by the principal (or what these would likely be if the principal had decision-making capacity in relation to that matter and could communicate their views, wishes and/or preferences).

63 This element of the provision mirrors *Powers of Attorney Act 2014* (Vic) s64, being a recently enacted provision of its kind.
64 Australian Law Reform Commission, '*Elder Abuse – A National Legal Response*' (Final Report 131, May 2017) [5.54].
65 Terry Ryan, 'Developments in Enduring Powers of Attorney Law in Australia' in Lusina Ho and Rebecca Lee (Eds), *Special Needs Financial Planning A Comparative Perspective* (Cambridge University Press, June 2019) 179, 199.
66 Australian Law Reform Commission, '*Elder Abuse – A National Legal Response*' (Final Report 131, May 2017) [5.61].
67 Queensland Public Advocate, 'Model financial enduring powers of attorney law', (July, 2023), cl 1.

The extent to which supported and substitute decision-making is and should be reflected in different EPOA and guardianship laws is a complex issue, and is one which is being considered at a national level by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (the Royal Commission). The Royal Commission has highlighted the difference between substitute and supported decision-making as follows:

'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)'.[68]

The general trajectory in law reform and practice has been that 'a number of Australian and international jurisdictions, sectors and organisations have started to move away from substitute decision-making toward supported decision-making'.[69]

At present, jurisdictions adopt different approaches in how they characterise the duty of an attorney to ascertain, consider, and then give effect to, the wishes or best interests of a principal (**Appendix 1** refers). These range from making a decision on behalf of the principal to:

- taking into account what is in the best interests of the principal;
- recognising and taking into account a principal's views, wishes and preferences;[70]
- supporting the principal in making a decision and giving effect to that decision, unless the decision or proposed decision has a high risk of being seriously injurious to the person's health or wellbeing;[71] or
- for jurisdictions that allow a supportive attorney to be made (such as in Victoria), the supportive attorney is authorised to support the principal in making a decision.[72]

Certain proposals for discussion released by the Royal Commission indicate it 'is considering a national supported decision-making framework', and the framework may include 'principles to guide reform of federal, state and territory laws, policies and legal frameworks, as well as policies and practices of public and private bodies'.[73] The Royal Commission has also identified that:

'In Australia, evidence suggests that supported decision-making and substitute decision-making, including guardianship, are not mutually exclusive. Rather, law reform bodies and researchers have examined the co-existence of guardianship and supported decision-making. Some research describes substitute decision-making as a legitimate part of a continuum when they are used as a last resort after all possible options to support a person with disability to make their own decisions have been exhausted.'[74]

As noted earlier in this paper in relation to witnessing arrangements, in moving towards a more nationally consistent approach in key areas of financial EPOA law, it is important that more protective frameworks are accommodated, while also developing a model which is suitable to meet local requirements in other States and Territories. In this case, the legislation in Victoria has the strongest obligations on an attorney to ascertain, and give effect to the views, wishes and preferences of a principal who does not have decision-making capacity.

68 Royal Commission Roundtable: Supported decision-making and guardianship: Proposals for reform, page 7 (Supported decision-making and guardianship - proposals for reform (royalcommission.gov.au)).
69 Royal Commission Roundtable: Supported decision-making and guardianship: Proposals for reform, page 7 (Supported decision-making and guardianship - proposals for reform (royalcommission.gov.au)).
70 *Powers of Attorney Act 1998* (Qld), Section 6C, Clause 10.
71 *Powers of Attorney Act 2014* (Vic), Section 4(e) and (f).
72 See Part 7 of the *Powers of Attorney Act 2014* (Vic)
73 Royal Commission Roundtable: Supported decision-making and guardianship: Proposals for reform, page 12.
74 Royal Commission Roundtable: Supported decision-making and guardianship: Proposals for reform, page 7.

The model law released by the Queensland Public Advocate, Dr Chesterman, adopts a similar approach to that in Victoria, providing that:

> 'Where an attorney under a financial enduring power of attorney is making a decision on behalf of a principal, the attorney must do so in a way that:
>
> a) encourages and supports the principal to participate in making the decision, including by taking any reasonably available steps in this regard
>
> b) gives all practicable and appropriate effect to the principal's views, wishes and preferences; and
>
> c) acts in a way that promotes the personal and social wellbeing of the principal.'[75]

It is anticipated that the current proposal will be consulted on while governments and the community are considering and responding to the recommendations of the Royal Commission, and that these processes will further inform the development of a potential national approach to this issue.

Consultation questions

1. Noting the increasing implementation of supported decision-making across different contexts in Australia, in what circumstances, if any, may substitute decision-making be appropriate under a financial EPOA?
2. In what circumstances may it be appropriate for a principal's views, wishes and preferences to be given less weight by an attorney acting under a financial EPOA (such as undue influence, coercion or risk of significant harm)?
    - Should an attorney be required, in all instances, to follow the views, wishes and preferences of the principal (even if there is a high risk of significant harm to the principal's health or wellbeing)?
3. Should all types of attorneys (family members/friends, public trustees and private trustee companies) be subject to the same obligations, regardless of their relationship with and access to the principal?
4. Is there a particular model law, an approach implemented in a jurisdiction, or an approach recommended in a particular inquiry which you consider provides the best framework to adopt for financial EPOAs?

75 Queensland Public Advocate, 'Model financial enduring powers of attorney law', (July, 2023), cl 18.

9. Interstate recognition of EPOAs

There are often circumstances in which an EPOA needs to be recognised and relied upon in a different jurisdiction from which it was made. This can include where a principal moves interstate after making the EPOA, or where an attorney needs to complete a transaction in a different State or Territory from where the principal resides.

Following work previously overseen by the Standing Council of Attorneys-General, six jurisdictions have adopted a common interstate recognition provision (**Appendix 1** refers). These jurisdictions recognise powers under an interstate EPOA if those powers can be validly conferred under the law in both jurisdictions. One jurisdiction requires an EPOA to be registered in at least one jurisdiction for it to be recognised locally, while another requires the attorney to apply for a tribunal for it to be recognised (the tribunal considers if the interstate EPOA corresponds sufficiently in form and effect to an EPOA made in their jurisdiction).

