

National Register of Enduring Powers of Attorney – Public Consultation Paper

Submission to the Attorney-General’s Department

Submissions can be lodged by email and sent to nationalregister@ag.gov.au by **30 June 2021** and must include a name and contact details for the department to discuss the submission should there be a need to do so.

The questions below reflect the exact questions contained in the Consultation Paper, and are provided for ease of reference. The [Consultation Paper](#) is available on the Attorney-General’s Department website for further context on each of the questions below. You are not required to provide a response to every question, the answer space may be left blank or marked with ‘no comment’. There is no word limit for responses to any question.

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Yes

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Yes No

A National Register of Enduring Powers of Attorney

Question 1: Would a National Register reduce financial abuse? How could this be achieved?

QAI agrees that a National Register of Enduring Power of Attorneys (“**EPOA**”) would assist in reducing financial abuse, in particular, the financial abuse experienced by more vulnerable members of the population including people with disability (particularly people with psychosocial, intellectual or cognitive disability) and older people.

The National Register should provide clarity by explaining the roles and powers of an attorney and allow the principal to maintain control by recording limits on an attorney’s power and the circumstances in which it would become active. The establishment of a National Register would simplify third-party verification and eliminate loss or destruction of paper documents, the consequences of which have the potential to significantly impact an individual’s autonomy and wishes.

In addition to requiring registration upon the creation of an EPOA, requiring registration of revocation would mitigate the effects of multiple existing EPOAs and provide comfort to individuals that their current instructions are reflected in a single point of access. While staff at the National Register (“the **Registry**”) will not make determinations as to the validity of a particular EPOA, the Registry should provide oversight by assuring requirements of form and witnessing are complied with before registration.

Finally, to provide certainty, the National Register could also assist with the reduction of financial abuse against the most vulnerable members of society by providing an automated notification system when an EPOA is activated, revoked, and relied upon.

Question 2: Are there any risks associated with the National Register? If so, how could these be minimised?

It is imperative that the National Register is developed with strict adherence to the principles of supported decision-making, as articulated in the Convention on the Rights of Persons with Disability (CRPD). Implementation of the scheme must be accompanied by appropriate and targeted community education and community legal education, both about the importance of and process of supported decision-making. The principal must be at the heart of the decision-making.

QAI has two primary concerns in relation to the establishment of a National Register: the first is ensuring compliance with a person’s fundamental right to privacy; the second is a person’s right to equitable access to the service, irrespective of economic status, geographical location and disability.

As the National Register will contain personally sensitive information about the principal, who will often be in a position of vulnerability when the EPOA is used, the National Register must protect the individual’s information as best as possible. This may include offering a ‘layered’ approach to information access, by providing only the information necessary for the attorney to implement the principal’s wishes under the EPOA. Access should be limited to appropriate individuals and entities and should be accessible by a unique code, developed for each particular access request (for example, a code auto-generated by the National Register for the attorney to provide to the principal’s bank for the attorney to exercise a financial power under the EPOA).

In order to create an accessible service, regardless of a person’s financial resources or location, a proposed principal should be able to lodge their EPOA, or any amendments or revocations, via digital and physical means (post, in-person). The National Register should also make accommodations for adults with disability who rely on the support of others to navigate systems and services. However, the upmost care should be taken by the Registry to ensure the principal’s EPOA is made free from any coercion where a third party is involved in this process.

Finally, while fraud and abuse are risks associated with EPOAs generally, and not specific to the National Register, consideration should be had to oversight mechanisms. This could be by either (or both) the involvement of relevant State and Territory public guardians or advocates to investigate flagged or alleged cases of abuse of the principal. An additional mechanism may be the introduction of an individual nominated by the principal, separate to the attorney, who is to be notified of activity on the National Register who may then raise concerns with the Registry staff and/or public guardians or advocates (see *Question 42*).

Question 3: How can the registration scheme be designed to ensure accessibility and facilitate use by Aboriginal and Torres Strait Islander people, those from culturally and linguistically diverse communities, and those in rural and remote areas?

QAI does not wish to provide a detailed response to this question and considers greater consultation with those relevant communities should be undertaken. However, there is a risk of non-engagement by vulnerable members of our community if access to the National Register is limited to online-only application and there are no options for fee-waiver (should fees be imposed). In turn, this may result in a more restrictive approach to substitute decision-making in the event of incapacity of the particular adult.

Access arrangements consistent with the purpose of the National Register

Question 4: Do you support the proposed access arrangements in section 3.2.6? Are there any other users who need access?

