**NSW Ageing and disability commission**

**submission to the CONSULTATION ON ACHIEVING GREATER CONSISTENCY IN LAWS FOR FINANCIAL ENDURING POWERS OF ATTORNEY**

NOVEMBER 2023

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## Background and focus of our submission

The NSW Ageing and Disability Commission (ADC) was established on 1 July 2019, with the objectives of protecting older people and adults with disability from abuse, neglect and exploitation, and protecting and promoting their rights.

A key role of the ADC is to respond to reports about older people (65 years and over or, if Aboriginal and/or Torres Strait Islander, 50 years and over) and adults with disability (18 years and over) in NSW who are subject to, or at risk of, abuse, neglect and exploitation in their family, home and community, including by providing advice, making referrals, and conducting investigations.

The submission of the ADC has been informed by our handling of reports about older people and adults with disability. Guided by this experience, the focus of our submission is on strengthening the laws and processes in relation to Enduring Powers of Attorney (EPOA) without making the requirements so onerous that they deter parties from taking up this option.

### **Brief data snapshot**

Between 1 January 2020 and 31 December 2022, the ADC received 10,963 reports, involving a 40% increase over the three-year period. In relation to these reports:

* The majority (77%) involved older people, including older people with disability. One-quarter (23%) involved adults with disability (who were not older people).
* For older people, the most common alleged abuse involved psychological abuse (40%), financial abuse (28%) and neglect (21%), primarily by their adult children or other family members.
* For adults with disability, the most common alleged abuse involved psychological abuse (34%), neglect (26%) and financial abuse (18%), primarily by their parents or other family members.
* The most common forms of alleged financial abuse involved financial exploitation, misuse of Power of Attorney or Enduring Power of Attorney (EPOA), preventing the adult’s access to their finances, and theft.
* Allegations about misuse of a POA/EPOA featured most often in relation to older people, comprising 5.3% of all allegations involving older people. Misuse of a POA/EPOA was the second most common financial abuse allegation in relation to older people (following financial exploitation), and the sixth most common allegation for older people overall.
* For both older people and adults with disability, psychological abuse has commonly been used to enable financial abuse and exploitation, including verbal threats, pressure, blackmail, and harassment.

More data relating to reports to the ADC about abuse, neglect and exploitation of older people and adults with disability in NSW is available on the Tools and Resources section of our website: [www.adc.nsw.gov.au](http://www.adc.nsw.gov.au).

## Execution of Enduring Powers of Attorney and witnessing arrangements in relation to principals

The ADC supports the proposed model provisions for execution of an EPOA and for witnessing arrangements in relation to principals. The proposed provisions are largely consistent with current requirements in NSW. We support continuation of the existing arrangements in NSW with the requirement for only one witness.

We agree with the proposal to retain jurisdiction-specific approaches to witnessing arrangements for principals to better cater for local conditions. In our experience, the scope and qualifications of authorised witnesses in NSW is appropriate.

The ADC strongly supports having plain language and accessible prescribed information on the rights and obligations of principals, and would like to see this be part of, or a mandatory attachment to, the prescribed EPOA form. To better inform the decision-making of principals and improve their protections, we consider that the accessible guidance should include clear information and practical examples for each of the components of the form. For example:

* to clearly illustrate what it means to authorise the attorney to give reasonable gifts and/or confer benefits
* to enable the principal to understand the types of conditions and limitations that can provide a critical safeguard for their finances/assets.

The ADC supports the proposed enhanced witnessing obligations in relation to principals. However, we note that NSW currently requires the witness to certify that they explained the effect of the EPOA to the principal before it was signed, and this is not limited to legal practitioners. We would have concerns about any changes that would weaken the existing arrangements in NSW.

## Acceptance of appointment by an attorney

The ADC strongly supports the model provisions that would require the attorney to sign undertakings that they understand and will comply with the requirements. We support the provision of plain language and accessible information that makes it clear what they can and cannot do, their obligations as an attorney, and the civil and criminal penalties that can apply if they do not comply with the requirements.

