

# Preventing financial elder abuse through better consistency in Enduring Power of Attorney laws

## *Submission to the Consultation by the Attorney-General's Department (November 2023)*

### About Justice Connect

In the face of rising unmet legal need, Justice Connect designs and delivers high-impact interventions to increase access to legal support and progress social justice.

Justice Connect's Seniors Law has over 15 years of experience in designing and delivering innovative, tailored legal services for older people facing elder abuse in Victoria and New South Wales (**NSW**). Our Health Justice Partnerships (**HJPs**) were the first and are the longest running in Australia to support older people and tackle elder abuse.

Our Seniors Law program prioritises preventing and better responding to financial elder abuse, particularly in the face of growing legal need. In addition to Justice Connect's specialised HJPs for older community members, along with delivering customised education and leveraging our health and pro bono partnerships, we are strategically focused on scaling our legal support and embracing a multi-channel, multi-intensity approach to extend our reach with older Australians. In the last 12 months, our Seniors Law program provided 1,289 tailored legal supports that addressed elder abuse, and built the capability and capacity of frontline health workers through delivery of 63 customised education sessions focused on the priority legal needs of the most at-risk older Australians.

### Executive summary

We welcome the opportunity to provide input into the Attorney-General Department's consultation on achieving greater consistency in Financial Enduring Powers of Attorney (**EPOAs**) laws in Australia.

Justice Connect's Seniors Law (**Justice Connect**) is uniquely placed to contribute to the discussion on achieving improved consistency in EPOA laws, as we have specialised expertise in both Victoria and NSW regarding EPOAs and the important role they play in preventing and better responding to financial elder abuse. As a service focused on financial elder abuse,

making and revoking EPOAs for clients forms a significant proportion of our targeted work.

The National Elder Abuse Prevalence study (Prevalence Study) tells us that financial elder abuse is a growing issue across Australia, with this issue increasing as the over-65 age group is expected to double in the next 25 years. The Prevalence Study also found that having an EPOA in place is associated with lower reports of elder abuse. These findings are closely aligned with Justice Connect's experience across 15 years of delivering specialised legal services to older people.

While EPOAs already play a critical role in preventing and tackling financial abuse, there is significant potential for stronger measures to be enacted through consistent EPOA laws across all jurisdictions, so that older Australians are better protected from financial abuse.

Sunil\* was a 70-year-old woman in rehabilitation at one of Justice Connect's health partners following a heart attack. She had three children. Her youngest child, Ravi\*, had mental health and substance dependence issues. He was unemployed and lived at home with his mother prior to her admission to hospital. In addition to the verbal abuse he inflicted on Sunil, Ravi never made contributions to groceries or rent, and was able to access his mother's bank account with her key card to pay for things that he needed.

During her admission to hospital, Sunil was able to disclose Ravi's financial abuse to Justice Connect's HJP lawyer. Following our targeted advice, Sunil accessed legal help to appoint her other two trusted children, Sari\* and Sunir\*, as her attorneys, to assist her with future financial decision-making and to protect her against further financial abuse from Ravi.

### Our seven recommendations

In response to the issues raised in the [consultation paper](#), Justice Connect shares client and casework

insights, and makes the following seven recommendations to prevent financial elder abuse through better consistency in laws for EPOAs across all Australian jurisdictions:

1. An 'authorised witness' to both the making and revocation of EPOAs should be limited to 'appropriately qualified professionals' who can advise a 'principal' about the effect of the document and the risk of financial abuse should it fall into the wrong hands. Additionally:
  - a. 'appropriately qualified professionals' should strictly comprise of: Australian legal practitioners, registrars of Local Courts, foreign lawyers, or approved Trustee and Guardian employees in the relevant state or territory.
  - b. provided they are an 'appropriately qualified professional', only one authorised witness should be required to witness the execution of an EPOA.
2. An attorney's acceptance should also be witnessed by an 'appropriately qualified professional' (as above), who should explain to the attorney the duties and obligations attached to the role and certify that the attorney appeared to understand their responsibilities.
3. The attorney's statement of acceptance should include the fact that they have had the duties and responsibilities of the role explained to them by the authorised witness.
4. Only a court or tribunal should be able to authorise transactions over a specified limit (such as \$10,000) proposed by an attorney that result in a conflict of interest.
5. Tribunal-based compensation schemes for principals should be instituted in all jurisdictions.
6. Training for attorneys on their duties and obligations should be compulsory.
7. Increased, sustainable funding should be directed to specialised free legal services for older people – including HJPs, and evidence-based digital legal supports – to improve access to free, targeted legal assistance for the execution and revocation of EPOAs across Australia.

