National Register of Enduring Powers of Attorney – Public Consultation Paper

Submission to the Attorney-General's Department

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

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

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Would you like to be contacted with updates about this project? yes

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A National Register of Enduring Powers of Attorney

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

If a national register and the registration process were to be well designed, adequately resourced and well-implemented, then yes it possible that it could contribute to reducing financial abuse. It is, however, only one aspect of the much broader systems and strategies needed to prevent and mitigate risks of financial abuse occurring, and it is imperative the function it can play is not hyped or overinflated.

Given that the national register is part of the larger whole in terms of responses to abuse and violence – it is especially important that the Attorney General's department works closely with all the related service systems (especially with services that respond to violence/abuse), to ensure that the national register can fulfil the functions for which it is being designed, and contribute to better overall mechanisms for responses to abuse.

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

There are a variety of risks associated with the national register.

If the design of the national register (and the processes associated with it) are too complex and not fit for purpose, it might not be used.

There are also risks that the data being collected could be accessed without authorisation (e.g. via hacking/cyber security threats), or otherwise misused.

If there is insufficient attention to what is needed by people experiencing abuse, and there are not sufficient safeguards, it is possible that the register could be used by people pepetrating abuse, to seek to legitimise their financial abuses.

Strategies to mitigate the above-mentioned risk include designing a system with strong safeguards. We especially highlight the need for a system that has a strong distinction between

- the independent witness, who meets with the principal, signs the document, and is involved in seeking to ensure that a principal understands the choices that they are making with the EPOA, and its impacts, and are making those choices voluntarily, and
- the organisation whose role it is to ensure that documents are registered.

Having two separate parties undertaking these two separate roles provides necessary visibility (and ensures at least, ideally, two independent checks throughout the EPOA creation, lodgement and registration processes).

We expand further on all of these risks, and potential responses throughout this paper, especially in response to questions 17, 19 and 40-43.

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

ADACAS recommends that the Attorney-General's department conduct specific consultations with diverse groups of people with lived experience from the populations mentioned above (and the advocacy/representative organisations that work with them) for guidance on these matters.

Access arrangements consistent with the purpose of the National Register

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

ADACAS agrees with the key access principles as outlined in section 3.2.6 of the consultation paper.

We note that individual advocates at community advocacy agencies (e.g. such as ADACAS and others also funded under the National Disability Advocacy Program, Older Persons Advocacy Network and other relevant advocacy programs) may also need access to information as to what EPOA arrangements are registered, in instances where they are working with (and have the permission of) a principal: a person who is experiencing, or suspects they are experiencing financial abuse. This would be especially important in situations where the principal trusts the community advocate to gain this information, but does not consent to involving other parties to assist in checking (e.g. Public Advocate staff).

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

Please see comments against question 4 above.

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

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

Access by applications should provide clear reasons (and backup evidence if appropriate/needed) to justify why access is required.

Access by application should also explain whether any other avenues for accessing this information have been explored (if not/ why not), and an explanation as to why access by application is the most suitable approach in the applicants view, in this situation.

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

Circumstances in which there is a serious risk of imminent harm to the principal (or attorney), might justify the need for urgent access.

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

Yes, there should be a review process, that is easily accessible, where the process is transparently described, and with a separate decision-maker involved.

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

Yes. Whilst consent should be sought from a principal where possible/appropriate - there could also be situations where the principal is unable to consent, and/or where there are reasonable grounds to suspect financial and/or other abuse by the attorney (and so it would not be appropriate to seek consent from the attorney). There could also be (rare) circumstances where there is evidence of a significant risk to the principal, where the process of seeking consent might be deemed too risky to the safety/wellbeing of the principal. In short – yes - there are situations where the right to live free from abuse, might be more important than the right to privacy.

In instances where there is a severe and imminent risk of harm, emergency services and/or statutory/other authorities who have responsibilities to intervene to prevent abuse) should have the authority to access this information without consent if necessary.

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

Whilst yes, there may be circumstances where users need to inspect an imaged copy of the executed instrument to satisfy themselves of the terms of the EPOA, this full access should only be available to those that need it especially if, as could be the case with the ACT, the EPOA documentation includes private information on other topics, that are not immediately relevant to finances.

For those who need more limited access - we envisage that a summary of the key information should instead be available. It is important that such a summary includes all the relevant key information about the extent of the powers of the attorney, any limitations on their role, whether it is current, and when and under what circumstances it becomes current.

If the scope of the national register were to be expanded, such that it covers also the other domains that are currently included within the EPOA documentation in the ACT (i.e. personal decisions, healthcare decisions, medical research decisions): people should only have access to the information that is both needed and relevant to their specific role (i.e. an authorised person working in a bank and checking for work purposes whether there is a financial EPOA document registered, should not have access to see who is appointed to make healthcare decisions etc).

We note also the need for the register to be able to hold multiple current EPOAs simultaneously, as in some instances there may be multiple EPOAs that cover different aspects of financial management, that are all concurrently valid (some of which might be historical, and, if the person no longer has decision-making capacity, unable to be re-issued).

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

Making phase

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

Potential issues with online creation of EPOAs might include:

• Lack of protections/visibility in situations where principals are being coerced into creating an EPOA, when they might not want to, or being coerced into entering wrongful information that does not align with their values, wish and preference.