QAI supports the proposed access arrangements as outlined in 3.2.6 of the Public Consultation Paper and does not consider that there are additional parties who may require access that could not do so with the use of 3.2.6(e).

Question 5: Why might someone need to apply to access the register (if not in categories (a)-(d) at 3.2.6)? What should be considered a legitimate need?

As EPOAs may be made for more than financial matters, other people and/or entities may be required to access the National Register to assist with implementing personal matters, such as decisions related to accommodation and the provision of services. However, QAI considers this could be achieved through the use of 3.2.6(e) where there is a “legitimate need” and with attorney’s consent and unique access code (see *Question 2*).

QAI submits that a “legitimate need” may be defined by having regard to the particular jurisdiction’s empowering statute’s definitions of the types of matters an EPOA may appoint an attorney for (see, for example, Schedule 2 of the *Powers of Attorney Act 1998* (Qld) - e.g. accommodation, health care).

Question 6: What reasons should be sufficient for a person to be given access by application?

As noted in Question 2, QAI holds concerns about the access of vulnerable community member’s personal information and the implementation of a strict application process and layered information access. However, this concern should be weighed against the potential for fraud and abuse to occur against the principal and a third party intending to act upon representations made by a purported attorney should

have an obligation (and therefore access) to confirm the scope of the attorney's power under an EPOA to ensure the act is duly authorised.

As noted in Question 5, a third party involved in any of the particular jurisdiction's "types of matters" should be entitled to access the National Register to confirm the scope of a EPOA's power upon receipt of a unique access code.

Question 7: Where access is by application, what information should be provided to demonstrate a legitimate need? What is a reasonable time for processing this kind of request for access?

QAI does not wish to provide a detailed response to this question, however, as noted in Questions 5 and 6, need may be determined by the various "types of matters" in the relevant empowering statute and access may be given by use of an individual access code uniquely generated for the particular decision.

In addition to this, the National Register may also consider requiring the particular agreement with the third party (e.g. contract for sale, service agreement, tenancy agreement) to demonstrate the legitimate need by the third party.

What is a reasonable time should depend on the nature of the request and associated risk should the EPOA information not be provided. For example, confirmation for extending a residential tenancy lease may not be as urgent as confirming a principal's medical wishes in the event of an emergency.

Question 8: Where access is by application, would any circumstance justify the need for urgent access? What are these?

See above answer to Question 7.

Question 9: If applicants are denied access, should they be entitled to request a review of this decision? If so, what would the review process look like?

QAI supports processes that foster procedural fairness and a culture of good administrative decision-making. Like many government services, an internal review process should be established and effectively implemented. Should the person concerned be dissatisfied with the outcome of the internal review, they should have the ability to refer the complaint for external review to the relevant State or Territory tribunal with jurisdiction over other EPOA decisions (e.g. the Queensland Civil and Administrative Tribunal's power conferred by the *Powers of Attorney Act 1998* (Qld)).

Question 10: Are there any circumstances in which access should be given without an attorney or principal's consent? What are these? How should this work in practice?

Consistent with the *Human Rights Act 2019* (Qld), QAI considers an individual's right to privacy to be a fundamental human right and any limitation on this right should be demonstrably justifiable. As such, unauthorised access to a principal's EPOA should be limited to requests by statutory entities, such as the relevant public guardian and/or advocate, and only where such a request is made for the purpose of conducting an investigation into allegations of abuse, neglect, and exploitation of the principal.

Question 11: Should users be required to inspect an imaged copy of the executed instrument to satisfy themselves of the terms of the EPOA?

Further to QAI's concerns raised in Question 10, access granted in accordance with a legitimate need should be limited to the principal's personal details (to confirm it is the same individual subject to the proposed decision) and the scope of the power related to the particular matter (*see comments on layered design in Question 2*). If this approach is taken, the Registry will be required to thoroughly review the enduring document to ensure it is consistent with form, made with capacity (including free from coercion), and duly witnessed.

Question 12: In what ways should the register enable information collected online to be interrogated by persons who search the register?

QAI does not wish to comment on this question.

Making phase

Question 13: Are there any issues in allowing online creation of EPOAs? If so, how could those issues be addressed?

QAI has concerns regarding independent witnessing of the enduring document and the confirmation the principal has the requisite capacity, as required by the empowering statute, to make an EPOA. This is particularly important to reduce opportunities for coercion and abuse of the principal. In addition, there is a need to ensure equitable access to the National Register by adults who do not have the technology or skill to utilise this service purely as an online resource.

