



29 November 2023

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

Dear Attorney-General's Department

ACT Human Rights Commission submission to Achieving Greater Consistency in Laws for Financial Powers of Attorney | September 2023

The Commission is pleased to provide a response to the consultation paper issued by the Department of the Attorney-General on Achieving Greater Consistency in Laws for Financial Powers of Attorney (Consultation Paper).

The Commission welcomes the proposal to achieve greater national consistency in financial enduring powers of attorney (EPOA) laws and considers that as a minimum, formulating an agreed set of nationally consistent principles for financial EPOAs will reduce the incidence of financial abuse of vulnerable adults and see an improvement in vulnerable adult safeguarding mechanisms.

While strongly supportive of the proposal to achieve national consistency in financial EPOAs, the Commission's submission identifies elements of the proposal for feedback that merit further consideration.

Should you wish to discuss this submission further, please contact me on 6205 2222.

Yours sincerely

Karen Toohey

Discrimination, Health
Services, and Disability and
Community Services
Commissioner

About the ACT Human Rights Commission

The ACT Human Rights Commission is an independent agency established by the *Human Rights Commission Act 2005* (HRC Act). Its main object is to promote the human rights and welfare of people in the ACT.

The Commission includes:

- i. the President and Human Rights Commissioner;
- ii. the Discrimination, Health Services, Disability and Community Services Commissioner;
- iii. the Public Advocate and Children and Young People Commissioner; and
- iv. the Victims of Crime Commissioner.

In May 2020 the role of the Commission was expanded to include a new complaints function for the abuse, neglect or exploitation of vulnerable people.

Section 41B (1) of the HRC Act provides that a person may complain to the Commission about the treatment of a vulnerable person if the person believes on reasonable grounds that the vulnerable person is subject to or at risk of abuse, neglect or exploitation.

The definition of a vulnerable person at s41B (2) in the HRC Act is as follows:

- a person older than 60 who has a disability or impairment or for some reason is socially isolated or unable to participate in community life
- any adult with a disability (defined in the *Disability Services Act 1991*) which includes an intellectual, physical, sensory or psychiatric impairment.

The ACT is only the second jurisdiction, together with NSW, to have a broad civil complaints process to respond to claims of abuse, neglect or exploitation of vulnerable people aged 60 years and above, and adults with a disability. The jurisdiction covers domestic and family settings, service providers, accommodation, guardianship and power of attorney arrangements, disability providers and in-home care.

Once the Commission accepts a vulnerable person's complaint, it investigates such allegations and takes any further action it considers necessary, including requiring the production of documents, initiating investigations on its own motion, providing third party reports, conciliating disputes, and working collaboratively with other agencies to support the vulnerable person keep safe while working within a supported decision-making framework. The Commission's intention is always to improve the safety of the vulnerable adult and uphold their rights.

It is clear to the Commission that there is a general lack of understanding in the community about financial EPOAs, including the responsibilities of an attorney and the ongoing rights of a principal. Achieving greater consistency in laws for financial EPOAs will improve this.

Consultation issues

The Commission supports a nationally consistent approach to the proposals for feedback, including the creation of nationally consistent laws. As a minimum, the Commission hopes that an agreed set of principles arising from this consultation can be formulated which will serve to guide the states and territories.

Our submission addresses the questions identified in the Consultation Paper as set out below.

1. Witnessing arrangements in relation to principals

a. 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?***

The Commission recognises the need to balance the key policy considerations of convenience and accessibility on the one hand, with effective safeguarding mechanisms on the other, when considering model provisions about the number and qualifications of authorised witnesses to an EPOA. The Commission considers this can be achieved using a nationally consistent approach across jurisdictions to witnessing requirements.

The Commission supports a nationally consistent approach (as opposed to retaining jurisdiction-specific approaches) to the overall number of witnesses required, the class of persons who may act as authorised witnesses, the class of persons who cannot act as witnesses and the qualifications they hold. The Commission also supports the model proposal that the principal's signature of an EPOA must be witnessed by at least one authorised witness, with two witnesses being preferable (one of whom being an authorised witness).

