



**Enhancing protections relating to
the use of Enduring Power of
Attorney instruments –
Consultation Regulation Impact
Statement**

March 2020

About the Office of the Public Guardian

The Office of the Public Guardian (OPG) is an independent statutory office which promotes and protects the rights and interests of children and young people in out-of-home care or staying at a visitable site, and adults with impaired decision-making capacity. The purpose of OPG is to advocate for the human rights of our clients.

While the OPG has a pivotal role in protecting the rights and interests of adults at risk of elder abuse, it is limited to investigating elder abuse only where it concerns adults who have impaired decision-making capacity.

OPG provides individual advocacy to children and young people through the following two functions:

- the child community visiting and advocacy function, which monitors and advocates for the rights of children and young people in the child protection system including out-of-home care (foster and kinship care), or at a visitable site (residential facilities, youth detention centres, authorised mental health services, and disability funded facilities), and
- the child legal advocacy function, which offers person-centred and legal advocacy for children and young people in the child protection system, and elevates the voice and participation of children and young people in decisions that affect them.

OPG also promotes and protects the rights and interests of adults with impaired decision-making capacity for a matter through its guardianship, investigations and adult community visiting and advocacy functions:

- The guardianship function undertakes both supported and substituted decision-making in relation to legal, personal and health care matters, supporting adults to participate in decisions about their life and acknowledging their right to live as a valued member of society.
- The investigations function investigates complaints and allegations that an adult with impaired decision-making capacity is being neglected, exploited or abused or has inappropriate or inadequate decision-making arrangements in place.
- The adult community visiting and advocacy function independently monitors visitable sites (authorised mental health services, community care units, government forensic facilities, disability services and locations where people are receiving National Disability Insurance Scheme (NDIS) supports, and level 3 accredited residential services), to inquire into the appropriateness of the site and facilitate the identification, escalation and resolution of complaints by or on behalf of adults with impaired decision-making capacity staying at those sites.

When providing services and performing functions in relation to people with impaired decision-making capacity, OPG will support the person to participate and make decisions where possible, and consult with the person and take into account their views and wishes to the greatest practicable extent.

The *Public Guardian Act 2014* and *Guardianship and Administration Act 2000* provide for OPG's legislative functions, obligations and powers. The *Powers of Attorney Act 1998* regulates the authority for adults to appoint substitute decision makers under an advance health directive or an enduring power of attorney.

Submission to the review

Position of the Public Guardian

OPG welcomes the opportunity to provide a submission to the Commonwealth Attorney-General's Department consultation, *Enhancing protections relating to the use of Enduring Power of Attorney instruments – Consultation Regulation Impact Statement (RIS)*. The views contained in this submission are that of OPG and do not purport to represent the views of the Queensland Government.

This submission addresses the issues and questions raised in the consultation paper where they relate to the experiences of OPG and the people that we serve. We have not provided individual responses to each of the consultation questions, electing instead to focus on the key issues and recommendations concerning the activities and experience of the OPG.

OPG would be pleased to lend any additional support as the options are further considered by the Attorney-General's Department. Should clarification be required regarding any of the issues raised, OPG would be happy to make representatives available for further discussions.

The Public Guardian recommends:

1. That action must be taken to address the misuse of enduring powers of attorney (EPOA).
2. That the register be accompanied by a comprehensive communications and outreach strategy, developed in consultation with relevant stakeholders that incorporates targeted information, through a range of mediums, with catered communications for different stakeholder groups.
3. That a systems administrator (or its representatives) be required to check the validity and authenticity of all documents submitted to the register.
4. That maintenance of the register be supported by independent audits of EPOAs and other registered decision-making instruments.
5. That a fee amnesty period be in place to encourage the registration of new and existing EPOAs, with concessional rates for those meeting certain criteria.
6. That ad-hoc users not bear the cost for viewing information on the register.
7. That access to the register be provided to other third parties with clearly defined viewing/edit functions based on the user profile and business need.
8. Clear transitional arrangements will be required in relation to EPOAs that are already active at the time the register commences.
9. That any changes to basic biodata by a principal not require registration of a new EPOA and not attract an additional fee.
10. That a process be put in place to allow any changes to an EPOA that follow a decision of a Tribunal to be recorded on the register in real time.

11. That the register maintain historical information of all changes made to an EPOA, including activation, suspension and cancellation.
12. That targeted consultation be undertaken with relevant bodies with a role in the financial administration system to address the impact of a register.
13. That a review of the register be undertaken 12 months after commencement to ensure the register is meeting its objectives.
14. That provisions underpinning the register are clear on when the EPOA is activated.
15. That financial withdrawals by an attorney have a time limit attached to them to enable checking of current EPOA status on the national register.
16. That voluntary registration be considered a more suitable approach to an EPOA register, accompanied by a comprehensive communications and outreach strategy to maximise registrations.

