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28 June 2024

Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
CANBERRA ACT 2600

Via email: corporations.joint@aph.gov.au

Dear Committee Secretary

Thank you for the opportunity to provide a submission to the Parliamentary Joint Committee on Corporations and Financial Services inquiry into financial services regulatory framework in relation to financial abuse. The Office of the Public Guardian (OPG) appreciates the extension of time to provide this response.

OPG is an independent statutory office in Queensland which promotes and protects the rights and interests of adults with impaired decision-making capacity, and children and young people in the child protection system or staying at a visitable site.

Relevant to this inquiry, the Public Guardian can investigate allegations that an adult with impaired decision-making capacity has been, or is being neglected, exploited or abused, or has inappropriate or inadequate decision-making arrangements in place.

The *Public Guardian Act 2014* provides the Public Guardian with powers to:

- require people to produce financial records and accounts
- access any relevant information, such as medical files
- cross examine witnesses
- issue a written notice requiring a person to attend at a stated time and place, to give information or answer questions and/or produce documents.

Our investigations focus on protective actions that can be taken for the adult concerned, with the rights of adults with impaired decision-making capacity at the centre of our approach to conducting investigations. The protective actions available to the Public Guardian include making urgent applications to QCAT for the appointment of a guardian or administrator, the suspension of an attorney's powers or, in extreme circumstances, a warrant application to remove the vulnerable person from a situation to ensure they are safe. In other situations, we may refer a person and/or other people in their life to relationship mediation, legal or advocacy services.

Financial abuse or incompetence is the most common type of allegation investigated, presenting as a factor in 26 of the 63 investigations that commenced in 2022-23. The remit of financial administration sits with the Public Trustee of Queensland who may be appointed by the Queensland Civil and Administrative Tribunal or a court to administer an individual's finances.

Having had the benefit of reading the Queensland Public Advocate's submission of 24 April 2024, OPG writes to reinforce the Public Advocate's stance on the importance of introducing harmonised

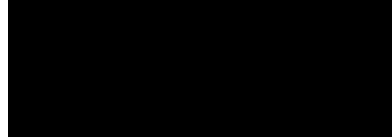
laws for enduring power of attorney documents as a mechanism for addressing financial abuse. We also invite the committee to consider two previous OPG submissions relevant to your inquiry, namely our submission on Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney (January 2024), and our submission on National Register of Enduring Powers of Attorney – Public Consultation Paper (July 2021).

OPG supports national harmonisation and consistency in financial enduring power of attorneys (EPOAs), including the legal framework and format of EPOAs. It is critical though that any move towards harmonisation reflects best practice and does not dilute any safeguards contained in Queensland's existing EPOA framework.

OPG supports in principle the establishment of a national register for EPOAs, but we are mindful that a register could be disproportionately relied upon as a safeguard against financial abuse. Robust consideration should also be given to whether an EPOA is activated, still operational and being used in accordance with the governing legislation, despite being on the register. For a register to be a genuine tool in preventing financial abuse, the administrator of the register must be empowered with the mandatory function and responsibility to ensure the documents submitted to the register are valid and are being used as intended. Additional functionality to flag unusual activity, such as frequent changes to the appointed attorney, and generating alerts to the relevant financial institution could boost the effectiveness of a register and better help identify financial abuse earlier.

Thank you again for the opportunity to contribute to the inquiry. I trust this information is of assistance. If you require further information, please contact Ms Kelly Unsworth, Principal Policy Officer, OPG, at [REDACTED] or on [REDACTED].

Yours sincerely

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Amelia Barker
A/Deputy Public Guardian

Enc. Queensland Public Advocate submission to the inquiry 24 April 2024

[OPG submission on Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney \(January 2024\)](#)

OPG submission on National Register of Enduring Powers of Attorney – Public Consultation Paper (July 2021)



National Register of Enduring Powers of Attorney – Public Consultation Paper

Submission to the Attorney-General's Department

July 2021

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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.

The OPG provides individual advocacy services to children and young people as a result of the following functions:

- the child advocacy function, which offers person-centred 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, and
- the child community visiting 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).

The OPG provides an entirely independent voice for children and young people to raise complaints and express their views and wishes. When performing these functions, the OPG is required to seek and take into account the views and wishes of the child to the greatest practicable extent.

The 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 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, the 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 the OPG's legislative functions, obligations and powers. The *Powers of Attorney Act 1998* regulates the authority for adults to appoint substitute decision makers, including the Public Guardian, under an advance health directive or an enduring power of attorney. The Public Guardian can only be appointed as attorney under an enduring power of attorney for personal matters, not financial matters.