Stakeholders have raised to various inquiries that interstate recognition laws continue to create uncertainty or present practical difficulties and costs for a range of parties. For example:

- Principals living in border communities and frequently travelling between jurisdictions may be advised to create two EPOAs (one for each jurisdiction), to circumvent interstate recognition issues[76]
- Under current arrangements, family and friends, and organisations such as banks, service and care providers of different kinds, may be required to ascertain or seek assurances about the operation of EPOA of laws in two jurisdictions, in order to be satisfied of the validity of an EPOA executed in another jurisdiction.[77] Where a principal owns assets in multiple jurisdictions, for example, it maybe unclear to the principal, attorney or a financial institution if and how an EPOA from another jurisdiction applies to decision making about those assets.[78]

Greater national consistency in core areas of EPOA laws (as proposed through this paper) would be expected to improve the effectiveness of current interstate recognition arrangements, as it would be clearer for all parties to ascertain whether an EPOA was validly made in another jurisdiction, and the extent to which it is then operative in the second jurisdiction. Greater national consistency would also assist with the portability of EPOAs across jurisdictions in border communities. Feedback is sought on whether specific additional legislative change is required to facilitate interstate recognition arrangements, or if other practical measures would be of more relevance and assistance, given the reforms already made in a number of jurisdictions.

Consultation Questions

1. Could the design of current interstate recognition arrangements for financial EPOA be improved or further simplified from a legislative perspective (that is, could amendment to the wording of interstate recognition clauses be improved)?
2. Feedback is sought on whether your experience of the interstate recognition requirements for financial EPOAs, as they apply in your jurisdiction, are working effectively, or on any challenges you have encountered.
3. Are there non-legislative steps which could be taken to assist the interstate recognition of EPOAs? For example, would it assist if further practical guidance was provided about the circumstances in which an EPOA in one State or Territory would be recognised in another, and conversely the circumstances in which interstate recognition may not occur?

76 South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia*, (Report 15, December 2020) 58, [3.2.8] and see more generally, Hume Riverina Community Legal Service, Submission No 186 to Australian Law Reform Commission, *Elder Abuse Issues Paper No. 47* (7 September 2016) 2(d) 'Cross border responses'.

77 'Cross-border issues with enduring powers of attorney', *COMPASS Guiding Action on Elder Abuse* (Web Page) <https://www.compass.info/featured-topics/powers-of-attorney/cross-border-issues-with-enduring-powers-of-attorney/>.

78 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, Vol.3, September 2010) 208, [16.343-16.345].

10. Access to justice issues – Jurisdiction, compensation and offences

Proposals for feedback

Jurisdiction and compensation

A model provision could provide that a court or tribunal may:

- Order an attorney acting under a financial EPOA to pay compensation for a loss caused by the attorney's failure to comply with the relevant State or Territory Act when acting as an attorney, or to account for any profits the attorney has gained as a result of the attorney's failure to comply with the relevant State or Territory Act. Compensation or an account of profits would be payable to a principal or the principal's estate, if the principal has died[79]
- Excuse the contravention of an attorney who has acted honestly, reasonably, and ought fairly to be excused for the breach.[80]

Offences

- EPOA specific offences should remain in jurisdictions where they currently exist.
- To ensure adequate coverage and consequences for attorneys who have misused their powers, the following should be penalised (either through specific EPOA related offences, broader general offences or civil penalty regimes, which encapsulate the relevant conduct):
    - dishonest inducement to execute or revoke an EPOA
    - dishonest use of an EPOA to obtain financial advantage for the attorney or another person; or to cause loss to the principal or another person
    - misrepresentation in relation to an EPOA (includes holding oneself out wrongly to be an attorney).

Jurisdiction and compensation

Certain jurisdictions enable tribunals to order compensation against an attorney for breaches of their statutory duties, including for financial loss caused to a principal or their estate.[81] However, there remains significant differences in the avenues available to principals (or their estates) to pursue civil compensation claims in tribunals against attorneys, and the grounds upon which compensation may be sought (**Appendix 1** refers). In the absence of a statutory avenue to seek compensation through a tribunal, claimants generally need to pursue equitable remedies in a Supreme Court.

Recent reviews have highlighted the importance of tribunal-based compensation schemes for principals. For example, the ALRC noted:

'In many instances of financial abuse (or abuse by a guardian which causes loss), there are limited options for an older person to seek redress, and few consequences for the representative who has misused their power. An abused person may want their money or assets returned, but may not want police involvement, preferring to retain relationships and not see the person prosecuted. They also may not be willing or able to afford to commence a civil action in the Supreme Court.'[82]

The SALRI review similarly noted that:

'any legal action through the Supreme Court would undoubtedly prove a costly and time-consuming process and victims may be unwilling or unable to bring such an action. The cost of pursuing civil legal remedies (especially through the Supreme Court) is likely to prove prohibitive for many principals (or their families). If the principal has lost their only asset in the process of being abused, the risk of unsuccessful legal action is often too great to enter into.'[83]

79 Adapted from *Power of Attorney Act 2006 (ACT)* sections *50A*, *Powers of Attorney Act 1998* (QLD) s106(1), and *Power of Attorney Act 2014* (VIC) s77(1), Powers of Attorney Bill 2021 (SA) s46(1) Lapsed.
80 Adapted from *Powers of Attorney Act 1998* (QLD) s105; *Powers of Attorney Act 2014* (VIC) s74.
81 See Australian Law Reform Commission, '*Elder Abuse – A National Legal Response*' (Final Report 131, May 2017) [5.85] where the ALRC noted that its recommendation was 'built on the Victorian model'. In recent years the ACT and Queensland have amended their legislation in relation to compensation and tribunal access.
82 Australian Law Reform Commission, '*Elder Abuse – A National Legal Response*' (Final Report 131, May 2017) [5.82-5.83].
83 South Australian Law Reform Institute, '*Valuable Instrument or Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia*', (Report 15, December 2020) [7.2.58].

The ALRC supported vesting State and Territory tribunals with the jurisdiction to order compensation:

'Vesting state and territory tribunals with the power to order compensation, where a substitute decision maker has acted outside their powers to cause loss, would serve two purposes. It would provide a practical way to redress loss for older persons unable or unwilling to take action in the Supreme Court. Tribunals aim to facilitate the just, quick and economical resolution of proceedings with a more flexible and informal approach to procedural and evidentiary matters than a court…. It would also operate as a deterrent to misusing funds, especially as any interested party, including another family member with an interest in the affairs of the principal, can seek a tribunal order for compensation on behalf of the principal.'[84]

The proposal for feedback provides that a court or tribunal, should be able to:

- order an attorney acting under a financial EPOA to pay compensation for a loss caused by the attorney's failure to comply with the relevant State or Territory Act when acting as an attorney, or to account for any profits the attorney has gained as a result of the attorney's failure to comply with the relevant State or Territory Act (with compensation or an account of profits to be payable to the principal's estate, if the principal has died); [85] and
- excuse the contravention of an attorney who has acted honestly, reasonably, and ought fairly to be excused for the breach.[86]

This proposal adopts key elements of the compensation arrangements which are in place across many, but not all, jurisdictions.

