



Australian Government
Attorney-General's Department

**Enhancing protections relating to the
use of
Enduring Power of Attorney
instruments**

**Consultation Regulation Impact Statement
February 2020**

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About this Consultation Regulation Impact Statement

This Consultation Regulation Impact Statement (Consultation RIS) investigates possible interventions which can streamline access to information about enduring powers of attorney (EPOA) and reduce the uncertainty regarding whether a document, as presented, can be relied upon as the basis for financial transactions.

The Consultation RIS considers options which involve a range of market participants, including industry and the Australian government working with state and territory governments, to introduce additional safeguards into an existing regime administered under jurisdictional law. The purpose of the Consultation RIS is to gather information on the options being considered to assist the Australian and state and territory governments in determining the appropriate government response.

A Council of Australian Governments (COAG) Consultation RIS has been developed to reflect that any new regulatory decisions in this area will involve multiple governments and affect citizens across multiple jurisdictions.

Stakeholder views, supported with evidence where possible, are sought on the options outlined in this Consultation RIS.

The Council of Attorneys-General (CAG), comprising Attorneys-General from the Australian Government and all state and territory governments, will further consider approaches to this issue at the first CAG meeting of 2020. The information received from stakeholders will be used to develop a Decision Regulation Impact Statement (Decision RIS) that will identify the options with the greatest net benefit, based on an analysis of the forecast costs and benefits of different options. This Decision RIS will assist Commonwealth, state and territory Ministers in decision making with regard to appropriate government responses.

Your input on the anticipated costs and benefits is an important part of providing Council of Attorneys-General Ministers with an accurate and comprehensive Decision RIS to guide their decisions.

The Commonwealth Attorney-General's Department, in cooperation with state and territory governments, has prepared this Consultation RIS in accordance with the Council of Australian Governments' (COAG) document [*Best practice regulation: A guide for ministerial councils and national standard setting bodies*](#).

1 Executive Summary

What is the problem?

Under state and territory law an individual (the 'principal') can assign authority to another person(s) to act on their behalf (an 'attorney(s)'). Where this authority continues beyond the point where the principal has impaired capacity, this is called an enduring power of attorney (EPOA).

Financial institutions report ongoing concerns with being able to identify if any EPOA can be relied upon to make financial decisions. There is no easily accessible, nationally consistent, source of data which organisations (like banks and health service providers) can use to determine if an EPOA is current and valid: an essential step in determining whether a transaction or decision can be validly made.

How can the problem be addressed?

Three options for addressing the problem are considered:

- **the Status Quo:** no changes to current regulatory frameworks are considered. This can be regarded as a baseline against which the incremental impacts of the proposals and alternative options can be compared.
- **Regulatory Option:** proposes the introduction of a mandatory registration requirement in order to establish a comprehensive, national data source able to be searched by approved third parties to confirm the existence and currency of the EPOA.
- **Non-Regulatory Option:** under this approach the Australian Government proposes to facilitate registration of EPOAs in a central location, with registration being voluntary.

Defining the population

There is no robust or consistent data on the number of EPOAs in existence, or the number which are created, amended or revoked in any year. Any estimates of the population likely to be affected by various options are necessarily based on a series of data points adjusted by assumption. These assumptions and estimates are examined in Section 7.

Measuring the costs and benefits

For the purposes of this Consultation RIS, the status quo option is assumed to not alter costs present in, and benefits currently available to, the community. The costs and benefits of the other two options are estimated as follows:

- **Estimated Costs:** \$3m-\$8m register build costs with ongoing costs of \$5.7m- \$57m for the regulatory option and \$1.6m - \$43m for the non-regulatory option
- **Quantifiable benefits:** data is sought from stakeholders to estimate quantifiable benefits
- **Unquantifiable benefits:** deterrent effect arising from the process of registration and the prevention for misuse of opportunities for misuse of EPOAs where currency of the EPOA may not be known by the parties.

2 How to provide feedback

The Attorney-General's Department welcomes submissions from all interested stakeholders, including financial institutions, regulators, government departments/agencies, legal professionals, members of the public and other parties who may be affected by implementation of any of the options outlined in this RIS.

We are particularly interested in your views on the options to strengthen safeguards in the area of enduring powers of attorney that are discussed in more detail in the following chapters of this Consultation RIS. Please support your views with evidence or data where possible.

Making a submission

Submissions are requested by **11.59 pm (AEDT) on 9 March 2020** by forwarding a copy of your submission to: EPOAConsultationRIS@ag.gov.au or in hard copy to:

Attorney-General's Department
Attn.: Elder Abuse Team, Family Safety Branch
3-5 National Circuit
CANBERRA ACT 2600

The Attorney-General's Department will seek to publish electronic submissions on this Consultation RIS. You can decide how your submission is published on the Attorney-General's Department's website by choosing from the following options:

- submission published with your or your organisation's name
- submission published anonymously, or
- submission not published.

For further information on the publication of submissions on, please refer to the department's [Privacy Policy](#). Please indicate your preference for publication when sending your submission to the Attorney-General's Department.

3 Background

Powers of attorney (POA) are an important mechanism to allow a person, or persons, to make decisions certain on behalf of another when that person is not able to. There are two types of POA, or ‘substitute’ decision making arrangements (where one person can make a decision on behalf of another):

- **General POA** – which apply for a specific time and are commonly used in circumstances when a person may be unable to undertake transactions for themselves, for example when overseas. General POA are only valid when the principal (the person giving the power to someone else) has decision making capacity (DMC). General POA cease to have effect once the principal has lost DMC.
- **Enduring POA** – this class of POA is specifically designed to continue – or endure – once a principal’s DMC starts to decline or has been lost, but must be made while DMC exists. Jurisdictions first commenced implementing legislation to allow for powers of attorney to be enduring from the 1970s and 1980s.

All Australian states and territories have legislation which allow for enduring documents to be made in relation to financial matters. In four jurisdictions EPOAs are stand-alone, and in the remaining four these are combined with medical/personal decision making capacity (otherwise referred to as enduring guardianship)¹.

This Consultation RIS relates to enduring powers relating to financial/property matters only.

EPOAs may commence immediately upon acceptance of the responsibilities by the attorneys or at a later time, depending on what is allowed under each jurisdictions’ laws and as selected by the principal.

Once made EPOAs can be altered by the principal, who has the ability to change or revoke the EPOA and replace existing EPOAs with superseding documents. Attorneys appointed under the EPOA may also resign their role as attorney, or become ineligible to act as an attorney for a range of reasons (for example, they themselves lose DMC, become bankrupt, or enter into a paid caring relationship with the principal²).

A person may therefore make several EPOAs during their lifetime. However, once DMC is lost the person can no longer legally give decision making powers to someone else, or revoke or amend an EPOA. Only a Tribunal can make that decision at that point.

While the options available to a person making an EPOA may differ between jurisdictions, the key elements of an EPOA are that the principal must, while they still have DMC, identify in writing who can make decisions on their behalf, and that document must be witnessed by appropriately authorised persons who may also have responsibility for assessing whether the principal understands the nature of the powers being given to the other person(s). Where allowable under law, the principal can also impose conditions on the exercise of those powers in the future.

Generally attorneys are able to exercise their responsibilities as if they were the person who has granted them the power, unless restrictions on those powers have been specified within the EPOA. Where no conditions have been made the attorney essentially has full control over the financial affairs of the principal

¹ Parties may elect to not give powers with respect to medical/personal decision making when using a combined form.

