Enhancing Protections relating to the use of Enduring Power of Attorney Instruments – Consultation Regulation Impact Statement

Submission to Australian Government Attorney-General's Department

March 2020

The Public Advocate

Influencing change to empower lives

Introduction

1. The position of Public Advocate is established under the *Guardianship and Administration Act 2000* (Qld). The primary role of the Public Advocate is to promote and protect the rights, autonomy and participation of Queensland adults with impaired decision-making capacity in all aspects of community life.

2. More specifically, the Public Advocate has the following functions:
   - promoting and protecting the rights of adults with impaired capacity (the adults) for a matter;
   - promoting the protection of the adults from neglect, exploitation or abuse;
   - encouraging the development of programs to help the adults reach the greatest practicable degree of autonomy;
   - promoting the provision of services and facilities for the adults; and
   - monitoring and reviewing the delivery of services and facilities to the adults.[1]

3. I welcome the opportunity to contribute to the development of options associated with the development of a national register for Enduring Power of Attorney (EPOA) documents across Australia.

Context and Purpose

4. Advance care planning, and, specifically, the development of enduring documents, represents a legal avenue for people to document their preferences and nominate substitute decision-makers for a time when they do not have decision-making capacity.

5. Consequently, the documents provide valuable safeguards and protections for people who have lost capacity, allowing for decisions to be made on their behalf by others who know their views, wishes and preferences.

6. Generally, the commencement of powers under an enduring power of attorney for financial matters (EPOA) is dependent upon the principal experiencing a loss of capacity (although many jurisdictions permit principals to set a specific date upon which the EPOA can become operative before a loss of capacity). The difficulty with documents that rely on a loss of capacity to become operative is that the process for determining when a person has lost capacity is not clearly defined in many jurisdictions, except via a formal tribunal (or similar forum) hearing and determination. In a large proportion of enduring powers of attorney, a decision about when the document becomes operative relies on a much less formal assessment of the principal's capacity, and the honesty and good will of appointed attorneys.

7. The power to legislate about matters relating to capacity, guardianship and administration resides with States and Territories, resulting in a plethora of different enduring documents, and EPOAs, across the country that are not necessarily recognised across State and Territory boundaries unless the individual document has the requisite characteristics to satisfy the local requirements for a valid EPOA.

8. The issues outlined above create significant challenges for financial institutions, accommodation and health care providers in determining whether an attorney is validly using an EPOA for decision-making on behalf of another. Principal among these is that there is no 'single source of truth' that can be accessed to determine if an EPOA is current and operative for decision making and transaction purposes.

9. In response to these issues, the Consultation Regulation Impact Statement examines the logistics and the expected costs and benefits of developing a national register of EPOA documents appointing financial administrators or attorneys, which can be accessed by banks,

[1] *Guardianship and Administration Act 2000* (Qld) s 209.

financial and other appropriate institutions and individuals to determine the currency of an EPOA as the basis for financial transactions.

National registry options

10. The three options proposed in the Consultation Regulatory Impact Statement include:
    - Maintaining the status quo — where no changes to the current framework are considered.
    - A regulatory option — which requires the introduction of mandatory registration requirements for EPOAs across the country which would be held in a national data source, accessible for searches by approved third parties to confirm EPOA existence and currency.
    - A non-regularly option — which would involve the introduction of a voluntary EPOA national registration system, with all EPOAs registered voluntarily held in a central location for searches by approved third parties.

    The Consultation Regulation Impact Statement is considering these three options outside of the potential harmonisation of laws related to the development of enduring documents.

11. I note that the proposal for the development of a national register for enduring documents (financial matters) has been driven by a range of factors including;
    - Anecdotal evidence suggesting that the abuse of enduring documents is a problem, and the extent of the powers granted by enduring documents means that any abuse is often relatively serious in its financial impact;[2]
    - Advocacy from the Australian Banking Association (ABA) and the Age Discrimination Commissioner for EPOA reforms, including a central register, supported by a range of community representatives.[3]

12. The Impact Statement also acknowledges that the policy response of developing a central national register (in whatever form) for EPOAs;

    > cannot and will not, remove all opportunities to deliberately or unintentionally misuse another person's money, but have been designed to provide additional information to the financial sector to detect and stop unauthorised transactions from occurring.[4]

13. Accordingly, the comments provided about the proposed policy options are made on the basis that the central register will act as an information source for banks, financial and other institutions and appropriate individuals to access when examining transactions for which an EPOA is proposed to be in effect.

The Public Advocate's position

Benefits of register unclear

14. While on its face, the proposal of a register for EPOAs seems to offer potential benefits, I am concerned that when closely examined, the benefits of a register in reducing or preventing financial elder abuse are untested.