The proposed approach recognises that avenues for redress in the context of financial EPOAs should be effective, informal, flexible and low cost, particularly for the cohort of older Australians where losses may have been caused by a family member and there is an element of urgency in recovering misappropriated money or assets.

The prospect that a personal compensation claim may be brought against an errant attorney, without the cost and complexity of pursuing Supreme Court action, may also have an important deterrent and educational benefit. Cautions about the risk of exposure to compensation claims are already on a number of prescribed forms – a common national approach in this area may have significant preventative benefits.[87]

In line with the view taken by the ALRC, the proposal for feedback recognises there may be circumstances where it would be appropriate for a court or tribunal to excuse an attorney from liability:

'The tribunals should have appropriate discretion to excuse breaches that are inadvertent or otherwise in good faith, recognising the onerous responsibilities that family members voluntarily assume when taking on the role of a substitute decision maker.' [88]

The proposal is adapted from other legislative schemes which provide that a fiduciary can be excused from liability in certain circumstances.[89] This can include taking into consideration the conduct of the attorney that resulted in the breach and any surrounding actions.

The above potential benefits need to be considered alongside the different tribunal arrangements across jurisdictions and the potential complexity of EPOA matters. As has been recognised, not all tribunals have legally qualified members, which may be required to hear compensation matters, and there may be limitations to the enforcement of tribunal decisions.[90] It is also acknowledged that Supreme Courts have remedies in equity beyond compensation, so may remain the most appropriate forum for redress in certain more complex cases.[91]

84 Australian Law Reform Commission, '*Elder Abuse – A National Legal Response*' (Final Report 131, May 2017) [5.89].
85 Adapted from *Power of Attorney Act 2006 (ACT)* sections *50A*, *Powers of Attorney Act 1998* (QLD) s106(1), and *Power of Attorney Act 2014* (VIC) s77(1), Powers of Attorney Bill 2021 (SA) s46(1) Lapsed.
86 Adapted from *Powers of Attorney Act 1998* (QLD) s105; *Powers of Attorney Act 2014* (VIC) s74.
87 For example, see *Powers of Attorney Regulation 2016* (NSW) sch 2 Form 2 cl 7 where an attorney is required to accept five responsibilities and it is noted that 'failure may incur civil and/or criminal penalties'.
88 Australian Law Reform Commission, '*Elder Abuse – A National Legal Response*' (Final Report 131, May 2017) [5.89].
89 For example, *Trustee Act 1925* (NSW) s85, *Trustee Act 1958* (Vic) s67; *Trustee Act 1936* (SA) s56; Trustee Act 1962 (WA) s75; *Powers of Attorney Act 2006* (ACT) s 52.
90 NSW Law Reform Commission, Review of the Guardianship Act 1987 (Report No.145, May 2018) [14.71]-[14.76]
91 South Australian Law Reform Institute, '*Valuable Instrument or Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia*', (Report 15, December 2020) [7.4.58].

Offences and civil penalties

Jurisdictions differ in their approach to criminalising conduct relevant to EPOAs. Certain jurisdictions have specific EPOA offences (such as dishonest inducement to make an EPOA), while others rely on more general offences. Even where there are specific EPOA offences, jurisdictions differ in relation to the offences that exist**.** The ALRC examined the variety of approaches and was:

'not persuaded that there is a need for a specific offence for misusing powers of attorney. Where they exist, offences for misusing powers of attorney have been established based on the argument that existing, broader offences are not being utilised, as opposed to the fact that they do not encompass the relevant conduct. Creating new offences risks duplicating existing offences, and risks increasing complexity, without any assurance of increased prosecution of the conduct.' [92]

The proposal for feedback is that, to ensure adequate coverage and consequences for attorneys who have misused their powers, the following should be penalised (either through specific EPOA related offences, broader general offences or civil penalty regimes, which encapsulate the relevant conduct):

- dishonest inducement to execute or revoke an EPOA
- dishonest use of an EPOA to obtain financial advantage for the attorney or another person, or to cause loss to the principal or another person
- misrepresentation in relation to an EPOA (includes holding oneself out wrongly to be an attorney).

These are suggested areas for offences as they rely upon dishonesty or misrepresentation by an attorney.

Consultation Questions

1. Feedback is sought on stakeholder experiences of the current arrangements for managing EPOA disputes through the existing court and tribunal systems in their State or Territory, and options which could be considered to enhance access to justice in cases of potential breaches of attorney duties.
2. Feedback is sought on whether the proposed approach to compensation and offences is sufficient or requires further elements, to address particular trends for either principals or attorneys which you are aware of.

92 Australian Law Reform Commission, '*Elder Abuse – A National Legal Response*' (Final Report 131, May 2017) [13.10] and [13.12]

11. Information, resources or training for witnesses and attorneys

Stakeholders and law reform reviews have previously raised the importance of information and training for witnesses, given the role they assume in many jurisdictions to identify a lack of decision-making capacity on the part of the principal to make the EPOA, or to identify signs of a principal being coerced in some way to make the instrument. In response to such feedback, the ALRC, for example, recommended that an authorised witness should be required 'to regularly undertake a course of continuing professional education that covers the skills and expertise necessary to witness an enduring document'.[93] Similarly, the importance of education, guidance and assistance to attorneys, to ensure they understand the nature of their role and specific duties they hold, has been emphasised in recent reviews and stakeholder feedback to inquiries.

It is acknowledged that establishing any form of prescribed training for witnesses, attorneys and/or principles would be a significant undertaking, and that uptake and completion of such training would be difficult to monitor or enforce.

In the context of the range of duties and obligations for witnesses and attorneys proposed in this paper, feedback is sought on associated information, resourcing or training requirements, including options such as extending voluntary resources such as the following:

- **Online training modules** – online resources could be made available to witnesses and attorneys to assist their understanding of their obligations, and potential risks they should be aware in relation to a principal not having decision-making capacity, or being coerced into establishing an EPOA.
- **Guidance material for witnesses** – QLD[94] and NSW[95], for example, have developed guidelines to assist witnesses assessing decision-making capacity, which are written in plain language and aim to assist people (including those that have not undertaken formal training with assessing decision-making capacity), to assess whether an adult has decision-making capacity to make an EPOA.