² Depending on jurisdiction.

from the time that the powers are specified to commence – this could be on signing, at a certain date, or upon an event like loss of DMC. Where the principal still holds DMC, and has the skills and access to monitor transactions conducted on their behalf, they may be able to oversee the financial decisions being made by the attorney(s), and amend the EPOA accordingly if they are unhappy with the exercise of the given power. However, if a principal loses DMC and is not able to monitor the use of the powers or vary the EPOA there is scope for attorneys to take financial advantage of the principal, or attempt to continue to use EPOAs which have been revoked/replaced. If a principal loses DMC and is not able to monitor the use of the powers or vary the EPOA, there is a higher risk of misuse of an EPOA. This can occur by misuse of powers within the EPOA (e.g. transacting where there is a conflict of interest), or by use of an EPOA which has been revoked/replaced (where this is unknown by the attorney or the transacting party, or both).

In the absence of procedures outlined in law/regulation regarding how the EPOA must be applied, many institutions have established their own internal policies as a way to assist staff presented with EPOAs in practical settings, to support their duty of care to their customers. For example, many financial institutions require that a copy of the EPOA be lodged with the bank in order for an account to be accessed by another person acting as the attorney.

However, where documents are updated, amended or revoked, there is no legal requirement that these changes be communicated to a financial institution. In the absence of an accessible data source to establish whether a document, as presented, is valid and has not been superseded, transactions which are technically no longer allowable may continue to be made, in the absence of any information indicating that a lodged EPOA ceases to have effect.

Financial institutions have raised concerns regarding this lack of transparency in relation to the currency of an EPOA, and called for the establishment of a central register of EPOAs. The Australian Law Reform Commission (ALCR), in its 2017 report *Elder Abuse: A National Legal Response*, also noted concerns with the ability for EPOAs to be misused and recommended a range of reforms, including the establishment of an appropriately designed register of enduring documents to assist in reducing elder financial abuse.

Registration requirements

There is no central register of EPOAs in Australia, although these do exist in a number of other countries, such as the UK. Currently, across the jurisdictions, EPOAs have differing registration requirements.

- In Tasmania, all EPOAs must be registered with the Lands Title Office. A registration fee of \$146.61 applies for registration.
- In all other states and territories except Victoria, an EPOA must be registered with the state's/territory's lands title office if the EPOA is to be relied on to transact in property (i.e. for an appointed attorney to sell a person's house). Registration fees range from \$127 - \$192 depending on jurisdiction.
- In Victoria there are currently no registration requirements.

In all states/territories other than Tasmania an EPOA can be validly made once the document has been signed by the parties and appropriately witnessed. In Tasmania the EPOA must be registered in order to enter into force.

Commencement

While documents can be validly made once signed and witnessed, not all EPOAs can be used immediately. Some jurisdictions allow for the EPOA's power to only be used from a certain date or upon a certain event. This is referred to in most legislation as "commencement". There are different commencement options in place in the different Australian jurisdictions.

Knowing if an EPOA has 'commenced' and the powers can be used would be very helpful for third parties.

None of the current registers provide direct access to third parties in order to be able to confirm whether an EPOA is valid, nor do they indicate whether a document has 'commenced'.

Currently commencement is a matter must be assessed by those parties involved with a transaction. An EPOA document will indicate when and how the powers commence. If it commences on loss of DMC, the third party must be satisfied that this has occurred (for example by presentation of a letter from an appropriately qualified health practitioner). Different institutions may have different approaches to establishing commencement where this does not occur on a specified date.

Point of use

As a financial tool, EPOAs are regularly relied upon at a point of transaction. While this may include the process of selling a person's house or the sale of other assets, such as shares, the majority of transactions conducted under cover of an EPOA will occur through a financial institution, such as a bank.

While general practice may be to provide the financial institution with a copy of the EPOA, there is no mechanism for these institutions to ensure that the most recent copy has been provided to them, or for them to be aware of other factors which may affect a person's ability to use or rely on the EPOA. This increases the risk to the maker of the EPOA, particularly where they do not have the physical access or mental capacity to monitor transactions occurring in the account.

Financial institutions also report challenges with training staff to interpret and apply EPOAs where they may encounter EPOAs made under different jurisdictional laws, or where the ability to use an EPOA is reliant upon medical and/or legal assessment of DMC.

The combination of uncertainty as to the EPOA's currency and uncertainty as to preconditions for use presents risks for both the principal and the third party a point of transaction when determining whether a particular hard-copy EPOA should be relied upon as the basis for making transactions.

Financial abuse of vulnerable Australians

Financial abuse is believed to be the most prevalent form of elder abuse, with this being particularly relevant as older Australians are the most likely cohort to have created an EPOA. As noted in more detail in section 5, the ALRC found that misuse of EPOAs, while not robustly quantified, is of sufficient volume to warrant intervention.

While concerns regarding financial abuse of older Australians has been examined in a range of formal reports, such as the ALRC's 2017 Elder Abuse: A National Legal Response, the House of Representatives Standing Committee on Legal and Constitutional Affairs' 2007 report into older people and the law, and the Victorian

Parliamentary Law Reform Committee’s inquiry into powers of attorney, these concerns are also reflected more broadly in the community.

“A ‘misuse of enduring power of attorney’ arises where an enduring attorney uses the powers given to them by the donor (the person who made the enduring power of attorney) to benefit themselves (or someone close to them) at the expense of the donor.”³

“Abuse of a POA is a well-recognised example of elder financial abuse... An increase in POA-related fraud is likely due to social factors triggered by delayed inheritances. We live longer than ever before, and inheritances that children previously could expect to receive in their 40s, 50s or 60s are now being delayed for decades.”⁴

“Unfortunately, it is the informal, private and unregulated nature of a Power of Attorney that makes it susceptible to misuse.”⁵

Calls for a national register of POAs to be established continue in order to prevent breaches from occurring in the first place, as there is no way of checking the validity of POAs when a principal’s relative, friend or carer attempts to withdraw funds or transfer money or property.⁶

The department acknowledges that the misuse of EPOAs is not the only way in which a person can perpetrate financial fraud. Many other avenues to exert financial control over another person unfortunately exist which do not involve formal transfer of DMC and which can involve a range of digital and physical processes. The creation of an EPOA has been encouraged by Australian jurisdictions as a way to provide protections to the EPOA maker, through the establishment of a legal relationship, with associated responsibilities, between the parties. There are avenues for legal redress for the misuse of an EPOA which may not be available to victims of other forms of financial abuse.

This Consultation RIS acknowledges that the possible interventions outlined in this document will not address all forms of financial abuse, particularly those occurring outside of the framework of EPOAs.

Use of EPOAs in Australia

There is no comprehensive record of the number of EPOAs in Australia, other than in Tasmania due to its mandatory registration requirements. Estimates are that there are several hundred thousand bank accounts being operated under some form of substitute decision making arrangement, with this potentially being as high as 500,000. It is not known what portion of these are general POAs and what are EPOAs. While this is a small portion of the total number of accounts which exist across Australia’s financial institutions, the large

³CRH Law. (2020). *What does misuse of Enduring Power of Attorney mean?* - CRH Law. [online] Available at: <https://www.crhlaw.com.au/our-expertise/elder-law/misuse-enduring-power-attorney-mean/> [Accessed Jan. 2020].