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[2] Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report 131), p181-182. Cited in Australian Government Attorney-General's Department, *Enhancing protections relating to the use of Enduring Power of Attorney instruments, Consultation Regulation Impact Statement, February 2020*. Accessed online <https://www.ag.gov.au/Consultations/Documents/consultation-regulation-impact-statement/enhancing-protections-relating-use-enduring-power-of-attorney-instruments.pdf>

[3] Australian Government Attorney-General's Department, *Enhancing protections relating to the use of Enduring Power of Attorney instruments, Consultation Regulation Impact Statement, February 2020*, p14. Accessed online <https://www.ag.gov.au/Consultations/Documents/consultation-regulation-impact-statement/enhancing-protections-relating-use-enduring-power-of-attorney-instruments.pdf>

[4] Ibid, p14

15. There is no suggestion the registration process will be doing anything more with the EPOAs than examining them superficially to see if they comply with the legal requirements of their jurisdiction. There will be no process to determine that the documents have been validly executed by the named parties and that the principal, at the time of making the document, had the requisite capacity.

16. Tasmania has had a system of mandatory registration of EPOAs for some time. Information provided by the Tasmania Public Trustee is that they have not seen any impact or deterrence of financial elder abuse related to the registration requirement.

17. Similarly, a review of the cases that have been brought against dishonest attorneys in Australian jurisdictions shows that, in the majority of those cases, the financial misconduct involved real estate owned by the principal. In all Australian jurisdictions other than Victoria, for an EPOA to be used for a property transaction, the EPOA must be registered with the Land Titles Office. Again, the registration process did not prevent the dishonest actions of the attorneys in those cases.

18. It should be acknowledged that if the registration proposal proceeds, there is a distinct risk that the registration of an EPOA could embolden potentially dishonest attorneys by giving them an additional veneer of authority and propriety that may make their misconduct more difficult to challenge and stop.

19. In addition, it is highly likely that the requirement of compulsory registration will create an additional hurdle that may discourage people from making an EPOA, especially if there is a fee for registration. Fewer EPOAs being made will expose more people who have lost capacity to the risk of exploitation and financial and other abuse, because they do not have decision-making arrangements already in place. It will also result in fewer people having their preferred attorney appointed to make decisions for them after they have lost capacity and will place more pressure on the formal guardianship and administration system.

Difficulties if laws not harmonised

20. In the interests of improving the usefulness and convenience of enduring documents, I fully support the harmonisation of laws for advance care planning across Australia. Making the advance care planning process as simple and user friendly as possible will hopefully increase the number of Australians preparing and maintaining valid enduring documents that can be recognised anywhere in Australia, irrespective of where they made the document or choose to reside. I remain concerned that the Consultation Regulatory Impact Statement is not focusing on the harmonisation of laws, given the inter-relationship between State and Territory laws for making enduring documents and the establishment and use of the register.

21. For example, consider a person who has executed a valid EPOA in Queensland under Queensland legislation, registered the EPOA on the proposed national register and later moved to New South Wales where they lost capacity. Could the Attorney use the EPOA to make decisions on behalf of the principal in New South Wales, and how would someone searching the register know whether their EPOA was valid under New South Wales law?

22. These are the types of questions that are raised when considering a national register without also harmonising the laws.

23. Additionally, given that under an EPOA principals can appoint substitute decision-makers for personal and health matters, in addition to financial matters, there is a case to be made for the national register to include EPOAs for all types of decisions, rather than limiting it to EPOAs for financial decisions. Health and residential aged care facilities, medical practitioners and allied health staff all need to make important decisions to manage the health and wellbeing of a person in their care who may have lost decision-making capacity. A register would assist all those people engaged with the person to assess the authority of any self-nominated substitute decision-makers seeking to act on behalf of the person.

24. The development of a register exclusively for financial EPOAs would result in some jurisdictions, for example, Queensland, having to amend current EPOA forms, as the current forms combine powers for personal and health, and financial matters into the one document. This could be a relatively lengthy process to implement and would create issues around whether existing EPOAs could be registered.

Challenges to be addressed

25. The concept of the register, as explained in the Consultation Regulatory Impact Statement, will require significant modification if it is to achieve its primary objective of providing a source of valid information for financial institutions and others.

26. As previously noted, an EPOA for financial matters, is not operative until the date nominated by the principal in the document or at a time when the principal has lost capacity to make financial decisions. Therefore, merely being able to search a national register of financial EPOAs to determine the currency of a particular EPOA will not necessarily provide financial and other institutions with the information they require to determine whether the EPOA is operative at that time and that the attorney has the power to make the decision or transaction he or she is proposing to make. To know whether a transaction conducted under an EPOA is valid requires confirmation that the EPOA is both **valid and operative** at the point in time the financial transaction is occurring.

27. Capacity was discussed in some detail at the stakeholders meeting I attended on 25 February 2020 in Canberra. The discussion highlighted the decision-specific nature of capacity as well as the potential for those undertaking capacity assessments (e.g. doctors and other medical professionals) to not be fully cognisant of the legal frameworks underpinning capacity determinations and their implications.

28. Also raised at the meeting was the plethora of orders that may apply to EPOAs, made by various agencies within the justice system, including state and territory tribunals and Supreme Courts. Questions were raised as to how this information, as it relates directly to the operation of an EPOA, would be recorded on the register. These orders also impact on the 'activation' of the EPOA and the attorney assuming decision making for the principal.

