

9 July 2021

National Register of Enduring Powers of Attorney
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

By email: nationalregister@ag.gov.au

Dear National Register Team

National Register of Enduring Powers of Attorney

Thank you for the opportunity to provide a response to the focus questions provided to participants at the stakeholder roundtable on 30 June 2021 (the **Focus Questions**). ADA Australia (**ADA**) appreciates being consulted on this important initiative.

About ADA Australia

ADA is a not for profit, independent, community-based advocacy and education service with nearly 30 years' experience in informing, supporting, representing and advocating in the interests of older people, and persons with disability in Queensland.

ADA also provides legal advocacy through ADA Law, a community legal centre and a division of ADA. ADA Law provides specialized legal advice to older people and people with disability, including those living with cognitive impairments or questioned capacity, on issues associated with human rights, elder abuse, and health and disability legal issues related to decision-making.

Response to the Focus Questions

Lodgement and Registration

a) *Who should be able to lodge an EPOA for registration?*

Authority to lodge an EPOA for registration should be reserved to the following:

- the individual who has made the document, or a legal practitioner or authorised witness engaged by the individual to assist in making the EPOA and who is instructed to register the document on their behalf;
- a representative of a Board of Tribunal that has appointed a guardian or administrator for an adult who has a decision-making disability;
- for EPOAs made prior to the register coming into effect, by the attorney/s nominated in an EPOA in circumstances where the principal has lost decision-making capacity. An EPOA registered by an attorney should attract a higher degree of verification to minimise the risk of fraud and elder abuse.

121 Copperfield Street Geebung Qld 4034 www.adaaustralia.com.au

FREECALL: 1800 818 338 p: (07) 3637 6000
f: (07) 3637 6001 e: info@adaaustralia.com.au

ADA Australia acknowledges the Traditional Custodians of this land and pays respect to Elders, past and present.

Aged and Disability Advocacy Australia trading as ADA Australia | ACN: 610 892 398 | ABN: 19 488 136 200



- b) *When should EPOAs be required to be registered (when made, before first use, or otherwise)?*

Requisite steps to register an EPOA should be completed as soon as the EPOA has been completed. Once registered, it may be beneficial for the register to generate an email to the nominated attorneys advising that the document has been registered and providing information about the responsibilities associated with the attorney role.

- c) *How should lodgement occur (post, online, in person)?*

The process must be clear, relatively simple and low cost to minimise obstructions to registration, and in the interests of ensuring the system is broadly accessible.

Lodgement methods should include by post, online and in person. Reliance on a single method will restrict accessibility for a variety of groups – including people without ready access to IT equipment or digital literacy, Aboriginal and Torres Strait Islander communities, people living in remote locations, and in some cases, persons from culturally and linguistically diverse backgrounds.

Utilising the existing Australia Post network and its long experience with authentication processes will assist with accessibility in regional areas.

- d) *What documents (in addition to the EPOA) and information should be on the National Register?*

Documents that are relevant to verifying the validity of a registered EPOA should be held on the register. Authority to access a document should be dependent on the identify of the searcher.

- Checklist accompanying registration – viewable by the principal and their legal practitioner, the Public Guardian and Public Trustee of a State or Territory, a Board or Tribunal;
- Revocations - viewable by the principal and their legal practitioner, an attorney, the Public Guardian and Public Trustee of a State or Territory, a Board or Tribunal;
- Tribunal Orders – viewable by the principal and their legal practitioner, the Public Guardian and Public Trustee of a State or Territory, police services, a Board or Tribunal, and the attorney/s of a registered EPO that has not been revoked;
- Notifications from the relevant State or Territory’s department regarding a registered marriage or divorce that may affect an EPOA – viewable by the principal and their legal practitioner, the Public Guardian and Public Trustee of a State or Territory, police services, a Board or Tribunal, and the attorney/s of a registered EPOA that has not been revoked;
- Notifications from the relevant State or Territory’s department regarding a death which may affect operation of an EPOA, such as death of an attorney - viewable by the principal and their legal practitioner, the Public Guardian and Public Trustee of a State or Territory, police services, a Board or Tribunal, and any remaining attorney/s of a registered EPOA that has not been revoked.

e) *What checks should occur prior to registration?*

Appropriate identification requirements should be incorporated into an authentication process which is customised for each model of registration (in person, online, by post).

The authentication process could include a checklist of required documentation and requiring the person lodging the document to make an acknowledgement that the documents provided in accordance with the registration process have been validly made.

f) *Should existing EPOAs be required to be registered, and what arrangements would need to be made?*

Yes, registration of existing EPOAs is necessary to ensure confidence in the system. A generous transitional period for registering existing should be permitted.

A staggered approach may assist: for example, if an EPOA exists but is not yet active, a principal should register it within a designated period of time after the register comes into effect (and ideally before the EPOA's first use).

If an EPOA exists and is already in use, it should be registered by the principal or the attorney before its next use.

A comprehensive community education campaign will be required prior to the register's commencement date, to raise awareness about the register and provide information about changing obligations with respect to registering new and existing documents. This would be an opportune time to undertake broader community education regarding the purpose and scope of an EPOA.

