

Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney

Submission to the Attorney-General's Department,
Australian Government

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Contents

Who we are	4
Introduction	5
General principles and decision-making capacity	5
Execution of Enduring Powers of Attorney.....	5
Witnessing arrangement in relation to Principals	7
Obligations on witnesses	8
Enhanced witnessing obligations.....	10
Consultation questions	11
Acceptance of appointment by an Attorney.....	12
Conclusion	14

Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal people of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the consultation being conducted by the Attorney-General's Department in relation to financial enduring powers of attorney (EPOA) laws. The ALA's submission responds to the consultation paper provided by the Attorney-General's Department in September 2023, entitled *Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney* ('Consultation Paper').
2. The ALA supports the Federal Government's commitment to promoting and protecting the rights of Australians who require formal assistance with decision making and in minimising the opportunity for financial abuse of vulnerable people. Financial abuse of older Australians and other vulnerable people is a serious problem.
3. The ALA submits that support for these measures includes supporting greater access to opportunities to make EPOAs, despite the opportunity for abuse which these documents inherently present.

General principles and decision-making capacity

4. The ALA agrees with the recommended principles and criteria for determining decision-making outlined in the Consultation Paper.²

Execution of Enduring Powers of Attorney

5. The ALA notes the following proposal for feedback, as outlined in the Consultation Paper.³

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

² Attorney-General's Department, Australian Government, *Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney* (Consultation Paper, September 2023) 8.

³ Ibid.

- 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).

6. The ALA is strongly supportive of a prescribed form that is the same or substantially the same in all jurisdictions.
7. Principals of EPOAs are likely to have to reside, in the short- or long-term, in a variety of jurisdiction, depending on the location of Attorneys, family members and available aged care facilities. In the current situation, all parties involved in the production of an EPOA (including lawyers), need to review the legislation of various jurisdictions to determine which parts of the EPOA will be recognised in different places. Many EPOAs are completed without legal assistance, increasing the risk that the Principal has not considered the effect of their EPOA in all jurisdictional contexts.
8. The ALA submits that differences in requirements across state and territory borders could create confusion as to who has the authority and to what extent they hold authority. The ALA contends that such confusion increases the risk of abuse.
9. In circumstances where the Principal has lost capacity, different requirements in enduring documents present in different jurisdictional requirements could create considerable confusion as to the extent of the authority of the Attorney. Although such confusion may be capable of remedy, it will come at a monetary cost and increased personal distress for Principal and Attorney and other family members.
10. The temptation, where it is apparent that an enduring document will need to be effective in more than one jurisdiction, is to prepare an enduring document for each jurisdiction. This may lead to a chain of competing enduring documents which may result in the unintended cancellation of earlier enduring documents.
11. The format for the execution of the EPOA will be discussed later in this submission.

Witnessing arrangement in relation to Principals

12. The ALA notes the following proposal for feedback, as outlined in the Consultation Paper.⁴

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 be provided that 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 person not able to be authorised witnesses.

13. The ALA recommends that there be uniform requirements in relation to witnesses.

14. If the purpose of a prescribed form is to improve certainty and ease in ascertaining the validity and scope of the EPOA, then the ALA submits it is important not to undermine the totality of this consistency with variations in witnessing requirements in different jurisdictions. Whilst acknowledging that there will always be challenges presented by remoteness and variations in socio-economic, cultural and educational groups, particularly in geographically larger jurisdictions, the number of witnesses required should be uniform.

15. Currently all jurisdictions require that the witness be authorised. There should be uniformity as to the class of persons who meet the description of authorised witness and not vary from jurisdiction to jurisdiction.

16. In the interests of consistency and clarity, there does not seem to be any reason why the definition of who is an authorised witness should not be uniform. Local needs and broader considerations should be taken into account in determining the scope of the authorised

⁴ Ibid 9.

witness description, rather than having variations from jurisdiction to jurisdiction. The list provided in the proposal is appropriate; however, the ALA recommends that a definition of “close relative” be adopted by all jurisdictions for consistency. Once jurisdictions agree on the definition of an authorised witness, it seems an unnecessary complication for jurisdictions to be able to identify other ineligible witnesses.

17. Increased level of formality could discourage people from making an EPOA. Despite the acknowledged failings in the enduring documents system, is a system to be facilitated rather than hindered because of the structure it provides to supported decision-making. If it is considered socially useful for people to have enduring documentation in place, then the process to achieve this must be made as easy as possible by making it simple, manageable and inexpensive.
18. Whilst the more proscriptive the measures implemented to ensure that the EPOA operates as intended by the Principal of the EPOA the greater the risk of deterring people from executing the document. Wills and EPOAs are already considered confronting and unnecessary by many in the community. The greater the complexity of the process, the less inclined those most in need of enduring documents will be to organise and execute them. Practicalities and cost of execution of enduring documents must be considered in determining at what point absolute safeguards should be conceded in favour of implementation of formal structure.

Obligations on witnesses

19. The ALA notes the following proposal for feedback, as outlined in the Consultation Paper.⁵

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)

⁵ Ibid 10.

- 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 \(publications.qld.gov.au\)](https://publications.qld.gov.au/guidelines)
- contact details where a principal could seek further expert assistance.

