

Model financial enduring powers of attorney law

This document contains proposed core provisions that could form the basis of nationally-harmonised state and territory financial enduring powers of attorney laws.

This document has so far been endorsed by the following individuals and agencies:

- Queensland Public Advocate, John Chesterman
- Queensland Law Society
- Law Institute of Victoria
- Age Discrimination Commissioner, Kay Patterson
- Victorian Public Advocate, Colleen Pearce

Background

The possibility of there being harmonised enduring powers of attorney laws in Australia has been discussed for decades; the challenge of recognising interstate enduring powers of attorney was on the agenda of the Standing Committee (now Council) of Attorneys-General as far back as 2000.

In 2007 the House of Representatives Standing Committee on Legal and Constitutional Affairs recommended:

‘... that the Australian Government encourage the Standing Committee of Attorneys-General to work towards the implementation of uniform legislation on powers of attorney across states and territories’ (House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older people and the law*, September 2007, Recommendation 16, par. 3.44; see also par. 3.42).

Ten years later this was the subject of a recommendation from the Australian Law Reform Commission (*Elder Abuse – A National Legal Response*, 2017, Recommendation 5-3, p. 181).

The National Plan to Respond to the Abuse of Older Australians [Elder Abuse] 2019–2023 (Initiative 4.1) notes that ‘States and territories [will] consider developing options for harmonising enduring powers of attorney, particularly in relation to financial powers of attorney, to achieve greater national consistency’.

The benefits of harmonised financial enduring powers of attorney laws are four-fold:

1. Greater knowledge and certainty would exist throughout the country on enduring powers of attorney creation, usage and safeguards.
2. Meaningful national education on enduring powers of attorney could occur, including on the responsibilities of attorneys.
3. Increased consistency and efficiency would be achieved in the practices and expectations of institutions which deal with enduring powers of attorney (such as banks and other financial services providers).
4. The forthcoming national register of enduring powers of attorney (which is currently being developed) would be optimally effective.

This draft legislation contains the core provisions concerning financial enduring powers of attorney that states and territories could enact separately or within broader legislation.

Such broader legislation (which could be new legislation or amended existing legislation) might also include provisions concerning:

- general (non-enduring) powers of attorney;
- the appointment of enduring non-financial decision-makers (which are known in some jurisdictions as attorneys for personal matters, and in some as enduring guardians);
- advance care or health directives; and
- transitional provisions.

This draft draws heavily on elements of Queensland's current *Powers of Attorney Act 1998* as well as Victoria's *Powers of Attorney Act 2014*, with additions from other state and territory enduring powers of attorney legislation. It also draws on suggestions made during discussions with various stakeholder groups concerning harmonised financial enduring powers of attorney laws.

The draft is consistent with the Queensland and Victorian human rights legislation and international human rights obligations.

Core provisions of model financial enduring powers of attorney law

General principles

1. Where a person is exercising a power, carrying out a function, or performing a duty under this Act for a principal, the person must do so in a way that —
 - a) recognises the presumption of capacity;
 - b) supports the principal to participate as much as possible in the making of decisions that affect them; and
 - c) is least restrictive of the principal's ability to decide and act as is possible in the circumstances.

Making a financial enduring power of attorney

2. A person who is at least 18 years of age who has decision-making capacity in relation to making an enduring power of attorney, and who is making the enduring power of attorney freely and voluntarily, may make an enduring power of attorney for one or more financial matters (hereafter referred to as a financial enduring power of attorney).

3. By a financial enduring power of attorney a person may authorise one or more eligible attorneys to do anything on behalf of the person in relation to financial matters that a person can lawfully do by an attorney.

Decision-making capacity

4. A person has capacity to make a decision if the person is able to:
 - a) understand the information relevant to the decision and the effect of the decision;
 - b) retain that information to the extent necessary to make the decision;
 - c) use or weigh that information as part of the process of making the decision; and

- d) communicate the decision in some way, including by speech, gestures or other means.

5. A person has decision-making capacity for a matter if the person can satisfy the criteria in section 4 when provided with practicable and appropriate support.

Activation

6. A principal may specify in a financial enduring power of attorney a time when, circumstance in which, or occasion on which, any power under the financial enduring power of attorney is exercisable. However, if the financial enduring power of attorney does not specify a time when, circumstance in which, or occasion on which, any power under the financial enduring power of attorney becomes exercisable, the power becomes exercisable once the financial enduring power of attorney is made.

7. A financial enduring power of attorney is not revoked by the principal becoming a person who does not have capacity to make one or more financial decisions.

Multiple attorneys

8. Where more than one attorney is appointed under a financial enduring power of attorney, the principal may appoint the attorneys to act as:

- a) joint attorneys;
- b) several attorneys;
- c) joint and several attorneys; or
- d) majority attorneys.

If the principal does not specify how the attorneys are appointed, the attorneys are taken to be appointed to act as joint attorneys.

