

Mr Tom Browne
Attorney-General's Department
Attn: Protecting the Rights of Older Australians Section
3-5 National Circuit CANBERRA ACT 2600

EPOAConsultation@ag.gov.au

Wednesday 29 November 2023

Dear Mr Browne

Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney

The Financial Advice Association of Australia¹ (FAAA) welcomes the opportunity to provide feedback on the Attorney-General's Department's (AGD) consultation paper proposing reforms to achieve greater consistency in the laws for financial Enduring Powers of Attorney (EPOAs).

There is no doubt that elder abuse is devastating and harmful to the victims, their family members, and friends. It can take many forms. Often one form of elder abuse can be an indicator of additional mistreatment. EPOAs are one important estate planning mechanism, that whilst delivering many benefits, can also provide a means for elder abuse.

The FAAA has drawn on the experience and expertise of our financial planner practitioner members to provide feedback on proposals and questions presented by the AGD.

It is important to balance consumer protections in the EPOA laws with accessibility. EPOAs help protect people when decision-making capacity declines or no longer exists. While it is vital to ensure the laws protect the interests of the principal, the requirements should not create an undue burden on Australians that makes it too difficult for the principal and attorney to establish an EPOA.

¹ The Financial Advice Association of Australia (FAAA) was formed in April 2023, out of a merger of the Financial Planning Association of Australia Limited (FPA) and the Association of Financial Advisers Limited (AFA), two of Australia's largest and longest-standing associations of financial planners and advisers. The FPA was a professional association formed in 1992 as a merger between The Australian Society of Investment and Financial Advisers and the International Association of Financial Planning. In 1999 the CFP Professional Education Program was launched. As Australia's largest professional association for financial planners, the FPA represented the interests of the public and (leading into the merger) over 10,000 members. Since its formation, the FPA worked towards changing the face of financial planning, from an industry to a profession that earned consumer confidence and trust, and advocated that better financial advice would positively influence the financial wellbeing of all Australians. The AFA was a professional association for financial advisers that dated back to 1946 (existing in various forms and under various names). The AFA was a national membership entity that operated in each state of Australia and across the full spectrum of advice types. The AFA had a long history of advocating for the best interests of financial advisers and their clients, through working with the government, regulators and other stakeholders. The AFA had a long legacy of operating in the life insurance sector, however substantially broadened its member base over a number of decades. The AFA had a strong focus on promoting the value of advice and recognising award winning advisers over many years. The AFA had strong foundations in believing in advocacy for members and creating events and other opportunities to enable members to grow and share best practice.

Improving the consistency of the laws governing EPOAs across Australia is a vital step in better enabling decision-making for those with reduced capacity, and also for strengthening protections in a balanced manner to reduce the risk of elder abuse.

The FAAA suggests a nationally consistent package is needed to achieve a balance between consumer protection and the accessibility of the EPOA system. This should cover:

- who should be permitted to witness or be an attorney under an EPOA
- the obligations and training required to act as an authorised witness or attorney
- how many witnesses there should be to establish an EPOA
- who is ineligible to witness an EPOA or be an attorney under an EPOA
- how parties, or their representatives, find and access support services and guidance to report suspicions of potential elder abuse, and
- how EPOAs can be verified in the absence of a National Register for EPOAs.

We would welcome the opportunity to discuss the matters raised in our submission with you further. If you have any queries, please do not hesitate to contact me on 02 9220 4500 or at phil.anderson@faaa.au.

Yours sincerely



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Financial Advice Association of Australia (FAAA)

Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney

Effective date: 29/1/2023



CONSULTATION QUESTIONS

3. Witnessing arrangements in relation to principals

1. *Is it practical (for principals, attorneys and witnesses) for a model provision to:*
 - *require at least one authorised witness to an EPOA, and to retain jurisdiction-specific approaches to the number of witnesses required*
 - *retain jurisdiction-specific qualifications requirements for the required authorised witness?*
 - *Alternatively, if you consider it appropriate that there is a consistent approach across jurisdictions in relation to the prescribed class of persons who may act as authorised witnesses, what qualifications should that class of witness be required to hold?*

The FAAA supports a nationally consistent approach to requiring *at least one* authorised witness to an EPOA. This could be either:

- two authorised witnesses, or
- one authorised witness (such as a legal practitioner and designated others) acting under the 'enhanced witnessing obligations'.