Upon the register coming into effect, we should anticipate an increase in the number of applications to State and Territory Tribunals seeking to clarify the validity of existing EPOAs.

g) *Should the registration of certain revocations be mandated?*

Yes, though the system would need to support this. If functioning properly, this would avoid disputes associated with duplication of EPOAs registered and may minimise opportunity for an attorney previously appointed and since revoked from continuing to make unauthorised decisions on the principal's behalf.

h) *What should be the effect of non-registration (for both new and pre-existing EPOAs)?*

It would need to be understood that the register is not an exhaustive resource and a new EPOA may have been made that has not been registered.

With the exception of existing EPOAs that fall within the designation transitional registration periods, an unregistered EPOA should be unable to be relied on until it is registered.

Accessibility and Safeguards

a) *What accessibility considerations need to be taken into account (for e.g. remote communities, older people, people with disabilities, CALD communities)?*

Accessibility should be reviewed under the lens of how various community cohorts and location will affect ability to undertake registration, including authentication and identity requirements. A program that relies on existing networks, such as the Financial Counsellor Network Rural Program, and trusted national services (for example, Australia Post verification system for passport applications) may assist.

A specialist legal team undertaking regional and remote tours, as well as aged care and disability accommodation visits for the purpose of raising awareness of the register and assisting with registration would be beneficial.

Comprehensive education campaigns targeted at different communities and with input from representatives of each community will be a critical component to build understanding, confidence in and uptake of the register. As mentioned above, these campaigns should include general information about what an EPOA is and how it operates.

- b) *What safeguards can be incorporated to mitigate the risk of fraud or coercion (e.g. to ensure the integrity of the registered instrument generally, and otherwise in situations involving family violence or elder abuse)?*

A comprehensive verification process is required to mitigate risk of coercion. An audit process, regularly scrutinising a sample of registered EPOAs and how they are used, would be useful.

Targeted education campaigns for banks and financial institutions, residential aged care facilities, and hospitals should emphasise that whilst safeguards built into the register are intended to reduce the risk of fraud or coercion, they cannot do so completely. It is critical that these institutions understand that they must continue to implement informed internal processes, including employee education in proper use of these documents and awareness of elder abuse.

There is a significant need for increased understanding by banks and financial institutions, residential care and hospital facilities regarding what an EPOA is, and how it operates. These institutions often adopt a default position which elevates the scope and role of the attorney to the exclusion of the principal.

- c) *Should the national Register have a notifications function (e.g. to parties and/or identified family members) and how could this work?*

Yes, this function would be beneficial. This may involve parties to an EPOA providing contact details, such as a monitored email address and/or mobile phone number.

In the event that a notification regarding a death, marriage or divorce is received by the register (either directly from the relevant State or Territory department, or from the principal) the system could generate a notification to the affected principal and/or attorney/s.

- d) *How can we ensure that a mandatory registration scheme does not discourage the making of EPOAs?*

By ensuring that the registration process is straightforward, accessible and inexpensive.

Please see responses under (a) and (b) of this section regarding need for education campaigns to raise awareness of the new process, and benefits of the register.

e) What educational features should be incorporated into/alongside the register?

Resources should be developed for online access and in print to provide information about the making of an EPOA, and attorney obligations for each State and Territory.

Clear and concise information should be developed about the register including:

- where the information is stored;
- who can access the register;
- how the search function will work (including any costs); and
- how privacy is protected.

Access

a) Who would need access to the National Register, and for what purpose (to affect it, search it, or both)?

Authority to affect and search should be provided to the principal, their legal practitioner, and relevant government agencies that may seek to rely on the register, including Courts and Tribunals, police, and the Public Guardian and Public Trustee of a State or Territory.

An attorney should have authority to search the register with consent of the principal, or in circumstances where a principal has lost capacity.

State healthcare services and registered healthcare practitioners should be eligible to make a request to the register to view a registered EPOA, for the purpose of confirming the appointed attorney of a current patient. Similarly, banks and financial institutions and registered aged care facilities should be eligible to make a request to view an EPOA relating to a current client/resident.

b) Should access to the National Register ever be provided without the consent of the principal or attorney, or without notifying them? In what circumstances?

Consent should be sought, except in circumstances where an authorised government agency is undertaking investigation – for example police, or the Public Guardian.

If consent cannot be sought, access to (or eligibility to request search) should be available in certain circumstances (e.g. OPG investigating an attorney post death of the adult).

Consideration might be given to the establishment of a separate role to assist the register and the principal. This person, nominated by the principal upon registration but who is not an attorney or family member of an attorney, could provide a support function for the principal by being notified that access has been requested or granted without consent.

c) What privacy concerns are citizens likely to have, and how could these be addressed?

Most people, when making an EPOA, do not intend for the document to ever be publicly searchable. This should be the default position when designing the system.

However, most post will assume that relevant government agencies and authorised persons are able to access necessary information as may be required. This suggests an expectation of a balance between protecting an individual's privacy, and allowing reasonable access by persons and oversight bodies for requisite operational and safeguarding objectives.

We suggest that consideration be given to the United Kingdom model, which has a program of staged disclosure.

Thank you again for the opportunity to comment. ADA would be pleased to further assist the National Register team. Should you wish to discuss this submission, please do not hesitate to contact [Redacted information]

Yours faithfully

A handwritten signature in black ink, appearing to read 'Geoff Rowe', with a long horizontal flourish extending to the right.

Geoff Rowe

Chief Executive Officer