Attorney eligibility

9. An attorney appointed under a financial enduring power of attorney must:

- a) be at least 18 years of age;
- b) have capacity to make decisions as an attorney;
- c) not be a witness to the enduring power of attorney;
- d) not be a person who is a paid carer for the principal;
- e) not have been convicted of an offence of violence or dishonesty, or have had a domestic violence order made against them, in the last five years; and
- f) not have been bankrupt or insolvent in the last five years.

Financial matters

10. Financial matters relate to the principal's financial or property (including real estate) matters, including payments, dealing with debt, receiving money, insurance of property, investments, businesses, and financial legal matters.

Formal requirements

11. Financial enduring powers of attorney must be in writing made in the approved form.
12. A financial enduring power of attorney must be:
 - a) signed by the principal (or an eligible signer on the principal's behalf), and
 - b) signed by an eligible witness who must state that they have:
 - i. the requisite qualification to act as a witness;
 - ii. witnessed the principal or an eligible signer sign the document;
 - iii. explained to the principal the effect of the enduring power of attorney;
 - iv. discussed with the principal whether the attorney is, or attorneys are, appropriate for the role; and
 - v. formed the view that the principal understood the nature and effect of making the enduring power of attorney.

13. An eligible witness is a person who is authorised to witness affidavits.

Attorney acceptance

14. Attorneys must sign their acceptance on the financial enduring power of attorney before exercising any power under the financial enduring power of attorney.

15. The acceptance must state that the attorney:
- a) is eligible to act as an attorney; and
 - b) will undertake to act in accordance with the duties and obligations of an attorney.

16. The acceptance must be signed in the presence of an eligible witness, who must certify that they have explained to the attorney the nature of the attorney's duties, and that they have provided to the attorney a statement of the attorney's duties.

Duties of an attorney

17. When exercising their powers under this Act for a principal, an attorney must:
- a) act honestly and with diligence; and
 - b) ensure that the principal is given reasonably practicable and appropriate support to enable them to participate in decisions affecting them.
18. Where an attorney under a financial enduring power of attorney is making a decision on behalf of a principal, the attorney must do so in a way that:
- a) encourages and supports the principal to participate in making the decision, including by taking any reasonably available steps in this regard;
 - b) gives all practicable and appropriate effect to the principal's views, wishes and preferences; and
 - c) acts in a way that promotes the personal and social wellbeing of the principal.

19. An attorney cannot enter into a conflict transaction with the principal unless specifically authorised either in the financial enduring power of attorney, or by an order of the court or tribunal.

20. An attorney must keep and preserve accurate records and accounts of all dealings and transactions made under the financial enduring power of attorney.

21. An attorney may be ordered to compensate the principal for losses caused by the attorney's failure in their duties.

Exercising power for a principal

22. An attorney may execute an instrument with the attorney's own signature and it must be executed in a way that shows the attorney executes it as attorney for the principal.

Resignation of attorney

23. An attorney under a financial enduring power of attorney may resign as attorney by giving a signed notice to the principal. However, where a principal does not have capacity to make a decision on a relevant matter, an attorney may only resign with the leave of the court or tribunal.

Revocation

24. The revocation of a financial enduring power of attorney must be in writing and made in the approved form.

25. The revocation of a financial enduring power of attorney must be:

- a) signed by the principal (or an eligible signer on the principal's behalf); and
- b) signed by an eligible witness who must state that they have:
 - i. the requisite qualification to act as a witness;
 - ii. witnessed the principal or an eligible signer sign the document;
 - iii. explained to the principal the effect of the revocation of the financial enduring power of attorney; and
 - iv. formed the view that the principal understood the nature and effect of revoking the financial enduring power of attorney.

26. A financial enduring power of attorney is automatically revoked if the principal:

- a) dies; or
- b) makes a later financial enduring power of attorney.

27. Where a principal divorces or has a civil partnership terminated, a financial enduring power of attorney is revoked to the extent that it gave power to the principal's previous spouse or civil partner.

Offences

28. Offences specific to financial enduring powers of attorney:

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- a) a person must not dishonestly induce the making or revocation of a financial enduring power of attorney;
- b) an attorney must not exercise their power dishonestly or fail to use reasonable diligence to protect the principal's interests;
- c) a person must not knowingly exercise power under a revoked financial enduring power of attorney;
- d) it is prohibited for a person to use confidential information gained in the course of acting as an attorney for purposes other than their role as an attorney;
- e) an attorney must not knowingly conduct unauthorised conflict transactions.

Other provisions not included in this model law

This document contains only proposed core provisions of a financial enduring powers of attorney law that could be enacted in each state and territory. Other provisions will clearly be necessary in relation to the following:

- Definitions of terms (including conflict transactions, eligible signer ...)
- Relationship of financial enduring powers of attorney legislation to other laws (including guardianship laws)
- Role of the jurisdiction's civil and administrative tribunal in providing advice and making relevant orders
- Execution of instruments
- Authorised investments
- Use of confidential information
- Remuneration of attorney only if authorised
- Presumption of undue influence where a transaction occurs between a principal and an attorney
- Protection of attorneys from personal liability (where the attorney acts honestly and reasonably, and/or where the attorney acts in compliance with tribunal or court advice)
- Scope of possible compensation claims
- Transitional and saving provisions

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