However, we do not currently support the proposed requirements for attorneys to have to sign in front of an authorised witness. This adds a layer of cost and bureaucracy into the process that will deter parties from agreeing to be an attorney, particularly if they have to pay for a legal practitioner to witness. Importantly, in our view the proposed witnessing requirements in relation to attorneys would not provide a sufficient safeguard from abuse that would warrant the barrier that they would present to getting EPOAs in place.

The introduction of clear and plain language guidance for attorneys, coupled with the requirement to sign undertakings, would be a significant improvement that would help to:

* better ensure that attorneys are clear from the outset as to what they can and cannot do with the EPOA
* reduce the unintentional misuse of EPOAs
* better hold attorneys to account for misuse of an EPOA.

Reducing the volume of cases in which the attorney has misused the EPOA due to not understanding the requirements would be of obvious benefit to principals but would also assist the work of safeguarding and justice agencies. Currently, many of the reports the ADC handles about misuse of the EPOA of an older person or adult with disability involve attorneys who did not understand that their actions were not permitted by the legislation and/or the EPOA – including attorneys who have pooled the principal’s bank account with their own and used the funds for their own purposes. The addition of plain language guidance and required undertakings for attorneys would make it easier for safeguarding agencies to identify at an early point the cases involving intentional improper use of an EPOA, and to take appropriate actions, including referral to police.

In relation to the proposed prescribed information for attorneys, we agree that it should cover their role and obligations, including the need to understand and follow the specific instructions of the principal set out in the EPOA. We also consider that the information should:

* provide clear information and practical examples for each of their obligations and components of the form – for example:
  + to enable them to understand how they are to involve and support the principal in the decisions
  + to clearly illustrate what is meant by ‘reasonable’ gifts, and ‘confer benefits’
  + to explain what acting honestly in relation to the principal’s legal and financial affairs involves
* be part of, or attached to, the EPOA document they are being asked to sign.

In relation to the latter point, we note that in many cases there can be an extended period of time between the attorney signing the EPOA and the commencement of the instrument. It is critical that the guidance stays with the EPOA, as well as easily publicly accessible, so that the attorney has the reminder and clear information about their obligations at the time that it is needed. In our view, ready access to timely education and information will be more effective in countering mistakes and abuse by attorneys than introducing witnessing requirements.

## Revocation of an EPOA

In the experience of the ADC, it is imperative that the process for principals to revoke an EPOA is as simple as possible. Principals must be able to revoke an EPOA quickly.

The ADC supports the use of an approved or prescribed form to facilitate a simple and speedy revocation process for the principal. But we do not agree with introducing witnessing requirements into this process. We understand that the proposed witnessing requirements are intended to mitigate the risk of a coerced revocation or a principal seeking to revoke the instrument when they no longer have legal capacity to do so. However, we note that:

* In our experience, the risks to the principal of not being able to revoke their EPOA quickly are much higher than the risk that they will be pressured into revoking when they do not want to.
* In the event that the principal has revoked the instrument at a time when they did not have legal capacity, there are other safeguards that apply. In particular, when the principal seeks to put in place a replacement EPOA, the witnessing requirements for executing the instrument provide an opportunity for any capacity concerns to be identified. In addition, the NSW Civil and Administrative Tribunal (NCAT) has the power to review the revocation of an EPOA.

## Automatic revocation of an EPOA

The ADC supports the proposed elements for a model provision in relation to the automatic revocation of an EPOA.

We generally support the proposal that an EPOA would be revoked at the time that a new EPOA is executed unless the principal specifies otherwise. In our experience, principals in a range of cases can be reluctant to inform the attorney that they have revoked the EPOA, particularly in circumstances where the attorney is a family member and/or where the principal is afraid of the consequences. The proposal for automatic revocation may alleviate this issue if notification of the old attorney was undertaken by the new attorney and proven by the production of the new instrument.