## Witnessing arrangements for principals

### Qualifications for authorised witnesses

In Justice Connect's view, there should be consistency in EPOA laws across all Australian jurisdictions regarding who can be prescribed as an 'authorised witness'. To prevent financial elder abuse, we consider

that all authorised witnesses need to have the skills, experience and education to adequately explain to principals the nature and effect of the EPOA and the associated risks. In that context, an authorised witness should be limited to the following appropriately qualified professionals: an Australian legal practitioner, registrar of the Local Court, foreign lawyer or approved Trustee and Guardian employee in the state or territory that the document is executed in. Having a lawyer or other appropriately qualified professional witness the execution of an EPOA ensures the principal receives specialised advice tailored to their personal circumstances, including advice about the risks of abuse associated with making an EPOA. Restricting witness eligibility to professionals with appropriate expertise highlights the gravity of the EPOA, the significance of the responsibility attached to the role of attorney, and the fiduciary nature of the relationship between attorney and principal.

Justice Connect acknowledges that limiting witness eligibility for the making of EPOAs to a strict class of appropriately qualified professionals may provide an obstacle for some people to execute these documents, particularly people in rural, regional and remote areas, with limited financial means, and/or with mobility or other accessibility issues. We note there is now legislation in place in all jurisdictions throughout Australia allowing for remote witnessing of the execution of EPOAs. In our experience, this legislation has significantly improved accessibility to legal support to execute EPOAs, particularly for those in rural, regional, and remote areas.

Judith\*, a 75-year-old Aboriginal woman, lives in remote NSW. Judith was referred to Justice Connect by a community social worker in the Murrumbidgee Local Health District (MLHD) where Judith accesses health services. Judith had been experiencing financial abuse by her son, Dan\*, who had borrowed money from her which he had never repaid, and who more recently had sold her car without her permission.

Judith's daughter Zoe\* lives with her, and has always been responsible with money. After talking with Justice Connect's HJP lawyer Judith decided to appoint Zoe, who she trusts, and who has the skills and integrity to look after her money, as her attorney.

With the help of the MLHD social worker who visited Judith at home with her laptop, our lawyer was able to witness Judith sign her legal documents online via videoconference. Judith was relieved to have these documents in place and to be assured that her she would be protected from further financial abuse by her son.

In the context of the rising prevalence of financial elder abuse in our community, we maintain that limiting witness eligibility for the execution of EPOAs is a proportionate and necessary safeguard provided that additional, complementary measures are also taken to improve accessibility to legal support, particularly for people with limited financial means. One critical measure of this nature would be for specialised, free legal services that work with older Australians to receive increased, sustainable funding (see below).

### Enhanced witnessing provisions

Justice Connect is supportive of the enhanced witnessing provisions proposed in the consultation paper. Given our position that witnesses be from strict categories of appropriately qualified professionals, we accept this also increases the extent of the obligations imposed on witnesses. As there are currently no requirements for monitoring of attorneys in the execution of their duties, it is essential that the witness has the skills necessary to:

- explain the effect of the document to the principal;
- assess the principal's capacity to make the document; and
- assess whether the document was signed freely and voluntarily.

In addition to the model provisions proposed in the consultation paper, Justice Connect is of the view that the authorised witness should check with the principal that the proposed attorney has the 'appropriate attributes' required of an attorney, and that they explain the risks of financial elder abuse occurring if an inappropriate person is appointed as an attorney.

Carlos\* was an inpatient at one of our health partners. Several years ago he had appointed a friend, Pat\*, as his attorney. Carlos said when he executed the EPOA, he did not have a clear idea who would be appropriate to appoint as attorney, and the person who witnessed him execute it didn't talk to him about the qualities he might look for when appointing someone. Carlos knew Pat liked to put money in the pokies at the local pub, but Pat was his only friend and brought him groceries, alcohol and medications when he was unwell.

During his hospital admission, Carlos became aware that Pat was withdrawing money from his bank account without his consent and putting it in the pokies. Justice Connect assisted Carlos to contact the bank and put a stop on his account, however, by the time we were able to intervene, Pat had already withdrawn all of Carlos' money.

Justice Connect has seen the significant consequences for older Australians where an inappropriate attorney is appointed, which could have been avoided had they received specialised advice and support when making the EPOA.

### Number of witnesses

Provided that the witness is from one of the strict classes of appropriately qualified professionals outlined above, Justice Connect proposes that only one authorised witness be required to witness the execution of the documents by a principal. In our view, it is not the number of witnesses that is key, but rather the fact that the witness has the requisite skills to adequately explain the nature and effect of the EPOA and to outline the appropriate attributes of an attorney.