Submission to the Attorney-General's Department

Position of the Public Guardian

The Office of the Public Guardian (OPG) welcomes the opportunity to provide a submission to the *National Register of Enduring Powers of Attorney – Public Consultation Paper*. The views contained in this submission are that of the OPG and do not purport to represent the views of the Queensland Government.

This submission addresses the issues raised in the consultation paper where they relate to the experiences of the OPG and the people that we serve.

Financial abuse

The OPG appreciates that a register of Enduring Powers of Attorney (EPOA) 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 mechanism for banks and hospitals. There are a number of functions the register could include to optimise the benefits for some third parties. For instance, third party access could have a time limit attached to them to enable checking of current EPOA status on the national register. The currency of the register could also allow financial institutions to conduct ongoing checks regarding an EPOA each time an attorney conducts a transaction on an adult's behalf and ensure the powers of the attorney remain active.

However, OPG is concerned that the existence of a register will be disproportionately relied upon as a safeguard against financial abuse. A significant proportion of investigations conducted by the OPG regarding the validity of an EPOA are not in relation to the administrative accuracy of the document itself. Some matters investigated by the OPG, in which an attorney is appointed and allegations of financial abuse are sustained, relate to circumstances in which an EPOA is deemed to be invalid based on a determination that the principal did not retain capacity to execute the document.

More commonly, investigations are undertaken into situations where an appointed decision-maker, through an administratively valid EPOA, has conducted transactions in contravention of the obligations in the *Powers of Attorney Act 1998* that amount to financial abuse. In these situations, a register would not have prevented the abuse. There is a genuine risk that entities will apply undue weight to the registered document when robust consideration should also be given to whether it is activated, still operational and being used in accordance with the governing legislation, despite being on the register.

In order for a register to be a genuine tool in preventing financial abuse, the administrator of the register must be empowered with the mandatory function and responsibility to ensure the documents submitted to the register are valid and are being used as intended. Additional functionality to flag unusual activity, such as frequent changes to the appointed attorney, and generating alerts to the relevant safeguarding body, would also boost the effectiveness of a register and would go further to address the underlying issues that lead to financial abuse.

While outside the scope of this consultation, it must be acknowledged that consistency in EPOA laws across all states and territories is critical to optimising the effectiveness of the register in reducing financial abuse. This would include national 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.

Importantly, any national harmonisation must be to the highest standard, and not reflect a lowest common denominator approach for the sake of national consistency. It is OPG's preference for the national harmonisation of the laws to be undertaken before the development of a supporting national register.

Importantly, the register must be recognised as only *one* element in a wider strategy to address financial and elder abuse, and that other supporting initiatives, such as building community awareness on identifying and reporting abuse, are integral to the register achieving its objectives.

Risks

A significant risk with the introduction of a register is the impact it will have on the current flexibility and ease of making an enduring document, and the current widespread use of such documents within the community. In an environment where enduring documents are no longer administratively easy, flexible and economical to make, the public may be deterred from utilising the protection of an EPOA. This is likely to see an impact upon tribunals, public guardianship and administration systems that would inevitably have to bear the burden of any increase in guardianship or administration appointments where there is less take up of enduring documents.

To address this risk, a range of readily accessible inquiry functions will need to be available for members of the public who may be unsure about the new system, including a dedicated phone line, email and an online enquiry option. Outreach activities will also be critical, as well as establishing linkages with stakeholders who have regular engagement with groups most likely to utilise an EPOA, such as older people and those with a disability.

Any fee imposed for lodgement of an EPOA will be a notable obstacle for some interested in making or lodging an EPOA, and therefore represents a risk to the register's utility. Ideally, there would be no fee for lodging a personal appointment, to encourage all those who wish to lodge an EPOA to do so regardless of their financial circumstances. However, recognising that this may not be feasible, the OPG recommends an initial fee amnesty to encourage the lodgement of EPOAs, and concessional rates for those meeting certain criteria. Information on concessional rates and any applicable charges to amend or revoke a document will need to be articulated and included in a communications strategy.

As mentioned above, the OPG is particularly concerned about the risk that, through the legitimacy of a government-endorsed register, the apparent validity of an EPOA and the conduct of the appointed attorney may be erroneously validated. There is a danger that by merely forming the opinion that a document is administratively valid, entities may incorrectly deduce that the document has been validly made. A lodging authority with the mandatory function to check the validity of documents submitted to the register will be critical.

Accessibility

The OPG suggests a comprehensive communications strategy be developed in consultation with relevant stakeholders to optimise accessibility and ease of use of a national register. Such a strategy would need to incorporate targeted information, through a range of mediums, in plain and easy English with catered communications for older Australians, Aboriginal and Torres Strait Islander people, people with impaired decision-making capacity and non-English speakers.