• Challenges with adequately proving identity (if there is family violence/domestic violence/abuse of older person by a potential attorney), the potential attorney might know or already have easy access to any identification documents that might be requested in order to complete the process online.

• Lack of protections (and visibility) when someone else is impersonating the principal through the creation of the form. (Moving the process online removes some of the vital identity safeguarding that exist at present when people are completing paper EPOA forms, given that independent witnesses are meeting with the principal and attorneys, and checking and viewing identity documentation directly, and assessing whether the principal seems to understand the impact of the documentation being signed, but also is choosing to engage with the process voluntarily. (We know that this is not a failsafe process given that the independent witness would usually have only a relatively short interaction with the principal and witnesses and sometimes the attorney, and the dynamics of abuse might not be easily identifiable)).

• Depending on the design of the form (and whether clear supporting information is available) – having to create it/complete it online could potentially make it harder for people to gradually complete a form over a period of time, as they decide and/or gather information that they need. For many people decisions re EPOAs are not always likely to be easy or taken lightly – they may wish to complete the paperwork over days, or weeks or longer). Completing a form over time online could mean that people forget login details, and/or become frustrated with repeated ID checks, and the process and logins etc and give up).

• Creates an additional barrier for people who are not digitally literate, or uncomfortable creating digital forms.

• Online forms are also a barrier for people who are digitally literate, but may not have easy access to being able to complete it online, whether via tablets, a smartphone or computers (some people might be uncomfortable completing private documentation in the few public settings which might offer computer access (such as libraries)). There can also be cyber safety concerns/ risks that information might be compromised when private information is entered via shared computers.

• Information being stored online in a database that is partly publicly accessible, risks that private information could be hacked.

• Having access to the form online, does not mean that people have easy access to be able to print and check the information provided.

In terms of how some of these risks could be mitigated:

• Do not allow the general public to enter the information online. Instead have processes whereby an independent other (not the principal or attorney) lodges the information and where a separate authority conducts further checks and registers it. (E.g. perhaps the independent witness scans to a secure system and/or provides paper documents to a separate authority, who is resourced to then arrange for the relevant data entry and checks to occur? As earlier mentioned - we note the imperative that there is separation between the independent witness who is checking understanding, and those that are registering the form).

• It has also been suggested that evidence of decision-making ability (or capacity) could be provided with the online documents. Given the importance of upholding decision-making rights to the greatest degree possible, and that for many people, their ability to engage in decisions can vary from decision to decision, and from day to day, we have strong concerns about this suggestion. Please refer to further discussion on this point in question 25.

• Whilst it would be a possibility to allow for the initial form to be created online (and added to the register with status Pending/not yet valid), but then for there to be a separate process where people met with an independent witness to check identity/ understanding/ whether there is coercion, in our view this is not helpful as it adds bureaucracy, and delays in information being finalised on the register, and as a process might prove too aversive (such that principals decide not to proceed with it). Additionally there is the possibility that busy staff responsible for identity and other checks, might not take the time needed to adequately check whether the options entered are really what the principal wants (Even if the attorney

leaves the room, if there is abuse, the principal may be too scared to reveal this, given they don't know what the impacts of doing so might be (if it becomes apparent to the person abusing that abuse has been divulged, there could be safety ramifications)).

- Allow for paper forms to always continue to be an option/completed (as long as there are relevant safeguards also for that process still in place) – added safeguards for which could additionally include increased training for independent witnesses on how to identify if abuse or coercion might be occurring.

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

See concerns raised above around separating out this process.

Lodgement phase

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

We note that there are situations that where a principals' health or disability might mean that they are unable to lodge a form in person. The principal, and/or with the permission of the principal, an independently authorised witness should be able to lodge the EPOA document.

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

Please refer to the response to question 13 for general concerns around the lodging and registration process.

The consultation paper outlines a number of administrative items which will be checked at the registration point. In our view, whilst administrative items (correct completion of the form etc) should be checked, it is also imperative that the following are checked at the lodgement point:

- Identity, and
- whether a principal understands what they are completing and its impacts, and
- whether it seems that the principal is completing the process voluntarily

Given the extent to which this document will be relied on, in our view, online identity verification processes are not sufficient as safeguards.

Whether before lodgement, or before registration (both are fine), the prospective attorney also needs to accept that they are willing to take on the role of attorney and sign that they understand their role and responsibilities. (please see additional commentary on this in the additional information section (question 45) at the end.

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

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Flexible options for principals who are seeking to engage with an EPOA process are important. Whilst ideally it would be great to allow as much flexibility as possible re lodgement –at the same time – it is imperative that there are adequate safeguards in place for each of these separate processes.

At the present time, we are not convinced that it will be easily possible to have sufficient safeguards in place to allow all of these options (online, by post, in person) whilst also safeguarding adequately against people impersonating others, or principals being pressured/coerced into submitting documents when they don't want to, or when the contents of those documents don't match their wishes, values and preferences.

Given, that financial abuse can often co-occur with other types of abuse(1) (whether emotional/psychological/physical or other), and that abuse could be perpetrated via documents lodged on the register if the information loaded does not match what the principal truly wishes, values and prefers, those safeguards must be sufficient to dissuade perpetrators from seek to prevent principals being coerced or pressured into lodging documents when they don't want to, or with wishes/preferences contrary to their own. It is also imperative that the processes are sufficiently robust to ensure that identity is adequately ascertained, to seek to prevent people from successfully impersonating others and enabling wrongful documents to enter the register that way.