⁴ Aged Care insite. *Breaches of enduring powers of attorney: the need for a national register* [online] Available at: <https://www.agedcareinsite.com.au/2017/12/breaches-of-enduring-powers-of-attorney-the-need-for-a-national-register/> [Accessed Jan. 2020]

⁵ BAL Lawyers. *Financial Exploitation through Powers of Attorney and the Remedies*. [online] Available at: <https://ballawyers.com.au/2018/04/05/financial-exploitation/> [Accessed Jan. 2020]

⁶Aged Care insite. *Breaches of enduring powers of attorney: the need for a national register* [online] Available at: <https://www.agedcareinsite.com.au/2017/12/breaches-of-enduring-powers-of-attorney-the-need-for-a-national-register/> [Accessed Jan. 2020]

majority of EPOAs are made by those in the 'older' age groups. If the majority of these accounts are held by Australians in the 65+ age groups, 500,000 accounts represents a much larger proportion of Australia's older population of approximately 3.7m.

With an ageing population, and significant increases in the number of Australians over the age of 65 predicted in the medium-term, it is reasonable to assume that the number of accounts, and therefore quantum of funds, being managed under a substitute decision making arrangement will grow significantly in the next few decades.

4 Introduction

Keeping Australians safe is the highest priority of the Australian government, and this includes protecting older Australians from all forms of abuse, including financial abuse.

Following the release of the ALRC's report *Elder Abuse: A National Legal Response*, the government is working with states and territories, through CAG, to reduce the prevalence of elder abuse in the Australian community. Under the National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019-2023 CAG has committed to reform of EPOA laws in two areas: developing options for harmonising state and territory laws to achieve greater national consistency, and investigating the feasibility of a national online register of EPOAs.

The Australian government has indicated that the development of a national register, in line with recommendations made by the ALRC and a call to action by the Australian Banking Association and Australia's Age Discrimination Commissioner, is an important area of public policy reform which requires additional consideration.

4.1 Defining the objectives of the RIS

The objective of this Consultation RIS is to examine the regulatory options under consideration, in order to understand their economic and social impacts, and determine the relative costs and benefits of the proposed options. The Consultation RIS seeks stakeholder views, supported with evidence where possible, on the relative merits of the options identified.

The questions in the Consultation RIS aim to clarify the extent of the identified problems, whether the proposed options address those problems and to collect information and data about the relative costs and benefits of each option.

4.2 Structure of this report

The structure of this report is set out as follows.

Section 5 defines the problem this Consultation RIS is seeking to address.

Section 6 explores how the problem can be addressed, including three options for addressing the problem, and the estimated impacts and costs/benefits of the various options.

Section 7 provides further supporting analysis regarding EPOA numbers and transactions.

Section 8 summarises what the results mean for policy makers and the implementation considerations.

Section 9 sets out the conclusions and next steps for this Consultation RIS.

5 What is the problem?

Maintaining sound decision making in relation to finances is a critical element of a person's wellbeing. While people are most likely to nominate those they trust to act on their behalf, there is anecdotal evidence, particularly gathered through calls to elder abuse helplines, that EPOA misuse is sufficiently widespread to require a response.

As noted by the ALRC in its 2017 report “..the ALRC is satisfied, based on studies of elder abuse hotlines, qualitative studies, submissions to the ALRC and consultations with stakeholders, that abuse of enduring documents is a problem, and that the extent of the powers granted by enduring documents means that any abuse is often relatively serious in its financial impact⁷”.

As noted in section 3 EPOAs can be created in every jurisdiction in Australia but there is no consistent requirement to lodge that document with a registrar, or capacity for external parties which are making decisions based upon those documents to be able to easily determine an EPOA's currency.

State and territory laws also provide for changes to the document to occur (for example an attorney can resign their role, or the document can be revoked by the principal, or cease to be valid for other reasons), with these changes not reflected on the EPOA presented to a third party, and these may therefore be 'invisible' to a person at a point of transaction (such as a bank).

There is limited formal data to indicate the extent to which EPOAs may be being used to perpetrate financial abuse. By virtue of the fact that many people enter into EPOAs at a time when they are concerned that they need support to continue to manage their affairs, or they are preparing for a time where they need greater support, these are a tool used by people with increasing vulnerability. While not exclusively used by older Australians, there is also indicative data which shows that EPOA use increases with age, with the highest usage in the older age categories.

Governments have a clear role in providing protections to all citizens, with this responsibility heightened in relation to those at greater risk of exploitation.

To the extent that EPOAs, which are meant to be a protective tool for people, are able to be intentionally or unintentionally used/misused, and this results in the financial exploitation of the principal, this represents an issue which requires further investigation.

The Australian Banking Association (ABA) and the Age Discrimination Commissioner have been advocating for reform of EPOA laws, including the establishment of a central register to address this particular issue. Other community representatives have joined with the ABA in calling for EPOA reforms, including a national

⁷ Australian Law Reform Commission. (2017). *Elder Abuse: A National Legal Response* (Report 131), pgs 181-182. Retrieved from <https://www.alrc.gov.au/publication/elder-abuse-a-national-legal-response-alrc-report-131/>

register, including Elder Abuse Action Australia, COTA, National Seniors, the Older Person's Advocacy Network, Seniors Rights and the Finance Sector Union⁸.

The challenge is to develop a national system which allows those institutions which are not parties to an EPOA, but which are required to rely on it to conduct business, to have increased certainty that an EPOA which legalises a transaction is validly made, is the most current, and provides sufficient powers to the attorney for them to act in the manner proposed, and for this information to be available to these institutions in a timely manner, to support the conduct of financial transactions to the benefit of the maker of the EPOA.

The proposal for a nationally consistent approach to this issue reflects the fact that many EPOAs are exercised across borders (particularly with geographically dispersed families/trusted parties a feature of modern society). In addition, the national footprint of financial institutions presents additional challenges for financial institutions, given the variation in different laws across Australia, with the financial institutions advocating for nationally consistent processes to be in place to improve their ability to provide accurate and appropriate training to staff, and to streamline processes to determine the validity of presented documents.

Possible impact of an intervention

Regardless of the interventions proposed in this Consultation RIS, there will continue to be people in society who deliberately seek to take advantage of another's circumstances to successfully take and use their money. There will continue to be situations where valid and current EPOAs can be misused by attorneys. Considering this issue is part of a broader discussion between states and territories to identify what additional protections can be established within EPOA and justice regimes.

The policy responses outlined in this Decision RIS cannot, and will not, remove all opportunities to deliberately or unintentionally misuse another person's money, but have been designed to provide additional information into the financial sector to detect and stop unauthorised transactions from occurring.

This work supplements the already existing, and in some cases, quite sophisticated approaches taken by financial institutions themselves to detect unusual patterns of activity in accounts and to attempt to identify and stop potentially fraudulent or unconscionable transactions from occurring.

Questions

Consultation question no. 1: *Is there evidence/experience of third parties having difficulty determining whether an EPOA should be relied up for transactions. Please outline your experiences and frequency with which these situations are encountered.*

Consultation question no. 2: *If invalid transactions have occurred due to incorrect assessment of the validity of an EPOA to support a transaction please outline legal and other costs incurred by individuals/third parties in these situations.*

Consultation question no.3: *Are the difficulties associated with identifying the currency on an EPOA thought to be significant enough to warrant a regulatory response.*

⁸ Australian Banking Association. (29 November 2019). *Mandatory national Power of Attorney register a win for older Australians* [online] Available at: <https://www.ausbanking.org.au/mandatory-national-power-of-attorney-register-a-win-for-older-australians/>,

6 How can the problem be addressed?

6.1 What are the objectives of the proposed policy change

The proposed policy change seeks to enhance protections associated with the use of EPOA documents, where these relate to the ability of one person(s) (the attorney(s)) to be authorised to make financial decisions on behalf of another (the principal).