Question 14: How should the register ensure that the information entered online in creating an instrument is identical to the signed and witnessed document?

As part of the process, users should be required to submit a digitalised copy of the EPOA (photo, scan) as part of the creation of their online version, which is to be cross-checked and confirmed by the Registry prior to it being finalised and accessible to third parties.

This process could also involve a confirmation and objection period whereby the principal is given an opportunity to confirm the online version reflects the original document and provide feedback to the Registry in the event of any inconsistencies. This will also allow for the principal and any other interested parties (*see Question 42 on nominated persons*) to object to the registration of an EPOA where there are concerns of fraud or abuse.

Lodgement phase

Question 15: Who should be able to lodge an EPOA for registration?

QAI does not wish to comment on this question, save for noting that the following should be able to lodge an EPOA for registration (subject to the implementation of the safeguards outlined in Question 14):

- principal;
- attorney;
- principal's nominated person (*see Question 42*);
- principal's solicitor or another formal representative (advocate, for example); and
- statutory bodies (relevant public trustee or guardian).

Question 16: What information should be checked on an EPOA when it is lodged? How should this information be checked?

QAI does not wish to comment on this question, save for submitting that in order to ensure a principal's wishes and preferences are adequately understood, only an EPOA in its entirety should be accepted and not any incomplete or partial versions of it.

Question 17: How should people be able to lodge EPOAs for registration – online, by post, in person?

QAI submits that, in order to maximise accessibility, registration of EPOAs should be available online, by post and in person.

Question 18: Are there any additional options that should be available for people living in remote communities?

QAI does not wish to provide a comment on this question.

Question 19: Are there any risks in allowing people to lodge EPOAs online? What safeguards could be implemented to protect against these risks?

Please see response to Question 13.

Registration phase

Question 20: What documents should be included on the National Register?

In addition to the enduring document itself, some of the following may be necessary to establish the validity of a revoked EPOA under empowering legislation, such as:

- Guardianship and Administration orders;
- Certificates related to marriage, separation, divorce, death;
- Evidence as to the principal's capacity.

If other general documents are to be uploaded, in order to best preserve an attorney's privacy, documents should be filed under the EPOA's particular decisions (*see discussion in Question 2*).

Question 21: When should EPOAs be required to be registered (when they are made or before first use)?

To ensure the National Register accurately reflects the principal's current wishes and preferences, EPOAs should be lodged within a reasonable set timeframe (for example, 21 days from its execution and witnessing). QAI holds concerns as to the effectiveness, and potential misuse, of EPOAs that are registered only prior to its first use, as to do so may cause delay in urgent circumstances and not allow for an objection period before it is registered (*see Question 14*).

A further safeguard concerning the attorney's use of the EPOA would be to require the attorney to notify the Registry before its intended use to allow an opportunity for the principal and/or their nominated person to object to the proposed use.

Question 22: What information should be checked on an EPOA when it is registered? How should this information be checked?

Please see response to Question 16. The requirements should be the same.

Question 23: What information should that person have to give to a registering authority to confirm their identity?

In order to prevent opportunities for fraud and other forms of abuse, the Registry should implement an identification confirmation process consistent with the Australian government's 'National Identity Proofing Guidelines'.

Question 24: Should registration of revocations by the principal be mandated? If so:

- a. What would be the effect of failing to register a revocation?
- b. Who should be able to lodge revocations for registration?
- c. Should the register record other revocation events (for example, the death of the principal, bankruptcy of attorney) and, if so, how?

In order to give effect to mandatory registration, revocations, and amendments, should also be mandated.

Mandating revocations will provide certainty to those seeking to rely on the National Register that its information is current and correct. Without mandatory revocation, and amendment, there is a risk principals may revoke or amend their EPOAs, withdrawing power from an attorney, who may be able to incorrectly rely on the power given to them as reflected on the National Register.

Acts done in accordance with an unregistered EPOA should have a consequence of making the particular act void. However, to the contrary, should the registration of revocation be mandated, acts done in good faith and in accordance with a registered EPOA, a revocation of which has not been registered, should be considered valid in accordance with the EPOA.

Those parties with the ability to lodge documents in Question 15 should also have the ability to lodge revocations for registration. Similarly, as noted in Question 20, documents related to other revocation events (like divorce, for example) should be uploaded and noted on the National Register to ensure the National Register accurately reflects the position.

It would be appropriate to allow a transitional period for registration of EPOAs.

Question 25: To what extent should the register reflect the status of an EPOA?