Consultation Questions

1. Feedback is sought on the resources, assistance and guidance which should be made available to assist witnesses, attorneys and principles to undertake their roles under financial EPOAs.
2. Do you consider voluntary online training modules as being a suitable path to explore further, as a way to inform and support principals, attorneys and witnesses?
3. Feedback is sought on whether you are aware of particularly useful resources for witnesses, attorneys and principles, which you would recommend be considered as a resource across jurisdictions.
4. Should there be any monitoring and/or reporting of training for witnesses, attorneys and principals?
5. How can witnesses, attorney and principals be encouraged to undertake training, including any ongoing/refresher training?

93 Australian Law Reform Commission, '*Elder Abuse – A National Legal Response*' (Final Report 131, May 2017) [5.44].
94 Queensland Government, '*Queensland Capacity Assessment Guidelines*' (Guide, 2020) 4.
95 NSW Department of Communities and Justice, '*Capacity Toolkit'* (Guide, 2020) 6.

12. Other initiatives for preventing and responding to financial elder abuse

Feedback is invited on other non-legislative work which the Commonwealth, States and Territories could be prioritising to prevent and respond to financial elder abuse, in particular, which would complement work to achieve greater consistency in financial EPOA laws.

Appendix 1 – Execution

Jurisdictions' existing legislation against proposal presented for consultation (execution)

An EPOA must be	ACT[96]	NSW[97]	VIC[98]	QLD[99]	TAS[100]	SA[101]	WA[102]	NT[103]
In the approved or prescribed form, or in a substantially similar form	■	■	■	■	■	■	■	■
Signed and dated by the principal, or by another person at the principal's direction and in their presence	■	■	■	■	■	■	■	■
Executed in the presence of an authorised witness	■	■	■	■	■	■	■	■
Signed and dated by the authorised witness in the presence of the principal (and, if applicable, in the presence of the person who signed at the principal's direction)	■	■	■	■	■	■	■	■

Key

- ■ Current legislation aligns with the proposal presented for consultation
- ■ Current legislation is somewhat similar to the proposal presented for consultation

96 See *Powers of Attorney Act 2006* (ACT) s13(1) Note 1 and Approved Form Powers of Attorney Act 2006 Enduring Power of Attorney, *Powers of Attorney Act 2006* (ACT) ss 13(1)-(2).
97 See *Powers of Attorney Regulation 2016* (NSW) Schedule 2 Form 2, *Powers of Attorney Act 2003* (NSW) ss 19(1)(b).
98 See *Powers of Attorney Act 2014* (VIC) ss 32-33(1)(a)-(b).
99 See *Powers of Attorney Act 1998* (Qld) ss 44(1), 44(3)(a), 44(3)(b)-(5)(c).
100 See *Powers of Attorney Act 2000* (Tas) ss 30(1), 9(1)(b)(i)-(ii).
101 See *Powers of Attorney and Agency Act* (SA) ss 6(1)(a)-(b)(ii), 6(2)(a).
102 See *Guardianship & Administration Act 1990* (WA) ss 104(1)(a), Schedule 3 Form 1, 104(2)(a)(i)-(ii), Schedule 3 Form 1.
103 See *Advance Personal Planning Act 2013* (NT) ss 9(1), 10(1)-(3).

Appendix 1 – Witness restrictions and number of authorised witnesses

Jurisdictions' existing legislation against proposal presented for consultation (witness restrictions and number of authorised witnesses)

	ACT[104]	NSW[105]	VIC[106]	QLD[107]	TAS[108]	SA[109]	WA[110]	NT[111]
An authorised witness cannot be a party to the EPOA								
An authorised witness cannot be a close relative of a party to the EPOA								
An authorised witness cannot be a person who has not reached the age of 18								
An authorised witness cannot be a person signing the EPOA at the direction of the principal								
Jurisdictions have the option to exclude additional persons from being authorised witnesses								

Key

- Current legislation aligns with the proposal presented for consultation
- Current legislation is somewhat similar to the proposal presented for consultation
- Current legislation does not expressly address the proposal presented for consultation
- Current legislation aligns with the proposal presented for consultation due to inference

104 See *Powers of Attorney Act 2006* (ACT) ss 21(1)(b), 21(2)(a)-(b), 21(1)(c) and 21(1)(a).
105 See *Powers of Attorney Act 2003* (NSW) ss 19(c)(iv) and 19(2)(a)-(e).
106 See *Powers of Attorney Act 2014* (VIC) ss 35(2)(c), s35(2)(d)(i)-(ii), s 35(2)(a), s 35(2)(b) and s 35(2)(d)(iii)
107 *See Powers of Attorney Act 1998* (Qld) s 31(1)(c), 31(1)(d), 31(1)(a), s 31(1)(b) and 31(1)(e).
108 *See Powers of Attorney Act 2000* (Tas) s 9(1)(ba) and South Australian Law Reform Institute, '*Valuable Instrument or Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia*', (Report 15, December 2020) para 3.8.9
109 See South Australian Law Reform Institute, *'Valuable Instrument or Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia'*, (Report 15, December 2020) para 3.8.9 and *Powers of Attorney and Agency Act 1984* (SA) Schedule 2.
110 See *Guardianship and Administration Act 1990* (WA) s 104(3)(b) and s104(3)(a).
111 See South Australian Law Reform Institute, *'Valuable Instrument or Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia'*, (Report 15, December 2020) para 3.8.9 and *Advance Personal Planning Regulations 2014* (NT) Reg 3.

Appendix 1 – Existing witness eligibility requirements

	ACT[112]	NSW[113]	VIC[114]	QLD[115]	TAS[116]	SA[117]	WA[118]	NT[119]
Minimum number of witnesses required	2	1	2	1	2	1	2	1
Witness qualifications								
A witness is not required to have any qualifications					●			
One witness must be either authorised to witness affidavits or a medical practitioner			●					
The witness must, or, where there is more than one, at least one witness must be a person authorised by law to take affidavits						●		
A witness must be a registrar of the Local Court or an Australian legal practitioner, or a legal practitioner duly qualified in another country, or an employee of the NSW Trustee and Guardian who has successfully completed a course of study approved by the Minister, by order published in the Gazette		●						
One witness must be authorised to witness statutory declarations	●						●	
A witness must be a justice of the peace, commissioner for declarations, notary public or a lawyer				●				
Both witnesses must be authorised to take declarations or, one witness must be authorised to take declarations and the other must be at least 18 years of age and not a person appointed to be a done or substitute done of the power							●	
A witness must be authorised to administer an oath or be a person prescribed by regulation to be an authorised witness								●

112 See *Powers of Attorney Act 2006* (ACT) ss19(2)(b) and 21(3).
113 See *Powers of Attorney Act 2003* (NSW) ss19(1)(b) and s19(2).
114 See *Powers of Attorney Act 2014* (VIC) ss 33(1)(b) and 35(1).
115 See *Powers of Attorney Act 1998* (Qld) ss 44(3)(b) and 31(1)(a).
116 See *Powers of Attorney Act 2000* (Tas) ss 9(1)(b)(ii).
117 See *Powers of Attorney and Agency Act 1984* (SA) s6(2)(a).
118 See *Guardianship and Administration Act 1990* (WA) ss104(2)(a) and s104(2)(a)(ii)(I) – witness authorised to take declarations.
119 See *Advance Personal Planning Regulations 2014* (NT) ss 10(2) and 10(5).