The proposed policy introduces (via legislation) a mechanism for EPOAs to be listed on a national register, to overcome risks associated with EPOAs potentially being a vehicle to facilitate financial abuse of older Australians, particularly where greater transparency regarding the status of the document (for example if it has been superseded) would stop invalid transactions from occurring.

- The option of mandatory registration provides access, to authorised third parties, to a comprehensive register which can support timely verification of EPOA currency to support transactions, such as undertaking day-to-day financial management tasks, and reduces inefficiency for financial institutions in attempting to determine if transactions are validly requested through storing this information in a central register.
- Creating a mechanism to robustly check the status of an EPOA creates new safeguards for some of Australia's most vulnerable citizens, to the extent that it can identify transactions which are not, or no longer, authorised by a current EPOA.

6.2 Why is government action needed

Without government action the issues associated with a lack of transparency of EPOAs are unlikely to be addressed. There will continue to be an inability to determine if one paper-based document has been superseded by another. This results in sub-optimal regulatory arrangements being established to protect a persons' financial interests, and avenues to detect and investigate deliberate fraud perpetrated using out-of-date documents will not have been taken advantage of.

EPOA regimes are already regulated – through legislative provisions which seek to place structure and controls around the ability of one person to act on another person's behalf. However, the current system does not provide as full a safety net as possible, and there have been strong public calls for greater protections in this area.

While the Australian Government does not have a role in legislating in relation to the creation of EPOAs (as this is a jurisdictional responsibility) it can facilitate the valuable exchange of necessary information through the establishment of a national register.

6.3 What are the options for addressing the problem?

Three options have been identified in order to address the problem. These options are as follows:

<p>Option 1: Status quo</p>	<p><i>Status Quo</i></p> <ul style="list-style-type: none"> • No change to current arrangements. Registration continues in line with existing state and territory legislation. • Access to information on EPOAs is achieved through a combination of prevailing practice (such as a requirement to lodge a copy of the EPOA with a financial institution) and requested searches of lands titles registries.
<p>Option 2: Regulatory option</p>	<p><i>National register with mandatory registration</i></p> <ul style="list-style-type: none"> • A national register provides the platform to collect the information necessary to display the characteristics of an EPOA, including its currency (e.g. the most recent or superseded), to those parties with a valid reason to access it. • Mandatory registration ensures that a full set of documents, and a comprehensive record of when those documents were in force and could be validly acted upon, is collected. • A national register provides uniform protections to all citizens, regardless of location.
<p>Option 3: Non-regulatory option</p>	<p><i>Voluntary registration influenced by policy/operating decisions of institutions (including financial) to not accept transactions requested under EPOA if the EPOA has not been registered</i></p> <ul style="list-style-type: none"> • Under this approach the Australian Government would establish a national register and individuals would elect to register documents if desired. Given that financial institutions have the strongest interest in EPOA documents being recorded in a register, it would be open to each institution to make internal policy decisions requiring EPOAs to be included on the register before transactions would be allowed. • This approach reflects a community-led response, facilitated by the Australian Government's willingness to provide a vehicle for these documents to be recorded. Governments have no regulatory role to play under this option, other than potentially denying registration of invalidly made EPOAs.

Both of the 'active' response options (i.e. not the status quo) involve the establishment of a national register for EPOAs. This reflects the stated needs of the financial sector to have a single avenue to search, in real-time, an authoritative record of EPOAs to be able to meet key information needs.

While one possible response option may be to develop jurisdictional registers, rather than a single central register, this option is not assessed in the RIS due to the perceived additional costs of developing seven new EPOA-specific registers (noting that Tasmania already has one), or amending existing registers to accommodate EPOA searching needs, and the business inefficiencies associated with national organisations

needing to search across multiple registries to be able to determine the existence/currency of EPOAs which may have been made in any Australian jurisdiction. A national register can more easily facilitate access to information in situations where the cross-border use of an EPOA is required.

There are several scenarios where a central register of documents could assist in determining if a physical EPOA document (as presented) should be relied upon to authorise a transaction. For example:

- An EPOA could have been made and provided to a specific financial institution (e.g. the attorney's local branch), but the transaction needs to be completed at another location which does not hold a copy of the document. Access to the register would facilitate the completion of this transaction in a timely manner.
- The principal has decided to revoke powers previously issued to the attorney, but has not advised the attorney directly, due to a range of concerns about doing this. A new EPOA reflects the allocation of power to a new attorney, which has been included on the registry, and the register record allows the financial institution to determine that the document presented (at the point of transaction by the previous attorney) is not the most recent version. In this situation the information in the register would allow the financial institution to deny the transaction requested by the previously authorised attorney.

Option 1: The Status Quo

Description

Under this approach no additional registration requirements would be imposed. Those EPOAs which are currently required to be registered (according to existing state or territory laws) would continue to be subject to those requirements. Existing arrangements to establish the currency and legitimacy of an EPOA would continue, with individuals/organisations able to establish policies and practices for engaging with EPOAs which best suit their business arrangements.

The regulatory and administrative outcomes achieved under this approach remain unchanged.

Concerns that the current lack of a mechanism by which EPOAs can be validated prior to transactions occurring is facilitating the deliberate or unintentional use of EPOAs which have been superseded, or otherwise rendered invalid, are not addressed. Any financial loss to the principal, which could otherwise have been avoided, continues to be likely to occur. Risks borne by financial institutions (that the principal may need to be recompensed for, for the invalid transaction which could not have otherwise been identified) continue to be present.

Impacts

Under this option the following impacts are forecast:

- Nil change in regulatory burden
- Challenges associated with determining the currency of an EPOA will continue to be managed within the community.
- There continues to be limited transparency around the extent to which outdated or invalid EPOAs are able to be still used due to lack of confirmation of an EPOA's currency.

Cost/benefits

Costs – in this instance the following indirect (opportunity) costs are incurred:

- Opportunities to increase clarity regarding the ability to rely on an EPOA will not be captured. To the extent that this information would have, had it been available, prevented the misuse of a person's funds then this cost to the person has not been avoided. Similarly, costs borne by governments and the general community, should government-funded support requirements increase as a result of not avoiding the negative financial impacts of EPOA misuse, have not been avoided.
- Personal distress.

The following direct costs are potentially incurred:

- Downstream legal costs to seek to recover losses arising from transactions conducted under cover of an invalid EPOA.

Benefits – direct benefits include:

- Avoidance of regulatory imposts associated with the creation of new registration requirements.
- Continuation of current arrangements which allow for significant independence from governments when electing to make an EPOA.

Questions

Consultation question no. 4: *Is there support for this approach (the status quo) and why.*

Consultation question no. 5: *Is there opposition to this approach (the status quo) and why.*

Consultation question no. 6: *Are alternative views held regarding the potential costs and benefits associated with this option (the status quo). If yes, please outline alternative calculations with evidence where available.*

Consultation question no. 7: *Please provide data or views on costs incurred by individuals/third parties from not addressing difficulties with determining whether to rely on an EPOA as the basis for a transaction.*

Option 2: Regulatory Option – establishment of a national register of EPOAs, with the introduction of a mandatory registration requirement

Description

Under this approach all new EPOAs would be required to be listed within a national electronic EPOA register in order to be validly made.