The EPOA process also needs to be able to cater to a very wide variety of complex life circumstances, including (but not limited to) the following groups:
• People in hospital, about to have major surgery
• People wanting to buy property, whilst out of state
• People living in residential aged care,
• People who experiences fluctuating ill health (including mental ill health), and/or disability, who want arrangements in place for the periods when they might be unable to make their own decisions.
• People who are homeless
• People who have just experienced trauma (e.g. a car accident) and need others to act on their behalf for a period of time.
• People with a diagnosis of dementia or another neurodegenerative condition, that mean that they want to put EPOA arrangements in place whilst they can, before their condition results in loss of decision-making capacity on these topics.
•People living with chronic and/or terminal illness.
We acknowledge also intersectional life experiences, and thus the importance of designing for intersectionality.

The processes also need to be accessible, for example, to people with disability who might need reasonable adjustments made (for example: a person with vision impairment and some hearing loss might need any discussions to be in person, and might not be in a position to directly engage with phonecalls, emails, or written information about possible arrangements, or people with cognitive disability who retain decision-making powers however need there to be adequate supported decision-making approaches, and clear information (definitely in plain English, possibly for some in Easy English) also in place).

There will also be accessibility needs for people who do not speak/read English (access to interpreters, translated materials, and/or support to navigate cultural differences to find suitable options).

(1) - Eriksson, M and Ulmestig R (2021), "It's Not All About Money": Toward a More Comprehensive Understanding of Financial Abuse in the Context of Violence Against Women (VAW), Journal of Interpersonal Violence, 2021, Vol. 36(3-4).

WHAT ARE THE EXISTING SAFEGUARDS IN THE ACT?

At the present time, when people complete enduring power of attorney paperwork in the ACT, there are two witnesses in the presence of the principal (and potentially also additionally another person authorised to sign on that person's behalf, if that person is unable to sign).

The ACT Public Trustee and Guardian's "Power to Choose" booklet(2) , which includes a copy of the EPOA form (and forms also to revoke that form) explains:

- Witness 1 must be a nominated independent person i.e. a person who is authorised to sign statutory declarations (Justice of the Peace, Lawyer etc). They cannot be being appointed under the EPOA.
- Neither witness can be being appointed as an attorney under the power of attorney. Only one witness can be a relative of the principal or of a person appointed as an attorney under this enduring power of attorney. A person cannot be a witness if they are signing on behalf of the principal.
- At the end of the EPOA process, both witnesses must complete documentation certifying that the principal signed the EPOA voluntarily, and that the principal had seemed to understand what they were signing and its impacts.

By default – this process thus inevitably has checks on the identity of the principal and requires both witnesses to assess and affirm that they believe the principal understands what they are signing to and its impacts, and that they believe the person is signing voluntarily (not under duress). By virtue of the groupings required, there is a minimum of three, sometimes four or more people in the room: the principal, two witnesses, possibly an appointer.

The attorney also has to sign that they are prepared to take on the role of attorney (although in the current setup, they don't need to be in the same room, which is important, given attorneys might not live in the ACT).

During COVID there were legislative changes which enabled some flexibility, such that for example, the ACT Public Trustee and Guardian, was also witnessing signatures via audio-visual link as allowed under COVID emergency legislation and described with the statement: 'I confirm that I witnessed the signature of XYZ by audio-visual link and that the document that was signed is one and the same as the document I witnessed and that I witnessed the signing of the document in accordance with S.4 of the COVID-19 Emergency Response Act 2020.' (3)

(2) ACT Government Public Trustee and Guardian (2016) The Power to Choose: A guide to completing an Enduring Power of Attorney, available from http://www.publictrustee.act.gov.au/publications-and-forms

HOW WILL THESE SAFEGUARDS NEED TO CHANGE OR BE ADAPTED AT THE POINT WHEN A NATIONAL REGISTER IS INTRODUCED?

Given the introduction of a mandatory registration process, we can identify potential issues as follows:

- The content of an EPOA could be changed after completion but before submission. (Potential safeguard: Witness 1, independent responsible person, could take and lodge the form?) Would need a system to ensure that this step is taken immediately post signing – what structures are needed to make sure it is done promptly / completed?)

- How will the requirement for the attorney to agree to take on the role, be incorporated, especially given that they might not be present/within state at the time that documents are being processed?

In ADACAS' view, as affirmed earlier, it is imperative that the roles of being a witness (including the independent witness) and also being responsible for registration checks and entering documents onto the register, are separate.

(3) COVID 19 Emergency Response Act 2020 (Australian Capital Territory) https://www.legislation.act.gov.au/View/a/2020-11/current/PDF/2020-11.PDF

WHAT ADDITIONAL SAFEGUARDS ARE POSSIBLE?

The national register also introduces the possibility of introducing "fitness to be an attorney" checks - see description in response to question 16.

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

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

There are risks in allowing people to lodge (and revoke) EPOAs online.