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2. *Feedback is sought on whether your experience of the witnessing requirements for financial EPOAs, as they apply in your jurisdiction, appropriately balance factors such as accessibility, with providing appropriate protection and assistance to principals.*

FAAA members are located across Australia. The feedback we have received on the laws governing EPOAs covers all State and Territory jurisdictions. With the goal of supporting our members in the delivery of advice and services to their clients, we are a strong supporter of a unified national approach to EPOA laws and requirements. There would be material benefit in this.

Feedback from FAAA members indicates that while financial planners recommend clients put in place an appropriate EPOA, generally financial planners do not act as an authorising witness for their clients. Rather, financial planners tend to refer clients to a legal practitioner to conduct the necessary due diligence and assessments and appropriately establish the EPOA to protect their client.

While the use of legal professionals can impact costs and accessibility for consumers, particularly in some regional locations, the witnessing of an EPOA requires extra due diligence and obligations to minimise the risk of elder abuse, above the requirements for witnessing a statutory declaration.

The assessments of decision-making capacity and undue influence are critical in protecting the principal from elder abuse. Such assessments are more effectively performed by trained individuals.

The FAAA supports the following elements of the proposed witness model:

- an authorised witness would be a person of a class prescribed in the law
- the following people cannot act as an authorised witness:
 - a person who has not reached the age of 18
 - a party to the EPOA, or a close relative of a party to the EPOA
 - a person signing the EPOA at the direction of the principal.

In addition, the FAAA recommends an authorised witness should make a self-declaration to a fit and proper person test with consideration to the following, for example:

- criminal convictions
- professional denunciations and misconduct
- the provision of false or misleading information
- disqualification of registration, licence or accreditation
- bankruptcy
- conflicts of interest (this should not include the charging of a fee for professional services such as those provided by a lawyer, medical practitioner or financial planner).

Inconsistencies across state and territory jurisdictions of the current legislative environment governing enduring arrangements adds significant complexity to the system. Nationally consistent laws for authorised witnesses are necessary to reduce the risk of elder abuse and provide greater clarity for consumers. It will also provide greater certainty for financial service providers regarding the authenticity of an EPOA, regardless of the state or territory in which it was established.

The FAAA recommends a nationally consistent authorised witness list of categories of people that should be restricted and specific.

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3. *Feedback is sought on the proposed establishment of prescribed information resources, which witnesses would draw to the attention of a principal. What matters do you consider should be addressed in the proposed prescribed information?*

The FAAA supports the proposal to introduce prescribed information requirements which an authorised witness should draw to the attention of a principal, as well as the use of standardised forms. In addition to the information proposed in the consultation paper, the prescribed information should include:

- how to access assistance if the principal is concerned about the actions of the attorney
 - the heightened risks of appointing just one attorney
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- where to go for further information on EPOAs – such as an online centralised national database of information, guidance and tools for principals, attorneys and authorised witnesses.

The authorised witness should be required to assess the person(s) to be appointed as the attorney. This should focus on the intent of the attorney(s) to do the right thing by the principal – ie. to act in the principal's best interest, over their own interests – and the fitness and propriety of the attorney(s). (See the FAAA response to question 7.2 below for further information.)

The authorised witness plays a critical role as it is the first opportunity to identify if the principal is under duress or influence, and to assess and determine the principal's decision-making capacity. This is one of the primary roles of the authorised witness, regardless of the category of witness under the proposed model.

It is vital that an authorised witness is provided with appropriate support to ensure they are capable and comfortable with fulfilling this role. This should include best practice guidelines and training options (non-mandatory) to enable an informed decision to be made to act as an authorised witness.

The FAAA recommends a nationally consistent approach to the prescribed information resources, which must be in plain language and include guidelines and training for authorised witnesses on how to present to and use the information for principals and attorneys.

The FAAA supports the proposed certification requirements for authorised witnesses. This certification should include a self-declaration that the authorised witness is a fit and proper person.

4. *Feedback is sought on the obligations proposed for authorised witnesses, and the model of having differing requirements for different types of authorised witnesses (such as Australian legal practitioners).*

We appreciate and support the intention of the proposal to introduce different types of authorised witnesses is to balance accessibility with enhanced consumer protections where possible.