This approach will require all state and territory legislation to be amended to reflect the new registration requirement and for Commonwealth legislation to be passed to authorise the creation of the register itself.

Each state and territory will continue to have primary responsibility for the legislation which allows EPOAs to be made, and for determining the parameters of making an EPOA in their jurisdiction.

Depending on negotiations with states and territories this approach may result in some greater consistency, across the jurisdictions, of those elements of an EPOA which would need to be reflected in the register. More significant changes to support greater consistency across the various EPOA regimes is not considered to be within scope of this option analysis.

As noted in the research report *Literature Review on Enduring Powers of Attorney and Financial Abuse*:

“The ABA believes the implementation of the Australian Law Reform Commission Report, *Elder Abuse: A National Legal Response* recommendations (5.3 and 14.7) would provide additional protections for vulnerable customers, specifically:

... A national online register that would enable banks and other financial institutions, organisations, companies and service providers to more easily establish the authenticity and currency of the instrument. The lack of a national register exposes people to the risk of financial abuse as banks are unable to check if the PoA is the most current legal document.”⁹

Impacts

This option involves the following changes to the status quo:

- In the majority of jurisdictions, a new requirement will be introduced for EPOA documents to be presented to an appropriate authority for registration, with this assumed to attract a registration fee.
- Additional rules regarding who has the authority to lodge a document for registration (for example, if a principal does not wish to register a document but an attorney does).
- In the majority of jurisdictions an EPOA will no longer be able to be validly made when the document is finalised (with relevant principal, attorney and witness signatures), with the point where an EPOA has been validly made being deferred until the registration process has been completed.
 - This is currently an existing provision in Tasmania.
- A complete record of all EPOAs (from the commencement of the mandatory registration scheme) will be held in a central location for the first time.
- Third party access to a directly searchable register will be available, but only to authorised parties with a demonstrated business need for access to the register and where access fees are paid. This will allow real-time access to information indicating the currency of an EPOA. Additional functionality may be available, depending on discussions with states and territories and the views of stakeholders.
- The requirement for individuals to register an EPOA under a state/territory scheme (with lands titles registries) may be replaced with the requirement to register in the central register ((i.e. no duplicate registration requirements), following a transitional period.

Cost/benefits

Costs include:

Government

- Development and operation of a register – development costs will vary depending on decisions regarding functionality, but initial estimates range from \$3m - \$8m. Ongoing operating costs for the technical aspects of the register are also dependent upon functionality and availability (e.g. business hours vs extended support hours such as 24/7), but have provisionally been estimated at between \$250,000 - \$1m per annum.

⁹ University of Melbourne, *Literature Review on Enduring Powers of Attorney and Financial Abuse*, 2019. Sourced from Australian Securities and Investments Commission

- Establishment/extension of state/territory government registration processes – a robust and reliable registration process envisages that an appropriately authorised body will assess EPOAs for compliance with state/territory legislation prior to being approved for registration¹⁰.
- Costs associated with possible changes to current registration processes for EPOAs intending to be used in lands transactions, in relevant jurisdictions.
- Costs associated with establishing a point of lodgement for EPOA documents for registration – yet to be determined (negotiations would not commence until a formal decision to proceed with a register was made).
- Costs associated with amending legislation and awareness raising of the requirements of the new scheme.
- Training of staff in organisations accessing the register (but not involved in the registration process itself)
 - Organisations as Public Advocates/Guardians/Tribunals/Public Trustees may also elect to train staff to access and interrogate the register.
 - Lands title registry staff across the jurisdictions also are likely to receive training in use of the register.

*Community*¹¹

- Individual registration fees paid to register a document (offset by the potential removal of registration fees for mandatory registration with lands titles authorities¹²). Preliminary estimates of costs range from \$5.5m - \$56m per annum¹³.
- Any fees relating to amendment/revocation of a document (if applicable)¹⁴.
- Time associated with completing the registration process.
 - Noting that one option for the register could involve an online form for the creation of an EPOA, where the time associated with lodging the EPOA for registration becomes a component of the overall time taken to develop the EPOA.
- Potentially reduced EPOA making as a result of the registration process, reducing protections adopted by vulnerable Australians. This may result in the higher use of information arrangements.

Business:

- Training for staff on the use of the new register:
 - ABA data indicates that there are 132,000 employees across 91 banks¹⁵.
 - Assuming 30%-40% of these have either direct customer contact or could in some way be involved with transactions conducted under an EPOA, approximately 39,600 – 52,800 may need some initial training, with these numbers potentially reducing in the out-years,

¹⁰ Costs proposed to be met from registration fees estimated below. Compliance checks are assumed to be related to form, rather than content. That is, has the form been appropriately completed and witnessed, rather than checking for evidence of coercion or duress.

¹¹ Costs associated with seeking professional advice, while generally recommended for any legal document, are not included in cost estimates for this measure as these costs currently exist and do not arise from the proposed registration process.

¹² At the discretion of states and territories, including pending any transitional arrangements established.

¹³ See section 7 for forecasts of potential EPOA registration volumes.

¹⁴ Assumed to be included within above forecasts.

¹⁵ Australian Banking Association. Statistics [online] Available at: <https://www.ausbanking.org.au/policy/the-economy/statistics/> [Accessed Jan 2020]

reflecting the lower number of new staff each year and some component of refresher training for existing staff (if applicable).

- Development/modification of internal policies relating to the use of the register in situations where transactions are conducted under cover of an EPOA.

Benefits – direct benefits include:

- Increased ability for investigations into the legitimacy of transactions purported to be made under current/valid EPOAs (e.g. in fraud cases).
- Greater visibility to governments of the number of EPOAs in place.
- Depending on register design, greater ability to interrogate data to understand the mostly commonly used characteristics of EPOAs (for example, how many attorneys are generally appointed, are conditions on exercise of the EPOA regularly specified), in order to support future policy design.
- Improved EPOA making, as invalidly made EPOAs (where invalidity arises from the forms being incorrectly completed) have a higher chance of being identified through the registration process (compared to no registration), allowing for errors in making to be corrected before the documents start being used¹⁶.
- May remove the requirement to provide physical copies of EPOAs at the time when each transaction is requested. Potential benefits exist in terms of reduced likelihood of loss of documentation, as original copies can be securely stored at all times.

Indirect benefits include:

- To the extent that invalid financial transactions are avoided, reduced downstream pressure on governments to provide support to vulnerable people who were previously (before the financial losses were incurred) able to support themselves.
- Potential reduction in actual or attempted EPOA fraud through a general deterrent effect.

Questions

Consultation question no. 8: *Is there support for this approach (mandatory registration) and why.*

Consultation question no. 9: *Is there opposition to this approach (mandatory registration) and why.*

Consultation question no. 10: *Are there alternative views held regarding the potential impact, costs and benefits associated with this option (mandatory registration). Please outline alternative calculations with evidence where available.*

Consultation question no. 11: *Please provide estimates of the costs incurred by third parties in implementing a mandatory register. Estimates of organisational change/training costs are desired.*

¹⁶ As per current arrangements it is not possible to guarantee that invalid EPOAs are not registered, although checks conducted during registration should reduce, if not eliminate, this risk.

Option 3 - Non-Regulatory Option

Description

The non-regulatory option considers how stated objectives can be achieved without regulation. This includes establishing a voluntary national EPOA register.

Under this approach individuals can elect to register an EPOA if desired. The onus for maintaining registration of subsequent EPOAs vests with individuals.