Outreach measures will also need to be put in place to ensure the more isolated members of the community can both readily 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. The OPG therefore recommends an outreach strategy be in place to ensure all members of the community can exercise their right to protection through an EPOA. Alternative means of lodgement will also be necessary for people who lack access to reliable internet.

Access arrangements

Respecting the privacy of principals and their attorneys under an EPOA is an important issue for the OPG. Any risk of compromising personal information and financial arrangements, be that real or perceived, could discourage many from using an EPOA and would be contrary to the intentions of the register. We recommend a stringent examination of access arrangements with privacy a key consideration.

Regarding access by financial institutions with permission from the principal and/or attorney, it would need to be clarified whether a financial institution would be able to refuse to act on an EPOA if consent is refused. If the institution can act despite the refusal of consent, the question begs whether a principal or attorney can really be able to refuse access. These are technicalities we anticipate will be discussed at greater length as the consultation phase progresses.

It is essential that safeguarding bodies, such as public advocates, guardians and trustees, have ready access to the register, subject to clear guidelines on the appropriate and inappropriate disclosure of information from the register. For example, information can be used by a safeguarding agency in a tribunal or court proceeding but cannot be provided to another party. If functionality is incorporated into the register to provide notifications of access, it is critical that access by safeguarding agencies does not generate a notification to a principal or attorney, as this could compromise any investigation into wrongdoing that may be underway. Urgent access for such bodies would also need to be enabled in certain circumstances where there is an immediate concern for the wellbeing of the principal.

The OPG holds concerns about the category of "other entities and individuals" having access to the register. Allowing an unspecified category of people to access the personal information of a principal's decision-making arrangements without their consent represents a potential breach of privacy. Conversely, it is important to encourage family and friends to be alert to signs of financial abuse and undertake actions to address it. Without the ability to view a principal's decision-making arrangements, effective monitoring by family and friends may be hindered. We acknowledge this is a difficult balance to strike. It may be that a person with a "legitimate interest" could apply for access to the register with a notification generated to the principal and attorney. If reluctant to alert the attorney and principal to their concerns, the interested party could apply for notification to be waived and a request for investigation sent to the relevant safeguarding agency. This issue highlights the complexities of access arrangements and the need for thorough consideration to be undertaken before the register is established.

The OPG also recommends that the register include information for principals on the importance of the terms, conditions and notifications they include in their EPOA. Principals should be encouraged to undertake careful consideration as to whom they wish their personal information to be disclosed and under what circumstances. We believe this information will be of paramount importance in preventing

financial abuse, not only to ensure the principal's wishes are clear, but also to alert the principal to scenarios they may not have anticipated and that could have an impact on who they appoint and the terms and conditions under which an attorney appointed.

Making phase

Allowing online creation of EPOAs raises the obvious concerns about online safety and data security. This could bring into question the integrity of the register and deter some people from making an EPOA due to fears of their personal information being improperly accessed. This is in some ways an unavoidable issue, as cyber security is a concern with all online lodgements of this kind. Public confidence in the register will be reliant on community education and adequate and reliable systems being established from the outset, along with readily accessible information and support.

Consideration must also be given to the vulnerability of older people who may not be technologically proficient and subsequently rely on their relatives, or their nominated attorney, to create and lodge the document on their behalf. This carries the inherent risk that the attorney will take advantage of their position and create a document that does not reflect the views and wishes of the principal.

The OPG would strongly support the proposal in the consultation paper that guidance and explanatory material be incorporated into the register to guide users as they develop their EPOA. Based on the nature of investigations into financial abuse conducted by the OPG, information on capacity is particularly important for anyone making an online EPOA to ensure they understand when the financial power could begin. Prompts and warnings about uploading invalid or fraudulent documents are also advised as a tool to address the inherent risks of an online register, along with information on elder abuse and the role of safeguarding bodies such as the OPG.

Lodgement phase

It is recommended that only principals be permitted to lodge their own EPOA for registration at a time when they have capacity to execute the document, i.e. before the document is activated. If an EPOA is registered at a time that the principal has lost capacity, i.e. upon activation, the principal is denied the opportunity to challenge the document or rectify information to ensure their views and wishes are carried out. Registering prior to the EPOA being activated would also enable the lodging authority to conduct a review of the document and, in the event that errors are identified, this could be communicated to the principal, empowering the principal with the opportunity to rectify the document at a time that they retain capacity.

The administrative review would need to go beyond a mere check of 'who ticked what box'. Information on the adult's capacity should be provided along with robust practice around determining this. Evidence of eligibility of the attorney and witness should also be taken into consideration as evidence of the document's validity. This again highlights the need for a fully empowered systems administrator and/or lodging authority to conduct a thorough examination of the validity of the documents and be alert to any "red flags" that could indicate financial abuse.

