

Friday, 6 August 2021

National Roundtable – Enduring Power of Attorney Law Reforms - Communiqué

On 15 July 2021, Dr Jacoba Brasch QC, President of the Law Council of Australia (**Law Council**), convened a national roundtable to discuss enduring power of attorney law reforms (**Roundtable**).

The Roundtable, which took place by audio-video link, brought together national experts from the legal sector (including the Law Council's constituent bodies) public advocates, older persons stakeholder groups, the Australian Law Reform Commission and the Australian Human Rights Commission.

The purpose of the Roundtable was to:

- increase national awareness of financial elder abuse arising from enduring power of attorney (**EPOA**) arrangements, and to build the public case as to why more consistent laws and a national model enduring document are required to address such abuse – this was addressed in Part A of the Roundtable; and
- build consensus on the core essential features of more consistent laws which could be adopted across state and territory laws and be reflected in a national model enduring document– this was addressed in Part B of the Roundtable.

To address each purpose, the Roundtable was divided into Parts A and B respectively during which three panellists addressed a number of draft recommendations proposed by the Law Council in its Background Paper (**attached**), followed by general participant discussion:

- Part A – Why are more consistent EPOA arrangements needed?
 - The Hon Dr Kay Patterson AO – Age Discrimination Commissioner, Australian Human Rights Commission
 - Mr Ian Yates AM – Chief Executive Officer, Council on the Ageing (Australia)
 - Mr Matt Corrigan – General Counsel, Australian Law Reform Commission (**ALRC**)
- Part B – How can we achieve more consistent EPOA laws?
 - Mr Darryl Browne – Chair, Law Council National Elder Law and Succession Law Committee
 - The Hon. Justice Geoff Lindsay – Supreme Court of New South Wales
 - Dr Kelly Purser – Queensland University of Technology

The recommendations proposed by the Law Council are directed towards shaping the future direction of law reform in relation to EPOA laws.

During the Roundtable discussion, general consensus was achieved regarding the following recommendations, adjusted slightly from the original:

Agreed recommendations

Part A – Why are more consistent EPOA arrangements needed?

- Developing more nationally consistent laws governing enduring powers of attorney and a national model enduring document should be matters of priority for Attorneys-General as they tackle the national problem of elder abuse, which is not limited by state and territory boundaries.
- Achieving greater consistency in such laws would increase clarity and awareness for all national stakeholders, including Australian families, communities, business, governments and the media, and enhance the overall effectiveness of these laws.
- Achieving greater consistency in such laws would assist the development of a national model enduring document and help to achieve other national priorities in overcoming elder abuse.
- While consistency is needed on laws governing all enduring powers of attorney (including medical and personal) and other personally appointed substitute decision-makers, an achievable starting point for reform would particularly focus on laws and documents regarding enduring powers of attorney on financial matters, given the comparative prevalence of financial elder abuse.

Part B – How can we achieve more consistent EPOA laws?

- To address elder financial abuse, laws relating to powers of attorney on financial matters must:
 - be directed to mitigate elder abuse arising from:
 - an attorney acting beyond authority (either intentionally or inadvertently); and
 - a breach of their fiduciary duties; and
 - include 'core' essential features, framed in the simplest, most accessible language.
- The 'core' essential features of such laws should address:
 - standard definitions;
 - the standard requirements for the valid execution of an EPOA – most notably providing a role for the witness in ensuring the respective parties understand their rights, duties and obligations under the enduring document and a similarly drafted model provision which provides for the revocation of an EPOA;
 - eligibility of the attorney;
 - duties of attorneys; and
 - a model provision addressing consistent interstate recognition of the execution and revocation of an EPOA.
- The model provisions in the Attachment form an important starting point for national law reform in this area which is directed to mitigate elder abuse arising from financial EPOAs.
- Constituent Bodies are invited to provide more detailed views on the core essential features of such laws, and the proposed model provisions to the Law Council.

- The Law Council will subsequently write to the federal Attorney-General setting out the outcomes of this process, and proposing that this area of reform be prioritised by the Meeting of Attorneys-General for detailed consideration and public consultation.