Appendix 1 – Existing witness certification requirements

	ACT[120]	NSW[121]	VIC[122]	QLD[123]	TAS[124]	SA	WA	NT[125]
That the witness reasonably believes that the principal is who they purport to be and is at least 18 years of age								●
That in making the EPOA, it appeared to the witness that the principal is acting voluntarily								●
That the principal signed the EPOA voluntarily in the presence of the witness	●		●					
That the principal signed the EPOA in the presence of the witness		●		●	●			●
At the time the principal signed the EPOA, the principal appeared to the witness to understand the nature and effect of making the EPOA	●	●	●	●				●
That if the EPOA is signed by a person for the principal, that the principal directed the person to sign the EPOA for them, and that the principal gave this direction voluntarily in the presence of the witness and at the time the principal gave the direction to sign the EPOA, the principal appeared to the witness to understand the nature and effect of making the EPOA	●		●	●				
That the witness explained the effect of the EPOA to the principal before it was signed		●						
That the witness is a prescribed witness		●						
That the witness is not an attorney under the power of attorney		●	●	●	●			
That the witness is not a relative of the principal or of an attorney under the EPOA			●	●	●			
That the witness is not the person signing at the direction of the principal			●	●				
If the witness is acting as a person who is authorised to witness affidavits or as a medical practitioner, the qualification on which the witness is acting			●					

120 See *Powers of Attorney Act 2006* (ACT) s22(1)(a)-(b), s22(2)(a)-(d).
121 See *Powers of Attorney Act 2003* (NSW) s19(c)(v), s19(c)(ii), s19(c)(i), s19(c)(iii)-(iv).
122 See *Powers of Attorney Act 2014* (VIC) s36(1)(a)(i), s36(1)(a)(ii), s36(2)(a)(i)-(iii), s36(1)(b)(i)-(ii), s36(2)(b)(i), s36(2)(c).
123 See *Powers of Attorney Act 1998* (Qld) s44(4)(a)-(b), ss44(5)(a)-(c), s 31(1)(b)-(d).
124 See *Powers of Attorney Act 2000* (Tas) s30(1)(b), s30(1)(c).
125 *Advance Personal Planning Regulations 2014* (NT) s10(3)(a), s10(3)(b(ii), s10(3)(c)(ii), s10(3)(b)(i)

* References to 'EPOA' in this table are also intended to encompass the Northern Territory's Advance Personal Plans

In South Australia and Western Australia, legislation does not directly state what witnesses are required to certify, although Schedule 3, Form 1 of the Western Australian Act does note that the witness must sign as a deed.[126]

Both Victorian and Queensland legislation refer to the witness certifying that the principal appeared to have decision-making capacity.[127] This wording is distinct from some other jurisdictions whose legislation refers to the witness certifying that the principal appeared to understand the nature and effect of making an enduring instrument. However, the definition of decision-making capacity as defined the Victorian Act is if the person is able to

a) understand the information relevant to the decision and the effect of the decision; and

b) retain that information to the extent necessary to make the decision; and

c) use or weigh that information as part of the process of making the decision; and

d) communicate the decision and the person's views and needs as to the decision in some way, including by speech, gestures or other means[128]

and the definition of capacity according to the Queensland Act is if the principal

a) is capable of making the enduring power of attorney freely and voluntarily and

b) understands the nature and effect of the enduring power of attorney.[129]

As such, for this purpose we have captured that both jurisdictions' legislation also, incidentally, refers to the witness certifying that the principal appeared to understand the nature and effect of making an enduring instrument.

126 *Guardianship and Administration Act 1990* (WA) sch 3, Form 1.
127 *Powers of Attorney Act 2014* (VIC) ss36(1)(ii) and 36(2)(a)(iii) and Powers of Attorney Act 1998 (Qld) ss44(4)(b) and 44(5)(c).
128 *Powers of Attorney Act 2014* (VIC) s4(1) 'meaning of decision-making capacity'.
129 *Powers of Attorney Act 1998* (Qld) s41(1).

Appendix 1 – Attorney acceptance

Jurisdictions' existing legislation against proposal presented for consultation (attorney acceptance)

	ACT[130]	NSW[131]	VIC[132]	QLD[133]	TAS[134]	SA[135]	WA[136]	NT[137]
All attorneys must sign a statement of acceptance								
The statement of acceptance must be to the fact they are eligible to act as an attorney								
The statement of acceptance must be to the fact they undertake to act in accordance with the responsibilities, duties and obligations of an attorney								
The statement of acceptance must be to the fact they undertake to act in accordance with the provisions of the Act relating to EPOAs								
The attorney's acceptance must be signed in the presence of an authorised witness								
Attorney acceptance								
The authorised witness is required to certify that they drew the attention of the attorney to the prescribed information about the operation and importance of EPOAs and								
The attorney appeared to understand their responsibilities, duties and obligations under the instrument								
Where the authorised witness is an Australian legal practitioner or a member of a class of witnesses prescribed by jurisdictions for this purpose, the witness is also to certify (in addition to the matters above) that they explained the nature and effect of the EPOA to the attorney								

Key

- Current legislation aligns with the proposal presented for consultation
- Current legislation is somewhat similar to the proposal presented for consultation
- Current legislation does not expressly address the proposal presented for consultation

130 See Powers of Attorney Act 2006 (ACT) s 23 and see Powers of Attorney Act 2006 Approved Form Enduring Power of Attorney 12 and Schedule 2
131 See Powers of Attorney Act 2003 (NSW) s 20, see Powers of Attorney Regulation 2016 (NSW) Schedule 2, Form 2, reg 7 and reg 6
132 See Powers of Attorney Act 2014 (VIC) ss 37(1)(a), 37(1)(c)(i)-(iii)
133 See Powers of Attorney Act 1998 (Qld) ss 44(8) and Form 2 Enduring Power of Attorney-short form Section 5: Attorney(s)' Acceptance. (Form 2- Enduring power of attorney- short form (publications.qld.gov.au).
134 See Powers of Attorney Act 2000 (Tas) s 30(2)(c) and Schedule 1, Form 3 and 4.
135 See Powers of Attorney and Agency Act (SA) s6(2) and Schedule 2.
136 See Guardianship & Administration Act 1990 (WA) s104(2)(b) and Schedule 3, Form 2.
137 The NT Act contains no requirements regarding attorney acceptance.