NSW law already provides that there is a vacancy in the office of an attorney if the attorney becomes bankrupt, and we consider that this should continue to be the case. We also support the proposal in the consultation paper that grounds for automatic revocation should include where an attorney is convicted or found guilty of an offence involving dishonesty. However, we do not support including the other events (relating to domestic and family violence) as additional grounds for revocation. We discuss this further in the following section.

## Attorney eligibility

The ADC supports the proposed restrictions based on age, decision-making and witness to an EPOA; they are largely consistent with current NSW arrangements.

We agree with the proposed restrictions based on paid carers, health providers and accommodation providers. The ADC has handled a range of cases involving financial abuse and misuse of EPOA in which paid support workers have effectively ‘groomed’ principals to be appointed as attorney and to gain financial benefit. In this context, we consider that parties that have provided paid health, care or accommodation services to the principal should remain ineligible for appointment as attorney for a period of at least two years after they have ceased to provide those services.

We also support the proposed restrictions for people who are or have been bankrupt or personally insolvent, and for people who have been convicted of an offence involving dishonesty. While the NSW Act provides that an attorney becomes unable to act if they become bankrupt after being appointed, it does not explicitly prevent a person who is or has been bankrupt from being appointed as an attorney. Due to the high risk involved, and the direct relevance to the attorney role, we consider that a person in these categories should be ineligible to be appointed as an attorney during the five-year ineligibility period, regardless of whether they have disclosed their bankruptcy or insolvency status or dishonesty conviction to the principal.

We do not support the proposals to prevent the principal from appointing a person who has been convicted or a domestic and family violence offence or a person who is the subject of a family or domestic violence intervention order. While we agree that coercive control is a significant issue, we consider that preventing the appointment of an attorney in these categories fails to adequately appreciate the family situations of many principals. In this regard, we note that:

* In many of the cases handled by the ADC, the principal has complex and fraught family relationships commonly involving violence and allegations of violence. A blanket restriction on appointing people who have been convicted of a DFV offence within the principal’s family or domestic context would present significant barriers to some principals being able to appoint a person they know and trust.
* There is a low threshold for interim intervention orders to be taken out, and applications for intervention orders are sometimes used as a ‘weapon’ during family disputes.
* We have handled cases in which attorneys have had action taken against them for violence against a spouse or family member but could be trusted not to act violently toward the principal (often the parent).

## Attorney duties

The ADC generally supports the proposed model provision in relation to attorney duties, including to:

* comply with the Act and the EPOA
* keep records and take reasonable steps to keep other attorneys informed
* act honestly, in good faith and with reasonable care
* keep property (including money) separate.

In relation to the proposed inclusion of a ‘duty not to enter conflict transactions’, we have concerns that this would be poorly understood by both principals and attorneys. In our experience, EPOA information needs to be pitched at a foundational level to enable an appropriate level of understanding and compliance by attorneys. Conflicts of interest are generally poorly understood by the general public. We are not convinced that this duty, as currently framed, would be sufficiently clear to support the principal to know what to authorise, or the attorney to know what to do. If this duty is included in the model provisions, at a minimum there would need to be comprehensive, clear and accessible guidance for principals and attorneys on what this duty means, with practical examples.

The NSW Act also identifies that, unless expressly authorised, the prescribed power of attorney does not confer authority to give gifts, confer benefits on attorneys, or confer benefits on third parties. The prescribed EPOA form in NSW requires attorneys to accept that they cannot gain a benefit from being an attorney unless expressly authorised. While we appreciate that this may be included in the currently proposed provisions (such as to comply with the EPOA), in our view attorney duties in relation to benefits and gifts should be specifically called out in the model provisions. The ADC commonly encounters inappropriate use of the EPOAs of older people and adults with disability associated with a poor understanding by attorneys as to what they can and cannot do in relation to gifts and benefits, with significant adverse consequences for the principal.