Some of the risks in our view include:

- That a principal will be coerced or pressured into lodging (or revoking) documents without this being visible/ apparent to an independent person and/or national register staff, or others able to intervene, and/or
- That a person might impersonate another principal and lodge wrongful documents and/or revoke correct documents wrongfully, without this being visible.
- That the existence of wrongful documents (or the absence of correct documents following wrongful revocation) could allow abuse to be continued/perpetrated as a result of documents being present (or a revocation process commenced) on the register, as opposed to the register being able to safeguard or dissuade financially abusive actions.
- That the very process of lodging documents online may dissuade people who are not digitally literate, or who need to consider carefully and decide over time their preferences, from lodging an EPOA.
- Cyber safety concerns: the possibility that having a register which is open for the public to enter data into directly, could enable it to be more easily hacked.
- Rights to access information vs right to privacy: that more information about principals on the register will be evident then it should be to others. (E.g. if a perpetrator happened also to have other roles of power (e.g. if they were a specialist health worker, or a police officer), would they have more access than they should, even if they don't work in the related area?)
- That the design of the online process will be too complicated, and/or not allow for people to work on their decisions/ save and return to the document without completing it, go back and look at what they entered for previous questions (and change their mind/choices).

Whilst some have suggested that principals could be permitted to upload documents online if there is a separate process to check that principals understand what they are completing and its potential impacts: we would like further explanation of how this would work. Would the proposal involve independent people outreaching/visiting in person the principal?

If, as ADACAS proposes in the section at the end of this submission "Additional comments, the National register is designed appropriately and with adequate safeguards such that it can capture all types of EPOA (not solely financial), there could potentially be concerns if: for example, a form was lodged online, but then the second process re checking identity and understanding, did not occur before the person became unwell/unable to act, especially if, for example, this process involved decisions about who is authorised to make healthcare decisions.

ADACAS also notes the need for EPOA processes to be accessible to people who have decision-making capacity, but a memory impairment, and who with independent support provided appropriately, can make informed decisions.

Registration phase

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

The following should be included on the National Register:

- A scanned copy of all current EPOAs, and previous EPOAs.
- A scanned copy of any documents that indicate that an EPOA has been cancelled/superceded (if for example, there is now guardianship documents in place)
- Summaries of key information to enable people who do not need the full information to be able to see the information that is needed only.

* A copy of the form signed by the attorney that indicates that they understand and accept the role and responsibilities that come with that role (which should be outlined clearly, and in plain english, on the form).

During the period that Australia still has a substitute decision-making system - ADACAS supports that all EPOAs (including those for healthcare, personal care decisions, and medical research decisions), in addition to guardianship, should be included as part of the national register. Guardianship documents should also be included as part of the national register, and that there should be consideration also for inclusion of other substitute decision-making documentation.

This being said, as will be further elaborated on in the response to Question 45 (Additional Information) - ADACAS supports a move away from substitute decision-making towards supported decision-making approaches.

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

In ADACAS' view, documents should be required to be registered when they are made, such that they are on file in preparation for first use.

For situations where the EPOA only becomes enacted (valid) at the point where the principal has impaired decision-making capacity, there needs to be extra due diligence to ensure that EPOAs are not being used before they are enacted.

At the present time, in the ACT, many residential aged care facilities require prospective residents who do not have guardianship arrangements, to have EPOA in place before entry to the facility (even if the prospective resident has full cognitive capacity).

ADACAS is aware of many situations across a variety of facilities, where residential aged care staff have defaulted to turning to the attorney for decisions before the EPOA is even valid. Whilst technically, in that instance, an EPOA should re-direct the facility back to the older person, in many instances this has not happened, and the EPOA has proceeded to make decisions on the principal's behalf, even though they had no legal right to do so, given that the EPOA has not been enacted. Sometimes it has become apparent that the reason the situation arose, is that staff need more training around how EPOAs work, or on what their legal responsibilities are (including the legal responsibility to make reasonable adjustments to ensure equitable experience of people experiencing disability). Other times staff have advised that there are systemic pressures (time/staffing levels) which in effect results in systemic pressures to ignore their legal responsibility to make reasonable adjustments, i.e. to spend more time explaining a decision when this is needed for the principal to be able to understand and make a decision etc.

Taking away people's right to make decisions about their own lives unduly, whilst they continue to have the ability to make those decisions, contravenes their human rights, and can also be abusive. It can have a profound impact on wellbeing, and the sense of control that people feel about their circumstances.

Given this - we ask that the National Register be designed with prompts and safeguards to remind others that an EPOA that is designed to be enacted only if someone's decision-making becomes impaired - is in fact - only to be enacted if that person's decision-making becomes impaired. And even in that situation - that we all have ongoing responsibilities to seek to ensure that principal's decision-making rights are being upheld to the greatest degree possible in each circumstance.

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

Please note the importance of the National Register (and the supporting structures around it) being designed in such a way as to capture information not solely about principals, but also about people seeking to act as and become attorneys, in a way that allows for easy analysis of trends, and action against people who are acting abusively/unethically (i.e. if it becomes apparent that one attorney is targeting multiple individuals over time, in situations where they might be vulnerable).

We would expect that with a change to a National Register, that the Attorney General's team might also be considering the introduction of further checks on the suitability of prospective attorneys as part of the registration process, to see, for example, whether an attorney has been banned as acting as an attorney for someone else (due to abuse) and/or is bankrupt.

We envisage that the Attorney-Generals' team might also be considering introducing requirements for prospective attorneys to submit police checks and/or Working with Vulnerable People card (or the relevant state/territory) equivalent.