While the implementation of a nationally consistent approach to witnessing EPOAs raises valid concerns regarding accessibility and flexibility of EPOA executions, particularly in regional and acute settings, measures can be achieved to ensure that a uniform system is adaptable to diverse needs by leveraging technology to assist with the witnessing process, expanding the eligibility of authorised witnesses, and establishing a mechanism for review and adaption of witnessing processes.

With respect to the qualifications that authorised witnesses are required to hold, the Commission considers that legal practitioners, JPs, certain health practitioners, and other

professionals familiar with the execution of legal documents would be suitable. Having a nationally consistent class of authorised witnesses is beneficial because it ensures uniformity across all jurisdictions, making it easier to understand and comply with the requirements necessary for witnessing an EPOA regardless of location. Moreover, having a class of identified witnesses would make it easier to streamline targeted training and resource development.

The Commission considers that a jurisdiction-specific approach perpetuates the fragmented legal landscape which this consultation is seeking to ameliorate, where individuals in different states and territories are subject to varying standards. This inconsistency undermines the principle of equal access to legal protections and may create a disparity in the level of protection afforded to people depending on the jurisdiction and location in which they reside. Moreover, the absence of a standardised approach could create educational challenges, particularly around upskilling witnesses on the requirements associated with assessing whether a principal understands the nature and effect of the EPOA.

b. Feedback is sought on whether your experience of the witnessing requirements for financial EPOAs, as they apply in your jurisdiction, appropriately balances factors such as accessibility, with providing appropriate protection and assistance to principals.

The ACT's *Powers of Attorney Act (2006)* provides, among other things, that one witness must be authorised to witness statutory declarations. The existing witness certification requirements in the ACT also include that the principal signed the EPOA voluntarily in the presence of the witness and at the time the principal signed the EPOA, the principal appeared to the witness to understand the nature and effect of making the EPOA.

While the *Powers of Attorney Act (2006)* attempts to minimise abuse, the list of authorised witnesses is expansive, and the Commission has concerns that many authorised witnesses are unfamiliar with the requirements set out in the legislation regarding what constitutes 'understanding the nature and effect of making the EPOA' or properly questioning whether the principal is executing an EPOA freely and voluntarily.

Accordingly, the Commission considers that safeguarding measures have been compromised by accessibility considerations in the ACT.

c. Feedback is sought on the proposed establishment of prescribed information resources, which witnesses would draw to the attention of the principal. What matters do you consider should be addressed in the prescribed information?

The Commission strongly supports the introduction of common prescribed information resources which witnesses would draw to the attention of the principal. The Commission

considers that the prescribed information should be common across all jurisdictions and accessible to people with disability and diverse communities.

The prescribed information should include the following elements (for Principals):

- Nature and effect of an EPOA: What is an EPOA is and how does it operate.
- Choosing an Attorney: Guidance on selecting an attorney, with an emphasis on the importance of trust and the attorney's ability to manage affairs responsibly and in accordance with the wishes of the principal.
- Scope of Attorney's powers: Information on the extent of the powers that can be granted, including any limitations or conditions.
- Rights of the principal: Clarify the principal's rights, including the right to be at the centre of decisions relating to their affairs.
- Decision-making capacity: Information on what amounts to decision-making capacity and what happens if the principal loses capacity. Information on decision-making principles and supported decision-making necessary.
- Risk of abuse and safeguards: Discuss the safeguards that can be put in place, like appointing multiple attorneys, etc.
- Revocation process: Explain how and under what circumstances an EPOA can be revoked.
- Where to go for help: Details of where the principal can obtain legal and financial advice regarding an EPOA or misuse of an EPOA.
- Questions around coercion and control to get the principal questioning whether they are being pressured into signing the document.

d. 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).

The Commission supports the requirement that all authorised witnesses certify a principal appeared to freely and voluntarily sign the EPOA and appeared to the witness to have decision-making capacity to make the EPOA. The Commission also considers the authorised witness could certify they have provided and discussed the prescribed information with the principal (see above) before witnessing the execution of the document.