The ADC supports the inclusion of a model provision that makes it explicit that an attorney must, to the greatest extent practicable, seek and take into account the will and preference of the principal, and support the principal to participate as much as possible in the decisions affecting them. In our experience, it is currently much too easy for attorneys in NSW to make decisions for the principal without seeking their views or preferences or involving them at all. In our view, the principles in the Victorian and Queensland Acts may provide a useful guide to inform the development of a model provision.

**Conditions and limits in EPOAs**

We agree that few EPOAs tend to have any conditions or limits placed on the powers of the attorney. In our experience, this is often due to the fact that the principal is appointing a close family member they trust, and they do not anticipate that this trust will be abused and/or do not wish to potentially offend or deter the person from acting as their attorney or affect their relationship.

In our view, it would be easier for principals to include conditions or limits if:

* there was easy to understand and accessible information for principals and attorneys that identified that certain conditions and limits are standard or good practice and help to protect both the principal and the attorney (with clear and practical examples)
* there was agreed information in relation to conditions and limits that must be discussed with the principal when the EPOA is explained to them prior to executing the instrument
* the prescribed form helped to set a greater expectation that certain conditions/limits are standard or good practice – for example, including additional check boxes that identify the more common good practice conditions/ limits for the principal to tick if they want these included (with additional free text field for other specific conditions or limits).

**Commencement of EPOA**

An area that the ADC would particularly like to see considered as part of this consultation is when the instrument should commence. The prescribed form in NSW currently provides principals with four options for when an EPOA could commence, which include:

* once a medical practitioner considers that I am unable to manage my affairs (and provides a document to that effect), or
* once my attorney considers that I need assistance managing my affairs.

In our experience, the latter option, in which the attorney makes the decision to commence the EPOA on their own consideration without any assessment or medical opinion, exposes the principal to greater risk of abuse and exploitation. In our handling of reports about misuse of EPOA, we have identified many situations in which this provision has been used by attorneys to start acting on the EPOA and using the principal’s funds despite:

* the principal still having decision-making capacity in relation to their financial affairs
* the principal not being informed that the attorney has started acting on the EPOA.

In the view of the ADC, there are a range of options for reducing the risks to principals associated with commencement of their EPOA, including consideration of:

* removing the option for the attorney to solely form the view that the principal needs assistance managing their affairs
* requiring that commencement of the EPOA on the basis that the principal needs assistance or is unable to manage their affairs is supported by a document from a medical practitioner
* providing clear and accessible guidance to principals about the risks associated with attorneys making the decision as to when the EPOA should commence, and requiring that this is explained to them prior to executing the instrument
* providing clear guidance on conditions that should be included if the attorney is able to make the decision as to when the EPOA should commence – for example, conditions in relation to informing and involving the principal; specifying the threshold that would need to be met as evidence that the principal needed assistance managing their affairs; and/or requiring a medical practitioner to confirm that the principal needs assistance to manage their affairs.

## Jurisdiction and compensation

In many cases, by the time the ADC receives a report about alleged financial abuse by misuse of an EPOA, the adult’s money and assets are already gone or have been seriously depleted. We work with the adult and other parties to protect their remaining and future assets and refer relevant matters to NSW Police.

In a small number of cases, the subject of allegation has been charged, convicted, and ordered to repay the misappropriated funds. However, this pathway and outcome is rare and there are currently limited alternative options in NSW. While parties can pursue civil litigation, this is not always a good option for a range of reasons, including that the adults are usually reluctant or refuse to take action against a family member, and do not always have capacity to give instructions.

In many matters handled by the ADC, the impact on the adult has been significant. The case studies below provide examples of the sizable funds being misappropriated by appointed EPOAs. However, even in cases with smaller sums, the adult has tended to be left in a dire financial situation, with associated risks of homelessness, inadequate support and/or debts.