Whilst we understand the desire to safeguard, we note the need also to balance this with the right of principals to make an informed decision and appoint someone who is important to them as their attorney (even if that person might have some flags against them) if they truly believe that person is the right person to appoint for their specific circumstance, as opposed to, say an official alternative (such as the Public Trustee and Guardian).

Regardless of which checks (if any) are included - we highlight the need for up to date information and support to be made available to principals to help them make informed decision as to who to appoint as an EPOA (for some it might make a difference to know what the research and literature says about how and when abuse can arise). We also concurrently highlight the need for the registering body to have staff trained to be able to respond in a nuanced (and evidence-informed) way to different situations.

Given the possible complexities/unintended consequences of a change such as introducing attorney "suitability" tests – we strongly urge careful examination of the literature, and suggest working with people with lived experience of violence/abuse and the representative/advocacy organisations that work with them (including family violence agencies) to find the balance as to what (if any) additional checks are introduced.

If the decision were to be to introduce "suitability checks" for attorneys: we note the importance of finding solutions to any timing issues that might foreseeably cause issues (what would happen, for example, if a principal wants to appoint an attorney now, but a WWVP card is not going to be available for 4 months, as that is the current wait time?) etc.

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

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

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

Yes. Registrations of revocations should be mandated. In our view, the principal should be able to lodge revocations for registration, also the ACT Civil and Administrative Tribunal (and counterpart tribunals in other states), also a shortlist of relevant and approved statutory authorities in each of the states and territories.
Given the intent is to have up to date data – there should be no fee payable by principals or authorities to lodge a revocation (we are concerned it would act as a disincentive).

The impact of failing to register a revocation would depend on the circumstances as to why that occurred, and the impacts. The consequences should be carefully calibrated taking account of the particulars of the situation. On this particular point – we defer to our colleagues with legal expertise and expertise in abuse/violence as to what the best approaches would be to seek to ensure that revocations can be in real time when this is needed, and the register is up to date, but also to balance concerns around ensuring that there are not undue consequences for the principal if there are delays whilst revocation registration is occurring (especially if the reason for the revocation being sought is abuse).

There need to also be adequate safeguards in place, to prevent against abuse via revocation processes (a checking process to again ensure the identity of the principal, that the principal when lodging a revocation request understands the impact of that request, and is lodging the revocation voluntarily). There should be options in terms of how the revocation process can occur.

If the decision is also to make revocation applications available online – it is also important that the revocation process includes adequate safeguards. Whilst there are benefits to being easily able to request a revocation of an EPOA online (for those who have access to do it that way), we can also see risks, if the principal is being coerced into this action (or others are doing it against the principal's wishes). There must be non-online options also to request revocation. We would recommend that any online revocation application requests should be seen as a request for revocation, which then would be followed up by further checks as needed for safeguarding purposes (in case for example, the principal had not wanted that revocation).

Yes the register should record other revocation events (death of the principal or attorney, bankruptcy of the attorney) etc.

If there can be appropriate ways found to seek the adequate permissions and to address privacy concerns, we would envisage this the recording of revocation events should occur via approved but automatic data matching between (for marriages, divorces and deaths): Births, Deaths and Marriages and the national register, in the background. This process should be overseen by a human, such that there can be double-checks when needed (e.g. if there are multiple people with the same name and date of birth and address).

If there can be appropriate ways found to seek the adequate permissions from principals and attorneys, and to address privacy concerns, we would also envisage that there should be a similar process checking for bankruptcy of attorneys, with the relevant government records.

The register should also indicate when an attorney resigns, which in the ACT is permitted in some circumstances, but needs tribunal approval in other circumstances. (4)
In terms of situations where the attorney resigns – if it goes to tribunal, the tribunal should alert the national register, if it does not need to go to tribunal (if the principal has capacity) - we would envisage that the attorney should let the national register know (and that the principal could also alert the register staff in many such instances.)

In terms of situations when an attorney becomes incapacitated – there should be appropriate pathways established also to ensure that the register is updated also in this circumstance.

(4) ACT Government Public Trustee and Guardian (2016) The Power to Choose: A guide to completing an Enduring Power of Attorney, available from http://www.publictrustee.act.gov.au/publications-and-forms

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

At present, in the ACT, it is possible for attorneys to be appointed who can act on financial matters:

- Immediately
- From a set date
- Or in a circumstance where decision-making becomes impaired.

The national register should absolutely indicate whether an EPOA is current (and if so, from when), which type/s it is (domains, but also in what circumstances it becomes or is enacted), whether it will be current (from when) or whether it has been revoked (and if so, from when). The register should also be able to track the history of EPOAs, and each time they changed status, and how the status changed.

However - in terms of whether it should also indicate whether it is enacted (i.e. whether a person has impaired decision-making capacity) – this is a lot more complex.

In our view – the national register should only indicate that there is impaired decision-making capacity on financial matters (that that aspect of the EPOA is definitely enacted) in rare situations where this is an undeniably permanent circumstance and where medical evidence re same has been provided ideally by a medical doctor who knows the person very well, and is well aware of where the person's decision-making abilities are at (or via an alternative, rigorous and very carefully safeguarded process involving medical staff if the person doesn't have medical staff who know them as well).