The Commission strongly disagrees with the proposal of imposing different obligations for different classes of witnesses as it could easily create a system of inequity. If certain classes of witnesses are held to higher standards or are required to undertake more rigorous witnessing practices and effectively improved safeguarding measures, this could lead to unequal treatment of EPOAs based on who witnesses them. For example, people who are financially disadvantaged, or experience other barriers to accessing specialised legal services, may be disadvantaged because of this two-tiered approach.

Moreover, if certain classes of witnesses have more stringent obligations, it might limit the pool of available witnesses willing to undertake the task, which could disproportionately impact individuals in remote or rural areas. Implementing and managing different sets of obligations would also require additional administrative resources and training, thus diverting resources from other areas.

2. Acceptance of appointment by an attorney

a. Feedback is sought on the benefits and feasibility of establishing a single national attorney acceptance form.

The Commission supports the model provision of a single national attorney acceptance form comprising the elements outlined in the Consultation Paper, other than the additional witnesses' requirements imposed on authorised witnesses from a class of witnesses prescribed for this purpose (see reasoning above at 1(d)).

b. Would the proposed role(s) for the authorised witness provide an appropriate degree of assurance that the attorney understands the obligations of their appointment?

The Commission considers that the proposed role of the authorised witness certifying that they drew the attorney's attention to: (a) the prescribed information addressing attorney duties; and (b) that the attorney understood their responsibilities, duties and obligations under the instrument, would provide an appropriate degree of assurance that the attorney understood the obligations of their appointment.

c. What matters do you consider should be addressed in the prescribed information?

The following matters should be included in prescribed information for attorneys:

- Nature and effect of an EPOA: What is an EPOA is and how does it operate.
- Scope of attorney's authority: Outline the extent and limits of the attorney's powers, including what decisions they can and cannot make.
- Roles and responsibilities: Clearly define the attorney's duties and legal requirements that the attorney must adhere to, including record keeping and prohibition on conflict transactions.
- Decision-making process: Provide guidance on making decisions aligned with the principal's values and preferences and how to support the principal make decisions in relation to their finances.
- Revocation process: Explain how and under what circumstances an EPOA can be revoked.
- Conflict of Interest: Highlight situations that could amount to a conflict of interest and outline how to avoid and manage them.
- Consequences of misconduct: Explain the legal implications of breaches of their obligations.

- Resources for Support and Advice: Provide information on where attorneys can seek further guidance, legal advice, or support.

d. 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?**

The proposed approach could be flexible enough to accommodate situations where an EPOA needs to be put in place urgently or where an attorney is overseas/interstate by leveraging technology and having a sufficiently trained class of witnesses available.

3. Revocation of an EPOA

- a. A risk identified is that a principal may wish to revoke an EPOA when they are considered not to have decision-making capacity to do so. What qualifications or training requirements 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?**

The Commission considers it necessary to align the qualifications and requirements for witnesses assessing the capacity to appoint an attorney with those witnessing its revocation. Just as it is crucial to ensure that a principal fully understands the implications when appointing an attorney, the same level of care and understanding is necessary during revocation. Witnesses identified to certify whether a principal appears to understand the legal nature of effect of appointment should be equally equipped to evaluate them during revocation.

Ensuring that an authorised witness is adequately trained to make a considered determination of capacity in both the context of appointment and revocation could include training on the following:

- The EPOA legal framework: A knowledge of the legal framework and the legal test for decision-making capacity to appoint and revoke and the criteria used to assess it.
- Information about capacity and assessing/maximising capacity from a rights- based perspective
- Assessment techniques – how to maximise a person's capacity and use of supported decision-making.
- Free and voluntary: more clarity and guidance on what “appeared to freely and voluntarily” sign the EPOA looks like.
- Communication skills
- Cultural competence

Ultimately, the Commission does not support the introduction of more stringent witnessing requirements at the point of revocation because it could lead to potential delays in revoking an EPOA, which may be detrimental if the principal needs to urgently change their attorney due to concerns of misappropriation of funds. Moreover, more stringent requirements could undermine the principal's agency to decide whether to revoke and result in them having to prove they have decision-making capacity. Finally, if there are concerns that a principal has revoked an EPOA when they lacked capacity to do so, there is the Tribunal review mechanism as a safeguard.

b. What elements do you consider the prescribed information about the revocation of an EPOA should include?