Documentation

The OPG considers it would be beneficial for all advance planning documents to be stored on the register. The purpose of recording an EPOA for financial purposes would not be able to capture the complexities of an EPOA and advance planning documents generally.

Historical EPOAs

Adding historical EPOAs to the register should be strongly encouraged. This is a record of the adult's previous views and wishes that may assist a tribunal in appointing an alternative decision-maker should the need arise. Access to historical EPOAs also provides the opportunity to further identify any unusual activity that could indicate elder abuse.

Revocations

The OPG strongly recommends that revocations be required to be registered in order to have legal effect. Failing to register a revocation would result in the national register holding an EPOA that is no longer a current or valid document.

There is a significant risk associated with automatic revocations that will need to be addressed for the register to be an accurate reflection of the status of an EPOA. In circumstances where the attorney is obliged to notify of an event that triggers an automatic revocation, there is a reliance on the attorney fulfilling their obligations in situations where they may not have the views and wishes of the principal at front of mind. Compliance with legislative self-reporting obligations is generally low. Operationally, it could mean that an EPOA has been automatically revoked but the registration authority has not been notified and the EPOA register could continue being relied upon by third parties such as financial institutions. It is acknowledged that this can occur with or without a register; however, as stated above, a government-hosted register can give perceived legitimacy to what may be an invalid document. To address this issue, it is critical that users be prompted to be cognisant of other factors that could mean the EPOA is inoperative and that may be signs of potential elder abuse.

Status of an EPOA

The full status of the EPOA should be available on the register, including areas of appointment, limitations included, and terms and conditions. Without this information, the register will be of limited use in ensuring the wishes of the principal are being adhered to. The level of detail viewable by each user would depend on the access level of the person searching. See above discussion under "access arrangements".

The importance of the full status of an EPOA being reflected on the register is demonstrated by a circumstance specific to Queensland. In Queensland, the Public Guardian can suspend the operation of all or some of an attorney's powers for an adult under an EPOA for up to three months if the Public Guardian suspects, on reasonable grounds, that the attorney is not competent (see s.34(1) *Public Guardian Act 2014*). During a suspension, the Queensland Public Trustee is taken to be the attorney for financial matters (financial administrator). The register will need the functionality to be able to reflect this intervention to ensure the attorney cannot continue to exercise their powers without authority and, in doing so, breach s.35(1) of the *Public Guardian Act 2014*. In the absence of such functionality, the register could add legitimacy to an invalid EPOA, allowing a suspended attorney to continue making decisions, putting the principal at an ongoing risk of financial abuse.

Dual registration

The OPG believes that dual registers could potentially increase the risk for documents that have been revoked or overtaken being relied on as representing an adult's decision-making arrangements. Should dual registers be explored, information sharing would be essential between the registers to ensure any

uploaded documents were simultaneously updated to maintain the currency and consistency of information.

Changes to the register

Further consideration is needed on what changes to an EPOA would necessitate a new EPOA being entered onto the register. The 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 should not require the creation of a new EPOA or 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 in Queensland 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, the 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.

Measurement of success

The 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. The 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.

Commencement of financial powers

Provisions underpinning an online register will need to be clear on when the power of attorney is activated. In circumstances where financial powers commence upon the principal losing capacity for these decisions, we would anticipate that the register would require evidence that the principal no longer has capacity. That being the case, there would need to be consideration of adults with fluctuating capacity and how this would be reflected in the register, and the administrative arrangements required to accommodate frequent updates of this nature. Functionality will need to be built into the register to ensure this information can be readily updated so as to maintain an accurate reflection of the status of an EPOA.

Streamlined register

In order to mitigate some of the concerns raised above around the introduction of a national register, the Commonwealth Government may wish to consider introducing a more streamlined version of a national register. For example, the register could require only basic information to be uploaded, i.e. enough to be able to establish the existence of an EPOA at the point in time a search is undertaken, rather than requiring parties to upload a copy of the entire EPOA. This more basic register would still achieve the goal of raising awareness about the protections of an EPOA as a useful tool to consider a principal’s enduring financial arrangements and a prompt to conduct further inquiries about decision-making arrangements. Meanwhile, with only the basic data about the existence of an EPOA being available and not the contents of the enduring document itself, the privacy of principals and attorneys would not be unnecessarily compromised. Further to this, the register would not give legitimacy to a

potentially invalid document, with users encouraged to conduct their own enquiries into the validity of a person's decision-making arrangements and not rely on the register as the sole source of truth.

Conclusion

The Public Guardian again thanks the Attorney-General's Department for the opportunity to provide feedback on the possible arrangements for a National Register as detailed in the *National Register of Enduring Powers of Attorney Public Consultation Paper*. We look forward to the opportunity to provide further comment as the final arrangements for the National Register are developed and the final proposal released for stakeholder consideration.