29. An additional obstacle to the recording of information about a loss of capacity is the need to protect the privacy of the principal, and the state and territory laws that prohibit the publication of information about a guardianship or administration tribunal proceeding that could identify a person that is the subject of a relevant proceeding.

30. Those discussions concluded with the suggestion that, in its first iteration, the register should not try to be 'all things to all people'. The register may not be able to record and provide accurate and up-to-date information about the capacity of a principal named in a particular EPOA, and/or whether the EPOA is operative. Instead, It may be better to focus on the register providing information about EPOA currency for financial institutions and others. It would remain the responsibility of the institution or person dealing with the attorney to satisfy themselves (as far as reasonably practicable) that the EPOA was operative. Financial and other institutions may need to develop further policies and training for staff about how to deal with attorneys and meet their responsibilities to their clients.

Specific proposals

31. Considering the two options proposed for the national register, the first proposes the development of a compulsory system of registration where EPOAs are not valid until the national registration process is complete and the second, which involves a voluntary system of registration, where individuals can elect to register an EPOA if desired. Under this type of system, the onus would also be on individuals to register revocations or the creation of new EPOAs.

32. Given the challenges that need to be addressed to make a national EPOA register effective and useful, the lack of clarity about the benefits of the register and the potential negative impacts, I am unable to endorse either option.

33. However, if the Commonwealth were to proceed with a register there are a number of issues I would raise for consideration.

34. There should be no fee for registration of the EPOA. A fee would operate as a disincentive to people making EPOAs and would be a negative outcome in terms of protecting people who have impaired capacity and supporting them to choose their attorneys. It would also increase demand on the formal guardianship and administration systems in each state and territory (except Tasmania, that already has compulsory EPOA registration).

35. There should be fees to undertake a search of the register which could fund the costs of developing (in the first instance), operating and maintaining the register.

36. There will be a need for significant legislative amendments in each State and Territory to facilitate the mandatory registration of EPOAs. The time and resources associated with the process of individual State and Territory legislative amendments could potentially be more effectively spent harmonising laws related to enduring documents at a national level, which would resolve many of the issues noted in this submission.

37. It is unclear how the national register would integrate with the current systems of registration in each state and territory to permit attorneys to deal with real property. People should not be required to register twice.

38. It is unclear who will be responsible for the establishment and funding of the registries in each state and territory. The inefficiencies of duplication of resources to undertake pre-registration checks across jurisdictions would need to be addressed.

39. Even with a national register, without harmonising the laws for EPOAs, the problem of interstate recognition and validity of EPOAs will remain and would need to be resolved. For example, if a person had an EPOA registered in New South Wales, paying any the fees associated with the registration process and then moved to Queensland, would they be required to go through the process again, including the payment of duplicate registration fees in addition to the preparation of new enduring documents?

40. This also raises the question of whether people whose EPOAs are registered will need to keep the registry notified of their current address and any change of state or territory that might mean their EPOA is not valid in that jurisdiction. Again, this would not be an issue if laws were harmonised nationally.

41. I do not support a proposal for a status marker for capacity as part of the information recorded on any proposed register.

42. For those preparing enduring documents, it appears that the introduction of a national register without the harmonisation of laws could add significantly to the complexity, cost and confusion surrounding the documents and the concept of advance care planning generally. It is anticipated that the added step of registration has the potential for people to perceive that they must visit a lawyer to have the document prepared, which they may not be able to afford. In Queensland, significant work has been undertaken on enduring documents in attempts to simplify the process and make them more accessible and not necessarily requiring a person to take professional legal advice. The introduction of a national registration system and the complexities associated with that may cause people to believe that the preparation of an EPOA is a complex legal process, acting as a disincentive to the completion of enduring documents and advance care planning generally.

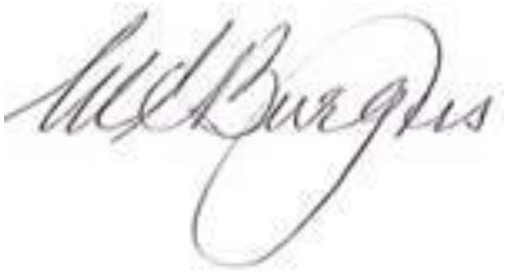
Conclusion

43. Thank you for the opportunity to contribute to this consultation process. I look forward to seeing the outcomes and to making further contributions regarding the harmonisation of laws and the potential development of a national register of EPOAs in the future.

44. Ultimately, improvements to advance care planning play an important role in respecting the rights, views, wishes and preferences of Australians who have either lost capacity to make decisions themselves or may at some stage in the future.

45. Given the issues associated with the development and operation of a national register outlined in this submission and at the external stakeholders meeting held in February 2020, I would be pleased to contribute to any working groups established at a state or national level to facilitate the introduction of a register if a decision is made to move forward with the project.

Yours sincerely



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