The information provided to a principal about the revocation of an EPOA should include the following aspects:

- Conditions of revocation: An outline under what conditions an EPOA can be revoked (this typically includes the requirement that the principal has decision-making capacity to decide to revoke).
- Revocation process: Information on how to revoke an EPOA.
- Notification requirements: An explanation of the importance of notifying the appointed attorney/s and relevant third parties about the revocation (such as financial institutions, aged care facilities, etc).
- Impact of Revocation: Information about the consequences of revocation, such as whether there is a need to appoint a new attorney or not.
- Seeking advice: Encourage the principal to see advice if they have any doubts or questions about the process and implications of revocation.

4. Automatic revocation of an EPOA

While the Commission supports the introduction of automatic revocation where the attorney has committed violent offences or family violence towards the principal, the Commission does not support automatic revocation when it applies to the principal's family.

In investigating many complaints relating to the abuse, neglect or exploitation of vulnerable adults, particularly in the context of elder abuse, the Commission has observed that older people are often brought into disputes between siblings, with one sibling seeking to take adverse action against the other, often to the detriment of the older person who is caught in the middle and wants to maintain a relationship with both parties. The Commission holds concerns that including automatic revocation provisions to encompass the principal's family (as opposed to just the principal), particularly with regards to family violence orders, may be a potential avenue used by family members in conflict, potentially resulting in the wishes of the principal not being recognised.

The Commission supports a model provision which 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 automatic revocation criteria.

5. Attorney eligibility

The Commission appreciates the key policy considerations of promotion of personal choice on the one hand, with the risk to the principal on the other, in determining attorney eligibility.

The Commission is of the view that people should be able to make an informed choice about who to appoint as their attorney and the ineligibility criteria should be limited to the following:

- 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
- a person who is bankrupt or personally insolvent
- a person who is currently serving a sentence for a conviction of an offence involving dishonesty
- a person who is currently serving a sentence for a conviction of an offence involving violence towards the principal
- a person who is the subject of a current family violence order towards the principal

The Commission does not support the introduction of a five-year limitation period after the sentence has been served as it would not preference the choice and decision-making of principals, and accordingly the Commission considers there would be no need for a 'disclose and approve' approach during a five-year period.

In any event, the Commission does not support an approach that includes a statement in the EPOA highlighting an attorney's history which could be made available to third parties (i.e., recipients relying on EPOAs like banks).

6. Attorney duties

- a. 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?**

The Commission supports the move towards a supported decision-making model, and for any laws on EPOA to allow for supported decision-making, following the Victorian model and

QLD PA's approach of placing obligations on attorney to ascertain and give effect to the views, wishes and preferences of a principal who doesn't have decision-making capacity.

There may be occasions where substitute decision-making may be appropriate under a financial EPOA, such as:

- Where the principal is unavailable to make decisions (may be in hospital, overseas, etc).
- The attorney may choose to defer entirely to the principal to make decisions under an EPOA.
- The principal is unable to communicate their wishes.

b. 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 significant harm)?

There may be certain circumstances where it may be appropriate for an attorney under an EPOA to give less weight to the principal's wishes, such as:

- Where the principal expresses a wish during a period when they lack decision-making capacity and those wishes would contradict their known values, previous instructions or known history of decision-making.
- If the principal's wishes involve actions that are illegal, including actions that would involve fraud, deception, or harm to others.
- Where the principal's wishes put the attorney in a conflict transaction or breach of a responsibility under the EPOA.
- Where the principal has impaired decision-making capacity and where the wishes of the principal would render the principal destitute, bankrupt, in financial hardship – particularly where the principal's wishes were made without full awareness of the consequences or under different circumstances.
- Where the principal has impaired decision-making capacity and is acting under influence or coercion by another.

c. Should all types of attorneys be subject to the same obligations, regardless of their relationship with and access to the principal?