While this may add complexity to the EPOA system, the FAAA supports the suggestion in the consultation paper that certain qualified persons (such as legal practitioners and designated others) who hold appropriate training and qualifications must *explain* the effect of an EPOA to a principal, as opposed to merely *draw to the attention* of the principal that an EPOA is a legal document.

The obligations for an authorised witness who is also an appropriately trained legal practitioner should ensure this additional consumer protection is realised.

However, the FAAA suggests differentiating terminology / titles be given to the different types of authorised witness to emphasize the distinct roles and make it clear for the principal of the higher obligations certain witnesses must meet and the services they must provide. For example:

1. authorised witness – '*draws to the attention*' of the principal the required information about what an EPOA is, its significance as a formal legal document, the general obligations that an attorney owes the principal, how to revoke an EPOA, and other key information.
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2. qualified witness – ‘such as a legal practitioner and designated others’ who operate under ‘enhanced witnessing obligations’, ‘explains’ the effect of the EPOA to the principal before it is signed and certifies that the principal ‘appeared’ to freely and voluntarily sign the EPOA and have decision-making capacity.

‘Enhanced witnessing obligations’

‘Financial planner’ and ‘financial adviser’ are protected terms under s923C of the Corporations Act. To use such terms when providing personal financial advice to retail clients, an individual must meet the following legislated professional standards:

- have an approved qualification
- pass the financial adviser exam
- participate in 40 hours of continuing professional development (CPD) each year
- comply with the Financial Planners and Advisers Code of Ethics 2019 – a set of principles and core values in the areas of ethical behaviour, client care, quality process and professional commitment.

Individuals who are new to the profession must also complete a full-time professional year that includes at least 1,500 hours of work activities and 100 hours of structured training (a total of 1,600 hours) to become a financial planner.

Financial planners and financial advisers who meet these standards are required to be authorised and listed on the ASIC Financial Adviser Register (FAR) as ‘relevant providers’ to be legally permitted to provide personal financial advice to retail clients. These obligations under the Corporations Act provide the legal parameters for ‘relevant providers’ to be appropriate authorised witnesses under the proposed enhanced witnessing obligations.

While it is a good starting position for a person to be a relevant provider, it is suggested that a financial planner, when fulfilling the role of authorised witness under the ‘enhanced witnessing obligations’, should hold a specialisation in estate planning or aged care advice.

While these professional standards may legally elevate financial planners into the proposed ‘enhanced witnessing obligations’ category, FAAA member feedback has been divided on whether financial planners would feel comfortable fulfilling this role. Of concern to some financial planners was the requirement to assess financial decision-making capacity and the risk this poses for all parties – principal, attorney and witness.

The FAAA recommends ‘relevant providers’ should be permitted to choose to act under the ‘enhanced witnessing obligations’, should it be implemented. However, financial planners should not be obliged to act as an authorised witness.

Determining decision-making capacity

Making a legal statement that a person has limited capacity or has lost the capacity to make their own decisions can have a profound impact on all aspects of that person’s life. It means that person no longer has control over their life; that someone is now going to make decisions for them.

A nationally consistent approach would be helpful for determining decision-making capacity. It is not practical to require principals to provide a medical certificate of capacity in all instances. This would have a significant impact on accessibility of the EPOA system.

However, it would be helpful to have guidelines determining decision-making capacity including the circumstances in which the authorised witness should request a medical check prior to witnessing the EPOA, for example.

There must be very clear parameters as to what the responsibilities and obligations are for authorised witnesses, and triggers for the circumstances that require a capacity test of the principal. Should these triggers arise, an assessment of a principal's decision-making capacity must be conducted by an appropriately qualified professional, such as a medical or legal practitioner. A practitioner who has a professional ongoing relationship with the principal, such as a financial planner, may also provide insights (to pass on to other professionals) as to whether there has been a decline in the principal's decision-making capacity.

The FAAA recommends nationally consistent guidelines be developed for the appropriate assessment of decision-making capacity for the purposes of witnessing an EPOA. This should include a process for determining the appropriate person(s) to conduct such an assessment. A simple starting point may be a question of whether the principal still has decision-making capacity, as opposed to making a definitive call that someone has lost capacity. If there is doubt, then the principal should be referred to a doctor or other appropriately qualified professional for assessment.