The Australian Government would still develop the central register, and states and territories would continue to administer their legislation, including implementing a new pre-registration check for compliance with current laws.

It is assumed, given the reported significance of a register to the financial services sector, that individual financial institutions may wish to actively encourage customers to register EPOAs. Responses to customers' potential desire not to engage with the register would be a matter for those institutions to address directly outside of the formal proposed regime.

This approach provides the majority of the protections outlined in Option 2 for those who independently elect to register EPOAs. However, it may introduce a specific set of additional risks, including:

- The risk that an invalid transaction is approved due to no EPOA data being held in the register, or an incomplete record set not indicating that a document has been superseded
- The risk that valid transactions are not approved, or are substantially delayed, due to the latest EPOA not being registered, incorrectly indicating that an attorney/transactions have not been authorised by the principal.

Under this option, the proposal to defer commencement of the EPOA until such time as registration has been completed would not apply, as a proportion of EPOAs would never be registered. Therefore under this scenario financial institutions, or others enacting transactions under an EPOA, would need to have their own policies for determining if transactions can proceed in the situation where the EPOA has not yet been, or will not be, included on the register.

Options may include:

- continuing as per the status quo and staff determine, in line with existing policies, if the EPOA applies
- deferral of a proposed transaction until the registration has been completed (where the individual indicates that registration has been/will be sought)
- individual institutions establishing policies to not transact under cover of EPOAs which have not been registered.

Also under this option it is not expected that the dual registration requirements (for mandatory lands title registration where intending on using the EPOA to transact in land) would be removed, or would only partially removed (for example where evidence of registration in the central register can be provided).

- This approach represents an additional layer of administrative complexity for both individuals and governments.

Impacts

This approach involves the following changes to the status quo:

- Establishment of a central register.
- Establishment of registration scheme (on a voluntary basis).
- Third party access to a directly searchable register will be available, but only to authorised parties with a demonstrated business need for access to the register and where access fees are paid. This will allow real-time access to information indicating the currency of an EPOA. Additional functionality may be available, depending on discussions with states and territories and the views of stakeholders.
- Additional rules regarding who has the authority to register a document (for example, if a principal does not wish to register a document but an attorney does).

Cost/benefits

Costs include:

Government

- Costs associated with building the register as per option 1.
- Establishment/extension of state/territory government registration processes – a robust and reliable registration process envisages that an appropriately authorised body will assess EPOAs for compliance with state/territory legislation prior to being approved for registration.
- Costs associated with establishing a point of lodgement for EPOA documents for registration – yet to be determined although anticipated to be slightly lower than option 1 to the extent that the costs are associated with volume. Fixed costs are expected to remain unchanged.
- Awareness raising of the option to register an EPOA in the central register.
- Training of staff in organisations accessing the register (but not involved in the registration process itself)
 - Organisations as Public Advocates/Guardians/Tribunals/Public Trustees may also elect to train staff to access and interrogate the register
 - Lands title registry staff across the jurisdictions also are likely to receive training in use of the register.

Community¹⁷

- Individual registration fees paid to register a document (offset by the potential removal of registration fees for mandatory registration with lands titles authorities if applicable¹⁸). The expected reduced volume of transactions has the potential to increase registration fees for individual users, as compared to Option 2, as fixed costs associated with establishing and managing a registration process must still be offset. Preliminary estimates of costs are slightly lower than Option 1, ranging from \$1.4m - \$42m per annum, spanning assumed 25%, 50% or 75% registration take-up rates.
- Any fees relating to amendment/revocation of a document (if applicable).
- Time associated with completing the registration process.

¹⁷ Costs associated with seeking professional advice, while generally recommended for any legal document, are not included in cost estimates for this measure as these costs currently exist and do not arise from the proposed registration process.

¹⁸ At the discretion of states and territories, including pending any transitional arrangements established.

- Noting that one option for the register could involve an online form for the creation of an EPOA, where the time associated with lodging the EPOA for registration becomes a component of the overall time taken to develop the EPOA.

Business:

- Training for staff on the use of the new register
 - ABA data indicates that there are 132,000 employees across 91 banks¹⁹.
 - Assuming 30%-40% of these have either direct customer contact or could in some way be involved with transactions conducted under an EPOA, approximately 39,600 – 52,800 may need some initial training, with these numbers potentially reducing in the out-years, reflecting the lower number of new staff each year and some component of refresher training for existing staff (if applicable).
- Costs associated with ensuring that staff are equipped to engage with EPOAs included on, or not included on, the national register.
 - Potential inefficiencies are assumed through needing to maintain two discrete sets of policies and ensuring staff are applying them accurately.

Benefits – direct benefits include:

- To the extent that individuals elect to register an EPOA in the central register, reduction in the number of invalid transactions which have been processed under cover of an invalid EPOA, with a corresponding reduction in financial losses to the principal.
- Increased ability for investigations into the EPOAs in place at any time, for example, in fraud cases, where EPOA records have been made and maintained by individuals (e.g. registering superseding documents).
- Improved EPOA making, as invalidly made EPOAs will be identified through the registration process, allowing for errors in making to be corrected before the documents start being used, where voluntary registration occurs.
- May be perceived as the more private option, as it retains the existing premise that EPOAs are documents made between the principal and trusted parties, with no requirement to advise the government in many situations.

Indirect benefits include:

- To the extent that invalid financial transactions are avoided, reduced downstream pressure on governments to provide support to vulnerable people who were previously (before the financial losses were incurred) able to support themselves.
- Potential reduction in actual or attempted EPOA fraud through a general deterrent effect.
- For those individuals who voluntarily register, this may remove the requirement to provide physical copies of EPOAs at the time when each transaction is requested. Potential benefits exist in terms of reduced likelihood of loss of documentation, as original copies can be securely stored at all times.

¹⁹ Australian Banking Association. Statistics [online] Available at: <https://www.ausbanking.org.au/policy/the-economy/statistics/> [Accessed Jan 2020]

Questions

Consultation question no. 12: *Is there support for this approach (voluntary registration) and why.*

Consultation question no. 13: *Is there opposition to this approach (voluntary registration) and why.*

Consultation question no. 14: *What is the expected uptake under a voluntary registration scheme (e.g. what percentage of EPOAs are forecast to be voluntarily registered).*

Consultation question no. 15: *Is this rate of uptake thought to be sufficient to provide a benefit to the institutions required to determine if a transaction is valid.*

Consultation question no. 16: *Are alternative views held regarding the potential costs and benefits associated with this option (voluntary registration). If yes, please outline alternative calculations with evidence where available.*

Consultation question no. 17: *Please provide estimates of the costs incurred by third parties in implementing a voluntary register. Estimates of organisational change/training costs are desired.*

Consultation question no. 18: *Assuming that this option is preferred in comparison to Option 2, why would this option produce a better outcome.*

Alternative approaches

Questions

Consultation question no. 19: *Are there alternative approaches which should be considered in a Decision RIS. If yes, outline the proposal including impacts, costs and benefits. Please show workings.*

7 Supporting analysis

7.1 Defining the population – mandatory registration

In the absence of any nationally representative data set regarding EPOA making and use, estimating the number of EPOAs in Australia can be complicated and relies on a number of assumptions.

In order to estimate the impacts of the proposed options estimates of both existing numbers of EPOAs and annual creation/change rates have been forecast using a number of different approaches.