To ensure consistency and equity in the support attorneys provide to principals, the obligations should be the same no matter the type of attorney appointed.

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

- a. 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.**

In addition to the Tribunal pathway in the ACT to manage disputes and make determinations on a range of factors relating to EPOAs (including the power to award compensation in cases of breaches by the attorney), the introduction of adult safeguarding measures in the ACT has enhanced access to justice in cases of potential breaches of attorney duties.

Since May 2020, the Commission received 120 complaints relating to the abuse, neglect or exploitation of vulnerable adults in the ACT. Most complaints related to the abuse of vulnerable adults in the ACT, with many relating to the financial abuse or exploitation of a vulnerable person by an enduring instrument.

The examples below are a sample of the issues the Commission has considered relating to financial abuse of a vulnerable adult. For many vulnerable people, this abuse is most often borne out in the form of financial abuse through the misuse of an EPOA.

Excessive control by attorney under EPOA

Concerns were raised with the Commission regarding the misuse of funds of an older person by their attorney under an enduring power of attorney. The Commission met with the older person who raised concerns that the attorney was controlling their finances and making decisions which did not reflect their express will or preference. The older person wanted information in relation to their accounts and more control in the decision-making process. The older person said they wanted to maintain the relationship with the attorney, if possible, who was their adult child. The Commission provided the attorney with an opportunity to respond to the concerns raised and assessed that the matter could be conciliated. The Commission facilitated a conciliation conference between the parties where the older person had the opportunity to express in a safe forum their views about the attorney being overly controlling, not considering their wishes, and not providing them with an opportunity to participate in decisions relating to their finances. The Commission also worked with the attorney to enhance their understanding of the rights and obligations of attorneys, and the key decision-making principles.

Misuse of funds by an attorney under EPOA

Concerns were raised with the Commission that an attorney had misappropriated approximately \$30,000 from the principal's bank account. The Commission contacted the attorney and requested they attend the Commission to discuss the concerns raised. An acknowledgement was made that the money had been taken and used for their benefit, and an agreement for the repayment of funds misappropriated was drafted by the Commission and signed by the parties. The attorney elected to resume a relationship with the principal after this point.

- b. 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.**

The ACT Justice and Community Safety Directorate released a report in October 2023 into the operation of offences of abuse of vulnerable people as required by section 442C of the *Crimes Act 1900 (ACT)*.

The report highlighted that criminal justice responses alone were ill-adapted to address the complex and highly variable interpersonal dynamics that arise in cases of abuse of vulnerable persons and may have the unintended effect of dissuading people to report.

The experience of the Commission has been that in the context of complex familial dynamics, a restorative approach to the abuse of vulnerable adults is preferable to criminal justice measures.

8. Information, resources or training for witnesses and attorneys

The Commission supports mandatory (rather than voluntary) training modules, as well as a paper one if required (for accessibility reasons) and the monitoring and reporting of training for witnesses and attorneys. Any guidelines developed to assist witnesses assess decision-making capacity should be based on best practice and be evidence based.

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

While our submission addresses the questions identified in the Consultation Paper, to improve the efficacy of a nationally consistent EPOA framework, the Commission would like to note that the reform agenda should ultimately strive to include the following additional initiatives:

- The development of a nationally consistent framework to the issue of decision-making capacity and supported decision-making.



- An information/education strategy to better inform principals of the implications of making an EPOA, and the role and responsibilities of attorneys acting under an EPOA.
- The implementation of a state and territory registers of EPOAs with obligations on principals to register an EPOA once executed and on attorneys to update an EPOA once enlivened.
- A national strategy to raise awareness of EPOAs in financial institutions, hospitals, aged care settings and the broader community, including the creation of education initiatives, services to assist people experiencing financial abuse, and resources about EPOAs and abuse of EPOAs.