

29 November 2023

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

Attorney-General's Department

**Submission: Achieving Greater Consistency in  
Laws for Financial Enduring Powers of Attorney**

National Seniors Australia (NSA) welcomes the opportunity to make a submission to the [Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney](#) consultation.

As the peak consumer body representing older people in Australia, NSA has a strong interest in ensuring older people are protected from elder abuse. While we are not intimately involved in providing services to people experiencing elder abuse, we have been consistently engaged in elder abuse debates, especially those related to financial elder abuse, bringing the interests of older people to the forefront of these debates.

Elder abuse is a symptom of ageism and has the potential to cause significant harm. No older person deserves to suffer abuse and should have at their disposal the tools to help protect them from abuse.

Enduring Powers of Attorney (EPOA) can give older people the means to manage their financial affairs even when decision making capacity is diminished. However, this is the case only if legislation to enable an EPOA has adequate protections. We should always remember an EPOA has the potential to entrench and reward abusive behaviour if misused.

In general, National Seniors Australia supports the model provisions put forward in the consultation paper.

However, we do not support the assertion that retaining jurisdiction-specific approaches in certain areas of financial EPOA law is necessary and appropriate. Unless there is a move to harmonise legislation we will be left with a patchwork of protections and ongoing confusion among the legal and financial actors required to implement and interact with EPOAs daily.

This is evident in the model provision on witness arrangements relating to principals on page nine of the consultation paper, which attempts to maintain different witnessing arrangements rather than consistent and strengthened arrangements.

In our view, witness requirements should be a priority area for achieving consistency when reforming EPOA laws because they play a key part in preventing EPOA misuse.

Witness requirements should be based on what provides the best protection for principals.

There should, for example, be a requirement for two witnesses and legislation should enable General Practitioners to be included as authorised witnesses (as is the case in several jurisdictions which have undergone reform to strengthen protections for older people).

National Seniors would be concerned if national EPOA laws are not made consistent as a result of the National Plan to Respond to the Abuse of Older Australians 2019-2023 (National Plan) to which this consultation is part.


Inconsistency between states and territories is also a productivity issue. Inconsistency will pose ongoing difficulties for financial institutions required to manage the financial affairs of a principal. This is especially important for banks and superannuation trustees operating across state and territory borders who need a system in place that reduces the risk of malfeasance.

State and territory governments must put aside their differences to harmonise legislative protections for the benefit of older people across the country and reduce the compliance burden on business.

We set out further details regarding our views on witnessing arrangements for principals in Appendix 1 and raise some minor concerns about the proposal for an acceptance of appointment by an attorney in Appendix 2.

Should you require any further information please contact Dr Brendon Radford, Director of Policy and Research [b.radford@nationalseniors.com.au](mailto:b.radford@nationalseniors.com.au).

Yours Sincerely



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## **Appendix 1: Witness Requirements**

Witness requirements should be a priority area for achieving consistency when reforming EPOA laws.

As a document that can give an attorney the right to manage the financial and personal affairs of an older person, it is vital the process of establishing an EPOA protects the rights and upholds the wishes of older people.

We must ensure an EPOA is an instrument to protect older people, not a tool to enable malfeasance. The process of creating an EPOA is a critical juncture in this regard.

Strengthening the process of establishing an EPOA will have positive impacts for organisations and businesses relying on an EPOA to perform financial transactions and will give greater surety the EPOA has not been put in place under a situation of abuse or coercion. This will result in greater protection and efficiencies in the day-to-day operation of an EPOA.

Ensuring adequate witness provisions is essential to this process. In this regard we support requiring two witnesses; allowing GPs to be a witness and for the provision of a Medicare Benefit Schedule for GP's involved in witnessing an EPOA.

The witness process is central to providing oversight against abuse because it injects independent third parties into the EPOA creation process. A sufficiently designed witness regime can help to ensure a principal:

- is entering freely into an EPOA;
- understands the roles and responsibilities of an attorney; and
- is comfortable with the person/s acting as their attorney.