The reason for this - it would be very difficult for a national register to accurately track whether someone has impaired capacity in situations where the person's capacity fluctuates (especially given that decision-making ability can vary from decision to decision, and from day to day (or sometimes within the same day)). We are concerned that if the national register seeks to track this (and does so poorly), it could result in the EPOA being listed as enacted for longer periods than it should be, which could then have a corresponding and impact on an individuals' rights to be their own decision-maker to the greatest degree possible (with support if needed)).

Given the myriad of challenges many people already experience against their decision-making rights being upheld (and the significantly negative impacts that having control taken away can have), it is important that the need for adequate safeguards in terms of financial decisions is also balanced with the need for people to be their own decision-makers (with support as needed) when possible.

We recognise that this might sometimes make it more complex, say for a bank staff member, who just wants to know whether or not an EPOA is current (and enacted) or not. We can also see the concerns of those attorneys who want to have a very clear idea of whether the EPOA is currently enacted or not, especially if there are significant decisions that need to be made, and acknowledge the support needed for that to be appropriately established. We emphasise the need to find ways to strike appropriately nuanced balances that work for each principal. We also again acknowledge the complexities in balancing safeguards and rights in this space.

A further comment - given that the current EPOA forms in the ACT are multipurpose - we note the need for the national register to have sufficient flexibility to be able to indicate that one element of an EPOA is enacted only, as an EPOA is not always enacted across the board (some people, for example, might have circumstance where they are not able to make financial decisions, but has still the ability to make decisions in other domains, e.g. on personal care matters, health care or medical research matters etc - or might have the ability to make some financial decisions but not others etc).

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

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

At the present time, in the ACT, there is unfortunately not currently a territory register of historical EPOAs.

ADACAS would suggest that there should not be a fee to register historical EPOAs (at least initially). We would suggest that there be a transition period (say six months) where people can register historical EPOAs at no charge to seek to encourage people to register EPOAs on the national register.

After that date, if there is a decision to charge a fee*, there should be a simple process for people to seek a fee waiver if needed due to extenuating circumstances.

*ADACAS supports the principle that people who have low incomes and/or who are in difficult financial circumstances should never be charged a fee for documents to be registered.

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

Given the desire to have a complete register of EPOAs, there should not be a fee payable to register historical EPOAs (it might act as a disincentive).

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

Unregistered EPOAs – Registration phase

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

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

Notifications – Registration phase

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

We note the risks inherent, for example, in notifying an attorney every time a search query for an EPOA occurs: especially if the search is occurring by an appropriate authority, due to concerns that the attorney is acting in ways that are abusive, or is acting beyond their powers, or in a situation where a principal just wants support to check what they arrangements are, discreetly, without alerting their attorney, as they are considering making a change to who they have appointed.

Options to address dual registration

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

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

ADACAS most frequently is working with people in relation to land EPOAs in situations where there are adult children wanting their aged parent to move house - whether into residential aged care, to shift home, or in with them. In situations where this is not want the parent wants (or when there was an arrangement that has fallen apart) and where abuse is occurring - we note that it is not uncommon for the older person to be experiencing abuse of multiple types (not solely financial). Similar situations occur for other family/friend configurations (abuse can happen in all sorts of ways).

The impact however, of losing a home that the principal doesn't want to lose, can be absolutely devastating emotionally and financially. It is imperative that there are strong protections around EPOAs in situations where land is involved.

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

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

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

Whilst we have worked with people where there have been land transactions, there has not usually been a separate EPOA specifically for that purpose (people have usually been relying on their usual EPOA documentation).

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

No

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

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

It is possible that principals or attorneys would object to paying two registration fees.
Two registration fees might also act as a disincentive to people for completing the paperwork.

As mentioned above - ADACAS preferred position is that there are no registration fees. If the decision is to proceed with fees, ADACAS supports the principle that people who have low incomes and/or who are in difficult financial circumstances (whether they are principals or attorneys) should never be charged a fee for documents to be registered.

Safeguards

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

ADACAS agrees with the Older Persons' Advocacy network submission, that the safeguards that should be included in the national register for older people who may not be digitally capable include safeguards could include:

- "independent witnesses to support the upload of any documents. This may assist in preventing circumstances where the potential abuser is uploading documents
- Introduction of a helpline for people who are not digitally capable
- Consideration of existing independent and professional digital capable supports that may be able to assist with upload (i.e. GP Practice Manager)." (5)

ADACAS additionally suggests that it would be helpful if the register could include fields that indicate the principal's preferences re communication (and also any known communication needs/ reasonable adjustments required re communication), so that communication happens in preferred and/or appropriate ways (if information needs to be translated before provision (and/or relayed verbally however with a particular type of interpreter used), that this can occur, if information needs to be relayed by phone or audio message that this can occur, if information needs to be provided in Easy English, that this can occur, etc. These fields would need to be able to be updated, as someone's circumstances change over time (and the changes (and where the requests for changes originated from, would need to be logged).

(5) Older Persons' Advocacy Network (2021), Submission to Consultation on National Register for Enduring Powers of Attorney, available online via: https://www.ag.gov.au/rights-and-protections/publications/submissions-received-national-register-enduring-power-attorney, accessed in July 2021.