Additional matters raised at the Roundtable

Participants at the Roundtable raised a number of issues which were thought to be worthy of further consideration in the context of future law reform in this area.

Decision-making principles

- Participants discussed decision-making principles which should apply to EPOAs – substitute decision-making versus supported or assisted decision-making – particularly in relation to persons with significant impairments.
- This issue was discussed in the context of the ALRC reports: ‘Equality, Capacity and Disability in Commonwealth Laws’ (ALRC Report 124) and ‘Elder Abuse – A National Legal Response’ (ALRC Report 131), which addressed these decision-making frameworks.
- It was agreed that this issue required further consideration.

Nomenclature and definitions

- There was general agreement that there is a need for common terms and definitions to be used across all jurisdictions, although further discussion may be required as to the content of particular terms.
- A number of principles were raised to inform decisions on terms and definitions:
 - Agreement should be reached not just on the technical meaning, but by asking: what do we want the terms to achieve?
 - The terms used should be able to be understood by lay-persons – the terms ‘attorney’ and ‘power of attorney’ for example, can be confusing and suggest that an attorney having authority over a principal.
 - Several terms were suggested, reflecting a consistent focus on the concept of agency, representation and a relationship of trust.
- It was noted that different approaches are taken to understanding what is meant by ‘capacity’ – some jurisdictions define it, but others do not. It was observed that this issue also affects the processes for assessing capacity. It was proposed that there be nationally consistent capacity assessment guidelines to overcome existing misunderstanding and inconsistency.

Additional proposals

The following reform options relating to the regulation of EPOAs were also suggested at the Roundtable:

- There be a statutory presumption that an attorney who acquires property of the principal acquires it subject to the obligations of fiduciary. That would have effect of the attorney not being able to suggest that the transaction was the principal’s action (when it was actually theirs).
- There be a power given to courts/tribunals/public trustees to audit an attorney’s dealings and produce a statement of dealings or account. This power would be administrative in the first instance but with a power of review vested in the court, although most circumstances

exercisable by a civil or administrative tribunal. The purpose of this would be to address evidentiary issues raised in circumstances where a person challenges the exercise of a power of attorney. Often, the principal is not available to give evidence and decisions need to be made on an analysis of the documents and cross-examination of the attorney.

- There be introduction of a searchable procedure to determine whether there has been a financial management order, which suspends the operation of a power of attorney.
- There be a power to apply for some form of injunctive relief in the nature of freezing order, which could be reviewed by the court in a quick way. This would address the present issue that by the time the parties get to court, property which has been misdirected by the attorney has generally been dissipated. Unless property is seized, the judicial process is a wasted effort.

The register

- Several participants expressed in-principle support for an EPOA register, but also noted that the benefits of a register of EPOAs are unlikely to be fully realised without a national model enduring document or harmonised laws. Concern was expressed about the possibility that a failed attempt at a register may push reform back.
- It was noted that there is a disparity in the quality of the state and territory laws, which would not be addressed by a register and conversely a register could generate a perception that registration would be a validation of an attorney.

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ATTACHMENT: Model provisions

Model provisions to form part of nationally consistent EPOA laws.

Agreed as a starting point for national law reform in this area at the National Roundtable – Enduring Power of Attorney Law Reforms – convened by Dr Jacoba Brasch QC, President, Law Council of Australia on 15 July 2021

Model execution provision

Form

- (a) be in the prescribed form; and

Signature

- (b) be signed either by the principal or a person acting on behalf of the principal in the presence of a suitable authorised witness and principal (when the document is signed on behalf of the principal); and
- (c) be signed and dated by the suitable authorised witness in the presence of the principal; and

Role of witness

- (d) contain a certificate signed by the suitable authorised witness certifying that:
 - (i) the principal signed the form voluntarily and in the presence of the witness;
 - (ii) the witness explained the effect of the enduring power of attorney (**EPOA**) to the principal before it was signed;
 - (iii) the witness checked with the principal that the attorney has the appropriate attributes in an attorney;
 - (iv) at the time of signing, the witness formed the view that the principal understood the nature and effect of giving the power of attorney;
 - (v) the witness is not a party to the EPOA and is not a close relative to any party to the EPOA;
 - (vi) the witness explained the obligations of the attorney to the attorney before the attorney accepted appointment;

