

## Response ID ANON-6Z1Q-USQT-Y

Submitted to Achieving greater consistency in laws for financial enduring powers of attorney  
Submitted on 2023-11-29 12:26:55

### Questions about you and/or your organisation

To continue with the survey, please confirm your agreement to the below declaration:

I agree

What is your name?

Name:  
Rebecca Cason

What is your email address?

Email:  
rcason@qdn.org.au

Are you responding to this survey as an individual or on behalf of your organisation?

Organisation

What is the name of your organisation?

Organisation:  
Queenslanders with Disability Network

Which category best describes you/your organisation?

non-government organisation

Please expand on your response:

Where is your organisation mainly based?

QLD

Where do you live?

QLD

Enter your response:

What is your age?

45-54 years

Enter your response:

Do you identify with any of the following groups?

None of the above, Other (Specify below)

Please expand on your response:

QDN's response is based on consultation with our members with disability.

Making your submission public

I agree to my submission being made public under my name and/or organisation

### Overview Questions

Do you support Attorneys-General working towards achieving greater consistency in financial EPOA laws, as an elder abuse prevention measure?

Yes, strongly support

Do the proposals for feedback in the Consultation Paper address a suitable range of areas for achieving greater national consistency?

Yes, a suitable range of areas are addressed

Please expand on your answers

Enter your response below:

### Moving towards achieving greater national consistency

What do you suggest governments should prioritise as the next steps in moving towards greater national consistency? For example, this might involve working towards a single national form, or jurisdictions pursuing their own reforms over time to align with an agreed set of provisions.

Enter your response below:

Queenslanders with Disability Network (QDN) welcomes the opportunity to make a submission to the Attorney-General's Department Achieving Greater consistency in Laws for Financial Enduring Powers of Attorney Consultation Paper.

It is broadly acknowledged that people with disability face risks, barriers and impacts in relation to many areas of their lives that people without disability do not. While Enduring Powers of Attorney (EPOA) are intended to protect and assist principals, they can instead contribute to financial abuse when they are misused or misapplied by an attorney, whether deliberately or inadvertently.

In making our submission, QDN acknowledges the expertise of our members across Queensland.

QDN also acknowledges the work of Queensland Public Advocate Dr John Chesterman in this area and his drafting of the 'Model financial enduring powers of attorney law'.

There are clear benefits to nationally harmonised EPOA laws including the flow on optimising effects to the forthcoming national registration scheme for EPOAs currently under consideration.

QDN suggests, where feasible, working towards national consistency in a set of core areas as a priority over jurisdictions pursuing their own reforms over time. Differences exist between states around applying a human rights or 'best interests' framework. In striving towards national consistency, the rights-based model used in Queensland and Victoria should be adopted in a national framework.

### Execution of Enduring Powers of Attorney & Witnessing Arrangements in Relation to Principals

In moving towards greater national consistency, do you endorse states and territories taking different approaches to the number of witnesses required, and the qualification requirements for witnesses?

Yes, I support different approaches to the number of witnesses, but jurisdictions should work towards having a common set of qualification requirements

Please expand on your response:

Please share your feedback on the obligations proposed for authorised witnesses, and the model of having differing requirements for different types of authorised witnesses (such as Australian legal practitioners).

Enter your response below:

To achieve consistency there needs to be uniformity across jurisdictions wherever possible. Differences in the definition or responsibilities of authorised witnesses across jurisdictions is not conducive to this. An easy way to move towards consistency is to require authorised witnesses to be people who can take affidavits. This would mean removing, for example, doctors from having this role in Victoria and changing the current situation in Tasmania and possibly the Northern Territory. The uniform legislation would then be clear.

In addition, an authorised witness should have the uniform duty to 'explain' the effect of the EPOA as is required in NSW.

QDN recommends jurisdictions work towards having a common set of qualification requirements for witnesses as outlined in Dr John Chesterman's 'Model financial enduring powers of attorney law'.

Please share any related supporting information.

Please expand on your response:

### Acceptance of appointment by an attorney

Would the proposed role(s) for the authorised witness provide an appropriate degree of assurance that the attorney understands the obligations of their appointment?