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

ADACAS strongly suggests that there should be a process of co-design with people with lived experience of family violence/abuse (and also with older people with experiences of abuse), and the organisations that support them, in developing the approach for the National Register to safeguards and also to responses, in these areas. We note also the importance of seeking out existing best practice evidence around how to respond to the complexity and nuance and individualised nature of experiences of financial and other types of abuse/violence/coercive control.

Some other general comments in the interim –
* Given the evidence that financial abuse can co-occur with other abuses, and that the national register is just one part of the response - we ask how best the National Register can work with other structures/systems to seek to both prevent and respond adequately to abuse?
* In some instances, the approach that the national register takes, has the potential to unintentionally exacerbate experiences of violence or abuse. It is imperative that there is very very careful evidence-and-lived-experience based design both of the register, but also of background policies and procedures (in conjunction with domestic/family and other violence/abuse informed experts/ people with lived experience). We envisage it could also be important for national register staff to have training, ongoing mentoring and also access to domestic and family violence specialists who can provide guidance and/or support as needed in individual circumstances.
* Additionally - in designing the national register - there needs to be careful consideration of how the system can be best designed to contribute in an ongoing way to improved knowledge/ways to seek to better prevent financial and other abuse (for example, are there particular reports that will be needed, deidentified data sets that would help in how National Register staff can work with other services to introduce new safeguards/approaches?) For example - we would suggest that the National Register needs to set up and have records searchable not just against the name of the person being exposed to that violence, but also to be able to track people against whom there are allegations that they are acting in abusive ways, i.e. attorneys who might be seeking to exploit, or be violent or abusive to multiple people in sequence or concurrently. The information needs to be both held and responded to sensitively and discretely, and taking full account of everyone's rights.

In Question 45 (Additional Information), we note that in the ACT, EPOAs incorporate not solely financial domains, but also it is possible for a principal to appoint someone using the same form to assist with decisions in other domains, including: personal, healthcare and medical research. In our view, it continues to be helpful to have those substitute decision-making appointments in the one form, and it would be beneficial if the full form could safely be registered with the National Register. Part of the reason - there is a risk that if the register doesn't hold information on all types of EPOAs, that an attorney might use the existence of a financial EPOA to imply/mislead others into thinking that they have broader/further powers (as currently frequently occurs), without this being something that can be easily checked when necessary.

EDUCATION/SUPPORT FOR PRINCIPALS and ATTORNEYs
In our view - there should be information, education and support easily available to principals who are considering completing EPOA documentation/appointing attorneys for EPOA, with the aim of them being able to take a fully informed approach around how the EPOA is structured, and who is appointed.

Additionally – there should be pilots (in the ACT, we would suggest led by the Public Trustee and Guardian, in partnership with community partners and people with lived experience) to establish best practice approaches/interventions to support attorneys understanding and appropriately undertaking their roles. (thus addressing issues of situations where abuse is arising from situations where attorneys are not familiar with their responsibilities and the limitations of their role, and/or need additional support to respond in different ways (e.g. to take supported-decision-making approaches)). Whilst we recognise that this would not be likely to assist in situations where the abuse is arising through coercive control practices, it could contribute to better experiences in situations where abuse is happening as a direct result of attorneys not understanding the responsibilities and limitations of their roles, or needing further capacity building.

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

Please see response to question 43.

Additionally - whilst recognising the tensions between ensuring the system is sufficiently straightforward for people to complete, whilst also ensuring there are adequate safeguards in place to seek to prevent (or reduce) likelihood of abuse – we ask the question – in setting up the questions that are being asked – are there risk factors around abuse that it would be important to capture data about?

We would suggest that there should be information about the reason for revocation sought as part of revocation processes. We note it would also be useful to capture information about the nature of the relationship between the principal and prospective attorn/ies, also between principal and witnesses.

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

As earlier outlined - there need to be sufficient safeguards in place to ensure that wrongful information is not being lodged, that principals are not being impersonated, and/or that principals are not being coerced into lodging information that does not reflect their values/wish and preference.

Given this – we would have concerns about attorneys (or witnesses connected to principals, or attorneys) lodging paperwork on a principal's behalf.

Perhaps independent witnesses could take a role in uploading this information?

Please note however the need for independent witnesses to have had access to training and support around how to identify coercion, or what to do if they suspect a principal doesn't understand/agree with what is in the paperwork.

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

This is a question that would benefit from co-designing a response with people with lived experience of financial and other abuse.

Additional comments welcome

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

ABOUT ADACAS
The ACT Disability Aged and Carer Advocacy Service (ADACAS) is a human-rights focussed advocacy organisation, whose primary focus is on providing individual advocacy together with people with disability and/or mental ill health, and/or older people, and/or carers. Individual advocates are working regularly with people seeking to challenge EPOA or guardianship arrangements. ADACAS also has project staff who have previously conducted research into supported decision-making.

ADACAS is based in Canberra and the ACT and has been providing free individual advocacy in this region for 28 years. ADACAS also provides free advocacy and information to people with disability in parts of NSW: specifically, in set areas of Shoalhaven, the Eurobodalla Hinterland, Batemans Bay, Broulee – Tomakin, Moruya – Tuross Head.

ADACAS acknowledges the language groups and Traditional Owners of the various lands on which we work: the Ngunnawal communities for our work in the Canberra area, the peoples from Dharawal and Yuin communities for our work on the NSW South Coast), and pay our respects to their Elders, and to all Aboriginal and Torres Strait Islanders in our communities.