Identity of the witness

- (e) must be someone who can fully explain the EPOA and appreciate whether the principal or attorney, as appropriate, understands the EPOA and the attorney's obligations;

Acceptance by attorneys

- (f) require all attorneys to:
 - (i) formally accept their appointment; and
 - (ii) sign an undertaking with respect to their role, responsibilities and obligations, which should be clearly stated; and
 - (iii) require the attorney's acceptance of appointment and undertaking with respect to their responsibilities and obligations to be signed before a suitable authorised

- witness. This witness does not need to be the same person who witnessed the signing of the enduring power of attorney by the principal;
- (g) require the witness to certify that the attorney's responsibilities and obligations were explained to the attorney and the witness formed the view that the attorney understood their obligations under the power of attorney.

Model revocation provision

Requirements

- (a) be in the prescribed form; and
- (b) be signed by the principal in the presence of an authorised witness; and
- (c) be signed and dated by the authorised witness in the presence of the principal;
- (d) contain a certificate signed by the authorised witness certifying—
- (i) that the principal signed the form voluntarily and in the presence of the authorised witness; and
 - (ii) that, at the time of signing, the principal appeared to the authorised witness to understand the nature and effect of revoking the EPOA; and
 - (iii) that he or she is not a party to the EPOA and is not a close relative to any party to the EPOA;

Notification

- (e) if a principal revokes an EPOA, they must provide the attorney or attorneys with notice in writing of the revocation.

Taken to be revoked

- (f) an EPOA is taken to have been revoked in the following circumstances:
- (i) on the death of the principal;
 - (ii) on the revocation by the attorney of the relevant EPOA;
 - (iii) if events have occurred such that an attorney would not, under the model eligibility provision (see below), be entitled to be appointed as an attorney under the EPOA;
 - (iv) at such time as the EPOA ceases to have effect according to its terms;
 - (v) at such time as a new EPOA made by the principal takes effect, unless a principal specifies otherwise;
 - (vi) if the principal and attorney are married or are domestic partners or are in a registered relationship — on the dissolution or annulment of the marriage or cessation of the domestic relationship or the end of the registered relationship.

Model eligibility provision

an attorney cannot be:

- (a) under the age of 18 years; or
- (b) a person who lacks mental capacity; or
- (c) a witness to the power of attorney; or
- (d) a paid carer, or anyone involved in a professional or administrative capacity in the principal's care and treatment or in the provision of accommodation to the principal; or
- (e) a person who is bankrupt or personally insolvent or has been bankrupt or personally insolvent within the last five years; or

- (f) a person who *after* the execution or activation of an EPOA is convicted of an offence involving dishonesty or violence which occurs in a family context or becomes bankrupt or personally insolvent; or
- (g) prior to the execution of an EPOA, has been convicted of an offence involving dishonesty, or violence which occurs in a family context within the last five years.

Model duties provision

an attorney:

- (a) must, at all times when exercising the authority under the EPOA, act in accordance with the requirements:
 - (i) of any Powers of Attorney Act; and
 - (ii) specified in the EPOA instrument
- (b) must take reasonable steps to keep the other attorneys (if any) informed of any action taken by the attorney under the EPOA;
- (c) must unless the contrary intention is specified, consult with the principal before, and notify the principal after, exercising the EPOA;
- (d) must not use the position to profit unless expressly authorised by the EPOA;
- (e) must not enter into any actual or potential conflict transactions unless expressly authorised by the EPOA;
- (f) must keep accurate records and accounts of all dealings and transactions made under the EPOA;
- (g) must keep the attorney's property (including money and financial assets) separate from the principal's property;
- (h) must act honestly and not fraudulently or with improper motives; and
- (i) must act with reasonable care.

Interstate recognition of the execution and revocation of an EPOA

A nationally consistent law which applies the above model execution and revocation provisions should be supported by a provision which recognises the execution and revocation of an EPOA made in another jurisdiction.