Appendix 1 – Revocation

Jurisdictions' existing legislation against proposal presented for consultation (revocation)

	ACT[138]	NSW[139]	VIC[140]	QLD[141]	TAS[142]	SA[143]	WA[144]	NT[145]
A principal may revoke a power of attorney at any time if the principal has decision-making capacity in relation to the making of a power of attorney								
A revocation must be in the approved or prescribed form, or in substantially similar form								
A revocation must be signed and dated by the principal, or by another person at the principal's direction and in their presence								
A revocation must be executed in the presence of an authorised witness								
A revocation must be signed and dated by the authorised witness in the presence of the principal (and, if applicable, in the presence of the person who signed at the principal's direction)								
The principal must take reasonable steps to give all attorneys, including any alternate attorneys, notice in writing of the revocation								
The witness must certify that								
They are qualified to act as an authorised witness								
The principal (or a person directed by the principal to sign on their behalf) appeared to freely and voluntarily sign the revocation								
The witness drew the attention of the principal to the prescribed information about the revocation of an EPOA								

Key

- Current legislation aligns with the proposal presented for consultation
- Current legislation is somewhat similar to the proposal presented for consultation
- Current legislation does not expressly address the proposal presented for consultation

138 See *Powers of Attorney Act 2006* (ACT) s 55.
139 See *Powers of Attorney Act 2003* (NSW) s5A.
140 See *Powers of Attorney Act 2014* (VIC) ss 44, 45, 46(1)(a)-(b), 50(1). Section 44 of the VIC Act further specifies that the principal may revoke the EPOA or the appointment of an attorney or alternative attorney is the principal retains decision making capacity. Section 46(1)(b)(i)-(iii) further specifies that a revocation must be executed in the presence of two witnesses who must also certify to the fact that principal appeared to freely and voluntarily sign and have decision making capacity. See *Powers of Attorney Act 2014* (VIC) ss49(1)(b) and 49(2)(b), s49(1)(a)(i) and s49(2)(a)(i).
141 See *Powers of Attorney Act 1998* (Qld) s 47(1), s49(1), s49(3)(a)(i)-(ii), s49(4)(a)-(b), s49(3)-(4)(a)-(b), s46(a)-(b) and s49(4)-(5).
142 See *Powers of Attorney Act 2000* (Tas) ss 30(3)(d) and s32AE (1).
143 See Land Services SA 'Revocation of Power of Attorney' form- the SA Act does not specify any requirements for the revocation of an EPOA by a donor.
144 See The Western Australia Office of the Public Advocate, *'A Guide to Enduring Power of Attorney in Western Australia'* (Guide, December 2013) 47- The WA Act does not specify any requirements for the revocation of an EPOA by a donor, revocation is governed by common law.
145 See *Advance Personal Planning Act 2013* (NT) s12(1)-(2).

Appendix 1 – Automatic revocation

Jurisdictions' existing legislation against proposal presented for consultation (automatic revocation)

EPOAS are taken to be revoked	ACT[144]	NSW[145]	VIC[146]	QLD[147]	TAS[148]	SA[149]	WA[150]	NT[151]
On the death of the principal								
On the death of the attorney								
If the attorney ceases to have decision-making capacity to act as an attorney								
If the attorney resigns								
At such time as the EPOA ceases to have effect according to its terms								
If the principal and attorney are married or are in a registered relationship – on the dissolution or annulment of the marriage, or the end of the registered relationship, unless a contrary intention is expressed in the EPOA								
An EPOA for financial matters is revoked at such time as a new EPOA made for financial matters by the principal takes effect, unless a principal specifies otherwise								

Key

- Current legislation aligns with the proposal presented for consultation
- Current legislation is somewhat similar to the proposal presented for consultation
- Current legislation does not expressly address the proposal presented for consultation
- Current legislation aligns with the proposal presented for consultation due to inference

144 See *Powers of Attorney Act 2006* (ACT) ss 60-61, 63, 53, 56, 62, 59, 69.
145 See *Powers of Attorney Act 2003* (NSW) ss 5(c), 5(f), 5(b) and 5(d).
146 See *Powers of Attorney Act 2014* (VIC) ss 51-53, 56, 43, 28, 55.
147 See *Powers of Attorney Act 1998* (Qld) ss 51, 58,56,55,54, 29, 53-53A, 50.
148 See *Powers of Attorney Act 2000* (Tas) ss 32AE (2),32AE (5), s (9), s32A, s31(1)(b), s32AE (3), s32AF.
149 See *Powers of Attorney and Agency Act 1984* (SA).
150 See *Guardianship and Administration Act 1990* (WA).
151 See *Advance Personal Planning Act 2013* (NT) ss 11(b)(iv) and (iii), 6 and 9(1)(a), 19(1)(b), 11(b)(i).

Appendix 1 – Attorney Eligibility

Jurisdictions' existing legislation against proposal presented for consultation (attorney eligibility)

An attorney cannot be	ACT[154]	NSW[155]	VIC[156]	QLD[157]	TAS[158]	SA[159]	WA[160]	NT[161]
A person who is less than 18 years								
A person who lacks decision-making capacity for the role								
A witness to the power of attorney								
A person who is a health provider, care worker or accommodation provider for the principal								
A person against whom an interim or final family or domestic violence intervention order or protection order has been made in the five years prior to execution of the EPOA, where the principal is a person for whose protection the intervention order or protection order was issued The prohibition period should commence from the expiry of the intervention or protection order, or the expiry of any renewal/extension of that order								
A person who has been convicted of an offence involving dishonesty in the last five years prior to the execution of the EPOA								
A person who has been convicted of an offence involving violence occurring within the principal's family or domestic context in the last five years prior to the execution of the EPOA								
A person who is bankrupt or insolvent, or who has been bankrupt or insolvent in the last five years prior to the execution of the EPOA								