In a larger legal practice, it may be straightforward to source a second witness to execute an EPOA. The same cannot be said, however, for a sole legal practitioner assisting an older person with limited social connections to do so. In the context of remote witnessing, requiring only one witness will also make it simpler for principals in rural, regional and remote areas to execute EPOAs, as well as for isolated, older people with limited mobility who live alone. We also note that within the context of HJPs, health workers are commonly prohibited from witnessing documents, making it a particular challenge in health services to find a second witness for an EPOA. On balance, we consider that the protective benefit of a second witness is outweighed by the inconvenience and negative effect that a requirement of this nature may have on an older person's ability to execute an EPOA.

### Acceptance of appointment by attorney

Given the significance of the role and the risk of financial elder abuse, Justice Connect advocates that an attorney's acceptance should also be witnessed by an authorised witness from one of the strict categories of appropriately qualified professionals outlined above, who should be required to explain to the attorney the duties and obligations of the role prior to signing. This could be the same person who witnesses the principal's signature, and could be done remotely if in-person access is an issue and an EPOA needs to be put in place urgently.

Justice Connect supports the establishment of a national attorney acceptance form, which includes an acknowledgement that the witness explained the nature and effect of the EPOA to the attorney. This will act as a safeguard against attorneys subsequently claiming they were unaware of their obligations as attorneys to purportedly excuse the perpetration of financial elder abuse against a principal.

## Revocation

Justice Connect supports the model provisions in the consultation paper requiring a revocation of an EPOA

Amir\*, a 67 year-old Malaysian-born man, was hospitalised following a stroke. A few years earlier, Amir had gone to a lawyer who had drawn up an EPOA appointing his three children jointly as his attorneys. His children did not attend the lawyer's office to have the document explained to them, but simply signed and dated the document in accordance with NSW requirements. While Amir was in hospital his children withdrew all of the money from his account and put it in a new account in their names, using the money as they pleased.

Amir subsequently made a full recovery from his stroke, and sought advice from Justice Connect's HJP lawyer about his financial situation, who assisted him to revoke the EPOA appointing his children. When Justice Connect's HJP lawyer contacted Amir's children to advise them of the revocation, they claimed they did not know they were not allowed to transfer their father's money into a new account in their names.

to be witnessed by an authorised witness. However, we reiterate that eligible witnesses should be limited to individuals from the strict categories of appropriately qualified professionals outlined above. We note that revocations are often required to be executed quickly as they may be needed to prevent abuse, and accept that our suggested restrictions relating to witness eligibility may pose a challenge to this occurring. On balance, however, due to the risk that a principal may be under duress to revoke an EPOA and execute a new one appointing a perpetrator, we maintain it is a necessary measure to require someone adequately skilled to witness the revocation and in doing so, confirm that the principal is acting free of undue influence. We confirm our view that the challenge relating to restricted witness eligibility can be addressed by (a) the ability to access witnesses via video link, and (b) increased resourcing of specialised free legal services to provide this support.

In Justice Connect's experience, where abuse has occurred it is common for clients to be too afraid to notify the attorney that they have revoked the EPOA given their fear of repercussions. While we note it is not the focus of the current consultation, in line with [our previous submission to the Attorney-General's Department](#), Justice Connect remains strongly supportive of the establishment of a National Register for EPOAs, where notice of revocation of an EPOA would be automatically sent to all relevant parties,

sparing the principal the stress and risks related to contacting an attorney who is perpetrating abuse.

## Attorney duties

Justice Connect is supportive of the wide-ranging duties proposed in the consultation paper to be imposed on attorneys. However, in our view, the following model provision creates unreasonable risk that a vulnerable principal may be subject to duress, undue influence and/or coercive control in the making of an EPOA:

*An attorney under an EPOA be allowed to enter into a transaction that results, or may result, in a conflict of interest where the EPOA specifies that the transaction may, even though it will or may otherwise result in a conflict of interest, be entered into by the attorney.*

In circumstances where there is a conflict of interest in relation to a particular transaction, Justice Connect proposes that transactions over a specified amount (such as \$10,000) should only be capable of being authorised by a court or tribunal.

John\* was referred to Justice Connect while in hospital following a minor stroke. John had no children and only one family member - his nephew, Tom\* – with whom he was in contact. John spoke to hospital staff about Tom, who had put him under pressure to appoint him as his attorney and to sell his property to Tom's son at a reduced price.