To ensure the principal's most recent wishes and preferences are reflected and acted upon, it should show a history including lodged, registered, amended, and revoked EPOAs. To assist with assessment of potential fraud and abuse, actions done by third parties in accordance with the EPOA should also be noted under the particular matter type (e.g. financial decision for a bank loan; tenancy agreement for an accommodation decision).

Having an understanding of when a new EPOA has been lodged, but not yet registered, will also allow for the third party to consider whether or not to proceed with the act until the new EPOA is registered in the event the proposed act is inconsistent with the new EPOA.

Further, the National Register may benefit from a traffic light style of coding to indicate to those accessing a particular EPOA whether it is current, revoked, or there are potentially some uncertainties (such as the lodgement of a new EPOA still to be registered or questions around the principal's capacity). See also discussion in Question 42 of the use of this tool.

Historical EPOAs (i.e. EPOAs in existence prior to mandated national registration) – Registration phase

Question 26: What arrangements would need to be made for historical EPOAs to be registered?

QAI does not wish to comment on this question, save for noting that it would be appropriate to allow for historical EPOAs to be registered within a prescribed timeframe.

Question 27: What arrangements would need to be made to require historical EPOAs already registered on state or territory registers to be registered on the National Register? Should a fee be payable for historical EPOAs to be registered? Should this be any different where the EPOA is already registered on a state or territory register?

QAI does not wish to comment on this question.

Question 28: For solicitors holding historical EPOAs in safe custody – how could the principal/attorney be contacted to arrange registration?

QAI does not wish to comment on this question, save for noting that solicitors could be required to make reasonable attempts to contact all clients that have been assisted by the relevant practice within the past seven (7) years, and to provide them with information regarding registration.

Unregistered EPOAs – Registration phase

Question 29: What should be the effect of reliance on an unregistered EPOA? Should this be any different for historical EPOAs?

Please see response to Question 24. QAI does not wish to comment on the use of historical EPOAs.

Question 30: What process should there be for considering whether an EPOA can be registered after first use or out of time? Who should be empowered to make decisions about this? The registering authority? Courts or tribunals?

QAI does not wish to comment on this question.

Notifications – Registration phase

Question 31: Should the register provide a notification function to parties of an EPOA? How should this work? For example, should certain identified persons be notified when a search query for an EPOA occurs?

QAI supports a notification function for parties of an EPOA being included in the National Register. In particular, it would be helpful if former parties to an EPOA are notified when a further enduring document is registered (e.g. to ensure former attorneys are aware of the cessation or change to their appointment). This would also ensure that the person making the EPOA, and their nominated person (*see Question 42*) are notified in the event of a fraudulent lodgement. The principal should then be provided an opportunity to object to the registration (if fraudulently made), which may go through the Registry's review process (*see Question 9*).

Further, a notification function also assists with the opportunity for the Registry and parties to assess potential of financial, or other, exploitation occurring in instances where a number of EPOAs are made within close succession.

Options to address dual registration

Question 32: What principles should be taken into account in considering options for dealing with dual registers?

QAI does not wish to comment on this question.

Question 33: Are there any issues specific to dealing with lands related EPOAs?

QAI does not wish to comment on this question.

Question 34: Is there any feedback on the options described, or alternative options that could be considered?

QAI does not wish to comment on this question.

Question 35: Do you have any information on the proportion of EPOAs that your agency or clients make that are registered on the land titles register (if applicable)?

QAI does not wish to comment on this question.

Question 36: Are separate EPOAs prepared specifically for land transactions?

QAI does not wish to comment on this question.

Question 37: Do you have any information on the average length of time between the making of an EPOA and the registration of an EPOA on the land titles register?

QAI does not wish to comment on this question.

Question 38: Do principals have any concern about registering the EPOAs on the land titles register due to privacy concerns (i.e. that the instrument would then become publicly searchable)?

QAI does not wish to comment on this question.

Question 39: Would principals or attorneys object to paying two registration fees?

QAI notes that there should be provision for waiver of registration fees for persons experiencing financial hardship and/or the recipient of a social security payment. Requiring the payment of a fee would limit access to the National Register's benefits and protections to those most vulnerable and whom the National Register seeks to protect.

Safeguards

Question 40: What safeguards should be included in the National Register for older persons who may not be digitally capable?

QAI notes that the importance of accessibility extends beyond older Australians, and is a significant issue for many people with disability, particularly those experiencing intersection disadvantage such as disability and poverty.

Question 41: What safeguards should be included in the National Register to help protect individuals where there is family violence?