4. Acceptance of appointment by an attorney

1. *Feedback is sought on the benefits and feasibility of establishing a single national attorney acceptance form.*

Potential benefits of establishing a single national attorney acceptance form include:

- reduce costs by removing the need for customised forms in each jurisdiction
 - use of the same plain language information every time an EPOA is established, making it easier for people to become familiar with the importance of an EPOA and the roles that all parties involved in an EPOA play
 - authorised witnesses provide consistent information to principals and attorneys, reducing the risk of misinformation and misunderstanding of the obligations of all parties
 - addresses current information difference of cross-jurisdictional EPOAs, where the principal and attorney are located in different state and territory jurisdictions
 - streamlines EPOA acceptance processes and improves efficiency
 - promotes compliance with relevant legislation
 - may contribute to the acceptance of EPOAs by financial institutions.
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- is a necessary step towards implementing the ALRC² recommendation of a National Register for EPOAs, which is supported by the FAAA.

The FAAA supports the proposal of a single national attorney acceptance form.

2. *Would the proposed role(s) for the authorised witness provide an appropriate degree of assurance that the attorney understands the obligations of their appointment?*

Yes, however, there is often a period of time between the establishment of an EPOA and the need for the EPOA to be activated. It is common for a person's (i.e. the attorney's) understanding and comfort to change when faced with the actual reality of such an undertaking.

It may be helpful for the attorney to be 're-acquainted' with the role and obligations of an attorney at the time the EPOA is activated. This could be achieved more cost effectively through an online training module; however, an authorised witness may choose to assist the attorney in this regard.

3. *What matters do you consider should be addressed in the proposed prescribed information?*

The proposed prescribed information should be upfront and direct about the responsibilities of an attorney under an EPOA and any assistance available to the attorney.

Appointment as attorney under an EPOA represents a great responsibility. Once the EPOA is activated the attorney must act in the best interests of the principal. However, the attorney will also be responsible to all those who rely on the principal whilst they survive, in addition to those who benefit under the principal's will. The interest of these parties can at times be at odds with the best interests of the principal and as such the actions of an attorney are often subject to close scrutiny and dispute. This should be made clear to the attorney.

Key attributes of an attorney must be honesty and a clear intent to do the right thing by the principal - that they have the best interests of the principal in mind. The use of plain language for the prescribed information is critical in assisting the attorney and authorised witness to understand this obligation.

However, accepting an attorney role may be daunting for some people, particularly if they lack confidence in dealing with financial matters. We suggest that financial literacy and confidence should not impact the ability of an attorney with the right intentions from accepting the role. The content of an EPOA can assist an attorney who lacks confidence in financial matters. For example, many EPOAs set out the 'will and preferences' of the principal, which the attorney is to follow. In addition, an attorney can seek professional financial advice from a registered financial adviser/planner to assist with carrying out the 'will and preferences' of the principal, or to make financial decisions on behalf of the principal in circumstances where the principal has lost decision-making capacity.

The proposed prescribed information should include resources available to assist the attorney to act on behalf of the principal under the EPOA, fulfill the role and meet the obligations of an attorney.

² Elder Abuse—A National Legal Response (ALRC Report 131)

5. Revocation of an EPOA

1. *A risk identified above is that a principal may wish to revoke an EPOA when they are considered (by family members, witnesses or others), not to have decision-making capacity to do so. What qualifications or training requirements (if any) do you recommend are necessary to ensure a witness is able to make a considered determination as to the principal's decision-making capacity in the case of a revocation?*

As discussed above, an EPOA can impact all those who rely on the principal and those who benefit under the principal's will. The interests of these parties can at times be at odds with the interests of the principal.

Similarly, it may be necessary for the attorney to make confronting and difficult decisions that the principal does not like, even if the decision is in the principal's best interest. For example, decisions involving residential care and/or selling the family home to fund a move to a care facility for the safety of the principal.

In line with our recommendation above, consideration must be given to whether the principal still has decision-making capacity, as opposed to making a definitive call that someone has lost capacity,

The FAAA recommends nationally consistent guidelines for determining the appropriate assessment of decision-making capacity should include circumstances where the revocation of an EPOA is made by the principal. This should include a process for determining the appropriate person(s) to conduct such an assessment and triggers for the circumstances that require a capacity test of the principal, to ensure the best interest and protection of the principal is prioritised over the interests of other parties.

