



COTA Victoria & Seniors Rights Victoria

Submission on Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney

To:

Attorney-General's Department

3-5 National Circuit

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About Us

Council on the Ageing (COTA) Victoria is the leading not-for-profit organisation representing the interests and rights of people aged over 50 in Victoria. For over 70 years, we have led government, corporate and community thinking about the positive aspects of ageing in the state.

Today, our focus is on promoting opportunities for and protecting the legal rights of people 50+. We value ageing and embrace its opportunities for personal growth, contribution, and self-expression. This belief drives benefits to the nation and its states alongside communities, families, and individuals.

In addition to our broad policy advocacy role on aged care issues, COTA Victoria plays an active role in the funded aged care system through delivery of the Care Finders program, building on our leading role in developing and trialling the Commonwealth Government funded and led pilot and program.

Seniors Rights Victoria (SRV) is the key statewide service dedicated to advancing the rights of older people and the early intervention in, and prevention of, elder abuse in our community.

SRV has a team of experienced advocates, lawyers, and social workers who provide free information, advice, referral, legal advice, legal casework, and support to older people who are either at risk of or are experiencing elder abuse. SRV supports and empowers older people through the provision of legal advice directly to the older person.

Executive Summary

COTA Victoria appreciates the opportunity to contribute to the consultation on 'Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney (EPOA)'. SRV is the leading service in Victoria dedicated to protecting the rights of older adults and preventing elder abuse. SRV's team of advocates, lawyers, and social workers provides free legal advice and support to at-risk seniors, empowering them with the resources they need to address abuse.

Our primary focus in this submission is to determine how best to protect the principal's wishes. While we support a national harmonisation of EPOA laws, we recognise that Victorian legislation already offers significant protection in certain areas. We are cautious about potential changes that could dilute our state's legislation for the sake of standardisation. Overall, we are calling for a considered approach that preserves the nuances of Victoria's existing protections, whilst moving towards a streamlined, national framework.

Our feedback is rooted in our practical experience of legislative gaps, with our central concern being the prevention of EPOA misuse. The feedback can be summarised in the following recommendations:

1. Implement a process that prioritises the principal's convenience while enhancing safeguards against potential misuse of an EPOA, ensuring the principal's will and preferences are respected.

2. We would also strongly support the introduction of a Register of Attorneys to relieve the principal of the obligation to notify third parties after revocation.
3. Refine the criteria for those qualified to witness an EPOA, ensuring only those who have training in ascertaining decision-making capacity and comprehend its significance and associated risks are eligible.
4. Introduce a requirement for qualified witnesses to actively inform attorneys of their responsibilities, mirroring the existing requirement for principals.
5. Simplify the revocation process by requiring only one authorised witness and no other witness, considering circumstances of urgency, the unique challenges faced by older individuals, and the restrictions on care facility employees.
6. Mandate attorneys to validate their understanding of their roles, possibly through some form of positive obligation or available training, confirming their comprehension of their duties.
7. Enforce transparency from potential attorneys, requiring them to disclose any factors that might be deemed disqualifying, ensuring uniform standards regardless of their relationship to the principal.
8. Streamline the EPOA revocation process in Victoria, with a stipulation for attorneys to return the original document promptly upon revocation.
9. Additionally, in cases of an attorney's financial distress, prioritise the safety and wishes of the principal.
10. Develop an online platform for resources and training for EPOA witnesses and attorneys, focusing on role clarity and responsibilities.

Responses to consultation questions

In this submission we have chosen not to respond to every individual consultation question to avoid repetition in our discussion. We broadly support the standardisation of EPOA laws given they do not dilute the existing safeguards in Victorian legislation. We commend the proactive approach of employing legislation not only as a corrective tool, but also to empower older people and prevent the misuse of EPOAs from occurring in the first place. Our submission includes real world case studies, with client names replaced, to demonstrate and highlight the misuse and abuse of EPOAs.

Witnessing arrangements in relation to principals

We wish to emphasise the importance of witnesses having a certain level of understanding of EPOAs to prevent misuse, advocating for maintaining Victoria's stringent witnessing standards. We recommend

simplifying the witnessing requirement to one authorized witness for revocations, particularly for individuals in care, to balance accessibility with protection. Prescribed resources should educate on reporting abuse and ensure witnesses inform principals about their rights and risks.

Case Study

Background: A client with questionable capacity, John, appointed his wife as an EPOA with the assistance of a solicitor. A few months later, his daughter took him to a police station. The daughter pressured John to appoint her as EPOA with a sergeant serving as a witness.

Issue: Some individuals with questionable capacity can sign EPOAs because the witnesses (or those overseeing the signing) fail to adequately assess or recognise the individual's cognitive state. This can lead to potential misuse or abuse of the power granted by the EPOA.