Key

- Current legislation aligns with the proposal presented for consultation
- Current legislation is somewhat similar to the proposal presented for consultation
- Current legislation does not expressly address the proposal presented for consultation
- Current legislation aligns with the proposal presented for consultation due to inference

154 See *Powers of Attorney Act 2006* (ACT) ss 13(3), 14(1)(b), 21(1)(b), s62, s63.
155 See *Powers of Attorney Act 2003* (NSW) ss 5(f) and 19(1)(c)(iv) and 5(d).
156 See *Powers of Attorney Act 2014* (VIC) ss 28, 35(2)(c) and 53.
157 See *Powers of Attorney Act 1998* (Qld) ss 29 and 31.
158 See *Powers of Attorney Act 2000* (Tas) ss 9(1)(ba) and 32AE(5)(b).
159 See *Powers of Attorney and Agency Act 1984* (SA) Schedule 2, Gino Dal Pont, *Powers of Attorney* (LexisNexis Butterworths, 2nd ed, 2015) [4.8].
160 See *Guardianship and Administration Act 1990* (WA) ss 104C, 3(b).
161 *Advance Personal Planning Act 2013* (NT), Gino Dal Pont, *Powers of Attorney* (LexisNexis Butterworths, 2nd ed, 2015) [4.8].

Appendix 1 – Existing interstate recognition landscape

Jurisdiction's existing interstate recognition landscape

ACT	NSW	VIC	QLD	SA	NT
• An interstate enduring power of attorney has effect in this State as if it were an enduring power of attorney made under, and in compliance with, this Act, but only insofar as the powers it gives under the law of the State or Territory in which it was made could validly have been given by an enduring power of attorney made under this Act.[162]					

TAS
• An instrument creating an EPOA that is registered in another jurisdiction that corresponds to this jurisdiction's Act is taken to be registered in this jurisdiction for the purpose of the Act. • In Tasmania an instrument creating or revoking a POA may be registered in Tasmania, whether or not it was executed in accordance with the law of Tasmania[163]. An instrument creating a POA that is registered in another State or a Territory is taken to be registered in Tasmania[164]. A registered instrument grants the same powers or substantially the same, effect as an EPOA made under Tasmanian law[165]. A legal practitioner is required to certify that an EPOA is registered in another State or Territory, or was executed in accordance of law of the relevant State or Territory

WA
• An attorney under an interstate EPOA may apply to the relevant tribunal for an order recognising the EPOA in this jurisdiction, and if the relevant tribunal is satisfied that the interstate EPOA corresponds sufficiently in form and effect with an EPOA made under this jurisdiction's Act and it is appropriate to do so, the tribunal may make an order recognising the interstate EPOA. • The relevant tribunal may at any time, on the application of a person who in the opinion of the tribunal has a proper interest in the matter, revoke an order recognising an interstate EPOA.

Section 25(4) of the *Powers of Attorney Act 2003* (NSW) provides that a document signed by an Australian legal practitioner that certifies that an interstate enduring power of attorney was made in accordance with the formal requirements of the law of the State or Territory in which it was made is admissible in any proceedings concerning that power and is prima facie evidence of the matter so certified".

162 This wording is used verbatim in both ACT and NSW provisions (see *Powers of Attorney Act 2006* (ACT) s 89(2) and *Powers of Attorney Act 2003* (NSW) s 25(1)) but other jurisdictions have provisions which essentially mirror this wording. See, for example, *Powers of Attorney Act 1998* (Qld), s 34.

163 *Powers of Attorney Act 2000* (Tas) s 43.

164 *Powers of Attorney Act 2000* (Tas) s 42.

165 *Powers of Attorney Act 2000* (Tas) s 47.

Appendix 1 – Attorney Duties

Jurisdictions' existing legislation against proposal presented for consultation (attorney duties)

Duty Provisions – whether there is a law stating an attorney must:	ACT[166]	NSW[167]	VIC[169]	QLD[169]	TAS[172]	SA[171]	WA[173]	NT[168]
1. *act in accordance the requirements specified in the EPOA*								
2. *act in accordance with the provisions of the relevant EPOA Act*								
3. *act honestly, in good faith and with reasonable care*								
4. *not enter into actual or potential conflicts unless expressly authorised under the EPOA or by a court or tribunal*								
5. *keep attorney and principal's property separate, unless owned jointly by the principal and attorney*								
6. *keep accurate records and accounts of all dealings and transactions made under the EPOA*								
7. *unless otherwise directed in the EPOA, take reasonable steps to notify any other attorneys appointed under the EPOA about any action taken under the EPOA*								
8. *seek the views, wishes and preferences of the principal and take into account any views, wishes and preferences expressed or demonstrated by the principal (or what these would likely be if the principal had decision-making capacity in relation to that matter and could communicate their views, wishes and/or preferences)*								

Key

- Current legislation aligns with the proposal presented for consultation
- Current legislation is somewhat similar to the proposal presented for consultation
- Current legislation does not expressly address the proposal presented for consultation
- Current legislation aligns with the proposal presented for consultation due to inference

166 See *Powers of Attorney Act 2006* (ACT) s50 and s50A 'an attorney may be ordered by a court to pay compensation for loss caused by the attorney's failure to comply with the Act in the exercise of the EPOA' and s44, s 42, s48, s 47, s44 and General principles in Schedule 1 of the Act, s32 (1A)

167 See *Powers of Attorney Act 2003* (NSW) s36(4)(e).

168 See *Advance Personal Planning Act 2013* (NT) s21(1)(b)(i), s21(1)(b)(iii), s21(1)(d), s31, s30, s22(3)-(5A).

169 See *Powers of Attorney Act 1998* (QLD) s67, s106(1),66, 73,86,85, 6C(10).

170 See *Powers of Attorney and Agency Act 1984* (SA) ss 7-8.

171 See *Powers of Attorney Act 2014* (VIC) s21 'Principles to be applied by persons acting under this Act or an enduring power of attorney', s77, s63, s63(1)(d) and s64,69, 63(1)(f) and s66, s21(2)(a)

172 See *Powers of Attorney Act 2000* (TAS) s32(1) attorney is taken to be a trustee and must protect interests of principal, s32AC, s32(3), s32AD, s32(1A).