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3. *Are there other suggested elements which would be beneficial to incorporate in a model provision?*

The proposed model for revoking an EPOA includes the following point:

- *The requirement to provide written notice to attorneys of a revocation would reduce the risks of attorneys relying on a revoked EPOA. The qualification that a principal must take reasonable steps to give this notice accounts for practical difficulties for a principal giving notice in urgent circumstances.*

While the FAAA supports the inclusion of this requirement, including the qualifications that a principal must take reasonable steps to give this notice, consideration should be given to provisions that would minimise the risk of an attorney deliberately and improperly transacting under the EPOA contrary to the actual status of the EPOA.

In the absence of a National Register that would enable banks, utilities etc to verify the authenticity and currency of an EPOA, a solution could be for the principal to notify such service providers that the EPOA has been revoked. If the financial institution had a record of notification from the principal that the EPOA had been revoked, that was flagged in their system on the principal's account, it could stop an attorney from accessing the principal's accounts using the revoked EPOA.

This may provide the principal with additional protection and enhance the opportunity for redress should the service provider approve a transaction under a revoked EPOA. While it would be in the

principal's interest to make such notifications, the law should be limited to requiring the *principal (or their representative) to take reasonable steps to notify financial institutions that an EPOA has been revoked*. It should not be mandated.

6. Automatic revocation of an EPOA

2. *Feedback is sought on the proposal that an EPOA for financial matters would be revoked at such time as a new EPOA for financial matters made by the principal is executed, unless a principal specifies otherwise. An alternative approach is that the earlier EPOA is taken to be revoked to the extent of inconsistency with the later financial EPOA.*

The FAAA supports the proposal that an EPOA for financial matters would be revoked at such time as a new EPOA for financial matters made by the principal is executed, *unless a principal specifies otherwise*. There may be valid circumstances where a principal establishes multiple EPOAs for different purposes or to co-exist to leverage different skills of each attorney.

The FAAA does not support the alternative approach that the earlier EPOA is taken to be revoked to the extent of inconsistency with the later financial EPOA.

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3. *Certain model laws and inquiry recommendations suggest additional grounds for automatic revocation, where they occur after the execution of an EPOA. Feedback is sought on whether the following events (or other additional events), if occurring after the execution of an EPOA, should be grounds for automatic revocation:*
 - a. *an attorney is convicted or found guilty of an offence involving dishonesty*
 - b. *an attorney is convicted of an offence involving violence occurring within the principal's family or domestic context*
 - c. *an attorney is a person against whom an interim or final family violence intervention or protection order has been made, where the order is relevant to the principal's family or domestic context*
 - d. *an attorney becomes bankrupt or personally insolvent.*

The FAAA agrees with these grounds for an automatic revocation of an EPOA and recommends this list should include failure of the fit and proper person test proposed by the FAAA below.

7. Attorney eligibility

2. *Feedback is sought on whether the proposed five-year ineligibility period, is appropriate in each of the following cases. A prospective attorney:*
 - a. *has been convicted of an offence involving dishonesty*
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- b. *has been convicted of an offence involving violence occurring within the principal's family or domestic context*
- c. *has been the subject of an interim or final family or domestic violence intervention order, where it relates to the principal's domestic or family context*
- d. *is a person who is bankrupt or personally insolvent, or who has been bankrupt or personally insolvent in the last five years prior to the execution of the EPOA.*

In addition to the proposed cases above (which we support), the FAAA recommends a prospective attorney should be ineligible if any of the following have occurred in the previous five years. The prospective attorney:

- is prohibited from acting as a director under the Corporations Act 2001 (Cth), or
- is banned by ASIC from providing financial services under the Corporations Act 2001 (or is banned by another-such regulator under the laws relevant to its oversight powers).

The inability for a person who is a *paid* care worker, a health provider or an accommodation provider for the principal should be expanded to include individuals who *'in the five years prior to the establishment of the EPOA have been' a paid care worker, a health provider or an accommodation provider for the principal* – ie *"a person who is, or 'in the five years prior to the establishment of the EPOA has been', a paid"*. However, this measure should not unnecessarily exclude family members who are care workers or health providers from acting as an attorney.

These cases, along with those proposed by the AGD, should form the basis of a fit and proper person test for attorneys.

The attorney(s) should be required to make a self-declaration to a fit and proper person test. The declaration should include a requirement to agree to act in the best interests of the principal, or to prioritise the interests of the principal over their own (or related parties') interests.