Enduring documents can be made by any person aged 18 or over. While able to be made by younger adults, it is generally the case that these are relied upon more as a person ages, with the greatest volumes of EPOAs understood to be made by people in their later years. While declining confidence in a person's ability to make decisions is often stated as a reason why EPOAs may be made, it is unlikely to be an exclusive reason. For those EPOAs where the principal selects that they commence upon making, there may be other factors which influence the need to obtain greater assistance from family and friends, such as restricted mobility or distance from services.

A range of factors, and data provided by states and territories (where available), have been used in best-efforts approaches to identify transaction volumes.

The total number of EPOAs in Australia, for the purpose of this RIS, is assumed to be 1.3m to 1.5m, representing the minimum and maximum projected numbers of the below scenarios. The numbers of EPOAs expected to be registered each year, under a mandatory registration scenario, is assumed to be 0.055m – 0.28m, representing the minimum and maximum projected numbers of the below scenarios.

Estimates of registration rates under a voluntary option have been calculated as a proportion of the estimated mandatory registration numbers, with 25%, 50% and 75% registration rates (as compared to the mandatory option) assumed. However, registration behaviour under this scenario represents individual preference, and is therefore not considered to be the result of regulatory intervention. In this scenario registration is facilitated by the government, rather than imposed by it.

Scenario 1 – general population estimates – total number of EPOAs in existence

ABS Census data from 2016 indicates of total population of 23.4m, 17.6m of which are aged from 15 – 85+ (being the closest proxy to 18+ for the purposes of being eligible to create EPOAs). While the overall population will have grown since 2016, Census data includes a robust indication of the age profile which is present, with the last Census conducted in 2016.

In order to estimate the number of EPOAs in place assumptions about the likelihood of people in any age cohort creating an EPOA must be applied. A high and low scenario has been forecast. Anecdotal data from Australia's financial institutions supports the proposition that EPOAs are more commonly used amongst an older cohort, with increasing numbers of accounts subject to an EPOA as people reach middle- and later-ages.

Age range	Low scenario - % making EPOAs	Est. total	High scenario - % making EPOAs	Est. total
15 to 19	0.5%	7,834	1%	15,668
25 to 34	2%	67,369	4%	134,738
35 to 44	4%	125,798	6%	188,967
45 to 54	6%	186,301	8%	248,401
55 to 64	8%	220,300	10%	275,375
65 to 74	10%	207,671	12%	249,205
75 to 84	15%	166,984	20%	222,645
85 or more	30%	146,054	40%	194,739
Total		1,128,310		1,529,467

In the absence of any data regarding the characteristics of those people making EPOAs in any given year, the department has estimated a possible pattern. Assuming that EPOA making behaviour grows slowly towards the mid age ranges, peaks in the 65-74 range and then declines (as capacity reduces and the ability to legally make EPOAs declines), annual estimates of EPOA making are assumed to be:

Age range	Low scenario - % making/changing EPOAs in any year	Est. total	High scenario - % making/changing EPOAs in any year	Est. total
15 to 19	1%	78	1%	157
25 to 34	1.5%	1,011	2.5%	3,368
35 to 44	2%	2,516	4%	7,559
45 to 54	4%	7,452	8%	14,904
55 to 64	6%	13,218	8%	22,030
65 to 74	10%	20,767	10%	24,921
75 to 84	5%	8,349	8%	16,698
85 or more	1%	1,461	3%	5,842
Total		54,852		95,479

The assumption that EPOA making is concentrated in later age groups is supported by case file analysis undertaken by the Queensland University of Technology on behalf of ADA Australia (discussed in greater detail below) which indicated that over 83% of requests for support which related to EPOAs were for those aged 65 or over.

Scenario 2 – extrapolation from Tasmania’s registration data

Tasmania is the only jurisdiction with mandatory registration of EPOAs. Data provided by Tasmania’s Department of Primary Industries, Parks, Water and Environment indicates that there are currently over 74,000 EPOAs recorded on the Lands Titles Register of Deeds in Tasmania, covering the period 1976 to 2019. This includes historical instruments lodged with the Lands Titles Office prior the introduction of the mandatory registration process.

More recent data, covering the period 2015 – 2019 indicates that an average of 4,942 documents are registered in Tasmania each year.

	1 Jan – 31 Dec 2015	1 Jan – 31 Dec 2016	1 Jan – 31 Dec 2017	1 Jan – 31 Dec 2018	1 Jan – 24 Dec 2019	Average
EPOA lodgements	4,831	4,697	4,853	4,914	5,413	4,942
Population estimates	516,586	509,965	522,152	528,201	534,281	
Lodgements as % of the population	0.94%	0.92%	0.93%	0.93%	1.01%	0.95%

Tasmania’s population has a slightly older profile than other Australian states and territories. Assuming the previous assumption is correct, that as people reach middle- to older-ages they are more likely to create EPOAs, this would mean that any extrapolation of the number of documents likely to be created each year, if based on a Tasmanian sample, would be higher than would otherwise be expected. For the purposes of this Consultation RIS, this impact is not thought to be significant.

Extrapolating based on the Tasmanian data, if 0.95% of the Australian population of 25.364m people (as at end June quarter 2019) are assumed to make an EPOA in a year, this RIS estimates that 240,000 EPOAs would be registered each year in Australia.

Scenario 3 (below) indicates that an assumed EPOA rate of 0.95% across the entire population²⁰ is not dissimilar to the international comparison of 1.2%.

Scenario 3 – comparisons with international EPOA making rates

The UK’s Office of the Public Guardian operates a register of lasting (LPA) and enduring (EPA) powers of attorney. The OPG’s 2018-19 annual report advises that 835,950 applications to register an LPA or EPA were received that year. The estimated 2019 population of the UK is 67.53m. Therefore approximately 1.2% of the population seeks to register a power of attorney each year.

Using the same assumptions in the Australian context approximately 280,000 Australians per annum may seek to register an EPOA.

²⁰ Acknowledging that only those 18 or over are eligible to make an EPOA

7.2 Costs of the various scenarios

In the absence of agreed potential registration fees, each of the scenarios has been costed against a low, medium and high registration cost scenario. All current registration fees fall within these boundaries.

Mandatory registration – registration fees

		EPOA no. estimate	Possible registration cost points		
			Low	Med	High
			\$100	\$150	\$200
Scenario 1	low	54,852	\$5,485,200	\$8,227,800	\$10,970,400
	high	95,479	\$9,547,900	\$14,321,850	\$19,095,800
Scenario 2		240,000	\$24,000,000	\$36,000,000	\$48,000,000
Scenario 3		280,000	\$28,000,000	\$42,000,000	\$56,000,000

Voluntary registration – registration fees

Note: EPOA registration rates calculated with reference to EPOA number estimates above

		EPOA no. estimate	Possible registration cost points		
			Low	Med	High
			\$100	\$150	\$200
Scenario 1 - low	low (25%)	13,713	\$1,371,300	\$2,056,950	\$2,742,600
	medium (50%)	27,426	\$2,742,600	\$4,113,900	\$5,485,200
	high (75%)	41,139	\$4,113,900	\$6,170,850	\$8,227,800
Scenario 1 - high	low (25%)	23,870	\$2,386,975	\$3,580,463	\$4,773,950
	medium (50%)	47,740	\$4,773,950	\$7,160,925	\$9,547,900
	high (75%)	71,609	\$7,160,925	\$10,741,388	\$14,321,850
Scenario 2	low (25%)	60,000	\$6,000,000	\$9,000,000	\$12,000,000
	medium (50%)	120,000	\$12,000,000	\$18,000,000	\$24,000,000
	high (75%)	180,000	\$18,000,000	\$27,000,000	\$36,000,000
Scenario 3	low (25%)	70,000	\$7,000,000	\$10,500,000	\$14,000,000
	medium (50%)	140,000	\$14,000,000	\$21,000,000	\$28,000,000
	high (75%)	210,000	\$21,000,000	\$31,500,000	\$42,000,000

Each of the above scenarios regarding potential quantum of registration fees should be paired with currently estimated register costs in order to determine possible total estimable costs of the proposed reform.