Yes

Please expand on your response:

Please share any related supporting information

Enter your response below:

### Revocation of an EPOA

Do the proposed requirements for revocation of an EPOA balance the relevant considerations in relation to:

Selection - The extent of obligation placed upon the authorised witness, regardless of the qualifications or positions they hold:

Yes

Selection - Ensuring a principal is supported to understand the effect of revoking an EPOA:

Yes

Selection - Flexibility to accommodate circumstances where urgent revocation is required:

Yes

Please expand on your response :

The requirements, qualifications, and obligations of witnesses for revocation should be the same as those relating to execution of an EPOA. A primary reason for this is that, unless otherwise stated, a new EPOA should cancel out an older one. Therefore, it is logical that the criteria for both execution and revocation be consistent.

Please share any related supporting information

Please expand on your response below:

### Automatic revocation of an EPOA

To what extent do you agree that if the following occurred after the execution of an EPOA, it should be grounds for automatic revocation.

Selection - An attorney is convicted of an offence involving dishonesty:

Strongly Agree

Selection - An attorney is convicted of an offence involving violence within the principal's family or domestic context:

Strongly Agree

Selection - An attorney is a person against whom an interim or final family violence intervention order is made, where the order is relevant to the principal's family or domestic context:

Strongly Agree

Selection - An attorney becomes bankrupt or personally insolvent:

Strongly Agree

Please expand on your answer:

Please share any related supporting information

Enter your response below:

### The eligibility of attorneys

How appropriate is the proposed five-year ineligibility period in the following scenarios:

Selection - A prospective attorney has been convicted of an offence involving dishonesty:

Highly appropriate

Selection - A prospective attorney has been convicted of an offence involving violence occurring within the principal's family or domestic context:

Highly appropriate

Selection - A prospective attorney is a person who is bankrupt or personally insolvent:

Highly appropriate

Selection - A prospective attorney is a person who has been bankrupt or personally insolvent in the last five years prior to the execution of the EPOA:

Highly appropriate

How appropriate is the proposed 'disclose and approve' provision in the following scenarios:

Selection - A person who has been convicted of an offence involving dishonesty:

Highly appropriate

Selection - A person who is bankrupt or personally insolvent:

Highly appropriate

Selection - A person who has been bankrupt or personally insolvent in the last five years prior to the execution of the EPOA:

Highly appropriate

Are there other types of offences, intervention or protection orders or criteria, which should make a person: entirely ineligible for appointment under a financial EPOA, or ineligible for a five year or another period?

Yes

Please expand on your response:

As noted in the consultation paper the 'disclose and approve' approach to past convictions (and related attorney ineligibility) provides little by way of a safeguard in situations such as coercive control. Coercive control is not always recognised or captured by legislative and policy frameworks as constituting domestic or family violence given it occurs beyond the typical intimate partner relationship. In the 12 months to July 2021, almost 600,000 Australians were affected by elder abuse and as our population ages we can expect this to increase. Psychological abuse (including coercion and control) is the most common subtype of elder abuse in Australia and elder abuse is most commonly committed by adult children (HopgoodGanim, Elder Abuse & Coercive Control Reform Report, 2023).

Consideration needs to be given to the five-year timing of attorney ineligibility. It's important to clarify in the 'disclose and approve' provision whether this timeframe is based on when the EPOA is executed or when the person starts acting as an attorney. If the restriction is tied to their actions as an attorney (not just their appointment), they might be able to resume their role after five years.

In this case, the argument could go in either direction. In the second scenario, the event causing ineligibility may not have occurred when the document was executed, so the principal might not consider appointing someone else. In the first scenario, a person might still be able to act as an attorney even if relevant convictions arise after their appointment.

Implementing this eligibility requirement might pose operational challenges however it makes policy sense for the ineligibility to apply both to the appointment and to the performance of the role. So, a provision could state that 'a person cannot be appointed, or act, as an attorney within five years of...').

Please share any related supporting information

Enter your response below:

## Attorney duties

In what circumstances may it be appropriate for an attorney acting under a financial EPOA to give less weight to a principal's views, wishes and preferences?

Where a principal may be subject to undue influence, Where a principal may be subject to coercion by another person (such as a family member), The principal's wishes appear to create a risk of significant harm to themselves or others

Please expand on your response:

The basis on which an attorney acts should be in accordance with the principal's 'views, wishes and preferences' unless to do so would cause 'serious harm'. This is the current situation in Victorian guardianship law (which uses 'will and preferences' although the use of the word 'will' can easily be confused with a testamentary document).