The FAAA also supports the proposal that an attorney be required to report to the principal, or to the relevant State or Territory authority if the principal has lost decision-making capacity, if there have been any changes in circumstances following the execution of the EPOA which relates to the initial eligibility criteria – for example, that the attorney no longer meets an element(s) of the fit and proper person test or another requirement(s) to be eligible to act as an attorney. This should be required even if this would result in the attorney becoming ineligible to maintain the role of attorney.

Consideration should be given to the validity of an active EPOA if the principal has lost decision-making capacity and the attorney(s) circumstances change resulting in the person no longer meeting the attorney eligibility criteria. This would significantly disadvantage the principal in these circumstances if an alternative attorney had not already been considered.

The FAAA acknowledges the challenges of putting in place appropriate time-critical solutions that would allow the appointment of a new attorney to act under the EPOA of a principal who lacked decision-making capacity.

A clear and nationally consistent approach to any necessary action to be taken, and by whom, is necessary to protect the principal where there is a change(s) in the attorney's circumstances following the execution of the EPOA, which relates to the initial criteria to be eligible to act as an attorney.

3. *Feedback is sought on whether the proposed disclose and approve approach is appropriate in each of the following cases:*
 - a. *a person who has been convicted of an offence involving dishonesty*
 - b. *a person who is bankrupt or personally insolvent, or who has been bankrupt or personally insolvent in the last five years prior to the execution of the EPOA.*

We understand the intent of this approach may be to improve accessibility to take out an EPOA. However, care must be taken to ensure the principal is not put at risk under an EPOA.

5. *Are there other types of offences, intervention or protection orders or criteria, which should make a person:*
 - a. *entirely ineligible for appointment under a financial EPOA, or*
 - b. *ineligible for a five year or other period?*

Yes. As stated above, a prospective attorney should not be eligible if the person:

- is prohibited from acting as a director under the Corporations Act, or has been prohibited from acting as a director under the Corporations Act in the last five years prior to the execution of the EPOA
- is banned by ASIC from providing financial services under the Corporations Act, or has been banned by ASIC from providing financial services under the Corporations Act in the last five years prior to the execution of the EPOA, or
- is, or has been in the five years prior to the establishment of the EPOA, a *paid* care worker, a health provider, or an accommodation provider for the principal.

8. Attorney duties

1. *Noting the increasing implementation of supported decision-making across different contexts in Australia, in what circumstances, if any, may substitute decision-making be appropriate under a financial EPOA?*

While supported decision-making should be used where possible, clarity is needed as to the obligations on an attorney if the 'will and preferences' of the principal pose a high risk of harm to the principal's health or well-being or financial situation. In such a case, does the attorney have an obligation to act in the principal's best interest and substitute the decision to protect the principal from harm, even if it is acting against the 'will and preferences' of the principal?

A nationally consistent approach and clear guidelines should be developed for the use of substitute decision-making, to protect principals and assist attorneys should supported decision-making not be possible or pose a high risk of harm to the principal.

9. Interstate recognition of EPOAs

3. *Are there non-legislative steps which could be taken to assist the interstate recognition of EPOAs? For example, would it assist if further practical guidance was provided about the circumstances in which an EPOA in one State or Territory would be recognised in another, and conversely the circumstances in which interstate recognition may not occur?*

The FAAA supports a solution that caters for people who travel for extended periods or live in locations that cross state/territory boundaries. Solutions could include:

- the provision of further practical guidance about the circumstances in which an EPOA in one State or Territory would be recognised in another, and conversely the circumstances in which interstate recognition may not occur.
- a certificate of verification that an EPOA has met the requirements in the state/territory in which it was established and other states where the principal is likely to also reside or visit.

11. Information, resources or training for witnesses and attorneys

1. *Feedback is sought on the resources, assistance and guidance which should be made available to assist witnesses, attorneys and principals to undertake their roles under financial EPOAs.*

Assistance and reporting elder abuse concerns

Noting efforts by all levels of government to raise awareness of elder abuse and to implement the National Plan to Respond to the Abuse of Older Australians in response to the 2017 ALRC Elder Abuse Inquiry, FAAA members have raised the following concerns about reporting suspected elder abuse:

- a. how can reports involving a client be made by a financial planners without breaching privacy laws?
- b. who can reports be made to that will result in the appropriate support for clients subject to suspected elder abuse under a valid EPOA?
- c. if a financial planner, or the principal, has concerns that the attorney is not acting in the principal's best interest, are there services that can:
 - i. assist the principal?
 - ii. provide guidance for the financial planner to support the principal and to report the situation?