QAI submits that introduction of the National Register must be accompanied by resourcing to support appropriate education, as well as funding for advocacy, social work and counselling services to protect individuals who have experienced family violence in relation to the making or execution of an enduring document.

QAI recognises that many victims of family violence will not wish to initiate proceedings against a family member, for reasons including love, loyalty, relationships, fear and conditioning. It is therefore imperative that there are non-adversarial options open to victims of family violence seeking redress, as well as ensuring the Office of the Public Guardian is appropriately resourced to investigate (both responsively and proactively) allegations of abuse in a comprehensive and timely manner.

Question 42: What safeguards should be included in the National Register to help protect individuals where there is elder abuse?

QAI supports the introduction of a notification system (*see Question 31*) of significant transactions/acts, as well as “flagged” registrations from acts such as the continual registration of multiple EPOAs, as this may lead to findings of potential abuse.

In addition to notifications and flagging, Registry staff should have an obligation to confirm acts of concern with the principal and their nominated person (if applicable). Where concerns are founded, this should be referred to the relevant State/Territory public guardian/advocate to perform its investigatory function. It may also be beneficial to require the attorney seeking to rely on the EPOA to notify the Registry and other interested parties prior to engaging in its power to allow an opportunity to object.

The “uncertainty” code (*see Question 25*) could also be used in instances where the EPOA is flagged and/or being referred for investigation, without expressly indicating to third parties the nature of the particular concern. This code may assist third parties wishing to rely on flagged (for an unspecified reason) EPOA in taking precautions around its use prior to relying on it.

Finally, QAI considers the inclusion of a nominated person, or a “monitor”, as used in other jurisdictions, who is appointed by the principal and is independent of the attorney, would provide an additional layer of accountability and protection. The nominated person would be notified, along with the principal, of activity occurring on the National Register and have the ability to object to acts done under the EPOA and raise concerns of potential fraud and abuse of the principal occurring. QAI understands that not everyone will be in a position to have an additional person to appoint to this role, therefore, where there is no suitable person for this role, the statutory authority may be appointed. This is a similar approach taken under some guardianship and administration law.

Question 43: Should a support person be able to lodge an EPOA on behalf of the principal? If yes, who should be able to act as this support person?

QAI submits that a support person should be able to lodge an EPOA on behalf of the principal.

Question 44: If the registration process is too complex, a potential principal may use alternative forms of financial management with less safeguards. How could this be avoided?

QAI does not wish to comment on this question, save for noting that it is important that the registration process is clear, accessible and accompanied by appropriate community education and community legal education. It is also important that implementation of the National Register is accompanied by provision for appropriate supports for people requiring such.

Additional comments welcome

The department welcomes general comments or feedback relating to this National Register of Enduring Powers of Attorney public consultation.

QAI would like to provide the follow case study as an example to support our submissions on the necessity of a central register to protect some of the most vulnerable members of our society.

CASE STUDY

*(*names and other identifiable information changed)*

Josh* is a 65-year-old man with two adult children. Both of Josh's children are appointed as his joint attorneys under an enduring power of attorney for financial matters (the **EPOA**) and this appointment has been in place for a number of years.

Josh had significant savings in his account (around \$50,000). Unfortunately, Josh had an accident and had been a long-stay inpatient at his local hospital for a number of months while his health and capacity improved. During this time, however, one of Josh's children, his eldest son, Simon*, has been accessing his savings account, under the purported authority of the EPOA, and has spent almost half of Josh's savings.

Josh said the EPOA came about when Simon took him to his bank and suggested it would be a good idea for Josh to appoint his children as his EPOA should anything happen to him. However, Josh does not remember getting the original or a copy of any of this documentation.

Josh came to our service to seek advice on removing Simon as his attorney under the EPOA. Josh wanted his youngest son to continue to be his attorney. When Josh informed Simon of his intentions, Josh's access to most of his bank accounts was blocked. In order to move forward with rectifying his situation and revoking Simon's appointment, Josh had to engage an advocate to assist him locating and accessing a copy of the EPOA from the only known location of its potential storage, his bank.

Josh was then able to complete the required documentation to revoke Simon's authority and provide his updated EPOA to his bank. Unfortunately, due to Josh's recent residential move, he lost his copy of the updated EPOA (revocation) and had to contact the bank, again, to be provided with copies in order for him to give it to his sons. Josh also had concerns around providing a copy of the revocation documentation directly to Simon.

In addition to complexities QAI's clients experience in relation to some of the issues identified above (such as location of their EPOA), QAI also submits that the National Register should extend to the registration of other substituted decision-making documents, like Advance Health Directives.