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| **Case study 1**  The ADC received a report about financial abuse of an older person by their son. The older person had appointed her son as her EPOA, and he had started to act in this role after her decision-making capacity became impaired. We were advised that, in the previous two years, there had been 136 betting transactions on the older person’s bank account, totalling over $117,000, and 70 ATM withdrawals, totalling over $55,000. At least $55,000 in betting wins had been credited to the woman’s account, in the name of her son.  The ADC made a report to NSW Police. Police made inquiries and advised that there was insufficient evidence to proceed with a fraud offence. We subsequently commenced an investigation into the alleged financial abuse and misuse of the older person’s EPOA. The bank froze the older person’s account and stopped the bank card so the son could not continue to access the account.  When we met with the older person’s son, he acknowledged that he had used his mother’s funds to gamble, and told us that his mother didn’t need much, and she would be leaving her money to him in the end anyway. He advised that he was providing care to his mother and, even though he was the sole beneficiary of her Will, he would share whatever money was left with his sister. In relation to the conditions of the EPOA and requirements on attorneys, the son said that he thought he read those at the time of appointment but did not remember what they were.  Our investigation confirmed the information that had been provided about the transactions on the older person’s account and misuse of her finances by her son to fund his gambling activities.  We submitted an application to NCAT, and the Tribunal appointed a financial manager (NSW Trustee and Guardian), which suspended the operation of the EPOA. Our concerns about the son’s exercise of his duties as the older person’s EPOA were shared by the Tribunal, which noted the son’s ‘abject failure to fulfil his fiduciary duty as attorney’. |

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| **Case study 2**  The ADC received a report of financial abuse and neglect of an older couple by their daughter, who was their primary carer and their appointed Enduring Guardian and Enduring Power of Attorney.  In addition to significant concerns about neglect of the older couple by the daughter, the report to the ADC included that they did not have access to their own finances, and their money did not appear to be spent on their care.  At the time of the report to the ADC, concerns had also been raised with police and the couple had been transferred to hospital after their daughter had gone interstate for three days and left them alone without food and any means of communication, despite them needing full-time care.  The police Aged Crime Prevention Officer (ACPO) worked with frontline police on this matter, met with the older couple, and arranged for the bank to freeze their accounts.  Examination of the couple’s financial records identified that large sums of money from their account (including from the sale of their home) had been transferred to the daughter’s account, and their pensions were going directly to the daughter’s account. The ADC made applications to NCAT, and NSW Trustee and Guardian and the Public Guardian were subsequently appointed to manage the couple’s finances and make certain decisions on their behalf.  The daughter was arrested and charged with three counts of fraud, relating to over $900,000 belonging to the couple. NSWTG is pursuing legal action against the daughter to recover the funds taken through misuse of the older couple’s EPOA. |

In NSW, there is currently no mechanism to order compensation for the loss of funds incurred through misuse of an EPOA in the Act. NCAT does not have the ability to order compensation of the principal for loss caused by the attorney.

In NSW, existing mechanisms for potential compensation involve:

* a civil claim in the District Court or Supreme Court
* criminal prosecution and conviction of the attorney where there is sufficient evidence of the commission of a criminal offence, such as fraud
* seek repayment of lost funds by the principal’s financial institution(s) on the basis that they did not take adequate steps to identify and prevent the abuse.

The above options do not provide a consistent pathway for compensation, and as noted in previous inquiries, there are barriers to pursuing existing civil and criminal options. In relation to the latter, previous inquiries such as the ALRC elder abuse inquiry have noted concerns that the law provides insufficient safeguards against financial abuse and does not treat many forms of financial abuse as criminal; and have highlighted the high evidentiary threshold and lack of redress options with criminal prosecution.

The ADC supports the proposal in the discussion paper in relation to compensation and agrees that avenues for redress should be ‘effective, informal, flexible and low cost’. We support consideration of NCAT as an accessible compensation pathway in NSW. In discussions with relevant agencies about the process for seeking compensation through VCAT in Victoria, the ADC received positive feedback, including that it is a user-friendly, low cost, non-adversarial process that older people have been willing to pursue.