Responses

Option one: The Status Quo

The OPG strongly believes that measures need to be put in place to address the misuse of enduring powers of attorney (EPOA). It is one of the most significant concerns regarding the elder abuse epidemic and the OPG has long advocated for national harmonisation of safeguarding provisions to protect vulnerable Australians from financial abuse by an attorney under an EPOA. For this reason the OPG would not support a status quo approach to this problem.

Recommendation 1:

That action must be taken to address the misuse of enduring powers of attorney (EPOA).

Option two: Regulatory option

Without knowing the detail of the model, the OPG has concerns about the introduction of a national register of EPOAs. OPG has long held the view that the creation of a register would provide little substance in protecting rights and combating the types of elder abuse that is the subject of OPG investigations. The majority of cases of elder abuse observed by OPG appears to result from social factors, and community failure to identify and report abuse, rather than the recognition of a decision making instrument.

Nonetheless, OPG does recognise that a register could play a role, however small, in preventing the financial abuse of vulnerable Australians who have an EPOA in place. A national register could provide third parties with a clear means of identifying whether a person has a valid power of attorney or similar agreement. For example, a register may be a useful tool for banks and hospitals. We also note that it is acknowledged in the RIS that the register is not intended as a coverall prevention against elder abuse and offers one method by which to address the misuse of invalid EPOAs by attorneys.

The OPG recommends the issues detailed below be addressed to optimise the capacity of the register to address the misuse of EPOAs.

Impact of a register on the uptake of EPOAs

Any register would need to take into consideration the impact it would have on the current flexibility and usefulness of the mechanism of powers of attorney, and the purpose and effectiveness of any register. As acknowledged in the RIS, increased regulation (through mechanisms such as registers) might detract from their usefulness, and deter people from using them.

To address this issue, OPG suggests a comprehensive communications strategy be developed in consultation with relevant stakeholders. Such a strategy would need to incorporate targeted information, through a range of mediums, in plain English with catered communications for older Australians, Aboriginal and Torres Strait Islanders, people with impaired capacity and non-English speakers. OPG would be eager to contribute to the drafting of such a strategy given our experience providing services for these groups.

Outreach measures will also need to be put in place to ensure the more isolated members of the community can readily both register an EPOA online and view relevant information. People in regional and rural areas, non-English language speakers, older Australians and prisoners may not have convenient access to the information or resources required to register an EPOA, placing these vulnerable members of the community further at risk of exploitation and financial abuse. We therefore recommend an outreach strategy be in place to ensure all members of the community can exercise their right to protection through an EPOA.

Recommendation 2:

That the register be accompanied by a comprehensive communications and outreach strategy, developed in consultation with relevant stakeholders that incorporates targeted information, through a range of mediums, with catered communications for different stakeholder groups.

Administration and maintenance of a register

Consideration will need to be given as to how the register will be administered and maintained once developed. It is imperative that, to be an effective mechanism for combating elder abuse, the national register require the system administrator to check the validity and authenticity of all documents submitted. The placement of a fraudulent document on a register would only provide an element of validity to the fraudulent document. This then begs the question as to who will administer the register in states and territories. It is critical they have the knowledge and resources available to identify any attempts to lodge fraudulent documents on the register.

OPG also recommends that maintenance of the register be supported by independent audits of powers of attorney, or other registered decision-making instruments.

While outside the scope of this consultation, OPG submits that guarding against fraudulent documents being submitted to the register is also likely to require significant harmonisation of laws and practices in witnessing enduring documents and their format, and legislative provisions to ensure only valid and active documents are uploaded to the register, with mechanisms to challenge and remove potentially fraudulent documents.

Recommendation 3:

That a systems administrator (or its representatives) be required to check the validity and authenticity of all documents submitted to the register.

Recommendation 4:

That maintenance of the register be supported by independent audits of EPOAs and other registered decision-making instruments.

Fees

OPG understands that a fee will apply for an EPOA to be registered with the appropriate authority. OPG acknowledges that the introduction of a new regulatory mechanism in the form of a register will involve additional costs for government which will need to be recouped. However, OPG recommends an initial fee amnesty to encourage the lodgement of EPOAs with concessional rates for those meeting certain criteria. Information on any concessional rates and any applicable charges to amend or revoke a document will need to be articulated and included in a communications strategy.

Additional information is also needed on the costs (if any) associated with accessing the register. OPG anticipates that regular users, such as banks and hospitals, would be required to pay an access fee. However, OPG questions whether ad-hoc users should bear the cost for seeking information from the register.

Recommendation 5:

That a fee amnesty period be in place to encourage the registration of new and existing EPOAs, with concessional rates for those meeting certain criteria.

Recommendation 6:

That ad-hoc users not bear the cost for viewing information on the register.

Access

OPG notes in the RIS that third parties seeking to access the RIS will need to be authorised parties with a demonstrated business need. The criteria for being classed as an “authorised party” and the limits of a “demonstrated business need” will need to be refined to prevent inappropriate or fraudulent use of the information on the register.