For further information about ADACAS, please refer to www.adacas.org.au

As an advocacy agency that works directly with people who experience abuse, ADACAS welcomes further work toward establishing a National Register of Enduring Powers of Attorney (EPOAs).

IMPORTANCE OF CO-DESIGN AND OF CONSULTATIONS/FEEDBACK FROM ALL WHO INTERACT WITH EPOAs
Whilst the proposal for the National register is acknowledged to have arisen following recommendations from the Australian Law Reform Commission (ALRC)'s work on Elder Abuse, this register has the potential to positively impact all people who use EPOAs, a very diverse population: including (but not limited to) people of all ages who experience disability and/or mental ill health and/or chronic health issues, as well as all the other aspects of diversity and intersectional life experiences that our communities include.

We encourage you to analyse closely whether the feedback that you have received via this consultation is adequately representative of the sectors/areas of expertise / lived experience, and take active steps to reach out if it becomes apparent that it is not.

From our perspective - at present, whilst the published range of stakeholders who responded to this consultation includes many important organisations, it does not seem to include the peak organisations working in family/domestic violence/abuse responses (or sufficient input from those sectors). We urge the staff working on this project to actively seek out that expertise, as well as to seek out expertise and input from people with lived experience and experts within other sectors who are likely to be strongly impacted by decisions made about the design/approach taken by the National Register, including but not limited to:

- people with lived experience of disability (of all ages) and their families/carers,
- people with lived experience of mental ill health (again of all ages) and their carers/families,
- people who experience alcohol and/or other substance use issues (and their carers/families),
- people from other priority populations including but not limited to: Aboriginal and Torres Strait Islander people and organisations, people from Culturally and Linguistically Diverse communities and organisations, Veterans, people who are homeless etc.

We also note the importance of the approach to design of the National Register actively taking consideration of intersectionality, and the intersectional life experiences that many principals with EPOAs are likely to have.

We note the especial importance of working with people with disability, given that many EPOAs only come into effect when decision-making is impaired (which can often arise from disability) - thus people with decision-making impairment are likely to be significantly affected by operations of the National Register and related entities.

EXPANSION OF NATIONAL REGISTER

Whilst the register might be intended for the purpose of registering EPOAs re financial matters and protecting against financial abuse, we note that in the ACT, the same EPOA creation document, also can establish EPOAs in relation to personal, healthcare and medical research decisions (in which there can also be abuse, and a need to know whether an EPOA is current/correct).

In our view, there is enormous value in collecting EPOA substitute decision maker preferences together (in the one form), and we would advocate for the national register of EPOAs, be designed in such a way that it can capture current EPOAs in this format, and could be expanded to cover all EPOAs, and guardianship documents in future (at least until such systems are abolished, and replaced with supported decision making approaches instead, to the greatest degree possible.

TERMINOLOGY USED THROUGH THIS SUBMISSION:
In terms of this submission and language – whilst respecting that cohorts are not mutually exclusive - ADACAS usually tends to use terms such as: person with disability, person with mental ill health, older person or carer as our preferred language (given these are the cohorts with whom we work). For the purposes of this consultation response, however, we have used the terms used in the consultation paper, i.e. the term “principal” to mean the person who is appointing an EPOA, and the term attorney for someone who has been appointed or is being appointed as an EPOA.

SUPPORTED DECISION-MAKING OVER SUBSTITUTE DECISION-MAKING APPROACHES WHEN POSSIBLE.
As a signatory to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), as a nation Australia has a responsibility to uphold the rights outlined by that convention.
Article 12 of the UNCRPD affirms that persons with disabilities have a right to "recognition before the law", and "enjoy legal capacity on an equal basis with others in all aspects of life"(6). The article proceeds to highlight that "State Parties shall take appropriate measure to provide access by persons with disabilities to the support they may require in exercising their capacity"(7), and that "States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests." (8)

Given the focus of the consultation paper and the national register, around seeking to combat financial abuse, we note the very specific mention in the UNCRPD's Article 12 also about financial matters:
"Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property." (9)

In effect - UNCRPD Article 12 is stating that adults with disability, inclusive those with impaired decision-making capacity, continue to have a right to make decisions based on their own rights, will and preferences, subject to safeguards; also that support or assistance to exercise decision-making rights must be provided as needed to maximise the exercising of these rights (including with financial and land decisions).

To meet our UNCRPD obligations, Australia thus needs to be looking at how we can best embed supported-decision-making approaches (as opposed to substitute decision-making) to the greatest degree possible.

Whilst this consultation is looking at a national register to capture the substitute decision-making tools currently in use, even in the design of this national register and the surrounding systems/processes - we

thus remind of the imperative to constantly be looking towards strategies for preferencing supported-decision-making approaches over substitute decision-making when possible. ADACAS' position continues to be that we would like substitute decision-making arrangements such as EPOAs and guardianship arrangements superceded to the greatest degree possible over time, and replaced instead with supported decision-making approaches (with adequate supports and safeguards designed in).

(6), (7), (8) and (9): UN General Assembly, United Nations Convention on the Rights of Persons with Disabilities (UNCRPD): resolution / adopted by the General Assembly, 24 January 2007, available at: https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-12-equal-recognition-before-the-law.html