A centralised and accessible online database of state and territory support services and resources for parties of an EPOA would be helpful.

The FAAA would welcome the opportunity to work with the Attorney-General's Department with education opportunities to improve financial planners' awareness of elder abuse reporting and support services.

2. *Do you consider voluntary online training modules as being a suitable path to explore further, as a way to inform and support principals, attorneys and witnesses?*

Yes. The FAAA supports the use on voluntary online training modules to educate and assist principals, attorneys and witnesses.

4. *Should there be any monitoring and/or reporting of training for witnesses, attorneys and principals?*

The FAAA strongly supports the benefits training would offer witnesses, attorneys and principals. However, monitoring and reporting are generally required for provisions in the law that have a penalty for non-compliance. The FAAA suggests that mandating training for witnesses, attorneys and principals, with a penalty for non-compliance, would significantly reduce the appeal, cost and accessibility of the EPOA system for Australians. Rather, training should be strongly encouraged.

Online modules may have the potential to track the uptake of training offerings by witnesses, attorneys and principals, that could offer useful data for the AGD without discouraging people from taking out an EPOA or acting as an attorney.

5. *How can witnesses, attorneys and principals be encouraged to undertake training, including any ongoing/refreshers training?*

To facilitate engagement with EPOA training, training could be a precursor to signing the prescribed form. However, we suggest that training would need to be efficient and free of charge for witnesses, attorneys and principals. Training for '*authorised witnesses (such as legal practitioner and designated others)*' should have an allocation for CPD purposes.

12. Other initiatives for preventing and responding to financial elder abuse

Electronic witnessing

An EPOA is commonly established by those who are ageing, those living with a disability, and those living with a degenerating disease. Consideration should be given to how the model could be adapted to improve access to the EPOA system for principals experiencing mobility issues.

The COVID pandemic resulted in the need to consider the legal parameters around electronic identity and signatory verification. This resulted in temporary changes in the law for AML/CTF and other purposes, which have recently been made permanent.

While in-person witnessing should be the primary method for establishing an EPOA, mandating face to face witnessing would make the system less accessible for Australians with mobility issues. Consideration must be given to establishing the legal parameters for principals, attorneys, and authorised witnesses to establish an EPOA using electronic means (eg. video conferencing) while protecting the privacy and security of all parties.

This should include consideration of online and cyber security risks and specific guidelines to ascertain and verify the identity of the principal, attorney and authorised witness, and allow the authorised witness to assess that the principal is not under duress or influence.

For example, online witnessing could be permitted if the principal, or circumstances, meet strict criteria that the parties would be compelled to demonstrate compliance with, and additional obligations for authorised witnesses with set guidelines on the process to be used. Establishing an EPOA using electronic witnessing should only be permitted through an '*authorised witness (such as a legal practitioner and designated other)*' operating under the 'enhanced witnessing obligations' and suggested additional electronic witnessing requirements.

Use and verification of EPOAs

A significant gap in the protection of principals is addressing how EPOAs are used in the absence of a National Register, particularly by financial institutions.

There is significant variation between the approach taken by financial institutions to verify and accept EPOAs, which is based on the organisation's internal policies and procedures, in addition to the legal requirements. FAAA member feedback includes cases of attorneys not being permitted to pay bills under valid EPOAs that were rejected by financial institutions, having significant impacts on principals.

A National Register of EPOAs, backed by nationally consistent laws and guidelines, would overcome this issue. The Register should enable all financial institutions to check the validity and currency of the EPOA, and the identity, eligibility, fitness and propriety of the attorney.

Required checks and verifications of transactions

FAAA members have provided case studies of attorneys accessing the principals' accounts to make sizeable purchases in the attorney's name. This is more likely to occur when only one attorney has been appointed.

The FAAA recommends additional protections be considered such as:

- the authorised witness should provide additional information to the principal of the heightened risk of appointing just one attorney (as suggested above), prior to establishing the EPOA
 - transactions above a prescribed amount that do not involve the payment of a utility or other paid service provider of the principal, should require the financial institution to undertake additional steps to verify the EPOA and the validity of the transaction. Consideration should be given to the important role that industry codes of practice applying to financial institutions could play in addressing this issue.
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