Witnessing Requirements for EPOAs: The authorization to witness affidavits is broad and can be susceptible to misuse in the case of EPOAs. Many individuals on the list might lack the expertise to assess decision-making capacity. It is imperative that any modifications to the witnessing requirements do not dilute the robustness of Victoria's current laws.

Balancing Accessibility and Protection: The *Powers of Attorney Act (2014)* has provisions, such as section 5A, that cater to witnessing procedures, including remote witnessing. While remote witnessing is commendable, it is essential to ensure safeguards against misuse. One such measure could be requiring the witness to certify that the principal is signing voluntarily.

Prescribed Information Resources: The prescribed resources should incorporate information that direct individuals to avenues where they can report misuse or elder abuse. It is important to implement a comprehensive process where witnesses actively inform the principal of their responsibilities and the potential risks.

Obligations for Authorised Witnesses: Given the challenges faced by individuals in care facilities to secure two witnesses, we recommend simplifying the process by requiring only one authorised witness for revocations. This reflects the urgent nature of some situations and aligns with our experiences with the challenges older individuals face, particularly in care facilities.

Case Study

Background: Jane, residing in a nursing home, urgently needed to revoke her EPOA. There was difficulty finding a secondary witness since most potential witnesses were nursing home employees. A student on placement, which isn't ideal, had to be used as the second witness.

Issue: Finding witnesses is especially problematic in nursing homes where potential witnesses are often employees of the facility and thus, cannot serve in this role.

Key Recommendations

1. Tighten criteria to be a witness for EPOAs to prevent misuse, ensuring witnesses are adequately qualified to assess decision-making capacity.
2. In remote witnessing for Powers of Attorney, implement safeguards such as mandatory certification by witnesses that the principal is signing voluntarily to prevent abuse.
3. Improve prescribed resources by including clear information on reporting misuse or elder abuse and outlining the principals' rights and risks.
4. Simplify witnessing for revocations for residents in care facilities by reducing the requirement to just one authorised witness.

Acceptance of appointment by an attorney

We propose a uniform attorney acceptance form in plain language to ensure attorneys fully understand their EPOA roles and obligations. Prescribed information should detail Attorney duties and legal provisions clearly, enhancing attorney education. EPOAs should only activate when the principal loses capacity, unless otherwise specified, to protect the principal's interests.

Case Study

Background: Jessica, with a mental health diagnosis but possessing capacity, had her neighbour appointed as an EPOA during COVID lockdowns. The neighbour loaned herself \$18,000 from Jessica's funds for home renovations and engaged in questionable financial transactions. The abuse was identified by another neighbour, prompting SRV to intervene and take appropriate action.

Issue: Attorneys either misunderstand or deliberately ignore their responsibilities and may not be aware of the consequences of doing so. This can result in conflicts of interest, financial and elder abuse, and failure to keep the principal informed or involved in decisions.

Uniform Attorney Acceptance Form: Research by the Australian Law Reform Commission indicates that attorneys often lack a comprehensive understanding of their roles, obligations, and the potential risks

associated with EPOA misuse. A consistent, plain-language document, available in multiple languages and audio formats, that requires formal acceptance is recommended.

Prescribed Information: The prescribed information should be in plain language and cover duties, seeking advice from the state tribunal, penalty provisions, obligations to keep the principal informed, record-keeping, rights, responsibilities, limitations, and interactions with other appointments, as per section 36, Division 1.

EPOA Activation and Attorney Acceptance: EPOAs should not be activated until the principal has lost capacity unless immediate application is indicated on the document. This stipulation regarding responsibilities should be clearly mentioned in the documents and understood by the attorney and the principal.

Key Recommendations

1. Create a standardised, plain-language form for EPOA attorneys, in multiple languages and audio formats, to ensure understanding of their roles and EPOA misuse risks.
2. Provide EPOA information in plain language, detailing duties, advice-seeking, penalties, communication, record-keeping, and rights, in line with legal requirements.
3. Activate EPOAs only after the principal's capacity loss, barring immediate application cases, with clear communication of these terms to both attorney and principal.

Revocation of an Enduring Power of Attorney

We maintain the need for a second witness in EPOA revocation, except for urgent cases in care facilities where a single authorised witness should suffice. Prescribed information should help principals understand when and how to appoint attorneys, including alternative options for attorneys.

Case Study

Background: Louise, a nursing home resident, needed an urgent revocation of her EPOA due to suspicious financial activities on her account. While building contractors on-site refused to assist, a resident's visiting spouse agreed to witness.

Issue: The absence of external witnesses posed a difficulty. Current forms necessitate witnesses to input their signature and home address, raising concerns over identity theft.

Revocation of EPOA: In cases of revocation, there should be a requirement for a second witness as per section 48(2)(d). However, if the person is in care, no additional witness should be necessary. Even without reducing the witness list, these situations may be urgent and require swift action.