Register build and operating costs estimates	Build costs	Operating costs	Total
Low	\$3,000,000	\$250,000	\$3,250,000
High	\$8,000,000	\$1,000,000	\$9,000,000

7.3 Impacts of abuse of EPOAs

This is an area with little formal research. However the impacts of the abuse of EPOAs has been noted in several sources.

ADA Australia- Examining access to justice for those with an enduring power of attorney who are suffering financial abuse, September 2017

This analysis was based on 121 de-identified case files held by ADA Australia. It identified a range of financial behaviours which were detrimental to the principal, including:

- emptying bank accounts
- intercepting regular payments, such as pensions
- accessing the principal’s accounts for their own use
- selling the principal’s home and keeping the proceeds
- controlling access to finances and limiting the principal’s spending
- not meeting the costs of health and wellbeing needs of the principal
- limiting access to information regarding the principal’s financial situation
- not keeping appropriate records of expenditure.

The research does not quantify the extent of the financial impacts associated with the misuse of EPOAs.

As can be seen from this research several of these forms of financial abuse involve a direct interface with financial institutions. To the extent to which the abuse may be allowed to occur, or continue, due to a reliance on superseded or revoked EPOAs which were not apparent to the financial institution, the register proposal can contribute to reducing the negative impact on vulnerable people of misuse of these instruments. Equally, in the context of an education program to raise awareness of the proposed register, there are significant opportunities to advise people of their rights in relation to amending or revoking EPOAs (should they be unhappy with the behaviour of their current attorneys) and for financial institutions to have streamlined access to information about new EPOAs, in order to deny transactions requested under a superseded document.

Financial abuse of elders: a review of the evidence, Monash University, June 2009

The report found that (s)tatistically, older people are less likely to be victims of criminal activity than are other segments of the population (Australian Institute of Criminology, 2006). However the impact of financial abuse is much greater for older people than younger people as they do not typically have the time or opportunity to recover their financial losses (Crosby *et al*, 2008, Dessin, 2000, Rabiner *et al*, 2004). For older people, loss of financial security may be permanent and life-threatening (Australian Institute of Criminology, 2006) and can result in greater dependence on government assistance, and increase the potential costs of care to the community. An Australian study conducted in 1996 found that in New South Wales all types of elder abuse combined increased the costs of services provided to the victims of elder abuse by \$311 per week, resulting in an estimated additional service cost of \$300m annually for that state (Setterlund, 2001).

It also reported the outcomes of Lush (1998²¹), that financial abuse occurs in 10% to 15% of cases involving registered EPAs.

7.4 Limitations of analysis

As noted, while actual data has been sourced where possible, there is no robust data source which indicates the number of EPOAs in existence in Australia. A range of assumptions have been relied upon to develop estimates. There is equally little data upon which to base robust estimates of the financial impact of EPOA misuse which could be avoided by any change to EPOA arrangements, or the implementation of registration requirements.

Questions

Consultation question no. 20: *Should alternative estimates for the volume of EPOAs likely to be registered be considered? If yes, please provide workings.*

Consultation question no. 21: *Have stakeholders estimated the quantum of EPOA fraud which might be avoided through the proposed registration scheme? If yes, please provide workings.*

²¹ Monash University (2009) *Financial abuse of elders: a review of the evidence* Available at: [https://www.eapu.com.au/uploads/research_resources/VIC-Financial Elder Abuse Evidence Review JUN 209-Monash.pdf](https://www.eapu.com.au/uploads/research_resources/VIC-Financial_Elder_Abuse_Evidence_Review_JUN_209-Monash.pdf) [Accessed Jan 2020]

8 Summary and implications

8.1 What do these results mean for policy makers?

There is considerable uncertainty regarding the extent to which EPOAs are misused or abused, and the financial implications of that abuse, impacting on the ability to accurately forecast the positive or negative impacts of any particular course of action. In such an environment there are several approaches which can be taken:

- Do not act now: monitor the situation, including establishing new processes to enhance access to information and governments' ability to monitor the scale of any risks, and assess the effectiveness of any actions taken by non-government entities.
- Act now and review in the future: using a risk management approach, take sensible steps to reduce identified, but unquantified risks, and review the operation of the proposed solution after a pre-determined period of time has elapsed.

Given the significance of the potential impact on individuals if EPOA misuse due to lack of transparency of the currency of a document is allowed to continue, and the conclusions of several reviews that registration of EPOAs is a viable solution, there appears to be a strong argument to take an "act now with review" approach to this issue.

Questions

Consultation question no. 22: *Do stakeholders consider that the potential benefits of acting now outweigh the potential drawbacks of this approach.*

Consultation question no. 23: *If no, what is the preferred approach.*

9 Conclusions and next steps

The analysis in the Consultation RIS indicates that there is a case to be made for regulatory intervention to assist in creating greater transparency in relation to the ability to rely on an EPOA, particularly through being able to robustly identify if a document, as presented, is the most recent in time and has not been revoked.

In assessing intervention options, ongoing industry and community sector calls for a central register of EPOAs have been noted, and this option has featured in the ALRC's comprehensive analysis of the legal system's response to elder abuse.

While EPOAs are not exclusively used by an older cohort, indications are that they are more commonly used by Australians over the age of 65. This means that considering EPOA abuse in the context of elder abuse is appropriate.

Elder abuse can be thought of as invisible crime, although its presence in society is increasingly being recognised. There are a range of factors identified as preventing reporting of elder abuse, including: shame, fear of the abuse escalating, reliance on abusers, and lack of willingness to report family members or have them subject to penalty. This impacts on the ability to accurately forecast the scale and impact, particularly financial impact, of the abuse. The anecdotal evidence builds a picture of a growing social problem affecting a vulnerable cohort in our community.

Any change in practice, policy or law will have costs. It is the role of governments to ensure that the costs incurred produce commensurate benefits. The two active options outlined in this Consultation RIS are proposed for consideration on the grounds that the registration of EPOAs will have a positive impact in reducing accidental or intentional misuse of EPOAs in specific circumstances.

- For end users, there will either be an opportunity, or requirement, to register EPOAs with a central register, in order to access the protections associated with institutions, particularly financial institutions, having access to a reliable source of information to determine if an EPOA remains in force.
- For financial institutions, there will be reduced uncertainty regarding the legitimacy of transactions made under cover of an EPOA, enhancing their ability to protect the interests of their customers.
- For government, there will be an opportunity to provide greater protection for vulnerable Australians without engaging in excessive regulation of essentially private decisions made between members of the community.

Next steps

All interested parties are invited to make submissions to the Attorney-General's Department as outlined in **Section 2 by 11.59 AEDT, 09 March 2020**. This information will inform further analysis, to be provided to Australian Attorneys-General in 2020. Parties should accompany any submissions with a covering lodgement form which indicates your publication preferences for the document (submission published with your or your organisation's name; submission published anonymously; or submission not published).

AGD will publish approved submissions in the format provided and cannot therefore ensure that all digital accessibility requirements have been met.