National Seniors believes best practice is to have two witnesses when establishing an EPOA. This will reduce the risk that a principal may have been coerced to appoint an attorney and will reinforce to the principal the obligations of an attorney.

The requirement of two witnesses was a recommendation of the Australian Law Reform Commission's report in 2017 as part of its recommendations on appropriate [Safeguards](#).

According to the ALRC:

“...having a second witness provides an opportunity to confirm both the principal's and attorney's apparent understanding of the document and an opportunity to pick up on any behaviours in the principal that may suggest duress or coercion.”

Currently there are four jurisdictions which require two witnesses – Victoria, Australian Capital Territory, Western Australia and Tasmania.

While the current approach to nationally consistent legislation is to allow differences in witness requirements, this is not in the best interests of older people, nor does it deliver fairness and justice

between older people across the Federation. There are no meaningful or efficacious arguments to support differences on this issue across jurisdictions.

In seeking to set a consistent national approach we should bring all jurisdictions to a consistently high standard, not allow watering down of protections for older people simply based on where they live and the legacy and culture of practices on a jurisdiction-by-jurisdiction basis.

Ideally, a witness should not be a person who is directly related to the principal, however it would be beneficial if one of the witnesses had an ongoing professional relationship with the principal.

Ideally, the two witnesses should be a medical professional and legal professional, each of whom could witness the signing of the EPOA by the principal separately.

By insisting that a medical professional, such as a GP, be one of two required witnesses, this would reinforce the need to assure and support adequate decision-making capacity when putting an EPOA in place.

Requiring two witnesses would reinforce to the principal and attorney the obligations of the attorney when entering an EPOA because it would give a second opportunity to explain the effect of an EPOA.

For example, we believe medical practitioners, such as a General Practitioner (GP), should be one of the professions able to witness an EPOA. However, this should be allowed only when there is proof of an ongoing relationship between the principal and the GP (e.g. at least 12 months). This could be facilitated by the witness declaration stating the period a principal has been their patient.

Expanding the authorised witness to include GP's would offset any concerns about having two witnesses given that GPs operate throughout Australia and are generally accessible to the community.

Any cost associated with having a GP witness the signing of a EPOA could be ameliorated by creating a specific Medicare Benefits Schedule item to subsidise the cost of a GP acting as a witness.

The benefit of having a trusted GP as a witness is that it strengthens oversight. If an authorised witness is required to certify that a principal appeared to freely and voluntarily sign the EPOA, then having a GP with knowledge of the principal's behaviour and health would be highly beneficial.

Ultimately, we do not believe it is prudent to retain jurisdiction-specific qualifications requirements for the required authorised witness. Best practice would be to set baseline witness requirements based on best practice.

For example, all jurisdictions should be encouraged to amend their EPOA legislation to include medical practitioners as a class of witness that is allowed to witness an EPOA, as is the case in Victoria, and to encourage the use of multiple witnesses.

## **Appendix 2: Acceptance of appointment by an attorney**

National Seniors supports the proposal to require an attorney to sign a declaration of acceptance.

In requiring that an authorised person witnesses the signing of a declaration of acceptance, it is important this does not create unintended consequences.

It would be problematic, for example, if this requirement meant an attorney and principal sought to have a witness sign for both parties, at the same time. This could undermine the ability of a witness to ensure a principal is not under duress.

Some states and territories recommend as best practice that a witness to an EPOA meet a principal alone to ensure there is no duress and that decision making capacity is confirmed.

For example [Queensland guidelines](#) for witnesses state:

“Ideally, try to meet with the adult alone. This allows you to have a discussion and develop a rapport with the person and to ensure the adult is not being pressured into making the document. It is a good idea to ask the adult directly whether they feel they have been pressured into making the enduring document.”

Our concern is that an obligation to witness an attorney sign a declaration of acceptance may undermine this best practice out of convenience, undermining the ability of a witness to detect situations of abuse.