Information on Revocation: The prescribed information should guide the principal on when it is appropriate to appoint an attorney. Additionally, information should be provided on other potential appointees, such as organisations or occupants of positions.

Key Recommendations

1. In cases of revocation, and if the person is in care, no additional witness should be necessary. These situations may be urgent and require swift action.
2. Include in the prescribed information clear guidelines for principals on when to appoint an attorney and provide details about other potential appointees, like organisations.

Automatic revocation of an Enduring Power of Attorney

We broadly support the proposals regarding automatic revocation but wish to emphasise the importance of considering the principal's individual choice and responsibility in scenarios where a safe contact intervention order is in effect, particularly if the carer is the respondent. Additionally, the principal's safety and wellbeing must be the primary concern when an attorney becomes bankrupt or personally insolvent.

Key Recommendations

1. Support automatic revocation of EPOAs in cases involving safe contact intervention orders and prioritise the principal's safety in scenarios where the attorney becomes bankrupt or insolvent.

Attorney Eligibility

Disclosure and Approval Approach: The disclosure and approval process must mandate full transparency from potential attorneys about any past issues that may affect their capability to act responsibly, such as prior dishonesty or current financial distress. It is particularly important to assess the implications of appointing someone as an attorney who has been bankrupt or insolvent or has a safe contact intervention order against them, especially if they are also the principal's carer.

Key Recommendations

1. Enforce full disclosure of any past issues from potential attorneys, especially in cases of past bankruptcy, insolvency, or safe contact intervention orders.

Attorney duties

We assert substitute decision-making should only be used when the principal's wishes are indiscernible, and decision-making capacity is absent, upholding Section 21's stringent safeguards. We also call for equal standards for all attorneys.

Case Study

Background: Beth's EPOA, her son, was in conflict with her. The son excluded Beth from crucial decisions and didn't respect her wishes. This conflict led to an intervention by SRV, and State Trustees were appointed as administrators.

Issue: Family conflicts play a significant role in many of the case studies, highlighting the need for standardisation across all types of attorneys.

Supported vs. Substitute Decision-making: Substitute decision-making should only be considered when there's no ascertainable will or preference and the principal does not have decision-making capacity. Section 21 should remain robust. Substitute decision-making is generally not supported unless in extreme circumstances where there's no indication of will or preference and no context or history that might indicate what the principal's wishes are.

Obligations for All Types of Attorneys: All types of attorneys, whether family members, friends, public trustees, or private trustee companies, should be held to the same standards and obligations. This is especially important when considering that an overwhelming majority of perpetrators of elder abuse are sons and daughters of the victim.

Key Recommendations

1. Reserve substitute decision-making for situations where the principal's will or preferences are unknown and they lack capacity, emphasising strict adherence to Section 21.
2. Apply uniform obligations and standards to all types of attorneys, in light of the high incidence of elder abuse by family members, particularly children.

Interstate recognition of EPOAs

We endorse a push for uniform language on forms and a clear national recognition statement on each document. Additionally, we propose creating an online training hub for attorneys and witnesses to ensure a consistent understanding of their responsibilities.

Interstate Recognition of EPOAs: The provision in section 138 is satisfactory, barring the need for more consistent wording across forms, such as medication treatment decision-maker, ensuring power of attorney, etc. Additionally, some institutions such as aged care facilities sometimes don't recognise POAs from other states as the documents are unfamiliar. We recommend the inclusion of a universal line statement on each document stating outlining its national recognition.

Resources and Guidance: We suggest an online hub for witnesses, recommended resources across jurisdictions, and a register for attorneys to facilitate engagement in ongoing training. These steps complement our recommendations for educating attorneys and witnesses on their roles and responsibilities.

Key Recommendations

1. Standardise terminology in EPOA forms and include a statement on each document affirming its national validity, especially for aged care facilities.
2. Develop an online platform for resources and training for EPOA witnesses and attorneys, focusing on role clarity and responsibilities.

Information, resources or training for witnesses and attorneys

We advocate for the creation and widespread distribution of unified, clearly named resources to improve nationwide understanding of EPOAs among attorneys, witnesses, and principals. Additionally,

we recommend establishing an attorney register to encourage training and ensure easy access to these resources, ultimately aiming to bolster knowledge and prevent EPOA misuse.

Useful Resources Across Jurisdictions: Resources that fall under the themes of such as the Victorian Office of the Public Advocate's 'Questions for your Lawyer', 'Guide for Attorneys' and 'You Decide Who Decides' and others should be produced and widely distributed across jurisdictions. The goal is to maximise understanding amongst attorney's, authorised witnesses, and principals.

Additionally, there should be consistent naming conventions for these documents and others related to EPOAs. It is crucial to ensure that these documents are recognised nationally across all states and territories to ensure seamless understanding and implementation.