It is vital that third parties are able to pursue compensation on behalf of a principal. For example, for the ADC to be able to apply for a compensation order for a principal in connection with an investigation we have conducted into misuse of their EPOA.

## Offences and civil penalties

The ADC supports the proposal that the following conduct by attorneys should be penalised:

* dishonest inducement to execute or revoke an EPOA
* dishonest use of an EPOA to obtain financial advantage for the attorney or another person, or to cause loss to the principal or another person
* misrepresentation in relation to an EPOA, including wrongly purporting to be an attorney.

In our view, there would be strong merit in considering an additional offence for an attorney failing to disclose the existence of grounds that would make them ineligible to be appointed an attorney. For example, if an attorney signs an EPOA despite not meeting the eligibility criteria due to their bankruptcy or insolvency status or a dishonesty conviction. This may be intended to be covered under ‘misrepresentation in relation to an EPOA’ but, if not, we would support a specific offence in relation to this.

Introducing offences in relation to the above would significantly strengthen practice and safeguards, and access to justice for principals in NSW. Currently, the offence provisions in NSW are inadequate and solely relate to an attorney knowingly using a suspended or terminated EPOA. It is much more common for the ADC to handle reports that identify dishonest use of an EPOA of an older person or adult with disability to gain financial advantage for the attorney and/or other person(s), but the options for holding the attorney to account are very limited.

While the ADC has seen improvements in the response of police to these matters, including a greater willingness to investigate in relation to potential fraud, it remains difficult to reach the threshold for proving fraud in many cases. Specific offences relating to dishonest conduct by an attorney in relation to an EPOA would make a substantial and positive difference.

## Information, resources or training for witnesses and attorneys

We agree that it is vital that there is adequate, accessible, and easy to understand information, resources and training for principals, attorneys and authorised witnesses. In earlier sections of this submission, we have provided feedback on the contents of the proposed plain language guidance for these parties, including the need to include clear and practical examples.

In our view, there is also a need for clear information for the general community, to enable simple and readily understandable messages to be read/heard and understood by people who may be bystanders in situations involving abuse or exploitation via an EPOA. Part of the information needs to include a call to action to raise their concerns, and the details of where they can go to, such as the ADC and other adult safeguarding bodies, and police.

In relation to attorneys, the timing of the information and training is critical. It is important that the attorney receives and understands the information at the time they are signing the EPOA. However, as many attorneys do not start acting on the EPOA for a long period after signing the document, we consider that there should also be a requirement that they re-read the guidance, undertakings and any training at the time the EPOA commences. We suggest the inclusion of clear text at the front of the EPOA document that states that before the attorney can start using the document, they must ensure they understand their duties as the attorney.

The ADC is currently finalising draft guidance for attorneys in NSW on their obligations, with practical examples of what they can and cannot do. We have previously developed guidance for principals and the community on the differences between EPOA, POA and Enduring Guardianship, and on how to revoke an appointment.

In relation to authorised witnesses, the ADC would be keen to see enhanced training for solicitors coming into the field, with clear links to their professional development (CPD points). In a range of reports involving financial abuse and exploitation of an older person or adult with disability via an EPOA, the solicitor has failed to provide an adequate safeguard for the adult, including failing to identify or follow-up red flags that the adult may not have decision-making capability to enter into an EPOA, and appearing to act on the instructions of family members rather than the adult.

It is critical that any changes to EPOA laws are accompanied by a public awareness campaign(s). In our discussions with relevant agencies in Victoria, we understand that there was no public awareness campaign at the time that the changes were made to their Act, including to introduce compensation orders. There was a clear view that this was a missed opportunity to let the public know about the reforms as well as to raise awareness more broadly about EPOAs and safeguarding.