Recommendation 6.10 of the Disability Royal Commission also recommends this as the preferred approach for supported and substitute decision-making law reform in all jurisdictions and in this case to promote and uphold the person's personal and social wellbeing with the least possible restriction to their dignity and autonomy. There needs to be the override (serious harm) exception, otherwise the attorney (in this protective appointment) would simply be an agent.

In the language used it is important to still talk about 'substitute decision-making' where someone makes a decision on a person's behalf (whether on a 'best interests' basis or on a 'will and preferences' basis). Supported decision making occurs when someone is supported to make their own decision. The use of terminology such as 'will and preferences' decision-making being an example of supported decision making can become ambiguous or confusing for people.

Should an attorney be required, in all instances, to follow the views, wishes and preferences of the principal (even if there is a high risk of significant harm to the principal's health or wellbeing?)

No

Please expand on your response:

Should all types of attorneys (family members/friends, public trustees and private trustee companies) be subject to the same obligations, regardless of their relationship with and access to the principal?

Yes

Please expand on your response:

Is there a particular model law, an approach implemented in a jurisdiction, or an approach recommended in a particular inquiry which, in your opinion, provides the best approach to this issue?

Yes

Please expand on your response:

QDN recommends Queensland Public Advocate Dr John Chesterman's 'Model financial enduring powers of attorney law' form the basis of nationally-harmonised state and territory financial EPOA laws.

Please share any related supporting information.

Enter your response below:

### Interstate recognition

Please rate your agreement with the following:

Selection - The interstate recognition requirements for financial EPOAs, as they apply in my jurisdiction, are working effectively:

Neutral

Could the design of current interstate arrangements for financial EPOAs be improved or further simplified from a legislative perspective?

Yes

Please expand on your response:

Recognition should be provided if the enduring power (or particular stipulation or requirement) can be made in the second jurisdiction.

Are there non-legislative steps that would help with interstate recognition of EPOAs?

Yes

Please expand on your response:

### Access to justice issues

Please rate your agreement with the following:

Selection - The current arrangements for managing EPOA disputes through existing court and tribunal systems in your jurisdiction are working effectively:

Agree

Selection - The proposed approach to compensation is appropriate:

Agree

Selection - The proposed approach to offences appropriate:

Agree

Please expand on your response for each three statements:

Please share any related supporting information

Enter your response below:

### Information, resources or training for witnesses and attorneys

Please rate your agreement with the following:

Selection - The resources, guidance and training for witnesses in your jurisdiction are suitable to enable them to undertake their role:

Agree

Are there additional resources, assistance or guidance that should be made available to assist witnesses to financial EPOAs?

Enter your response below:

Short online training would be a better use of resources than mandatory training. Having training materials ready and on-hand when people need them at time of execution and activation is ideal.

Please rate your agreement with the following:

Selection - The resources, guidance and training for attorneys in your jurisdiction are suitable to enable them to undertake their role:  
Neutral

Are there additional resources, assistance or guidance that should be made available to assist attorneys to financial EPOAs?

Enter your response below:

Please share any related supporting information

Enter your response below:

Other initiatives for preventing and responding to financial elder abuse

Please provide any feedback on other non-legislative work that the Commonwealth, states and territories could prioritise to prevent and respond to financial elder abuse, particularly any that would complement work to achieve greater consistency in financial EPOA laws.

Enter your response below:

QDN recommends embedding a robust supported decision-making framework in the legislation to ensure people, particularly those with disability, have the tools and resources to make informed choices about EPOA. Implementation will need a comprehensive education program for community and key agencies in each jurisdiction.

QDN acknowledges that the consultation paper was published before the final report from the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. The following recommendations from the final report are relevant to this work including:

- Recommendation 6.4 which calls for states and territories to:
  - o use the term 'representative' to indicate a decision-maker;
  - o 'remove the terms "enduring guardianship" and "enduring power of attorney", and replace these with "enduring representation agreement";
  - o 'remove the terms "decision-making capacity", "capacity" and replace these with "decision-making ability";
- Recommendation 6.6 which contains proposed supported decision-making principles;
- Recommendation 6.7 which contains proposed provisions concerning decision-making ability;
- Recommendation 6.8 regarding tribunal and personal appointment of 'supporters'.

The term 'attorney' is recommended over the Royal Commission's report term 'representative'. 'Attorney' is more commonly recognized in this context and does not have the same paternal connotations as 'guardian'. 'Attorney' also indicates the person has been formally appointed to the role.

QDN commends the work of the Attorney-General's Department consultation paper and its strong alignment with the Royal Commission recommendations.