Beyond regular users such as banks, hospitals, Public Trustees and the Queensland Public Guardian (in relation to the investigation function), it is unclear who else will be eligible to view information on the register and whether restrictions will apply to the type of information they can access.

OPG would support access being expanded to other third parties. However; this is subject to there being clearly defined viewing/edit functions based on the user profile and business need. Full access would be required by authorised parties with a demonstrated business need. Beyond this, OPG recommends a basic form of a register be accessible by members of the public for the purpose of identifying whether a person has an appointed attorney, guardian or administrator. It is recommended that only principals can register their own EPOA (prior to it becoming active).

Recommendation 7:

That access to the register be provided to other third parties with clearly defined viewing/edit functions based on the user profile and business need.

Transitional arrangements

OPG requires clarification on the proposed arrangements to recognise EPOAs that are active at the time the register is introduced so there is no unintended disadvantage.

A comprehensive engagement and communication strategy, as referred to above, will be a necessity during this transition period to ensure stakeholders at all levels are aware of the changes and the implications of the new system. The OPG would be pleased to offer advice and resources to inform and implement this strategy.

Recommendation 8:

Clear transitional arrangements will be required in relation to EPOAs that are already active at the time the register commences.

Changes to the register

Further articulation is needed on what changes to an EPOA would necessitate a new EPOA being entered onto the register. OPG questions whether simply updating the contact details for an attorney would require a new EPOA being entered onto the register with the associated registration fee. In the interests of limiting the regulatory burden on consumers, it is recommended that changes to basic biodata by a principal not require the creation of a new EPOA and not attract an additional fee. However, it is imperative that only the principal be able to access this edit function.

It should also be considered that currently a new EPOA is not required for all changes to the document, namely, when a decision is made by the Queensland Civil and Administrative Tribunal (QCAT). Accordingly, OPG recommends a process be put in place to have this information recorded in the register in real time. It is further recommended that the register maintain historical information of all events relating to an EPOA, including activation, suspension and cancellation. This function could aid in the identification of “red flags” for the misuse of an EPOA by an attorney.

Recommendation 9:

That any changes to basic biodata by a principal not require registration of a new EPOA and not attract an additional fee.

Recommendation 10:

That a process be put in place to allow any changes to an EPOA that follow a decision of a Tribunal to be recorded in the register in real time.

Recommendation 11:

That the register maintain historical information of all events relating to an EPOA, including activation, suspension and cancellation.

Impact on tribunals

The development of a register for EPOAs would need to take into consideration the impact upon tribunals, public administration systems that would likely have to bear the burden of any increase in financial administration appointments where there is less take up of making enduring documents for financial matters. This may occur where enduring documents are no longer administratively easy and flexible to make, or economical, and require navigation of a registration regime.

OPG therefore recommends targeted consultation with relevant bodies with a role in the financial administration system to address the impact of a register.

Recommendation 12:

That targeted consultation be undertaken with relevant bodies with a role in the financial administration system to address the impact of a register.

Measurement of success

OPG seeks clarification on how the effectiveness of the register will be measured. Whether it be qualitative, in terms of the incidences of misuse of EPOAs decreasing, and/or quantitative measures based on the number of EPOAs registered within a period of time. OPG suggests a review of the register be undertaken 12 months after commencement to ensure the register is meeting its objectives in terms of preventing the misuse of EPOAs.

Recommendation 13:

That a review of the register be undertaken 12 months after commencement to ensure the register is meeting its objectives.

Commencement of financial powers

Provisions underpinning an online register, mandatory or otherwise, will need to be clear on when the power of attorney is activated.

Recommendation 14:

That provisions underpinning the register are clear on when the financial power of attorney is activated.

Time limits for financial transactions

Financial withdrawals by an attorney could have a time limit attached to them, for example 72 hours, to enable checking of current EPOA status on the national register.

Recommendation 15:

That financial withdrawals by an attorney have a time limit attached to them to enable checking of current EPOA status on the national register.

Option three: Non-regulatory option

As stated above, OPG recognises the positive role that a register could play in protecting the rights of Australians who have an EPOA in place. However, OPG has identified areas requiring clarification and other concerns relating to a register of EPOAs that necessitate resolution before any register is committed to. If the issues identified are not easily addressed, perhaps a voluntary register would be more suitable.

As mentioned above, any reforms to the registration of EPOAs will necessitate a comprehensive communications strategy to be in place and liaison with the relevant bodies to raise awareness and educate the community about the changes. This is particularly important for a system of voluntary

registration to ensure the public is aware of the benefits of registering an EPOA and provided with the required resources to register their enduring document, should they wish to do so. A communications and outreach strategy, with an adequate lead in time, will also be a means to engage with the public and perhaps address any privacy concerns that may be deterring them from registering their EPOA.

Recommendation 16:

That voluntary registration be considered a more suitable approach to an EPOA register, accompanied by a comprehensive communications and outreach strategy to maximise registrations.