Justice Connect's HJP lawyer provided advice to John about the fact that Tom was not acting in his best interests and was breaching his fiduciary duty to him as his attorney, and advised him to revoke the EPOA appointing Tom. As Tom was John's only support, however, he decided to proceed with the transfer of the property to Tom's son at a reduced price to keep his relationship with Tom intact.

In relation to the duty to keep accurate records and accounts of all dealings and transactions made under the EPOA, this provision could go further to include a duty to provide accounts to anyone specified by the principal in the EPOA. We also suggest that this duty should be expanded to include a requirement to provide accounts on the request of the executor of the principal's estate for a period of two years following the death of the principal. This would add an extra layer of accountability to attorneys in safeguarding a vulnerable person's property, particularly for those who have lost capacity or have declining capacity.

## Access to justice issues

Justice Connect strongly supports the creation of a national system that allows for the awarding of compensation for financial loss caused by an attorney's breach of their statutory duties. We recommend that a tribunal in each state or territory have this jurisdiction. This would ensure that a principal (or any interested party if the principal no longer has capacity) could seek compensation for losses incurred due to misuse of an EPOA, without the expense or complication of having to make an application to the Supreme Court.

In NSW, the NSW Civil & Administrative Tribunal currently has no jurisdiction to award compensation for financial abuse by attorneys, meaning that attorneys in NSW face limited consequences for misuse of their powers. Supreme Court action is complex and expensive and not an option for principals without the means (often due to the abuse they have experienced) to access the higher-court system.

In Victoria, by contrast, eligible claimants can apply for compensation in the Victorian Civil and Administrative Tribunal if an attorney appointed under an EPOA breaches their duties and causes loss to the principal. This approach in Victoria is significantly simpler and more accessible for vulnerable older people who have suffered a financial loss because of abuse. To improve access to justice for principals in this situation, we recommend that EPOA laws aligned with the relevant Victorian provisions should be instituted in all states and territories.

## Information, resources & training

A key focus of our work through Justice Connect's HJPs is the education of frontline health workers, so they can better identify and respond to financial elder abuse. Evaluation of our training consistently demonstrates its effectiveness as an important measure in the early detection and prevention of financial elder abuse. Given the key role that targeted education plays in heightening awareness of financial elder abuse, we support the consultation paper's suggestion that there be a duty for attorneys to undertake a compulsory training module (online or face-to-face) on the duties and responsibilities attached to their role. While we accept that monitoring and enforcement of this requirement may be challenging, in our view, confirmation that a training module has been completed should be part of the model certification clause signed by attorneys.

In addition to training for attorneys, information and resources for principals about the benefits and risks of

future planning should be widely available. Resources like Justice Connect's innovative '[Conversation Guides](#)' should be actively promoted to encourage people to think about future planning and prepare them to execute EPOAs. Our Conversation Guides are tailored resources codesigned by the community, which facilitate meaningful conversations among groups of older people about what they want their older age to look like. We have identified this as an important precursor to readying older people to put future planning documents in place.

## Increased, sustainable funding for specialised, free legal services for at-risk older people

There are currently more legal needs related to older people than ever: not only does Australia have an [ageing population](#), but the rising cost of living pressures in the community are also resulting in an increasing risk of financial elder abuse.

To counter difficulties in accessing legal help for the making and revocation of EPOAs, increased, sustainable funding should be directed to free legal services across Australia that provide specialised legal support to older people to execute EPOAs. Integrated services like Justice Connect's HJPs are best practice for successfully preventing and addressing financial elder abuse: by integrating lawyers into the services that older people use, HJPs improve accessibility to legal services for older people who may need legal help and not know it, or not know how to access it. Importantly, they also allow for [earlier intervention](#) in clients' 'life problems' before they escalate into complex legal disputes, facilitating [cost-savings](#) to government and the wider community.

As discussed, remote witnessing also has significant potential to improve accessibility to legal services for older people in rural, regional and remote areas and/or with mobility issues. In that context, targeted funding should also be directed to support evidence-based digital innovation strategies that increase reach and effectively deliver legal support to at-risk older Australians, who may otherwise miss out on critical legal assistance to avoid financial elder abuse.

## Contact

If you have any questions, please contact our Seniors Law Manager, Yvonne Lipianin on (02) 8599 2111 or [yvonne.lipianin@justiceconnect.org.au](mailto:yvonne.lipianin@justiceconnect.org.au), or Seniors Law Principal Lawyer, Sadie Davis on (02) 9160 7174 or [sadie.davis@justiceconnect.org.au](mailto:sadie.davis@justiceconnect.org.au).

*\*Name has been changed.*