20. The ALA submits that the certification requirement works well in Queensland where it has been implemented. The ALA notes, however, that the Queensland Capacity Assessment Guidelines are 56 pages in length.

21. The ALA submits that an authorised witness must be a witness with training in assessing capacity and explaining the significance of enduring documents, such as lawyers who have a current practising certificate, JPs, Cdecs, police officers, notary publics, doctors, pharmacists and officers of the court. Those who are not lawyers in this group must have appropriate training as to the effect of the EPOA, as well as how to make a reasonable assessment of capacity and whether the Principal understands the EPOA. Provided the appropriate training and resources are provided to the authorised witness, certification of the above will make the validity of the document easier to establish and there will be increased certainty that the Principal has understood the significance of the EPOA.

22. A document – which can be as short as two pages – can be provided to the Principal, or read to the Principal, to ensure that all the essential information about the purpose of the document, extent of the authority that will be given to an Attorney, when the document will come into effect, the right to limit the power of the Attorney and revocation of the EPOA has been given.

23. The ALA contends that making this information accessible, even if the Principal does not have access to a lawyer, ensures that the Principal understands nature of the power they are giving to the Attorney and how it will operate.

Enhanced witnessing obligations

24. The ALA notes the following proposal for feedback, as outlined in the Consultation Paper.⁶

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, 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).
- 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).

25. The ALA does not agree that only those who have sufficient resources to access a lawyer should be entitled to have the effect of the EPOA explained to them. If the material referred in the previous section is endorsed by the legislative framework, then it will be sufficient for all Principals.

26. Those whose affairs require “tailored advice” will need the assistance of a lawyer in drafting clauses in the EPOA and it will be fundamental to the provision of those legal services that the effect of the EPOA will be explained and does not need to be part of the certification for it to have occurred. In the event that a lawyer, who presumably has not drawn the EPOA, is required to explain the EPOA, the lawyer is likely to invoice the Principal for the time involved in doing same, thereby increasing the cost of the process.

⁶ Ibid 11.

27. The ALA does not support the need for different requirements for different types of authorised witnesses.
28. Should the requirement for explanation be implemented, there needs to be federal funding provided to enable free legal services to those who are remote or who cannot afford a lawyer, to ensure that all Principals have access to legal explanations.
29. In all other respects, the requirements of the above certifications are supported by the ALA.

Consultation questions

30. The ALA notes the list of questions in the Consultation Paper,⁷ some answers for which have already been provided earlier in this submission.
31. Additionally, the ALA considers that the matters which should be addressed in the prescribed information should include the following:
 - a. Identification that EPOA is a very powerful document;
 - b. Should the Principal lose mental ability to look after their affairs, whether that is temporarily or permanently, that their Attorney will have complete control over all their assets;
 - c. The number of Attorneys who can be appointed and how they make decisions;
 - d. When the power of a financial Attorney commences;
 - e. The documents enable the Principal to limit the powers of the Attorneys, conflict transactions, make gifts and that professional Attorneys may charge;
 - f. Impact on the terms of the Principal's will if assets are sold by the Attorney;
 - g. How the EPOA can be revoked;
 - h. The impact of marriage, civil partnerships and divorce on EPOAs;

⁷ Ibid 12.

- i. The need to have independently chosen the Attorney and the nature of the Principal's relationship with them;
- j. The obligations of the Attorney and enforcement of same;
- k. Resignation of an Attorney; and
- l. Advice to regularly review the EPOA.

Acceptance of appointment by an Attorney

32. The ALA notes the following proposal for feedback, as outlined in the Consultation Paper.⁸

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.

⁸ Ibid 13.

- 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.
- 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.

33. The ALA does not support the requirement that Attorneys' signatures should be witnessed or that their role should be explained to them by a witness. The ALA acknowledges that the role of the Attorney is extremely complex and that they should be educated as to their obligations.

34. However, Attorneys may not live so conveniently close to the Principal such as to enable the easy organisation by the Principal of the witnessing of the signature. Ensuring that the Attorney signs and returns the EPOA to the Principal or their solicitor is sufficiently time consuming. Ensuring that they have their signature witnessed by a qualified witness will add to the complexity of the process. The EPOA must be presumed to take effect even if the Attorney does not sign and return the document.

35. In addition to these difficulties, the time required for a legal witness to explain the nature and effect of the EPOA is likely to be considerable and would be charged, presumably to the Principal, thereby increasing the cost of the EPOA. If an explanation of the duties of an Attorney was required, there needs to be federal funding provided to enable free legal services to those who are remote or who cannot afford a lawyer, to ensure that all Attorneys have access to legal explanations.

36. Alternatively, comprehensive written material can be provided to an Attorney with the EPOA for signature. The Attorney could be required to sign an acknowledgement that they have read the material.

- a. The ALA submits that there should be an emphasis in the material around duties and responsibilities of the Attorney so that the Attorney is fully aware of the extent of their role. Formal education classes should be made available but undergoing this should not be a requirement for the valid appointment of the Attorney.

Conclusion

37. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the consultation being conducted by the Attorney-General's Department in relation to financial enduring powers of attorney laws.

38. The ALA is available to provide further assistance to the Attorney-General's Department on the issues raised in this submission.



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