National Register of Attorneys: We recommend the establishment and use of an attorney register where enlisted individuals can be readily identified and contacted. This would facilitate capacity-building, encourage training, and promote access to additional resources.

Key Recommendations

1. Produce and distribute educational guides and resources across all jurisdictions, aiming to enhance understanding among attorneys, witnesses, and principals.
2. Standardise the naming conventions for EPOA-related documents, ensuring national recognition and seamless understanding across all states and territories.
3. Establish a national register for attorneys to enable easy identification and contact, support capacity-building, and provide access to training and resources.

Revocation of an EPOA

For the revocation of an EPOA, it is vital to establish a process that is both responsive and secure. We propose that revocation process that removes barriers to a swift response while ensuring the principal's intention is clearly executed and protected from potential abuse.

Case Study

Background: Walid, after family conflict and cognitive decline, had to be shifted from his property to a care facility. He revoked his EPOA while in the hospital. Walid worried that his daughter might use the

old EPOA agreement to sell his property. SRV had to advise social workers to conduct regular checks to ensure the property isn't placed on the market.

Issue: Even after revoking EPOAs, there's a prevalent fear among principals that the revoked EPOA might still be misused. The current system does not provide enough safeguards or assurances to principals that the revoked EPOA will not be abused further.

Model Provision for Revocation: Only an authorised witness should be required, with no need for a second witness, particularly in aged care situations.

National Register of Attorneys: The establishment of a National Attorney Register would help facilitate better processes to ensure that revoked EPOAs are followed and enforced by all relevant parties.

Key Recommendations

1. Require only one authorised witness for EPOA revocation, eliminating the need for a second witness, particularly in aged care contexts.
2. Create a National Attorney Register to improve enforcement and adherence to revoked EPOAs by all relevant parties.

Other initiatives for preventing and responding to financial Elder Abuse

The perpetration of elder abuse and the misuse of EPOAs often occur not due to a lack of legislation, but despite it. Enhancing legal frameworks will undoubtedly bolster the legal system's capacity to support victims and combat the misuse of EPOAs, serving both as a deterrent and as a means for recourse. However, this legislative strengthening is just one facet of the comprehensive solution needed to effectively address the issue.

To prevent and address financial elder abuse, it is crucial for the Commonwealth, States, and Territories to prioritise non-legislative measures that complement efforts to harmonise financial EPOA laws. This includes sustained funding for organisations like SRV, which specialise in community education and elder abuse prevention.

Over the past year, SRV has seen a 50% increase in calls to the Elder Abuse Helpline and a 40% rise in non-legal advice sessions, indicating not just heightened demand but also greater case complexity. Some cases require extensive consultation, exceeding 50 hours. These trends, along with research showing increased awareness and prevalence of elder abuse, suggest a pressing, unmet need for services, particularly in regional Victoria.

Additionally, As the only Community Legal Centre in Victoria dedicated to preventing and responding to elder abuse, SRV offers free, accessible workshops and presentations. These sessions are targeted at older individuals, their family members, and caregivers. The aim of our education program is to empower those in close contact with the elderly to identify and appropriately respond to instances of elder abuse.

Funding constraints have led SRV to struggle with meeting this demand. The Helpline, following staffing cuts in July 2023, has been unable to promptly respond to calls, leading to a backlog and extended wait times. The resulting high staff turnover and the need to reallocate resources away from non-legal advice and casework have compromised SRV's integrated service model and increased caller frustration.

Just as economies of scale amplify the value of larger investments, the reduction in SRV's funding has caused a disproportionate decrease in service efficiency and effectiveness. Adequate funding is essential not just for preventing elder abuse and EPOA misuse, but for ensuring that organisations like SRV can maintain and expand their critical support services.

Conclusion

Through our submission, we have endeavoured to underscore the delicate balance between the ease of use of EPOAs and the robust safeguarding of older Victorians against financial abuse. Our recommendations are drawn from on-the-ground insights and are directed towards reinforcing the protection of the principal's wishes and enhancing the accountability of attorneys.

We advocate for a considered approach that preserves the nuances of Victoria's existing protections, whilst moving towards a streamlined, national framework. This includes the need for witnessing requirements, an informed and transparent appointment process, and an efficient yet secure revocation process. We also highlight the importance of providing adequate resources and training to both witnesses and attorneys to fulfil their roles effectively, and the need for ongoing support for organisations like SRV, which play a critical role in preventing and addressing elder abuse.

As the demographic of older Australians grows, it becomes increasingly critical to ensure that our legal frameworks evolve to meet their needs, prioritise their safety, and maintain their dignity. We trust that the feedback and case studies presented will be a valuable contribution to the discourse on this matter and will assist in shaping laws that are not only consistent, but also just and protective of one of our most respected and vulnerable cohorts.