173 See *Guardianship and Administration Act 1990* (WA) S107 (1)(a) 'act with reasonable diligence', s107.

Appendix 1 – Attorney Duties

Jurisdictions' existing legislation: the views, wishes and preference of the principal

Duty Provisions – whether there is a law stating an attorney must:	ACT[174]	NSW[175]	VIC[179]	QLD[177]	TAS[180]	SA[178]	WA[181]	NT[176]
1. *at all times exercise their powers under an EPOA in the **best interests** of the principal*		●				●	●	
2. ***ascertain and consider** the principal's views, wishes and preferences*	●			●	●			●
3. ***give appropriate and practicable** effect to the principal's views, wishes and preferences*			●					

174 See *Powers of Attorney Act 2006* (ACT) sch 1 item 1.6(4).

175 The *Powers of Attorney Act 2003* (NSW) does not outline objectives or principles which should be followed by attorneys to assist in their decision-making in relation to the role and use of EPOAS, however the prescribed Enduring Power of Attorney form provided by NSW Land Registry Services states that "An attorney must always act in your best interest".

176 See *Advance Personal Planning Act 2013* (NT) s 22(4)-(5A).

177 See *Powers of Attorney Act 1998* (QLD) ch 1A s6C(10) ss(3)-(5).

178 The *Powers of Attorney and Agency Act 1984* (SA) does not outline objectives or principles which should be followed by attorneys to assist in their decision-making in relation to the role and use of EPOAS. However, the principles expounded in the *Guardianship and Administration Act 1993* (SA) s5 and the *Advanced Care Directives Act 2013* (SA) s10(g) reflect a 'best interests' approach.

179 See *Powers of Attorney Act 2014* (VIC) s21(1)-(2).

180 See *Powers of Attorney Act 2000* (TAS) s32(1A)(c)(i)-(ii).

181 The *Guardianship and Administration Act 1990* (WA) does not outline objectives or principles which should be followed by attorneys to assist in their decision-making in relation to the role and use of EPOAS, however see s4(2) where it is stated that the primary concern of the State Administrative Tribunal shall be the best interests of any represented person or of a person in respect of whom an application is made.

Appendix 1 – Compensation

Jurisdiction's existing legislation: compensation provisions

Proposal/current law - TBA	ACT[182]	NSW[183]	VIC[188]	QLD[185]	TAS[187]	SA[186]	WA[189]	NT[184]
Compensation for loss caused by failure to comply with the relevant State or Territory Act when acting as an attorney or to account for any profits the attorney has gained as a result of the attorney's failure to comply with the relevant State or Territory Act								
Relief from personal liability due to contravention is available if attorney acted honestly, reasonably and ought fairly to be excused for the breach								
Whether time limits apply for seeking compensation against an attorney								
Whether compensation available for loss of benefit in estate (ademption)								
Whether an interested party may apply to the court or tribunal in relation to EPOA?								
Whether compensation available even if attorney's appointment ended								

Key

- Current legislation aligns with the proposal presented for consultation
- Current legislation is somewhat similar to the proposal presented for consultation
- Current legislation does not expressly address the proposal presented for consultation

182 See Powers of Attorney Act 2006 (ACT) s50, s52, s50(3) – apply within 6 months of death of attorney or principal and if both deceased, within 6 months of the first death, though time may be extended, s50A, This is not explicit although compensation is available if the attorney has died Powers of Attorney Act 2006 (ACT) ss50, 50A.

183 See Powers of Attorney Act 2003 (NSW) s22, s31.

184 See Advance Personal Planning Act 2013 (NT) s83, S31 manage as trust property, s58(i).

185 See Powers of Attorney Act 1998 (QLD) s106 – Compensation and an account of profits are alternative remedies, s105, Six months – 106(5) and 106(6),107, s110 – includes family, public guardian or trustee or interested person, s106(4).

186 See Powers of Attorney and Agency Act 1984 (SA) s7,) s12 provides some relief from liability, For ademption claims, 6 months – s11A, s11A, s11.

187 See Powers of Attorney Act 2000 (TAS) s32, s51(1A) limited to revoked EPOAs, s32AH– a 3-month time limit applies, s32AD(3).

188 See Powers of Attorney Act 2014 (VIC) s77, s74, Six months – s79, s83A, s78, s77.

189 See Guardianship and Administration Act 1990 (WA) Note while administrators appointed by the SAT may be liable for losses (Guardianship and Administration Act 1990 (WA) s80) there are no such provisions for a donee (attorney) under an EPOA, 109.

Appendix 1 – Existing criminal EPOA offences

Jurisdiction's existing legislation: criminal EPOA offences

Does the Act feature -	ACT[190]	NSW[191]	VIC[194]	QLD[193]	TAS	SA	WA	NT[192]
Criminal penalties that relate to misrepresentation and EPOAs? (e.g. holding oneself out wrongly to be an attorney)		●						●
Criminal penalties that relate to the dishonest use of an EPOA?			●	●				●
Criminal penalties that relate to the dishonest inducement of another to make, amend or revoke an enduring document and/or to exercise authority as an attorney contrary to the enduring document?	●		●	●				●

Key

- ● Yes, there is a specific EPOA criminal offence in relation to this matter
- ▢ No, there is not a specific EPOA criminal in relation to this matter

Note for completeness that inducing the attorney to exercise authority improperly in an offence in the NT.[195] Some jurisdictions have criminal offences in addition to those listed above but still relate to breach of duties under an EPOAs. Some examples include, a failure by the attorney to keep and preserve accounts of dealing under the EPOA is an offence in SA. [196] A failure to act honestly and with reasonable diligence is an offence in Queensland.[197] A failure to keep property separate in Tasmania attracts a penalty of a fine not exceeding 50 penalty units.[198] Further, some jurisdictions have specific EPOA offences that do not directly relate to duties under an EPOA but relate to broader tribunal and government processes involving EPOAs. For example, providing a false or misleading statement to Tasmanian Civil and Administrative Tribunal is an offence in the context of an EPOA application and providing misleading information in relation to an advanced personal plan to an 'agency officer' is an offence in the NT.

190 See *Powers of Attorney Act 2006* (ACT) s90.
191 See *Powers of Attorney Act 2003* (NSW) s49
192 See *Advance Personal Planning Act 2013* (NT) ss 76, 78(3)-(4), 77 and 79. For other criminal penalties that relate to the abuse/misuse of or breach of duties under an advanced care plan, see broadly ss 75-83
193 See *Powers of Attorney Act 1998* (QLD) ss 61, 66.
194 See *Powers of Attorney Act 2014* (VIC) ss 135-136
195 See *Advance Personal Planning Act* (NT) s79.
196 See *Powers of Attorney and Agency Act* 1984 (SA) s8.
197 See *Powers of Attorney Act 1998* (Qld) s66.
198 See *Powers of Attorney Act 2000* (TAS) s32(3).