

28 November 2023

Australian Government
Attorney General's Department
<https://consultations.ag.gov.au/families-and-marriage/epoa/>
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As the Assistant Public Advocate Exercising the Powers and Functions of the South Australian Public Advocate, I welcome the opportunity to provide a submission to the consultation paper on *Achieving Greater Consistency in Laws For Financial Enduring Powers of Attorney, September 2023*.

In the authority established under the *Guardianship and Administration Act 1993*, the Public Advocate supports the rights of, and safeguarding measures for, South Australians with decision-making impairment.

I further advise that the Public Advocate can be appointed as a guardian for people who need assistance to make decisions where there is no other suitable person willing and able to undertake that role. As of November 2023, the Public Advocate is guardian for approximately 2100 clients who have been deemed by the South Australian Civil and Administrative Tribunal (SACAT) as lacking "mental capacity".

About a third of clients under the Guardianship of the Public Advocate are older South Australians with dementia, or other cognitive impairment, who may once have had capacity and now rely on others to assist them. These persons also often have a psychosocial disability and may live with other comorbidities e.g., trauma, mental health, social isolation, or homelessness. These people are highly vulnerable citizens in the community and law makers should do all that they can to safeguard them from fraud and abuse.

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The decision-making role of the Public Advocate, as public guardian, does not extend to financial decisions, and many clients of the Public Advocate are also under an administration order of the Public Trustee or have provided an Enduring Power of Attorney (EPOA) to a private citizen.

I hold the firm view that all South Australians should be free from fraud and abuse and empowered to make decisions about their finances to the greatest extent possible, in line with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). Consequently, as the role of the Public Advocate is not dictated by EPOA laws, but is tangentially affected by them, my comments in this submission are focused on achieving both rights protection and prevention of abuse for clients of the Public Advocate and vulnerable Australians generally.

I support all proposals in the Discussion Paper, with some exceptions as articulated below.

1. I strongly support proposals related to supporting the wishes, views, and preferences of the principal. While the EPOA is a substitute decision-making regime, it is recognised that Supported Decision-Making (SDM) is the preferred approach for all people with a cognitive impairment as SDM seeks to uphold the equal legal rights of citizens as specified under the UNCRPD. The recent report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability has also highlighted the importance of SDM in every area of a person's life. It is pleasing to note that the proposed EPOA changes support this approach as far as is possible. It is further noted that, as SDM is a new and emerging area, education about it for both principals and attorneys may be required. Materials should be developed to assist all parties to an EPOA to understand and give effect to such provisions and that these materials should be linked to the proposed National Register of EPOAs.
2. With respect to administrative matters, the discussion paper proposes numerous requirements for national uniformity. To the greatest extent possible, all legal provisions, forms, duties, and requirements should be uniform across jurisdictions. This would provide the greatest opportunity for ease of understanding by parties to an EPOA as well as mitigating the risk of abuse and fraud. However, there may be jurisdictional variations to consider, due to the intersection of EPOA laws with other jurisdictional laws and requirements.
3. With respect to the obligation for an authorised witness to draw the principal's attention to certain information, the OPA supports all suggestions other than that of '*...Assessing whether a principal has decision making capacity*'. This should

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only be assessed by a medical professional or an appropriately empowered body. There are some conditions, especially in older age, that can appear to a lay person as indicating a lack of capacity and to prevent erroneous decisions here, determination of capacity should always be done by a medical professional.

4. I support the inclusion of model provisions for acceptance of an appointment by an attorney and note the importance of these provisions, given the powers that the EPOA grants to an attorney.
5. Obligations of an authorised witness (AW) are also supported. However, I query whether the proposal to require that the AW explains the nature and effect of the EPOA to the attorney equates to the provision of legal advice. If so, this requirement should be restricted to Australian legal practitioners and not apply to any other class of AW who is not trained and authorised to provide legal advice. This provision could also specify the consequences for an attorney should they fail to comply with their duties and obligations. Such an inclusion would put attorneys on notice about the significance of their role and the obligations they owe to the principal.
6. My greatest concern regards the proposal to only allow revocation of an EPOA where the principal has decision-making capacity. As all the clients under the guardianship of the Public Advocate have been deemed by the SACAT to lack decision-making capacity in one or more areas of their life, this is likely to act as a significant barrier to fraud protection for these clients. A principal may be aware of the perpetration of fraud by their attorney and these provisions would prevent them revoking that EPOA. While the EPOA was granted with the intention of it empowering the attorney should the principal lose capacity, the principal should still have a right to have an EPOA revoked where their attorney is acting abusively or fraudulently. To mitigate this risk, the principal (or someone acting for the principal) should have a mechanism to report instances of fraud and/or abuse, which would trigger an immediate suspension of the attorney's powers, pending investigation by an appropriate body. Such safeguards would greatly assist in the rights protection of my clients and older Australians generally.
7. It is proposed to prohibit a person from acting as an attorney for the period of five years following the conduct of certain acts, including conviction of an offence involving dishonesty, for bankruptcy, or for family or domestic violence. Offences of this nature should prohibit a person from acting as an attorney for a lengthier period and potentially entirely. This is because a principal is more prone to the risk of coercive, exploitative, and controlling behaviours in circumstances of dishonesty and/or family and domestic violence. There is a risk that the

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principal's relationship with such a person would lead them to appoint the perpetrator as their attorney. It may be appropriate to allow application to an appropriate body who would determine whether such a convicted person should be allowed to act as attorney in certain circumstances, where this is the genuine wish of the principal. Overall, however, greater consideration should be given to this proposal, together with an appropriate exclusion period.

8. Regarding access to justice and compensation for loss incurred by an attorney who has failed to comply with the law, new avenues need to be considered. Currently in South Australia, such compensation is only accessible via the court system. Extending the jurisdiction of SACAT to deal with these matters would provide a cheaper and more flexible resolution process, allowing them to recover losses quicker in circumstances of urgency. I also support the proposed penalty regime for attorneys who act dishonestly and/or fraudulently, to better protect the rights of vulnerable people.

I thank you for the opportunity to make this submission.

Yours faithfully,



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